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# Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing

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*Sentencing is widely viewed as an objective and scientific exercise, whilst emotions have long been regarded as a danger to the rationality of the legal realm. For that reason, emotions have traditionally been kept at arm's length from the sentencing exercise. However, the last two decades have witnessed something of an 'emotionalisation' of law and criminal justice. It is now widely contended that emotions may enrich our justice system through bolstering therapeutic jurisprudence, procedural justice, through the quality of decision-making and may even transform relationships between victims and offenders. A number of mechanisms have been developed in recent years which provide victims and offenders with limited means to express their emotions to the court and these may be taken into account as part of the sentencing exercise. Whilst these developments are broadly welcomed, the authors question the overall capacity of criminal courts rooted in a retributive tradition to enrich justice through a better understanding of human emotions.*

## Introduction

The place of emotions in the criminal justice system is defined by a curious paradox. On the one hand, law is imbued with emotion. The criminal law, in particular, is replete with numerous examples of trials concerning crimes of passion, episodes of provocation and inquiries into the general state of mind of the offender.<sup>1</sup> The existence, absence or extent of emotions such as anger, passion, fear, or extreme distress on the part of the accused may well determine the applicability of various defences, such as the loss of control (formerly provocation), diminished responsibility, duress or self-defence. Magistrates, judges and juries are routinely faced with facts that will inevitably trigger emotional responses including anger, disgust, moral outrage and compassion.<sup>2</sup> The collapse of the public/private divide has permitted the penetration of emotions into the public space,<sup>3</sup> where they have become popular currency in an era of "new punitiveness" and "moral panics".<sup>4</sup> The

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<sup>1</sup> S Karstedt, "Emotions and criminal justice" (2002) 6 *Theoretical Criminology* 299.

<sup>2</sup> See further T A Maroney, "Emotional Regulation and Judicial Behavior" (2011) 99 *California Law Review* 1481.

<sup>3</sup> J Brewer, "Dealing with Emotions in Peacemaking" in S Karstedt, I Loader and H Strang (eds), *Emotions, Crime and Justice* (Oxford: Hart, 2011).

<sup>4</sup> See generally, J Pratt, D Brown, M Brown, S Hallworth and W Morrison (eds.), *The New Punitiveness: Trends, Theories, Perspectives* (Cullompton: Willan, 2005).

increasing tendency to adopt public shaming rituals as part of community-based sentences (such as public works whilst wearing orange jumpsuits) are designed in part to assuage public anger whilst simultaneously triggering shame on the part of the offender.<sup>5</sup>

On the other hand, the imprecision and volatility of emotions pose a direct challenge to the presumed rational and measurable nature of the legal realm. In a lawyer-driven system underpinned by adversarial confrontation, there is little room for empathy, or any form of enquiry into emotions other than those which the law deems to be relevant. As Bandes contends, “the passion for predictability, the zeal to prosecute, and mechanisms, such as distancing, repressing and isolating one’s feelings from one’s thought processes are the emotional stances that have always driven mainstream legal thought.”<sup>6</sup> The fear that victims, witnesses, defendants, lawyers and judges might be anything other than rational actors pervades the law in general<sup>7</sup> and sentencing process in particular.<sup>8</sup> In leaving the door ajar for emotions that are traditionally alien to legal discourse, it is feared that its core normative features of consistency, certainty and fairness would be lost in a maelstrom of emotional outpourings. Emotions of anger, hatred and pain – or indeed of sorrow, understanding and forgiveness – may translate into undue punitiveness or leniency and thereby compromise the normative objectivity of the law. This aversion to emotion is reflected in the structures and processes and magnetises its governance. As such, emotions tend to “creep in interstitially, as indicators that individual defendants are less bad and so need less deterrence, incapacitation, or retribution.”<sup>9</sup> Remorse, for example, may be directly linked to rehabilitation, insofar as that an offender who realises that his / her actions were wrong is less likely to repeat them in the future. In this way, remorse may also serve to reinforce social norms, denounce public wrongs, and thus contribute to deterrence in the longer run.<sup>10</sup>

Yet recent years have seen a marked reduction in scepticism toward emotions. Emotions have come to feature prominently in late modernity, with

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<sup>5</sup> See further D Kahan, “What’s Really Wrong with Shaming Sanctions” (2006) 84 *Texas Law Review* 2075; T Massaro, “Shame, Culture, and American Criminal Law” (1991) 89 *Michigan Law Review* 1880; “The Meanings of Shame: Implications for Legal Reform” (1997) 3/4 *Psychology, Public Policy, and Law* 645; M Nussbaum, *Hiding from Humanity. Disgust, Shame and the Law* (Princeton: Princeton University Press, 2004); J Pratt, “Emotive and ostentatious punishment: Its decline and resurgence in modern society” (2000) 2 *Punishment & Society* 417; J Whitman, “What is Wrong with Inflicting Shame Sanctions?” (1998) 107 *Yale Law Journal* 1062. Though shaming need not be used in a stigmatic way, but – if properly instituted – carries reintegrative potential: see generally J Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

<sup>6</sup> S Bandes, “Empathy, Narrative, and Victim Impact Statements” (1996) 63 *U. Chi. L. Rev.* 361, p. 369.

<sup>7</sup> S Bandes, “Introduction” in S Bandes (ed), *The Passions of Law* (New York: New York University Press, 1999).

<sup>8</sup> See eg DJ Hall, ‘Victims’ Voices in Criminal Court: The Need for Restraint’ (1991) 28 *American Criminal Law Review* 233; Y Buruma, ‘Doubts on the Upsurge of the Victim’s Role in Criminal Law’ in H Kaptein and M Malsch (eds.), *Crime, Victims, and Justice, Essays on Principles and Practice* (Aldershot: Ashgate, 2004).

<sup>9</sup> S Bibas and R A Bierschbach, “Integrating Remorse and Apology into Criminal Procedure” (2004) 114 *Yale Law Journal* 85, p. 88.

<sup>10</sup> *Ibid.*

heightened emotional awareness is increasingly viewed as quintessentially a “good thing”, comprising “a critical source of information for problem-solving and learning”.<sup>11</sup> A greater awareness of emotions should enable institutions and decision-makers within them to better predict when negative sentiments may arise and how best to dissipate them.<sup>12</sup> In doing so, institutions can become better placed to adapt their procedures in such a way so as to perform a more effective regulatory role whilst simultaneously building confidence among the public.<sup>13</sup>

In a widely cited 2002 presidential address to the American Society of Criminology, Lawrence Sherman called for an “emotionally intelligent” approach to criminal justice,<sup>14</sup> “in which the central tools will be inventions for helping offenders, victims, communities, and officials manage each other’s emotions to minimize harm.”<sup>15</sup> Under this paradigm, the state itself would adopt a rational stance in dealing with the emotions of victims, offenders and communities in order to persuade citizens to comply with the law and repair any harm caused.<sup>16</sup> Sherman envisages such a system working “like an emotionally intelligent political campaign or product marketing plan, one that is likely to employ disaggregated strategies based on research evidence about what messages or methods work best for each type of audience.”<sup>17</sup>

This article draws on Sherman’s vision, and examines the place of emotions within the law and practice of sentencing within England and Wales. In a sense, sentencing can be viewed as the apogee of the criminal process; it is at this juncture that the aims of punishment are given concrete and public expression.<sup>18</sup> We begin by exploring in depth why emotions matter, and, in particular, the benefits that a more emotionally-intelligent approach to sentencing might reap. Next, we consider a number of legal and policy developments that have arguably increased the place of emotion in

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<sup>11</sup> William J. Long and Peter Breke, *War and Reconciliation: Reason and Emotion in Conflict* (MIT Press, Boston, 2003), p. 127.

<sup>12</sup> K Murphy, ‘Procedural Justice, Emotions and Resistance to Authority’ in Karstedt et al, n. 3 above.

<sup>13</sup> See generally D D Welch, “Ruling With the Heart: Emotion-Based Public Policy” (1997) 6 *Southern California Interdisciplinary Law Journal* 55.

<sup>14</sup> L Sherman, “Reason for Emotion: Reinventing Justice with Theories, Innovations, and Research — The American Society of Criminology 2002 Presidential Address” (2003) 41 *Criminology* 1. The concept of emotional intelligence itself is generally attributed to Howard Gardner, who proposed an alternative concept of multiple intelligences, which included both *interpersonal intelligence* (our capacity to understand the feelings and motivations of other people) and *intrapersonal intelligence* (our capacity to understand our feelings, our wants and fears, our strengths and weaknesses, and motivations and goals): H Gardner, *Frames of Mind: The Theory of Multiple Intelligences* (New York: Basic Books, 1983). Debate continues as to the precise definition of emotional intelligence, and indeed whether it is a useful concept at all given the lack of consensus as to what constitutes an ‘emotion’ as opposed to a mood, affect, feeling, cognition, temperament or personality: see generally R Plutchik, “The Nature of Emotions” (2001) 89 *American Scientist* 344.

<sup>15</sup> Sherman, “Reason for Emotion”, *ibid.*, p. 6.

<sup>16</sup> *Ibid.*, 8.

<sup>17</sup> *Ibid.*, citing D. Massey, ‘Presidential Address. A Brief History of Human Society: The Origin and Role of Emotion in Social Life’ (2002) 67 *American Sociological Review* 1.

<sup>18</sup> R Henham, *Sentencing and the Legitimacy of Trial Justice* (Abingdon: Routledge, 2012), p. 1.

sentencing; particular attention is given to pleas in mitigation and the reception of victim impact evidence. Finally, we move on to evaluate the overall role of emotion within the sentencing framework of England and Wales and proceed to make a number of suggestions to unlock the full potential benefit of emotions.

## **The Importance of Emotional Narratives**

An emotionally intelligent approach as advocated by Sherman would require us to ascertain how its primary participants – victims, offenders and legal actors - think and interact using both their emotional and rational brains.<sup>19</sup> Law and policy would evolve in light of what we learn about the emotional responses of victims, offenders and the community. In particular, we contend that such an approach holds the potential to reap four significant benefits to the sentencing process: (1) strengthening therapeutic jurisprudence; (2) strengthening procedural justice; (3) improving the quality of decision-making; and, finally (4), the transformation of relationships.

### *(1) Strengthening Therapeutic Justice*

Perhaps the most commonly cited advantage of an emotionally-intelligent approach to sentencing is the potential for therapeutic benefit. There is considerable overlap between emotional intelligence and therapeutic jurisprudence discourse. Therapeutic jurisprudence posits that lawyers and policymakers can seek to reduce anti-therapeutic aspects of the legal process, whilst simultaneously enhancing its therapeutic effects by studying the emotions and psychological experiences of victims and offenders.<sup>20</sup> While lawyers cannot be expected to act as therapists, and trials cannot provide a substitute for psychological interventions, therapeutic jurisprudence contends that justice processes, and their key players, hold the potential to operate as 'change agents' whereby victims and witnesses are offered respect and space to tell their story and air their emotions.<sup>21</sup>

As far as victims are concerned, their emotions are likely to vary according to the types of crimes committed, the levels of injury / loss experienced, and the diverse life experiences of individuals as well as the inherent characteristics.<sup>22</sup> Bearing this in mind, care should be taken in navigating a minefield of literature that can be at times prone to adopting generalist and vague concepts such as “emotional redress / restoration”, “closure”, “healing”,

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<sup>19</sup> Massey, "A Brief History", n. 17 above.

<sup>20</sup> B Winick, "The Jurisprudence of Therapeutic Jurisprudence" in D Wexler and B Winick. *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996).

<sup>21</sup> D Wexler, "Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer" (2005) 17 *St. Thomas Law Review* 743, p. 748.

<sup>22</sup> See generally J Shapland and M Hall, "What do we know about the effects of crime on victims?" (2007) 14 *International Review of Victimology* 175.

“catharsis”, etc. without defining what is specifically meant.<sup>23</sup> Even if emotional expression does lead to such phenomena, it should not be assumed that feelings of closure or catharsis expressed in the aftermath of a criminal hearing will necessarily have any longer-term bearing on clinical diagnoses such as depression, anxiety, post-traumatic stress or recognised psychiatric disorders.

However, evidence does suggest that overcoming negative emotions resonates closely with evidence-based strategies to deal with states of distress. There is now a robust body of empirical evidence suggesting that externalizing traumatic experiences through verbalization can be an effective intervention for many people facing major life-changing events, including violent crime.<sup>24</sup> Such verbalisation – which is the lynchpin of contemporary counselling and psychotherapy - can help reduce feelings of anger, anxiety and depression;<sup>25</sup> bolster self-confidence;<sup>26</sup> and even improve physical health.<sup>27</sup> By pinpointing the therapeutic effect through more specific and evidence-based terminology, some of the pitfalls associated with altogether grander claims about the capacity of the criminal justice system to effect “closure” or “catharsis” for victims can be avoided.<sup>28</sup>

Although the highly-fragmented nature of story-telling that takes place within the trial is vastly different from the comparatively free-flowing and client-focused nature of most talking therapies,<sup>29</sup> there is evidence that victim impact statements can give certain victims a sense of confidence and control, which can also serve to reduce feelings of anger and retribution.<sup>30</sup> As Erez has argued, “[t]he cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims

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<sup>23</sup> See further A Pemberton & S Reynaers, “The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements” in E Erez, M Kilchling and J Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Durham, NC: Carolina Academic Press, 2011).

<sup>24</sup> J Smyth and J Pennebaker, “Sharing One’s Story: Translating Emotional Experiences Into Words As A Coping Tool” in C. Snyder (ed.), *Coping: The Psychology Of What Works*, (Oxford: Oxford University Press, 1999); J.Kenney, “Gender roles and grief cycles: Observations of models of grief and coping in homicide survivors” (2003) 10 *International Review of Victimology* 19; M White, *Narrative Means to Therapeutic Ends* (New York: W.W. Norton & Co, 1990). A 2005 study by Zech and Rime did, however, suggest that some of these benefits may be perceived rather than real: E Zech and B Rime, “Is talking about an emotional experience helpful? Effects on emotional recovery and perceived benefits.” (2005) 12 *Clinical Psychology & Psychotherapy* 270.

<sup>25</sup> T Orbuch, J Harvey, S Davis, and N Merbach, “Account-Making and Confiding as Acts of Meaning in Response to Sexual Assault” (1004) 9 *Journal of Family Violence* 249.

<sup>26</sup> J Koenig Kellas and V Manusov, “What’s in a story? The relationship between narrative completeness and tellers’ adjustment to relationship dissolution” (2003) 20 *Journal of Social and Personal Relationships* 285.

<sup>27</sup> R Enright and R Fitzgibbons, *Helping clients forgive: An empirical guide for resolving anger and restoring hope* (Washington D.C: American Psychological Association, 2000).

<sup>28</sup> Pemberton and Reynaers, “The Controversial Nature”, n. 23 above.

<sup>29</sup> See generally C Feltham, *What Is Counselling? The Promise and Problem of the Talking Therapies* (Sage, London, 1995).

<sup>30</sup> J C Karremans and P Van Lange, “Does activating justice help or hurt in promoting forgiveness?” (2005) 41 *Journal of Experimental Social Psychology* 290; H Strang, *Repair or Revenge? Victims and Restorative Justice* (Oxford: Clarendon, 2002).

often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering.”<sup>31</sup> By the same token, however, it ought to be borne in mind that such therapeutic effects will not be universally experienced by all victims; and indeed there is some evidence that while participation may help victim recovery in certain cases, it may hinder it in others.<sup>32</sup>

A further therapeutic benefit for the victim may result from the offender expressing remorse or offering an apology. Although there is strong empirical evidence to suggest that victims desire apologies and feel better in their aftermath,<sup>33</sup> there is also an obvious risk that some expressions of remorse will be feigned in order to secure a lighter sentence. Yet, as Bibas and Bierschbach contend, even false or half-hearted expressions of remorse are better than none at all these may still help victims to feel vindicated and may ultimately lead offenders to internalise the awareness that they ought to feel remorse after a period of time.<sup>34</sup>

While the most obvious therapeutic benefits of participation may be self-evident in the case of victims, offenders may also benefit in a similar way. Although there is a dearth of empirical evidence as to the precise nature of offender emotions in the sentencing process,<sup>35</sup> the literature is replete with references to anger, resentment, hatred, anxiety, depression, remorse, defiance and shame.<sup>36</sup> Participation in the justice system might be used as a means of processing the myriad of sometimes conflicting emotions that an offender may experience before, during and after committing the offence. If we accept that rehabilitation and desistance are desirable goals for the criminal justice, then we should do everything to encourage verbalisation and the construction of personal narratives. This is, after all, a proven means by which individuals can be encouraged to accept responsibility for their actions, identify reasons for their offending behaviour; and learn practical techniques that may help them to desist in the future.<sup>37</sup>

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<sup>31</sup> E Erez, “Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice” [1999] *Crim LR* 545, pp. 550–51.

<sup>32</sup> C Hoyle, “Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence” in E Erez, M Kilchling and J Wemmers (eds), n. 23 above.

<sup>33</sup> C Fercello and M Umbreit, Client evaluation of family group conferencing in 12 sites in 1st Judicial District of Minnesota (St. Paul: Center for Restorative Justice & Mediation, 1998); Strang, *Repair or Revenge?*, n. 30 above.

<sup>34</sup> Bibas and Bierschbach, “Integrating Remorse”, n. 9 above.

<sup>35</sup> M Proeve, D Smith, & D Niblow, “Mitigation without definition: remorse in the criminal justice system” (1999) 32 *Australia & New Zealand Journal of Criminology* 16.

<sup>36</sup> For a generally overview, see J Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (New York: Basic Books, 1988); D Canter and M Ioannou, “Criminals’ emotional experiences during crimes” (2004) 1 *International Journal of Forensic Psychology* 71; T Scheff and S. Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts*. (Lexington: Lexington Books, 1991); J Braithwaite, ‘Shame and Modernity’ (1993) 33 *British Journal of Criminology* 1.

<sup>37</sup> See eg R Masters, *Counselling Criminal justice Offenders* (Thousand Oaks, CA: Sage, 2003); S Tarolla, E Wagner, J Rabinowitz & J Tubman, “Understanding and treating juvenile offenders: A review of current knowledge and future directions” (2002) 7 *Aggression and Violent Behavior* 125; A Moster, D Wnuk & E Jeglic, “Cognitive Behavioral Therapy Interventions With Sex Offenders” (2008) 14 *Journal of Correctional Health Care* 109.

As with victims, criminal courts cannot or should be transformed in therapy rooms overnight, and there is little scientific evidence to support the therapeutic efficacy of “one-shot” forms of expression.<sup>38</sup> However, it still seems sensible to at least explore the ways in which therapeutic potential of sentencing procedures can be maximized through the use of personal narratives, whilst simultaneously taking steps to minimise the risk of any anti-therapeutic effects.

## (2) *Strengthening Procedural Justice*

An increased emphasis on the role of emotion should ensure much improved levels of procedural justice. Procedural justice is crucial to ensuring the legitimacy of the criminal justice system. Basically, the theory stipulates that an individual’s sense of justice in any given case is largely dependent on the procedure that led to the decision (as opposed to merely the outcome).<sup>39</sup> Moreover, it has been found that individuals are likely to place more trust in authorities after a negative outcome than they did prior to that outcome, providing that the procedures followed have been perceived as fair.<sup>40</sup>

There are a number of values and attributes that have come to be associated with high levels of procedural justice, including “representation, honesty, quality of decision, and consistency, and more generally of participation and esteem.”<sup>41</sup> However, the notion of “voice” is perhaps one of the most renowned yardsticks for procedural justice.<sup>42</sup> As one recent study suggests the concept of “voice” is not just about expressing one’s needs but gravitates around communication and the concept of being heard.<sup>43</sup> It is the mechanism used to express oneself, and as such it is indelibly intertwined with our emotions. The ability to exercise voice is critical for victims and offenders alike. Victims of violent crime, in particular, are often beset with negative emotions including fear, helplessness, shame, self-blame, anger and vulnerability that may prevail for some time.<sup>44</sup> However, as noted in the

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<sup>38</sup> Pemberton & Reynaers, “The Controversial Nature”, n. 23 above.

<sup>39</sup> See generally E Lind and T Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

<sup>40</sup> Lind and Tyler, *ibid*; E Lind, C Kulik, M Ambrose & M de Vera Park, “Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic” (1993) 38 *Administrative Science Quarterly* 224; T Tyler, *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 1990).

<sup>41</sup> Tyler, *ibid*, p. 175.

<sup>42</sup> See eg R Folger, “Distributive and procedural justice: Combined impact of voice and improvement on experienced inequity” (1977) 35 *Journal of Personality and Social Psychology* 108; Lind and Tyler, *ibid*; E Lind, R Kanfer, C Earley, “Voice, control, and procedural justice: Instrumental and noninstrumental concerns in fairness judgments” (1990) 59 *Journal of Personality and Social Psychology* 952.

<sup>43</sup> J Wemmers and K Cyr, “What Fairness means to Crime Victims; A Social Psychological Perspective on Victim-Offender Mediation” (2006) 2 *Applied Psychology in Criminal Justice* 102.

<sup>44</sup> J Bisson & J Shepherd, “Psychological reactions of victims of violent crime” (1995) 167 *British Journal of Psychiatry* 718; A Lurigio “Are all victims alike? The adverse, generalized, and differential impact of crime” (1987) 33 *Crime & Delinquency* 452; P Resick,



previous section, such negative emotions have been shown to be considerably reduced when victims are given the opportunity to participate in justice and personal narrative of their emotional journeys.

In a similar way, victims value the opportunity to tell offenders how the offence impacted upon them and have their questions answered.<sup>45</sup> A range of empirical studies confirm that victim participation in the criminal justice process enhances satisfaction with justice through giving victims a sense of empowerment and official, albeit symbolic, acknowledgement.<sup>46</sup> Without a mechanism for exercising voice, procedures may seem fundamentally unbalanced - and thus unfair - given the offender's right to express his or her emotions to the court through a mitigating plea.<sup>47</sup>

Procedural justice and the concept of 'voice' are also important to offenders. Even victim impact evidence may instil a sense of procedural justice among offenders, since it provides a link between the impact of the offence and the imposition of punishment. Of course, offender participation is equally important. A study by Casper et al showed that convicted felons' views as to whether their sentences were heavier than those given other offenders convicted of the same crime strongly correlated with their sense of whether their overall treatment was fair.<sup>48</sup> Like victims, offenders are the owners of their stories and, as such, should ultimately control the message conveyed to the court on their behalf.<sup>49</sup> The more an offender feels involved in the process, the more fair that process is likely to be perceived as fair. It might be surmised that being able to explain to the court the emotional turmoil that may have precipitated an offence, or the feelings of shame and remorse that followed in its aftermath, may all contribute to the sense of procedural justice experienced by offenders.

An "emotionally intelligent" approach to sentencing would thus prioritise the role of voice. Both victims and offenders should be able to relate their emotions to the courtroom directly; in their own words and at their own pace.

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"Psychological effects of victimization: Implications for the criminal justice system" (1987) 33 *Crime & Delinquency* 468.

<sup>45</sup> J Roberts and E Erez, "Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements" (2004) 10 *International Review of Victimology* 223. 238; J Shapland, J Willmore, and P Duff, *Victims and the Criminal Justice System* (Aldershot: Gower, 1985); Strang, *Repair or Revenge?*, n. 30 above.; J Wemmers, *Victims in the Criminal Justice System* (Amsterdam: Kugler Publications, 1996).

<sup>46</sup> See eg E Erez, L Roeger, and F Morgan, "Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience" (1997) 5 *International Review of Victimology* 37; E Erez and E Bienkowska, "Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland" (1993) 21 *Journal of Criminal Justice* 47; Shapland et al, *ibid.*, J Wemmers, "Victims in the Dutch Criminal Justice System" (1995) 3 *International Review of Victimology* 323; J Wemmers and K Cyr, "Victims' Perspectives on Restorative Justice: How Much Involvement Are Victims Looking For?" (2004) 11 *International Review of Victimology* 259.

<sup>47</sup> P Cassell, "In Defence of Victim Impact Statements" (2008) 6 *Ohio State Journal of Criminal Law* 611.

<sup>48</sup> J Casper, T Tyler & B Fisher, "Procedural Justice in Felony Cases" (1988) 22 *Law & Society Review* 483.

<sup>49</sup> K Thomas, "Beyond Mitigation: Towards a Theory of Allocution" (2007) 75 *Fordham Law Review* 2641, p. 2659.

The more of an opportunity victims and offenders are given to tell their emotional stories, the more likely it is that they will perceive the process as fair even where they are dissatisfied with the actual sentencing decision. Indeed, aside from specific benefits to victims and offenders, the criminal justice system as a whole stands to benefit from higher levels of procedural justice bolstered by emotions given its intrinsic value to legitimacy and more effective governance. Studies have shown that negative experiences of the criminal processes are likely to deter victims from co-operating in the future.<sup>50</sup> In the same way, procedural justice may be seen to contribute to desistance from future offending by instilling a greater sense of respect for the law, a willingness to remain within its parameters, and a greater sense of legitimacy of its institutions.

### (3) *Improving the Quality of Decision- Making*

An emotionally-intelligent approach to sentencing would also carry a third potential benefit, insofar that it may enhance the quality of the decision-making process. In most common law jurisdictions, the question of sentence is resolved primarily by reference to offence seriousness. Determining seriousness is not a precise science; it may depend on any number of factors depending on the jurisdiction, although culpability and harm tend to act as common indicators.<sup>51</sup>

Emotions – and the ability to empathise - may be useful to sentencers in providing a more accurate picture of both culpability and harm. As the former US Federal Judge Irving R. Kaufman explained, “our intuition, emotion and conscience are appropriate factors in the jurisprudential calculus.”<sup>52</sup> Learning about the offender’s emotional state prior to, during and after the offence gives way to a truer perception concerning the question of culpability. Anger, hatred and resentment prior to the offence may all give an indication as to motive, which in turn may provide evidence of intention and blameworthiness. Similarly, blameworthiness may be lessened if the offender was depressed, anxious or nervous. Information of this type allows the sentencer to empathise and appreciate the perspective of others and how blameworthy they ought to be in the eyes of the law.<sup>53</sup>

In a similar way, the more sentencers learn about the emotions of victims, the more information they glean about the full extent of the harm that has been caused. Cassell and Erez both cite a number of empirical studies highlighting how sentencers often value the additional information supplied within victim impact evidence.<sup>54</sup> In the context of emotions, this is perhaps most obvious in

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<sup>50</sup> Shapland, Willmore, and Duff, *Victims*, n. 43 above.

<sup>51</sup> “Seriousness” in England and Wales is determined by the offender’s culpability as well as “any harm which the offence caused, was intended to cause or might foreseeably have caused: Criminal Justice Act 2003, s 143(1).

<sup>52</sup> I R Kaufmann, “The Anatomy of Decisionmaking” (1984) 53 *Fordham Law Review* 1, p. 16.

<sup>53</sup> See further Bandes, “Empathy”, n. 6 above.

<sup>54</sup> Cassell, “In Defence”, n. 45 above; “E Erez, “Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice” [1999] *Criminal Law Review* 545.

relation to psychiatric or emotional harm, which is becoming more widely recognised, in addition to harms which are physical or material in nature.<sup>55</sup> Victims would be better placed than anyone else to describe the nature and extent of their emotional and psychological states and, in doing so, sentencers would be granted important new insights into dimensions of the case of which they may not previously have been aware.

However, many opponents of victim allocution maintain that emotional outpourings endanger the objectivity of sentencing and are inherently inappropriate for the courtroom.<sup>56</sup> Susan Bandes, for example, warns that the “hatred, bigotry, and unreflective empathy” contained within victim impact statements serves to demean the dignity of both victims and offenders.<sup>57</sup> Whilst Bandes’ comments were made in the specific context of US capital murder trials, they nonetheless underline the need to carefully consider what emotions victims *actually* convey through their participation in criminal justice. Whilst it may be foolhardy to deny that many victims experience deep-seated feelings of anger, hatred and desire some measure of revenge, studies suggest that victims would seem to be no more punitive than the general public in relation to sentencing attitudes.<sup>58</sup> Moreover, as with offenders expressing remorse, the sentencer is under no obligation to believe the statement or to alter the proposed sentence in response to victim outrage.<sup>59</sup> Therefore we should entrust sentences to use their judgment and discretion appropriately and in the manner in which they have been trained and educated.

Finally, a better understanding of emotions may also assist judges in tailoring the specific nature of a sentence so that it best “fits” the offender. As Thomas argues, taking close account of how the offender feels, and how he/she is likely to respond to a sentence can help to ensure that the sentence is likely to be beneficial in achieving its goals:

Having this information could allow judges and other actors in the criminal justice system to develop a more nuanced portrait of defendants. By doing so, these officials may, for example, be better

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<sup>55</sup> The English courts have come under some criticism for their failure to attach criminal liability of emotional harm that is unaccompanied by recognised psychiatric injury. See further J Stannard, “Sticks, stones and words: emotional harm and the English criminal law” (2010) 74 *Journal of Criminal Law* 533. A similar critique has been made of the position in the English civil courts: see R Mulheron, “Rewriting the requirement for a “recognized psychiatric injury” in negligence claims” (2012) 32 *Oxford Journal of Legal Studies* 77.

<sup>56</sup> See eg Bandes, “Empathy” n. 6 above.

<sup>57</sup> *Ibid.*, p. 394.

<sup>58</sup> See eg M Hough and A Park, ‘How malleable are attitudes to crime and punishment? Findings from a British deliberative poll’ in J. Roberts and M. Hough (eds), *Changing Attitudes to Punishment*. (Cullompton: Willan, 2002); J Mattinson and C Mirrlees-Black, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British crime Survey* (London: Home Office, 2000). S Maruna and A King, “Public Opinion and Community Penalties” in T. Bottoms, S. Rex & G. Robinson (Eds.) *Alternatives to Prison: Options for an Insecure Society* (Cullompton: Willan, 2004).

<sup>59</sup> Indeed, arguably most victims already realise this fact and wish to participate notwithstanding: see P G Cassell, “Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment” (1999) *Utah Law Review* 479.

able to develop creative solutions to criminal justice problems or to observe trends in offender characteristics or behaviour.<sup>60</sup>

Using the specific example of shaming-type punishments, Thomas argues that whilst in some cases, a punishment involving some degree of public moral condemnation or embarrassment might be acceptable, in other cases it would have a disproportionate effect on the offender's rehabilitation efforts.<sup>61</sup> Similar arguments might also be levied in terms of the impact of imprisonment. In sum, the more detailed and holistic the picture that is offered, the more accurate and proportionate the sentence is likely to be.

#### (4) *Transforming Relationships between Victims and Offenders*

A more central role for emotions could also herald new and better opportunities for reconciliation between the victim and the offender. Drawing on Randall Collins' theory of interaction rituals,<sup>62</sup> Sherman et al. contend that the dissemination of emotions (which may include anger, compassion, remorse and shame) create a new shared experience and sense of solidarity.<sup>63</sup> This reflects what social psychologists have termed the so-called 'contact hypothesis', which postulates that conflict can be most effectively resolved through direct and deliberative contact and communication between conflicting parties.<sup>64</sup> In this sense, a previously broken bond may be transformed by the emotional energy into a new social bond, providing a potential platform for repair of broken relationships. Individual narratives of victims and offender can create a coherent story-frame for both victims and offenders, and their interaction can thereby create a new 'co-narrative' which can serve to affirm a new norm, vindicate victims, humanise offenders, and denounce the evil of an act without labelling any person as a villain.<sup>65</sup>

In order for this to happen, sentencing procedure would need to open a more communicative conduit capable of facilitating dialogue between victims and offenders. There is already an abundance of evidence that victims place a high value on receiving apologies,<sup>66</sup> and this prospect is often an important factor influencing their decision to become involved in mediation and restorative justice programmes.<sup>67</sup> A genuine apology should signal to the victim that the offender genuinely regrets his or her behavior and wishes to

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<sup>60</sup> Thomas, "Beyond Mitigation", n. 49 above, p. 2675.

<sup>61</sup> As illustrated, for example, through the use of "shaming" practices which are frequently criticized on the ground that they are reflective of the "punitive turn: see n 3 above.

<sup>62</sup> R Collins, *Interaction ritual chains* (Princeton, MA: Princeton University Press, 2004).

<sup>63</sup> L Sherman, H Strang, C Angel, D Woods, G Barnes, S Bennett, and N Inkpen, "Effects of face-to-face restorative justice on victims of crime in four randomized controlled trials" (2005) 1 *Journal of Experimental Criminology* 367.

<sup>64</sup> See generally WG Stephen, "Intergroup Contact: Introduction" (1995) 41 *Journal of Social Issues* 1; RJ Fisher, *The Social Psychology of Intergroup and International Conflict Resolution* (Springer: New York, 1990).

<sup>65</sup> See further J Braithwaite, 'Narrative and "compulsory compassion,"' *Law and Social Inquiry* 31 (2006): 425-446; Thomas, "Beyond Mitigation", n. 49 above, pp. 2673-74.

<sup>66</sup> Fercello and Umbreit, n. 33 above; Strang, *Repair or Revenge?*, n. 30 above.

<sup>67</sup> Strang, *Repair or Revenge?*, n. 30 above.

make amends. The victim is then empowered to choose whether to accept the apology (thereby restoring a state of equality), or reject it, allowing that moral imbalance to stay in place.<sup>68</sup>

The potential benefits of an apology are not limited to victims. As Etienne and Robbennolt point out, offenders who apologise “may be able to relieve their guilt and assuage other negative emotions, begin to repair their relationships with their victims and society, improve their reputations, and begin a process of reintegrating into society.”<sup>69</sup> Similarly, encouraging the expression of remorse and/or repentance is something that is potentially valuable to the community, in terms of the offender having acknowledged that communal norms have been breached.<sup>70</sup> It is also highly probable that most people who are remorseful and repentant are less dangerous, and are thereby less likely to reoffend than those who are unrepentant or defiant.<sup>71</sup> This would be particularly true in the case of first-time offenders.<sup>72</sup>

It will be apparent that the four potential benefits outlined above are not necessarily discrete and may overlap. Whilst care should be taken, for example, not to conflate victims’ sense of procedural justice with therapeutic benefits, some studies have suggested that such a link exists.<sup>73</sup> In the same way, the expression of an apology or reconciliation during the sentence may also significantly increase both procedural satisfaction as well as carrying therapeutic effects. Having outlined a range of purported benefits, the next section proceeds to consider the extent to which emotional intelligence underpins the sentencing process of England and Wales.

## **The Role of Emotional Narratives in the English Sentencing Process**

Since the beginning of the eighteenth century, a process of adversarialisation and lawyerisation of criminal trials has resulted in the silencing of victims and offenders in English criminal justice.<sup>74</sup> This “appropriation” of private conflicts<sup>75</sup> turned the trial into a showdown between lawyers representing the State and the defence, with the role of the primary stakeholders being

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<sup>68</sup> C Petrucci, “Apology in the criminal justice setting; Evidence for including apology as additional component in the legal system” (2002) 20 *Behavioral Science and the Law* 337.

<sup>69</sup> M Etienne and J K Robbennolt, “Apologies and Plea Bargaining” (2007) 91 *Marquette Law Review* 295, p. 298.

<sup>70</sup> S Bibas, “Forgiveness in Criminal Procedure” (2007) 4 *Ohio State Journal of Criminal Law* 329.

<sup>71</sup> J G Murphy, “Remorse, Apology, and Mercy” (2007) 4 *Ohio State Journal of Criminal Law* 423.

<sup>72</sup> J Jacobson and M Hough, “Personal Mitigation in England and Wales” in J Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge: Cambridge University Press, 2011).

<sup>73</sup> J Wemmers and C Cyr, “Can Mediation Be Therapeutic for Crime Victims? An Evaluation of Victims’ Experiences in Mediation with Young Offenders” (2005) 47 *Canadian Journal of Criminology and Criminal Justice* 527.

<sup>74</sup> J H Langbein, *The Origins of the Adversary Criminal Trial* (Oxford: Oxford University Press, 2003).

<sup>75</sup> N Christie, ‘Conflicts as Property’ (1977) 17 *British Journal of Criminology* 1.

restricted to “evidentiary cannon fodder” for one side or the other.<sup>76</sup> Whilst the end of the nineteenth was marked by the emergence of a common law right of allocution for the defence,<sup>77</sup> the latter years of the twentieth century and early years of the twenty-first century have witnessed a drive towards similar participatory rights for victims.<sup>78</sup> In this section we particularly focus on the ways in which the emotional narratives of victims and offenders can be taken into account when determining sentence; with particular reference to the communication of offenders’ emotions through pre-sentence reports and pleas in mitigation, and the communication of victims’ emotions through Victim Personal Statements (VPS) and Family Impact Statements (FIS).

### *The Narratives of Offenders*

Most offenders play a passive role in English criminal trials. Whilst some may testify in their own defence, it is rare for offenders to speak directly at the sentencing stage. Nonetheless, offenders may convey their emotions indirectly to the court through two channels, the pre-sentence report (PSR) and the plea in mitigation.

Section 156 of the Criminal Justice Act 2003 stipulates that courts must obtain a PSR and take it into account in determining sentence unless it forms the opinion that a pre-sentence report is unnecessary.<sup>79</sup> Their purpose is to assist the courts “in determining the most suitable method of dealing with an offender”;<sup>80</sup> in other words, it gives the sentencer a better idea of the seriousness of the offence as well as the offender’s suitability to carry out particular types of sentences. While the report may contain a sentence recommendation, the court is not bound to follow this and can deviate from any recommendation if it chooses to do so.<sup>81</sup>

To this end, PSRs are heavily based on probing interviews with a probation officer.<sup>82</sup> Its precise form and contents are laid down within the National Standards for the Management of Offenders,<sup>83</sup> although it can be noted that interviews will typically cover offending information; analysis of the offences;

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76 J Braithwaite, ‘Juvenile Offending: New Theory and Practice.’ Address to the National Conference on Juvenile Justice, Adelaide, Institute of Criminology, September 1992.

77 The practice of permitting the defendant to make an unsworn statement from the dock evolved in the nineteenth century as a means of enabling some form of personal participation by the defendant. It was not until the passage of the Criminal Evidence Act 1898 that defendants were permitted to give evidence on oath. For comparative US perspective, see Thomas, “Beyond Mitigation”, n. 49 above.

78 See generally J Doak, ‘Participatory Rights for Victims of Crime: In search of international consensus’ (2011) 15 *Canadian Criminal Law Review* 41.

79 Criminal Justice Act 2003, s 156(3). While the report may contain a sentence recommendation, the court is not bound to follow this and can deviate from that recommendation if it chooses to do so.

80 Criminal Justice Act 2003, s158.

81 Criminal Justice Act 2003, s 156(4).

82 Or, in the case of a young offender, by a social worker or a member of a Youth Offending Team.

83 Ministry of Justice, *National Standards for the Management of Offenders* (London: Ministry of Justice, 2011).

accommodation; education; training and employability; financial management and income; relationships; lifestyle and associates; drug and alcohol issues; emotional wellbeing; thinking and behaviour including the offender's attitudes towards the victim and the offence.<sup>84</sup> Offenders may be asked by the probation officer about attitudes to the victim and the offence; the level of the awareness of its consequences; the extent to which responsibility is accepted; along with relevant emotional responses as denial, defiance, remorse, shame or a desire to make amends for their actions.<sup>85</sup>

When PSRs were introduced by the Criminal Justice Act 1991, there was a sense of optimism that this new opportunity for offenders to exercise 'voice' would constitute a welcome departure from the conveyor belt of lawyer-led proceedings. Such an aspiration was expressed by one commentator in a 1992 article in the *Criminal Law Review*:

The probation officer is requested to interview the defendant in a private, relatively unhurried, in-depth encounter, having some of the ambience of the confessional, encouraging the defendant to be candid, open and trusting. Defendants can welcome this opportunity to speak because they can feel listened to, understood and respected in a way that may be missing from their other encounters with criminal justice professionals.<sup>86</sup>

Notwithstanding the best efforts of many officers, such hopes seem to have given way to a sense of frustration as demands for cost efficiency have impacted on both the number and nature of pre-sentence reports. The introduction of the computerised Offender Assessment System (OASys) in 2001 added considerably to resource investment required to complete full reports,<sup>87</sup> which triggered a decision to change the majority of reports to a "fast-delivery" format based on a "tick-box" exercise.<sup>88</sup> Interviews for these types of reports tend to be considerably less detailed since the reports are usually completed within the same day. Interviews thus tend to be considerably shorter, with less scope for defendants to relay their narratives. "Full" or "standard" reports are now restricted to more complex and serious cases where it would not be deemed possible to provide sufficient information to meet the needs of the court within the "fast delivery" report.<sup>89</sup>

The second means by which the offender may communicate emotions is through the plea in mitigation. This is an oral statement read to the court by

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<sup>84</sup> P Whitehead, "The probation service reporting for duty: court reports and social justice" (2008) 6 *British Journal of Community Justice* 86.

<sup>85</sup> N Stone, "Pre-sentence reports, culpability and the 1991 Act" [1992] Crim LR 558.

<sup>86</sup> *Ibid.*, pp. 565-6.

<sup>87</sup> Whitehead, "The probation service", n. 84 above.

<sup>88</sup> However, scope remains to include explanatory written text to expand upon tick box data if required. It is even possible for a simple verbal report to be given if a written report is not considered necessary (see *ibid.*).

<sup>89</sup> HC Justice Committee, *The Role of the Probation Service*, Eighth Report of Session 2010–12, Vol. 1, p. 16. The Committee also notes that Probation trust budgets were immediately reduced in 2009 on the assumption that standard delivery reports would only be used where use of the fast delivery report would be inappropriate.

the defence advocate and which has traditionally brought a wide range of factors to the attention of the court, including information about the offender and the circumstances of their offence in a bid to reduce the severity of the sentence. Whilst it is not uncommon for offenders to speak for themselves in the United States, this is relatively rare in England and Wales. Nevertheless, it has been suggested that sentencers may place greater emphasis on the plea in mitigation than the pre-sentence report, given that the former may have been prepared some time beforehand.<sup>90</sup> There is also some evidence to suggest that PSRs may be afforded less weight because judges may view them as encroaching upon their “ownership” of the sentencing process, since they essentially amount to a recommendation by an outsider as to how to perform that role.<sup>91</sup> By contrast, pleas in mitigation are delivered by lawyers, who are insiders to the court and may be seen as having a more legitimate conduit to the judge.

Given that there are limited channels in which offenders are able to communicate their emotions to the court, we must consider the question of what weight – if any – is attached to these emotions in determining sentence. The starting point for the court is its assessment of the seriousness of the offence. This is undertaken by reference to the culpability of the offender and the harm he or she caused / intended to cause / might foreseeably have caused.<sup>92</sup> Once the level of seriousness has been determined, the court must take account of any aggravating or mitigating factors as well as any personal mitigation of the offender. It is within this latter context that the Sentencing Guidelines Council has envisaged that the emotions of the offender (specifically remorse) may enter the equation:

1.27 When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.<sup>93</sup>

In addition to the generic provision above, existing Sentencing Guidelines make specific reference to offender remorse as a mitigatory factor in relation to assault offences, attempted murder, and burglary.<sup>94</sup> However, none of the Guidelines offer any indication as to the form it ought to take or the weight that ought to be attached to it. The extent to which the sentencer’s discretion will be

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<sup>90</sup> A Ashworth, *Sentencing and Criminal Justice*, 5<sup>th</sup> ed. (Oxford: Oxford University Press, 2010), p. 381.

<sup>91</sup> *Ibid.*, p. 379.

<sup>92</sup> Criminal Justice Act 2003, s 143(1).

<sup>93</sup> Sentencing Guidelines Council, *Seriousness: Overarching Principles* (London: Sentencing Guidelines Council, 2004).

<sup>94</sup> Guidelines are issued by the Sentencing Council pursuant to Part IV of the Coroners and Justice Act 2009. Remorse is a factor relevant to personal mitigation in the Sentencing Council’s Definitive Guidelines on all of which make clear reference to offender remorse as a mitigating factor. See: <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> (accessed 31/07/12). By contrast, the lack of remorse or defiance is not explicitly identified as an aggravating factor, although there is no reason why a judge could not consider it as such in practice.



used to consider such information is very much dependant on the subjective view of sentencers as to the relevance of such factors, and the extent to which the offender's legal representative seeks to bring the offender's emotions to the attention of the court in their plea in mitigation.

The variable effect of emotional expressions was confirmed by a study by Jacobson and Hough who analysed the role in personal mitigation in some 132 cases across five Crown Court centres in 2007.<sup>95</sup> It was found that emotional responses of the accused did bear some influence on the sentencing decision, although mere expressions of remorse alone were unlikely to carry much weight in the minds of the sentencers. Such expressions became much more effective in bringing about sentence reduction where it was accompanied by honest discussion of the circumstances of the offending behaviour or a gesture, such as a letter of apology to the court.<sup>96</sup> Admittedly, determining the extent of remorse was an uncertain exercise; judges spoke of using "experience and feeling" or "gut feeling rather than careful calculation."<sup>97</sup> Emotions also entered into sentencing where the sentencer believed that the prosecution process caused the offender to suffer emotionally.<sup>98</sup> Such suffering is sometimes treated as part of the punishment for the crime, thereby lessening the severity of sentence.<sup>99</sup> Emotional stress at the time of the offence was also taken into account as a mitigating factor in a small amount of cases.

In summary then, offenders have limited capacity to provide emotional narratives to the court; the system is structurally conditioned for them to remain passive observers in their own cases. Although some offenders will communicate expressions of remorse through counsel as part of their plea in mitigation, such sentiments are communicated to the court; offenders are not encouraged to provide explanations or apologies directly to victims. A generally remorseful offender has no clear channel to pursue should s/he want to do so, and since such gestures are not generally repaid in the currency of sentencing law, so it is unsurprising that processes are not put in place to facilitate them. While remorse is perhaps the most desirable emotion, it may not be the only one which offenders experience at the point of sentence. While protests of innocence or messages of defiance may not be what the victim, the public or the sentencer want to hear, arguably these stories should also be heard.<sup>100</sup>

### *The Narratives of Victims*

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<sup>95</sup> J Jacobson and M Hough, *Mitigation: the role of personal factors in sentencing* (London: Prison Reform Trust, 2007).

<sup>96</sup> *Ibid.*, p. 24.

<sup>97</sup> *Ibid.*, p. 48.

<sup>98</sup> *Ibid.*, p. 28.

<sup>99</sup> There are a number of studies in the US suggesting significant reductions in sentence for offenders who express contrition of remorse in both state and federal courts: see further Bilbas and Bierschbach, n. 9 above, p. 93.

<sup>100</sup> See further Thomas, "Beyond Mitigation", n. 49 above, p. 2665 (citing the example of Nelson Mandela's address to the Rivonia Trial upon being sentenced to life imprisonment in 1964).

The most common (and most hotly contested) means of participation is through giving some form of victim impact evidence at the point of sentence. Since October 2001, victims are entitled to submit a Victim Personal Statement (VPS) to the court containing details of how the crime affected them; whether they feel vulnerable or intimidated; whether they are worried about the offender being given bail; whether they are considering a compensation claim; and anything else that they feel may be helpful or relevant.<sup>101</sup> A more advanced version of the VPS scheme also exists for the benefit of relatives bereaved by homicide; the Victim Focus Scheme (VFS) operates in a similar way allowing families to submit a “Family Impact Statement”, which means (unlike the VPS) that the statement will be read aloud in court by the prosecutor or the judge.<sup>102</sup>

Inclusion in the scheme is voluntary and it is possible for all crime victims to participate, with the exception of large retailers and corporations. In line with the Lord Chief Justice’s Consolidated Criminal Practice Direction,<sup>103</sup> the police officer transcribing the statement is likely to guide the victim as to the issues they may wish to include such as the financial, emotional, psychological, physical or other impacts that the crime has had upon them. The officer should also advise the victim to avoid the inclusion of their opinion on sentence as this is considered irrelevant to the sentencing decision. Although this may be preferable than leaving victims to their own devices, there is a risk that the more emotional aspects of victim narrative might come to be replaced with a sanitised and innocuous version of events which is less capable of fully conveying to the court the full intricacies of the crime’s impact upon the victim.

The VPS is appended to the case papers, but will only be considered by the sentencer as and when a finding of guilt has been reached. Its legal significance is detailed in the Practice Direction as well as the Court of Appeal in *R v Perks*.<sup>104</sup> While both authorities make it very clear that the victim’s opinions as to sentence must be disregarded, they also stipulate that the information contained within the VPS should be taken into account in determining offence seriousness. Although weight that ought to be attached to these factors has never been clarified in precise terms, they appeared to weigh heavily in the Court of Appeal’s determination of the appropriate sentence in *R v Saw*,<sup>105</sup> a domestic burglary case. Here Lord Phillips CJ drew attention to the adverse consequences that may follow a burglary. Such effects, he noted, related not only to the emotional consequences of material loss, but also to the aggravating impact of the severe shock that victims often experience, especially the elderly, when intruders are known to have been present in their homes. In the eyes of the court, the emotional effects of

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<sup>101</sup> See:

[http://www.cps.gov.uk/victims\\_witnesses/reporting\\_a\\_crime/victims\\_personal\\_statement.html](http://www.cps.gov.uk/victims_witnesses/reporting_a_crime/victims_personal_statement.html) (accessed 30/07/12).

<sup>102</sup> See further Doak, J., Henham, R. & Mitchell, B. “Victims and the Sentencing Process: Developing Participatory Rights?” (2009) 29(4) *Legal Studies* 651.

<sup>103</sup> Consolidated Criminal Practice Direction (November 2011), Pt III.28.

<http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/CCPD-complete-text-Oct-2011.pdf> (accessed 30/07/12).

<sup>104</sup> [2001] 1 Cr.App.R.(S) 19.

<sup>105</sup> [2009] EWCA Crim 1.

burglary on the victim could clearly be taken into account alongside the state's interests in consistency and proportionality or other factors relating to the offender's interest culpability.

The recent publication of the Sentencing Council's Definitive Guidelines has affirmed the position that the impact of the crime on the victim as a factor affecting sentence severity.<sup>106</sup> Indeed, some make implied reference to the emotional well-being of the victim as an aggravating factor; for example, the Guideline on Assault Offences states that "ongoing effects upon the victim" can merit an upward adjustment in sentence severity.<sup>107</sup> While this does not specifically mention emotional impact, this can clearly be encompassed within the notion of "ongoing effects." The Guideline on burglary similarly makes reference to "significant trauma to the victim"<sup>108</sup> as an aggravating factor; and again this may encompass the concept of emotional harm.

It is not always, however, the case that the impact of the offence on the victim will constitute an aggravating factor. Indeed, the Court of Appeal has been willing on a number of occasions to reduce a sentence where it was felt that the original decision exaggerated the impact on the victim or on his or her family. A sentence of four years' imprisonment for causing death by dangerous driving was reduced to three years in *R v Nunn*,<sup>109</sup> where the mother and sister of the deceased appellant had given evidence that the length of sentence was adding to their grief. Similarly, in *R v Matthews*,<sup>110</sup> the appellant's five year prison sentence for the manslaughter of his brother was reduced to three years because of concerns about the impact a lengthier sentence would carry on other family members.<sup>111</sup>

This underscores the point that considerable care needs to be exercised in making assumptions about what victims actually seek through participating in the criminal process and, specifically, the extent to which they seek vengeance through doing so. Although content analysis of victim impact evidence is somewhat thin on the ground, research conducted in Staffordshire in 2005 by one of the authors suggests that where a victim chooses to participate in the VPS scheme they are very likely to include an outline of the emotional impact that the crime has had upon them.<sup>112</sup> The content analysis conducted as part of that study found that 88% of the 233 VPS considered included information outlining the emotional response of the victim to the

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<sup>106</sup> See <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> (accessed 31/07/12).

<sup>107</sup> See: [http://sentencingcouncil.judiciary.gov.uk/docs/Assault\\_definitive\\_guideline\\_-\\_Crown\\_Court.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf) (accessed 31/07/12).

<sup>108</sup> See the Guideline on Aggravated Burglary, p.5. The Guideline on Domestic Burglary makes a similar reference to 'trauma to the victim, beyond the normal inevitable consequence of intrusion and theft' (at p. 8). The Guideline on Burglary Offences can be accessed at: [http://sentencingcouncil.judiciary.gov.uk/docs/Burglary\\_Definitive\\_Guideline\\_web\\_final.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf) (accessed 31/07/12).

<sup>109</sup> [1996] 2 Cr App R (S) 136.

<sup>110</sup> [2003] 1 Cr App R (S) 26.

<sup>111</sup> See further I Edwards, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders' [2002] *Criminal Law Review* 689.

<sup>112</sup> These are the findings from an unpublished study by Louise Taylor analysing the content of 233 VPS taken from Magistrates' Court files for Chase Police Division in 2004.

crime committed against them, with the most often cited emotions being fear, upset and anger.<sup>113</sup> While many of emotional responses would tend towards sentence aggravation there were also limited instances where victims displayed emotional responses such as sympathy and empathy,<sup>114</sup> which could serve to mitigate the offender's sentence. These findings broadly correlate with other studies.<sup>115</sup> In their evaluation of the VPS pilots, Hoyle et al found that, as indicated earlier, 'rather than... encouraging exaggeration, inflammatory statements, and vindictiveness, the opposite appears to apply: they [victim personal statements] tend to understate rather than over-state the impact of offences.'<sup>116</sup> Similarly, in Chalmer's et al analysis of the content of victim statements in Scotland, statements made concerning sentence tended to be unspecific and some even displayed some concern for the offender and requested a lighter sentence.<sup>117</sup> Even where victims do express anger or a desire for vengeance, sentencers have little problem disentangling legally relevant information from that which is inappropriate conjecture or opinion.<sup>118</sup>

It is vital, however, that victims are made fully aware of the purpose of their participation. In particular, they should be advised in very clear terms that they cannot make specific demands as to sentence, and that the effect of the crime upon them is only one of a number of factors which the sentence must consider.<sup>119</sup> A number of studies have identified a real risk that victims may end up frustrated and even more isolated if they feel their expectations have not been met.<sup>120</sup> This is a particularly salient finding given that studies suggest

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<sup>113</sup> As a percentage of the total emotions detailed by victims in the study 37% of these related to fear, 26% related to upset, and 9% related to anger.

<sup>114</sup> Two VPS in the study demonstrated this emotional response which represented 0.5% of the total emotions detailed by victims in the study.

<sup>115</sup> C Hoyle, E Cape, R Morgan, and A Sanders, *Evaluation of the One Stop Shop and Victim Pilot Statement Projects* (London: Home Office, 1998); Chalmers et al, n. 12 above.

<sup>116</sup> Hoyle et al, *ibid*, p. 28.

<sup>117</sup> J Chalmers, P Duff, and F Leverick, "Victim impact statements: can work, do work (for those who bother to make them)" [2007] *Criminal Law Review* 360, p. 374.

<sup>118</sup> E Erez and L Rogers, "Victim impact statements and sentencing outcomes and processes: The perspectives of legal professionals" (1999) 39 *British Journal of Criminology* 216; M L Schuster and A Proben, "Degrees of Emotion: Judicial Responses to Victim Impact Statements" (2010) 6 *Law, Culture and the Humanities* 75; M O'Connell, "Victims in the sentencing process: South Australia's judges and magistrates give their verdict" (2009) 4 *International Perspectives in Victimology* 50; A Sweeting, R Owen, C Turley et al., *Evaluation of the Victims' Advocate Scheme Pilots*, Ministry of Justice Research Series 17/08 (London: Ministry of Justice, 2008).

<sup>119</sup> Empirical evidence in both the UK and further afield suggests that victim impact evidence rarely influences sentencing decisions to a significant degree: see eg Chalmers et al, n. 118 above; T Eisenberg, S P Garvey, and M T Wells, "Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases" (2003) 88 *Cornell Law Faculty Publications* 306; E Erez and P Tontodonato, 'The Effect of Victim Participation in Sentencing on Sentence Outcome' (1990) 28 *Criminology* 451; R Morgan and A Sanders, *The Use of Victim Impact Statements* (London: Home Office, 1999). See further J V Roberts and M Manikis, *Victim Personal Statements at Sentencing: A Review of Empirical Research* (London: Office of the Commissioner for Victims and Witnesses for England and Wales, 2011), pp. 30-31.

<sup>119</sup> E Erez and L Rogers, Victim Impact Statements and Sentencing Outcomes and Processes: The Perspective of Legal Professionals (1999) 39 *British Journal of Criminology* 216, p. 226.

<sup>120</sup> Chalmers et al, "Victim Impact", n. 118 above; E Erez and P Tontodonato, 'Victim participation in sentencing and satisfaction with justice' 9 *Justice Quarterly* 393; A Sanders, C

that victim impact evidence rarely influences sentencing decisions to a significant degree.<sup>121</sup>

Although the VPS and VFS do open a channel through which victims can communicate their emotions to the court, the emotional power of their stories is likely to be significantly diminished by the fact that they are unable to address either the defendant or the court in person. Unlike the United States, where victims are able to exercise a right to allocution in all federal and most state criminal hearings, victims in England and Wales are restricted to exercising their voice indirectly, through a third person. Whilst the VFS was initially intended to give victims of homicide the choice between reading an oral statement themselves or leaving that task to counsel, this option has since been withdrawn. In their evaluation of the VFS pilots,<sup>122</sup> Sweeting et al found that a significant minority of victims (22%) had opted to present them in person. This was an opportunity that appeared to be valued by the families who did so, with the husband of one deceased victim telling the researchers that he was “doing it because I just felt I owed it.”<sup>123</sup> Moreover, the researchers noted that overcoming the fear of speaking in court on such an emotional subject had helped victims to feel empowered and more satisfied with the process. It was also reported that there was a perception among practitioners that family members felt they could have a greater personal impact and “do more to help” by delivering the evidence themselves. Although self-delivery of the statement tends to involve additional work for all stakeholders, it is regrettable that the emotional potential of the VFS has been curtailed by placing restrictions on the victim’s role, rather than seeking to strengthen it.

### *The Limits of Emotion*

There is clearly some scope for victims and offenders to communicate their emotional narratives to court. Certainly, opportunities to do so have increased in recent years. However, by the same token, the room for emotional narratives is still extremely small, and an emotionally intelligent approach to sentencing involves more than victims and offenders expressing their views to the court in a formulaic and mechanistic manner. Evidentiary and procedural rules, and the structure of the trial as an adversarial content mean that victims and offenders can only portray their stories in a way that lies within these stringent parameters. This is particularly true within magistrates’ courts;

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Hoyle, R Morgan, and E Cape, ‘Victim Impact Statements: Don’t work, Can’t work’ (2001) *Criminal Law Review* 437.

<sup>121</sup> See eg Chalmers et al, “Victim Impact”, n. 118 above; T Eisenberg, S P Garvey, and M T Wells, “Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases” (2003) 88 *Cornell Law Faculty Publications* 306; E Erez and P Tontodonato, ‘The Effect of Victim Participation in Sentencing on Sentence Outcome’ (1990) 28 *Criminology* 451; R Morgan and A Sanders, *The Use of Victim Impact Statements* (London: Home Office, 1999). See further J V Roberts and M Manikis, *Victim Personal Statements at Sentencing: A Review of Empirical Research* (London: Office of the Commissioner for Victims and Witnesses for England and Wales, 2011), pp. 30-31.

<sup>122</sup> Sweeting et al, n. 119 above. Note that the VFS was originally known as the Victim Advocate Scheme.

<sup>123</sup> *Ibid.*, p. 21.

sentencing here has been said to be “swift to the point of abruptness, relying heavily on the speedy delivery of guilty pleas.”<sup>124</sup> Indeed, many victims will opt not to attend such hearings, and will thus not hear any emotions expressed by the offender or his/her lawyer.

As Habermas famously observed, the justice system has become ‘colonized’ by abstract principles of formal law, drawing the court of law away from the *Lebenswelt* or ‘lifeworld’, this being the typical environment which human beings experience and use as a point of reference in their personal narratives and in their relationships with others.<sup>125</sup> Intimate, informal and direct interactions generally act as precursors and conveyers of apology and forgiveness,<sup>126</sup> and these are a far cry far cry from the world of the criminal court. Here, the formal environment is bipartisan, rigidly structured, ritualistic and dominated by zealous advocates.<sup>127</sup> It is the advocates, rather than victims or offenders, who assume the roles of story-tellers, suppressing individual narrative autonomy, shaping narratives to bring out their maximum adversarial effect,<sup>128</sup> and turning witnesses into “weapons to be used against the other side”.<sup>129</sup> There is no physical space or procedural mechanism through which victims or offenders might communicate freely their own stories in the way that makes sense to them. Bilbas and Bierschbach contend that this explains why apologies, expressions of remorse, and victim acknowledgement or forgiveness are exceedingly rare in US courtrooms:

Courtrooms are quasi-public settings, where defendants' families and close friends are often present. This setting can humiliate offenders, especially those who prize their reputations most highly (such as white-collar offenders) or who have committed highly stigmatized crimes (such as sex offenders). Sentencing allocutions, moreover, are tightly scheduled, hurried, vague, and often in front of a judge who did not preside over the guilty plea. For most defendants, this is their first real chance to apologize for their crime to victims or the community. It is no wonder that, when apologies do occur at sentencing, they often are stilted, forced, or ‘not enough’<sup>130</sup>

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<sup>124</sup> C Tata, “A sense of justice: The role of pre-sentence reports in the production and disruption of guilt and guilty pleas” (2010) 12 *Punishment and Society* 239.

<sup>125</sup> J Habermas, *The Theory of Communicative Action*, Vol. I (Boston: Beacon Press, 1984), p. 376.

<sup>126</sup> S Retzinger and T Scheff, “Strategy for community conferences: Emotions and social bonds” in B Galaway and J Hudson (eds.). *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice, 1996); J Braithwaite, “Narrative and ‘compulsory compassion’” (2006) 31 *Law and Social Inquiry* 425. See also L Hickson, “The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study” (1986) 25 *Ethnology* 283. Not all commentators agree that forgiveness is always the appropriate moral response: see eg. J and J Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1998).

<sup>127</sup> See further S Szmanua and D E Mangis, “Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts” (2005) 89 *Marquette Law Review* 336.

<sup>128</sup> W Pizzi, *Trials without Truth* (New York: NYU Press, 1997), p. 197.

<sup>129</sup> .Ibid.

<sup>130</sup> Bilbas and Bierschbach, n 3 above, p. 98.

It might be added that even those emotions which are successfully communicated to the court are passive and 'locked' in time. Victims may have prepared a VPS many months, or perhaps longer, before sentencing occurs. The emotions contained in that document may no longer reflect how they feel at the point of sentence. The passage of time, counselling, and other forms of support and assistance may have changed the way the impact of the offence and their feelings towards the offender. Family impact statements prepared under the VFS, and indeed pleas in mitigation, can be more easily tailored to the moment. However, these also represent a very momentary insight into the emotions of victims and offenders. We are unlikely to gain much deeper insights into the life journey of victims and offenders, how they felt about the fairness legal process, and how their emotions might have evolved over time. There is a considerable body of evidence supporting the idea that emotions, as cognitive processes, may fluctuate and are open to change,<sup>131</sup> both victims and offenders may feel an array of complex and potentially contradictory emotions in the aftermath of an offence. Unfortunately, the sentencing system does not offer a means of communicating this fluidity to other stakeholders or the court.

### **Future Directions: Towards Emotionally Intelligent Practice**

A fully-fledged emotionally-intelligent model of sentencing may depend on a significant reconfiguration of penal ideology. Such a normative shift remains an indeterminate prospect in the short to medium term. However, it is still conceivable to think of a number of ways in which emotion might usefully play a more central role within the existing normative parameters of the criminal justice system. There are three ways, in particular, by which current sentencing might be better tailored to facilitate the communication of emotions.

#### *1. The Need for Legal Clarity*

First, there is a need to clarify the legal weight that can be attached to the emotions of victims and offenders in sentencing. As a starting point, the Sentencing Council ought to consider providing more detailed guidance concerning their operation of discretion vis-à-vis personal mitigation. As noted above, current guidance offers very little detail as to the weight that sentencers ought to attach to personal mitigation in general, and expressions of remorse in particular. Judges could, for example, be offered guidance as to how remorse might be assessed; whether it might carry more weight if accompanied by an unconditional apology, an offer of reparation or any other step taken to make amends. Bibas proposes that US federal sentencing law should be amended to replace the almost-automatic 35% sentence discount for guilty pleas with a sliding scale that reflects remorse, apology, and forgiveness. It is our contention that the English sentencing system, which

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<sup>131</sup> Bandes, n. 2 above; see also M C Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990); R C Solomon, *The Passions, Emotions and the Meaning of Life* (Indianapolis: Hackett Press, 1993).

also operates a similar automatic discount,<sup>132</sup> may also benefit through the introduction of a similar mechanism.

Clarity is also needed in respect of the function of VPS and VFS. Although the Lord Chief Justice and the Court of Appeal have attempted to shed light on their potential impact on sentences, there is still no guidance as to the nature of the relationship between (emotional) harm to victims and offence seriousness. Yet the duty to shed light on the role and function of the VPS and VFS is not limited to the judiciary. Both initiatives were introduced citing a myriad of justifications and objectives,<sup>133</sup> and it is unclear whether their primary purpose concerns boosting satisfaction levels (and/or therapeutic benefits) among victims, or whether they are simply intended to give the sentencer an improved picture of past events. It would be helpful for both stakeholders and practitioners to know how emotional harm might be specifically weighed alongside other factors in determining the overall seriousness of the offence. As things stand, rates of participation vary considerably across the country and victims seem unsure of the purpose of the schemes.<sup>134</sup> This can lead to later problems insofar as victims may feel dissatisfied if their expectations have remained unmet. To this end, a much clearer system of protocols and guidelines for professionals and information sheets for victims themselves could give victims a better picture of what participation does and does not entail and what they can expect from the process.<sup>135</sup>

## 2. *The Need for Victim / Offender Interaction*

A second emotionally-intelligent reform would entail the opening up of communication channels between victims and offenders. As mentioned above, this would not only help to resolve conflicts between individuals, but might also send out a broader message to society concerning the social causes of crime and punishment and how best to address them.<sup>136</sup> Victims and offenders should - if they so choose - have the opportunity to engage in dialogue with each other, rather than talking to the court through lawyers. Under this proposal, victims would be conferred with a direct right of allocution and would be able to prepare and read their own statements in court. They would be given broad remit as to the content, and might also include photographs, drawings or poems as is currently permitted in the Australian

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<sup>132</sup> See Sentencing Guidelines Council, *Definitive Guideline for Reduction in Sentence for a Guilty Plea*. Available:

[http://sentencingcouncil.judiciary.gov.uk/docs/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-\\_Revised\\_2007.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-_Revised_2007.pdf) (accessed 31/07/12).

<sup>133</sup> See Doak, Henham and Mitchell, n. 102 above.

<sup>134</sup> J Roberts and M Manikis, "Victim personal statements in England and Wales: Latest (and last) trends from the Witness and Victim Experience Survey" (2012) 12 *Criminology and Criminal Justice* [forthcoming].

<sup>135</sup> *Ibid.* The Ministry of Justice has now recognised the need for such clarity and has recently announced a consultation on reform of the scheme: *Getting it Right for Victims and Witnesses* (London: Ministry of Justice, 2012).

<sup>136</sup> Bandes, "Empathy", n. 6 above, p. 404.



state of Victoria.<sup>137</sup> Importantly, victims could also ask questions of the offender; the ‘why me?’ question, in particular, is one which tends to preoccupy victims of serious crime.<sup>138</sup>

Offenders should also be offered the opportunity to respond to victims’ statements, and, indeed, challenge them where appropriate. The lawyer-led plea in mitigation would be replaced by the opportunity for the offender to deliver a statement in person. This would take the form of a narrative that would not be confined by the parameters of legal relevance. Offenders would be free to recount aspects of their life stories and their emotions before, during and after the offence. Such emotions would not only cover the “acceptable” feelings of shame and remorse but offenders would also be free to make protests of innocence or defiance. Just as offenders would have a right to challenge aspects of the victim’s evidence, so too would victims be empowered to challenge any aspect of the offender’s statement. It is, perhaps, self-evident that a risk exists that a dialogue of this nature could quite easily spiral into a freewheeling fracas, or indeed the victim narrative could become dominant, thereby drowning or pre-empting the account of the offender.<sup>139</sup> However, with carefully formulated ground rules, close facilitation by the trial judge, and preparation and oversight by legal professionals, such a risk could be substantially reduced.

### *3. Integrating Restorative Justice within Sentencing*

A more radical step than either of the two proposals set out above would entail the mainstreaming of restorative justice. Restorative justice programmes provide a forum for victims and offenders to exchange views and emotions within a safe environment. In spite of its growing popularity, restorative justice remains a contested concept, which has proved difficult to define in concise terms. One of the more widely accepted definitions is that provided by Tony Marshall, who described it as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>140</sup> In restorative justice settings, personal narratives are used “to understand the harms, the needs, the pains and the capacities of all participants so that an appropriate new story can be constructed.”<sup>141</sup> They are typically delivered in the victim’s own words, and at his or her own pace. In contrast to the courtroom, a new ‘co-narrative’ is created to collectively affirm a norm, vindicate a victim, and denounce the evil of an act without labelling any person as a villain.<sup>142</sup>

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<sup>137</sup> Ibid.

<sup>138</sup> L Sherman and H Strang, “Repairing the harm: Victims and restorative justice” (2003) 1 *Utah Law Review* 15.

<sup>139</sup> Bandes, “Empathy”, n. 2 above, p. 386.

<sup>140</sup> T Marshall, *Restorative Justice: An Overview* (London: Home Office, 1999), p. 5.

<sup>141</sup> K Pranis, “Restorative Values and Confronting Family Violence” in H Strang and J Braithwaite (eds.), *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002), p. 31.

<sup>142</sup> J Braithwaite, “Narrative and ‘compulsory compassion’” (2006) 31 *Law and Social Inquiry* 425.

While many post-conviction and prison-based schemes exist throughout England and Wales, these operate independently of the formal sentencing process and lie on the periphery of the criminal justice system. Research evidence suggests that restorative justice delivers considerably higher satisfaction levels among stakeholders than court. In a meta-study of seven RJ programmes which compared restorative practices with court-based sentencing, Poulson found that almost three-quarters (74%) of offenders apologized in RJ settings, around the same proportion (71%) who went through the court process did *not* apologize.<sup>143</sup> In other words, offenders were 6.9 times more likely to apologize to the victim in restorative justice settings than in court. If we accept that emotions matter – but are difficult to channel within the confines of the criminal court – it may be that we ought to look at how the court might make use of restorative justice operating in a different environment.

With appropriate safeguards, court-ordered mediation and conferencing could serve to complement existing sentence practice. Referrals to mediation are becoming increasingly commonplace within continental Europe; Austria and Finland both operate schemes whereby the law provides that certain cases may be diverted away from court at the prosecution stage.<sup>144</sup> Perhaps the most useful lesson for England and Wales, however, comes from across the Irish Sea. In Northern Ireland, all young people who plead guilty or who are convicted of an offence are referred to conferencing either by the Public Prosecution Service or by the court (providing they consent to the process).<sup>145</sup> The subsequent agreement is then returned to court for approval by the magistrate to ensure that the sentence is not disproportionate and that the public interest is served. Although careful thought would need to be given to the roll-out of any equivalent scheme for adults in England and Wales – and particularly which offences it might cover – there is no reason in theory or practice why such a system could not be successfully established in the adult criminal courts of England and Wales.

## Conclusions

Emotions have assumed centre stage in various legal and criminological discourses including procedural justice, therapeutic jurisprudence, restorative justice, transitional justice as well as conflict resolution and peace building.<sup>146</sup>

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<sup>143</sup> B Poulson, "A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice" (2003) 1 *Utah Law Review* 167.

<sup>144</sup> See further D O'Mahony and J Doak, *Restorative Justice and Criminal Justice: International Developments in Theory and Practice* (2010: Dublin, Department of Justice and Law Reform).

<sup>145</sup> Justice (NI) Act 2002, Pt IV. Only those offences which carry an automatic life sentence are excluded from the regime. See further D. O'Mahony and C. Campbell, "Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland" in J Junger-Tas and S Decker (eds), *International Handbook of Youth Justice* (Amsterdam: Springer, 2006).

<sup>146</sup> See eg Karstedt, "Emotions" n. 1 above; Brewer, "Dealing with Emotions", n. 3 above; Nussbaum, "Hiding from Humanity", n. 5 above; Bandes, "Empathy", n. 6 above.

Scholars and practitioners in these areas acknowledge significant value placed on the role of emotions, and the processes put in place to elicit them. Yet despite the rapid expansion of these concepts, emotions are still regarded with suspicion. The vast majority of sentencing decisions remain within the preserve of the formal legal system and are characterised by formality, legality and a closed system of communication<sup>147</sup> dominated by legal professionals. All this takes place against a normative framework orientated towards retributivism (albeit slightly mottled with occasional allusions to deterrence, incapacitation, rehabilitation and reparation).

Emotions *ex post facto* are largely deemed an irrelevant factor for pure retributivists,<sup>148</sup> and such a narrow focus has led to the social causes of and solutions to conflict being sidelined in discussions concerning how both theory and practice might move forwards. Still, as Bandes has contended, if the lawyers have not been persuaded by the encroachment of emotion, they have certainly felt impelled to respond.<sup>149</sup> As this *special edition* attests, the place of emotion within law is well and truly established as a key theme within legal discourse.

Undoubtedly some relatively recent initiatives, such as the advent of sentencing guidelines and victim impact statements, have increased the flow of emotional information to the court. However, the potential of emotions to enrich our justice system has been simultaneously thwarted by the reluctance of policymakers and practitioners to consider the wider questions concerning how sentencing might be improved by affording a more central role to emotional narratives and the need for deliberative interactions between victims and offenders. As it stands, the sentencing system of England and Wales affords scant attention to the emotions of criminal offenders and victims. Whilst, in the longer term, a considerable amount of theoretical and practical work needs to be done in developing and refining our understanding of emotions – and their precise relationship to the justice system – there are some steps that can be taken in the interim to make criminal sentencing more responsive to human emotions. Our hope is that a timely injection of emotional intelligence may trigger a broader realisation that criminal sentencing ought to perform a wider function than the mere retribution of wrongs.

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<sup>147</sup> N Luhmann, "Law as a Social System" (1989) 83 *Northwestern University Law Review* 136.

<sup>148</sup> Clearly emotions such as remorse cannot alter seriousness of crime or culpability of the time of the offence: see further A Von Hirsch, "Proportionality and Progressive Loss of Mitigation: Further Reflections" in J Roberts and A von Hirsch eds, *The Role of Previous Convictions in Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart, 2010).

<sup>149</sup> Bandes, "Empathy", n. 6 above p. 368.