

# Hearing the voices of victims and offenders: the role of emotions in criminal sentencing

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The place of emotions in the criminal justice system is delineated 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 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> In the USA in particular, the increasing tendency to adopt public shaming rituals as part of community-based sentences (such as the wearing of sandwich boards indicating criminality, or undertaking 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>

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1 S Karstedt, ‘Emotions and Criminal Justice’ (2002) 6 *Theoretical Criminology* 299.

2 See further T A Maroney, ‘Emotional Regulation and Judicial Behavior’ (2011) 99 *California Law Review* 1481.

3 J Brewer, ‘Dealing with Emotions in Peacemaking’ in S Karstedt, I Loader and H Strang (eds), *Emotions, Crime and Justice* (Hart Publishing 2011).

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

5 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 University Press 2004); J Pratt, ‘Emotive and Ostentatious Punishment: Its Decline and Resurgence in Modern Society’ (2000) 2 *Punishment and Society* 417; J Whitman, ‘What is Wrong with Inflicting Shame Sanctions?’ (1998) 107 *Yale Law Journal* 1062. However, some commentators have argued that shame in and of itself need not be used in a stigmatic way: see, e.g. J Braithwaite, *Crime, Shame and Reintegration* (CUP 1989); T Brooks, ‘Shame on You, Shame on Me? Nussbaum on Shame Punishment’ (2008) *Journal of Applied Philosophy* 322; A-M McAlinden, ‘The Use of “Shame” with Sexual Offenders’ (2005) 45 *British Journal of Criminology* 378; L Walgrave and I Aertsen, ‘Reintegrative Shaming and Restorative Justice: Interchangeable, Complementary or Different?’ (1996) 4 *European Journal on Criminal Policy and Research* 67.

Nevertheless, 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 of the law 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 an offender who realises that his or 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>

Recent years have seen a marked reduction in scepticism toward emotions. Emotions have come to feature prominently in late modernity, with heightened emotional awareness 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, it is said, 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 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

6 S Bandes, 'Empathy, Narrative, and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361, 369.

7 S Bandes, 'Introduction' in S Bandes (ed), *The Passions of Law* (New York University Press 1999).

8 See, e.g. D J 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* (Ashgate 2004).

9 S Bibas and R A Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114 *Yale Law Journal* 85, 88.

10 *Ibid.*

11 William J Long and Peter Breke, *War and Reconciliation: Reason and Emotion in Conflict* (MIT Press 2003) 127.

12 K Murphy, 'Procedural Justice, Emotions and Resistance to Authority' in Karstedt et al (n 3).

13 See, generally, D D Welch, 'Ruling with the Heart: Emotion-Based Public Policy' (1997) 6 *Southern California Interdisciplinary Law Journal* 55.

14 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* (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.

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.<sup>18</sup> 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>19</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 sentencing; particular attention is given in this context 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 the primary participants in the system – victims, offenders and legal actors – think and interact using both their emotional and rational brains.<sup>20</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.

#### 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>21</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

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15 Sherman (n 14) 6.

16 Ibid 8.

17 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.

18 The two Irish jurisdictions (the Republic of Ireland and Northern Ireland) have their own sentencing systems, and while the approach may be similar in many respects, this is not necessarily the case.

19 R Henham, *Sentencing and the Legitimacy of Trial Justice* (Routledge 2012) 1.

20 Massey (n 17).

21 B Winick, 'The Jurisprudence of Therapeutic Jurisprudence' in D Wexler and B Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press 1996).

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>22</sup>

As far as victims are concerned, their emotions are likely to vary according to the types of crimes committed, the levels of injury or loss experienced and the diverse life experiences of the individuals concerned, as well as their inherent characteristics.<sup>23</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’, ‘catharsis’ etc. without defining what is specifically meant.<sup>24</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 externalising traumatic experiences through verbalisation can be an effective intervention for many people facing major life-changing events, including violent crime.<sup>25</sup> Such verbalisation – which is the lynchpin of contemporary counselling and psychotherapy – can help reduce feelings of anger, anxiety and depression,<sup>26</sup> bolster self-confidence<sup>27</sup> and even improve physical health.<sup>28</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>29</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>30</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>31</sup> As Erez has argued, ‘[t]he cumulative knowledge acquired from research in

22 D Wexler, ‘Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer’ (2005) 17 *St Thomas Law Review* 743, 748.

23 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.

24 See further A Pemberton and 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* (Carolina Academic Press 2011).

25 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* (OUP 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* (WW 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 and Psychotherapy* 270.

26 T Orbuch, J Harvey, S Davis and N Merbach, ‘Account-Making and Confiding as Acts of Meaning in Response to Sexual Assault’ (2004) 9 *Journal of Family Violence* 249.

27 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.

28 R Enright and R Fitzgibbons, *Helping Clients Forgive: An Empirical Guide for Resolving Anger and Restoring Hope* (American Psychological Association 2000).

29 Pemberton and Reynaers (n 24).

30 See, generally, C Feltham, *What Is Counselling? The Promise and Problem of the Talking Therapies* (Sage 1995).

31 J C Karemans 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* (Clarendon 2002).

various jurisdictions, in countries with different legal systems, suggests that victims often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering.<sup>32</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>33</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>34</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, as 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>35</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>36</sup> the literature is replete with references to anger, resentment, hatred, anxiety, depression, remorse, defiance and shame.<sup>37</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 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>38</sup>

As with victims, criminal courts cannot and should not be transformed into therapy rooms overnight, and there is little scientific evidence to support the therapeutic efficacy of 'one-shot' forms of expression.<sup>39</sup> However, it still seems sensible to at least explore the ways in which the 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.

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32 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, 550–51.

33 C Hoyle, 'Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence' in E Erez et al (n 24).

34 C Fercello and M Umbreit, *Client Evaluation of Family Group Conferencing in 12 Sites in 1st Judicial District of Minnesota* (Center for Restorative Justice and Mediation 1998); Strang (n 31).

35 Bibas and Bierschbach (n 9).

36 M Proeve, D Smith and D Niblow, 'Mitigation without Definition: Remorse in the Criminal Justice System' (1999) 32 *Australia and New Zealand Journal of Criminology* 16.

37 For a general overview, see J Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (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 Books 1991); J Braithwaite, 'Shame and Modernity' (1993) 33 *British Journal of Criminology* 1.

38 See, e.g. R Masters, *Counselling Criminal Justice Offenders* (Sage 2003); S Tarolla, E Wagner, J Rabinowitz and 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 and E Jeglic, 'Cognitive Behavioral Therapy Interventions with Sex Offenders' (2008) 14 *Journal of Correctional Health Care* 109.

39 Pemberton and Reynaers (n 24).

## STRENGTHENING PROCEDURAL JUSTICE

An increased emphasis on the role of emotion should ensure much improved levels of procedural justice. Basically, the theory of procedural justice 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>40</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>41</sup> There is thus a clear link between high levels of procedural justice and overall perceptions of legitimacy with the criminal justice system.

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>42</sup> However, the notion of 'voice' is perhaps one of the most renowned yardsticks for procedural justice.<sup>43</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>44</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, all of which may prevail for some time.<sup>45</sup>

Victims clearly value the opportunity to tell offenders how the offence impacted upon them and have their questions answered.<sup>46</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, acknowledgment.<sup>47</sup> Without a mechanism for exercising voice, procedures may seem fundamentally unbalanced – and

40 See, generally, E Lind and T Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988).

41 Ibid; E Lind, C Kulik, M Ambrose and 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 University Press 1990).

42 Tyler (n 41) 175.

43 See, e.g. 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 (n 40); E Lind, R Kanfer and C Earley, 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments' (1990) 59 *Journal of Personality and Social Psychology* 952.

44 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.

45 J Bisson and 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 and Delinquency* 452; P Resick, 'Psychological Effects of Victimization: Implications for the Criminal Justice System' (1987) 33 *Crime and Delinquency* 468.

46 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* (Gower 1985); Strang (n 31); J Wemmers, *Victims in the Criminal Justice System* (Kugler Publications 1996).

47 See, e.g. 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 (n 46); 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.

thus unfair – given the offender’s right to express his or her emotions to the court through a mitigating plea.<sup>48</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 and others showed that convicted felons’ views as to whether their sentences were heavier than those given to other offenders convicted of the same crime strongly correlated with their sense of whether their overall treatment was fair.<sup>49</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>50</sup> The more an offender feels involved in the process, the more 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 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. The more 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, the criminal justice system as a whole stands to benefit from higher levels of procedural justice given its potential to bolster legitimacy and effective governance. Studies have shown that negative experiences of the criminal process are likely to deter victims from cooperating in the future.<sup>51</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 with regard to its institutions.

### IMPROVING THE QUALITY OF DECISION-MAKING

An emotionally intelligent approach to sentencing would also carry a third potential benefit, in 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 rely on any number of factors depending on the jurisdiction, although culpability and harm tend to act as common indicators.<sup>52</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>53</sup> Learning about the offender’s emotional state prior to, during and after the offence leads to a more accurate assessment of his or her 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

48 P Cassell, ‘In Defence of Victim Impact Statements’ (2008) 6 *Ohio State Journal of Criminal Law* 611.

49 J Casper, T Tyler and B Fisher, ‘Procedural Justice in Felony Cases’ (1988) 22 *Law and Society Review* 483.

50 K Thomas, ‘Beyond Mitigation: Towards a Theory of Allocution’ (2007) 75 *Fordham Law Review* 2641, 2659.

51 Shapland et al (n 46).

52 ‘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).

53 I R Kaufmann, ‘The Anatomy of Decisionmaking’ (1984) 53 *Fordham Law Review* 1, 16.

type allows the sentencer to empathise and appreciate the perspective of others and to assess their culpability in the eyes of the law.<sup>54</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>55</sup> In the context of emotions, this is perhaps most obvious in relation to psychiatric or emotional harm, which is becoming more widely recognised, in addition to harms which are physical or material in nature.<sup>56</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 participatory rights for victims maintain that emotional outpourings endanger the objectivity of sentencing and are inherently inappropriate for the courtroom.<sup>57</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>58</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 are no more punitive than the general public in relation to sentencing attitudes.<sup>59</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>60</sup> Therefore we should trust sentencers 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 or 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,

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54 See further Bandes (n 6).

55 Cassell (n 48); 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.

56 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.

57 See, e.g. Bandes (n 6).

58 *Ibid* 394.

59 See, e.g. 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* (Willan 2002); J Mattinson and C Mirrlees-Black, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey* (Home Office 2000). S Maruna and A King, 'Public Opinion and Community Penalties' in T Bottoms, S Rex and G Robinson (eds), *Alternatives to Prison: Options for an Insecure Society* (Willan 2004).

60 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.



for example, be better able to develop creative solutions to criminal justice problems or to observe trends in offender characteristics or behaviour.<sup>61</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>62</sup> Similar arguments might also be made 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.

#### 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>63</sup> Sherman and others contend that the dissemination of emotions (which may include anger, compassion, remorse and shame) create a new shared experience and sense of solidarity.<sup>64</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>65</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 offenders can create a coherent story-frame for both, 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>66</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>67</sup> and this prospect is often an important factor influencing their decision to become involved in mediation and restorative justice (RJ) programmes.<sup>68</sup> A sincere apology should signal to the victim that the offender genuinely regrets his or her behaviour and wishes to 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>69</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

61 Thomas (n 50) 2675.

62 As illustrated, for example, through the use of 'shaming' practices which are frequently criticised on the ground that they are reflective of the 'punitive turn': see n 3.

63 R Collins, *Interaction Ritual Chains* (Princeton University Press 2004).

64 L Sherman et al, 'Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized Controlled Trials' (2005) 1 *Journal of Experimental Criminology* 367.

65 See, generally, W G Stephen, 'Intergroup Contact: Introduction' (1995) 41 *Journal of Social Issues* 1; R J Fisher, *The Social Psychology of Intergroup and International Conflict Resolution* (Springer 1990).

66 See further J Braithwaite, 'Narrative and "Compulsory Compassion"' (2006) 31 *Law and Social Inquiry* 425; Thomas (n 50) 2673–74.

67 Fercello and Umbreit (n 34); Strang (n 31).

68 Strang (n 31).

69 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.

society, improve their reputations, and begin a process of reintegrating into society.<sup>70</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>71</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>72</sup> This would be particularly true in the case of first-time offenders.<sup>73</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>74</sup> In the same way, the expression of an apology or reconciliation during the sentence may also significantly increase 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>75</sup> This 'appropriation' of private conflicts<sup>76</sup> has turned the trial into a showdown between lawyers representing the state and the defence, with the role of the primary stakeholders being restricted to 'evidentiary cannon fodder' for one side or the other.<sup>77</sup> Whilst the end of the nineteenth century was marked by the emergence of participatory rights for the accused,<sup>78</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>79</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 (VPSs) and family impact statements (FISs).

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- 70 M Etienne and J K Robbenolt, 'Apologies and Plea Bargaining' (2007) 91 *Marquette Law Review* 295, 298.  
 71 S Bibas, 'Forgiveness in Criminal Procedure' (2007) 4 *Ohio State Journal of Criminal Law* 329.  
 72 J G Murphy, 'Remorse, Apology, and Mercy' (2007) 4 *Ohio State Journal of Criminal Law* 423.  
 73 J Jacobson and M Hough, 'Personal Mitigation in England and Wales' in J Roberts (ed), *Mitigation and Aggravation at Sentencing* (CUP 2011).  
 74 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.  
 75 J H Langbein, *The Origins of the Adversary Criminal Trial* (OUP 2003).  
 76 N Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1.  
 77 J Braithwaite, 'Juvenile Offending: New Theory and Practice' (Address to the National Conference on Juvenile Justice, Adelaide, Institute of Criminology, September 1992).  
 78 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 a comparative US perspective, see Thomas (n 50).  
 79 See, generally, J Doak, 'Participatory Rights for Victims of Crime: In Search of International Consensus' (2011) 15 *Canadian Criminal Law Review* 41.

## THE NARRATIVES OF OFFENDERS

Offenders play a passive role in English criminal trials. Whilst some may testify in their own defence, it is rare for them to speak directly at the sentencing stage. More usually, offenders utilise two main conduits to convey their emotions indirectly to the court, these being the pre-sentence reports (PSRs) and pleas in mitigation.

The use of PSRs is governed by s 156 of the Criminal Justice Act 2003. This provision stipulates that courts must obtain a PSR and take it into account in determining sentence unless it forms the opinion that a PSR is unnecessary.<sup>80</sup> The purpose of a PSR is to assist the courts 'in determining the most suitable method of dealing with an offender';<sup>81</sup> in other words, they are designed to give 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. Whilst the report may contain a sentence recommendation, the court is not bound to follow it and may deviate from any such recommendation if it chooses to do so.<sup>82</sup>

To this end, PSRs are heavily based on probing interviews with a probation officer.<sup>83</sup> Their precise form and contents are laid down within the National Standards for the Management of Offenders,<sup>84</sup> although it can be noted that interviews will typically cover a number of factors including: offending information; analysis of the offences; accommodation; education; training and employability; financial management and income; relationships; lifestyle and associates; drug and alcohol issues; emotional well-being; thinking and behaviour, including the offender's attitudes towards the victim and the offence.<sup>85</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, and the extent to which responsibility is accepted, along with relevant emotional responses such as denial, defiance, remorse, shame or a desire to make amends for their actions.<sup>86</sup>

The introduction of PSRs in the early 1990s gave rise to 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.<sup>87</sup> 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>88</sup>

However, notwithstanding the best efforts of many probation 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 PSRs. The introduction of the computerised Offender Assessment System (OASys) in 2001 added considerably to the investment of resources

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80 Criminal Justice Act 2003, s 156(3).

81 Ibid s 158.

82 Ibid s 156(4).

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

84 Ministry of Justice, *National Standards for the Management of Offenders* (Ministry of Justice 2011).

85 P Whitehead, 'The Probation Service Reporting for Duty: Court Reports and Social Justice' (2008) 6 *British Journal of Community Justice* 86.

86 N Stone, 'Pre-sentence Reports, Culpability and the 1991 Act' [1992] *Criminal Law Review* 558.

87 PSRs were first introduced by the Criminal Justice Act 1991, s 3.

88 Stone (n 86) 565–66.

required to complete full reports,<sup>89</sup> which triggered a decision to change the majority of reports to a 'fast-delivery' format based on a 'tick-box' exercise.<sup>90</sup> Interviews for these types of reports 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>91</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 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 USA, 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 PSR, given that the former may have been prepared some time beforehand.<sup>92</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>93</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.

Although PSRs and pleas in mitigation do provide limited channels through which offenders are able to communicate their emotions to the court, it is unclear as to what weight – if any – sentencers ought to attach to such emotions alongside other relevant factors. 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, or might foreseeably have caused.<sup>94</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:

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>95</sup>

In addition to this generic provision, existing sentencing guidelines make specific reference to offender remorse as a mitigatory factor in relation to assault offences, attempted murder

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89 Whitehead (n 85).

90 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: Whitehead (n 85).

91 Justice Committee, *The Role of the Probation Service (eighth report)* (HC 2010–12, I) 16. The Justice 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.

92 A Ashworth, *Sentencing and Criminal Justice* (5th edn, OUP 2010) 381.

93 Ibid 379.

94 Criminal Justice Act 2003, s 143(1).

95 Sentencing Guidelines Council, *Seriousness: Overarching Principles* (Sentencing Guidelines Council 2004), para 1.27.

and burglary.<sup>96</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 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 of personal mitigation in some 132 cases across five Crown Court centres in 2007.<sup>97</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 they were accompanied by honest discussion of the circumstances of the offending behaviour or a gesture, such as a letter of apology to the court.<sup>98</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>99</sup> Emotions also entered into sentencing where the sentencer believed that the prosecution process caused the offender to suffer emotionally.<sup>100</sup> Such suffering is sometimes treated as part of the punishment for the crime, thereby lessening the severity of sentence.<sup>101</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 only 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 he or she 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. Whilst 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>102</sup>

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96 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, 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 July 2012. 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. These guidelines do not extend to Northern Ireland, though the Northern Ireland Court of Appeal says that they may be followed in appropriate cases: *Attorney General's Reference (No 1 of 2008) Gibbons et al* [2008] NICA 41, para 44.

97 J Jacobson and M Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust 2007).

98 Ibid 24.

99 Ibid 48.

100 Ibid 28.

101 There are a number of studies in the USA suggesting significant reductions in sentence for offenders who express contrition or remorse in both state and federal courts: see further Bibas and Bierschbach (n 9) 93.

102 See further Thomas (n 50) 2665 (citing the example of Nelson Mandela's address to the Rivonia Trial upon being sentenced to life imprisonment in 1964).

## THE NARRATIVES OF VICTIMS

A more controversial question is the extent to which the victim may participate in the sentencing process, for instance, by giving some form of victim impact evidence at the point of sentence. Since October 2001, victims are entitled to submit a 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>103</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 an FIS, which means (unlike the VPS) that the statement will be read aloud in court by the prosecutor or the judge.<sup>104</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>105</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 to 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 details 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>106</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 the 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 Sam*,<sup>107</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 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 or culpability.

The Sentencing Council has now made clear, through its Definitive Guidelines, that the impact of the crime on the victim is a factor affecting sentence severity.<sup>108</sup> Indeed, some make implied reference to the emotional well-being of the victim as an aggravating factor; for

103 See <[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 July 2012.

104 See further J Doak, R Henham and B Mitchell, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29 *Legal Studies* 651.

105 Consolidated Criminal Practice Direction (November 2011) part III.28. <[www.justice.gov.uk/courts/procedure-rules/criminal/docs/CCPD-complete-text-Oct-2011.pdf](http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/CCPD-complete-text-Oct-2011.pdf)> accessed 30 July 2012.

106 [2001] 1 Cr App R (S) 19.

107 [2009] EWCA Crim 1.

108 See <<http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>> accessed 31 July 2012.

example, the Guideline on Assault Offences states that ‘ongoing effects upon the victim’ can merit an upward adjustment in sentence severity.<sup>109</sup> Whilst 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>110</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 Numm*,<sup>111</sup> where the mother and sister of the deceased victim had given evidence that the length of sentence was adding to their grief. Similarly, in *R v Matthews*,<sup>112</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 have on other family members.<sup>113</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>114</sup> The content analysis conducted as part of that study found that 88 per cent of the 233 VPSs considered included information outlining the emotional response of the victim to the crime committed against them, with the most often cited emotions being fear, upset and anger.<sup>115</sup> While many emotional responses would tend towards sentence aggravation, there were also limited instances where victims displayed emotional responses such as sympathy and empathy,<sup>116</sup> which could serve to mitigate the offender’s sentence. These findings broadly correlate with other studies.<sup>117</sup> In their evaluation of the VPS pilots, Hoyle and others found that, as indicated earlier, ‘rather than . . . encouraging exaggeration, inflammatory statements, and vindictiveness, the opposite appears to apply: they [VPSs] tend to understate rather than over-state the impact

109 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 July 2012.

110 See the Guideline on Aggravated Burglary, 5. The Guideline on Domestic Burglary makes a similar reference to ‘trauma to the victim, beyond the normal inevitable consequence of intrusion and theft’ (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 July 2012.

111 [1996] 2 Cr App R (S) 136.

112 [2003] 1 Cr App R (S) 26.

113 See further I Edwards, ‘The Place of Victims’ Preferences in the Sentencing of “their” Offenders’ [2002] Criminal Law Review 689.

114 These are the findings from an unpublished study by Louise Taylor analysing the content of 233 VPSs taken from magistrates’ court files for Chase Police Division in 2004.

115 As a percentage of the total emotions detailed by victims in the study, 37 per cent of these related to fear, 26 per cent related to upset and 9 per cent related to anger.

116 Two VPSs in the study demonstrated this emotional response which represented 0.5 per cent of the total emotions detailed by victims in the study.

117 C Hoyle, E Cape, R Morgan and A Sanders, *Evaluation of the One Stop Shop and Victim Pilot Statement Projects* (Home Office 1998); 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.

of offences'.<sup>118</sup> Similarly, an analysis by Chalmers and others of the content of victim statements in Scotland indicated that statements made concerning sentence tended to be unspecific and some even displayed some concern for the offender and requested a lighter sentence.<sup>119</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>120</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 sentencer must consider.<sup>121</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>122</sup> This is a particularly salient finding given that studies suggest that victim impact evidence rarely influences sentencing decisions to a significant degree.<sup>123</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 in the USA, where victims have a right to make representations 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 families of 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>124</sup> Sweeting and others found that a significant minority of victims (22 per cent) 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>125</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

118 Hoyle et al (n 117) 28.

119 Chalmers et al (n 117) 374.

120 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 Prosen, '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 et al, *Evaluation of the Victims' Advocate Scheme Pilots* (Ministry of Justice Research Series 17/08 2008).

121 Empirical evidence in both the UK and further afield suggests that victim impact evidence rarely influences sentencing decisions to a significant degree: see e.g. Chalmers et al (n 119); 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* (Home Office 1999). See further J V Roberts and M Manikis, *Victim Personal Statements at Sentencing: A Review of Empirical Research* (Office of the Commissioner for Victims and Witnesses for England and Wales 2011) 30–31; Erez and Rogers (n 120) 226.

122 Chalmers et al (n 119); E Erez and P Tontodonato, 'Victim Participation in Sentencing and Satisfaction with Justice' (1992) 9 *Justice Quarterly* 393; A Sanders, C Hoyle, R Morgan and E Cape, 'Victim Impact Statements: Don't Work, Can't work' [2001] *Criminal Law Review* 437.

123 See, e.g. Chalmers et al (n 117); 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; Erez and Tontodonato (n 121); Morgan and Sanders (n 121). See further Roberts and Manikis (n 121) 30–31.

124 Sweeting et al (n 120). Note that the VFS was originally known as the victim advocate scheme.

125 *Ibid* 21.



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 contest 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; sentencing here has been said to be 'swift to the point of abruptness, relying heavily on the speedy delivery of guilty pleas'.<sup>126</sup> Indeed, many victims will opt not to attend such hearings, and will thus not hear any emotions expressed by the offender or his or 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>127</sup> Intimate, informal and direct interactions generally act as precursors and conveyers of apology and forgiveness,<sup>128</sup> and these are a far cry from the world of the criminal court. Here, the formal environment is bipartisan, rigidly structured, ritualistic and dominated by zealous advocates.<sup>129</sup> It is the advocates, rather than victims or offenders, who assume the roles of storytellers, suppressing individual narrative autonomy, shaping narratives to bring out their maximum adversarial effect,<sup>130</sup> and turning witnesses into 'weapons to be used against the other side'.<sup>131</sup> There is no physical space or procedural mechanism through which victims or offenders might freely communicate their own stories in the way that makes sense to them. Bibas and Bierschbach contend that this explains why apologies, expressions of remorse and victim acknowledgment 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

126 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.

127 J Habermas, *The Theory of Communicative Action*, vol I (Beacon Press 1984) 376.

128 S Retzinger and T Scheff, 'Strategy for Community Conferences: Emotions and Social Bonds' in B Galaway and J Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice 1996); Braithwaite (n 66). 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, e.g. J Hampton and J Hampton, *Forgiveness and Mercy* (CUP 1998).

129 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.

130 W Pizzi, *Trials without Truth* (New York University Press 1997) 197.

131 Pizzi (n 130).

a judge who did not preside over the guilty plea. For most defendants, this is their first real chance to apologise 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>132</sup>

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 impact of the offence and their feelings towards the offender. FISs 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 of the 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>133</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 sentencing

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.

#### 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 relevance with regard to 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 per cent 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 also operates a similar automatic discount,<sup>134</sup> may also benefit through the introduction of a similar mechanism.

Clarity is also needed in respect of the function of the VPS and VFS. Although the Lord Chief Justice and the Court of Appeal have attempted to shed light on their potential impact

132 Bandes (n 7); see also M C Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (OUP 1990); R C Solomon, *The Passions, Emotions and the Meaning of Life* (Hackett Press 1993).

133 Bibas and Bierschbach (n 9) 98.

134 See Sentencing Guidelines Council, *Definitive Guideline for Reduction in Sentence for a Guilty Plea* <[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 July 2012.

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 VPSs and VFSs is not limited to the judiciary. Both initiatives were introduced citing a myriad of justifications and objectives,<sup>135</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>136</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>137</sup>

### 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>138</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 state of Victoria.<sup>139</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>140</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 evidentiary rules as to 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, that the victim narrative could become dominant, thereby drowning or pre-empting the account of the offender.<sup>141</sup>

135 See Doak et al (n 104).

136 J Roberts and M Manikis, ‘Victim Personal Statements in England and Wales: Latest (and Last) Trends from the Witness and Victim Experience Survey’ (2012 forthcoming) 12 *Criminology and Criminal Justice*.

137 *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* (Ministry of Justice 2012).

138 Bades (n 6) 404.

139 *Ibid.*

140 L Sherman and H Strang, ‘Repairing the Harm: Victims and Restorative Justice’ (2003) 1 *Utah Law Review* 15.

141 Bades (n 6) 386.

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.

### INTEGRATING RJ WITHIN SENTENCING

A more radical step than either of the two proposals set out above would entail the mainstreaming of RJ. RJ programmes provide a forum for victims and offenders to exchange views and emotions within a safe environment. In spite of its growing popularity, RJ 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>142</sup> In RJ 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>143</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>144</sup>

Research evidence suggests that RJ 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 per cent) of offenders apologised in RJ settings, whereas around the same proportion (71 per cent) who went through the court process did *not* apologise.<sup>145</sup> In other words, offenders were 6.9 times more likely to apologise to the victim in RJ 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 RJ operating in a different environment.

Traditionally, restorative programmes have often been situated on the periphery of the criminal justice system and have been primarily associated with diverting young offenders before any court process is instituted. However, in recent times commentators and policy makers alike are affording more thought as to how RJ might interact and dovetail with the established sentencing framework.<sup>146</sup> 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>147</sup> Whilst 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. They are generally applied in a haphazard fashion and are not currently subject to any form of statutory control. However, in a significant move, the government recently indicated that it

142 T Marshall, *Restorative Justice: An Overview* (Home Office 1999) 5.

143 K Pranis, ‘Restorative Values and Confronting Family Violence’ in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (CUP 2002) 31.

144 Braithwaite (n 66).

145 B Poulson, ‘A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice’ (2003) 1 *Utah Law Review* 167.

146 See, generally, T Brooks, *Punishment* (Routledge 2012); J Shapland, ‘Restorative Justice and Criminal Justice: Just Responses to Crime?’ in A von Hirsch et al (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing 2003); D O’Mahony and J Doak, *Criminal Justice and Restorative Justice: Theory, Law and Practice* (Hart Publishing 2013 forthcoming).

147 See further O’Mahony and Doak (n 147).

intended to introduce an amendment to the Crime and Courts Bill 2012 which would provide a statutory basis by which courts could defer imposing sentence until a restorative activity has taken place.<sup>148</sup> At the time of writing (November 2012), it remains to be seen whether this provision will eventually enter into law, and, if so, whether it might act as something of a precursor to placing RJ on a more prominent (and legally certain) footing within the criminal justice system.

Such a mainstreamed framework is already in place in the Northern Ireland youth justice system. Here, all young people who are found guilty of an offence or are prepared to admit to having committed it are, except in the most serious cases, referred to conferencing either by the Public Prosecution Service or by the court, providing they consent to the process.<sup>149</sup> The aim of the youth conference, which is attended by the offender<sup>150</sup> and in which the victim is entitled to participate,<sup>151</sup> is to consider how the young person ought to be dealt with,<sup>152</sup> and if possible to draw up an agreed plan of action for addressing the offence – the so-called ‘youth conference plan’.<sup>153</sup> This is then returned to the Director of Public Prosecutions or to the court as appropriate<sup>154</sup> for approval, to ensure that its requirements are not disproportionate to the offending behaviour and that the public interest is served. Although careful thought would need to be given to the roll-out of any equivalent scheme in England and Wales, whether for children or for adults – and particularly which offences it might cover – there is no reason in theory or practice why such a system could not be successfully established to offer a more effective approach to sentencing across the Irish Sea.

## Conclusions

Emotions have assumed centre stage in various legal and criminological discourses including procedural justice, therapeutic jurisprudence, RJ and transitional justice, as well as conflict resolution and peace-building.<sup>155</sup> 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>156</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).

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148 Providing that such a course of action is opted for by both the victim and the offender: see Crime and Courts Bill 2012, sch 16(2), inserting a new s 1ZA of the Powers of Criminal Courts (Sentencing) Act 2000.

149 These provisions are to be found in parts 2, 3A and 6 of the Criminal Justice (Children) NI Order 1998 as amended by part 4 of the Justice (NI) Act 2002. Only those offences which carry an automatic life sentence are excluded from the regime, though reference to a conference is discretionary in the case of children found guilty of offences triable only on indictment. 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* (Springer 2006).

150 Criminal Justice (Children) (NI) Order 1998, art 3A(2)(b).

151 Ibid art 3A(6)(a).

152 Ibid art 3A(1).

153 Ibid art 3C.

154 Ibid art 10A(2)(c) and (6) (DPP); art 33A(5)(b) and (9) (court).

155 See eg Karstedt (n 1); Brewer (n 3); Nussbaum (n 5); Bandes (n 6).

156 N Luhmann, ‘Law as a Social System’ (1989) 83 *Northwestern University Law Review* 136.

Emotions *ex post facto* are largely deemed an irrelevant factor for pure retributivists,<sup>157</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>158</sup> As this special issue 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 VISs, 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 policy makers 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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157 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* (Hart Publishing 2010). However, it is also worth noting Chris Bennett's observation that emotions are, in effect, the principal reason for the public engaging with the very concept of retribution through their moral disapproval of criminality: C Bennett, 'The Varieties of Retributive Experience' (2002) 48 *Philosophical Quarterly* 145.

158 Bandes (n 6) 368.