

# How Can Forensic Systems Improve Justice for Victims of Offenders Found Not Criminally Responsible?

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Controversy has arisen surrounding findings of not criminally responsible (NCR) or not guilty by reason of insanity (NGRI) in recent years. In some countries, the debate has been driven by the concerns of victims, who are seeking greater information on discharge, accountability on the part of the offender, and involvement in the disposition of NCR or NGRI perpetrators. Their demands raise questions about proportionality between the seriousness of the index offense and the disposition imposed, the place of retribution in the NCR regimen, and the ethics-related challenges that emerge from this tension. We conducted a literature review focused on the relationship of victims to NCR and NGRI processes. The literature is limited. However, theoretical reasoning suggests that interventions based on restorative justice principles reduce persistently negative feelings and increase a sense of justice for victims of criminally responsible defendants. Opportunities and problems with extending such processes into the area of mentally abnormal offenders are discussed.

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The verdict of not criminally responsible on account of mental disorder (NCR) has come under public scrutiny in Canada after a series of high-profile homicides in which the offenders were subsequently found NCR. These outcomes have ignited a public debate over the perceived lack of justice surrounding the verdict. This perception is enhanced by the idea that such persons may be discharged from a forensic hospital into the public in a potentially short time-frame, should their mental health improve. There have been similar public debates about the justice of the insanity defense (called not guilty by reason of insanity, or NGRI, elsewhere) in other Western jurisdictions, including the United States,<sup>1</sup> the United Kingdom,<sup>2</sup> and Australia.<sup>3</sup> Although public opinion, on this topic is in some ways constructed by the media (Ref. 2, p 115), some victims complain about

a lack of justice when the verdict of NCR is given to their offenders.

Victims have been called “the forgotten party” of the criminal justice system (Ref. 4, p 27). They are intimately linked to offenses committed against them and arguably feel a large stake in the outcome, but often feel that they are simply used as witnesses in the prosecution of the offender. The victims’ rights movement has grown in recent decades across the Western world, as victims and their advocates seek to improve the sense that they have received justice from the legal system.

In Canada, the federal government has recently proposed the Not Criminally Responsible Reform Act.<sup>5</sup> The bill creates a new “high-risk category” for those NCR acquittees who committed violent offenses, paralleling similar reforms elsewhere as part of a tough-on-crime agenda.<sup>6</sup> These patients can have a longer interval between review board hearings and can be detained with less access to the community. This status may be conferred on the basis of a pattern of risk or the seriousness of the index offense, with less emphasis on current risk. Its imposition can be seen as punitive and introduces proportionality be-

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tween the seriousness of the offense and the duration of the consequent compulsory mental health treatment.

The purpose of this article is to explore some of the questions arising in this debate. Specifically, we will discuss how forensic systems could respond to the sense of injustice experienced by victims, while remaining cognizant of the rights of the NCR patient. By reviewing approaches in different Western jurisdictions, we will examine the following questions. What factors determine the judgment of justice by victims of crime? Are calls from victims' advocates for retributive components in NCR regimens appropriate? Can the availability of case information, such as victim notification, improve victim satisfaction? By what methods could victims be given a voice and become engaged in the NCR process to improve their sense of justice? Finally, should victims be included in the ongoing recovery of NCR patients, and what challenges would such involvement create?

## Literature Search

There appears to be very little written on the topic of victim engagement in the NCR process. A search of the resources PsychINFO, Medline, and Embase using OVID for the terms *not criminally responsible*, *not guilty by reason of insanity*, and *insanity defense*, combined with *victim\* rights*, yielded six results. Combining the three insanity defense options with *victim impact statement\**, *victim\* involvement*, *victim notification*, or *victim engagement* yielded no results. Combining the three insanity defense options with *punishment* yielded 193 results; with *retribution*, 12; with *accountability*, 6; and with *proportionality*, only 2, both of which involved the question of proportionality with regard to competency to stand trial. Combining the three insanity defense options with *restorative justice* yielded one result. Combining *violent crime\** and *restorative justice* yielded 23 results. Combining *victim\* of crime* with *satisfaction* or *justice* yielded 180 results. All the papers were reviewed, and their reference lists and citing articles were searched for relevant papers.

## Results

### Victims' Views of Justice

Wemmers<sup>4</sup> reviewed the victimology research literature on what factors are involved in victims' judgments of fairness and satisfaction with their ex-

periences in the justice system. She noted several important themes. Victims have, in general, a higher sense of satisfaction when they receive timely information from authorities on the status of their cases (referred to as part of informational justice). Satisfaction strongly increases with positive, respectful interactions with criminal justice personnel (referred to as interactional justice), especially any initial contact with the police. Information availability continues to improve satisfaction, even in the absence of personal interaction. When reviewing the literature on distributive justice (or punishment goals), Wemmers found that victims, even in violent crimes, most strongly support instrumental goals of safety for the victim and society and deterrence for the offender. Revenge and just deserts (emphasizing proportionality and equality in punishment of offenders) receive less support if other facets of justice are addressed. She found that procedural justice produces high satisfaction for victims who participate in restorative justice procedures, such as conferencing or victim-offender mediation. This satisfaction is largely attributable to the victims' sense of having a voice in the procedures, which is defined as ". . .to be heard; and. . .not feel hindered in making demands" (Ref. 4, p 37). Wemmers argued that when victims receive timely information, feel heard and included in justice procedures, and have positive interactions with the personnel in the system, their sense of justice and level of satisfaction improves. In the absence of information and a sense of having a voice, they lose faith in the procedures of the justice system and instead support vengeful goals.

### Retribution in NCR

The insanity defense flows from the idea that a justice system cannot assign punishment where it cannot assign blame. Those who are judged NCR are found to have been in a state of mind at the time of their offenses such that they did not appreciate what they were doing or that their acts were wrong.<sup>7</sup> Thus, punishment is inappropriate for insanity acquittees; a medical disposition is the most suitable one<sup>8,9</sup> and is the usual ethical approach of forensic practitioners. For instance, Skipworth<sup>10</sup> showed that progress toward unsupervised time out of the hospital under forensic rehabilitation is not proportionate to the severity of the index offense but is related to the forensic patient's clinical progress and risk management.

The retributive concept of proportionality is raised by the proposed Canadian Not Criminally Responsible Reform Act's inclusion of a high-risk designation for those who have committed serious personal-injury crimes, as opposed to treating all NCR patients equally and assessing risk individually. High-risk patients will be subject to greater confinement, and discharge will be possible only if the high-risk designation is removed by the committing court as opposed to the provincial review board, which currently determines the rate of rehabilitative progress. This change links final clinical progress to the initiating criminal process, rather than the more therapeutically oriented NCR regimen. Similar legislation was passed in Missouri in 1996 as part of a get-tough-on-crime initiative and has been found to have inadvertently increased the length of time that all NGRI patients spend in secure hospitalization, including those whose index offenses were nonviolent.<sup>1</sup>

In the Canadian bill, the interval between the required annual reviews by the provincial review board may actually be up to three years. A similar reform has been proposed in Australia, on which Chappel commented:

[T]he proposal has the . . . negative import of attaching to an insanity verdict what amounts to a "minimum term" in detention, akin to a custodial sentence for a convicted offender, rather than for someone who has been judged to be not guilty of any crime and requiring appropriate treatment for a debilitating mental disorder" [Ref. 3, p 48].

This change lacks evidentiary support. There is little evidence that extended hospital stays prevent re-arrest among insanity acquittees upon eventual release.<sup>11,12</sup> Further, studies of discharged insanity acquittees in Canada<sup>13</sup> and New Zealand<sup>14</sup> find a much lower rate of recidivism than do matched offenders. Thus, these amendments serve a purely retributive function, masquerading as public protection.

Victims may still feel, on some level, that the NCR offender is guilty, and may continue to wish for retribution. Victims and the public may feel that the NCR offender got away with the crime. The media may not seek to place the blame on the NCR patient for the offense, but may focus on the mental health system for failing to prevent the event and thus demand tighter oversight to ensure public safety.<sup>15</sup> Insanity acquittees are doubly stigmatized as mad and bad, give up their ability to plea bargain, are confined for indeterminate amounts of time, and are often

confined for longer than if they had pleaded guilty.<sup>1,16</sup> However, as Wemmers<sup>4</sup> described, victims' desires for revenge and punishment are rated less highly than their goals of safety and offender deterrence, which is also in the interest of mental health institutions and provincial review boards (in Canada), whose primary statutory concern is risk assessment and management. Victims' desire for revenge also decreases with timely notification of developments regarding their cases and a sense of inclusion and having a voice in the criminal justice process.<sup>4</sup>

### Victim Notification

Beyond decreasing the desire for punishment, the availability of timely information about key developments in their offenders' cases has been found to improve victims' overall sense of justice.<sup>4</sup> It is therefore worth considering the impact that formalized victim notification procedures may have on both victims and offenders found NCR. Part of the proposed Not Criminally Responsible Reform Act in Canada includes the right for victims to register voluntarily to receive notification of the discharge of NCR accused persons into the community. This method may be reasonable for improving victims' satisfaction and sense of safety. Other jurisdictions with similar notification legislation include New South Wales, Australia,<sup>3</sup> the United Kingdom,<sup>2</sup> and, the U.S. state of Missouri.<sup>1</sup>

Ward and Glassberg<sup>17</sup> prepared a report regarding victims of persons with mental illness for the U.S. Department of Justice. They examined victim notification procedures throughout the United States and noted several deficiencies when the accused person is found NGRI. Even before such a verdict, many victims are simply unaware of their information rights, although this problem is often rectified in areas served by a victims' advocate. However, the authors found that, once an accused person is declared NGRI, the information regarding the victim was rarely passed on to state mental health institutions. Even in cases in which it was, hospitals often did not feel comfortable releasing information, including discharge date, to victims, citing health privacy concerns on behalf of the NGRI acquittee. Similar concerns around the balance between health privacy and victim information rights have been discussed in the UK context.<sup>2</sup> Ward and Glassberg<sup>17</sup> recommend that victims and their advocates should have the right

to be notified by mental health staff of the discharge of NCR patients a minimum of 30 days in advance and cite the Missouri Victims' Bill of Rights as a possible legislative model.<sup>18</sup>

### **The Review Process and the Victim**

In what manner should victims be involved in the review process of those found NCR? Before describing methods by which victims could be given more voice in the NCR process, it is relevant to question the appropriateness of involving victims after the verdict of NCR is delivered. Michael Feindel, an Assistant Crown Attorney in Toronto, noted that "the role victims ought to play in relation to NCR cases is a live question that participants in the Review Board hearing process continue to grapple with." (Ref. 19, p 194). Mental health practitioners may resist any victim participation because of concerns that it may "induce punitiveness toward patients on the part of decision-makers." (Ref. 2, p 130). On the one hand, the verdict of NCR is based on a finding that the perpetrator is severely impaired in his judgment because of mental illness at the time of the index offense. On the other hand, as Feindel<sup>19</sup> noted, this absence of responsibility is what justifies the state's intervention to help manage the future risk that the person may pose. He stated that there is a nexus between the offender and the victim in the form of the offender's past behavior and by extension, unmanaged risk. In this sense, the accused and the victim are linked via the index offense, even in the absence of *mens rea*, on the basis of mental disorder. Feindel argued that the index offense serves as a relevant illustration of the accused person's behavioral potential when his illness is untreated. He further pointed out that, in addition to the risk assessment of the patient, the narrative of the victim makes the magnitude of the potential harm more fully understood by review boards and therefore assists them in decision-making regarding progress and release.

The link between the perpetrator and the victim is illustrated in the 2013 documentary *NCR: Not Criminally Responsible*, by the Canadian multi-E Emmy-award-winning film maker John Kastner.<sup>20</sup> The documentary provides a narrative account of an NCR patient's life story, offense, and recovery, with that of his victim and family. It describes how the offense affected them all and how resolution gradually became possible. This work underlines the ongoing link experienced by the victim of the offense

and the fear that the victim continues to experience, interwoven with the perpetrator's illness and remorse.

One common avenue for giving victims a voice in NCR review board decision-making is the preparation of a written statement describing the impact that an NCR offender's actions have had on the victim. The Canadian federal government amended legislation in 2006 to provide for the canvassing of victims in advance of every review board hearing to determine if they wished to file an impact statement.<sup>19</sup> Similarly, in New South Wales, Australia, registered victims can submit an impact statement to be considered for reading at a Mental Health Review Tribunal.<sup>3</sup> This presentation can be given in person, by video or audio recording, or by written statement.

Feindel<sup>19</sup> described some of the challenges in the use of victim impact statements. He noted that the practice originated in Canada in 1988 and was intended for court hearings involving a conviction, as opposed to forensic review board hearings regarding the progress of an NCR accused. In the original context, impact statements served a retributive function in the sentencing of the accused. Although most victims choose not to give statements, those who do may have more strongly persistent fearful or negative feelings. Such reactions have led to problems with victims who harbor sentiments that are critical of the NCR finding and are considered irrelevant by review boards. A board may remove the offending material or reject the statement entirely. Victims may then feel robbed of their voice. Similar concerns have arisen in the United Kingdom,<sup>2</sup> where many lawyers feel that victim impact statements should have no bearing on decisions made by the Mental Health Review Tribunals. However, Feindel<sup>19</sup> argues there may be a role for impact statements within the therapeutic paradigm. As the review boards' primary function is to determine the safest disposition for the offender with the minimum encroachment on his liberty, the impact statement is a narrative of the harm that can be caused when the patient is unwell and may remind the risk assessors of the human cost of reoffending. Although impact statements are now a common feature of hearings, they may not actually improve a victim's satisfaction with the justice system.<sup>21</sup> It is therefore worth exploring other means of enhancing the victim's sense of having a voice.



### Restorative Justice After NCR Verdicts

As retributive justice is inappropriate for offenders found NCR, restorative justice methods have been proposed as an alternative worthy of investigation.<sup>1</sup> Restorative justice is a process “whereby parties with a stake in a specific offense collectively resolve how to deal with the aftermath of the offense and its implications for the future.” (Ref. 22, p 5). Restorative justice appears to help give victims a better sense of procedural justice.<sup>4,23</sup> It has been one of the most researched alternatives to retributive or court justice in recent years and includes mechanisms such as victim-offender mediation (VOM), restorative justice conferencing (RJC), and other forums that bring the victim and the offender together to share perspectives and attain resolution. It can occur before or after adjudication. Armour and Umbreit<sup>24</sup> examined 56 studies from several Western jurisdictions and found that 8 in 10 participants felt high levels of satisfaction with VOM. In those studies where comparison groups were available, victims preferred VOM over traditional adjudication. Sherman and Strang<sup>25</sup> reviewed 12 randomized, controlled trials of RJC in the United Kingdom, Australia, and the United States. They found that victims who went through RJC had reduced posttraumatic stress symptoms, anger, and desire for retribution. They noted, “[T]he evidence [for RJC] is particularly strong with respect to violent crimes, even though RJ may be most difficult to arrange in such cases” (Ref. 25, p 398). They found that RJC led to a reduced frequency of reconviction of offenders. Restorative justice has been applied in addition to traditional adjudication (as would likely be the case in NCR) and has been found to improve victim satisfaction with the process.<sup>23</sup>

Implementing restorative justice programs for victims when the offender is found NCR presents particular challenges. Chappel noted that many victims may feel that the insanity verdict is “unjust and a barrier to any healing process, including restorative justice” (Ref. 3, p 39). Attempts to use restorative justice initiatives in a juvenile mental health court in Alameda County, California, did not work, because many of the offenders were too unwell to admit responsibility or communicate effectively (Baliga S, personal communication, March 2013). This experience may mean that restorative justice cannot occur until the offender’s mental health is improved and most likely not until after adjudication. However, given the high victim satisfaction ratings and lower

recidivism found when restorative justice initiatives are used in crime in general, it is a worthy avenue for exploration when offending is caused by mental illness. Since restorative justice may be most effective when the offender and victim share a common identity,<sup>26</sup> an initial study could investigate its efficacy when applied to intrafamilial offenses. This notion is relevant, given that so much violent offending by persons with psychotic illness is against family members. Restorative practices may already be taking place informally as part of family therapy in insanity acquittee rehabilitation programs.

### Discussion

We have examined the debate surrounding justice for victims of offenders who are found NCR. Research in general victimology has found that victims’ satisfaction and sense of justice is influenced by the availability of information, faith in the procedures of the justice system, and a sense that they have a voice. When these factors are absent or inadequate, victims’ desire for revenge increases. As such, in the context of public and victim outrage over NCR verdicts, the vengeful attitude may be symptomatic of inadequate procedures up to that point. In Canada, as elsewhere,<sup>1</sup> such outrage is being harnessed by politicians to justify legal reform.

The idea that victims and NCR offenders are linked via the offense warrants further consideration. Traditionally, forensic practitioners have not regarded these situations in this light. Treating forensic clinicians tend to view these events as occurring when the person was unwell, and certainly, the presence of mental illness must be understood as a component in risk assessment and formulation and must be processed with an eye toward both recovery and safety. Forensic clinicians focus on their prime duty to their patients, and thereby, to reduce risk and ensure public safety. Victim involvement in the present, rather than an exemplar of past and future risk, does not fit easily into the psychiatrist-patient relationship. Ethics standards regarding confidentiality and primary duty to patients would not allow further sharing of information or expansion of the therapeutic space to embrace victims in restorative justice processes. Further, the difficulty with dual agency to both the patient and society, through the accountabilities of NCR regimens, can be confusing enough, without adding a third person, the victim, to the already complex ethics landscape.<sup>27</sup> Boyd-Caine<sup>2</sup> found consid-

erable nervousness about these concerns among psychiatrists and legal counsel involved in the oversight of forensic patients in the United Kingdom. Forensic practitioners have understood that their duty to victims is to prevent further victimization, rather than to contribute to their healing.

There are certain themes that run through the narrative from victims' perspectives that forensic practitioners might carefully consider. They include victims' need to have their stories told; viewing the offense as their offense; and needing the perpetrator, regardless of responsibility, to be held to account. From a utilitarian perspective, there is sufficient evidence from the victimology and restorative justice literature in relation to ordinary offending to suggest that the manner in which NCR systems are run may have a positive or negative impact on the needs and perceptions of victims. Research into this question is needed, but the available evidence raises concerns that we should at least consider the needs of victims. The findings suggest that some of the methods of restorative justice and victim inclusion may enhance procedural justice and therefore the overall satisfaction of victims. These include providing timely information on, for example, upcoming review boards and potential discharge dates of NCR accused persons and enhancing the victim's voice through presenting informed impact statements to review boards. Perhaps most important is exploring restorative justice alternatives as a future research direction.

It is also important to note the finding that there may be benefit for both the victim and the perpetrator in restorative justice processes in recovery. The evidence that RJ acts to reduce offender recidivism suggests that something also changes for the perpetrator in confronting his regret and responsibility for the persons he has harmed. Forensic practitioners should not be too quick to rule out such opportunities simply on the basis of the ethics of their primary duty to their patients.

There are many risks in introducing reforms involving the victim's voice. There is no clear evidence that ongoing victim impact statements are helpful for the victim's recovery, and some victims may become locked in a cycle of providing information about their distress to ensure that a person is not released. This process may not assist victims in working through their traumatic experiences. Victims may go to the media with concerns that may make clinically

justifiable progress difficult for them to achieve, especially early community reintegration.<sup>28,29</sup> Finally, there are times when persistent desire for revenge or retribution may place the NCR patient at risk of harm by the victim or the victim's family.

All of the above suggests that in no way can such initiatives be imposed on NCR patients. Any consideration of sharing information or convening meetings with victims must involve very careful planning. It is also notable that the only attempt we are aware of where RJ principles were extended to mentally ill adolescent offenders was not successful because of the mental vulnerability of the young people (Baliga S, personal communication, March 2013). Clearly the mental state of the NCR patient must be a central consideration.

There is also a major difference between innovations to enhance the victim's voice and those used in restorative justice. Mechanisms to enhance voice (victim notification and victim impact statements) provide the opportunity both to know and be heard, but also to campaign for longer detention, regardless of the needs of the perpetrator. Restorative justice processes, however, require the joint engagement of victim and perpetrator so that they hear each other; understand feelings, concerns, and remorse; and aid in the recovery of both (see, for example, Ref. 30). Restorative justice processes, while more complex, also generate the possibility of greater personal growth for both victim and perpetrator, which is presumably related to the improved satisfaction and lowered recidivism demonstrated in studies of RJ. It is perhaps RJ that holds the greatest therapeutic possibility for all involved.

These questions about victims' needs are a major concern confronting justice systems internationally and are now entering NCR legal and clinical frameworks also. The demands for a voice, involvement, and accountability are prominent. At times, these are healthy requests; at other times, they speak more to a desire for retribution that the NCR defense cannot and should not answer. Approaches coming from a restorative perspective should be heard, even if there is little evidence to guide forensic practitioners in how to respond. The use of RJ techniques appears to be positive for both victim and offender, but requires considerable adaptation to work with mental illness-associated offending. Current policies and controversies demand that we resolve these questions.

A victim who has been neglected may have a more persistent sense of trauma and negative emotion. A vacuum is thus created that can be filled by populist policies that are not evidence based or in the best interest of either the victim or the mentally ill offender, both of whom belong to vulnerable and traumatized populations. The well-being of both groups should be of concern to the psychiatric profession.

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