Scientific knowledge about the adverse impact that childhood trauma can have on adults is getting stronger. Public awareness of trauma-related issues has grown. Is the criminal justice system keeping up?

"Unfortunately, it's not," Deborah W. Denno, a national expert on the role of trauma in criminal cases, answered when Mike Gousha, Marquette Law School's distinguished fellow in law and public policy, posed the question.

"On the one hand, I've been impressed in looking at . . . how accepting courts are of new scientific evidence," Denno said. "On the other hand, I don't think judges—many judges—still quite get this. They're so used to looking at a very traumatized pool of individuals that I think they . . . get just sick of it, in a way, number one.

"Number two, I think sometimes attorneys have trouble . . . investigating and presenting this kind of evidence. It can be very difficult even for me to read a case about some of these individuals and what they've been through. I think it's comparably difficult for attorneys to do these kinds of investigations.

"But lastly, attorneys aren't always going to have the opportunity to educate themselves on the latest cutting-edge techniques that they could learn about on behalf of their clients."

Overall, "the legal system is really behind the times," Denno said. "Attorneys need to be better educated. . . . I think for the most part, attorneys just don't see how this could play a role when, in fact, in our day-to-day lives, it is increasingly imperative for attorneys, judges, the entire legal system, to get on board when we're starting to talk about the brain and human behavior."

Deborah W. Denno

Denno is a leading figure nationally among those who favor considering the impact of trauma in deciding what to do with both children and adults in the criminal justice system. She is the Arthur A. McGivney Professor and Founding Director of the Neuroscience and Law Center at Fordham University School of Law. She has both a J.D. and a Ph.D. from the University of Pennsylvania.

She visited Marquette on November 15, 2018, to deliver the Barrock Lecture on Criminal Law (see excerpt following this article). In conjunction with that visit, Denno and Milwaukee County Circuit Court Judge Mary E. Triggiano took part in an “On the Issues with Mike Gousha” program about the impact of childhood trauma on the legal system. Triggiano has championed efforts in the Milwaukee area to educate people in the criminal justice system on trauma awareness.

Triggiano was somewhat more positive in her assessment of whether things are changing for the better, at least when it comes to the criminal justice system in Milwaukee. She has been a leader in offering people in just about every role in the system educational opportunities for understanding and responding to trauma-related issues.

"We're being very persistent in trying to get everyone speaking the same language and thinking the same way about the prevalence of trauma and what we can do," Triggiano said. "I do think . . . that the judges and the district attorneys and the public defenders and the guardians ad litem and the private bar attorneys who work in the problem-solving courts are changing the paradigm. They're making that shift that requires taking what we know to be true about trauma and actually putting it to work in practice."

Denno told Gousha and an audience of about 200 that her interest in trauma “really started quite some time ago when I was doing my Ph.D. dissertation on a group of children who were born in Philadelphia, low-income children, for whom a lot of data were collected, biological and sociological data, [and] they were visited by social workers every six months. I started reading about what the social workers were saying about the children and was really shocked by the degree of trauma. This was a sample collected in the late ’50s and early ’60s, and I think, at the time, people didn’t
realize how much trauma these children were being exposed to, not even the social workers. It seemed like decades later that we could see that.”

Triggiano’s interest was triggered by what she called an “aha moment” about 12 years ago when she was a judge at children’s court in Milwaukee County. “I was a judge for all of about two years, and I had a 15-year-old on my caseload,” she said, referring to him as “Cory.” “Cory came to me because he was charged and found delinquent of possession of marijuana and theft. He presented with green hair and piercings and was very quiet and didn’t say much.

“I put him on probation, and he repeatedly came back to me [in that context], and we would talk about his issues. . . . But he was doing quite well. Hair color came back, no piercings. He was back in school. He had a job. He had a girlfriend. About three months later, I got the call, and I found out that he had committed a brutal homicide.

“He was back in my courtroom, and what we had found out was that he had been posing nude in front of an older gentleman for money so that he could buy drugs. What Cory recounted was that he had an episode where this guy wanted to force sex, and he didn’t want that. Cory didn’t want that at all, and what Cory said is he became enraged, and he killed him. As a judge, we kind of say to ourselves, ‘You know, what did we miss? How could we have prevented something like this?’”

Denno and Triggiano each said that, from what they had learned, they became persuaded of two related things. One is that trauma during childhood often becomes an important root of criminal conduct in later years. The other, a logical corollary, is that understanding this can help the criminal justice system—from the first points of contact with a person to the time of sentencing—become more effective in helping people and preventing further crimes.

But both also said the impact of trauma does not mean that victims and the general public should not be protected or that perpetrators should escape from the consequences of their actions.

Triggiano said, “I think we’re, number one, suggesting that we take universal precautions—that we just assume people have been impacted by trauma when they come into the system. We’re starting as far back as when there’s a police interaction. How can we be trauma smart, or trauma respectful, to the person who might be in front of us so that we can get better results? . . .”

“For instance, I had a 14-year-old girl in my court. She was charged with delinquency . . . . She [then] was on probation. Most often, she wouldn’t show up, so I would issue a warrant for her arrest. We’d get her in. The cycle would continue. Most often in court, we spend probably about 15 minutes on a case; right? We don’t have a lot of time because we have a lot of cases.

“She would come in. The first thing the district attorney would say was all the things that went wrong, what she did. She ran away. She didn’t go to school. She didn’t go to therapy. The next person would say the same thing, and the next person, the same thing. I had an opportunity to watch her reaction to our discussion. Most judges probably would think, ‘Ah, she’s rolling her eyes’; right? She is not paying any attention to us.’ [But] she wasn’t rolling her eyes. She was actually protecting herself by disassociating. The only thing I could see was the whites of her eyes for about a minute and a half.

“I stopped, and I said, ‘Look. We’re going to start over. We’re going to do a do-over.’ What I knew to be true was that she loved track. So we started talking about track, and everyone went around the
room and said one good thing about what she had done before she came into my court. . . . Because we did that, she showed up for court every time after that.”

Triggiano said that little things such as that can help. She quoted Tim Grove, senior leader in trauma-informed case initiatives for SaintA, a nonprofit social service agency based in Milwaukee, who calls such actions “swinging at the right piñata.” Triggiano and Grove taught a course at the Law School last year, Problem-Solving Justice and the Neuroscience of Trauma.

Triggiano said, “If we have [people] in front of us, and we don’t really know what’s causing their behavior, we may steer them into the wrong program. We may put them in jail because we don’t understand their behavior. We may do a variety of things that are disrespectful, I suppose you could say, to their trauma and the impact of trauma in their lives.

“If we are trauma smart, and if we understand that that behavior has, at its core, the trauma in their lives, like we do in our drug treatment courts where we understand that maybe drug use is a symptom or substance use disorders are symptoms of underlying trauma, we’re able to be smart enough to steer them into the right programming . . . so that we’re not spinning our wheels and seeing them come in over and over and over again.”

Denno said she views the impact of trauma on three levels.

“The first part is something called the event, the traumatic event. . . . It could be some kind of sexual abuse or some kind of physical abuse.

“The next is how the person experiences that event subjectively. [He or she] might experience something right away and react accordingly, or it may be something that festers over a period of years and comes out later on, either in killing somebody else or in doing something else.

“The last thing is the effects of that event. What is it that it is doing to someone’s brain, even if it’s physical abuse or sexual abuse? It can have all sorts of brain changes that we know about that could start influencing that individual’s behavior, and it becomes sort of a cycle. Your behavior starts changing because your brain is changing, and then, you, yourself, start to engage in aggressive or hostile behavior, and you may end up killing somebody . . .

“Because this can start so long ago, so many years, you could have a defendant who’s in his mid-20s or something and the abuse started when they were born. I’ve looked at cases where it starts immediately with some sort of brain injury at birth and then just continues on. It really is a cycle that perpetuates itself.”

Triggiano emphasized the importance of responding early to trauma issues in children.

“We know that early matters and if we can get to these kids and, in particular, babies, when their brains are developing at the highest rate and have an ounce of prevention—look at all that we can salvage from a standpoint of dollars, resources, and just human beings.”

An audience member at the event in the Law School’s Lubar Center, saying that she was a prosecutor, asked Denno and Triggiano how she should handle information about the trauma-related background of defendants. She said, “I’m not somebody who’s going to bring that up to the judge and say, ‘But, your Honor, look. This is perhaps why [that person] acted this way’ as part of asking for a lighter sentence.”

Triggiano responded, “This information should never be used as a path for disregarding public safety or accountability. But it should be an opportunity to inform us—so how you create your sentencing recommendation, what the judge takes in in terms of what they know to be true, within the parameters of accountability and public safety. People with horrific childhoods who commit horrific crimes may end up in prison, or there may be another path that we can create for them because we know more about how to help them.”

Denno said, “We all have to compartmentalize a very dangerous person . . . and also recognize that they can be dangerous or commit a future act again. But also, that is reminding me, the United States is one of the most punitive countries in the world, certainly one of the most punitive in the Western world, and that none of these people benefit from further incarceration.”

Denno added, “This notion of having the prosecution and the defense, these two adversaries, as the way the criminal justice system has always operated may no longer make as much sense at it used to. It would be great if prosecutors could wisely recognize somebody’s background and at least mention it to the courts because I think it is the courts’ responsibility—ultimately, they’re the ones doing the sentencing—to be aware of these people’s backgrounds and for the courts to take the responsibility for the kinds of decisions that they’re making.”
Advice for Attorneys with Trauma-Impacted Clients

This is an edited excerpt from “How Courts in Criminal Cases Respond to Childhood Trauma,” which will appear in the *Marquette Law Review* (winter 2019). The article was written by Deborah W. Denno, the Arthur A. McGivney Professor and Founding Director of the Neuroscience and Law Center at Fordham University School of Law. It is based on the Barrock Lecture on Criminal Law that Denno delivered at Marquette Law School in fall 2018.

While courts often accept evidence of childhood trauma in mitigation arguments, this outcome does not imply that such evidence will successfully mitigate or lessen a defendant's sentence. In fact, in most cases in the neuroscience study that I led, the court or jury found that this evidence was outweighed by aggravating factors, affirming the defendant's sentence.

In general, if childhood trauma evidence is found to be vague, remote, or irrelevant, courts are likely to reject it for the purposes of mitigating a sentence. In *Adanandus v. Johnson* (W.D. Tex. 1996), for example, the defendant argued that his childhood medical records describing head injuries should be included as mitigating evidence. The court, however, was not convinced that the records were relevant since they did not establish that the defendant's criminal conduct was attributable to the injuries.

In addition, courts often assume that defendants have personal responsibility, even if this assumption contradicts psychological and medical knowledge about the consequences of child abuse. For example, in two cases discussed in another study, *Elledge v. Dugger* (Fla. 1993) and *State v. Steffen* (Ohio 1987), the courts discounted the long-term effects of physical abuse on the defendants when their siblings, who had experienced the same abuse, appeared to be unaffected.

That said, defense attorneys should be fulfilling their constitutional duty to thoroughly investigate the defendant's background and family history. Since the Supreme Court of the United States has repeatedly stated that this evidence is relevant mitigating evidence during capital proceedings, there is no excuse for an attorney to not be acquainted with the evidence if it exists.

Defense attorneys also need to effectively communicate with their clients about the importance of presenting such evidence. Some defendants are wary of presenting evidence of their past, out of fear of embarrassment. In these situations, attorneys need to stress that presenting evidence of the defendant's history may lessen the sentence, a reality that can possibly outweigh a defendant's fears.

Attorneys and judges should seek education regarding the effects of trauma and how trauma can impact adult behavior and cognition. This knowledge should also be conveyed to juries to allow them to make informed decisions when it comes to convictions and sentencing.

Not only should attorneys investigate and present this evidence, but it also is vital that they draw connections between childhood trauma and the defendant's offenses and criminal behavior. If juries are made aware of such connections, they will be able to better understand the defendant's actions and decision-making processes.

*Blue v. Cockrell* (5th Cir. 2002) exemplifies a circumstance where the attorney did make a connection between the defendant's history of trauma and the offense committed in his presentation of mitigating evidence. Michael Lynn Blue was convicted of the robbery and murder of a cab driver in Texas and was sentenced to death. Blue confessed to hitting the man's head with a claw hammer and taking his wallet. His accomplice shot the victim in the head twice, and the two then burglarized the man's house.

At trial, Blue's attorney presented evidence of his childhood, including the physical and sexual abuse he endured, his mental disability, and his antisocial personality disorder. On appeal, Blue claimed that the instructions the jury received prevented the jurors from fully considering this mitigating evidence. In order to determine the validity of Blue's claim and whether additional instruction was needed, the court had to decide if the evidence presented was relevant.

The Fifth Circuit found that the severity of the mitigating evidence, as well as the fact that Blue's attorney showed a definite nexus between the evidence and the criminal conduct, qualified...
the evidence as highly relevant. Thus, the court concluded that an additional instruction was needed to allow the jury to fully consider this nexus. Ultimately, the court affirmed the district court’s grant of relief on Blue’s federal habeas corpus petition.

This essay has provided other examples of when attorneys successfully make connections between childhood trauma evidence and the crimes their clients have committed. While this essay has also considered in detail the challenges that attorneys face in their attempts to present such evidence and sew such threads, the increasing availability of research on this topic demonstrates the existence of strong and convincing patterns if attorneys decide to avail themselves of it and courts decide to accept it.

The introduction of childhood trauma evidence is an important part of a defense attorney’s representation of a criminal defendant. An attorney’s failure to uphold the duty to investigate and present this evidence to a judge or jury could have detrimental effects on the defendant’s case and could result in the client’s receiving a death penalty.

Childhood trauma evidence is most compelling when a nexus is shown between the trauma and the criminal behavior. An attorney who understands the long-term effects of childhood trauma will be better equipped to make such connections.

The increasing sophistication of research indicating associations among defendants’ childhood trauma and their later cognitive and behavioral problems may not be sufficiently used or recognized in criminal court cases by either judges or attorneys. While capital cases allow for the introduction of a broad array of mitigating evidence, the strength of some of that evidence may be dampened by the standards for claims of ineffective assistance of counsel, which are highly deferential to attorney discretion. Yet, increasingly, attorneys’ “strategic decisions” and courts’ acceptance of them may reflect more of a willful blind eye to scientific advances than a protection of the decisions that attorneys in fact make in criminal cases each day.

Marquette University and Marquette Law School
INITIATIVES ON THE IMPACT OF TRAUMA ON CHILDREN AND ADULTS

2017
The Law School’s Lubar Center for Public Policy Research and Civic Education supported the work of John Schmid of the Milwaukee Journal Sentinel in researching and writing a series of stories titled A Time to Heal. The series has played a central role in increasing understanding in the Milwaukee region of long-term results of childhood trauma.

November 29, 2017
What K–12 Students Need: Striking a Balance Between Social-Emotional and Academic Learning, a conference presented by the Law School and the College of Education and featuring national and local experts.

2018
The Law School offers a new course for upper-level students, Problem-Solving Justice and the Neuroscience of Trauma, taught by Tim Grove, senior leader in trauma-informed care at SaintA, a social-services agency in Milwaukee, and Mary Triggiano, judge of the Milwaukee County Circuit Court.

October 4, 2018
Racial Inequality, Poverty, and the Criminal Justice System, a conference keynoted by Bruce Western of Columbia University, a prominent expert on what happens to people after release from incarceration.

November 9, 2018
The Power of Restorative Justice in Healing Trauma in Our Community, a conference focused in large part on the impact of trauma on people in law enforcement.

November 15, 2018
The Barrock Lecture on Criminal Law and the “On the Issues with Mike Gousha” program, featuring Deborah W. Denno, focused on increased understanding of the impact of trauma on children and adults.

March 22, 2019
Youth Mental Health Challenges and Schools, a conference sponsored by the Law School, the College of Education, and the Milwaukee Journal Sentinel.

October 7–8, 2019
Over the past year, Marquette President Michael R. Lovell and his wife, Amy Lovell, have led an effort, Scaling Wellness in Milwaukee (SWIM), which has brought together leaders of numerous organizations involved in youth and adult services in Milwaukee, with the goal of increasing overall coordination and effectiveness. The 2019 Summit on Poverty and SWIM Conference was hosted in October by Marquette University and the Social Development Commission at the Wisconsin Center in downtown Milwaukee.