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What is so 'special' about law and emotions?

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We are grateful to the editors of the *Northern Ireland Legal Quarterly* for allowing us to put together this special edition on 'Law and Emotions'. But what is so special about it? The very existence of such a field of study may appear at first sight to be counter-intuitive; as has been so often pointed out, law and emotion have traditionally been seen as polar opposites, the former being based on 'reason' and the latter on 'feeling'.[1] However, this has been shown to be a false dichotomy in a number of respects, being an accurate reflection neither of the way the law is structured and administered,[2] nor of the way emotion works,[3] nor indeed of the way humans live.[4] Indeed, such is the influence of emotion on human behaviour that the relevance of emotion to law has been said to be 'a point so obvious as to make its articulation seem almost banal'.[5] Be that as it may, the study of law and emotions, though now reasonably well established in America, is less familiar to students and practitioners of law, or indeed academics working in the area, on this side of the Atlantic, and this collection is therefore designed to provide an insight into the subject.

The aim of this introduction is threefold. First of all, it will outline the history of law and emotion studies and the directions in which it has developed. Next, it will demonstrate how the present collection of essays fits into the overall picture. Finally, it will attempt to assess where the study of law and emotions stands at present, and to sketch out possible directions for future development with particular reference to the UK and Irish experience.

The intersection of law and emotions has never been entirely ignored by scholars, but up until recent years it has been addressed in a somewhat piecemeal fashion. Thus, for instance, the role of anger as a mitigating factor has always been of relevance to criminal

1 Terry Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 Law and Human Behavior 119, at 120.

2 K Abrams, 'The Progress of Passion' (2002) 100 Michigan Law Review 1602.

3 In particular, it takes little or no cognisance of the important role of cognition in emotion: see Tim Dalgleish and Mick Power (eds), *Handbook of Cognition and Emotion* (John Wiley & Sons 1999); Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (CUP 2001); Robert Solomon, *Not Passion's Slave: Emotions and Choice* (OUP 2006)

4 Daniel Goleman, *Emotional Intelligence* (Bloomsbury 1996).

5 Maroney (n 1) 20.

law in the context of the defence of provocation,[6] and fear in the context of the defence of duress has been similarly recognised.[7] The law of tort has its cases on so-called 'nervous shock',[8] and the recovery of damages for disappointment has always been a topic of interest to contract lawyers.[9] Much of the law of criminal evidence can be seen as a mechanism for controlling the emotional prejudices of juries,[10] and the American Realist movement even touched on the role of emotion in judging.[11]

However, it was not until the very end of the last century that an attempt was made to draw some of these topics together. Following a conference on law and emotions at the University of Chicago Law School in May 1998,[12] a collection of essays edited by Susan Bandes, *The Passions of Law*, was published in 1999,[13] the aims being to demonstrate to readers the relevance of emotion to the study of law and to provoke further debate on the subject.[14] In introducing the collection, Bandes drew attention to the curious paradox whereby emotion pervades the law, but convention demands that it be sidelined on the grounds that the true preserve of law is not emotion but reason. Though emotion might have a place in the conventional account, she observed, it was a very circumscribed one, the assumption being it was only of relevance in the criminal context and to laypeople without legal training.[15] In seeking to challenge that conventional account, 13 essays were produced, ranging broadly over a number of different axes. Thus, a wide range of emotions were considered, including shame, disgust, remorse, revenge, anger, romantic love, fear and cowardice.[16] Law and emotions were seen to relate together in a number of different ways, with the law not only reacting to emotion, but sometimes expressing it, or even creating it.[17] Another strength of the collection was said to be the way in which some at least of the contributors were prepared to draw on a more sophisticated and scientifically based understanding of the emotions themselves, as opposed to the old view of emotions in terms of mere feeling or 'affect'.[18] As might be expected from a pioneering work of this sort, there were a number of drawbacks identified: for example, there was still too much of a criminal flavour to the collection[19] and too much emphasis on the negative emotions.[20] As well as that, it was argued that more could have been done to engage with the debates

6 Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992). For an early study in the field drawing on contemporary physiological and psychological research, see Peter Brett, 'The Physiology of Provocation' [1970] Criminal Law Review 634.

7 Alan Wertheimer, *Coercion* (Princeton University Press 1989); Lawrence Newman and Lawrence Weitzer, 'Duress, Free Will and the Criminal Law' (1957) 30 Southern California Law Review 313, at 326–30.

8 Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Hart Publishing 2009).

9 Nelson Enonchong, 'Breach of Contract and Damages for Mental Distress' (1996) 16 Oxford Journal of Legal Studies 617.

10 Victor J Gold, 'Limiting Judicial Discretion to Exclude Prejudicial Evidence' (1984) UC Davis Law Review 59; Geoffrey P Kramer et al, 'Pre-trial Publicity, Judicial Remedies and Jury Bias' (1990) 14 Law and Human Behavior 409.

11 Jerome Frank, *Law and the Modern Mind* (Brentano's 1930), ch 13, cited in Terry Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 California Law Review 629.

12 Maroney (n 1) 22 fn 11.

13 Susan Bandes, *The Passions of Law* (New York University Press 1999).

14 Ibid 7 and 11, cited by Maroney (n 1) 42.

15 Bandes (n 13) 1–2.

16 Kathy Abrams, 'The Progress of Passion' (2002) 100 Michigan Law Review 1602, 1603–07.

17 Ibid 1608–12.

18 Ibid 1610.

19 Ibid 1613.

20 Ibid 1613–14.

taking place within primary emotions scholarship.[21] Nevertheless, *The Passions of Law* deserves to be ranked as a seminal work, not least because for the first time it sought to present law and emotions as a wood rather than a mere collection of trees.

Since then the literature on law and emotions has expanded in many different directions,[22] and has engaged with many different areas of the law, including criminal law,[23] tort,[24] property law,[25] family law,[26] constitutional law,[27] victims' rights,[28] refugee law,[29] judging[30] and even the law of burial disputes.[31] A comprehensive review of this literature would now fill many volumes, but, even so, Maroney argues that it is still a moot point as to what extent law and emotions can be called a recognised 'discipline' in its own right.[32] A number of reasons can be given for this: there is no consensus as to what counts as law and emotions scholarship;[33] approaches to the scientific and empirical study of emotions vary enormously;[34] and not all those who work within the field of law and emotions even realise that they are doing so.[35] Nevertheless, she concludes that, given the inevitability of emotion's influence on law, and vice versa, the topic is well worth continued investigation, not least in the hope that greater knowledge of the subject will enable it to put down firmer methodological and epistemological roots.

As the literature demonstrates,[36] and not least the present collection, there are a number of different ways in which the interrelationship of law and emotions can be studied. The first of these is the one adopted in the previous paragraph, which considers the ways in which

21 Maroney (n 1) 122.

22 See below, nn 36–44.

23 Dan Kahan and Martha Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 Columbia Law Review 269; John Stannard, 'Sticks. Stones and Words: Emotional Harm in the English Criminal Law' (2010) 74 Journal of Criminal Law 533; Eimear Spain, *The Role of Emotions in Criminal Law Defences* (CUP 2011); Susanne Karstedt et al, *Emotions, Crime and Justice* (Hart Publishing 2011).

24 Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Hart Publishing 2009); Laura E Little, 'Just a Joke: Defamatory Humor and Incongruity's Promise' (2012) 21 Southern California Interdisciplinary Law Journal 99.

25 Peter H Huang, 'Reasons within Passions: Emotions and Intentions in Property Rights Bargaining' (2000) 79 Oregon Law Review 435; Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing 2007).

26 Janet Weinstein and Ricardo Weinstein, '"I Know Better than That": The Role of Emotions and the Brain in Family Law Disputes' (2005) 7 Journal of Law and Family Studies 351; Jennifer Schweppe, 'Best to Agree to Disagree: Parental Discord, Children's Rights and the Question of Immunisation' (2008) 37 California Common Law World Review 147; Phillip Shaver et al, 'What's Love Got to Do with It? Insecurity and Anger in Attachment Relationships' (2009) 16 Virginia Journal of Social Policy and Law 491

27 Laura E Little, 'Loyalty, Gratitude and the Federal Judiciary' (1995) 44 American University Law Review 699; Laura E Little, 'Envy and Jealousy: A Study of Separation of Powers and Judicial Review' (2000) 52 Hastings Law Journal 47; Terry Maroney, 'Emotional Common Sense as Constitutional Law' (2009) 62 Vanderbilt Law Review 851.

28 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2009).

29 Jane Herlihy, 'The Psychology of Seeking Protection' (2009) 21 International Journal of Refugee Law 171.

30 Terry Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (Vanderbilt Law and Economics Research Paper no 10-28 2011); Terry Maroney, 'Emotional Regulation and Judicial Behavior' (2011) 99 California Law Review 1481; Terry Maroney, 'Angry Judges' (2012) 65 Vanderbilt Law Review 1207.

31 Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 University of New South Wales Law Journal 860.

32 Maroney (n 1) 136.

33 Ibid 123–25.

34 Ibid 136 (a 'wobbly compendium of thought').

35 Ibid 124.

36 Ibid 126.

emotions are or should be reflected in different areas of legal doctrine;[37] this is perhaps the one that is most immediately accessible to lawyers. The second is emotion-centred and focuses on the way in which the law responds to or reflects particular discrete emotions such as love, hate, fear, anger and so on;[38] this is an obvious approach, but is hampered to some extent by the absence of any generally accepted taxonomy of emotions.[39] The third looks at particular legal actors such as judges, solicitors, barristers and so on, the aim being to consider how their work is or should be influenced by emotion;[40] much of the work in this field so far has concentrated on judges[41] and jurors,[42] but is of equal relevance to practitioners generally.[43] Other approaches identified by Maroney include the 'emotional phenomenon' approach (describing particular emotional phenomena and analysing how these should be reflected in law), the 'emotion-theory' approach (examining legal doctrines and practices in the light of particular theories of emotion) and the 'theory-of-law' approach (analysing the emotional theories and presuppositions reflected in particular legal theories).[44] This list is by no means exhaustive; thus, for instance, another possible approach is to adopt an analysis whereby emotion may interact with the law in three different ways, these being: (1) the response of law to emotion; (2) the role of the law in creating and fostering emotion; and (3) the influence of emotion in the practice of the law. And, of course, it is quite possible to mix these approaches, for instance, by adopting one particular area of legal doctrine and then considering the impact of particular emotions in that area.

In this collection, we have adopted Maroney's taxonomy and begin with four articles which are 'actor-centred': Maroney looks at the emotions of judges, with a particular focus on judicial anger and its place in the legal system; Doak and Taylor reimagine the sentencing system to make it more emotionally intelligent – an approach that they argue would benefit both offenders and victims; Chakraborti and Zempi examine the impact of the veil ban on Muslim women, their communities and society in general; and finally, Herlihy and Turner examine the role of both asylum seekers and decision makers in the asylum process. We then proceed to a 'doctrine-centred' approach, with Conway and Stannard's examination of the emotional context in which the doctrine of adverse possession operates; and, finally, we look to two articles which are 'emotion-centred': Spain's examination of love and compassion in the context of end-of-life decisions; and Abrams and Keren's examination of the ability of legal actors to cultivate resilience in their clients. That said, some papers straddle two or more areas, but this basic breakdown is a useful starting point for our analysis.

37 Maroney (n 1).

38 Ibid.

39 For a flavour of the debate see Silvano Arieti, 'Cognition and Feeling' in Magda Arnold (ed), *Feelings and Emotions* (Academic Press 1970) 135; Nancy Stein and Keith Oatley (eds), *Basic Emotions* (L Erlbaum 1992); Paul Ekman, 'Basic Emotions' in Dalgleish and Power (n 3) 45; Alexandra Newen, 'Classifying Emotion: A Developmental Account' (2001) 161 Synthese 1.

40 Maroney (n 1) 126.

41 Abrams (n 15) 1618–19. Much of Maroney's own work is in this area; see the works cited at n 30.

42 Neil R Feigenson, 'Sympathy and Legal Judgment: A Psychological Analysis' (1997) 65 Tennessee Law Review 1; Neil R Feigenson, *Legal Blame: How Jurors Think and Talk about Accidents* (American Psychological Association 2000); Reid Hastie, 'Emotions in Jurors' Decisions' (2001) 66 Brooklyn Law Review 991; Neil R Feigenson et al, 'The Role of Emotions in Comparative Negligence Judgments' (2001) 31 Journal of Applied Social Psychology 576; David A Bright and Jane Goodman-Delahunty, 'Gruesome Evidence and Emotion' (2006) 30 Law and Human Behavior 183.

43 See the works cited by Maroney (n 1) 133. Mention should also be made of the concept of 'therapeutic jurisprudence' coined by Bruce Winick and others: see B J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 Psychology, Public Policy and Law 184; see further below, n 48.

44 Ibid 126.

In the first article, Terry Maroney begins by observing that, traditionally, the task of the legal system is to 'systematically reduce the opportunities for judicial emotion to insert itself'. However, she cogently argues that this view of human emotion is contrary to 'virtually everything we know about emotion and its value' for four key reasons: first, emotion reveals reasons; second, emotion motivates action in the service of reasons; third, emotion enables reason; and, finally, emotion is educable. She argues that, rather than seeking to suppress judicial emotion, the legal system should rather aim to regulate it, a process which will both allow judges to deal with the emotional challenges of their job, but also 'selectively integrate those emotions into their decisional processes'. Using judicial anger as a lens through which this new model is tested, she observes that anger is 'quintessentially judicial' as, once triggered, it generates a desire to affix blame and assign punishment. However, it can also be 'deeply threatening to competent judicial performance'. Thus, she concludes, judicial anger should be regulated, rather than stifled, particularly given the health risks of emotion suppression. This approach will 'maximise beneficial iterations of judicial anger while minimizing destructive ones'.

Building on Maroney's observations on the role of emotions in the legal system generally, Doak and Taylor note that the perception is that if the door to emotions is left ajar, the 'core normative features of the legal system of consistency, certainty and fairness would be lost in a maelstrom of emotional outpourings'. However, they go on to observe that, in the context of sentencing in particular, 'emotions matter' and a more emotionally intelligent sentencing system would be beneficial for four key reasons: first, it would strengthen therapeutic justice; second, it would strengthen procedural justice; third, it would improve the quality of decision-making; and finally, it would transform the relationships between victims and offenders. They then examine the ways in which the emotional narratives of victims and offenders can be taken into account when determining sentence through both pre-sentence report and victim personal statements or family impact statements. The authors admit that, while these innovations have been a step in the right direction, they do not go far enough and argue that emotions can play an even more central role within the current parameters of the criminal justice system. While seeing these steps as an interim measure, the ultimate aim being a 'fully-fledged emotionally-intelligent model of sentencing' which would require a significant reconfiguration of penal ideology, they argue that these interim steps may well trigger a broader realisation that criminal sentencing 'ought to perform a wider function than the mere retribution of wrongs'.

In the past decade, a number of European countries have imposed restrictions on the public practice of Islam and Chakraborti and Zempi examine the emotional impact that veil ban laws have on Muslim women in Western cultures. They argue that, contrary to public opinion, where the wearing of the veil is seen as the mark of a subjugated woman, the veil ban is actually a form of oppression. They introduce us to the key concept of *ummah*, which 'reflects the development of a robust collective identity among the world's Muslims'. The veil ban, which results in both multiple and intersectional discrimination against Muslim women, alienates women from society and its cumulative effect, they argue, can be to 'reinforce the sense of alienation experienced by members of the *ummah*-based community'. Of perhaps even more concern, they argue, is the stigmatisation of such women as criminals, thereby potentially 'legitimising' acts of violence against them when they are in public. Finally, they observe, the ban goes beyond Muslim women, but affects the entire Muslim community and indeed society as a whole, 'on the basis that [the] law attacks the fundamental value of liberal democratic states: the issue of choice'. Ultimately, they argue that the veil ban 'compounds the emotional suffering of those affected by it on the basis that it communicates a message

of institutionalised Islamophobia through formal power structures of law-making, police procedure, prosecutorial power and governmental policy'.

Herlihy and Turner then examine the role of emotions in refugee law, particularly the emotions of both the applicant and the decision maker in asylum claims. Drawing on psychological science, they show how an understanding of these principles can assist us in comprehending the experiences of both sets of actors in the asylum process. First, they look at the emotions of the claimant and how lay theories of emotions can sometimes lead to conclusions which are contrary to a psychological understanding of the experience. They observe the different way in which individuals process different types of memory and the impact that post-traumatic stress disorder can have on the recalling of such memories. Relying on psychological theories of memory and recall, rather than lay theories, they argue, will improve the asylum process. They then turn to the experiences of the decision maker, noting that the subject matter of asylum claims, involving 'some of the most atrocious acts that humans perpetrate on each other', can impact on the decision maker in a number of ways. Particularly interesting is their discussion on the manner in which decision makers must sometimes 'tolerate uncertainty' which adds to the emotional burden of the work: a decision maker cannot know if their decision was correct, or if they have returned the claimant to face further torture and persecution. Ultimately, they argue that these crucial decisions regarding asylum claims must be made in a manner which is both informed and underpinned by the best available scientific knowledge.

Conway and Stannard take a doctrine-centred approach and begin their analysis of the emotional paradoxes of adverse possession by wryly observing that property lawyers are generally 'a serious lot, not prone to feverish bursts of excitement'. However, one area of property law which energises even the most staid of lawyers, along with the population as a whole, is the doctrine of adverse possession. The authors begin their examination of the doctrine by looking at the manner in which Western cultures value property and observe that, while society sometimes sees the actions of a squatter on land as 'immoral', the misuse or neglect of land by the original owner can also be contrary to the value which we as a society place on land. They go on to examine a number of instances of 'squatting' and note that the actions of both the squatter and the landowner will impact on the perception of the squatter in society as a whole. These perceptions are then reflected in the legal system through the courts and the legislature, which seek to confine the operation of the doctrine in a manner which protects the owner. They argue that there is an 'overwhelming sense' in society that adverse possession is both morally and socially wrong and that by shifting the protection from squatter to landowner, the law is responding to 'the negative emotions generated by adverse possession'.

Our final two articles take an emotion-centred approach to this complex area. Spain examines the topical and legally complex area of assisted dying, observing that central to any debate on the issue are 'the emotions which motivate those involved'. Arguing that the law should understand emotions before punishing individuals who commit acts while under their influence, she states that, in the context of end-of-life decisions, two emotions are often central to the decision-making process: love and compassion. She then goes on to discuss the current legal position and particularly examines the role of the traditional defences in cases of assisted dying, observing that no established defence is useful in these contexts for either policy or theoretical reasons. She then goes on to argue that a new excusatory defence should be established which recognises the key role that the emotions of the defendant play in these cases. This defence would operate where the defendant acted out of love or compassion for the victim and reflects the modern evaluative view of emotions. It would be subject to limitations, however, where the emotion and response were

'reasonable and socially justifiable' and where the medical condition of the victim was 'objectively verifiable' as a terminal or chronic illness. This new defence, she argues, would exculpate those individuals who act 'in an understandable way in response to reasonable and socially acceptable emotions'.

Finally, Abrams and Keren provide a fitting end to our collection, in their analysis of the potential of law to enhance resilience by cultivating positive emotions. They note that legal actors are slow to use the law to achieve emotional goals, but ultimately argue that positive affective responses can be achieved by programmatic interventions prescribed by law, through a sustained process of habituation. They begin by discussing the literature on resilience, noting that individuals respond to adversity in very different ways – this ability or inability to cope and the role of positive emotions in building resilience to adverse situations forms the psychological foundation of their analysis. Drawing on their earlier study on the ability of legal actors to cultivate hope,[45] they argue that many of their earlier understandings reflect 'insights embodied in the psychological literature'. Observing that the ability of an individual to cope effectively is a function of their connection with resources in their environment, they argue that the turn to law 'which is capable of structuring or regulating relations between individuals and their environments, [is] a plausible and necessary move'. Once legal actors have established programmes which foster positive emotions, there may be, they argue, 'new opportunities for psychologists to examine the processes by which lawyers and legally structured institutions help to foster positive emotions among groups who are their clients and beneficiaries'.

Writing in 2004, Stephen Morse predicted that in the long run scholarship on law and the emotions was likely to have considerably less impact than that on law and economics.[46] We have already looked at some of the reasons for his pessimism, including the enormous potential breadth of the topic, the lack of any 'standard' theory of emotion and the fact that not everyone engaged in the study of law and emotions even knows that they are doing so.[47] However, assuming for the purposes of argument that law and emotions is a topic worth studying – and for the reasons given above there are good grounds to believe that it is – there are a number of challenges which need to be borne in mind if that study is to have the impact it deserves.

The first is the need to encourage scholars working in the field both to realise that fact, and to pool their insights with others. As at least one of the present editors can testify from experience, it is all too easy to study law and emotions in a vacuum without being aware of the work that is going on elsewhere[48] – all the more so, given that the field straddles so many discrete academic disciplines. As we have seen, Terry Maroney and others have done much in recent years to draw the different threads together, but there is more work to be done. One useful approach would be for someone to try to draw up a comprehensive bibliography of law and emotions, which would then be regularly updated. Another would be to foster regular contacts between those engaged in the area, in which scholars from different disciplines could share their insights and inform future work on the subject. This

45 Kathy Abrams and Hila Keren, 'Law in the Cultivation of Hope' (2007) 95 California Law Review 319.

46 Stephen J Morse, 'New Neuroscience, Old Problems' in B Garland (ed), *Neuroscience and the Law: Brain, Mind and the Scales of Justice* (Dana Press 2004) 157, 186 (cited by Maroney (n 1) 133.

47 See above, nn 33–35.

48 Thus, for instance, eight years before *The Passions of Law* came on the scene, David D Wexler and Bruce Winick brought out their seminal *Essays in Therapeutic Jurisprudence* (Carolina Academic Press 1991), in which they argued that law itself could be seen to function as a therapist or therapeutic agent. However, there has until recently been little cross-fertilisation between 'law and emotions' and 'therapeutic jurisprudence', despite the key relevance of the latter to Maroney's 'legal actors' approach (nn 40–43).

has already been done to some extent on the other side of the Atlantic,[49] and there have recently been similar initiatives in Ireland,[50] but there is a lot more room for this sort of thing if law and emotions is to find its feet as a discipline in its own right.

Another challenge is the need for lawyers working in the area to be aware of the psychological and philosophical debates surrounding the emotions. One major difficulty that has to be met is that there is no consensus even as to what an emotion is,[51] or to how it relates to kindred concepts such as feeling and affect,[52] still less as to the content and taxonomy of discrete emotions.[53] Again, scholars from a legal background who venture into the area have to be aware of the pitfalls of terminology, with seemingly familiar concepts such as 'cognition' and 'intention' having very different meanings in the context of psychology and philosophy to those to which they have become accustomed.[54] Given that law and emotions scholarship straddles so many different academic disciplines, each with its own established jargon, to call for a common vocabulary is perhaps, as Lord Wilberforce said in another context,[55] to cry for the moon, but one who reads in areas with which he or she is unfamiliar has at least to be aware of these problems.

The third challenge is the need to write with precision and to ensure that what is said is rooted in evidence. Law and emotions may sound rather 'touchy-feely', but that is no excuse for academic sloppiness when writing in the area. A scholar who writes about the relevance of particular emotions in the legal context should be careful to ensure that he or she can define what these emotions mean;[56] one who writes about the behaviour of legal actors must do so by reference to the psychological literature;[57] one who writes about the law's reaction to emotion in the context of public opinion must be careful to check what the

49 Thus, *The Passions of Law* itself had its genesis in a conference held in Chicago in 1998 (see n 12 above), and in 2007 a further conference was held at Berkeley, California, on the topic 'Law and the Emotions: New Directions in Scholarship' <www.law.berkeley.edu/1111.htm> accessed 18 December 2012.

50 For instance the interdisciplinary conference on 'Regulating Emotions' organised by one of the present editors and held in May 2012 under the aegis of the Emotions and Society Research cluster at the University of Limerick, and the Law and Emotions Colloquium held at Queen's University Belfast in March 2013.

51 This question was famously raised by William James in his seminal article 'What is an Emotion?' (1884) 9 Mind 188, but, as Solomon points out, the debate has gone on since the days of Plato and Aristotle and has still not been resolved: Robert C Solomon, 'The Philosophy of Emotions' in Michael Lewis, Jeannette M Haviland-Jones and Lisa Feldman Barrett (eds), *Handbook of Emotions* (3rd edn, Guilford Press 2008) 3; see also Paul E Griffiths, *What Emotions Really Are: The Problem of Psychological Categories* (University of Chicago Press 1997); Paul Ekman and Richard J Davidson (eds), *The Nature of Emotion: Fundamental Questions* (OUP 1994); Robert C Solomon, *What is an Emotion?* (OUP 2003).

52 Ekman and Davidson (n 51) 48–96; Joseph V Brady, 'Emotion: Some Conceptual Problems and Psychophysiological Experiments' in Arnold (n 39) 69, 70; Nancy L Stein, Marc W Hernandez and Tom Trabasso, 'Advances in Modeling Emotion and Thought' in Lewis et al (n 51) 575, 578–80.

53 Ekman and Davidson (n 51) 5–47; Arieti (n 39) 135; Paul Ekman, 'Basic Emotions' in Dalgleish and Power (n 3) 45.

54 Thus 'cognition' does not imply conscious appraisal: Andrew Ortony, Gerald L Clore and Alan Collins, *The Cognitive Structure of Emotions* (CUP 1988) 4; Richard S Lazarus, 'The Cognition–Emotion Debate: A Bit of History' in Dalgleish and Power (n 3) 10. Nor does 'intention' imply desire or purpose: Peter Goldie, *The Emotions* (Clarendon Press 2000) 16; John R Searle, *Intentionality: An Essay in the Philosophy of Mind* (CUP 1983), ch 1.

55 In *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 844. Lord Wilberforce was talking here about the problems of terminology in relation to contractual discharge, but the literature on emotions displays similar problems.

56 This is not as impossible a task as might at first appear; a lot of work has been done in defining and classifying discrete emotions for the purposes of computer recognition programs: see Roddy Cowie, Ellen Douglas-Cowie and Cate Cox, 'Beyond Emotion Archetypes: Databases for Emotion Modelling Using Neural Networks' (2005) 18 Neural Networks 371.

57 The first three articles in the present collection are good examples of this.

public actually feels, if possible on the basis of empirical evidence.[58] One of the problems here is that such evidence is not always easy to obtain; one wonders, for instance, whether some of the empirical studies done elsewhere, such as the judicial survey referred to in the essay by Terry Maroney, could be replicated in the context of the British Isles. But a lot more work of this sort needs to be done if future writings on law and emotions are to be built on the rock and not on the sand.

One of the problems with law and emotions, as with any evolving field of study, is that it takes time to design new tools for the job and to acquire the necessary skill in using them. Another problem is the need for those who write on law and emotions to know their way round a number of disciplines, including law, philosophy, psychology and sociology; most of those who embark on the study of the topic are grounded in only one of these, and there is the ever-present danger that the Jack – or Jill – of all trades will end up as the master – or mistress – of none. Be that as it may, this collection of essays is offered to the reader in the hope that it will stimulate an interest and will lead to a more mature appreciation of a new and fascinating field of study.

58 See, for instance, the work of Hough and others, suggesting that public attitudes to crime are not as 'punitive' as is often assumed: Julian Roberts and J M Hough, *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Willan 2002).

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Judges and their emotions

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Judges are human beings; human beings have emotions; ergo, judges have emotions. The simplicity, even banality, of this syllogism belies its potentially revolutionary nature. In legal theory and popular opinion, the judge's humanity has long been either ignored or regarded as a necessary evil, an unfortunate consequence of having to populate the legal system with fallible, biased, real people. Emotion traditionally has been counted among the primary sources of fallibility and bias. The task of the legal system, under this view, is to systematically reduce the opportunities for judicial emotion to insert itself; the task of the good judge is to prevent emotion from exerting any influence wherever such opportunities remain.

Understood through the lens of these negative value judgments, the simple syllogism provides a rationale for vigilantly policing and suppressing judicial emotion. But what if those judgments were to change? If we were appropriately to value both the judge's humanity and the role of emotion in human life, the syllogism's implications would be profoundly different. We would seek not to police and suppress judicial emotion in all instances but, rather, to acknowledge, examine and sometimes even welcome it.

Revolutionary though it may be, this is the correct objective. The traditional devaluation of judicial emotion is both misguided and destructive.

As other contributors to this special issue have no doubt demonstrated, contemporary law and emotion studies have sought systematically to expose the assumptions about human emotion underlying legal theory and practice, and then to examine those assumptions in light of a sophisticated understanding of emotion itself.[1] The aim of this short article is to show how applying that methodology compels a dramatic shift in how we think about judges and their emotions. I have explored these themes in a series of prior articles;[2] I synthesise them here. I first trace the development of the ideal of dispassionate judging and argue that it conflicts with virtually everything we know about emotion and its value. Having dislodged that ideal from its comfortable post, I suggest that the proper stance toward judicial emotion is not elimination but regulation. Judicial emotion regulation provides a flexible structure within which emotion may be examined, accepted, changed, or simply lived with. I then discuss the particular case of judicial anger. Anger can be either

1 Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions?' (2010) 94 Minn L Rev 1997.

2 Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 Cal L Rev 629; Terry A Maroney, 'Emotional Regulation and Judicial Behavior' (2011) 99 Cal L Rev 1481; Terry A Maroney, 'Angry Judges' (2012) 65 Vand L Rev 1207.

helpful or unhelpful for judges, and therefore serves as an excellent testing ground on which to show how regulation helps to discern and enact that difference. I close with thoughts about directions for future research.

The project's centre of gravity is, at present, firmly in the USA. With the exception of some insights drawn from a study of Australian magistrates, the concrete examples on which I rely are from the US context. However, there is every reason to believe that the model I offer would translate well to the context of the British Isles. We share a common law heritage, including the traditional notion of dispassionate judging that long has animated that heritage. The psychological truths that challenge that traditional notion are, generally speaking, common to all human beings. Culture unquestionably influences how we experience and regulate emotion; legal and cultural differences (both between Britain and its former colonies, and among the countries of the contemporary British Isles) therefore deserve close analysis.[3] Though such analysis is not possible here, I hope that this project will spur similar efforts in Ireland and the UK, where the study of law and emotion – let alone its applicability to judging – remains at a relatively young stage.

Judicial dispassion: some history

Insistence on emotionless judging is a cultural ideal of unusual longevity and potency. As long ago as the mid-1600s, none other than Thomas Hobbes declared that the ideal judge is 'divested of all fear, anger, hatred, love, and compassion'.[4] More than three centuries later, US Supreme Court Justice Sonia Sotomayor testified at her confirmation hearing that judges 'apply law to facts. We don't apply feelings to facts.'[5] After a nasty public fight over whether Sotomayor might be unduly 'empathetic', a quality sought by US President Barack Obama,[6] one journalist characterised the idea that emotion might influence judging as 'radioactive'.[7] Then and now, calling a judge 'emotional' is considered a stinging insult.[8]

Several converging developments in Western culture and jurisprudence – here painted only in broad strokes – contributed to the remarkable entrenchment of the dispassionate judge ideal. It is rooted in the European Enlightenment's insistence on a dichotomy between emotion and reason. Sharply simplified, the Enlightenment intellectual tradition reified rational inquiry, science and secularisation. Emotion was associated with religious fervour, ignorance, prejudice, and reliance on epistemological sources such as tradition and revelation, forces from which enlightened persons sought to be freed.[9] This asserted dichotomy between reason and emotion became highly relevant to law. As law was aligned

3 See e.g. Batja Mesquita and Janxin Leu, 'The Cultural Psychology of Emotion' in Shinobu Kitayama and Dov Cohen (eds), *Handbook of Cultural Psychology* (Guilford Press 2007) 734–59. The fact that the US and the British Isles share a dominantly Western and anglophone cultural heritage suggests that cultural variation, while real, may be relatively limited. This will be progressively less so as the cultures become more separated by time, and as they become less internally homogenous.

4 Thomas Hobbes, *Leviathan*, A R Waller (ed) (CUP 1904/1651) 203.

5 <http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=515> (statement of Judge Sonia Sotomayor).

6 Obama nomination remarks, quoted in John Hasnas, 'The Unseen Deserve Empathy Too' *Wall Street Journal* (New York, 29 May 2009); remarks of Barack Obama (Planned Parenthood Action Fund, 17 July 2007) <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction>; Susan A Bandes, 'Empathetic Judging and the Rule of Law' (2009) Cardozo L Rev De Novo 133.

7 Peter Baker, 'In Court Nominees: Is Obama Looking for Empathy by Another Name?' *New York Times* (New York, 26 April 2010) A12.

8 Jeffrey Rosen, 'Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun' *The New Republic* (Washington, 2 May 1994) 13–14.

9 Henry Farnham May, *The Enlightenment in America* (OUP 1976) xiv, 42.

with reason, it necessarily was positioned as emotion's opposite. This alignment only strengthened as law increasingly was conceptualised as a science.[10]

Interestingly, despite the Enlightenment tradition's commitment to intellectual and political equality, its position on emotion betrayed lingering elitism; emotion came to be associated with the irrational beliefs and unrestrained impulses of common people.[11] Indeed, that association was on vivid display in the USA at the time of the nation's founding.[12] In the well-known words of James Madison:

> It is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.[13]

Under this view – a point of agreement between Hobbes and Madison – judges were critical agents in ensuring that law acted as a bulwark against popular emotion. Judges fulfilled this responsibility by taming the emotions of litigants, ignoring those of the public, and divesting themselves of their own.[14] Thus, by the turn of the twentieth century, it seemed clear that – in the words of a leading Continental theorist – emotionless judging was a 'fundamental tenet of Western jurisprudence'.[15]

Then came the legal Realists. As part of their effort to shatter illusions about law's objectivity and determinacy, Realists insisted that emotion formed part of a broader 'human element' that inevitably shaped judging.[16] Benjamin Cardozo asserted that it was impossible to understand 'what judges really do' without dialogue on the contrast between 'reason versus emotion'.[17] Jerome Frank went considerably further, drawing heavily on psychoanalytic theory to propose that judges routinely were led astray by 'childish' emotional drives and fantasies and should instead inspire to emotional 'maturity' (a state he left frustratingly undefined).[18] Though their account of judicial emotion was simultaneously muddled and thin, the Realists contributed to a more general acknowledgment that judicial emotion exists and, contrary to the traditional party line, exerts influence. Indeed, during the tail end of the Realist heyday in the USA, one judge bluntly wrote that emotionless judges are 'mythical beings', like 'Santa Claus or Uncle Sam or Easter bunnies'.[19]

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10 Christopher C Langdell, *A Selection of Cases on the Law of Contracts* (Little Brown & Co 1871) vi.

11 May (n 9) 337.

12 Ibid 97–98.

13 *The Federalist Papers* 49 [James Madison], Clinton Rossiter (ed) (New American Library 1961) 317. See also Doni Gewirtzman, 'Our Founding Feelings' (2009) 43 U Rich L Rev 623, 637–40.

14 William J Brennan, 'Reason, Passion, and "The Progress of the Law"' (1988) 10 Cardozo L Rev 3; Gewirtzman (n 13) 679; Richard A Posner, *Frontiers of Legal Theory* (Harvard University Press 2001) 226.

15 Karl Georg Wurzel, *Methods of Juridical Thinking* (1904), translated in *Science of Legal Method: Selected Essays*, Ernest Bruncken and Layton B Register (eds) (Boston Books 1917), 298. Wurzel wrote that it was necessary to neutralise judicial emotion because 'absence of emotion is a prerequisite of all scientific thinking' and judges regularly are 'exposed . . . to emotional influences'.

16 Legal Realism was an intellectual movement anchored firmly in the USA, flourishing primarily between the First and Second World Wars. See e.g. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007); Arthur L Corbin, 'The Law and the Judges' (1914) 3 Yale Rev 234; Charles Grove Haines, 'General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges' (1922) 17 Ill L Rev 96 (1922); John Dickinson, 'Legal Rules: Their Function in the Process of Decision' (1931) 79 U Pa L Rev 833; Karl Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harv L Rev 1222.

17 Benjamin N Cardozo, 'Jurisprudence', Lecture before Assoc Bar City of NY, in *Selected Writings of Benjamin Cardozo* (Fallon Publications 1947) 7–46, 19.

18 Jerome Frank, *Law and the Modern Mind* (Brentano's 1930) 143.

19 *United States v Ballard*, 322 US 78, 93–94 (1944) (Jackson J dissenting).

Despite this dose of realism, however, the ideal of dispassion has remained steadfast.[20] For most, the sole point of acknowledging judicial emotion is to better control it.[21] Thus, Justice Sotomayor successfully defended herself by testifying that judges are 'not robots [who] listen to evidence and don't have feelings. We have to recognise those feelings and put them aside.'[22] Realism may have modified the ideal but it did not fundamentally change its underlying premises.

Why the ideal of dispassionate judging is misguided

That the script of judicial dispassion is deeply ingrained does not make it correct. This has become increasingly clear as law has become more open to insights from other disciplines, and as those disciplines – particularly psychology – have greatly expanded our understanding of emotion. Emotion is not necessarily, or even usually, a pernicious influence in human life. Other contributors to this special issue no doubt have made a similar argument, and I therefore sketch it only briefly here.[23] Contemporary affective psychology, with significant backing from philosophical accounts, teaches the following: emotion reveals reasons, motivates action in service of reasons, enables reason, and is educable.[24]

First, *emotion reveals reasons* because it relies on thoughts about states of the world. Every emotion contains an underlying belief structure, known in psychology as a cognitive appraisal. Fear, for example, reflects a cognitive appraisal that one faces 'an immediate, concrete, and overwhelming physical danger', while guilt attends self-evaluation of having 'transgressed a moral imperative'.[25] The dichotomy between reason and emotion thus is revealed to be far less than sharp. Knowing what a person is feeling reveals what they are thinking, and both we and they can then evaluate those thoughts for accuracy and normative justification. Second, *emotion motivates action in service of reasons*, for it prompts us to respond to relevant states of the world in light of our goals. If a human being perceives that a bear is approaching,[26] her fear focuses attention on the danger, prompts her to evaluate its personal relevance – for example, its incompatibility with her desire not to be mauled to death – and enables responsive action, including activating physical responses that promote survival (like fleeing or screaming for help).[27] Third, *emotion enables reason*. Contemporary scientific research demonstrates the interdependence of emotional capacity and substantive rationality, particularly in the areas of practical reason, self-regarding choice,

20 For example, during the nomination battle over Justice Sotomayor, one US senator insisted that judicial empathy put 'nothing less than our liberty at stake' <http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=515> (statement of Senator Orrin Hatch).

21 Only a small minority of post-Realist judges and scholars have suggested that judicial emotion might be a *good* thing. See, e.g. Brennan (n 14); Irving J Kaufman, 'The Anatomy of Decisionmaking' (1984) 53 Fordham L Rev 1, 16.

22 14 July 2009 <http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html>.

23 A fuller account of contemporary research on emotion's nature and value may be found in Maroney (n 2) 'The Persistent Cultural Script' 642–52.

24 See, generally, Michael Lewis and Jeannette M Haviland-Jones (eds), *Handbook of Emotions* (2nd edn, Guilford Press 2000); Richard J Davidson et al (eds), *Handbook of Affective Sciences* (OUP 2003); Richard D Lane and Lynn Nadel (eds), *Cognitive Neuroscience of Emotion* (OUP 2000).

25 See, e.g. Richard S Lazarus, 'Universal Antecedents of the Emotions' in Paul Ekman and Richard J Davidson (eds), *The Nature Of Emotion: Fundamental Questions* (OUP 1994), 163, 164–5, table 1.

26 The approaching bear scenario is one that has been commonly invoked in emotion theory since the inception of the field: William James, 'What is an Emotion?' (1884) 9 Mind 188–205, 190.

27 These propensities toward typified physical responses are called 'action readiness' or 'action tendencies'. See David Sander and Klaus R Scherer (eds), *The Oxford Companion to Emotion and the Affective Sciences* (OUP 2009) 1–2.

and social judgment.[28] Moral judgment, too, appears to be strongly intertwined with emotional capacity.[29] Finally, *emotion is educable*; not only can humans alter its external manifestation (for example, by suppressing or forcing a smile), but the emotion itself can be altered by changing one's underlying thoughts and goals.[30] As Richard Lazarus nicely explained, though evolved 'biological universals link the *if* with the *then*' – as where perception of irrevocable loss leads to sadness – individual and cultural factors 'affect the *if* ' by determining what circumstances are thought to constitute such a state of affairs.[31] In addition to explaining human emotional diversity, this flexibility creates space for emotional growth and change.

Taken together, these findings show that the traditional legal story casting emotion as stubbornly irrational is simply not true. These lessons about emotion are as true for judges as for other humans. Literal elimination of judicial emotion is not just unrealistic as a goal;[32] it is destructive as a value. The inquiry therefore must shift, asking not how judges can be rid of emotion but rather how they can cope with it – and potentially derive something of value from it.

Judicial emotion regulation

As the prior discussion makes clear, under both the traditional account of judging and its post-Realist iteration we expect judges to *regulate* emotion, either by preventing its emergence or by walling off its influence. The presumed object of such efforts is to attain an emotionless state when performing a judicial function. Taking emotion research seriously requires us to abandon a rigid commitment to that object. It does not, however, require us to abandon a commitment to emotion regulation. On the contrary, it counsels us more fully to embrace emotion regulation as a critical judicial skill.

Emotion regulation refers to any attempt to influence what emotions we have, when we have them, and how those emotions are experienced or expressed.[33] It is difficult to overstate regulation's importance. Recognising that emotion is of enormous value does not signify that it must be allowed free rein.[34] Emotion often helps us achieve our goals, such as escaping bear maulings, but this is not always the case. Fear sometimes can paralyse; sadness can overwhelm; love can blind. Emotion can reveal undesirable thoughts, as when

28 The best-known of these studies (which continue to proliferate) are by Antonio Damasio, Antoine Bechara and their collaborators. See, generally, Antonio R Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (Grosset/Putnam 1994); Antonio Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* (Harvest Books 1999); Antoine Bechara et al, 'Characterization of the Decision-making Deficits of Patients with Ventromedial Prefrontal Cortex Lesions' (2000) 123 Brain 2189–202. See also S W Anderson et al, 'Impairments of Emotion and Real-world Complex Behavior following Childhood – or Adult-onset Damage to Ventromedial Prefrontal Cortex' (2006) 12 J Int Neuropsychol Soc 224, 224; Terry A Maroney, 'Emotional Competence, "Rational Understanding", and the Criminal Defendant' (2006) 43 Am Crim L Rev 1375, 1392–97.

29 Walter Sinnott-Armstrong (ed), *Moral Psychology: The Neuroscience of Morality: Emotion, Brain Disorders, and Development*, vol 3 (MIT Press 2008); Dacher Keltner et al, 'Emotions as Moral Intuitions' in Joseph P Forgas (ed), *Affect in Social Thinking and Behavior* (Psychology Press 2006) 162–75; Jesse Prinz, 'The Emotional Basis of Moral Judgments' (2006) 9 Phil Explorations 29; <www.wjh.harvard.edu/~jgreene/> (Moral Cognition Lab); Liane Young et al, 'Damage to Ventromedial Prefrontal Cortex Impairs Judgment of Harmful Intent' (2010) 65 Neuron 845–51.

30 James J Gross and Ross A Thompson, 'Emotional Regulation: Conceptual Foundations' in James J Gross (ed), *Handbook of Emotion Regulation* (Guilford Press 2007) 3–24, 13–15.

31 Lazarus (n 25) 167–8.

32 In the prior articles I have demonstrated at length why the ideal is unrealistic, by systematically culling evidence of judicial emotion including (inter alia) sadness, joy, anger and fear.

33 James J Gross, 'Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology' (1998) 74 J of Personality and Soc Psychol 224.

34 Jennifer S Beer and Michael V Lombardo, 'Insights into Emotion Regulation from Neuropsychology' in Gross (n 30).

one feels jealousy rather than pride at a child's achievement, or unworthy goals, as when one delights in the misfortune of others. At times it is important to show one's emotions – for example, by smiling proudly at the child – while at others just the opposite is called for – for example, by feigning courage to dissuade a possible assailant. Emotion is adaptive, but so too is the capacity to regulate it in response to varied environmental demands and in service of accurate beliefs and worthy objectives.[35] Such capacity is a hallmark of what is popularly known as 'emotional intelligence'.[36] Indeed, Aristotle's vision of the virtuous man – one who has the right emotions, in the right situation, for the right reasons, and to the right degree[37] – is now a philosophical and psychological article of faith.

Judges in their private lives, of course, can strive for such emotional virtue. Far more important for legal theorists, though, is the realisation that judges can do so in their professional lives as well. Thanks to the pioneering work of the US sociologist Arlie Hochschild, we may recognise this effort as a form of *emotional labour*, or the work of regulating emotion so as to conform to the expectations of one's profession and workplace.[38] Though empirical research is scant, all indications are that judges do perform such emotional labour. Surveyed Australian magistrates, for example, reported expending significant energy coping with emotional challenges. One described his caseload as a constant parade of 'absolute misery'; another spoke of having difficulty at the end of the day 'walking away and erasing everything about everything I've heard about families and the stress that they're under, [and] the treatment children have been dished out'.[39] Importantly, these and other judges[40] find this emotional labour difficult. Much of that difficulty stems from two intertwined causes. The first is the unrealistic expectation of dispassion. US state court judges complained that because the legal system tends 'to strip away emotions', they were becoming 'insulated and numb'.[41] The second is the lack of available models. As one Australian magistrate put it bluntly:

> [T]here's two things that can happen to you. Either you're going to remain a decent person and become terribly upset by it all because your emotions . . . are being pricked by all of this constantly or you're going to . . . grow a skin on you as thick as a rhino, in which case I believe you're going to become an inadequate judicial officer because once you lose the . . . feeling for humanity you can't . . . do the job.[42]

35 Vanderkerckhove et al, 'Regulating Emotions: Culture, Social Necessity, and Biological Inheritance' in Marie Vanderkerckhove et al (eds), *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance* (Blackwell 2008), 1–12, p 3 (regulation serves to 'fine-tune' our emotional system to 'socio-cultural contexts'); Richard J Davidson et al, 'Neural Bases of Emotion Regulation in Nonhuman Primates and Humans' in Gross (n 30), 47–68, 47 (regulation provides 'important flexibility to our behavioral repertoire').

36 Daniel Goleman, *Emotional Intelligence: Why it Can Matter More than IQ* (Bloomsbury 1996); Paula M Niedenthal et al (eds), *Psychology of Emotion: Interpersonal, Experiential, and Cognitive Approaches* (Psychology Press 2006) 162.

37 James R Averill, *Anger and Aggression: An Essay on Emotion* (Springer-Verlag 1982) (quoting Aristotle, 'Nicomachean Ethics' (1106b20) in R McKeon (ed), *The Basic Works of Aristotle* (Random House 1941).

38 Arlie R Hochschild, *The Managed Heart: Commercialization of Human Feeling* (University of California Press 1983); see also Vanda L Zammuner and Cristina Galli, 'The Relationship with Patients: "Emotional Labor" and its Correlates in Hospital Employees' in C E J Hartel et al (eds), *Emotions in Organizational Behavior* (Psychology Press 2004) 254, 251–83.

39 Australian norms, like those of the USA, dictate that judges 'not be swayed' by emotion and deem any emotionally influenced judicial action 'irrational': Sharon Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour' (2005) 32(4) Journal of Law and Society 590.

40 See also Mary Lay Schuster and Amy Propen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements' (2010) 6 Law, Culture and Humanities 75 (reporting similar findings among judges in Minnesota).

41 Ibid 89.

42 Anleu and Mack (n 39) 612.

As this *cri de coeur* suggests, we have stranded our judges. Not only have we tethered them to an unrealistic goal, but we have commanded them to carry out a highly sophisticated psychological task with no guidance as to how. I already have offered a solution to the first problem, which is to abandon pretensions of dispassion. The solution to the second problem is nowhere near as straightforward. Fortunately, we have an excellent guide – a robust, well-validated body of contemporary psychological research on emotion regulation.[43]

As I have elaborated at greater length elsewhere, applying this body of research to the judging context yields a promising model for judicial emotion regulation, one that encourages judges to engage with their emotions rather than avoid, suppress, or deny them. I cannot do full justice to that model here, but I will outline its fundamentals.

Emotion regulation may be pursued by way of a diverse array of strategies, all designed to change either the emotion-eliciting situation, one's thoughts about that situation, or one's responses to that situation.[44] Each strategy has distinct costs, benefits and effects on decision-making.[45] All have both occasional utility and maladaptive manifestations, the latter of which may include causing paradoxical or unintended effects.[46] Simplistic ideas about emotion tend to lead to simplistic regulatory choices, which often will prove a poor fit with a complicated reality.[47] Poor regulatory choices can be remarkably impervious to correction through experience. Finally, the most critical regulatory capacity is flexibility.[48]

A sound model for judicial emotion regulation identifies relatively stable attributes of judging that render particular strategies generally more or less well suited to that context and prioritises those with greatest inherent flexibility. That model indicates the following about the major categories of regulatory strategy, presented here in descending order from the most promising to the most maladaptive.

The most promising judicial emotion regulation strategy is *cognitive reappraisal*. Reappraisal involves changing one's thoughts in order to feel a desired emotion or avoid an undesired one. Imagine fear upon seeing a snake. To reappraise that fear requires a change in one's perception (it's actually a curvy stick), evaluative judgment (that type of snake is harmless), or goal (I don't value my physical safety). So, for example, a judge may decide to think about a neglectful parent not as a person who is trying to harm her child, but rather as someone who is not presently equipped to handle parenting. That mental shift might spur compassion (rather than, say, disgust or anger) and focus the judge on a new goal, such as determining whether and how the legal system could help the parent do better. Cognitive reappraisal can also help judges achieve relative emotional neutrality. Experiments have consistently shown that people asked to view disturbing images 'with the detached interest of a medical professional' and to 'think about them objectively and analytically rather than

43 James J Gross, 'Preface' in Gross (n 30) xi–xiv and figure P1; Sander L Koole, 'The Psychology of Emotion Regulation: An Integrative Review' (2009) 23 Cognition and Emotion 4, 5.

44 Gross and Thompson (n 30) 10. Another common strategy is to alter one's subjective and physical state with drugs and alcohol. Josh M Cisler et al, 'Emotion Regulation and the Anxiety Disorders: An Integrative Review' (2010) 32 J Psychopathology and Behav Assessment 68, 75. Because this tactic is so obviously off-limits to on-duty judges, I do not discuss it.

45 Renata M Heilman et al, 'Emotion Regulation and Decision Making Under Risk and Uncertainty' (2010) 10 Emotion 257.

46 See, e.g. <http://selfcontrol.psych.lsa.umich.edu/>; Gross (n 33) 224; Koole (n 43) 6.

47 Tanja Wranik et al, 'Intelligent Emotion Regulation: Is Knowledge Power?' in Gross (n 30) 393–407, 400, 403; Koole (n 43) 22.

48 Nancy Eisenberg et al, 'Effortful Control and its Socioemotional Consequences' in Gross (n 30) 287–306, 290; James J Gross, 'Emotion Regulation: Affective, Cognitive, and Social Consequences' (2002) 39 Psychophysiology 281, 289.

as personally, or in any way emotionally relevant' feel and display fewer emotions than control subjects.[49] Such reappraisal has virtually no costs; indeed, it appears to enhance memory. Adopting such a professional attitude is a form of cognitive pre-commitment that changes how the mind processes stimuli. To a doctor, a wound becomes less disgusting than informational; focusing on its informational value for diagnosis and treatment allows the doctor to bypass any disgust reaction. Similarly, judges can learn to treat vivid stimuli as professionally relevant rather than personally provocative.

Reappraisal is the strategy that most closely conforms to our present expectations of judges. However, to be effective consistently and over the long term it must be acknowledged, trained, and practised. Further, such reappraisal cannot always be relied upon, for judges will encounter situations that cause even the most practised professionalism to crack. Consider a recent video posted on YouTube of a judge screaming angrily at a mother accused of child neglect. Interviewed afterwards, he confessed, 'I reacted humanly; I try not to do that.'[50]

Another strategy that often will be highly adaptive for judges is *disclosure*. Disclosure usually takes the form of talking or writing about one's emotions and the experiences that prompted them. As highly stigmatised as judicial emotion disclosure is, judges might be expected to do this privately (with family and friends) if at all. Even such private disclosure is likely to be productive: though thinking and talking about emotions does not generally lessen their intensity, it enhances self-knowledge, allowing judges to build 'a specific and detailed data bank' about their emotions from which they can draw lessons.[51] Disclosure also draws others into that evaluative process and, over time, helps one live with emotion more comfortably. However, private disclosure is unlikely to be sufficient. Sharing emotional challenges with other judges would be particularly beneficial, strengthening camaraderie and facilitating mutual support.[52] After all, who could have more insight than another judge? Unfortunately, peer disclosure appears rare. One prominent judge told me that he had never had such a discussion with judicial colleagues and did not think they would be open to such conversation. Another US federal judge wrote that he had once broached the subject of the emotional difficulty of criminal sentencing with a senior colleague, only to receive a vague assurance that it would 'get easier'.[53] Loosening the expectation of dispassion would make peer disclosure more likely, as judges would be less worried about harming their reputations by admitting emotional reactions.

Public disclosure may also be beneficial. Though it is rare, judges occasionally publicly acknowledge emotion: both of the previously mentioned judges wrote articles doing so,[54] and judges occasionally let emotion show in written opinions, often in dissent. Public disclosure has many potential benefits. It would normalise judicial emotion and draw the broader community into the emotion-evaluation process. However, some caution is warranted. As discussed in the section to follow, disclosure's benefits are likely to vary

49 J P Hayes et al, 'Staying Cool when Things Get Hot: Emotion Regulation Modulates Neural Mechanisms of Memory Encoding (2011) 4 Frontiers in Human Neuroscience 1–10; Jane M Richards and James J Gross, 'Emotion Regulation and Memory: The Cognitive Costs of Keeping One's Cool' (2000) 79 Journal of Personality and Social Psychology 410.

50 Maroney, 'Angry Judges' (n 2).

51 Pierre Philippot, Aurore Neumann and Nathalie Vrielynck, 'Emotion Information Processing and Affect Regulation: Specificity Matters!' in Marie Vanderkerckhove et al (eds), *Regulating Emotions* (Blackwell 2008) 202, 206.

52 Bernard Rimé, 'Interpersonal Emotion Regulation' in Gross (n 30), 474 and table 23.1.

53 Mark W Bennett, 'Heartstrings or Heartburn: A Federal Judge's Musings On Defendants' Right and Rite of Allocution' (2011) (March) The Champion 26, n 1.

54 Alex Kozinski, 'Teetering on the High Wire' (1997) 68 U Colo L Rev 1217.

considerably depending on the judge's objectives, the manner in which it is done, and the emotion at issue; expressions of anger, disgust and contempt may be uniquely dangerous.

A strategy that is often necessary, but highly costly, is *behavioural suppression*. Behavioural suppression involves inhibition of expressive behaviour, such as facial expression (e.g. smiling), verbalisation (e.g. groaning), or bodily movement (e.g. cringing). Physical impassivity is generally what we expect of judges. That expectation is not entirely irrational, for it serves at least two important purposes. A judge who projects little emotional responsivity models good courtroom decorum, which others may mimic.[55] Such a judge also blocks others from perceiving her appraisals. Imagine a judge who believes that a witness is shading the truth, but knows that a jury, not she, is entrusted with making the credibility determination. The judge needs to mask any anger, disgust, or contempt, lest the jury see (and presumably rely upon) what it broadcasts about the judge's opinion of the witness. Unfortunately, though, behavioural suppression is effortful and comes at a cost. Suppression consumes cognitive resources, impairing memory and one's ability to engage in logical reasoning.[56] As one prominent contemporary scholar of emotion regulation summed it up, behavioural suppression makes a person temporarily 'stupider'.[57] Nor do these costs tend to pay off in terms of directly changing emotion. Not only does behavioural suppression not lessen the intensity of negative emotion, it may magnify physiological responses.[58] Adopting a 'poker face' thus is beneficial only where it serves some critical judicial function, such as maintaining order; it is not a steady state toward which judges always should aspire.

Judges have limited ability to engage in another common strategy: *situation selection* and *modification*. Situation selection involves choosing or avoiding situations because of their anticipated emotional effect; modification refers to altering the situation's features. An example of judicial situation selection would be to choose the court in which one serves. A judge might avoid the family court if she believes that exposure to distressed families will be depressing, or seek appointment to the probate court if she believes that she will feel pride in helping grieving families settle their affairs. Such self-selection might be beneficial if the judge's predictions are accurate – and there is reason to believe they may not be, unless preceded by experience; a judge seeking to transfer out of the family court, for example, is on better footing in this regard than one seeking to avoid it. But few judges have such a luxury, and many serve in courts of general jurisdiction in any event. Judges may also try to exert control over the cases they hear. This strategy is likely to be even less possible. Judges can recuse themselves from cases only for specific reasons, such as when it implicates a personal interest; avoiding emotion is not one of those reasons.[59] Few courts have discretionary jurisdiction, and even those that do – like the US Supreme Court – cannot forever avoid deciding certain issues. But if a judge generally cannot avoid emotional situations, she might be able to modify them. For example, she might schedule gruesome evidentiary testimony on a day that will permit frequent breaks, or delegate aggravating tasks – such as interacting with

55 Anleu and Mack (n 39) 614.

56 Barnaby D Dunn et al, 'The Consequences of Effortful Emotion Regulation when Processing Distressing Material: A Comparison of Suppression and Acceptance' (2009) 47 Behavior Res and Therapy 761, 764 n 2; R Baumeister et al, 'Ego Depletion: Is the Active Self a Limited Resource?' (1998) 74 J Personality and Social Psychol 1252; Jane M Richards and James J Gross, 'Personality and Emotional Memory: How Regulating Emotion Impairs Memory for Emotional Events' (2006) 40 J Res in Personality 631.

57 Conversation of Terry A Maroney with James J Gross (5 March 2010).

58 James J Gross and R W Levenson, 'Emotional Suppression: Physiology, Self-report, and Expressive Behavior' (1993) 64 J Personality and Social Psychol 970–86.

59 Only rarely, when a judge's emotional reaction to a party rises to the level of threatening fundamental fairness, will recusal be appropriate: *Liteky v US*, 510 US 540, 555–56 (1994).

obnoxious attorneys on scheduling issues – to a clerk. It is reasonable to assume that judges routinely make such small accommodations, with little impact on the quality of judging. However, courtroom management responsibilities may foreclose many modifications. The judge may not, for example, decline to set scheduling orders with bothersome attorneys. Nor may she walk out of the courtroom to take a break whenever she wants one, particularly if she has a busy docket or is sitting on a judicial panel.[60] Further, judges often must face emotionally vivid stimuli so as to control the extent to which *others* are exposed to it. For example, if the judge must decide whether the jury should be permitted to view a gruesome autopsy photo, she must look closely at the photo herself. Avoiding and altering emotionally vivid situations therefore is only of limited use to judges.

Attentional deployment and *distraction* are closely related to avoidance and modification, but take place internally: one modifies emotional response by refusing to attend to the provocative stimulus. Instead, one looks at or thinks about something else, reads, hums a song, and so on. This approach will virtually never be appropriate. It is not hard to see why: if we expect anything of our judges, it is to pay attention to all relevant aspects of a case, including the unpleasant ones. For similar reasons, *mindfulness* is not obviously compatible with judging. Drawn from the Buddhist tradition, mindfulness emphasises observation and acceptance of mental phenomena, including emotion.[61] At the risk of oversimplification, its explicitly nonjudgmental approach might conflict with the task of a judge – that is, to judge. To be sure, attentional deployment, distraction, and mindfulness might all have some place in the judge's regulatory toolbox. Sometimes the judge will have the luxury (say, in chambers) of taking a mental break by playing sudoku; she might be able to introduce calming music, or glance at a picture of her family; and the precepts of mindfulness might help her judge herself less harshly if she is not always able to manage her emotions exactly as she would like.

Finally, seeking directly to *suppress emotional experience* is always likely to be maladaptive for judges, despite the fact that it is encouraged by the ideal of dispassion. Suppression can take various forms: 'steeling oneself', as when one resolves in advance simply not to feel any emotion in response to an anticipated stimulus; denial, as when one pretends that an emotion never existed or that it has been extinguished; and literal repression, described by Freud as a process by which unwanted emotional memories are displaced to the subconscious. Experiential suppression is a bad bet for a variety of reasons, the first being that it seldom works. Emotions cannot easily be headed off at the pass just by willing them to be so.[62] This is particularly true for judges, who cannot help but encounter novel, often extreme, situations for which they find themselves unprepared.[63] Moreover, experiential suppression, like its behavioural counterpart, comes at a high cost. It impairs logic, self-control and social judgment.[64] Pushing emotions out of mind also can result in ironic increase in their intensity, particularly when under stress or cognitive load (as judges usually

60 One judge told me that he did sometimes simply walk out so he could pull himself together; however, he was the sole judge in a small, rural jurisdiction and had virtually total control over his courtroom. Maroney, 'Emotional Regulation' (n 2) 1525.

61 Koole (n 43) 27.

62 Richard Chambers, Eleonora Gullone and Nicholas B Allen, 'Mindful Emotion Regulation: An Integrative Review' (2009) 29 Clinical Psychol Rev 560, 566; Koole (n 43) 6 ('people may still display unwanted emotions despite their best efforts').

63 See, e.g. *In re Skyler M*, 2007 WL 2109797 (Cal App 2 Dist) ('All my years of sitting here, I don't think I've ever seen a doctor cry on the witness stand.').

64 Daniel M Wegner, *White Bears and Other Unwanted Thoughts: Suppression, Obsession, and the Psychology of Mental Control* (Guildford Press 1989) 81–82; Iris B Mauss, Silvia A Bunge and James J Gross, 'Culture and Automatic Emotion Regulation' in Vandekerckhove et al (n 51).

are).[65] Emotional suppression can harden into a repressive coping style, associated with poor health outcomes[66] and arrogance.[67] The former is relevant to judges primarily as people (though it raises the prospect of longevity costs), but the latter clearly is of great concern for judges qua judges.

In sum, judicial emotion is best regulated not by turning away from it, but rather by turning toward it. The ideal of judicial dispassion encourages overconfidence in the ability of judges to eliminate emotion by willing themselves not to feel it, denying that they do, and controlling its outward expression.[68] Judicial emotion suppression is the sort of maladaptive regulatory cycle that resists self-correction, particularly since it is societally reinforced. Instead, we ought to encourage judges to prepare realistically for inevitable emotional challenges, process and respond thoughtfully to any emotions they may have, and selectively integrate those emotions into their decisional processes. The ideal of the dispassionate judge thus might be replaced by that of the emotionally well-regulated judge.

Judicial anger: an illustrative example

To be successful, a new model for thinking about judicial emotion must be both theoretically sound and functional on the applied level. I therefore will briefly demonstrate how it may be applied to judicial anger.[69] Anger is a fitting focus, for it is both one of the most common judicial emotions and the one judges feel most free to express. Written opinions, news reports, new media sources such as YouTube, and judges' self-reports amply demonstrate the ubiquity of anger. Lawyers are the most common targets, followed by litigants (including criminal defendants), witnesses, and other judges. The most common triggers for judicial anger are incompetence (particularly on the part of lawyers), disrespect, unwarranted harm inflicted on others, and lying.

Anger is quintessentially judicial.[70] It follows assessment that a rational agent has committed an unwarranted wrongdoing, either because she intended to harm or was neglectful where care was warranted.[71] Once triggered, anger both generates a desire to affix blame and assign punishment and facilitates actions necessary to carry out that desire. From this perspective it is hard to see how judges could fail to feel anger, or how they could do without it, given the rather precise match between its core attributes and much of what we ask judges to do. Certainly, judges might be able to render many decisions in a cold, clinical manner and reach equivalent outcomes.[72] But if valuing the judges' humanity means anything – if we retain a strong intuition that we would choose a judge over a decision-generating robot – it means retaining a capacity for righteous anger. A judge ought to care about her work and the affected persons. If she does, it would be impossible for her to feel

65 Wegner (n 64) 122–24; George Loewenstein, 'Affect Regulation and Affective Forecasting' in Gross (n 30) 180–203, 190–91; Niedenthal et al (n 36) 176.

66 Chambers et al (n 62) 564.

67 Koole (n 43) 20.

68 Wegner (n 64) 15. Overconfidence discourages self-examination and learning. See e.g. Stuart Oskamp, 'Overconfidence in Case-study Judgments' in Daniel Kahneman et al (eds), *Judgment under Uncertainty: Heuristics and Biases* (CUP 1982) 287–93.

69 A far more extended treatment, including a detailed description of specific episodes of judicial anger, may be found in Maroney, 'Angry Judges' (n 2).

70 Indeed, in many religious traditions deities are thought of as righteously angry judges. Michael Potegal and Raymond W Novaco, 'A Brief History of Anger', in Michael Potegal et al (eds), *International Handbook of Anger* (Springer 2010) 9–24.

71 James R Averill, *Anger and Aggression: An Essay on Emotion* (Springer-Verlag 1982) 248–49.

72 This was Seneca's position, but it is one that has few adherents. Seneca, *De Ira* (Loeb Classical Library AD 40–50/1963).

nothing when determining that a fellow human has raped a child, cheated a pensioner, violated a direct order to produce vital documents, lied under oath and so on. As Robert C Solomon put it, we cannot 'have a sense of justice without the capacity and willingness to be personally outraged'.[73]

But anger seems also to pose a danger to neutral, careful decision-making, a quality as valued in a judge as a sense of justice.[74] Anger tends to trigger relatively shallow patterns of thought, increasing reliance on heuristics and stereotypes. It can lead to premature decisions, as the angry person tends to be very certain of her judgment and may resist new or conflicting evidence; it also has been shown to increase punitive, perhaps even disproportionately punitive, actions. Anger triggered by one cause can easily bleed over into unrelated contexts. Finally, it can manifest itself in aggression and violence. Each of these characteristics is deeply threatening to competent judicial performance.

Judicial anger must therefore be carefully regulated. Because it is so common, the US courts have developed a rough template for its post hoc assessment. Some judicial anger is considered right and proper (for example, being 'appropriately angered' by a defendant who made false accusations of government misconduct in order to waste resources);[75] most is thought to fall within an unfortunate but understandable buffer zone (including 'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display');[76] and a small slice is deemed improper, because it bespeaks bias,[77] prompts carelessness or haste,[78] suggests a poor judicial temperament,[79] or demonstrates unfitness to serve.[80] These hindsight categories are functional enough, though they have a 'we-know-it-when-we-see-it' quality. But what is most needed is a system for shaping judicial anger experience and expression in the first instance. Emotion regulation serves that function.

First, if the judge knows she is going to encounter an angering situation – such as a criminal sentencing of a defiant and 'reprehensible' person – she can prepare realistically by acknowledging that he is going to make her angry and choosing a response pattern in advance. She may think carefully about her professional role, which – she may decide – includes expressing anger on behalf of the public and any victims, making victims feel welcome, and denying the defendant the satisfaction of having 'gotten to' her. If those are her goals, she may decide to maintain a poker face while the defendant speaks, treat victims with warm courtesy, and read prepared remarks so she can control exactly how she communicates anger. Executing such a plan will be easier the more accurately the judge predicts how the hearing is likely to unfold. Judge Mark Bennett, for example, consistently encounters 'infuriatingly insincere nonsense from sophisticated, highly educated white collar defendants'.[81] Experience with such recurrent triggers helps the judge formulate realistic anger regulation plans.

73 Robert C Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* (Addison-Wesley 1990) 34, 42.

74 For a thorough review of anger's behavior effects, see Paul M Litvak, 'Fuel in the Fire: How Anger Impacts Judgment and Decision-Making' in Potegal et al (n 70); Jennifer S Lerner and Larissa Z Tiedens, 'Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition' (2006) 19 J Behav Dec Making 115, 117.

75 *Campbell v US*, 2010 WL 1379992 (SD West Virginia, 10 March 2010).

76 *Liteky v US*, 510 US 540, 555–6 (1994).

77 *Harrison v Anderson*, 300 F Supp 2d 690 (SD Indiana 2004).

78 *Sentis Group v Shell Oil*, 559 F 3d 888 (8th Cir 2009).

79 *McBryde v Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of US*, 264 F 3d 52, 54–55 (DC 2001).

80 *In re Sloop*, 946 So 2d 1046, 1051, 1053, 1057 (Fla 2007) (per curiam).

81 Bennett (n 53) 26.

Life being unpredictable, these plans will not always pan out. One defendant surprised his judge by spitting in her face;[82] another mocked the judge;[83] another lobbed extremely profane insults.[84] Judges therefore need a plan to cope with anger that could not be (or simply was not) avoided. Cognitive reappraisal is critical here as well. It can help judges discern (a) what their anger is about, and whether it (b) rests on an accurate assessment of reality, (c) reflects proper judicial values, and (d) can or should be rethought. For example, if a judge reacts angrily because a litigant appears to be violating an order to sit down, she could consider the possibility that the litigant is simply confused.[85] If she is angry at an attorney who announces that he has prevailed against her on appeal, she may remind herself that he had a right to appeal and that the legal system depends on her acceptance of such judgments.[86]

Reappraisal requires self-awareness, which is beneficial for other reasons as well. A judge who is both self-aware and aware of the common effects of anger will be in a far better position to regulate her behaviour. She will be in a better position to suppress angry behaviours when appropriate. If she feels like she has a short fuse on a given day, she may be more careful than usual in asking herself if she is truly angry at *this person* for *this incident*, or whether anger is being displaced. A judge who sees herself precipitously declaring the proceedings 'done' and imposing the harshest possible sanction might realise that she needs to take a minute (or more) to gather herself before finalising any decisions.[87]

Self-awareness is also furthered through productive disclosure. By discussing their feelings with trusted others and peers, judges can enlist support in recognising what tends to make them angry, how they tend to act, and how anger has helped or hindered their judging. Public disclosure can help as well. When Judge Gregory O'Brien Jr wrote an article discussing the causes of his frequent anger and how he learned to overcome it, it represented an important step in lessening that anger and lengthening his career – and it helped the public to better understand the challenges judges face.[88]

In contrast, seeking to suppress or deny anger is a dangerous path. Judges have been removed from the bench for so aggressively trying to tamp down anger that they blow up in extreme and unpredictable ways.[89] The health risks of emotion suppression are particularly severe for this emotion, and the callous arrogance that suppression breeds is of special concern given judges' extraordinary power over people's lives.

Here, a special note of caution is warranted: that anger suppression is bad does not signify that unfettered anger disclosure is good. Making anger known can be destructive in a way that showing other emotions, like sadness, generally cannot. Consider the Wisconsin judge who publicly referred to his colleague as a 'total bitch',[90] or the federal judge who stunned the audience at an oral argument by accusing a colleague of hogging time and

82 'How to Piss Off the Judge' (13 August 2009) <www.youtube.com/watch?v=uCNo4ky6GXE>.

83 'Judge, Defendant Spar During Sentencing' (Associated Press, 24 March 2009) <www.youtube.com/watch?v=X7Z4LQO6B58>.

84 Mary Lay Schuster and Amy Propen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements' (2010) 6 Law, Culture and Humanities 75, at 93.

85 <http://wn.com/Judge_loses_it_on_cam,_jails_man_for_sitting_too_slow>.

86 *Anderson v Sheppard*, 856 F 2d 741 (6th Cir 1988).

87 *Sentis Group v Shell Oil*, 559 F 3d 888 (8th Cir 2009).

88 Gregory C O'Brien Jr, 'Confessions of an Angry Judge' (2004) 87 Judicature 251, 252.

89 *In re Sloop*, 946 So 2d 1046, 1051, 1053, 1057 (Fla 2007) (per curiam).

90 'Justices' Feud gets Physical' *Milwaukee-Wisconsin Journal Sentinel* (Milwaukee, 25 June 2011).

suggesting that he leave the courtroom.[91] Anger also appears to be distinct from many other emotions in that giving it voice can increase its potency.[92] Judges can come to enjoy the sense of power, confidence, and control anger brings. The case law is replete with judges who repeatedly belittle, abuse, insult, humiliate and lash out at litigants, attorneys and even colleagues, and these incidents are typically infused with great anger. These dangers highlight the great importance of cultivating judicial anger-management skills.

In short, competent anger regulation will help a judge prepare realistically for anger, for it is certain to come; respond thoughtfully to anger, for she may be able to rethink the situation or select a different response; and integrate anger selectively, by making use of it when it is helpful to do so and by finding other outlets – such as private disclosure to a trusted colleague – when it is not.

Conclusion: toward a new ideal of emotionally intelligent judging

This article has briefly set forth the fundamental flaws in the ideal of judicial dispassion, made the case that judges are best advised to engage with rather than suppress their emotions, and demonstrated how taking such an approach can maximise beneficial iterations of judicial anger while minimising destructive ones.

Unfortunately, neither law schools nor judicial institutes routinely address these issues, let alone provide the necessary training; this appears to be as true in the British Isles as in the USA. The US medical profession, facing a strikingly similar challenge, has begun to do so, with uniformly positive results. Though the research remains preliminary, it seems that more emotionally intelligent doctors are not only happier, more well-adjusted people, but better doctors as well.[93] One highly promising move would be to develop a parallel approach for judicial education. A comparative approach might also yield important insights. Particularly in the Continental system, judges are more coherently trained than in the US and in the British Isles, where judges train as lawyers and are either appointed or elected straight out of practice. The career-track model of judging therefore may provide more natural opportunities for training. It is also worth considering whether cultural differences might reliably track differences in judicial emotion and its regulation. In addition to pilot work that has begun in Australia,[94] a research duo has just begun to undertake an ambitious project to observe and analyse judges' emotions in Sweden. Were such studies to both proliferate and coordinate, the potential would be enormous.

Judicial emotion is truly *terra nova* for legal scholars, psychologists, sociologists, and so many others. One hopes that more brave judges will step forward to share their experience and help us navigate this terrain. Let's go.

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91 Debra Cassens Weiss, '5th Circuit Oral Arguments Turn Contentious when Chief Judge Tells Colleague to Shut Up' *ABA Journal* (Chicago 26 September 2011). It is highly likely that expression of certain other emotions, certainly contempt and probably disgust, has equally destructive potential. See Maroney, 'Angry Judges' (n 2).

92 B J Bushman, 'Does Venting Anger Feed or Extinguish the Flame? Catharsis, Rumination, Distraction, Anger, and Aggressive Responding' (2002) 28 Personality and Social Psychol Bull 724–31.

93 Jason M Satterfield and Ellen Hughes, 'Emotional Skills Training for Medical Students: A Systematic Review' (2007) 41 Med Educ 935; Daisy Grewal and Heather A Davidson, 'Emotional Intelligence and Graduate Medical Education' (2008) 300 J Am Med Association 1200, 1200–02; Kant Patel, 'Physicians for the 21st Century: Challenges Facing Medical Education in the United States' (1999) 22 Evaluation and the Health Profs 379–98; Stacey Teicher Khadaroo, 'Medical School Reinvented: Adding Lessons in Compassion' *Christian Science Monitor* (Boston, 15 September 2009) USA 2; L Granek, 'When Doctors Grieve' *New York Times* (New York, 27 May 2012) SR122.

94 Anleu and Mack (n 39).

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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.[1] 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.[2] The collapse of the public/private divide has permitted the penetration of emotions into the public space,[3] where they have become popular currency in an era of 'new punitiveness' and 'moral panics'.[4] 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.[5]

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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'.[6] The fear that victims, witnesses, defendants, lawyers and judges might be anything other than rational actors pervades the law in general[7] and sentencing process in particular.[8] 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'.[9] 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.[10]

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'.[11] 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.[12] 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.[13]

In a widely cited 2002 presidential address to the American Society of Criminology, Lawrence Sherman called for an 'emotionally intelligent' approach to criminal justice,[14] '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'.[15] 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.[16] 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'.[17]

This article draws on Sherman's vision and examines the place of emotions within the law and practice of sentencing within England and Wales.[18] 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.[19] 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.[20] 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.[21] 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

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.[22]

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.[23] 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.[24] 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.[25] Such verbalisation – which is the lynchpin of contemporary counselling and psychotherapy – can help reduce feelings of anger, anxiety and depression,[26] bolster self-confidence[27] and even improve physical health.[28] 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.[29]

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,[30] 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.[31] 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 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* (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.'[32] 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.[33]

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,[34] 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.[35]

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,[36] the literature is replete with references to anger, resentment, hatred, anxiety, depression, remorse, defiance and shame.[37] 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.[38]

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.[39] 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).[40] 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.[41] 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'.[42] However, the notion of 'voice' is perhaps one of the most renowned yardsticks for procedural justice.[43] 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.[44] 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.[45]

Victims clearly value the opportunity to tell offenders how the offence impacted upon them and have their questions answered.[46] 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.[47] 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.[48]

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.[49] Like victims, offenders are the owners of their stories and, as such, should ultimately control the message conveyed to the court on their behalf.[50] 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.[51] 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.[52]

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'.[53] 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.[54]

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.[55] 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.[56] 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.[57] 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.[58] 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.[59] 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.[60] 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,

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.[61]

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.[62] 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,[63] 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.[64] 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.[65] 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.[66]

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,[67] and this prospect is often an important factor influencing their decision to become involved in mediation and restorative justice (RJ) programmes.[68] 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.[69]

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'.[70] 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.[71] 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.[72] This would be particularly true in the case of first-time offenders.[73]

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.[74] 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.[75] This 'appropriation' of private conflicts[76] 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.[77] Whilst the end of the nineteenth century was marked by the emergence of participatory rights for the accused,[78] 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.[79] 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).

70 M Etienne and J K Robbennolt, '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.[80] The purpose of a PSR is to assist the courts 'in determining the most suitable method of dealing with an offender';[81] 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.[82]

To this end, PSRs are heavily based on probing interviews with a probation officer.[83] Their precise form and contents are laid down within the National Standards for the Management of Offenders,[84] 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.[85] 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.[86]

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.[87] 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.[88]

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

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,[89] which triggered a decision to change the majority of reports to a 'fast-delivery' format based on a 'tick-box' exercise.[90] 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.[91]

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.[92] 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.[93] 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.[94] 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.[95]

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

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.[96] 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.[97] 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.[98] Admittedly, determining the extent of remorse was an uncertain exercise; judges spoke of using 'experience and feeling' or 'gut feeling rather than careful calculation'.[99] Emotions also entered into sentencing where the sentencer believed that the prosecution process caused the offender to suffer emotionally.[100] Such suffering is sometimes treated as part of the punishment for the crime, thereby lessening the severity of sentence.[101] 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.[102]

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.[103] 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.[104]

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,[105] 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*.[106] 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 Saw*,[107] 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.[108] 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> 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> 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.[109] 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'[110] 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*,[111] 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*,[112] 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.[113]

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.[114] 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.[115] While many emotional responses would tend towards sentence aggravation, there were also limited instances where victims displayed emotional responses such as sympathy and empathy,[116] which could serve to mitigate the offender's sentence. These findings broadly correlate with other studies.[117] 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> 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> 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'.[118] 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.[119] 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.[120]

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.[121] 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.[122] This is a particularly salient finding given that studies suggest that victim impact evidence rarely influences sentencing decisions to a significant degree.[123]

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,[124] 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'.[125] 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 Propen, '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'.[126] 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 *Lebensweld* 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.[127] Intimate, informal and direct interactions generally act as precursors and conveyers of apology and forgiveness,[128] 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.[129] 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,[130] and turning witnesses into 'weapons to be used against the other side'.[131] There is no physical space or procedural mechanism though 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'.[132]

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;[133] 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,[134] 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> 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,[135] 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.[136] 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.[137]

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.[138] 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.[139] 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.[140]

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.[141]

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 Bandes (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 Bandes (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'.[142] 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'.[143] 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.[144]

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.[145] 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.[146] 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.[147] 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.[148] 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.[149] The aim of the youth conference, which is attended by the offender[150] and in which the victim is entitled to participate,[151] is to consider how the young person ought to be dealt with,[152] and if possible to draw up an agreed plan of action for addressing the offence – the so-called 'youth conference plan'.[153]. This is then returned to the Director of Public Prosecutions or to the court as appropriate[154] 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.[155] 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[156] 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).

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,[157] 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.[158] 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.

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.

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What do we know so far about emotion and refugee law?

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In this pioneering edition on emotion and law in the UK and Ireland it seems appropriate to return to Maroney's[1] 2006 review of the field and to start by clarifying where this paper will fit into her taxonomy.

Maroney proposes six areas of enquiry into how emotion is embedded in and drives the development of the legal circumscription of society. The first four are: (1) how a given emotion is reflected in the law (emotion-centred); (2) how particular mechanisms of emotion are reflected in the law (emotion-phenomenon); (3) how particular theories of emotion are reflected or utilised in law (emotion-theory) and (4) the study of how theories of emotion are reflected in legal theory ('theory of law'). This paper will address the other two, more applied questions, of how emotion is or should be reflected in doctrine or particular determinations (the 'legal doctrine' approach) and how particular legal actors' performances are – and where they perhaps should be – influenced by emotion (the 'legal actor' approach).

In this paper we will draw on studies examining what is loosely called 'refugee law'. We will outline the relevant aspects of the law available to people who flee situations of persecution and seek the protection of a state outside their own. We will then examine the way in which receiving states manage the decision to allow some people that protection, whilst at the same time managing their own state borders, which necessarily means a restriction on immigration. We will then look at the emotional aspects of this decision-making process, and where psychological science can be of use, both in the area of legal doctrine and in working with legal actors to ensure that this crucial area of decision-making is based on the best available science of human behaviour.

What is a refugee?

The definition of a refugee was constructed by a group of states that came together after the Second World War to write the Convention for the Protection of Refugees.[2] It was approved in Geneva in 1951 (hence it is commonly called the Geneva Convention on

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1 T A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 Law and Human Behavior 119.

2 Convention relating to the Status of Refugees 1951.

refugees), and it came into force in 1954. In 2011, there were 148 signatories to the Geneva Convention.

A refugee, as defined by the Geneva Convention, is a person who

> . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .[3]

This definition has been broadened in respect of Africa, where the term 'refugee' has been extended in a more recent convention to apply also to every person who

> owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[4]

Similarly, the 1984 Cartagena Declaration extended the definition of refugees in the Americas to

> . . . persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.[5]

Refoulement and asylum

The principle of non-*refoulement* is set out in art 33(1) of the 1951 Geneva Convention as follows:

> No Contracting State shall expel or return ['*refouler*'] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This principle applies not only to refugees, but to asylum seekers whose status has not yet been determined, and those seeking entry at a border.[6] The principle of non-*refoulement* is also prohibited by the Convention against Torture, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[7]

The European Union Directive 2004/83/EC additionally provides for subsidiary protection for every third-country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned would, if returned to his or her country of origin, face a real risk of suffering serious harm. Furthermore, member states of the Council of Europe must consider art 3 of the European Convention on Human Rights which requires that: 'No State Party shall expel, return [*refouler*] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Article 3 does not require a 'Convention ground'. In practice in the UK, the

3 Art 1(2).

4 Art 12.

5 Conclusion 3: see J Herlihy, C Ferstman and S Turner, 'Legal Issues in Work with Asylum Seekers' in J P Wilson and B Drozdek (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, and War and Torture Victims* (Brunner-Routledge 2004).

6 UNHCR, *Conclusions of the Executive Committee* No 6 (XXVIII) (UNHCR 1977).

7 Herlihy et al (n 5).

Refugee Convention, subsidiary protection and art 3 are considered concurrently; in the Republic of Ireland, protection rights under the Refugee Convention must be exhausted before subsidiary protection is considered.[8]

Refugee receiving states which are signatories to the 1951 Geneva Convention relating to the status of refugees, whilst bound to offer protection to persons fitting the definition of a refugee, are free to assess claimants by their own procedures. The United Nations High Commission for Refugees (UNHCR) has issued a number of non-binding documents to guide the task. Thus, paragraph 195 of the UNHCR Handbook states:

> The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.[9]

Such statements usually involve a history of persecution, which goes towards establishing their 'well-founded fear' of return for one of the five Convention reasons.

Decision-making in most receiving countries has two or more stages, allowing for an initial decision and the possibility of an appeal process. In the UK, the initial decision is taken by a state-employed case-owner, who interviews the claimant, reviews any paperwork and either allows the claim or writes a 'reasons for refusal' letter, addressed to the claimant and signed 'on behalf of the Secretary of State'. The claimant may then appeal to an independent tribunal, consisting of a single judge, usually with an oral hearing. Both the state and the judicial decision maker have an unusually difficult task. Unlike other areas of law there is often little or no corroborating evidence to the history given in support of the claim. The decision maker may draw on country evidence, that is, reports gathered about current situations in the alleged country of origin. Other than this, the judgment typically relies on an assessment of the credibility of the claimant and his or her account. All of this has to be performed within a highly politicised and media-dominated context of discussions about immigration, human rights and – rightly or wrongly – terrorism and crime.

This reliance on credibility makes refugee status determinations a particularly interesting area of law for psychological study. A recent report on the asylum process in the UK quoted immigration judges as saying that their task was to rely on 'common sense and experience'[10] to decide the credibility of the people before them, the plausibility of the histories they allege and the reliability of their testimony. However, many authors have highlighted the subjectivity of this approach.[11] A US-wide survey of refugee status determinations shows widespread inconsistencies of decision-making according to which court hears the claim, which countries claimants come from, the gender of the claimant and the gender of the judge, amongst other factors,[12] showing that there are biases which come to the fore in the absence of some additional methodology alongside the 'common sense' of the judge.

8 European Communities (Eligibility for Protection) Regulations SI No 518 of 2006 (article 4 in particular).

9 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 1979, re-edited 1992).

10 Independent Asylum Commission, *Fit for Purpose Yet? The Independent Asylum Commission's Interim Findings* (Independent Asylum Commission 2008).

11 A Macklin, *The Truth about Credibility* (International Association for Study of Forced Migration 2006); S Kneebone, 'Believable Tales: Credibility and Proving a "Well-founded Fear of Persecution"' (Conference on Law and Mental Health, Sydney, 2003); G Coffey, 'The Credibility of the Credibility Evidence at the Refugee Review Tribunal' (2003) 15 International Journal of Refugee Law 377; M Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations' (2003) 17 Georgetown Law Journal 1.

12 J Rami-Nogales, A Schoenholtz and P Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press 2009).

Jarvis[13] undertook an investigation of the factors taken into account by UK immigration judges. She found a lack of methodology and consistency in approach:

> The extent to which all judicial decisions rely upon the notion of 'commonsense' and, in turn, the meaning to a judge, of the term 'commonsense' (and the extent to which that is a fundamentally gendered concept) are matters that are not always apparent . . . even when they seem to be calling on it for aid when relying on myths and assumptions in decision making.[14]

In order to clarify some of the assumptions that immigration judges rely on in their decision-making, Herlihy, Gleeson and Turner[15] conducted a qualitative study of a series of UK determinations. UK immigration judges are required to produce a written determination, outlining the claim before them, the law relied on and the decisions that go to make up the final judgment to allow or dismiss the appeal. A copy of this written determination is made available to the appellant. Using an initial sample of determinations, a coding structure was developed which defined assumptions about people's behaviour, intentions, motivations, knowledge and the way they tell their stories. These definitions were used to build a data set of 117 assumptions, which were then subjected to an inductive – data-driven – thematic analysis.

Three major themes became apparent in the data. Firstly, assumptions were made about how a credible claimant 'would have behaved' in situations of fear or traumatic experience: for example, who makes decisions about what a family does following serious threat, or how threat is interpreted by individuals and families. For example, the husband who 'sent [his wife] to this country ahead of anyone in his own family, including his sister, who had been raped' was seen to be non-credible. This theme in the data also includes the notion of plausibility, which immigration judges draw upon to assess situations presumably outside of their own experience. In the words of one judge, for example: 'I do consider it implausible that a family in fear, on seeing a man throw something over the fence and into their garden . . . would go to investigate it.'[16]

Secondly, assumptions were made about how people behave through the asylum-seeking process, knowing the correct procedures and, more interestingly from a psychological point of view, behaving appropriately. This included basing credibility judgments on the concrete behaviour of applying for asylum immediately upon arrival, as well as the less obvious assumptions that claimants will know and use appropriate language and behaviour in the court. For example, of a man alleging persecution on the grounds of his sexuality, from a country where homosexuality is illegal, the judge writes: 'the appellant denies having slept with the sponsor, which the sponsor [a UK citizen] says has occurred'.[17] Another judge noted that 'none of the three witnesses testified about any of the hardships faced by the appellant and her family'.[18] Both of these examples assume that the appellant and family or friends understand and have accepted both their role in the court and what they are expected to speak about. This theme also raises questions about the cross-cultural communication in the court and how well the 'rules of conversation' of the different cultures (of court and appellant) are understood by all parties.

13 C Jarvis, 'The Judge as Juror Re-visited' [2003] Winter Immigration Law Digest 7.

14 Ibid 9.

15 J Herlihy, K Gleeson and S Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments' (2010) 22 International Journal of Refugee Law 351.

16 Ibid 358.

17 Ibid 360.

18 Ibid.

The third theme identified was to do with assumptions about the nature of a truthful account. Internal consistency in details across repeated questioning, early disclosure of all material facts and lay assumptions about memory were all being relied upon to indicate a fabrication of accounts in order to make a false claim for protection. In the words of one judge, 'given that rape is such a serious thing to happen to any woman, I would have expected a raped person to know when they were raped. This is not the type of event which I would expect a person to forget about or confuse.'[19] In another case a judgment that an account was true was based on an assumption about the consistency of memory, the judge remarking that the applicant 'was able to withstand a cross examination from Mr H that lasted for over one hour without any serious discrepancies coming to light'.[20]

The important question raised by this study lies not in the individual examples, but in the assumptions on which they are based. All are questions of human behaviour, or intention, or response to situations. All are areas of psychological enquiry, some of which have an extensive knowledge base, built on the scientific hypothetico-deductive model. Some of the assumptions identified in this study were in line with the latest psychological research. Some were not. The contention raised by this study is that, in such a crucial area, decisions based on assumptions about people's behaviour, intentions and motivation should draw on the latest and best available scientific knowledge about human behaviour, not least as the outcome could be a matter of life or death.

The scientific background

In this section we will review some of the scientific investigations which have specifically aimed to illuminate aspects of refugee decision-making. These studies differ in their methodology both from legal research and from social research. In legal and social research, the discovery of one or more examples of a case or a principle is an important finding, as it demonstrates, for example, guidance being ignored, or a law being misapplied.[21] Quantitative psychological research, on the other hand, relies on hypothesis-testing based in methods developed in the physical sciences. It sets out to test general theories of emotion and behaviour as applied to groups of people, for example, mechanisms of fear-conditioning. This type of research, if valid, can be replicated in other settings. If similar results are found in a second study, by different researchers, we can be more confident that the construct we are measuring is something real 'in the world'.[22] Thus, these enquiries, despite sharing the language of 'research', fulfil different albeit complementary functions.

We shall now consider two key areas in which research of this nature can illuminate the ways in which decisions as to refugee status are taken, the first relating to the emotions of the claimant, and the second to those of the decision-maker.

The emotions of the claimant

The asylum claim relies very heavily on memory. Although the core of the claim is 'future risk [of persecution]', it is currently generally accepted that the best – possibly the only – way to establish this is by describing events which have already happened, giving rise to a 'well-founded fear' of what could happen in the future. Claimants thus have to describe to officials, lawyers, decision makers and sometimes expert witnesses, what are usually the worst moments of their lives, including torture, sexual torture, loss of loved ones and

19 Herlihy et al (n 15) 361.

20 Ibid 362.

21 We are grateful to Debora Singer of Asylum Aid <www.asylumaid.org.uk> for articulating this distinction.

22 See <www.thepsychologist.org.uk/archive/archive_home.cfm?volumeID=25&editionID=213&ArticleID=2059> for a paper and discussion about the issues of replication in psychological studies.

extreme hardship and survival. It is here that psychological research on memory can be of immense significance. We will first consider autobiographical memory generally, and then the more specific case of recalling and retelling traumatic experiences.

Autobiographical memory and seeking asylum

Autobiographical memory serves a number of functions.[23] First of all, the recalling and telling of episodes from the past helps us to develop, maintain and nurture social bonds. Secondly, our personal past is our guide to our behaviour in the present; it gives us examples of key events that helped to develop our morals and our emotional responses, and it helps us explain to ourselves and others the decisions we make about life directions. Accordingly, our stories of the past will be updated and developed in the light of new understandings about ourselves and the world. Thirdly, our autobiographical memories guide our definition and expression of our own identities and sense of self, and the changing self, maintaining our sense of 'biographical identity'.[24] In the context of traumatic experiences, which challenge the self, memories can be modified and refined in order to protect, or rebuild, a sense of self. As a possible example, a young man interviewed twice about a police interrogation said on the first occasion 'we were slapped around', but on a later occasion 'we were badly beaten'.[25]

In general, it seems that autobiographical memory is an exercise of reconstruction, not reproduction, as was once thought. As has been said:

> contrary to common lay opinion, research over the last 50 years has provided compelling evidence to suggest that autobiographical remembering is not an exact replaying of an event. This type of memory is a reconstruction of events based on several elements and subject to distortion as well as failure (forgetting or false remembering).[26]

Thus, we see a chasm of understanding between the demands of memory made by the asylum system – for reliable, legal evidence – and a psychological process, which has developed to be socially interactive, flexible and open to being updated and refined as needed.

Traumatic memory

In addition to autobiographical memories of adverse experiences, there may also be traumatic memories. When recounting a normal event, we are able voluntarily to retrieve a verbal narrative, with a beginning, middle and end, and a sense of being in the past. This narrative is updateable, as described above, should new information become available. However, traumatic memory has some quite different attributes. This is a sensory 'snapshot' of the traumatic moment – perhaps just the sound of screams, the image of a face, or a feeling of pain; it is without narrative structure and, crucially, does not have a sense of being in the past but is 're-experienced', as if it were happening in the present. These memories are not available for updating.[27] They are not voluntary, as normal

23 For a fuller review of autobiographical memory and the asylum process, see J Herlihy, L Jobson and S Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' 26 Applied Cognitive Psychology 661–76.

24 Ibid.

25 J Herlihy, P Scragg and S Turner, 'Discrepancies in Autobiographical Memories: Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 British Medical Journal 327.

26 Herlihy et al (n 23).

27 Indeed one of the principal tasks of psychological therapy is to make such memories available in such a way that updating information can be incorporated, in order that the memory can be integrated into the rest of the person's identity and life story.

memories, but triggered, by external or internal cues (such as the sight of someone in uniform, a pain, or a feeling of guilt).[28]

Most people recover from traumatic experiences, given time and the right kinds of family and social support.[29] However, for some people[30] a pattern develops of persistent, sudden re-experiencing of traumatic memories, strong efforts to avoid the triggers of the memories, and a variety of symptoms of hyperarousal, such as sleep disturbance, irritability or anger, loss of concentration, an elevated startle response and hypervigilance. These comprise the symptoms of post-traumatic stress disorder (PTSD).[31] However, even without reaching the threshold of a diagnosis, these symptoms can seriously impede the process of making a claim for protection. PTSD avoidance symptoms in particular may include conscious avoidance, such as an effort not to speak or think or have feelings about the traumatic event. However, they can also include symptoms which are not under the conscious control of the individual, such as emotional numbing, or dissociation – 'cutting out' – under even moderate stress. In addition to PTSD, refugees often develop symptoms of depression: persistent low mood; loss of pleasure or interest in activities previously enjoyed; changes in appetite; changes in weight; sleep problems; fatigue or loss of energy; diminished ability to think or concentrate or indecisiveness; feelings of worthlessness or excessive guilt and recurrent thoughts of death or of harming or killing themselves.[32] However, it is not necessarily the diagnosis of depression which holds the key to understanding an asylum seeker's possible difficulties with the legal processes he or she has to traverse. People are asked factual questions about their country, to establish their provenance, and feelings of worthlessness can lower a person's confidence in their memory and knowledge, leaving them appearing unsure – and hence not credible. Similarly, poor concentration, or simply not having slept for more than a few hours together for many months, can make a person poorly equipped for lengthy, detailed interviews about their present and past circumstances.

Recall and disclosure of sexual violence

Following experiences of sexual torture, different patterns of psychological responses have been observed and, again, these are of great relevance to the process of claiming asylum. Whereas in survivors of torture generally intrusive memories are common, in survivors of sexual violence it is the avoidance symptoms that are more prevalent.[33] This effect has been replicated and linked to dissociation and shame. In a study of 27 asylum seekers in the

28 C Brewin, T Dalgleish and S Joseph, 'A Dual Representation Theory of Posttraumatic Stress Disorder' (1996) 103 Psychological Review 671; C Brewin, 'A Cognitive Neuroscience Account of Posttraumatic Stress Disorder and its Treatment' (2001) 39 Behaviour Research and Therapy 373; C Brewin et al, 'Intrusive Images in Psychological Disorders: Characteristics, Neural Mechanisms and Treatment Implications' (2010) 117 Psychological Review 210.

29 B Andrews, C R Brewin and S Rose, 'Gender, Social Support, and PTSD in Victims of Violent Crime' (2003) 16 Journal of Traumatic Stress 421.

30 PTSD is more likely after certain types of events, particularly interpersonal trauma, with torture being the most likely to give rise to PTSD: see, e.g. D Lee and K Young, 'Post-traumatic Stress Disorder: Diagnostic Issues and Epidemiology in Adult Survivors of Traumatic Events' (2001) 13 International Review of Psychiatry 150.

31 For the relevant diagnostic criteria, see American Psychiatric Association, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (APA 2000).

32 Ibid; M Fazel, J Wheeler and J Danesh, 'Prevalence of Serious Mental Disorder in 7000 Refugees resettled in Western Countries: A Systematic Review.' (2005) 365 Lancet 1309.

33 C van Velsen, C Gorst-Unsworth and S Turner, 'Survivors of Torture and Organized Violence: Demography and Diagnosis' (1996) 9 Journal of Traumatic Stress 181.

UK,[34] Bogner et al found that, compared to participants with a history of non-sexual torture, those with a history of sexual torture scored higher on measures of PTSD avoidance symptoms, PTSD overall, dissociation, shame and difficulty in disclosing their histories at their immigration interview. Across both groups, there was a positive association between their difficulty in disclosing sexual violence and higher levels of total PTSD symptoms, PTSD avoidance symptoms, shame, depression and dissociation.

The importance of this study is that people who disclose sexual violence during the course of an asylum claim, but failed to do so at the first possible opportunity, are under suspicion, and are very often judged to be fabricating evidence in order to strengthen an otherwise unfounded claim for protection.[35] It thus supports, using scientific methodology, and drawing on psychological theory and empirical findings, what campaign and advocacy groups have long been demonstrating, namely that refugees who have been sexually assaulted are systematically at a disadvantage when it comes to claiming protection. Perhaps more importantly, the study begins to explain some of the mechanisms whereby people can have severe difficulties in fulfilling the requirements of the asylum process as it is currently implemented. A better understanding of these barriers could inform a better approach to decision-making which takes into account the theoretical and empirical science on the disclosure of experiences of persecution.

Recognising emotional distress

Given that PTSD is recognised as of importance in the assessment and treatment of asylum seekers, the question arises of how it is recognised by lawyers and other people involved in the assessment of asylum seekers. Psychiatrists and psychologists are specifically trained to recognise, assess, diagnose and work with PTSD, but most actors in the asylum process do not have this background. When immigration lawyers have clients whom they suspect may be having psychological difficulties, they have the possibility (funding allowing) to commission a medico-legal assessment by a qualified mental health expert. A recent study[36] explored how immigration lawyers make this decision. In-depth interviews with a sample of immigration lawyers found that, as well as considering the legal decision about the utility of an expert report for the case, they relied on the presentation of the client identifying elevated levels of sadness, upset, aggression or withdrawal as possible indicators of a problem. The conclusion drawn was that:

> representatives and decision makers may rely on lay understandings of distress that do not necessarily fit with all possible presentations of psychological disorder . . . presentations of PTSD which are less well-understood by lay decision makers may pass unrecognised.[37]

The issue was further explored using an experimental design, in which an actor recounted the same asylum story employing four different sets of behavioural presentations.[38] In the first he showed the typical signs of having PTSD; in the second he exhibited cues indicating

34 D Bogner, J Herlihy and C Brewin, 'Impact of Sexual Violence on Disclosure during Home Office Interviews' (2007) 191 British Journal of Psychiatry 75.

35 H Muggeridge and C Maman, *Unsustainable: The Quality of Initial Decision-making in Women's Asylum Claims* (Asylum Aid 2011).

36 L Wilson-Shaw, N Pistrang and J Herlihy (2012) 'Non-clinicians' Judgments about Asylum Seekers' Mental Health: How do Legal Representatives of Asylum Seekers Decide when to Request Medico-legal Reports?' 3 European Journal of Psycho-traumatology.

37 Ibid.

38 H Rogers, S Fox and J Herlihy, 'The Impact of the Behavioural Sequelae of Post-traumatic Stress Disorder on the Credibility of Asylum-seekers' (submitted).

he was lying; in the third he presented both cues of PTSD and lying; and in the last he gave a neutral account. All of the behavioural expressions were derived from the literature on PTSD and on deception[39] and were validated by expert clinicians. Students instructed in asylum decision-making then rated each presentation (in counterbalanced sequence) as to their credibility. The presentation deemed most credible was the PTSD-alone account. However, further qualitative questions asked participants to explain their decision-making process and found that comments such as 'he seemed understandably traumatised by events' appeared most commonly with regard to the PTSD-alone account. This chimes with work done on rape trials, where it has been found that 'emotional congruence' can be crucial to witnesses being believed; for example, the perceived credibility of a (simulated) rape victim's statement increased when the 'victim' showed despair.[40]

Overgeneral memory

Returning to memory, another of the consequences of both depression and PTSD according to a significant number of studies is overgeneral memory.[41] This is measured by a test consisting of cue words – e.g. happy, sad, gate – to which the study participant is asked to give a memory of a personal event, specific in time and place (for instance, dancing at John's party last week). Overgeneral memory refers to memories which are either 'extended' in the sense that they last longer than one day (e.g. 'when we were on holiday') or 'categoric' in the sense that similar events are experienced several times (e.g. 'when I used to go Salsa dancing'). This is important because there is an assumption in asylum decision-making that detail is indicative of a true account. For instance, one judge reported that 'there was a texture and richness to the details of her evidence that indicates that this was true'.[42]

However, a robust finding over many studies is that when people are depressed, they give more overgeneral memories.[43] The phenomenon has also been shown to be associated with PTSD. There are suggestions that there is also a cultural element to overgeneral memory, most of the studies in the literature having been conducted with participants of Western culture. In this connection, Hofsted[44] has distinguished cultures that are individual or independent from those that are collective or interdependent, and this has given rise to research on social and cognitive differences between people from those two backgrounds. Reviewing studies of the development of memory and, in particular, the specificity of memories, Jobson points out that 'cultures emphasizing interdependence do not value specificity of autobiographical memories because the aim of the relatedness self is to achieve interdependence, and the retrieving of specific autobiographical memory has the potential to undermine this objective'.[45]

Jobson's study asked people from a range of backgrounds to describe, in writing, an everyday memory and a trauma memory. Each memory was rated as 'specific' if it gave

39 E.g. A Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd edn, John Wiley & Sons 2008).

40 G Kaufmann et al, 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility' (2003) 17 Applied Cognitive Psychology 21.

41 For a fuller review see, J M G Williams et al, 'Autobiographical Memory Specificity and Emotional Disorder' (2007) 133 Psychological Bulletin 122.

42 Herlihy et al (n 15). This example did not appear in our published paper of this study, but was one of the data items analysed.

43 Williams et al (n 41).

44 G Hofstede, 'Geert Hofstede Cultural Dimensions' (2011) <www.clearlycultural.com/geert-hofstede-cultural-dimensions/> accessed 17 June 2012; G Hofstede and G J Hofstede, *Cultures and Organizations: Software of the Mind* (McGraw-Hill 2005).

45 L Jobson, 'Cultural Differences in Specificity of Autobiographical Memories: Implications for Asylum Decisions' (2009) 16 Psychiatry, Psychology and Law 454.

details such as date, time, people, location and suggested a specific episode, or 'general' if the event described occurred regularly or repeatedly, was difficult to date and could not be linked to a specific episode. Significantly, more of the participants from 'independent' countries (such as Australia, New Zealand, the United States, Canada and the countries of Western Europe) gave specific accounts compared to the group from 'interdependent' cultures (such as those from countries in Asia, Africa and South America). Given that the interdependent cultures in this study are often the refugee-producing areas of the world and the independent cultures are where the rules are mostly defined for access to refugee protection, Jobson warns that 'culture impacts on specificity and needs to be considered when deeming an autobiographical memory as credible or not in legal settings, such as in asylum decision-making processes'.[46]

Overgeneral memory – and perhaps even this is too derogatory a term in the present context – is likely to be present for asylum seekers both because of their cultural background and because of PTSD.[47] This indicates that relying on memory of dates and other specific details to establish the credibility of people seeking protection is not in line with the psychological literature.[48]

Consistency of memory

Another assumption which is commonly made in assessing the credibility of asylum claimants is that inconsistencies in an account are an indicator of fabrication. This continues to be documented in asylum claims,[49] despite being at odds with a burgeoning literature on the inconsistency of repeated recall. Thus, for instance, a series of studies on war veterans has shown that when they are asked to complete a checklist of traumatic experiences, on return from deployment and again after a number of months or years, the number of events they endorse changes.[50] The exact mechanisms remain unclear, but the literature does seem to be coming to the conclusion that specific and non-trivial trauma memories can be subject to significant distortion, alteration and discrepancies.[51]

Two further studies, which specifically focused on the consistency of refugees' memory, had complementary findings. In the first of these, 'UK programme' refugees – who had been given blanket permission to stay in the UK, thus not having to engage with individual asylum claims – were interviewed on two occasions about one traumatic and one non-traumatic experience. These interviews were unrelated to any legal process and there was no obvious motivation for any deception. Approximately 30 per cent of the details they gave about these events changed between interviews. They were also asked to rate whether the details were central to the narrative or emotional gist of what happened, or if they were peripheral to the experience. Statistical analysis then showed that the highest rates of discrepancies between the interviews were for peripheral details of traumatic events, such as the exact date that a traumatic event happened – exactly the kinds of details that are required of a 'credible' asylum claimant. The other finding from this study was that for

46 Jobson (n 45) 457.

47 Belinda Graham, 'Overgeneral Memory in Asylum Seekers and Refugees: The Influences of PTSD and Cultural Background' (DClinPsych thesis, University College London 2012).

48 See also Helen Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 International Journal of Refugee Law 469.

49 See, for example, J Pettitt, *Body of Evidence: Treatment of Medico-Legal Reports for Survivors of Torture in the UK Asylum Tribunal* (Freedom from Torture 2011).

50 Herlihy et al (n 23).

51 Ibid.

people with higher levels of PTSD symptoms a longer time between interviews was associated with a higher rate of discrepancies.[52]

The second study, which involved 376 Bosnian refugees, used the checklist approach seen in studies of veterans.[53] Though the events investigated were by no means trivial — examples included 'present while bombs or other weapons exploded' and 'saw/heard beatings, injuries, or killings of family'— the answers once again changed over a three-year period. However, particularly notable in this study was the reporting of sexual abuse and rape. The item 'saw/heard the rape/sexual abuse (non-family)' was endorsed by 115 at the first interview, but by none at all three years later. It seems unlikely that these were events that had been merely forgotten. No one at all reported having been raped themselves, despite studies showing the prevalence of wartime rape in Bosnia.[54] This concurs with qualitative findings in the study described above, whose participants described 'cultural reasons' for the non-disclosure of rape and other sexual abuse.[55]

In the light of these studies, there are clear implications for the reform of the asylum process. In the words of Herlihy et al:[56]

> These conclusions suggest that the asylum process might be improved in a number of ways: by realising that consistency can be enhanced by measuring broad inclusive categories of events rather than asking about more narrowly defined, specific events, about which people are less consistent in their answers; by realising that discrepancies are more likely for peripheral details of traumatic events . . . by understanding that a longer delay between interviews is associated with more discrepancies; and by appreciating that memory for traumatic experiences in refugee and asylum seeking groups is heavily influenced by the complexities of reporting certain experiences such as rape and the desire to consign experiences to the past.

We turn now to the other area where understanding of emotional processes could better inform the processes and procedures of refugee law.

The emotions of the decision maker

Much of the work on the making of decisions with regard to refugee status necessarily focuses on the emotion of the claimant, who is usually the only witness to events. However, the other side of the coin is the person making the decision, whether judge, tribunal member or state-employed first instance decision maker. Jarvis's examination of credibility assessment in the UK tribunal[57] cites Graycar, who states:

> . . . we need to pay careful attention to what judges know about the world, how they know the things they do, and how the things they know translate into their activities as judges . . . Judicial notice may resemble a window that judges try to

52 Herlihy et al (n 25).

53 R F Mollica, K R Caridad and M P Massagli, 'Longitudinal Study of Posttraumatic Stress Disorder, Depression, and Changes in Traumatic Memories Over Time in Bosnian Refugees' (2007) 195 Journal of Nervous and Mental Disease 572. The authors investigate the possible psychological reasons for this on the basis of previous studies on the effects of PTSD on memory.

54 A Richters, 'Sexual Violence in Wartime' in P J Bracken and C Petty (eds), *Rethinking the Trauma of War* (Free Association Books 1998); D Kozaric-Kovacic et al, 'Rape, Torture and Traumatization of Bosnian and Croatian Women: Psychological Sequelae' (1995) 65 American Journal of Orthopsychiatry 428.

55 Bogner et al (n 34); D Bogner, C Brewin and J Herlihy, 'Refugees' Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information' (2009) 36 Journal of Ethnic and Migration Studies 519

56 Herlihy et al (n 23).

57 Jarvis (n 13).

> look through but that has reflective glass in it: so it is really a mirror. When judges look at it they see what they think is 'human nature', 'human experience' and 'ordinary or reasonable people'. What they are really seeing is the society they know. (And they do not see that they are looking in a mirror.)[58]

Jarvis concludes from her survey of 27 UK immigration judges (including 10 extended follow-up interviews) that:

> Some respondents realize that they are looking into a mirror and, recognizing the effect of who and what they are upon their ability to fairly assess credibility, try to look through the glass in order to carry out the exercise, whilst acknowledging that sometimes they forget that the mirror is there. Others have not yet seen the mirror; or if they have, are not admitting to its existence.[59]

Obviously it is not possible not to have any cultural background, or not to be alive at a certain historical moment, but the decision maker's task is to recognise this, and to be aware of the differences that might apply to the person about whom they must make judgments.

Emotion and judging

It is not only the cultural and social background of judges that is important. The emotions of the decision maker are just as important here as in other courts and administrative offices. However, what is particular to only some areas of law is the extremity of the material which must be seen and heard. Maroney suggests that 'traditional legal theory either presumes that judges have no operative emotions . . . or mandates that any such emotions be actively suppressed'.[60] Asylum claims entail accounts of some of the most atrocious acts that humans perpetrate upon each other, usually in the name of the state or political ideology. The effects of working regularly with such material are not well known in the field of refugee law, but there are some indications that they are felt. Thus, a study of claims heard by the Refugee Review Board of Canada[61] described highly emotionally charged hearings, with board members being sarcastic with claimants, expressing anger, dismissing or trivialising horrific events and laughing amongst themselves. A recent academic legal study of the UK Asylum and Immigration Tribunal reports strategies of detachment and distance as ways of coping with the emotional impact of asylum work.[62]

Vicarious traumatisation

A useful construct here is vicarious traumatisation (VT), an umbrella term often used to describe the psychological effects – well documented in therapists working with psychological trauma[63] – of exposure to other people's traumatic experiences. It can involve symptoms which mirror the symptoms of PTSD, such as having nightmares about a client's trauma, or forgetting particularly stressful parts of the account, or it can mean a more

58 R Graycar, 'The Gender of Judgments: An Introduction' in M Thornton (ed), *Public and Private Feminist Legal Debates* (OUP 1991) 262.

59 Jarvis (n 13) 10.

60 Maroney (n 1) 132.

61 C Rousseau, F Crepeau, P Foxen and F Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 Journal of Refugee Studies 43.

62 H Baillot, S Cowan and V E Munro, 'Hearing the Right Gaps: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' 21(3) Social and Legal Studies 269-96.

63 L McCann and L A Pearlman, 'Vicarious Traumatization: A Framework for Understanding Psychological Effects of Working with Victims' (1990) 3 Journal of Traumatic Stress 131; C R Figley (ed), *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those who Treat the Traumatized* (Brunner-Routledge 1995); K W Saakvitne and L A Pearlman, *Transforming the Pain: A Workbook on Vicarious Traumatization* (WW Norton 1996).

pervasive change of beliefs and attitudes, seeing the world as a more dangerous, untrustworthy place. The important aspect of such effects where the sufferers have crucial decisions to make about the people in front of them are the resultant attempts that can be made – not necessarily deliberately – to avoid such distress, which can involve 'trivialization of horror, cynicism, and lack of empathy'.[64] Similar effects have been observed in the recent war crimes tribunal in Cambodia – another locus of extremely distressing material – where the repeated interjections of President Nil Nonn in the first trial of Khmer Rouge leaders, instructing witnesses to 'control their emotion', have been widely cited as indications of his own struggle with the levels of emotion brought into the court.[65]

Such responses to horrific material have been described as 'psychological self-protection'.[66] It is easy to see how they might have significant effects on the decisions made about people seeking asylum, although this has yet to be shown empirically.

One study which went beyond conjecture about judges' managing of the effects of traumatic material interviewed 105 Family Court judges, and found indications of VT in 63 per cent of the group.[67] Other studies have examined lawyers; one of these compared criminal lawyers to non-criminal lawyers, finding that the criminal lawyers reported higher levels of subjective distress, VT, depression, stress and cognitive changes relating to safety and intimacy compared to their non-criminal colleagues.[68] In immigration lawyers, a recent qualitative study drew on a model of 'emotional burden' and highlighted the ways in which lawyers were attempting to balance conflicting roles of 'empathic advocate' with 'objective fact-finder'.[69] However, no quantitative assessment of VT in immigration lawyers has been attempted. Nor have potential links between VT and decision-making been explored in this crucial area.

Tolerating uncertainty

Legal professionals are taught to discover facts in order to uncover the truth, and to make binary decisions.[70] Nowhere is this clearer than in refugee or humanitarian protection decisions, where the outcomes of the decision may include either a wrongful return of an individual who may then face further torture or even death or a decision to allow individual immigrants to remain in the host country against a tide of social, governmental and media pressure.[71] Thomas describes the unique nature of asylum decision-making in these words:

> Asylum adjudication, as Sedley LJ once explained, does not involve a conventional lawyer's exercise of applying a litmus test to ascertained facts but 'a global appraisal of an individual's past and prospective situation in a particular

64 Rousseau et al (n 61) 49.

65 J D Ciorciari and A Heindel, 'Trauma in the Courtoom' in B van Schaak, D Reicherter and C Youk (eds), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia 2011).

66 Rousseau et al (n 61) 60.

67 P Jaffe 'Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice' (2003) 54(4) Juvenile and Family Court Journal 1.

68 L P Vrklevski and J Franklin, 'Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material' (2008) 14(1) Traumatology 106.

69 C Westaby, '"Feeling like a Sponge": The Emotional Labour Produced by Solicitors in their Interactions with Clients Seeking Asylum' (2010) 17 International Journal of the Legal Profession 153.

70 Michael Kagan (personal communication); see also the discussion at M-B Dembour and E Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) 15 European Journal of International Law 158, fns 24 and 163, as to what constitute facts in criminal law trials.

71 See, for example, <www.freemovement.org.uk/2012/07/19/judge-hung-out-to-dry/> for a discussion of two recent newspaper articles criticising UK immigration judges for their rulings.

> cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose'[72] The task of prognosticating the risk of persecution or ill-treatment must usually be undertaken on the basis of incomplete, uncertain and limited evidence. Also, underlying the decision exercise are unusually high error costs which arise from the acute and pervasive tension between maintaining immigration control and protecting individual rights: asylum adjudication raises the constant problem of either refusing protection to the genuine claimant or affording protection to the non-genuine claimant.[73]

In most cases the final outcome of such cases – especially where the individual is returned to his or her country of origin — is unknown. In terms of judging whether someone is lying in order to make a claim, such a lack of feedback precludes being able to learn from experience. In terms of the 'emotional burden' of the work, however, it means that decision makers have to learn to tolerate the uncertainty of never knowing whether or not their decision was correct, and whether or not it had disastrous consequences for the individual concerned. The very notion of a 'standard of proof', whether it be above or below 51 per cent, suggests a tolerance of uncertainty; however, this does not guarantee that in the culture and thinking of lawyers and judges it is easy to accept and live with the uncertainty inherent in making decisions to return people to what they claim will involve torture and possibly death.[74]

In the area of psychological therapy, Barry Mason[75] wrote about 'tolerating uncertainty', proposing a model of certainty/uncertainty crossed with safety/unsafety, giving a range of possible positions: (1) unsafe certainty (Mason's example is of a father whose son is 'out of control' and who brings the son to therapy to be 'fixed'); (2) unsafe uncertainty (the person who is lost and can see no way forward); (3) safe certainty (the 'expert position',[76] seen as important for surgeons and other professionals), and (4) safe uncertainty – where curiosity and change become possible. According to Mason, the fourth of these positions is to be preferred for the therapist, but what position can the immigration judge inhabit in order to do his or her job? The task of judges is to make a final decision, and their training and tradition say they must be certain – but as we have seen, certainty is often impossible in this area of decision-making. Thus, Maroney describes the – hopefully extreme – example of a judge who was removed from office in Florida, following his being 'callous, rude, condescending, and abusive':

> By constantly 'striving to demonstrate calm in difficult situations,' [his psychiatrist] testified, the judge eventually 'placed himself in' a state of 'emotional over-control.' His drive to control his emotions became so strong that he was unable to 'incorporate emotions into his life without worrying he would display inappropriate anger' – which, inevitably and ironically, he did.[77]

Requiring 'safe certainty' of judges in this impossible area of decision-making is to impose a burden which can be bad for judges[78] and bad for the people about whom the decisions

72 *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* [1997] Imm AR 145 (HC) 153 .

73 R Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20 International Journal of Refugee Law 491.

74 Michael Kagan (personal communication) 6 August 2013.

75 B Mason, 'Towards Positions of Safe Uncertainty' (1993) 4 Human Systems: The Journal of Systemic Consultation and Management 189.

76 H Anderson and H Goolishian, 'The Client is the Expert: A Not-knowing Approach to Therapy' in S cNamee and K Gergen (eds), *Social Construction and the Therapeutic Process* (Sage 1992).

77 T Maroney, 'Emotional Regulation and Judicial Behavior' (2011) 99 California Law Review 1481.

78 Ibid.

must be made.[79] It may also be raising the stakes in terms of judges' confidence, that is, requiring them to exude and if possible feel confidence, which 'has its own downsides, perhaps because it discourages self-examination and learning'.[80]

The importance of this issue does not lie in attacking or criticising those who are taking on one of our most difficult humanitarian tasks. Rather, Maroney[81] proposes a model of 'emotional regulation', drawing on psychological research and parallels from the training of doctors (who also have to make important decisions in the face of gruesome realities). Such a model could be integrated into training programmes, without prejudice or judgment about those participating.

The other frequent factor in asylum decision-making is the knowledge that at least some of the people before the decision maker may be using systems of humanitarian protection deceitfully. Without going into the structural and political reasons why this might be happening, the fact remains that some people do exaggerate accounts, use stories given to them by agents and hide or change details in order to protect themselves or others. Continually having to consider whether or not one is being lied to would test the most liberal of assessors and can lead some judges to become 'hardened'.[82]

Maroney's proposed programme of 'emotional regulation' may well be a useful approach for actors in this area of law. In addressing consistency and methodology, Jarvis advocates 'education and training delivered to judges with open minds',[83] and this would be a good way forward to address the emotional burden of making protection decisions. However, given the 'persistent cultural script of judicial dispassion',[84] decision makers and emotion researchers and practitioners need to agree on the size and shape of the problem as a necessary prerequisite to any such proposals.

Conclusion

In a paper considering expert witness reports before immigration tribunals, John Barnes, a retired senior immigration judge in the UK, compared the two main sources of expert evidence available.[85] One is known as 'country evidence' and mostly comprises reports compiled by government bodies, or non-governmental groups such as Amnesty International, giving geographical details of the country and current political and social conditions. An expert – usually an anthropologist – might provide a report for the court going to the specific case but this can be 'evaluated against other material'.[86] This is not the case, he explains, in the case of expert medical evidence, saying 'there will be no similar breadth of evidence to assist in the evaluation of expert medical evidence'.[87] Accordingly, 'medical evidence' currently consists only of individual assessments, usually by a psychiatrist or psychologist, and which is usually expected to include a psychiatric diagnosis of the claimant. As Barnes also puts it: 'In appeals where medical issues are raised, the occasions on which any medical evidence is introduced for the Secretary of State . . . are so rare that

79 Maroney (n 77); see also Rousseau et al (n 61); Baillot et al (n 62).

80 Maroney (n 77) 1549 fn 389.

81 Ibid.

82 Baillot et al (n 62).

83 Jarvis (n 13) 16.

84 T A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 California Law Review 629.

85 J Barnes, 'Expert Evidence: The Judicial Perception in Asylum and Human Rights Appeals' (2004) 16 International Journal of Refugee Law 349.

86 Ibid 354.

87 Ibid.

it is more sensible to say that there is no such input.'[88] In other words, where any psychological information is introduced to this court, it is by means of a single expert witness report, comprising an assessment of the appellant. Unlike other areas of law, there is no contrasting report to enable decision makers to compare positions – they are left to decide what weight to give to a report commissioned by the appellant. This can lead to experts going beyond their duty as experts, being led into the temptation of advocating for what is often their clinical client. It has also given rise to 'judges without appropriate expertise endeavour[ing] to interpret the medical evidence'.[89]

In a recent paper, Herlihy and Turner[90] reviewed the process of claiming asylum, suggesting that, at each stage, there is, indeed, a wealth of *general* psychological knowledge that would help to illuminate and possibly improve the decision-making process. A better understanding of the situation of the client would involve considering not only the medical and psychiatric considerations of head injury, intellectual capacity and psychiatric diagnoses,[91] but also the literatures on trust, decision-making under stress, autobiographical memory, eye-witness testimony and the effects of distress and, in particular, traumatic experience on memory. Interviewing draws on a different area of psychological literature, including accounts of the ways a narrative is constructed in context,[92] the suggestibility of interviewees,[93] barriers to disclosure[94] and consistency across repeated interviews.[95] The psychology of the interviewer is also a key factor, and his or her ability to hear repeated stories of persecution under conditions of pressured decision-making.[96] Other material that can be of relevance in this context is the literature on decision-making and the use of heuristics,[97] the 'story model' of judging[98] and stereotyping.[99]

We have shown here some of the ways in which the science of emotion has started to help illuminate some of the emotional processes at work within the legal processes and procedures concerned with state protection. It is not for psychology researchers nor practitioners to stray into the domain of legal decision-making, but it is essential that a role is carved out for collaboration, education, and working together towards ensuring that these crucial legal decisions are informed and underpinned by the best available scientific knowledge.

88 Barnes (n 85) 352.

89 D Rhys Jones and Sally Verity Smith, 'Medical Evidence in Asylum and Human Rights Appeals' (2004) 16 International Journal of Refugee Law 389; D Rhys-Jones, 'Important Judgment on Value of Medical Reports' (2012) May Fahamu Refugee Legal Aid Newsletter <http://frlan.tumblr.com/post/24358917253/important-judgment-on-the-value-of-medical-reports> accessed 23 November 2012.

90 J Herlihy and S W Turner, 'The Psychology of Seeking Protection' (2009) 21 International Journal of Refugee Law 171.

91 J Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony' (2001) 69 Medico-Legal Journal 25.

92 M Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 Journal of Refugee Studies 248.

93 See, for instance, J S Baxter, J C W Boon and C Marley, 'Interrogative Pressure and Responses to Minimally Leading Questions' (2006) 40 Personality and Individual Differences 87.

94 Bogner et al (n 34).

95 Herlihy et al (n 25).

96 Maroney (n 77); Rousseau et al (n 61).

97 D Kahneman and A Tversky, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124; T Gilovich, D Griffin and D Kahneman (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment* (CUP 2002).

98 R Hastie, *Inside the Juror: The Psychology of Juror Decision Making* (CUP 1993).

99 See, for instance, P R Hinton, *The Psychology of Interpersonal Perception* (Routledge 1993).

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Criminalising oppression or reinforcing oppression? The implications of veil ban laws for Muslim women in the West

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In a post-9/11 climate, certain European countries have applied restrictive measures and bans on the practice of Islam in the public sphere. Such bans involve the hijab (headscarf) and the niqab (face veil), as well as minarets.[1] In 2004, the French government passed a law that banned the wearing of 'ostentatious' religious symbols in public schools.[2] The law on 'secularity and conspicuous religious symbols' was an amendment to the French Code of Education that expanded principles founded in the then existing French law, especially the constitutional requirement of *laïcité*: the separation of religion and state. Although prohibited items included a large cross, a Sikh turban and a yarmulke (a head-covering worn by Jewish men and boys), the main effect was to ban the headscarf on the basis that this law predominately applied to Muslim girls. In a post-9/11 context, the Muslim headscarf has greater symbolic resonance than other 'ostentatious' markers of religious identity, and correspondingly political, media and public debates have been chiefly concerned with the Muslim headscarf. In April 2011, France became the first country in Europe to introduce a law banning the wearing of the face veil in public places including public buildings, educational institutions, hospitals and on public transport.[3]

Although France's Constitutional Court ruled that the veil ban does not illegitimately restrict human rights,[4] the court made a change to the law as it was passed by the French legislature, in that the ban would not apply to public places of worship where it might violate religious freedom.[5] Under the new law, women who wear face veils in public places in France are subject to fines of €150 and/or participation in citizenship education. The law also penalises, through a fine of €30,000 and one year in prison, anyone who forces another to wear face-coverings in public; these penalties may be doubled if the victim is under the age of 18. Belgium was the second European country after France to enforce a similar ban.

1 Thus, for instance, Switzerland has banned the construction of new mosque minarets on the basis that minarets are a sign of Islamisation. In November 2009, Swiss voters supported a referendum proposal to ban the building of minarets. More than 57 per cent of voters and 22 out of 26 provinces voted in favour of the referendum.

2 French law number 2004–228 of 15 March 2004.

3 French law number 2010–1192 of 11 October 2010.

4 The French Constitutional Council ruled that the Bill, which makes it illegal to wear full-face veils in public, conforms to the French Constitution. For more information see decision of 7 October 2010 <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2010613dc.pdf>.

5 'French Ban Clears Last Legal Battle' (*BBC News,* 7 October 2010) <www.bbc.co.uk/news/world-europe-11496459>.

Under Belgian law, 'offenders' (that is, Muslim women in veil) face a fine of €137 and up to seven days of imprisonment. Following the example set by France and Belgium, the Dutch government has now agreed to introduce a ban on face-covering in public, so making the Netherlands the third country in Europe to prohibit the face veil. Countries such as Austria, Denmark, Norway, Switzerland and Spain are considering similar legislation, whilst in northern Italy, an old anti-terrorist law against concealing the face for security reasons has been used by some local authorities to fine Muslim women who wear face veils.[6] Other European states[7] have also sought bans on religious dress in the context of state employment and educational institutions though no other country except France and Belgium as yet has criminalised the Muslim veil.

Although the UK does not have any legislative prohibitions in place, there are calls for such legislation to be introduced. For instance, the Conservative MP Philip Hollobone sought to introduce a Private Members' Bill entitled the Face Coverings Regulations Bill which would make it illegal for people to cover their faces in public. The Bill, which received its second reading in the House of Commons in December 2011, was rejected.[8] The British National Party and the UK Independence Party both supported a veil ban in their most recent election manifestos,[9] and extremist groups such as the English Defence League – including its offshoot divisions, namely the Scottish Defence League and the Welsh Defence League – have staged a number of violent anti-Muslim protests against elements of Islam such as Sharia law, mosques and the Muslim veil. The comments in 2006 of the then Secretary of State for Justice Jack Straw attracted considerable publicity when he stated that the face veil is a 'visible statement of separation and of difference' that can weaken community relations,[10] as did those of Tony Blair, the then Prime Minister, who described the wearing of the face veil as a 'mark of separation' in 2006.[11]

This article critically assesses the implications of the French veil ban and its emotional impact upon veiled Muslim women in the West. Using legislation to ban the veil has serious human rights implications, particularly when it contravenes freedom of religious practice and freedom of expression. Seen in this light, the ban adopts a patriarchal ideology in order to justify and rationalise Islamophobic understandings of the veil. Within this framework, our article is premised on three lines of argument. First, we argue that the veil ban prevents veiled Muslim women from full participation in society by exacerbating their multiple and intersectional discrimination on the grounds of both religion and gender, thereby increasing (rather than decreasing) social exclusion by pushing these women to the margins of society. Secondly, we suggest that this law stigmatises veiled women as 'criminals', thereby potentially 'legitimising' acts of violence towards them when they are spotted in public. In this sense, the veil ban increases the sense of vulnerability of Muslim women dressed in

6 'The Islamic Veil Across Europe' (*BBC News*, 22 September 2011) <www.bbc.co.uk/news/world-europe-13038095>.

7 Eight out of Germany's 16 states (Baden-Württemberg, Bavaria, Hesse, Lower Saxony, Saarland, Bremen, North Rhine-Westphalia and Berlin) have enacted legislation to prohibit the wearing of hijabs by teachers and, in some states, by civil servants and law enforcement officers. See Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany* (Human Rights Watch 2009).

8 'MP Philip Hollobone's Planned Law to Ban Wearing the Burka in Public is Binned by Parliament' *Birmingham Mail* (Birmingham, 20 January 2012) <www.birminghammail.net/news/uk-news/mp-philip-hollobones-planned-law-8737>.

9 'Socialist Resistance Statement on the Banning of the Veil' *Links* (26 July 2010) <http://links.org.au/node/1809>.

10 M Taylor and V Dodd, 'Take off the Veil, says Straw – To Immediate Anger from Muslims' *The Guardian* (London, 6 October 2006) <www.guardian.co.uk/politics/2006/oct/06/immigrationpolicy.labour>.

11 'Blair's Concerns over Face Veils' (*BBC News*, 17 October 2006) <http://news.bbc.co.uk/1/hi/6058672.stm>.

niqab in the public sphere. Thirdly, we argue that this law – as an example of ideological Islamophobia – affects the wider Muslim community.[12] We conclude by noting that the effects of the veil ban policy are not exclusively restricted to women who adhere to Muslim codes of dress and the Muslim community; rather, the harm extends to society as a whole on the basis that this law attacks the fundamental value of liberal democratic states: the issue of choice. Before contextualising these individual and collective harms, the article first considers dominant justifications in favour of the veil ban.

Justifications behind the veil ban

The underlying principle behind the French veil ban is the historical commitment to secularism – *laïcité*. Though France has been a rigidly secular republic since the French Revolution, French secularism is currently based on the 1905 French law on the separation of church and state.[13] During the twentieth century, *laïcité* meant equal treatment of all religions; however, a more restrictive interpretation of the term has developed since 2004 when the French government banned conspicuous religious symbols, including the Muslim headscarf, from public schools.[14] In the current climate, the French interpretation of separation of religion and state forbids the wearing of face veils in public places on the basis that the visibility of veils makes Islam visible in French society. Indeed, Islam is highly visible in the West and the face veil is seen as a powerful marker of difference, an essentialised symbol of a 'traditional' identity associated with being Muslim. Just as veils for women and beards for men are the most obvious personal markers of Islam in the West, so too are mosques clear signs of the growing presence of Islam in the West. Such visible Islamic symbols are perceived to conflict with national identity in European states which promote a shared (non-religious) identity and culture.

Another viewpoint commonly cited in defence of the ban sees the veil as a practice synonymous with religious fundamentalism and, as such, one which fosters political extremism. Accordingly, the veil is perceived as an example of Muslim 'otherness', particularly when linked to the 9/11 and 7/7 terrorist attacks and the global War on Terror. From this perspective, the covering of the face with the Muslim veil is seen as a tool of Islamist fundamentalism in the West and a threat to public safety since the public have no idea who is behind the face-covering – be it male or female. In this context, the conflation between Islam and terrorism accentuates the validity of the hypothesis about the incompatibility between Islam and the West, and about the threat constituted by the settling of Islam in the West. Muslims who visibly profess and practise their religion are routinely labelled 'radicals' whilst those who are non-practising Muslims (or live their faith privately) are seen as 'moderates'.[15] Within this framework, the wearing of the full veil symbolises the otherness of Islam in the West as it is more visible and thus more 'threatening' to the democratic values of Western societies. As a symbol of Islamist fundamentalism, the veil is interpreted as incompatible with the values and ethos of European society.

Equally, the veil is often understood as a political symbol conflicting with gender equality.[16] In this context, the veil is seen as an expression of the dissociation from Western

12 In this context, Muslims are led to view themselves as members of a stigmatised and socially excluded population.

13 H Astier, 'The Deep Roots of French Secularism' (*BBC News*, 1 September 2004 <http://news.bbc.co.uk/1/hi/world/europe/3325285.stm>.

14 French law number 2010–1192 (n 3).

15 A Wing and M N Smith, 'Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf' (2005) 39 UC Davis Law Review 743–78.

16 N Chakraborti and I Zempi, 'The Veil under Attack: Gendered Dimensions of Islamophobic Victimisation' (2012) 18(3) International Review of Victimology 269–84.

values including the emancipation of women. From this premise, when Muslim women wear the veil it confirms the underdeveloped status of women in radical Islam and symbolises that they accept (or they are forced to accept) all of the conditions that radical Islam mandates. For fundamentalist Muslim men, a hidden female body represents the rejection of a mixed society and the fixing of inequality in gender difference.[17] Ultimately, the practice of veiling is said to subjugate women and make them 'invisible'. In this context, the veil is seen as a sign of gender oppression, which symbolises belonging to a single man: the Muslim husband.[18] By this logic, accepting the veil means approving the possession of the female body by fundamentalist Muslim men, and the veil ban therefore pursues the legitimate aim of promoting gender equality and maintaining secularism.

Finally, the wearing of the face veil can be associated with the existence of parallel communities and with the failure of integration. It has been argued that Muslims have attempted to create an Islamic identity which is both visible and naturalised within the Western context through wearing the headscarf and/or the veil, the erection of mosques and loud Islamic calls to prayer.[19] However, in the eyes of the French state, these activities represent a paradigm of Huntington's 'clash of civilisations' thesis, which posits that Islam and the West are two monoliths that are at war with each other.[20] By the veiling of women, Islam is illustrated, interpreted and marked as a completely 'different' world where the veil signifies the border between the 'West' and 'Islam'.[21] For instance, in 2008, France refused a Muslim woman citizenship because she wore a face veil. Faiza Silmi, whose husband was already a French citizen, had her application rejected on the grounds of 'insufficient assimilation into France'.[22] On appeal, the French Council of State said that she had 'adopted a radical practice of her religion, incompatible with essential values of the French community, particularly the principle of equality of the sexes'.[23] Justifications of this nature are therefore designed to ensure that Muslim females in France become well-assimilated citizens who speak, think and dress in an appropriately 'French' fashion.

The veil ban as a mark of oppression

The discussions above highlight that there are a variety of intersecting reasons why governments may be persuaded to ban the Muslim veil in public places. These are guided by perceptions of the veil as a symbol of Islamist fundamentalism, of the inferior status of women in Islam and of a lack of willingness to integrate into 'host' countries. However, we would argue that the veil ban operates within an essentialist understanding of Islam that is inherent in the 'clash of civilisations' paradigm. In other words, the veil ban acts as an identifier of a stigmatised community whereby Islam is depicted as a backward religion, Muslim women as oppressed and Muslim men as barbaric. In essence, we argue that the French rejection of the veil is a sign of intolerance, even of Islamophobia.[24]

17 Wing and Smith (n 15).

18 Chakraborti and Zempi (n 16).

19 Wing and Smith (n 15).

20 S P Huntington, *The Clash of Civilisations and the Remaking of World Order* (Touchstone 1997).

21 E Klaus and S Kassel, 'The Veil as a Means of Legitimisation: An Analysis of the Interconnectedness of Gender, Media and War' (2005) 6(3) Journalism 335–55.

22 See C Skeet, 'Globalisation of Women's Rights Norms: The Right To Manifest Religion and "Orientalism" in the Council of Europe' (2009) 4 Public Space: The Journal of Law and Social Justice 34–73.

23 Ibid.

24 For the purposes of this discussion, Islamophobia is defined as 'a fear or hatred of Islam that translates into ideological and material forms of cultural racism against obvious markers of "Muslimness"': Chakraborti and Zempi (n 16) 271.

As we have seen, one of the most popular justifications in favour of the veil ban is that veiling subjugates women.[25] Unquestionably, there are some Muslim women and girls who may be subjected to mandatory wearing of the veil by their family or community, and the law in question may serve to protect these women. However, while some may feel pressured, others may decide to wear the veil independently and often against their family's or community's wishes.[26] Muslim women may choose to wear the veil for many reasons, including personal religious conviction, compliance with family or community values, protection from sexual harassment, desire to express individuality and expression of their religious and cultural identity. Linked to this choice to wear the veil is pride in being a Muslim in a non-Muslim country and also a sign of their affirmation of 'Muslim identity'. In this context, veiling in a non-Muslim country could be a way of asserting a determination to be both European and Muslim through veiling, which is one example of displaying a Muslim identity.

Although gender oppression is one of the factors most commonly linked to the practice of veiling, it could be argued that oppression in this context does not come from the use of the veil as such. Rather, the oppression of veiled women lies in a lack of control over their bodies. This suggests that women who want to adopt the veil out of personal religious conviction may feel morally and legally pressurised to conform by unveiling themselves. In this sense, the veil ban constitutes a form of oppression. In light of the fact that the veil stands as symbolic of Islam, its prohibition can be seen as an example of an attempt by Western European governments to oppress personal expressions of Islamic religion and culture. The justifications for laws of this kind are based on the notion that *all* Muslim girls and women who wear the veil are forced to do so, which ultimately denies the autonomy of those who are not. Indeed, as we shall see, for Muslim women who want to wear the veil, its prohibition oppresses them and has a significant impact upon their sense of freedom of expression and Muslim identity.

It is important to challenge the idea that the solution to veiled women's 'oppression' lies in banning the veil. Rather, it is in empowering these women to make individual choices about their bodies. The ideal for liberation of veiled women should begin with dismantling the patriarchy that controls their bodies – whether oppressors are Islamist fundamentalists or Western 'liberators'. However, the arguments used to justify the veil ban demonstrate that Islamophobia – as an ideological framework of understanding Islam and Muslims – becomes idiomatic within the cultural, political and legal framework of the 'host' society, to the extent that Muslim women who choose to wear the veil are denied their fundamental right to participate as citizens. This reality of oppression has dire consequences for the everyday lived experiences of Muslim women in this position, serving to ostracise them from society, causing them emotional damage and increasing their sense of vulnerability in public places. By invoking the coercive power of law to impose such legislation, the veil ban directly affects the *ummah*, since what appears to affect only a minority of Muslims will have implications for that community as a whole.

An appreciation of the concept of *ummah* and its implications has relevance for understanding the community impact of the veil ban. In essence, the notion of *ummah* reframes the parameters of what defines national identity in Islam and reflects the development of a robust collective identity amongst the world's Muslims, which cannot be adequately explained purely within the framework of religious fellowship.[27] In the words of

25 Chakraborti and Zempi (n 16).

26 Wing and Smith (n 15).

27 Huntington (n 20).

Mandeville: 'Muslims living in diaspora – particularly in the West – are of varied and diverse ethnic origins. What links them together, however, is a shared sense of identity within their religion, an idea most clearly located within the concept of the *ummah*.'[28] The cumulative impact of the veil ban – and its attendant layers of stigmatisation and marginalisation – can be to reinforce the sense of alienation experienced by members of the *ummah*-based community. This means that the veil ban impacts upon notions of belonging and cohesion amongst Muslims, who are reminded of the appropriate alignment of 'us' and 'them'. At the same time, the veil ban impacts upon notions of safety within the Muslim community by reinforcing the fear that, in the presence of the dominant European identity, Muslims are vulnerable to attacks, harassment and discrimination.

Discrimination and social exclusion

The veil ban appears to attack Islam through banning a religious piece of cloth which is worn exclusively by Muslim women. In particular, this law does not ban religious symbols per se but exclusively the religious codes of dress adopted by women in Islam. This observation indicates that two types of discrimination weigh on veiled Muslim women in France and Belgium: one forbids them access to the public sphere by virtue of their 'Muslimness' whilst the other isolates them as women. The effect of this is that the law in question explicitly forces veiled Muslim women to choose between their religious convictions and participation in society, violating their right to freedom of religion and to equal treatment. Such policies are not abstract concerns but have a profound effect on veiled Muslim women's lived experiences.

This reality of double discrimination leads to their social exclusion from mainstream society whereby women in veil feel unwelcome and marginalised. In particular, the ban excludes women in veil from the public sphere by creating barriers to accessing mainstream services. According to the Council of Europe's Commissioner for Human Rights, banning veiled women from public places including public institutions, hospitals and government offices may simply result in them avoiding such places altogether, which leads to their alienation from mainstream society.[29] It is not surprising that, in France, veiled women have been found to experience social isolation and alienation by virtue of being denied access to the public sphere by the society in which they live.[30]

Evidence suggests that there are Muslim women in France who continue to wear the face veil as an act of resistance and non-conformity.[31] This indicates a deliberate refusal to become part of the mainstream community, prioritising a culture of seclusion over a culture of inclusion. However, it is necessary to bear in mind that for these women veiling is a religious obligation – an act of submission to God. Muslim women who are committed to their faith and who wish to see a visible expression of that commitment expressed in terms of adherence to the Muslim dress code may decide to defy the veil ban. Those women who continue to wear the veil consciously choose to isolate themselves from mainstream society through their refusal to conform to the normative cultural standards or to the dominant identity. The consequence of this is that they deliberately choose not to integrate with non-Muslims by living in separate communities because integration would entail hiding their

28 P Mandaville, 'Communication and Diasporic Islam' in K Karim (ed), *The Media of Diaspora* (Routledge 2003) 135.

29 T Hammarberg, 'Penalising Women who Wear the Burqa Does not Liberate Them' (19 April 2012) <http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=157>.

30 Open Society Foundations, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-face Veil in France* (Open Society Foundations 2011).

31 A Chrisafis, 'France's Burqa Ban: Women are "Effectively under House Arrest"' *The Guardian* (London, 19 December 2011 <www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa>.

Muslim identity. Ultimately, a law that bans the veil leaves veiled Muslim women little option but to lead parallel lives in order to protect their religious and cultural identities. At the same time though, a major contributing factor to the problem of Islamophobia and its impact on victims is a failure to recognise the emotional, psychological and, to some extent, physical effects of expressions of Islamophobia on its targets.

Emotional and physical harms

Muslim women in veil suffer both emotionally and physically because of the law banning the veil in public places and its Islamophobic dimensions.[32] At an emotional level, the veil ban can be seen as a form of oppression and violation. For Muslim women who want to wear the veil, the ban results in a sense of imprisonment on the basis that it restricts their participation in society. Islamophobia, like its sister oppressions – racism and other forms of hate crime – constrains self-development and self-determination and disrupts notions of belonging.

From this perspective, the banning of the veil constitutes a form of 'spirit injury' that negatively affects veiled Muslim women. Spirit injury is the product of the psychological, spiritual and cultural effects of multiple types of racism, sexism and discrimination upon 'other' women, and it can lead to the slow death of a person's soul or psyche.[33] Muslim women who want to wear the veil but are not permitted to do so by legislation might feel some of the symptoms of spirit injury including 'defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviours, acute despair/emotional death'.[34] Victims might feel responsible for the circumstances that they find themselves in, perhaps without being aware that Islamophobia played a major role. Alternatively, victims might be aware of Islamophobia but might feel helpless to deal with its effects, such as strong feelings of shame and guilt, depression, general anxiety, or various combinations of all these effects. As such, the veil ban may constitute a psychic human rights violation.[35] All of this suggests that experiences of Islamophobic discrimination can result in psychological and emotional injury.

The levels of psychological and emotional suffering can be devastating for victims. In particular, veiled Muslim women who have been victims of Islamophobia multiple times because of the visibility of their Muslim identity are more likely to be traumatised by the banning of the veil. Empirical studies of targeted victimisation suggest that the emotional, psychological and behavioural impact is more severe for victims of hate crimes when compared to non-hate-crime victims.[36] The impact of this victimisation may exceed that of 'normal' crime because of victims' perceived and actual vulnerability due to their group membership. Being a member of oppressed and socially marginalised groups often means

32 In some senses it may be somewhat artificial to separate emotional injury from physical forms of abuse: physical forms of abuse also inflict emotional and psychological harm on victims, and both forms of harm serve to establish dominance and control over the female body. However, despite the conceptual and experiential overlap, the various forms of harm are considered separately for the purposes of this discussion.

33 Wing and Smith (n 15).

34 A K Wing and M R Johnson, 'The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries' (2002) 7 Michigan Journal of Race and Law 247–89.

35 Wing and Smith (n 15).

36 See G Herek, J Cogan and R Gillis, 'Victim Experiences in Hate Crimes Based on Sexual Orientation' (2002) 58(2) Journal of Social Issues 319–39; R Boeckmann and C Turpin-Petrosino, 'Understanding the Harm of Hate Crime' (2002) 58 Journal of Social Issues 207–25; J Garland and N Chakraborti, 'Recognising and Responding to Victims of Rural Racism' (2006) 13(1) International Review of Victimology 49–69; P Iganski, *Hate Crime and the City* (Policy Press 2008); J McDevitt, J Balboni, L Garcia and J Gu, 'Consequences for Victims: A Comparison of Bias- and nonbias-motivated assaults' (2001) 4(4) American Behavioral Scientist 697–711.

engaging in self-blame and having feelings of confusion, shame and guilt.[37] In the same way, research on stigmatised populations suggests that the experience of racism and/or discrimination can be a source of chronic stress that may result in negative psychological and physical health outcomes, such as increased blood pressure, anxiety, depression and post-traumatic stress disorder symptoms.[38] As such, the veil ban may lead to lasting emotional and psychological damage, particularly for repeat victims of Islamophobia.

We have already noted how the veil ban supports a patriarchal discourse which reduces the veil to a symbol of Islamist fundamentalism, gender subjugation and deliberate lack of integration.[39] Such readings of the veil as a threat may often translate into a series of Islamophobic actions on the ground. According to the French Council of the Muslim Faith, Islamophobia targeted at veiled women is on the rise in France since the passing of laws that ban Muslim women's choice of dress.[40] In the same way, French Muslim groups report a significant increase in verbal and physical violence against veiled women – such as people in the street taking the law into their hands and trying to remove their veils, bus drivers refusing to carry women who wear the face veil or shop owners trying to bar entry to women in niqab – whilst some police officers face a dilemma on whether to refer the case to a local judge or to simply 'turn a blind eye' when they see women wearing the face veil in public places.[41] Along similar lines, a recent report which focused on the experiences of veiled Muslim women in France found that almost all of the research participants had experienced verbal abuse, whilst some veiled women had also been physically attacked since the debate on the French ban.[42] This evidence suggests that Muslim women who wear the veil may experience harassment, verbal and physical abuse from people who see them as 'criminal' following the criminalisation of the face veil in France.

Drawing on Maroney's taxonomy on law and emotions and the intersection of reason and emotion, one could argue that the veil ban compounds the emotional suffering of those affected by it on the basis that it communicates a message of institutionalised Islamophobia through formal power structures of law-making, police procedure, prosecutorial power and governmental policy.[43] By making the wearing of the face veil a criminal offence, this law promotes a climate of intolerance, even hostility, thereby legitimising violence targeted at veiled Muslim women – be it in terms of violation of human rights, discrimination, or harassment on the street. From this perspective, the veil ban justifies and rationalises a negative discourse that makes women in veil 'easy targets' for verbal abuse and physical attacks when they are spotted in public places. Equally worryingly, the veil ban incites anti-Islamic, anti-Muslim hatred not only in those countries where the ban has been enforced but also in other European countries such as the UK, where it is still legal to wear the face veil.

Against the backdrop of heightened concerns about national security, gender equality, secularism, the failure of multiculturalism and the fear of Islamist fundamentalism, the veil ban in France stigmatises the wearing of the veil as dangerous, illegal and thus 'criminal'. Correspondingly, this justifies public manifestations of anti-Muslim hostility towards women who defy this legislation in France and elsewhere in the West, and highlights the

37 E B Carlson, *Trauma Assessments: Clinician's Guide* (Guilford 1997).

38 D R Williams, H W Neighbors and J S Jackson, 'Racial/Ethnic Discrimination and Health: Findings from Community Studies (2003) 93 American Journal of Public Health 200–08.

39 Chakraborti and Zempi (n 16).

40 Cordoba Foundation, *Islamophobia and Anti-Muslim Hatred* (2007) 10(7) Arches Quarterly 6–156.

41 Hammarberg (n 29).

42 Ibid.

43 T A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30(2) Law and Human Behavior 119–42.

ripple effects of this legislation on other Western European countries, where veiled Muslim women are perceived as 'criminals'. In this context, there is a strong link between the French veil ban policy and attacks on veiled women in the UK, as noted in a recent study of Islamophobic victimisation.[44] This finding is illustrative of the domino effect of European policy, whereby events in one European country can influence public opinion in its neighbouring states. In the words of Yasmin, one of the research participants in the aforementioned study:

> France's action has given people in the UK the right to be abusive. Some people feel that they've got the platform and the right to say things that they wouldn't have before. So whereas before they'd keep it quiet and know that British values are different, that we are tolerant and we are very pro-multicultural, the moment France did what they did, suddenly these people thought 'Right, now we've got a voice, now we've got justification, now we can talk because if the government in France thinks veiling is bad, it is ok for us to raise our racist opinions.'

Community implications

As with any religion and its followers, Islam is increasingly being used by Muslims – including those who have converted to Islam – as a basis of identity definition and formation.[45] However, this rise in Muslim identity is shaped to a certain extent by experiences of Islamophobia. As Muslim identities have been constructed as 'other' to Western European identities, an attempt to distort Muslim identities, or to suppress the symbols of these identities, often has the opposite effect: it strengthens these identities, which in turn has the effect of exacerbating the polarisation which already exists between Islam and the West.[46] Within this framework, an act of discrimination which is perceived by the individual to be motivated by hatred towards Islam may lead to 'Islam' becoming a more predominant part of the person's self-identity. In light of banning the veil, Islam may become a more salient and important marker of identity in response to attempts made by the state to render Islam invisible. This could be understood as a 'resistance identity'.[47]

The notion of resistance identity indicates the importance of cultural, religious and national identity as sources of meaning for people, and particularly for those social actors who are devalued or stigmatised by the logic of domination.[48] In assuming a resistance identity, Castells sees such individuals 'building trenches of resistance and survival on the basis of principles different from, or opposed to, those permeating the institutions of society'.[49] The persistence of popular debates in crystallising Muslims as permanent and essential 'others' – and the well-documented tendency of politicians to use legislation as a comfort blanket to reassure the public that the government is 'doing something' – have contributed to the emergence of an *ummah*-based community as a response to the current

44 A recent piece of research on the lived experiences of veiled Muslim women in Leicester found that all research participants understood the French veil ban as a trigger event that has led to increased levels of hostility and abuse because of the way they dress in the UK: I Zempi, *Unveiling Islamophobia in Leicester: The Victimisation of Muslim Women in Veil* (2014 forthcoming).

45 T Modood and F Ahmad, 'British Muslim Perspectives on Multiculturalism' (2007) 24(2) Theory, Culture and Society 187–213.

46 M Brown, 'Multiple Meanings of the Hijab in Contemporary France', in W J F Keenan (ed), *Dressed to Impress: Looking the Part* (Berg 2001) 105–21.

47 M Castells, *The Power of Identity* (Blackwell 1996).

48 Ibid.

49 Modood and Ahmad (n 45) 8.

climate of Islamophobia in the West.[50] Accordingly, the notion of belonging to the *ummah* can be an expression of collective resistance to the problem of Islamophobia. In light of the fear and hostility generated by 9/11 and 7/7, the consequential backlash against Muslims worldwide has strengthened this concept particularly amongst those Muslims living outside the Muslim world. The veil ban has come into effect in the age of the War on Terror, where Muslim minorities in Western countries have been facing increasing discrimination in schools, the workplace and society in general whilst *all* Muslims have been essentialised as terrorists or terrorist sympathisers.[51]

As already mentioned, ideological expressions of Islamophobia – in line with material forms of Islamophobic victimisation – can have psychological and emotional effects including fear, vulnerability and a sense of normativity of discrimination on both direct and indirect victims. In this context, Islamophobia acts as a form of emotional terrorism in that it segregates and isolates Muslims, in terms of restricting their freedom of movement in the public sphere and changing their patterns of social interaction. Thus, the tangible fear of being assaulted and abused limits pivotal aspects of identity-building, such as visiting friends, going to college, or attending the Mosque.[52] For Perry and Alvi, this is not a voluntary choice, but the 'safe' choice.[53] They argue that whether individually or collectively, the reality of Islamophobia creates social and geographical yet 'invisible' boundaries, across which members of the Muslim community are not 'welcome' to step. The enactment of physical, geographical boundaries impacts upon 'emotional geographies' in relation to the way in which Muslims perceive the spaces and places around and outside their communities of abode.[54] Rather than risk the threat of being attacked, both verbally and physically, many victims and potential victims opt to retreat to 'their own' communities. The fear of discrimination, harassment and violence reinforces these emotional and geographical boundaries whilst contributing to ongoing withdrawal and isolation. Ultimately, it furthers patterns of segregation for 'us' and 'them'. This symbiosis of the individual and the collective is crucial for understanding the community impact of the veil ban.

At the same time though, it is important not to treat members of the *ummah* as monolithic or psychologically similar with regard to their experiences and understanding of Islamophobia as a form of oppression and violence. There is no single monolithic Muslim community and as a result, no single monolithic Muslim standpoint on the veil ban policy. An understanding of the different layers of identity surrounding the core identity of *ummah* has significance for understanding the diversity of Muslims' responses to this piece of legislation. Muslim women (and men) are not a homogeneous group: their social, educational and cultural backgrounds, family and occupational situations differ significantly and determine to a large extent their religious affiliation, their integration and relationship with the 'host' community.[55] This line of thought suggests that experiences and effects of Islamophobia are likely to be shaped by a range of characteristics of the individual such as age, gender, class, ethnicity, sexuality, geographical location and socio-economic status.

50 R A Saunders, 'The Ummah as Nation: A Reappraisal in the Wake of the Cartoons Affair' (2008) 14(2) Nations and Nationalism 303–21.

51 Ibid 6.

52 G Mythen, S Walklate and F Khan, "'I'm a Muslim, but I'm not a Terrorist": Victimisation, Risky Identities and the Performance of Safety' (2009) 49(6) British Journal of Criminology 736–54.

53 B Perry and S Alvi, "'We are All Vulnerable": The in Terrorem Effects of Hate Crimes' (2012) 18(1) International Review of Victimology 57–71.

54 P Hopkins, 'Young Muslim Men's Experiences of Local Landscapes after 11th September 2001' in C Atkinson, P Hopkins and M Kwan (eds), *Geographies of Muslim Identities: Diaspora, Gender and Belonging* (Ashgate 2007).

55 Ibid 6.

Recognising the intersectionality of identities and the interplay of different aspects of Muslim identities with other personal, social and situational factors is crucial to understanding the impact of this piece of legislation both individually and collectively.

Conclusions

This article has examined the significance of the veil ban and its emotional impact upon veiled Muslim women in the West. We have argued that the face veil has come under attack in European domestic policies on the basis that it is a symbol of Islamist fundamentalism, gender inequality and lack of integration. Certainly, these are legitimate state interests in relation to law enforcement. However, although the veil ban may be legal under French and Belgian law, and secularism may be a core feature of European law, the law in question arguably constitutes a human rights violation[56] and also undercuts individual agency, privacy and self-expression no less than in countries where women are forced to veil. Whether veiling is a compulsory form of dress for women or whether it is outlawed, the impact upon women is the same. Such policies of disciplining and regulating women's bodies are imposed by state authorities and, as such, challenge the autonomy of women to make choices about their bodies and dress.[57]

Nor can it be forgotten that the veil ban is but one manifestation of the harmful effects of Islamophobia. Muslim women – whether veiled or not – can still be subjected to discriminatory treatment and harassment at home, in schools and in wider society.[58] They may face multiple and simultaneous discrimination, not only on the basis of their religion and gender, but also due to their ethnicity, age, class, disability, sexual orientation, nationality and political ideology. An informed awareness of the impact of the veil ban policy illustrates the multiplicative and intersectional nature of the potential discriminations involved. Muslim women need to become more economically, politically and legally empowered so they can more fully participate in mainstream society and in making decisions about their own lives. Given the emphasis placed on imposing the veil ban as part of a strategy to achieve women's equality, law makers in France and Belgium should consider whether the veil ban has any less desirable consequences for Muslim women.

The consequences of the veil ban policy are threefold. First, the veil ban oppresses women who want to wear the veil by depriving them from having control over their bodies and the way they dress. Clearly, this law is not a 'religious-blind' piece of legislation; rather it attacks 'Islam' through the religious code of dress for Muslim women. Secondly, the law stigmatises veiled Muslim women as 'criminals' and fosters 'otherness' in the form of anti-Muslim prejudice. In this light, the veil ban policy – including support for state veil bans – is fertile ground for anti-Muslim hate crimes and other such incidents in the public sphere. Even if not explicitly inciting hate-motivated violence, the law in its application contributes to a climate of intolerance and to mounting tensions between Islam and the West. Last but not least, the veil ban affects the wider Muslim community in the West through reference to the notion of *ummah* (the worldwide community of Muslim believers). Feelings of social exclusion, isolation and forced segregation are coupled by feelings of rejection by mainstream society. These realities of discrimination, fear, vulnerability, social and economic exclusion – informed by an ideological Islamophobia – have not appeared as a result of the veil ban alone. High unemployment rates, discrimination in development

56 Under article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion).

57 See J Zine, 'Unveiled Sentiments: Gendered Islamophobia and Experiences of Veiling among Muslim Girls in a Canadian Islamic School (2006) 39(3) Equity and Excellence in Education 239–42.

58 Wing and Smith (n 15).

opportunities and the overall isolation of Muslim communities in Europe in parallel with the racist essentialising of their 'Muslimhood' have alienated the Muslim population from the rest of European society.

Ultimately, Islamophobia as an ideology tars all Muslims with the fundamentalist brush and legitimises discrimination towards those Muslims who do not embrace the values, norms and behaviour of the dominant identity. The veil ban demonstrates that anti-Muslim discourse is no longer confined to far-right political parties but is increasingly found within the mainstream of the political spectrum.

In 2009, the former French President Nicolas Sarkozy announced that the full-face veil is incongruous with French values, commenting that 'in our country, we cannot accept that women be prisoners behind a screen, cut off from all social life, deprived of all identity'.[59] Such comments demonstrate that rhetoric of this sort has become increasingly legitimised, as it has moved from the far right of the political spectrum to the mainstream. These are issues affecting not simply the Muslim community but wider society as well. In this regard, victims are not only those directly targeted, such as Muslim women who are forced to remove their veils. In essence, society as a whole loses out when discrimination is legitimised because it undermines the fundamental values of a democratic society.

59 A Chrisafis, 'Nicolas Sarkozy says Islamic Veils are not Welcome in France' *The Guardian* (London, 22 June 2009) <www.guardian.co.uk/world/2009/jun/22/islamic-veils-sarkozy-speech-france>.

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The emotional paradoxes of adverse possession

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Property lawyers are generally viewed as a serious lot, not prone to feverish bursts of excitement as we seek comfort and solace in established legal rules and precepts. In the same way, property law disputes tend to have a fairly low profile and fail to capture the public imagination in the same way as, for example, those involving criminal or human rights law. Such apparent indifference might seem a little strange, given the centrality of property in everyday human life and the significance which legal systems and individuals attach to property rights. However, there is one issue which always inflames passions amongst lawyers and non-lawyers alike: the acquisition of land through the doctrine of adverse possession, often described as 'squatter's rights'. No property-related topic is likely to light up a radio show phone-in switchboard quite like squatting.[1]

Most, if not all, legal systems allow one person to lay claim to another's land, based on uninterrupted possession over a period of time.[2] Adverse possession results in a trespassing squatter becoming the 'rightful' owner of property through what is initially a 'wrongful' act, while the original owner has their title extinguished without any payment of compensation

* The authors' names are arranged alphabetically. We would both like to thank Professor Kieran McEvoy, School of Law, Queen's University Belfast, for his comments on an earlier draft of this article.

1 Though the right to defend one's home against intruders (the so-called 'batter a burglar' debate) comes a close second, given the media attention generated in England and Wales by recent judicial comments that burglars shot by their victims while committing such crimes should not expect any sentencing leniency, and the Conservative-led Coalition government's proposals to allow householders to use disproportionate force in certain circumstances: see M Evans and S Marsden, '"Expect to Be Shot if You Burgle Gun Owners", Judge Warns Criminals' *The Telegraph* (London, 26 September 2012); and N Watt and P Wintour, 'Tories Go Back to Basics on Right to Defend Home' *The Guardian* (London, 9 October 2012).

2 In most jurisdictions, the basic limitation period (i.e. the time within which the rightful owner can bring an action to recover their land when it is being occupied by someone else) is set out in the relevant 'statute of limitations'. For example, in Northern Ireland, the Limitation (NI) Order1989 stipulates a 12-year period for actions to recover land and, in the Republic of Ireland, a similar period is set out in the Statute of Limitations 1957. The Land Registration Act 2002 in England and Wales stipulates a minimum 10-year period of occupation alongside other procedural requirements which are noted briefly in part 3 of this article. It is, perhaps, not surprising that the greatest variance in limitation periods occurs throughout the USA, ranging from three years in Texas, through to 10 years in states such as Alabama and Iowa, to 20 years in, for example, Delaware and Maryland, and 30 or 60 years in Pennsylvania (depending on whether the land is cultivated or uncultivated): for a full listing see S L Martin, 'Adverse Possession: Practical Realities and an Unjust Enrichment Standard' (2008) 37 Real Estate Law Journal 133, text to fnn 32–64.

from the squatter (or from the state).[3] Attitudes towards the doctrine range across the entire spectrum, from laissez-faire notions of rewarding initiative and promoting efficient land use to more prevalent feelings of outrage and incredulity that the law is effectively sanctioning land theft. This article questions why adverse possession provokes such visceral reactions and identifies a number of inherent emotional paradoxes. Focusing on conventional, domestic-type squattings,[4] it draws on selected cases and academic literature from both sides of the Atlantic where the topic has been one of increasing debate in recent years and the core issues essentially the same. The article begins by examining why ownership of property (and land in particular) creates such strong sentimental attachments within Western societies[5] and uses these instinctive human responses as a means of deconstructing the predominantly negative emotions surrounding adverse possession. It then goes on to look at the range of variables which influence our perceptions of specific adverse possession claims, such as the character of the squatter, the level of apparent wrongdoing and the amount and type of property at stake. Finally, the article considers how adverse possession conflicts purport to be adjudicated in an emotional vacuum, yet both judges and legislators have responded to the less palatable aspects of the doctrine with an increasing emphasis on owner protection – the recent criminalisation of 'residential' squatting in England and Wales[6] providing a good illustration.

1 The emotional response to adverse possession

Adverse possession claims vary, from minor encroachments and innocent trespasses over another's property to larger-scale and/or deliberate instances of land-taking. Various rationales can be put forward for allowing the doctrine to operate,[7] though three are often cited in particular. First and foremost, adverse possession is part of the general law of limitations; it prevents 'stale' claims with all their evidential difficulties, potential for costly litigation and capacity to upset continued reliance on the status quo.[8] Secondly, the doctrine validates disputed land titles where official ownership records do not match perceived realities – an essential element of any property law system in which possession is the root of title[9] – and facilitates land transfers where physical and legal boundaries are

3 Thus, adverse possession has been described as 'an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law': H W Ballentine, 'Title by Adverse Possession' (1918–19) 32 Harv L Rev 135, 135. See also K J Gray and S F Gray, *Elements of Land Law* (5th edn, OUP 2009) 1159: '[T]he inception of adverse possession brings about one of the larger paradoxes of the law of realty – an uncompensated shift of economic value to the squatter or interloper . . . Estate ownership is fundamentally determined by behavioural fact rather than by documentary record.'

4 In other words, those between neighbouring landowners or homeowners, or between private individuals, as opposed to larger scale, socio-economic or politically motivated squattings, which often occur as a form of land reclamation within post-conflict states or those in a period of transition: see, for example, S Moyo and P Yeros (eds), *Reclaiming the Land: The Resurgence of Rural Movements in Africa, Asia and Latin America* (Zed Books 2005).

5 While this is not an exclusively Western phenomenon, collective views of landownership and the values attached to it vary within different societies and are strongly influenced by socio-cultural factors. Thus, Western constructs with their emphasis on private property and individualism will differ significantly from, for example, indigenous concepts of property and their emphasis on communal rights: see, generally, F W Rudmin, 'Cross-Cultural Correlates of the Ownership of Private Property' (1992) 21 Soc Sci Res 57.

6 Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012: see part 3 below.

7 For an overview, see J E Stake, 'The Uneasy Case for Adverse Possession' (2001) 89 Georgetown Law Journal 2419, 2434–55.

8 See T W Merill, 'Property Rules, Liability Rules, and Adverse Possession' (1984) 79 Northwestern University L Rev 1122, at 1128.

9 See Merill (n 8) 1129–30; as well as Gray and Gray (n 3) 163.

misaligned.[10] Thirdly, the threat of squatting encourages landowners to be vigilant and can be linked to broader notions of social responsibility in promoting maximum use and productivity of a finite and valuable resource.[11] Yet, such ostensibly legitimate aims are irrelevant when it comes to the emotional reactions engendered by adverse possession and the loss of land which the doctrine facilitates. From the perspective of the dispossessed landowner, the primary emotions are often anger and disgust directed towards the squatter – a figure frequently portrayed as a villainous bogeyman in the popular media and elsewhere.[12] Such negative feelings are hardly surprising, given that adverse possession taps into key elements of the human psyche.

At its most basic level, adverse possession tends to be viewed as nothing more than 'theft or robbery, a primitive method of acquiring land without paying for it'.[13] The offence of theft itself connotes morally repugnant notions of someone taking something which does not belong to them and violating the rights of the property owner in doing so. Yet, when the subject-matter is land, the stakes are raised significantly, not least because to steal a person's land is to steal not only their property but their territory – their 'patch'.[14] Western societies are characterised by an overwhelming bias towards the concept of private property and ownership rights.[15] Ownership of property, and land in particular, is inextricably linked with certain social and cultural values. Land is much more than a precious natural resource which is vital for the sustenance of mankind; it is a potent and socially recognised symbol of material wealth, identity, social standing and financial security for the owner.[16] The old mantra that 'an Englishman's home is his castle' conjures up important notions of dominion and control, with ownership conveying a sense of 'economic power, individual self-meaning, and personal self-worth'.[17] Adverse possession represents a direct attack on these basic constructs and the feelings of happiness, well-being and personal satisfaction

10 For example, as a means of rectifying previous conveyancing errors or resolving the classic boundary dispute between neighbouring properties.

11 Stake (n 7) 2434–36.

12 For examples of this, one need look no further than at the campaigns conducted by sections of the popular press in relation to the squatting controversies of the 1970s, the hippy convoy of 1986, the Parliament Square camp of 2010 and the Dale Farm evictions of 2012. These portray squatters as folk devils of the very worst sort; an articulated, sophisticated and ruthlessly organised army of hippies, layabouts and drug addicts (many of them foreign) who lie in wait to take over your house as soon as you go on holiday and smash it up for the sheer pleasure of doing so. Their alleged aim is nothing less than the complete destruction of civilised society: see B Glastonbury and G Thompson, 'Conspiracy, Criminal Law and Squatting' (1976) 3 British Journal of Law and Society 233; N Anning et al, *Squatting: The Real Story* (Bay Leaf 1980) ch 5; P Vincent-Jones, 'Private Property and Public Order: The Hippy Convoy and Criminal Trespass' (1986) Journal of Law and Society 343; and P Scraton, *Power, Conflict and Criminalisation* (Routledge 2007) ch 1.

13 Ballantine (n 3) 135; and see also Martin (n 2) 133, describing the doctrine as a 'legal way to get something for nothing'.

14 This notion of territory is, of course, something even animals recognise: see J Edney, 'Human Territoriality' (1974) 81 Psychological Bulletin 959; S N Brower 'Territory in Urban Settings' in I Altman et al, *Environment and Culture* (Plenum Press 1980); and R D Sack, 'Human Territoriality: A Theory' (1983) 73 Annals of the Association of American Geographers 55.

15 See, generally, Rudmin (n 5).

16 See N Davidson, 'Property and Relative Status' (2009) 107 Mich L Rev 757; and L Bloom, 'People and Property: A Psychoanalytical View' in F W Rudmin (ed), *To Have Possessions: A Handbook on Ownership of Property* (Select Press 1991).

17 R R Coletta, 'The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis' (1998) 1 University of Pennsylvania J Const L 20, 24. See also J T Powell, 'The Psychological Cost of Eminent Domain Takings and Just Compensation' (2006) 30 Law and Psychol Rev 215, 219 (property ownership is closely linked to a person's 'identity and feelings of well-being and security'); as well as M J Radin, 'Property and Personhood' (1982) 34 Stan L Rev 957.

associated with ownership. Little wonder that the doctrine raises hackles and gets the adrenaline pumping.

Psychological studies have established strong personal connections between individuals and their material possessions, an innate sense of 'me' and 'mine' that attaches to objects and generates positive emotions of the type just described.[18] Such deeply rooted predispositions are hardly surprising, given that evolutionary stable patterns of behaviour could not have developed without some means of asserting control over finite commodities and resources. However, individual connections to land are even stronger, not just because of a deep sense of emotional attachment,[19] but because every piece of land is unique and potentially irreplaceable. With this in mind, our instinctive responses to adverse possession are hardly surprising. As Coletta has observed:

> Biologically, ownership of real property engenders a defined band of emotional attachments. Humans are conditioned to ground themselves in their physical environment and to claim nearby space with a characteristic absoluteness. Strong feelings surround this sense of ownership and any attack on its inviolability produces immediate outrage and defensive strategies. The idea that property is one's individual domain 'feels' correct. Ownership carries with it the sensations of stability, security and well-being.[20]

Physiological traits aside, the very concept of land ownership generates certain shared assumptions which also exert a strong influence on reactions to adverse possession. Ownership and respect for ownership play an important part in how we relate to others, and how we 'imagine' ourselves as part of a broader collective community and a civilised nation.[21] Society expects individual citizens to respect the property rights of others and to act accordingly, in what might be described as a property-centric version of the biblical mantra to 'do to others as you would have them do unto you'.[22] As Rudmin puts it:

> We know where our possessory interests and property rights reside and where they do not. We limit our behaviour accordingly, and expect others to know and do the same.[23]

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18 For an excellent analysis, see J L Pierce, T Kostova and K T Dirks, 'The State of Psychological Ownership: Integrating and Extending a Century of Research' (2002) 7 Review of General Psychology 84; as well as J A Blumenthal, 'Property Law: A Cognitive Turn' (2010) 17 Psychonomic Bulletin and Review 186 and '"To Be Human": A Psychological Perspective on Property Law' (2008–09) 83 Tul L Rev 609 and the various sources cited therein. See also J E Stake, 'The Property "Instinct"' (2004) 359 Phil Transactions Royal Society B 1763; and D B Barros, 'The Biology of Possession' (2001) 20 Widener L J 291.

19 This idea of emotional attachment has been well documented in the eminent domain or compulsory acquisitions context: see Powell (n 17), the author making the point that, while property owners are often paid the full market value of their properties, compensation for loss of emotional connections and (in some instances) loss of community are much more difficult to measure. See also E Sherwin, 'Three Reasons Why Even Good Property Rights Cause Moral Anxiety' (2006–07) 48 Wm and Mary L Rev 1927, 1939, where the author suggests that people build their lives and businesses 'in the expectation of control over a type and quality of resources' and 'endow their holdings psychologically'.

20 Coletta (n 17) 72. Later in the same article, the author remarks: 'Once I attach land as "mine", my perspective is in many ways predetermined by my biology: external interference with my dominion and control is perceived as hostile and villainous': 75.

21 See, for example, B Bowden, 'The Ideal of Civilisation: Its Origins and Socio-Political Character' (2004) 7 Critical Review of International Social and Political Philosophy 25, discussing inter alia the work of Norbert Elias (see N Elias, *The Civilising Process* (Blackwell Publishers 2000)).

22 Luke 6:31.

23 F W Rudmin, '"To Own is to be Perceived to Own": A Social Cognitive Look at the Ownership of Property' (1991) 6 Journal of Social Behaviour and Personality 85, 86. See also E M Peñalver and S Katyal, 'Property Outlaws' (2007) 155 University of Pennsylvania L Rev 101, 136 ('property rights and the social norms that accompany . . . property ownership play an important role in ordering our interactions with other human beings').

The sanctity of land ownership creates reciprocal notions of respect for property rights, based on broader constructs of social morality;[24] interference with these rights by a squatter is regarded as an immoral act, not just by the original owner but by the community at large.

Another important factor is the perceived role of the state as both law maker and law enforcer. Societal views of adverse possession are shaped by an expectation that the law provides strong (if not impervious) protections for private property rights. Such rights are subject to minimal state inference; they must be upheld and protected as one of the benchmarks of a so-called 'civilised' society.[25] Yet, in successful adverse possession claims, the state (having passed the relevant statute of limitations) allows a squatter to 'take' land from the original owner and is effectively sanctioning theft while failing in its duty to protect its citizens against what is perceived to be an unlawful appropriation by others.[26] In short, the role of the state 'adds insult to injury', thus fuelling the collective sense of anger and injustice associated with the doctrine. According to Stake:

> [Adverse possession] strikes at the heart of our concept of property. 'Property' means rights – rights in a thing, that are enforced by the state. We support state enforcement of rights in things for reasons of both justice and efficiency. The fundamental idea of property is that it cannot be taken against the owner's wishes . . . Yet that is what adverse possession does. The doctrine effects a transfer of state-sanctioned rights in land from owners to non-owners without the consent of the owner.[27]

Adverse possession disregards entitlement as the state effectively colludes with and facilitates the squatter in appearing to reward egregious behaviour. Little surprise then that the doctrine often prompts simultaneous feelings of disgust, despair and disbelief – all of which contribute to the pervasive sense of moral outrage.[28] Meanwhile, the punitive element of the doctrine creates both confusion and a heightened sense of unfairness. Other areas of law, such as criminal law and torts, generally punish only those who have performed affirmative wrongful acts, or failed to act to avoid creating an unreasonable risk of harm. In contrast, adverse possession penalises landowners for inactivity that poses no threat to others; failing to use or attend to their land results in 'poor, unsuspecting, innocent owners los[ing] all or part of [it] . . . without having done anything wrong'.[29] Of course, sentiments such as these reveal more than ingrained emotions; they speak to deeper societal fears realised in the spectre of a decent, law-abiding citizen who works hard, pays their taxes

24 '[P]roperty rights command widespread respect. This respect can only be provided by some version of morality that treats violations of possession . . . and other gross interferences with property as wrongs subject to widespread disapprobation': T W Merill and H E Smith, 'The Morality of Property' (2006–07) 48 Wm and Mary L Rev 1849, 1852–53. See also R S Auchmuty, 'Not Just a Good Children's Story: A Tribute to Adverse Possession' [2004] Conv 68.

25 'Property rights . . . provide individual security and (in the process) diffuse political power. They create and protect material wealth and prosperity, necessary preconditions for social civility, social stability, and the maintenance of democratic governance.': L S Underkuffler, *The Idea of Property* (OUP 2003) 138. The popular image of ownership as generating entitlements safeguarded by the state has also been enhanced by the rights-based culture of the latter twentieth century: see, for example, the protection of property provision in art 1, Protocol 1 of the European Convention on Human Rights, and compare art 44 of the Irish Constitution.

26 Of course, the irony here is that adverse possession is perfectly lawful, assuming that the requisite conditions have been met. This is discussed further below.

27 Stake (n 7) 2420. The author also makes the point later in the same article that: 'if land is part of the self, its reallocation by the state is akin to physical or mental punishment, which the state ought not be able to impose without a finding of criminal behaviour': 2456.

28 See Peñalver and Katyal (n 23) 103: 'The overwhelmingly negative view of property lawbreakers in popular consciousness comports with the centrality of property rights within our characteristically individualist, capitalist, political culture.'

29 Stake (n 7) 2434.

and obeys the rules, yet is still vulnerable (through no perceived fault of their own) to having their interests subordinated to those who fail to respect the rights of others. And if the law allows this to happen to one individual, what is to stop the same thing happening to anyone else?

In contrast, advocates of adverse possession would argue that it does nothing more than reward the efforts and initiative of squatters who maximise the use of a finite and under-utilised resource.[30] At some basic level, the squatter's labour contrasted with the landowner's disregard for their property justifies a shift in ownership to the former. Psychological studies suggest that an association between a person and an object can validate ownership claims because that object means more to the person who currently possesses it and has invested their labour in it – in other words, a type of investment–attachment theory which favours the possessing individual.[31] Transferring title in adverse possession claims rewards the squatter who appears to 'value' the land more because of an ostensibly greater and more contemporaneous physical, financial and emotional investment in it,[32] while also giving effect to alleged social assumptions about who is the rightful owner based on the public appearance of an association between the squatter and the property in question.[33] As regards the landowner, the punitive element of adverse possession is entirely justified; 'lazy' owners who, through indifference, carelessness or wilful neglect, fail to remove a squatter as the limitation period ticks slowly by deserve to lose their property,[34] or at least be prodded into some sort of preventative action.[35]

This analysis suggests that adverse possession is nothing more than a form of corrective justice, premised on dual notions of squatter investment and landowner culpability. Moreover, labelling squatters as land thieves is fundamentally wrong, since such individuals are 'doing nothing more than knowingly employing the law's own process for acquiring land'.[36] Yet, such views are not borne out in societal attitudes towards adverse possession and the basic stereotypes which are often applied to squatters. As Merill and Smith have argued:

> Someone who has deliberately taken the property of another is simply a bad person, and should not be rewarded for such behavior. The immorality of the original act of deprivation trumps all considerations of utility that can be argued on the other side.[37]

30 See the various sources cited immediately below. It could also be argued that, in using someone else's land, squatters are merely acting on a basic human instinct to acquire property, with evolutionary theory suggesting that such instincts are derived from a basic competition for scarce or finite resources: see, generally, Stake (n 18).

31 See, for example, Rudmin (n 23) and J K Beggan and E M Brown, 'Association as a Psychological Justification for Ownership' (1994) 128 Journal of Psychology 365.

32 L A Fennell, 'Efficient Trespass: The Case for "Bad Faith" Adverse Possession' (2006) 100 Northwestern University L Rev 1037, 1064, highlights this idea of 'moving scarce resources into the hands of those who place the highest value on them'. See also the discussion in Peñalver and Katyal (n 23) 149.

33 'Active possession of the land for an extended period takes precedence over the documented title to the land . . . [T]he law recognizes that the active social perception of ownership is a higher order principle of ownership than the archival memory of ownership': Rudmin (n 23) 92. See also O Friedman and K R Neary, 'First Possession beyond the Law: Adults' and Young Children's Intuitions about Ownership' (2008–09) 83 Tul L Rev 679.

34 See J Netter, P Hersch and W Manson, 'An Economic Analysis of Adverse Possession Statutes (1986) 6 International Review of Law and Economics 217, 219.

35 See Stake (n 7) 2435.

36 Fennell (n 32) 1044.

37 Merill and Smith (n 24) 1876. See also Peñalver and Katyal (n 23) 156, the authors noting that in most cases the 'desire for the property of another will be unworthy and unjustified, and society correctly responds to the lawbreaker's behavior by punishing her for her transgression'.

In short, for most of us, a legal doctrine cannot 'turn a moral wrong into a right'.[38] Adverse possession rewards and facilitates conduct that society generally regards as a form of wrongdoing; it provokes such overwhelmingly negative responses because it encourages what is perceived to be morally and socially unacceptable behaviour, while promoting the uncompensated loss of a valuable commodity.[39] In many instances, it appears, literally, to add state-sanctioned legal insult to injury.

2 Altering the emotional response: the influence of external factors?

Our instinctive reactions to adverse possession are also shaped by external factors, not least of which is the perceived identity or character of the squatter. In this respect, much will depend on whether or not such individuals are deemed to be guilty of whole-scale wrongdoing. We may be prepared to turn the proverbial 'blind eye' to boundary disputes or minor encroachments and to tolerate the innocent, 'good-faith' squatter who unknowingly trespasses on another's land; such claims are, perhaps, more likely to produce an emotionally neutral response. However, the same cannot usually be said of the opportunistic, 'bad-faith' squatter who deliberately sets out to acquire land by adverse possession and acts in full knowledge of the landowner's (initially) superior rights; here, the emotional response is much more pronounced because of an innate dislike for those who are contemptuous of the rights of others.[40]

One of the most extreme examples of this occurred several years ago in Boulder, Colorado, in a dispute between two neighbouring landowners.[41] The Kirlins had purchased land in 1984, intending to build their 'dream home' there some day; the lot in question was several blocks from the couple's current home and directly beside property owned by Richard McClean and his wife, Edith Stevens. For 25 years, McClean and Stevens used around a third of the Kirlins' lot as a garden and as a means of access to their own back yard; they also stored wood on the lot and held various social gatherings there. When the Kirlins realised what was happening (sometime in 2006), they started to fence a dividing line between the two properties (i.e. theirs, and the one owned by McClean and Stevens) but were prevented from doing so when McClean obtained a restraining order to stop the fencing. McClean and Stevens then claimed that one-third of the Kirlins' lot was theirs by adverse possession and were awarded title to part of it in October 2007, provoking public uproar. Hundreds of people gathered to protest the court's decision, while a barrage of negative media commentary surrounding the case (and adverse possession more generally) brought the matter to the attention of the Colorado General Assembly.[42] The result was sweeping amendments to the law of adverse possession in the state of Colorado, making it virtually impossible for a similar claim to succeed in the future.[43]

Public reactions to this particular dispute were so very pronounced for one reason: the fact that McLean was a retired district court judge and former mayor of Boulder and that

38 Fennell (n 32) 1054.

39 See, for example, Stake (n 7) 2433.

40 '[T]he cases do clearly show that the trespasser who knows he is trespassing stands lower in the eyes of the law . . . than the trespasser who acts in honest belief that he is simply occupying what is his already': see R H Helmholz, 'Adverse Possession and Subjective Intention' (1983) 61 Washington University Law Quarterly 331, 332.

41 *McLean and Stevens v DK Trust and Kirlin*, Boulder District Court Case No 06 CV 982 (filed 4 October 2006). For a more detailed discussion, see Martin (n 2).

42 See the discussion in Martin (n 2), text to fnn 80–90, for public reactions to the decision and associated reporting in the local media.

43 These amendments were rushed through in 2008 and are noted briefly in part 3 of this article.

Stevens was a practising lawyer. The Kirlin case was not only an example of deliberate 'land theft'; the conventional negative response to adverse possession was apparently amplified because Stevens was someone who was expected to defend the rights of others, while McLean was someone whose career had centred on the administration of justice and, having occupied public office, was expected to adhere to basic standards of honesty and integrity. The fact that the couple's actions were completely lawful was irrelevant; both were castigated as shameful hypocrites who had abused their respective positions, and were effectively labelled social pariahs.[44] Public sympathies lay firmly with the Kirlins, as seemingly upright citizens who had suffered a huge injustice and would no longer be able to build their dream home given the loss of part of their land and the $400,000 in legal fees spent contesting the dispute.

The amount of land at stake and its value can also be a significant factor when it comes to our reactions to adverse possession claims. Most are contested boundaries, involving fairly small and relatively inexpensive parcels of land. Yet, when we think about adverse possession, our minds immediately conjure up images of squatters seizing uninhabited homes or large rural properties – something which effectively came to pass in the Kirlin dispute, and occurred in even starker form in the English case of *J A Pye (Oxford) Ltd v Graham*.[45] Pye was a development company which had purchased land in Berkshire in 1977; it included a large estate comprising 'Manor Farm' and the 23 hectares (57 acres) of land at the heart of the litigation ('the disputed land'). Manor Farm was sold shortly afterwards and eventually bought by the Graham family in 1982. Pye retained the disputed land, intending to develop it when planning permission could be secured, but issuing grazing licences over it to the owners of Manor Farm in the meantime. The Grahams had such a licence and, conscious of the fact that it would expire on 31 December 1983, contacted Pye asking if the permission could be renewed for another year. Pye refused, because of an anticipated planning application. Between December 1984 and May 1985, the Grahams made repeated requests to renew the grazing licence, but received no reply. In the meantime, nothing changed – Pye never obtained planning permission and had no further communications with the Grahams who continued to farm the disputed land as before. This continued until June 1997 when the Grahams claimed that the property was theirs by adverse possession. Pye subsequently issued proceedings to reclaim its land; following a lengthy and protracted legal battle, the House of Lords ruled in favour of the Grahams resulting in Pye losing title to 23 hectares of prime agricultural land with development potential and an estimated value of £10m.

Perhaps one of the most surprising aspects of the *Pye* litigation is that responses to the decision were fairly muted; despite the amount of land at stake and its value, there was none of the public outcry which the Kirlin dispute generated, and reports in the national media

44 See, for example, D Harsanyi, 'Property Rights Wrongfully Taken' *The Denver Post* (Denver, 19 November 2007) <www.denverpost.com/harsanyi/ci_7501264> accessed November 2012. The same article also suggests a certain pro-establishment bias in McClean being granted court orders by members of the judiciary with whom he once served.

45 The case was litigated at all three court levels in Britain: [2000] Ch 676 (Ch), [2001] Ch 804 (CA), and [2003] 1 AC 419 (HL). It was then appealed to the European Court of Human Rights in a long-running saga which eventually ended in August 2007 – *JA Pye (Oxford) Ltd v UK* (2006) 43 EHRR 3 and (2008) 46 EHRR 45. While *Pye* was an atypical adverse possession case given the amount of land at stake, it was essentially a dispute between private individuals (without any socio-economic or political objective) and falls within the category of 'domestic squattings' being looked at in this article.

were fairly anodyne despite the publicity generated by the case.[46] The Grahams knew their actions were wrong in the sense that they were not permitted to be on the land from 1984 onwards, and there is a certain counter-utilitarian aspect to the decision given that it resulted in land which Pye intended to use for housing being placed into private ownership. However, reactions were probably also influenced by the fact that Pye was a wealthy (and faceless) corporation with an abundance of land and was also in some way responsible for what had happened by failing to remove the Grahams. In short, while people might find the Grahams and their conscious 'taking' of someone else's property objectionable, they also tend to have little sympathy for indifferent or neglectful landowners like Pye who fail to act despite being fully aware that someone else is using their land. Indeed, such inaction is perhaps viewed as evidence that they cannot have had a strong emotional attachment to it in the first place.

Another significant difference between the *Pye* case and that involving the Kirlins is that the former involved land intended for development rather than a private residence. Whilst it may be true to say that people's relationships with places generally are frequently 'saturated with emotions',[47] this is doubly so in relation to a home. The concept of 'home' has spawned a vast amount of literature in recent years,[48] much of which serves to emphasise the complex and multifaceted nature of the idea.[49] Thus, for Fox, the notion of home connotes a physical structure, territory, identity and a social/cultural unit;[50] for Oluwole, it is at once heart, hearth, an area of autonomy and a source of social status.[51] For Gurney, the home is, for good or ill,[52] nothing less than an 'emotional warehouse';[53] for Low these emotions can be not only 'proactive' ones such as love, warmth, trust and security, but also 'reactive' ones associated with defensive feelings and a desire to be protected from real or imagined dangers.[54] The significance of these feelings in the present context is plain to see; taking someone's home is so much worse than taking other property because of complex emotional attachments to the home and the sense of shelter and security that it connotes. In the two cases discussed here, Pye simply lost its land; the Kirlins lost what was intended to be their perfect home in what was effectively a symbolic

46 For example, one of the more forceful headlines reporting on the House of Lords' decision was C Dyer, *The Guardian*, 'Britain's Biggest Ever Land-Grab', 9 July 2002, while *BBC News Online* simply referred to 'Windfall Hope for Farming Family' (4 July 2002) <http://news.bbc.co.uk/1/hi/england/2094190.stm> accessed November 2012. Media reporting of Pye's eventual defeat in the Grand Chamber of the European Court of Human Rights was equally lacklustre: see, for example, M Herman, 'Developer Loses Landmark Squatting Case' *The Times* (London, 30 August 2007); and J Rozenburg, 'Firm Loses Case Over £21m Loss to Squatters' *The Telegraph* (London, 30 August 2007). The respective parties in *Pye* had placed highly conflicting values on the land, ranging from £10m–£21m. However, the final figure appears to have been much closer to £10m.

47 B M González, 'Topophilia and Topophobia' (2005) 8 Space and Culture 193.

48 S Mallett, 'Understanding Home: A Critical Review of the Literature' (2004) 52 Sociological Review 62.

49 G D Hayward, 'Home as an Environmental and Psychological Concept' (1975) 20 Landscape 2; K Dovey, 'Home and Homelessness' in I Altman and C M Werner (eds), *Home Environments* (Plenum Press 1985) 34; H Easthope, 'A Place Called Home' (2004) 21 Housing, Theory and Society 183; I Oluwole, 'Home and Psycho-Social Benefits' (2011) 19 Ife Psychologia; and D B Barros, 'Home as a Legal Concept' (2006) 46 Santa Clara L Rev 255. For a more critical approach, see S Stern, 'Residential Protection and the Legal Mythology of Home' (2009) 107 Mich L Rev 1093.

50 L Fox, 'The Meaning of Home' (2002) 29 JLS 580, 590.

51 Oluwole (n 49) 3.

52 Thus, many critics have suggested that romanticised ideals of home are often at odds with the lived experience of many people, most notably those for whom it is a place not of safety but of terror: see Mallett (n 48).

53 C Gurney, 'Towards a more Affective Understanding of Home' in *Proceedings of Culture and Space in Built Environments: Critical Directions/New Paradigms* (2003) 33, as cited by Oluwole (n 49).

54 S F Low, 'The New Emotions of Home' in M Sorkin (ed), I*ndefensible Space: The Architecture of the National Insecurity State* (Routledge 2008) 233.

shattering of the core values of the 'American dream': the concept of private property and protection of basic rights and freedoms.

The decision in *Pye* aside, other high-profile squatting claims show that public reactions can be just as strong in England as they are on the other side of the Atlantic, especially where the squatter's actions are deliberate and the potential loss of valuable property (often, but not always, a home or private dwelling) creates a strong sense of injustice.[55] Such claims are also characterised by a tendency on the part of the media to vilify certain categories of squatter, and not simply because of their actions in claiming another person's land; this would be bad enough on its own, but the fact that the squatter is classed as a certain 'type' of individual makes things even worse and heightens the emotional response. For example, those who engage in organised squattings are frequently portrayed as 'scruffy layabouts', scrounging off the rich by moving into affluent neighbourhoods and occupying private dwellings, or acquiring valuable council properties at the expense of the taxpayer.[56] Adverse possession has also occasionally been linked to the immigration debate, with certain newspapers suggesting that those who come to Britain from other countries are not simply changing communities and threatening citizens' livelihoods but are now 'taking our homes' as well.[57] Although the likelihood that adverse possession will ripen into title is virtually nil here, the association of adverse possession with immigration, with all that this implies by way of broader societal fears and prejudices, makes it a much more contentious and divisive issue than it might otherwise be.

3 Mediating the emotional response: judges, legislators and the shift towards owner protection

Adverse possession is an example of the capacity of the law to generate negative emotion. Yet, there appears to be little room for an emotional response to contested land claims, at least insofar as the legal system itself is concerned. This is hardly surprising. Property law facilitates a dispassionate dialogue with its emphasis on rules and legal formalism, and the resolution of adverse possession disputes is no different. Mechanistic principles ignore such things as the landowner's sentimental attachment to the property or its financial worth; the

55 Gray and Gray (n 3) 1167 cite public reactions to *Ellis v Lambeth LDC* (1999) 32 HLR 596 (loss of valuable council property in London to squatter who had been there for almost 15 years), as well as headlines such as 'Squatters Sell Home For £103,000 . . . And it is Completely Legal' *Daily Express* (London, 8 July 1996). See also C Gysen, 'Squatter Becomes Owner of £100,000 Flat' *Daily Mail* (London, 15 June 2001).

56 Some of the more lurid headlines include the following: J Hartley-Brewer, 'Squatter's Right to £200,000 Home: Council Blunder Gives Free Property Windfall to Man who has Lived in House for 16 Years without Paying a Penny in Rent, Rates or Taxes' *The Guardian* (London, 21 July 1999); D Millwards, 'Squatters are Evicted from Economist's £1.5m Home' *The Telegraph* (London, 25 August 2001); A Gillan, 'Squatters Move into £20m House' *The Guardian* (London, 9 November 2002); C Johnston, 'Squatters Lock Pensioner out of her £1.5m House' *The Times* (London, 30 April 2005); V Dodd, 'The Party's over for Squatters in £14m House' T*he Guardian* (London, 1 September 2006); H Pidd, '£6m House, 30 Rooms, One Careful Anarchist Collective: inside Britain's Poshest Squat' *The Guardian* (London, 7 November 2008); J Swaine, 'Squatters Move into £4.5m Hampstead Mansion' *The Telegraph* (London, 10 April 2009); and R Seales, 'Squatters Who Took Over £4m Ten-bedroom Mansion Face Eviction after "Hitting Golf Balls from the Roof"' *Daily Mail* (London, 20 March 2012). Although some of these could be described as 'Robin Hood' style, redistribution of wealth-type squattings wherein a lack of affordable housing for families and public-sector employees in expensive city areas clashes with the significant number of empty properties neglected by wealthy landowners, the various media reports tend to be critical of squatters regardless of their motives.

57 See, for example, M Horsnell, 'Polish Builders do up Flat, then Stay as Squatters' *The Times* (London, 11 November 2006); C Gray, 'How Migrants Snatched our Homes' *Daily Express* (London, 23 September 2010); J Matthews, 'I Want an Even Bigger House says Latvian in £10 Million Squat' *Daily Express* (8 January 2011); and M Wardrop, 'Squatting Rises as Eurozone Crisis Drives Migrants into London' *The Telegraph* (London, 8 June 2012).

squatter's motivations are also irrelevant, as is the sense of outrage and injustice which any successful claim might generate. However, this is not to say that courts have remained entirely neutral in their views.

While the various statutes of limitation stipulate a time after which a squatter can claim title to another's land, certain doctrinal requirements must also be satisfied such as exclusive physical control over the land and intention to possess to the exclusion of all others[58] – what might be described as a type of 'judicial gloss' on the legislation. The application of these rules does not tend to distinguish between so-called good-faith and bad-faith takings, with the result that the 'rapacious land-grabber is treated no differently to the innocent, land-caring trespasser'.[59] Yet there is a subjective tendency on the part of judges to categorise some adverse possession claims as less deserving than others and to raise the legal threshold accordingly by making it more evidentially difficult for a squatter to prove intention to possess or factual control of the land, both of which must be established on the facts of the individual case. In other words, by subtly manipulating the doctrinal requirements of adverse possession, judges can sometimes ensure that deliberate land thieves, or those whose adverse possession claims appear to them to be less meritorious, find it more difficult to succeed.[60]

We might describe this as an intuitive emotional response; instead of simply applying law to fact in a mechanical and deliberative way, judges may be swayed (in adverse possession claims where they ensure that title remains with the owner) by certain biological predispositions around notions of property and ownership, and by the negative moral connotations which squatting generates.[61] As argued above, such factors strongly influence societal responses to adverse possession,[62] and judges are no different, even if they can justify a particular outcome on the basis of legal rules as opposed to human intuition. It is also interesting to note that judges do not tend to criticise individual squatters or make negative comments about their actions, even where such persons are acting with blatant disregard for the rights of others.[63] Once again, this is hardly surprising given that squatters

58 These are the basic doctrinal requirements in English law, as established in cases such as *Powell v McFarlane* (1977) 38 P & CR 452; *Buckingham County Council v Moran* [1990] Ch 623; and the House of Lords decision in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

59 B Edgeworth, 'Adverse Possession, Prescription and their Reform in Australia' (2007) 15 APLJ 1, 15. However, the position will obviously be different where adverse possession laws for a particular jurisdiction specifically state that such a distinction should be made, as is now the case in the state of Colorado: see text to n 66.

60 Cooke notes a 'recurring theme' in English case law whereby judges 'have at times appeared to strive to make things difficult for the squatter by setting the [doctrinal] requirements . . . rather higher than they need be': see E Cooke, *The New Law of Land Registration* (Hart Publishing 2003) 134 and the examples cited therein. Similar trends have been noted in the USA, with courts being reluctant to award title to so-called bad-faith squatters: see Helmholz (n 40), 339–41.

61 For an analysis of the tensions between formalist and realist or intuitive models of judging, see C Guthrie, J J Rachlinski and Judge A J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell L Rev 1 and the various sources cited therein.

62 See part 1 above.

63 For example, in the *Pye* litigation, any negative expressions were confined to the outcome of the case and aspects of adverse possession more generally with Lord Bingham and Lord Hope reluctantly awarding title to the Grahams while criticising the absence of any compensation mechanism for Pye as well as the 'lack of safeguards against oversight or inadvertence' on the part of the owner: *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 447, per Lord Hope. It is worth noting here that Lord Bingham actually suggested that the Grahams had 'acted honourably throughout' and were merely 'doing what any farmer in their position would have done' by continuing to farm the 23 hectares of land when no new grazing agreement materialised ([2003] 1 AC 419 at 426). This perhaps embellishes things somewhat, given that the Grahams knew of Pye's superior right and that their continued use of the land was unauthorised and unpaid for!

are merely taking advantage of what the law allows them to do, and there are probably numerous instances of judges having to apply laws which they disagree with on a personal level yet must uphold as a directive of the state.[64] Instead, manipulation of the doctrinal requirements for adverse possession can be seen as a discreet yet effective means of channelling judicial empathy for disenfranchised landowners, while also signalling a tacit disapproval for acts of deliberate squatting.

Public attitudes towards adverse possession have also influenced legislative responses to the doctrine, contributing to what we might describe as an increasingly 'owner-protectionist' stance in some jurisdictions. Law-makers have traditionally accepted (or tolerated) adverse possession as a necessary means of placing a time limit on lawsuits while ensuring that land records match lived realities as a means of promoting marketability. Yet, occasional high-profile or atypical squatting cases (especially those which involve deliberate land-taking) provoke public outrage and prompt calls for change, even if they also distort the more habitual application of the doctrine. The strength of the local reaction generated by the Kirlin dispute in Colorado[65] is a powerful example of law responding to emotion, the public's instinctive aversion to the outcome and perceived immorality of adverse possession prompting a knee-jerk reaction which saw the state legislature rush through new laws within a matter of months. These reward only good-faith trespassers and allow courts to force a victorious squatter to pay for any land acquired, as well as reimbursing the rightful owner for any property taxes paid by them during the limitation period.[66]

In Britain, the driving forces behind recent changes to core adverse possession laws have been more subtle though no less significant in their effect. Public perceptions of the doctrine undoubtedly played a part, given some of the media headlines referred to earlier[67] and the sense that it was becoming almost too easy for deliberate squatters to succeed. However, other factors were also at play, in particular, arguments that adverse possession did not sit comfortably with a system of compulsory title registration and its definitive record of land ownership,[68] as well as issues around whether an uncompensated loss of land breached art 1, Protocol 1 of the European Convention on Human Rights and its right to 'peaceful enjoyment of possessions'.[69] Existing adverse possession laws in England and Wales 'suddenly seemed, in popular imagination, to endorse a form of land theft',[70] resulting in sweeping changes under the Land Registration Act 2002. Under this statute, a squatter cannot simply succeed by occupying land for the limitation period; after a period of 10 years, he must apply to the Land Registry to be registered as the proprietor of the land.[71] The landowner will be alerted to the hostile claim and can object accordingly. At the

64 See, generally, E H Levi, 'The Nature of Judicial Reasoning' (1965) 32 University of Chicago L Rev 395; and A Mason, 'The Art of Judging' (2008) 12 S Cross U L Rev 33.

65 See text to n 42.

66 See C D Joyce and A J Laydon, 'Adverse Possession Claims in Colorado' <www.fwlaw.com/tabid/86/tabid/171/Default.aspx> accessed November 2012.

67 See text to nn 55–57.

68 See, in particular, the discussion in Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001) pt II.

69 Although the Grand Chamber of the European Court of Human Rights ultimately concluded that adverse possession did not infringe art 1, Protocol 1 in *JA Pye (Oxford) Ltd v UK* (2008) 46 EHRR 45, the background to the decision and growing awareness of human rights issues following the enactment of the Human Rights Act 1998 which incorporated the Convention into UK domestic law undoubtedly fuelled the debate on reform of adverse possession laws in England and Wales.

70 Gray and Gray (n 3) 1166.

71 The procedure is set out in sch 6 of the 2002 Act and only applies to registered land in England and Wales. For a more detailed analysis, see Gray and Gray (n 3) 1169–75.

risk of over-simplification, the squatter will only succeed where certain exceptions apply – for example, where he is entitled to the land under the doctrine of estoppel or occupies the land because of a mistaken belief as to its boundaries and 'reasonably believed' that the land belonged to him.[72] Like Colorado, the new laws in England and Wales suggest an overwhelming shift towards protecting vulnerable owners, while the fact that bad-faith squatters will have little chance of success is perhaps indicative of some sort of legislative intent to address the potential injustices caused by adverse possession.

A more recent salvo against squatting in England and Wales was unveiled by Prime Minister David Cameron at a press conference on 21 June 2011, in which he announced a range of measures to be included in a raft of criminal justice reforms being introduced that day.[73] One of these was a new criminal offence of squatting, to be brought into effect after a short consultation exercise.[74] These proposals came as something of a surprise to MPs, the Justice Secretary having said nothing about them in his statement to the House of Commons that morning,[75] and some disquiet was expressed from both sides of the House at this presentation of important matters of policy to the media before MPs had had a chance to ask questions about them.[76] The Legal Aid, Sentencing and Punishment of Offenders Bill was duly given its first reading that afternoon,[77] and its second reading the following week,[78] but it was not until the beginning of November that the new provisions on squatting were introduced, being inserted into the Bill during the course of its report stage.[79] The effect of these provisions, which can now be seen in s 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, is to make it a criminal offence for a person to be in a residential building as a trespasser having entered it as a trespasser, where the person knows or ought to know that he or she is a trespasser, and is living in the building or intends to live there for any period.[80] The new offence is triable summarily and is punishable by imprisonment and/or a fine of up to £5000.[81]

Arguments around the state effectively underpinning the rights of the property owner seem intuitively strong; yet the purpose of this new offence is by no means clear and, unlike the Kirlin dispute in Colorado, there was no cause célèbre driving calls for legislative change. In summing up the debate on the clause which preceded s 144, the Minister of State declared that it was wrong to steal someone else's home and that the new provisions were intended to address this,[82] but at the end of the day these provisions have little or no bearing on the law of adverse possession other than to strip it of any notion of state legitimacy in cases to which the offence applies. As stated above, the acquisition of title by adverse possession in England and Wales had already been made virtually impossible (at least in the case of registered land)[83] by the Land Registration Act 2002. The real impact on adverse possession doctrine comes from the 2002 Act, and in any event few if any residential squatters of the sort contemplated by the new criminal law offence would ever have been likely to be allowed

72 2002 Act, sch 6, paras 5(2)–(4).

73 <www.number10.gov.uk/news/pm%E2%80%99s-press-conference-on-sentencing-reforms/> accessed November 2012.

74 Ibid.

75 HC Deb 21 June 2011, col 9WS.

76 Ibid, col 190 (Hilary Benn and Peter Bone).

77 Ibid, col 191.

78 HC Deb 29 June 2011, cols 984–1073.

79 HC Deb 1 November 2011, cols 864–94.

80 2012 Act, s 144(1).

81 2012 Act, s 144(5).

82 HC Deb 1 November 2011, col 889.

83 See n 71.

to remain in possession long enough to acquire title by these means. Nor does it do much to improve the protection given to homeowners; as was pointed out on several occasions during the parliamentary debates, s 7(1) of the Criminal Law Act 1977 already makes it an offence for a person who is on any premises as a trespasser, after having entered as such, to fail to leave on being required to do so by or on behalf of a 'displaced residential occupier' of those premises.[84] The consultation that preceded the enactment of the new provisions was somewhat perfunctory, and the responses received certainly did not indicate a major degree of public concern about the problem.[85] All in all, it is hard to disagree with the comments of Sadiq Khan, the MP for Tooting,[86] who suggested during the debate that the purpose of these and other punitive provisions inserted into the Bill was to give a 'tough' appearance to a piece of legislation that might otherwise have been perceived as being somewhat 'soft' on crime.[87] To borrow from a well-known song from *Mary Poppins*,[88] a spoonful of sugar helps the medicine go down in a most delightful way. Political symbolism aside, it is likely that the criminal law sanction against squatting will resonate strongly with private citizens and be viewed as a direct response by the state to the negative emotions generated by adverse possession, thereby ensuring some level of populist appeal.[89]

Conclusion

Despite its existence in most legal systems for centuries, adverse possession is an emotive and divisive topic. The fact that reactions to the doctrine are so very visceral is hardly surprising. Property and ownership are ingrained human traits in Western societies; the fact that sentimental attachments to land tend to be even stronger, yet adverse possession allows a squatter to take it from the owner with relative impunity, unleashes a sea of hostile feelings. In this respect, the sense of state complicity only adds to the emotional maelstrom.

The present article has identified a number of paradoxes surrounding adverse possession and the emotions involved in it, be they on the part of those involved in the dispute, the wider public, the popular media, judges or legislators. The first paradox lies in the doctrine itself; a wrong becomes a right, in that what was originally a tort committed against the landowner becomes the basis of the trespasser's legal title. The second paradox

84 HC Deb 1 November 2011, cols 869, 875, 881, 884 and 945.

85 Government Consultation Paper, *Options For Dealing with Squatting* (CP12/2011) 7. Only 10 victims of squatting came forward in response to the consultation and, of those, only seven were residents while 25 other members of the public said that they were concerned about the problem. As against this, no less than 2126 respondents indicated that they were concerned about the impact of criminalising squatting on the problem of homelessness. Some 1990 of these responses were received in support of a campaign organised by a pressure group for squatters; even so, the rather feeble response from the other side of the debate is somewhat surprising given the hostile attitude to squatters expressed in parts of the media: see nn 55–57 above. Members of the legal profession have not expressed widespread support for s 144 of the 2012 Act; see C Baksi, 'Lawyers Berate New Law Criminalising Squatters' *Law Society Gazette* (London, 31 August 2012) <www.lawgazette.co.uk/news/lawyers-berate-new-law-criminalising-squatters> accessed November 2012.

86 HC Deb 29 June 2011, col 996.

87 Thus, for example, a significant feature of the Bill was the abolition of the indeterminate sentences for public protection introduced by the Labour government in the Criminal Justice Act 2003: see now s 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

88 Musical film produced by Walt Disney and released in 1964.

89 This use of legislation as an emotional palliative and to reassure the public that 'something is being done' is described by Sir Francis Bennion as 'law-churning': see B Hunt, 'Foreword', *The Irish Statute Book: A Guide to Irish Legislation* (Firstlaw 2007) 3. Compare M Lodge and C Hood, 'Pavlovian Policy Responses to Media Feeding Frenzies? Dangerous Dogs Regulation in Comparative Perspective' (2002) 10 Journal of Contingencies and Crisis Management 1; and see *Laws Based on Emotion* (Stockholm Criminology Symposium 2012) <www.criminologysymposium.com/symposium/event-information/2012/archive/news/2012–10–05-laws-based-on-emotion.html> accessed November 2012.

lies in the emotional responses to adverse possession, which seem to be strongest in those cases where there is little or no chance of the doctrine ever coming into effect, as in cases of residential squatting where the owner is only too anxious to evict the adverse occupants as soon as possible. The third paradox lies in the response of judges and legislators which, while not necessarily emotional in itself, may be motivated by the need to respond to and to generate emotion on the part of the public at large.

Of course, some adverse possession claims are more defensible than others, depending on how they are perceived and the influence of certain factors, including the amount of land involved and degree of apparent culpability on the part of the squatter. Yet, there is an overwhelming sense in which adverse possession is morally and socially wrong, and that laws which allow this to happen are unjust, unfair and in urgent need of change. Judges are limited in what they can achieve here, although recent legislative developments suggest that law-makers have been influenced by contemporary community attitudes. By shifting the emphasis firmly towards owner protection and more socially acceptable (or tolerable) notions of good-faith squatting, the law is responding to the negative emotions generated by adverse possession. While crossing boundaries and acquiring someone else's land without compensation is never likely to receive widespread approbation, reducing its scope may result in adverse possession being seen as less of an affront to basic societal ideals.

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Love in life and death

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The issue of assisted dying is once again in the public consciousness given several recent high-profile cases challenging the legal prohibition on assisted dying in jurisdictions on both sides of the Atlantic. In June 2012, the Supreme Court of British Columbia declared the relevant provisions of the Canadian Criminal Code which prohibited assisted dying invalid on the grounds that they unjustifiably infringed the rights of the plaintiff under the Canadian Charter of Rights and Freedoms.[1] Almost contemporaneously, the High Court of England and Wales heard a case in which it was argued that it would not be unlawful for a doctor to terminate the applicant's life or assist him in terminating his life on the basis of the defence of necessity.[2] The applicant also asserted that art 8 of the European Convention on Human Rights (ECHR) is infringed by the current criminal law of England and Wales 'in so far as it criminalises voluntary active euthanasia and/or assisted suicide'.[3] These cases raise many important issues for the criminal law, among them the role of the courts in deciding important moral and ethical debates, and the proper balance to be struck between the desire to protect the sanctity of life principle and the most vulnerable on the one hand, with the desire to respect individual autonomy and display compassion to individuals caught up in tragic circumstances on the other.

Central to any debate on this topic are the emotions which motivate those involved in assisted dying. It is difficult to imagine a more emotionally charged event than the taking of life, particularly the life of a loved one who is suffering, a fact often acknowledged by the courts. Yet, the courts, review bodies and commissions, legislators and commentators have yet to place emotions at the centre of the debate. This article will concentrate on the role which emotions play in end of life decisions, focusing on the proper legal response to such decisions given the strong emotions which underpin them. It seeks to address the questions of whether and why these emotions are relevant to the imposition of criminal liability by pointing to the properly exculpatory nature of emotions of this kind in the criminal law, particularly given the modern understanding of emotions as capable of both rationality and evaluation. In particular, we shall examine the existing state of the law in this area, focusing particularly on

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1 *Carter v Canada (Attorney General)* 2012 BCSC 886.

2 *R (on the application of Tony Nicklinson) v Ministry of Justice* [2012] EWHC 2381.

3 Ibid [5]. The High Court had previously stuck out the plaintiff's claim in relation to art 2 on the basis that he was not asserting a claim based on his asserted rights.

the availability of existing criminal law defences and how these could be utilised, reformed or supplemented to deal with the circumstances under consideration. Following a review of the existing defences available to one who assists another to die, a new defence is proposed which looks to the love and/or compassion experienced by the defendant.

The emotions of assisted dying

That emotions are important to law, both in shaping the contents of the law and the behaviour of actors within the legal system is beyond doubt, and this special issue highlights the importance of emotions in a number of different contexts.[4] The importance of emotions to the criminal law lies in their role in shaping human judgments and behaviours. If the criminal law is to punish individuals who commit criminal acts under the impulse of emotion, there should be some understanding and acknowledgment of the role which emotions play in motivating such actions and a consideration of their impact on the attribution of criminal responsibility. The emotions experienced by individuals who assist another to die are very often central to the decision to act, a reality recognised by the courts. Thus, for instance, in *Inglis*,[5] the court acknowledged the emotions which motivated a mother who killed her severely disabled son by means of a heroin overdose, noting '[t]here was no malice, only love in [the] heart'.[6]

While love is the emotion most often associated with cases of assisted dying, this is not the only emotion engaged in these situations. Often actors will experience sadness at the plight of the sufferer and fear for the suffering and indignity they face. Compassion is also often mentioned in the context of assisted dying cases. However, while love is considered to be one of the basic or core emotions,[7] there has been much controversy over the nature of compassion and whether it is properly categorised as an emotion at all. Three views have been put forward, one viewing compassion as a vicarious emotion,[8] another seeing it as a variant of love or sadness[9] and a third considering it as a distinct emotion in its own right.[10] It is now increasingly recognised as a distinct emotion which 'arises in witnessing another's

4 See, generally, Terry Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 Law Hum Behav 119 and Kathy Abrams and Hila Keren, 'Who's Afraid of Law and Emotion?' (2010) 94 Minn Law Rev 1997.

5 [2010] EWCA Crim 2637, [2011] 1 WLR 1110. The appeal against the appellant's conviction for murder and attempted murder was unsuccessful, but the nine-year minimum term of her mandatory life sentence was reduced to five years.

6 Ibid 1117. The court was in 'no doubt about the genuineness of her belief that her actions in preparing for and eventually killing Thomas represented an act of mercy or that the grief consequent on the loss of her son is undiminished by her responsibility for his death': ibid 1123.

7 Along with fear, anger, happiness, disgust, sadness and surprise. See Maroney (n 4).

8 In much the same way as empathy which is dependent upon one's apprehension of the emotions of others. For example, see Martin L Hoffman, 'Is Altruism Part of Human Nature?' (1981) 40 Journal of Personality and Social Psychology 121, 128; Susan Bandes, 'Empathetic Judging and the Rule of Law' (2009) Cardozo L Rev De Novo 133, 136–67.

9 For example, S Sprecher and B Fehr discuss compassionate love as 'an attitude toward other[s], either close others or strangers or all of humanity; containing feelings, cognitions, and behaviors that are focused on caring, concern, tenderness, and an orientation toward supporting, helping, and understanding the other[s], particularly when the other[s] is [are] perceived to be suffering or in need': 'Compassionate Love for Close Others and Humanity.' (2005) 22 Journal of Social and Personal Relationships 629, 630. See also B Fehr, S Sprecher and L G Underwood (eds), *The Science of Compassionate Love: Theory, Research, and Applications* (Wiley-Blackwell 2008) 81–120.

10 Richard S Lazarus, *Emotion and Adaptation* (OUP 1991) 289; Jennifer L Goetz, Dacher Keltner and Emiliana Simon-Thomas, 'Compassion: An Evolutionary Analysis and Empirical Review' (2010) 136(3) Psychological Bulletin 351, 351.

suffering and that motivates a subsequent desire to help',[11] clearly a factor of great importance in many cases of assisted dying. This article will focus on the emotions that are most central to the decision to assist another to die, namely love and compassion. However, we must always be cognisant of the fact that emotions such as these will not always be engaged in cases of assisted dying and any proposals for reform which place these emotions at their core must be able to deal with this concern.[12]

The first issue to be considered is just how emotions arise and influence the decisions we take, drawing on literature from other disciplines, particularly psychology. Law typically conceives of emotions as irrational forces which 'overcome' us, as embodied by the provocation defence. However, from a psychological perspective, emotions are now commonly understood to result from a cognitive, if not always conscious, appraisal of the personal relevance of a situation to the individual in line with their beliefs, goals, values and morals. Thus, Fridja notes that '[t]here seems little doubt that the meaning of events (their implications for well-being and the achievement of goals and values), rather than their objective nature as stimuli, is the primary determinant of most emotions'.[13] Emotions provide vital information to both ourselves and to third parties about what is valued in life, that is, our goal hierarchies, and accordingly shape our behaviour.[14] Glore suggests that '[e]motions not only serve an informational role, signalling the value of things, but it is also an embodiment of such value. Rather than simply believing something to be of value, emotion creates a direct experience of that value.'[15] Empirical research also supports the view that by focusing attention and increasing awareness, emotions assist us in processing events and situations on a deeper level than one would in their absence.[16] In the words of de Sousa: 'when the calculi of reason have become sufficiently sophisticated, they would be powerless in their own terms, except for the contribution of emotion'.[17]

Emotions are also linked to rationality in that they follow a train of reasoning and embody our judgments about the situation and our own goals, values and morals rather than being merely forces which overwhelm us, and as such are capable of being judged.[18] That is, they can be evaluated to consider if they were reasonable or normatively acceptable in a given situation.[19] Emotions are therefore rational in a very important sense. However, it is

11 Goetz et al (n 10). Following an evolutionary analysis, Goetz et al suggest that 'compassion evolved as a distinct affective experience whose primary function is to facilitate cooperation and protection of the weak and those who suffer'. The authors conclude that compassion 'arises out of distinct appraisal processes and has distinct display behaviours, distinct experiences, and an approach-related physiological response': 368.

12 It must also be considered that medical professionals and or others who do not have a close relationship with the individual sufferer will be more likely to feel compassion rather than love when observing an individual in pain and distress. Compassion and love are considered to be separate emotions which are not necessarily preceded or accompanied by one another: Goetz et al (n 10) 355.

13 N H Frijda, 'Emotions Require Cognition, Even If Simple Ones', in P Ekman and R J Davidson (eds), *The Nature of Emotions: Fundamental Quest* (OUP 1994) 197.

14 Robert de Sousa, *The Rationality of Emotions* (MIT Press 1987) 9; Gerald L Clore, 'Why Emotions are Felt', in Ekman and Davidson (n 13) 103–11; Lazarus (n 10) 22; N Eisenberg, 'Emotion, Regulation, and Moral Development' (2000) 51 Ann Rev Psych 665, 665.

15 Gerald L Clore, 'For Love or Money: Some Emotional Foundations of Rationality' (2005) 80 Chicago-Kent L Rev 1151, 1152.

16 See Jeremy Blumenthal, 'Does Mood Influence Moral Judgement?: An Empirical Test with Legal and Policy Implications' (2005) 29 L and Psychology Rev 1, generally and 18 specifically.

17 de Sousa (n 14) xv.

18 Or are at least capable of rationality; see Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press 2004) 10.

19 Thus, de Sousa links emotions to rationality given 'judgements of reasonableness, the use of emotions as excuses and justifications, and the thought-dependency of most emotions': de Sousa (n 14) 5.

important to realise that, while emotions are capable of rationality, they will not always be objectively rational. For example, they may result from a misinterpretation of the situation, an overestimation of the personal relevance of a situation or a flawed value system.[20] Emotions can sometimes also be irrational in that they may 'rearrange the priorities of goals'.[21] So, while ordinarily one's primary priority may be self-preservation, love may cause one to forgo this primary goal in favour of a loved one.[22] In this way, emotions may cause an individual to act in a way which is not consistent with their settled values in the absence of emotion. So, for example, while ordinarily one may abhor violence, hold human life in the highest esteem and prefer to obey the law, when faced with a loved one facing a slow and agonising death, love and compassion may cause one to re-evaluate what is important in the circumstances and result in a decision to take a life. It is for this reason that emotions are often considered to be irrational. However, it must be remembered that these ongoing goals and values are reassessed in light of the particular circumstances, in this case seeing someone whom you love dying in a slow and painful way. It is also clear that emotions will not always cause one to take the course of action which is most advantageous for society as a whole; they are based on subjective assessments of the personal relevance of a situation to the individual involved, given their goal hierarchies and morals amongst others.[23] This fact is of great significance when considering the legal response to actions taken while under the influence of emotion, particularly in deciding whether a defence of this nature should be based in justification or in excuse.[24]

Given the modern understanding of emotions as being capable of both rationality and, importantly for attributions of legal responsibility, capable of being judged as reasonable or unreasonable, it is argued that the law should recognise the exculpatory nature of certain emotions, in particular, the love and compassion which motivates individuals to assist their loved ones to die. Before exploring the question of how the law should respond, it is necessary to examine the current legal position for those who take a life in these circumstances.

The current legal position

This debate regarding the law in this area is often highly charged and confusing, not least because of the different contexts in which life is taken and the lack of consistency in the terminology used. 'Euthanasia' is considered to be the deliberate ending of another's life by a third party and may be voluntary or involuntary, such as when an individual is unable to express a desire to die. 'Assisted suicide' occurs where one takes one's own life with help from another, including information and medication. So death may take place with consent or in the absence of consent of the dying individual and may be effectuated by the individual themselves, a loved one, a medical professional, or a third party. The relationship between the individual whose life is ended and the actor is very important in this context as the emotions motivating the actor will vary accordingly. The term employed in the course of this discussion to cover all the situations outlined above is 'assisted dying'.[25]

20 Nussbaum (n 18) 11–12.

21 Keith Oatley and Jennifer M Jenkins, 'Human Emotions: Functions and Dysfunction' (1992) 43 Ann Rev Psych 55, 60.

22 James R Averill, 'Emotions are Many Splendored Things', in Ekman and Davidson (n 13) 100.

23 Ibid 100.

24 See below at nn 128–32.

25 A term recently utilised by the British Columbia Supreme Court encompassing both assisted suicide, physician assisted suicide and voluntary euthanasia: *Carter v Canada (Attorney General)* 2012 BCSC 886 [39].

The legal ramifications for those who assist another to die vary across jurisdictions. Euthanasia and/or assisted suicide is permitted in various jurisdictions including Oregon,[26] Washington,[27] Switzerland,[28] Belgium,[29] Luxembourg[30] and the Netherlands.[31] However, the legal position in these jurisdictions is the exception rather than the rule. In the pages which follow we shall examine the legal position regarding assisted dying in the British Isles by looking first at the relevant crimes that may be committed and then at the possible defences that may be raised.

Crimes

In the Republic of Ireland, those who assist another in dying without actually killing the person concerned may be charged with assisting suicide under the Criminal Law (Suicide) Act 1993 which makes it an offence to aid, abet, counsel or procure the suicide of another person, or an attempt by another person to commit suicide. This offence carries a maximum penalty of 14 years' imprisonment and the maximum sentence mirrors that in the Criminal Justice Act (Northern Ireland) 1966[32] and the Suicide Act 1961,[33] which operates in England and Wales. Similar legislation in England and Wales and in Northern Ireland makes it an offence to do 'an act capable of encouraging or assisting the suicide or attempted suicide of another person'[34] with the intention to encourage or assist suicide or attempted suicide.[35]

In both the UK and Ireland, those who actively take a life in these circumstances are liable to be convicted of murder and sentenced to life imprisonment. In the words of Lord Judge CJ, 'the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well established partial defences, like provocation or diminished responsibility, mercy killing is murder.'[36] In this connection the law considers the life expectancy of the victim to be irrelevant, with the same penalty attaching to shortening a life by one hour as 50 years.[37]

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26 Death with Dignity Act 1994. Physician assisted suicide is available exclusively for terminally ill patients under s 2.01 and euthanasia is specifically excluded.

27 Here assisted suicide was legalised in the Death with Dignity Act 2008.

28 Inciting or assisting suicide for selfish motives is prohibited under art 115 of the Swiss Penal Code. Therefore, anyone who assists a person to commit suicide for non-selfish reasons commits no crime. Euthanasia, on the other hand, is prohibited under art 114 which prohibits 'death on request'. However, this crime carries a lower minimum sentence than that of murder or manslaughter under Swiss law.

29 Both physician assisted euthanasia and physician assisted suicide are permissible subject to certain conditions under the 28 May 2002 Act on Euthanasia. While physician assisted euthanasia is explicitly legalised under certain conditions, physician assisted suicide is only implicitly included.

30 Physician assisted euthanasia and assisted suicide is permitted in this jurisdiction. A physician will not be prosecuted if certain conditions are satisfied under the Law of 16 March 2009 on Euthanasia and Assisted Suicide.

31 Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002 (*Wettoetsing levensbeëindiging op verzoek en hulp bij zelfdoding* (*Euthanasiewet*)). Both euthanasia and assisted suicide are prohibited under criminal law but an exception is created in the Act for physicians who act to assist another in committing suicide or actively take a life, subject to satisfying certain conditions, including that patients must be experiencing unbearable physical or mental suffering, with no prospect of relief. Other jurisdictions which permit assisted dying include Montana, which also recognises a defence of consent to homicide by a physician of a terminally ill patient, and Columbia, which permits physician assisted dying for terminally ill patients, see Sentencia C-239/97.

32 S 13.

33 S 2.

34 S 2(a) of the Suicide Act 1961; s 13(1)(a) of the Criminal Justice Act (Northern Ireland) 1966 (both as amended by the Coroners and Justice Act 2009).

35 S 2(b) of the Suicide Act 1961, s 13(1)(b) of the Criminal Justice Act (Northern Ireland) 1966 (both as amended by the Coroners and Justice Act 2009).

36 *Inglis* [2010] EWCA Crim 2637, [2011] 1 WLR 1110, 1118.

37 Ibid.

However, in many cases a difficulty arises in determining the exact cause of death due to the weakened state of the victims and a charge of attempted murder rather than murder is sometimes levelled.[38]

This is not to say that the law does not recognise some circumstances where a course of action which will ultimately result in the death of an individual is legally permissible. First, individuals have the right to refuse medical treatment, even if this decision will result in their death.[39] Secondly, the courts recognise the validity of the doctrine of 'double effect' that recognises that treatment provided to ease pain or for valid medical reason, which has the additional effect of ending the patient's life, is permissible.[40] Thirdly, it is also permissible in certain circumstances to withdraw treatment from a patient even though this will inevitably result in death.[41] Thus, in the Irish case of *Re a Ward of Court*,[42] the applicant[43] sought an order directing that all artificial nutrition and hydration of the patient should cease and for directions as to her future care. The patient was in a near persistent vegetative state (PVS) following complications which arose during a minor gynaecological operation under general anaesthetic more than 20 years before.[44] The Supreme Court found that the withdrawal of feeding tubes was in the best interests of the ward and affirmed the High Court decision to consent to the withdrawal. A clear distinction was drawn between this and a positive action to take life. In this connection, Hamilton CJ noted that there was no 'right to have life terminated or death accelerated and [the right] is confined to the natural process of dying. No person has the right to terminate or to have terminated his or her life, or to accelerate or have accelerated his or her death.'[45]

A similar distinction between the withdrawal of treatment or care and active euthanasia was made by the House of Lords in *Airedale NHS Trust v Bland*.[46] The patient in this case had been injured in the Hillsborough football stadium disaster and had been in a PVS for over three years with no hope of recovery. The applicants in this case sought a declaration from the court that it would be lawful to end medical treatment and discontinue ventilation, hydration and nutrition by artificial means, an application opposed by the Official Solicitor.[47] The court found that it was permissible for doctors to withdraw feeding and hydration tubes[48] even though this would inevitably result in the death of the patient from

38 As in *Cox* (1992) 12 BLMR 38 where the defendant was convicted of attempted murder rather than murder due to the difficulty in ascertaining the cause of death following an injection of drugs into a woman's heart aimed at ending her suffering.

39 See *Re a Ward of Court (No 2)* [1996] 2 IR 79; *Re T* [1992] 4 All ER 649; *Re B* [2002] 2 All ER 449. Generally, see Ciara Staunton, 'The Development of Health Care Planning in Ireland' 2009 15(2) MLJI 74–81.

40 See *Airedale NHS Trust v Bland* [1993] AC 789, 867 (Lord Goff); *A, B and C v Ireland,* Application No 25579/05 16 December 2010 (2011) 53 EHRR 13. For discussion in an Irish context, see Jennifer Schweppe, 'Taking Responsibility for the "Abortion Issue": Thoughts on Legislative Reform in the Aftermath of *A, B and C*' (2011) 14(2) IJFL 50; Deirdre Madden, *Medicine, Ethics and Law* (Butterworths 2002). This situation is distinguished from that where the doctor's purpose is to end life and has been criticised as a fiction: A C Grayling, *Ideas that Matter* (Weidenfeld & Nicholson 2009) 134; Suzanne Ost, 'Euthansia and the Defence of Necessity: Advocating a More Appropriate Legal Response' [2005] Criminal Law Review 355; compare J M Finnis, 'Bland: Crossing the Rubicon' (1993) 109 LQR 329.

41 In *R (Burke) v GMC* [2005] EWCA Civ 1003, it was held that it is not permissible to withdraw treatment from a competent patient against his/her wishes and that to do so would violate art 2 of the ECHR.

42 [1996] 2 IR 79.

43 The ward's mother was appointed as committee of the ward's person and estate.

44 By a majority of four to one, Egan J dissenting. For the full facts see [1996] 2 IR 79 at 85–88.

45 Ibid 124.

46 [1993] AC 789.

47 Ibid: see David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 77–79.

48 Feeding and hydration were classified as medical treatment.

dehydration and/or starvation, but that it would be impermissible for them to hasten the patient's death by a positive act, such as giving him or her a lethal injection.[49] This decision has been the subject of much debate, particularly the rather artificial distinction drawn between active steps and omissions resulting in the death of the patient.[50] The withdrawal of the feeding tube was considered to be a lawful omission, ignoring the fact that removing a piece of medical equipment that is already there, as opposed to failing to put something in place that was not, involves an element of positive conduct. Lord Goff acknowledged that such a stance:

> may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by lethal injection, rather than let him linger on in pain until he dies.[51]

While the above-mentioned cases relate to patients in a PVS, the decision facing the loved ones involved in cases of this nature reflects that faced by many competent individuals whose poor quality of life results in a wish to die. They face a choice between continuing to live in a state which is unacceptable to them, or starving to death. These concerns were raised in *Inglis*[52] where the defendant was charged with murder and attempted murder having given a lethal injection of heroin to her son who had suffered catastrophic brain injuries in a fall. In this case 'the appellant explained that she had become increasingly concerned about the consequences of the possible withdrawal of hydration and nutrition in due course. She thought that this would be a dreadful death, dreadful for [her son] and this time, she wanted to do the job properly.'[53] Similarly, in the recent case of *R (on the application of Tony Nicklinson) v Ministry of Justice*,[54] the applicant recognised that this option was available to him, but quite understandably indicated that he did not see this as a viable course of action. In this case the applicant suffered a severe stroke in 2005 which left him paralysed below the neck and unable to speak, dependent on carers and with very limited means of communicating with the outside world. Mr Nicklinson's case was particularly problematic given that his physical condition made it impossible for him to take positive steps himself to take his life; assisted suicide was not an option.[55] He was adamant that he did not wish to die of thirst. He unsuccessfully argued that 'the common law should develop or change to provide a lawful route to ending his suffering by ending his life at a time of his choosing with the assistance by positive action of a doctor in controlled circumstances that have been sanctioned by the court'.[56] Despite her support for the decision to refuse his application for judicial review, Macur J noted:

49 Lord Goff noted that 'it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be . . . So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and the other hand euthanasia – actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law.' [1993] AC 789, 865.

50 See further Brian Hogan, 'Omissions and the Duty Myth' in *Criminal Law: Essays in Honour of J C Smith* (Butterworths 1987) 85.

51 Ibid.

52 [2010] EWCA Crim 2637, [2011] WLR 1110.

53 Ibid 116.

54 [2012] EWHC 2381 (Admin).

55 Ibid [16]. The court accepted that he would be unable to commit suicide himself despite discussing the possibility of using a computer which would administer a fatal dose of drugs on Mr Nicklinson's command.

56 *Nicklinson* [2012] EWHC 2381 (Admin) [18].

> the dire physical and emotional predicament facing Tony and Martin and their families may intensify any tribunal's unease identified by Lord Mustill in *Bland* . . . in the distinction drawn between 'mercy killing' and the withdrawal of life sustaining treatment or necessities of life.[57]

Defences

For those who find themselves subject to criminal charges in relation to a death through assisted dying, there are several existing criminal defences which are potentially available. In particular, attempts have been made in the past to excuse or partially excuse killing in these circumstances using the defences of diminished responsibility, provocation (or loss of self-control) and necessity.

Diminished responsibility

In Ireland, the partial defence of diminished responsibility is available to those who kill another while suffering from a mental disorder that diminished substantially their responsibility for the act, despite not being enough to successfully raise an insanity defence.[58] The formulation in England and Wales[59] and in Northern Ireland[60] allows a partial defence to defendants who kill another while suffering from an abnormality of mental functioning arising from a recognised medical condition[61] that substantially impaired their ability to understand the nature of their conduct, to form a rational judgment or to exercise self-control and that provides an explanation for their acts and omissions in this regard.[62] Given the differing formulations of the defence across the jurisdictions, caution must be exercised in drawing comparisons; however, the principal criticisms of the application of the diminished responsibility defence in this context apply generally.[63]

The defence has been utilised successfully in a number cases of assisted dying,[64] most recently the English Court of Appeal case of *Webb*[65] where the 73-year-old appellant was convicted of manslaughter by reason of diminished responsibility in relation to the death of his mentally ill wife. Mrs Webb was convinced that she was suffering from a terminal illness and wished to die. Following an attempted overdose by the victim, Mr Webb smothered his wife with a plastic bag. The Court of Appeal took the view that the defendant's actions were similar to an assisted suicide.[66] While the acceptance by the jury of the defence of diminished responsibility allowed the court to reflect compassion at sentencing, this approach is open to criticism as resulting in the medicalisation of those

57 *Nicklinson* [2012] EWHC 2381 (Admin) [152].

58 S 6 of the Criminal Law (Insanity) Act 2006.

59 S 2 of the Homicide Act 1957 as substituted by s 52 of the Coroners and Justice Act 2009.

60 S 5 of the Criminal Justice Act (Northern Ireland) 1966 as substituted by s 53 of the Coroners and Justice Act 2009.

61 Homicide Act 1957, s 2(1)(a). In Northern Ireland the requirement is for a recognised *mental* condition: Criminal Justice (Northern Ireland) 1966, s 5(1)(a).

62 This means that the abnormality of mental functioning must be a cause or contributing factor of D's conduct: Homicide Act 1957, s 2(1B); Criminal Justice Act (Northern Ireland) Act 1966, s 5(1B).

63 Louise Kennefick, 'Diminished Responsibility in Ireland: Historical Reflections on the Doctrine and Present-Day Analysis of the Law' (2011) 62 NILQ 269.

64 For example, see *Lawson*, *The Times*, 9 June 2001, Crown Ct (Maidstone). See also Law Commission, *Report on Partial Defences to Murder* (Law Com No 290, 2004) Appendix B, 'The Diminished Responsibility Plea in Operation – An Empirical Study'.

65 [2011] EWCA Crim 152. On appeal, his two-year sentence was reduced to a 12-month sentence.

66 Ibid [21].

who commit a putatively criminal act out of love and compassion.[67] It suggests that one who takes a life in these circumstances is suffering from a mental condition rather than responding in a rational way to an extremely emotive situation. Its utility is also quite limited, as a medical professional who acted similarly in these circumstances would be unlikely to be able to claim a defence of diminished responsibility and, indeed, would be loath to do so given the personal and professional ramifications of such a defence: '[t]he lack of a close familial relationship means that the patient's suffering is unlikely to have the kind of severe emotional and psychological impact that could satisfy the requirements of diminished responsibility'.[68]

Provocation

The second defence available to one charged with murder in this connection is that of provocation, a defence available to individuals who lose self-control as a result of something said or done, implicitly recognising the exculpatory nature of anger. The precise nature of this defence differs across jurisdictions. Ireland retains a common law defence of provocation which requires that the 'provocative conduct must be such as to: (1) Actually cause in the defendant, a sudden and temporary loss of self-control making him so subject to passion that he or she is not the master of his/her mind. (2) Make a reasonable person (ordinary person) do as the defendant did.'[69] Until recently, a similar defence was available in England and Wales and in Northern Ireland where an individual was provoked to such an extent by things said or done to suddenly and temporarily lose self-control and the provocation was enough to make a reasonable man do as he did.[70] This defence was recently replaced in England and Wales and Northern Ireland with the defence of loss of self-control, which retains the requirement that a defendant loses self-control as a result of a 'qualifying trigger' and that a person of the defendant's age and sex and with 'a normal degree of self-tolerance and self restraint and in the circumstances of D, might have reacted in the same or in a similar way to D'.[71] The new defence of loss of self-control contains no requirement that the loss of self-control be sudden or temporary, however, the defendant cannot act in a considered desire for revenge.[72]

In *Inglis*,[73] the defendant was charged with attempted murder and murder in relation to the death of her son by means of a heroin overdose and raised the defence of provocation.[74] Mrs Inglis's son had suffered catastrophic brain injuries in a fall from an ambulance and it was claimed that the defendant acted out of love; '[a]ccording to her account, once they were alone she injected him with a fatal dose of heroin, telling him, everything is fine. I love you.'[75] The application of the provocation defence in a case of this nature raises many

67 See Law Commission (n 64) 88–9.

68 Ost (n 40) 361.

69 Irish Law Reform Commission, *Report on Defences in Criminal Law* (LRC Rep 95-2009, 2009) para 4.59. See also *People (DPP) v MacEoin* [1978] IR 27; *People (DPP) v Kelly* [2000] 2 IR 1.

70 *Duffy* [1949] 1 All ER, 93n, as modified by s 3 of the Homicide Act 1957 in England and by s 7 of the Criminal Justice (Northern Ireland) 1966 in Northern Ireland.

71 Coroners and Justice Act 2009, ss 54–56. The 'qualifying triggers' identified in s 55 are a fear of violence emanating from the victim and/or 'things done or said (or both) which (a) constitute circumstances of an extremely grave character, and (b) cause D to have a justifiable sense of being seriously wronged'.

72 Ibid s 54(4).

73 [2010] EWCA Crim 2637, [2011] 1 WLR 1110.

74 The offence occurred before the coming into force of the Coroners and Justice Act 2009. The appeal against conviction for murder was dismissed, but the nine-year minimum term of the mandatory life sentence was reduced to five years.

75 [2011] 1 WLR 1110, 1115.

uncomfortable questions. It is very difficult for one who takes a life in the circumstances envisaged in this article to satisfy two main elements of the defence: a requirement of an adequate provocation and loss of self-control. Very often, the taking of life in compassion and love is a deliberate act taken after much soul-searching, so it will be very difficult to satisfy a requirement of a sudden and temporary loss of self-control:[76] '[i]n reality, in a true case of mercy killing, provocation is unlikely to provide any defence. The more likely defence would be diminished responsibility.'[77] The trial judge in *Inglis* removed the defence of provocation from the jury due to the lack of evidence that the defendant had lost self-control, and this was affirmed in the Court of Appeal. In the words of Lord Judge CJ:

> all the evidence demonstrated that the appellant applied her mind to her objective, which was to kill her son, and that she did so with scrupulous and meticulous care, and that in doing so she fulfilled her long-standing objective . . . However, in relation to her son and his injuries, she was resolved that she should relieve him of his suffering. When she did so, she knew exactly what she was doing, and why she was doing it, and how it was to be done, and how it was imperative that its success should be assured. Far from lacking or losing self-control (an essential ingredient for the defence of provocation) the appellant was completely in control of herself.[78]

The requirement of provocative conduct, or a qualifying trigger under the new law operating in England, Wales and Northern Ireland, is also problematic in this context. The position in Ireland is similar to that which previously pertained in England and Wales and in Northern Ireland, in that the provocative conduct need not be unlawful[79] but there is some doubt whether circumstances alone can amount to a provocation.[80] In *Doughty*,[81] it was held by the English Court of Appeal that the crying of a baby was an adequate source of provocation, on the grounds that the relevant legislation in force at the time required everything done or said to be taken into account.[82] Commenting on the decision, the late Sir John Smith pointed out that this was not a case of provocation by mere circumstances; rather, there was a human being who was the source of the provocation and against whom the resulting anger was naturally directed.[83] In a similar way, in cases of assisted dying, the provocation can sometimes be attributed to the words or actions of the individual who is assisted in dying; however, it is hardly a conceptually pleasing result. While it may be possible to satisfy the requirement of an adequate provocation, the utilisation of this defence may seem to imply some form of wrongdoing on behalf of the victim,[84] which runs counter to the very nature of these actions. Similarly, the 'qualifying triggers' identified

76 Above, n 70.

77 [2011] 1 WLR 1110, at 1120. The Law Commission also took the view that the defences available in mercy killing cases were limited, noting: 'Unless able to avail him or herself of either the partial defence of diminished responsibility or the partial defence of killing pursuant to a suicide pact, if the defendant intentionally kills the victim in the genuine belief that it is in the victim's best interest to die, the defendant is guilty of murder.': *Report on Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) pt 7.4.

78 [2011] 1 WLR 1110, 1118.

79 *Doughty* [1986] Crim LR 625; *People (DPP) v Kehoe* [1992] ILRM 481.

80 This was certainly the position in England and Wales: see *Acott* [1977] 2 Cr App R 94. However, it has been suggested that *People (DPP) v Kehoe* [1992] ILRM 481 supports the proposition that circumstances may be sufficient in Ireland: Conor Hanly, *An Introduction to Irish Criminal Law* (2nd edn, Gill & Macmillan 2006) 224; Liz Campbell, Shane Kilcommins and Catherine O'Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) 1053.

81 [1986] Crim LR 625.

82 S 3 of the Homicide Act 1957.

83 *Doughty* [1986] Crim LR 625, 626 (commentary by J C Smith).

84 Campbell et al (n 80) 1044.

in s 55 of the Coroners and Justice Act 2009 for the new defence of loss of self-control do not fit well with the nature of the actions under consideration here. The triggers identified are much stricter than the test under the old law and require either a fear of violence emanating from the victim and/or 'things done or said (or both) which (a) constitute circumstances of an extremely grave character, and (b) cause D to have a justifiable sense of being seriously wronged'. It seems that an attempt to claim this defence in respect of an act of assisted dying will fall at the first hurdle because acts of God,[85] including illness, will not constitute 'things done or said' under s 55.

Apart from the practical difficulties identified above, it is also important to note that, for those who take a life as a result of love or compassion, it would be difficult to accept the suggestion that the law recognises a partial defence on the basis that they lost self-control as a result of anger or fear or, indeed, that they acted as a result of a mental impairment.[86] The rationale of a defence is very important to those claiming the defence and, on the principle of fair and proper labelling, defendants who assist another to die out of love and compassion should have a defence available to them that adequately reflects their motives.[87] It is clear that some defendants may refuse to raise the defences discussed above as they wish their actions to be understood and would not wish their actions in taking the life of a loved one in love and compassion to be tainted by being associated with anger or mental impairment. It must also be remembered that, while both diminished responsibility and provocation (or loss of self-control) are partial defences which have the effect of removing the mandatory life sentence and allowing a reduced sentence, the defendant is still subject to a conviction for manslaughter.[88]

Necessity

The recent *Nicklinson*[89] case has placed a third defence, that of necessity, at the forefront of the debate on assisted dying. While a necessity defence would provide a full defence if raised successfully, two hurdles must be surmounted. First, for those charged with murder, the court must accept necessity as a defence to that crime, where it has been specifically excluded in the past[90] and, secondly, the defendant must fulfil the elements of the defence as set out by Brooke LJ in the case of *Re A (Children) (Conjoined Twins: Surgical Separation)*, namely that '(i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil inflicted must not be disproportionate to the evil avoided'.[91] The claimant in *Nicklinson* argued before the High Court of England and Wales that on the basis of necessity it would not be unlawful for a doctor to terminate his life or assist him in terminating his life. He contended that on 'a humane application of Sir James Stephen's test, which Brooke LJ followed, the defence of necessity should be potentially available to a doctor who agreed to

85 See Ormerod (n 47) 518.

86 Similar arguments are made in relation to the medicalisation of the actions of women who kill their abusive husbands and rely on the defence of diminished responsibility. See Law Commission (n 64) 88–89.

87 This refers to the idea that the nature and gravity of an offender's wrongdoing should be fairly reflected by the label of the offence with which he or she is charged: J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217.

88 These defences are only available on murder charges. Those charged with attempted murder or assisted suicide will still be subject to conviction and punishment, subject to prosecutorial discretion, jury nullification and compassion at sentencing.

89 *Nicklinson* [2012] EWHC 2381 (Admin).

90 See *United States v Holmes* 26 F Cas 360 (1842); *R v Dudley and Stephens* (1884)14 QBD 273.

91 [2001] Fam 147, 240.

terminate Tony's life at Tony's request'.[92] This was a novel approach in England and Wales, where a necessity defence had never before been claimed in the context of an end of life decision. In an earlier High Court hearing, Charles J had found that it was arguable that the common law defence of necessity might develop to encompass voluntary active euthanasia and assisted suicide.[93] Charles J therefore gave permission to seek a declaration by means of a judicial review that a necessity defence would be available to a doctor who terminated or assisted in the termination of his life if the following conditions were met:

> (a) the Court has confirmed in advance that the defence of necessity will arise on the facts of the particular case; (b) the Court is satisfied that the person is suffering from a medical condition that causes unbearable suffering; there are no alternative means available by which his suffering may be relieved; and he has made a voluntary, clear, settled and informed decision to end his life; (c) the assistance is to be given by a medical doctor who is satisfied that his or her duty to respect autonomy and to ease the patient's suffering outweighs his or her duty to preserve life.[94]

In coming to the decision to grant permission to seek the declaration, the court was referred to the writings of Glanville Williams, who noted the absence of a decision on this question and suggested:

> [i]t is by no means beyond the bounds of imagination that a bold and humane judge might direct the jury, if the question was presented, that voluntary euthanasia may in extreme circumstances be justified under the general doctrine of necessity . . . it is possible to imagine the jury being directed that the sanctity of life may be submerged by the overwhelming necessity of relieving unbearable suffering in the last extremity, where the patient consents to what is done and where in any event no span of useful life is left to him.[95]

However, the claim was ultimately rejected by the High Court. The claimant had relied on the case of *Re A (Children) (Conjoined Twins: Surgical Separation)*,[96] which had seen the expansion of the scope of the necessity defence to cover a situation which involved the separation of conjoined twins in circumstances where the operation would inevitably result in the death of the weaker twin.[97] However, the court in *Nicklinson* was not willing to consider expanding the scope of the defence of necessity to circumstances of this nature and did not apply the test to the case before them.[98] The case of *Re A* was distinguished on the basis that it 'was a case of highly exceptional facts, where an immediate decision was required. Tony's condition is tragic but sadly not unfamiliar.'[99]

92 [2012] EWHC 2381 (Admin) [72].

93 [2012] EWHC 304 (QB) [37].

94 [2012] EWHC 304 (QB) [6].

95 Glanville Williams, *The Sanctity of Life and the Criminal Law* (Knopf 1957), referred to at [2012] EWHC 304 (QB) [10].

96 [2001] Fam 147.

97 Brooke LJ explicitly based his decision on the defence of necessity. Ward LJ's reasoning was founded in a defence of quasi-self-defence which has been interpreted as implicitly recognising a defence of necessity in *Nicklinson* [2012] EWHC 2381 (Admin): 'He did not use the language of necessity, but his reasoning may be said to fall within the doctrine.' [64] Walker LJ decided the case based on 'all three strands of necessity, lack of intent and lack of causation' [65].

98 The inevitable and irreparable evil which the claimant argued could only be avoided by his death was the continuation of his unbearable suffering contrary to rights of self-determination, dignity and autonomy: [2012] EWHC 304 (QB) [11].

99 [2012] EWHC 2381 (Admin) [74].

While the High Court of England and Wales was unwilling to develop the common law defence of necessity to encompass cases of assisted dying, it is arguable nonetheless that there is scope for the defence to develop in much the same way as the defence was developed to cover the separation of conjoined twins in the case of *Re A*.[100] It was argued that the case of *Re A* 'shows that the court is able to fashion means of permitting doctors to act in a way which accords with the demands of humanity'.[101] Indeed, the court recognised that all previous statements on the question of a defence of voluntary active euthanasia, although of high persuasive authority, were not binding on the court.[102] The primary hurdle to the expansion of the defence to cover cases of this nature is the reluctance of the judiciary to interfere with the proper role of Parliament. In the words of Toulson LJ:

> To do as Tony wants, the court would be making a major change in the law . . . These are not things which the court should do. It is not for the court to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place. Under our system of government these are matters for Parliament to decide, representing society as a whole, after Parliamentary scrutiny, and not for the court on the facts of an individual case or cases. For those reasons I would refuse these applications for judicial review.[103]

However, the court did recognise its power to develop the common law if necessary to ensure that the court (a public body under the Human Rights Act 1998) was acting in a way which was compatible with the ECHR.[104] Had the courts identified a breach of art 8 of the ECHR due to the lack of defence of voluntary active euthanasia, they would have declared such a defence to be available at common law.[105] While the European Court of Human Rights has held that art 8 encompasses a right for an individual to decide how and when to end his or her life, the High Court was satisfied that the ban on voluntary euthanasia was within the margin of appreciation afforded to states under the ECHR.[106] The court therefore rejected the applicant's arguments that art 8 required a defence of voluntary euthanasia to be made available,[107] noting that the Suicide Act 1961 had previously been found to be compatible with art 8.[108] Unfortunately for those seeking clarity in this confused area of law, although not for Mr Nicklinson, he died of natural causes before an appeal to the decision of the High Court could be heard so it is unlikely that a definitive Court of Appeal or Supreme Court ruling will be delivered in this case.[109]

Of course, this is not the first time the defence of necessity has been utilised in this context. In the Netherlands in the 1980s and 1990s, the courts recognised the availability of a defence of necessity in certain circumstances to doctors who administered voluntary

100 [2001] Fam 147.

101 [2012] EWHC 2381 (Admin) [63].

102 Ibid [51].

103 Ibid [150]; see also [151] (Royce J); and [152] (Macur J).

104 Ibid [18].

105 Ibid [19].

106 Ibid [121], citing *Haas v Switzerland* (2011) 53 EHRR 33; *Pretty v UK* (2002) 35 EHRR 1; and *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345.

107 [2012] EWHC 2381 (Admin) [122].

108 Ibid [148]; *Pretty v UK* (2002) 35 EHRR 1

109 In *R (on the application of Tony Nicklinson) v Ministry of Justice, DPP*, High Court, 2 October 2012, the court refused permission to appeal or allow Mrs Nicklinson to be made a party to the proceedings as the court did not consider that the proposed appeal had any real prospect of success as any change to the law in this area was a matter for Parliament [9].

active euthanasia to relieve suffering,[110] and was followed by legislation legalising euthanasia in that jurisdiction.[111] The defence of necessity has also been considered in this context by the Canadian Supreme Court in *Latimer*.[112] Mr Latimer was convicted of killing his daughter by carbon monoxide poisoning. The victim suffered from a severe form of cerebral palsy, was in considerable pain and due to undergo a serious operation which would have resulted in considerable discomfort and involve an extended recovery period. The Supreme Court held that a necessity defence was unavailable to Mr Latimer on the facts as he failed to satisfy the criteria of the defence; not being in imminent danger, having reasonable legal alternatives available to him and taking actions which were disproportionate to the harm to be avoided. However, the court left 'open, if and until it arises, the question of whether the proportionality requirement could be met for a homicide'.[113] It went on: '[a]ssuming for the sake of analysis only that necessity could provide a defence to homicide, there would have to be a harm that was seriously comparable in gravity to death (the harm inflicted). In this case, there was no risk of such harm.'[114] Interpreting this authority in *Carter v Canada (Attorney General)*[115] recently, the court found that the defence of necessity 'is likely not available'.[116]

While the rationale of the defence of necessity may be considered to accord with the actions of those who assist individuals who are suffering to die, affording a defence to defendants who find themselves in difficult circumstances and as a result are forced to break the letter of the law, its basis in justification is problematic in the present context. Excusatory defences such as provocation and diminished responsibility recognise that the actor should not be held responsible or fully responsible,[117] while condemning the act itself. Defences based on justification, such as necessity, on the other hand, exculpate a defendant on the basis that the act in which he or she engaged was justified and is not worthy of condemnation.[118] The important communicative role of the law must not be ignored in this context.[119] Seeking to justify the taking of life out of love and compassion is difficult given the competing moral stances. Accordingly, it may be assumed that it would be easier to excuse than to justify the taking of life in cases of assisted dying. Dressler argues that, rather than punish an individual because the act of killing is wrong, excuse requires us to exonerate because punishment is not 'necessarily, unalterably, and unfailingly'[120] deserved, which seems to more adequately reflect the situation in assisted dying cases.

110 *Schoonheim*, Supreme Court, 27 November 1984, NJ 1985, No 106. The *Postma* decision (District Court, Leeuwarden, 21 February 1973, NJ 1973, No 183) was the first in the series and saw a physician who euthanised her 78-year-old mother sentenced to one week of probation for the crime of 'death on request', which was subject to a maximum sentence of 12 years. For discussion of these cases, see *Carter v Canada (Attorney General)* 2012 BCSC 886 [457]–[9].

111 Above, n 31.

112 [2001] 3 LRC 593.

113 *R v Latimer* [2001] 3 LRC 593, 607.

114 Ibid.

115 2012 BCSC 886.

116 Ibid [203].

117 There are differing theories of excuse including those based on 'choice', 'capacity' and 'character'.

118 Necessity is viewed as an excusatory defence in Canada. The Irish Law Commission also classified necessity as excusatory, without explaining the basis of this classification.

119 '[T]he criminal law fulfils an educational role that is also expressed in the distinctions that it makes among different kinds of acquittal.': Khalid Ghanayim, 'Excused Necessity in Western Legal Philosophy' (2006) XIX(1) CJLJ 31, 35.

120 Joshua Dressler, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' in Michael Louis Corrado (ed), *Justification and Excuse in the Criminal Law: A Collection of Essays* (Garland 1994) 406.

Prosecutorial discretion

Individuals may also escape conviction in connection with the death of an individual through euthanasia or assisted suicide through the exercise of prosecutorial discretion. Prosecutions in Ireland in connection with the death of an individual through assisted suicide or euthanasia are rare.[121] The Director of Public Prosecutions looks at each case 'on an individual basis and decisions are taken in accordance with the criteria set out in . . . published guidelines for prosecutors'[122] rather than by reference to a specific set of guidelines in relation to assisted dying. The situation in England and Wales was formalised following the *Debbie Purdy* case[123] with a set of guidelines for prosecutors issued in February 2010.[124] These guidelines require prosecutors to apply the usual two-stage test in cases of assisted suicide: the first being the 'evidential' stage (asking whether there is a reasonable prospect of conviction); and the second the 'public interest' stage (asking whether prosecution would be in the public interest.[125] In cases of assisted suicide, the first of these tests involves asking whether 'the suspect did an act capable of encouraging or assisting the suicide or attempted suicide of another person'; and whether 'the suspect's act was intended to encourage or assist suicide or an attempt at suicide'.[126] As far as the public interest test is concerned, a prosecution will be less likely if:

1 the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
2 the suspect was wholly motivated by compassion;
3 the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
4 the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
5 the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
6 the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.[127]

121 A 45-year-old man (Gareth Volrath) was recently charged with murder in connection with the death of his 83-year-old mother in a nursing home in County Waterford on 9 January 2012: Barry Roche, 'Man on Charge of Murdering his Mother in Care Home' *The Irish Times* (Dublin, 6 June 2012).

122 James Fogarty, 'Exit International Ireland Reports Growing Interest in Assisted Suicide' *Medical Independent* (Dublin, 17 May 2012) <www.medicalindependent.ie/page.aspx?title=exit_international_ireland_reports_growing_interest_in_assisted_suicide> accessed 2 August 2012.

123 *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

124 Director of Public Prosecutions, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (February 2010). Similar guidelines were published in Northern Ireland by the Public Prosecution Service for Northern Ireland, *Policy on Prosecuting the Offence of Assisted Suicide*.

125 *Code for Crown Prosecutors* (2010), para 4.1.

126 Director of Public Prosecutions (n 124) para 17.

127 Ibid para 45.

While this policy did not result in the decriminalisation of assisted suicide, there has been a significant decrease in the number of prosecutions in respect of assisted suicide since the policy was issued.[128]

Where to from here?

Given the preceding discussion, which has highlighted the central role which emotions play in motivating behaviour and the important communicative effect of the law, it is of great concern that existing defences ignore or sideline the central role that emotions play in the decision of those who take the life of an individual who is suffering. While the defence of provocation implicitly recognises the role that emotion plays, the defence is focused on anger, an emotion which is not often associated with euthanasia or assisted suicide.[129] Not only is this approach unsatisfactory in failing to adequately reflect the operating reasons of the individual who assists a loved one to die, it also privileges an emotion which is not generally considered to be socially desirable.[130] There are some emotions, such as love and compassion, which may be classified as positive, as they are considered to 'have a proper role in human life'.[131] These are the emotions which we as a society want to nurture and encourage, and our society is better for these emotions. Conversely, anger is not an emotion which is typically viewed as positive.[132] While it is certainly arguable that there is a role for virtuous or righteous anger in any society, it is generally not an emotion we wish to cultivate. We do not encourage it in our children; instead, we teach them to respond calmly to frustrating situations and to manage their anger. The incoherency of privileging anger over other emotions has been recognised in many quarters. In its *Report on Murder, Manslaughter and Infanticide*, the Law Commission noted:

> Under the current law, the compassionate motives of the mercy killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation) and fear (self defence).[133]

If the law recognises the exculpatory nature of an emotion such as anger, it is certainly arguable that one should be excused when one acts due to love or compassion. This argument is given credence by the modern understanding of emotions as reflecting both moral and rational decisions.[134] Of course, as stated previously, not all decisions taken while under the influence of emotion will be rational or morally acceptable. However, if the emotions associated with cases of assisted dying, love and compassion are reasonable and socially acceptable, indeed desirable, and the response of the individual is reasonable and socially acceptable, then should the individual concerned be subject to punishment? This

128 Robert Winnett and Martin Beckford, '44 Cases of Assisted Suicide since CPS Guidelines Published' *The Telegraph* (London, 3 September 2011). Despite a total of 44 files being passed to the Crown Prosecution Service (CPS) since 2009, no prosecutions were brought for assisted suicide in England and Wales between February 2010 and September 2011. The High Court found in *Nicklinson* [2012] EWHC 2381 [123]–[44] that there was no legal obligation on the DPP to provide further clarity on this policy.

129 More recently, the role of fear in criminal defences has been recognised. For example, the defence of loss of self control recently introduced in England and Wales and Northern Ireland recognises a fear of violence emanating from the victim as a 'qualifying trigger': Coroners and Justice Act 2009, s 55.

130 See Robert C Solomon and Lori D Stone, 'On "Positive" and "Negative" Emotions' (2002) 32 (4) Journal for the Theory of Social Behaviour 417–35. See also Maroney (n 4) 134.

131 Anthony Duff, 'The Virtues and Vices of Virtue Jurisprudence' in T D J Chappell (ed), *Values and Virtues* (OUP 2006) 99.

132 Solomon and Stone (n 130).

133 Law Commission (n 77) pt 7.

134 Above, nn 14–25.

gives rise to the following issues: (1) whether individuals who act in these circumstances should be partially or fully exculpated; (2) whether any new defence should be excusatory or justificatory in nature; (3) what the rationale of such a defence should be; and (4) the communicative effect of such a rationale.

A new defence of assisted dying

Given the criticisms outlined, it is suggested that it would be preferable to recognise a new defence available in cases of assisted dying rather than allowing the development of the law in this area by analogy, dependent on a case arising with an appropriate factual background, a sympathetic defendant, a receptive court and the whims of defence lawyers deciding on the appropriate defence to raise. Rather, it is suggested that an excusatory defence of assisted dying should be recognised, which is available to those who kill a suffering individual as a result of love and/or compassion. Individuals who act in these circumstances do not display evidence of a bad character deserving of punishment; his or her actions do not 'reflect on him [or her] in a way that makes the kind of criticism communicated by the imposition of criminal responsibility appropriate'.[135] Duff has suggested that people who act in these circumstances:

> . . . should regret committing their crimes: indeed, they should repent them as wrongs. But the crimes were motivated by worthy emotions and virtuous commitments, and to resist the temptation to commit those crimes in those contexts would have required a moral strength whose lack we cannot justly condemn.[136]

In the same way, Dressler expresses the view of excuses as operating not just as an expression of compassion for the defendant but as operating when justice demands it; '[u]ltimately, excusing is a matter of justice, not of compassion'.[137]

While the rationality of emotions has been recognised, emotions will not always be rational in the sense that deliberate reflective judgments are rational, nor will the actions which result from them.[138] There is therefore a clear risk that a defence of this nature would be open to abuse by unscrupulous members of society. In the words of the Law Commission:

> there would need to be a much wider debate before concluding that the concept of compassion, as a motive, is in itself a sufficiently secure foundation for a mercy killing offence or partial defence . . . It is too important and socially significant a subject for us to make a recommendation without explicitly consulting on the question . . . Others would say that recognising a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity can very easily become simply a mask for anarchy, so the concept of compassion vague in itself could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives.[139]

It is therefore important that, if a defence is to be recognised, the rationale for which is the love and compassion which the defendant was experiencing at the time he or she committed the putatively criminal act, that it be subject to an objective limitation, thereby ensuring the

135 Victor Tadros, *Criminal Responsibility* (OUP 2005) 49. See also William Wilson, 'The Filtering Role of Crisis in the Constitution of Criminal Excuses' (2004) 17 Can J L and Jurisprudence 387; John Gardner, 'The Gist of Excuses' (1997–1998) 1(2) Buff Crim L Rev 575.

136 Duff (n 131) 99–100.

137 Dressler (n 120) 398.

138 Samuel Pillsbury, 'Moralizing the Passions of Criminal Punishment' (1989) 74 Cornell L Rev 655, 679.

139 Law Commission (n 77) paras 7.29–30.

normative acceptability of the defendant's actions in taking a life. As discussed previously, under the evaluative view of emotion, emotions are generated as a result of a cognitive appraisal of the personal relevance of a situation to an individual in line with one's values, goals, morals and capabilities and can be subject to judgment on the appropriateness of such emotions and the actions which result.[140] The defence would essentially require that the emotion and subsequent response was reasonable and socially acceptable.[141] This would require a consideration of whether a reasonable person sharing the characteristics of the accused would have experienced love or compassion[142] in the circumstances and would have responded in a similar manner. Given the very real concerns surrounding grounding a defence in an emotion experienced by a defendant, it is suggested that this test of reasonableness should be supplemented by a requirement that the individual who was assisted in dying was suffering from a terminal or chronic illness or was suffering severely. That is, the condition must be objectively verifiable.

The defence would be available to individuals charged with a range of offences in connection with assisted dying, including murder, attempted murder or assisting suicide in the following circumstances:

1 an individual (D) assisted another to die as a result of love and/or compassion;
2 the emotion and subsequent response was reasonable;
3 the individual who was assisted in dying was suffering from a terminal or chronic illness or was suffering severely;
4 The individual had made a voluntary, clear, settled and informed decision to end his or her life.[143]

Given the nature of the emotions concerned, this defence would most often be claimed by those in a close relationship with the individual who is assisted to die. However, medical practitioners and third parties who assist in taking the life of an individual with whom they do not have such a relationship would be allowed to raise the defence provided that they acted purely out of compassion for the individual concerned.[144] The approach recommended here does not legalise the offence, rather it recognises that, in some dire situations, in the face of extreme suffering, individuals, (including medical practitioners) may experience emotions 'whose primary function is to facilitate cooperation and protection of the weak and those who suffer'[145] and the law cannot justly condemn those who act upon such emotions and assist another to end their suffering.[146]

140 Above, nn 19–20.

141 For further discussion of how an emotion-based defence would operate, including the objective test, see Eimear Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (CUP 2011).

142 These concepts would not need to be defined in the legislation. Courts would follow the literal approach and give words their ordinary and everyday meaning, as in any other piece of legislation: *Brutus v Cozens* [1973] AC 854.

143 This would mean that the defence would not cover the taking of active steps to end the life of individuals who cannot communicate such a desire. However, it is argued that this condition is necessary to ensure that only individuals who have made a considered decision to die are covered.

144 Of course, many doctors would find it very troubling to be asked by a patient to assist in ending their life and the British Medical Association decided in June 2012 to maintain its opposition to the legalisation of assisted dying: <http://bma.org.uk/news-views-analysis/news/2012/june/bma-sticks-with-opposition-to-legalising-assisted-dying> accessed 26 July 2012.

145 Goetz et al (n 10) 351.

146 Ibid.

Conclusion

While the approach adopted here has been to focus on the recognition of a defence which operates to excuse individuals who have been charged with assisting another to die, this approach is certainly not without its drawbacks. Otherwise perfectly law-abiding citizens and their families, including often the individual who is assisted to die, will still face an enormously difficult situation, often without outside support. Those who rely on a defence of this nature are still subject to prosecution, with all the attendant distress, and doctors who assist patients to die face prosecution and censure. However, this approach serves to reflect the real value placed on human life in our society while achieving justice by excusing those who act in dire circumstances to relieve the suffering of another human being. Ultimately, a defendant who acts in an understandable way in response to reasonable and socially acceptable emotions should be exculpated.

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Legal hopes: enhancing resilience through the external cultivation of positive emotions

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Legitimated by rationality and grounded in claims of dispassion and objectivity, the law has been reluctant to acknowledge its relationship to the emotions.[1] When legal actors have recognized emotion, their focus has often been on negative emotions – from vengeance to shame or regret — and the way that their amplification, control, or redirection can shape doctrine, or contribute to the achievement of legal goals.[2] Legal thinkers have been slower to embrace a role in which legal actors use *law to achieve emotional goals*, rather than using *emotion to achieve legal goals*.[3] This has been true, a fortiori, where the goal of legal action is to foster *positive* emotions, such as hope, interest, joy, or feelings of affection or solidarity. The spectre of an intrusive state coercing the performance of sham emotions[4] has slowed exploration in this potentially productive area. In this article, we challenge legal scholars to rethink this reluctance, by exploring one context in which the legal cultivation of positive emotions may prove particularly useful. This context is the fostering of resilience, defined either as the capacity for normal development in circumstances of chronic stress or deprivation (e.g. extreme poverty or parental violence or drug use), or as the ability of less systematically disadvantaged individuals to respond productively to more acute stressors (e.g. unemployment, or death or illness of a family member). A growing psychological literature has highlighted the role of positive emotions in producing resilience and has emphasized the role of habituation in fostering such emotions. Drawing on our earlier work on the legal cultivation of hope, we argue that habituation to positive affective responses can be achieved not only by self-regulation and therapeutic intervention, but by programmatic interventions prescribed by law.

Our paper is divided into three parts. In the first part we describe the major strands of psychological literature on resilience (and the related concept of coping), and we highlight the emerging view of the positive emotions as a critical resource for resilient adaptation to

1 S Bandes (ed), *The Passions of Law* (New York University Press 1999); K Abrams and H Keren, 'Who's Afraid of Law and the Emotions? (2010) 94 Minnesota Law Review 1997.

2 See, for instance, M C Nussbaum, '"The Secret Sewers of Vice": Disgust, Bodies and the Law' in Bandes (n 1) 19; D M Kahan, 'The Progressive Appropriation of Disgust' in Bandes (n 1) 63; S Garvey, 'Can Shaming Punishments Educate?' (1998) 65 University of Chicago Law Review 73; C Guthrie (2008). 'Carhart, Constitutional Rights and the Psychology of Regret' (2008) 81 Southern California Law Review 877.

3 Abrams and Keren (n 1).

4 C Sanger, 'The Role and Reality of Emotions in Law' (2001) 8 William and Mary Journal of Women and Law 107.

adverse circumstances. In particular, we underscore some recent work which suggests that positive emotions may be fostered by a process of habituation.

In the second part, we describe our work on the positive emotion of hope. We argue that hope – which we define as the capacity to conceive and project oneself toward a distant but not impossible goal – can be cultivated through law by a sustained process of habituation. We describe a framework through which a legal actor or an institution designed by law can foster hope in individuals or groups, a framework which may have application to other positive emotions as well.

In the third part, we identify three themes in the potential relationship between our work on the legal cultivation of hope and the psychological literature on resilience. First, the psychological literature may affirm and offer empirical support for important dimensions of our framework. Second, our framework for the external cultivation of hope, through legal representation or institutional design, may extend current psychological approaches, which focus on individual self-regulation or intervention through the limited context of therapeutic relationships. Third, legal interventions aimed at providing individuals or groups with the habituation to hope may offer psychologists a context in which to explore habituation to positive emotions and its contribution to resilience in all its 'real world' complexity.

Resilience: a brief tour of a burgeoning field

Why do some individuals respond to adversity in a way that permits them to flourish, while others struggle or fail to adapt? This question promises to be central to the study of human vulnerability; it enables scholars to glimpse a trajectory out of systematic disadvantage for some who are subject to structural inequalities, violence, trauma, or natural disasters. It may also permit policy makers to design interventions that draw on this experience by formulating strategies that provide or mobilize the distinctive range of resources utilized by these more successful adapters. Given these stakes, it is not surprising that the study of resilience, in both children and adults, has been a lively focus of inquiry in psychology, as well as in allied fields such as social work and education. Notwithstanding these potential benefits, however, the analysis and cultivation of resilience have not been a focus of investigation in law.

Early literature on resilience

Until recently, the psychological literature on resilience could be divided into two broad categories. One body of literature, which was more developmental in its emphasis, described resilience as the adaptive functioning of children or young adults who had been exposed to conditions of adversity.[5] Adaptive functioning was most frequently described as normal development, understood in cognitive, psychological/affective, or behavioural terms.[6] The conditions of adversity surmounted by resilient youth ranged from the physical or psychological illness or drug-dependence of a parent to systematic socio-economic disadvantage.[7] This work focused on 'factor-specific' analyses (which used multivariate

5 S S Luthar, D Cicchetti and B Becker, 'The Construct of Resilience: A Critical Evaluation and Guidelines for Future Work' (2000) 71 Child Development 543; A S Masten, 'Ordinary Magic: Resilience Processes in Development' (2001) 56 American Psychologist 227.

6 B Egeland, E Carlson and L A Sroufe, 'Resilience as Process' (1993) 5 Development and Psychopathology 517. A similar framework is applied to adults in G A Bonanno, 'Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive after Extremely Aversive Events?' (2004) 59 American Psychologist 20.

7 Luthar et al (n 5); M Conrad and C Hammen, 'Protective and Resource Factors in High- and Low-risk Children: A Comparison of Children with Unipolar, Bipolar, Medically Ill, and Normal Mothers' (1993) 5 Development and Psychopathology 593.

statistics to test for relations between risk, development or competence achieved, and specific personal or environmental factors that may protect individuals from potentially negative influences on development), or on 'person-specific' analyses (which compared people with different outcome profiles along specific criteria to determine what naturally occurring clusters of factors tended to differentiate resilient children).[8] These studies, in the main, described resilience as a product of both individual attributes, such as 'cognitive and self-regulation skills' or 'positive views of self' and of group-based or relational features of the surrounding environment, such as 'connections to competent and caring adults in the family and community'.[9] This literature, which depicted its subjects as situated individuals subject to group-based influences and interventions, was often cryptic or elliptical in its treatment of the emotions. While works within this literature sometimes described the adaptive functioning of its young subjects along an affective axis, this focus was frequently limited to observing the presence or absence of clinical symptoms, such as anxiety or depression.[10] And while particular scholars sometimes identified affective influences, such as 'emotionally responsive [parental] caregiving',[11] or 'connections to . . . caring adults',[12] most did so without analysing at depth the emotional dimensions of these connections.[13] Although resilience in this literature was often described as a process,[14] this was a developmental process, which did not entail discussion of patterns of habituation.

A second body of literature analysed coping in relation to stress. This literature focused on adults who experienced either long-term stressors, such as the illness or death of a spouse,[15] or short-term stressors, such as work or financial pressures, or any set of developments that temporarily taxed an individual's 'resources', broadly defined.[16] This literature was more explicit and analytical in its approach to the emotions. This focus is exemplified by the work of Richard Lazarus, who analysed coping through a 'cognitive theory of the emotions'.[17] In this account, the ability of a particular person to cope with adversity is conditioned by his or her 'cognitive appraisal' of her situation: 'through cognitive appraisal the person evaluates the significance of what is happening for his or her

8 Masten (n 5).

9 Ibid.

10 R D Felner et al, 'Socioeconomic Disadvantage, Proximal Environmental Experiences, and Socioemotional and Academic Adjustment in Early Adolescence: Investigation of a Mediated Effects Framework' (1995) 66 Child Development 774.

11 Egeland et al (n 6).

12 Masten (n 5).

13 Some work is more ambivalent with respect to its exploration of the emotions. Egeland et al (n 6) associate 'emotionally responsive parenting' with performance on a particular experimental measure administered to a parent and child when the child is 42 months old. However, the article also uses the work of John Bowlby (*Attachment* (Penguin 1984)) to try to explain the contribution of this attribute. Citing Bowlby, Egeland notes that 'emotionally responsive parenting is thought to assist the child with regulating emotional response and developing confidence in the supportive presence of others'. In this account, the child interacts with the caregiver over time and comes to feel that he is 'lovable and worthwhile'. Although Bowlby's work is on attachment rather than resilience, and Egeland at al's attention to it reflects an emotional focus which seems atypically sustained for this body of literature, this notion of developing confidence and capacity for self-regulation over time, through the supportive response of a caregiver, may preview later works: see, for instance, M M Tugade, 'Positive Emotions and Coping: Examining Dual-process Frameworks of Resilience' in S Folkman (ed), *The Oxford Handbook of Stress, Health and Coping* (OUP 2011) 186; J T Moskowitz, 'Coping Interventions and the Regulation of Positive Affect' in ibid 407.

14 Egeland et al (n 6)

15 Bonanno (n 6).

16 R S Lazarus and S Folkman, *Stress, Appraisal, and Coping* (Springer 1984).

17 Ibid.

wellbeing'.[18] This process may encompass a 'preliminary' appraisal of whether the situation or event is positive, irrelevant, or stressful to the individual and, if the event is stressful, a 'secondary' appraisal of 'what might and can be done'.[19] Both appraisals, in Lazarus's account, rest on an individual's commitments, or judgments, about what is important, and beliefs about the world and his or her own capacities. These appraisals are also intertwined with emotions. Emotions – such as the feeling of fear, anger, or excitement that may emerge prior to purposeful cognitive evaluation – may provide the first signal that an individual is facing a circumstance that requires assessment. Emotions may also emerge as the *products* of cognitive appraisal. A person who believes that he or she has the ability to resolve a challenge consistently with his or her goals may feel pride, confidence, or relief. One who believes that the circumstances are beyond his or her ability to cope may feel fear or panic. One who believes that he or she cannot respond effectively to the surrounding circumstances without violating one or more of his or her existential commitments may feel frustration or some form of emotional ambivalence. Emotions may help processes of coping (hope or confidence or indignation may fuel perseverance in facing a difficult situation), or hinder them (outrage or fear or excitement may make it difficult to conceive or execute a plan). They may also trigger further cognitive reassessment in an ongoing process. For Lazarus, improved coping can arise from helping the individual to engage in cognitive reappraisal – that is, to think differently about his or her capabilities or goals, so that there is less anxiety experienced, or more confidence in the ability to respond to the circumstances eliciting it. Coping can also arise from helping the individual to regulate the effects of the emotion, through such strategies as distraction or distancing.[20] Although Lazarus and Folkman state that there is no empirical basis at present for preferring one of these approaches to the other, the weight of their analysis is applied to the strategy of cognitive reappraisal.[21]

While this theory reflects nuance in its cognitive theory of the emotions generally, it does not take a position on the value or potential contribution of any particular set of emotions. Emotions are analysed as accurate or inaccurate reflections of the circumstances, or the cognitive assessments, that produced them, or as assisting or hindering efforts to cope with particular problems. The answer to situationally problematic emotions lies in helping the individual to engage, first, in cognitive reappraisal and, perhaps secondarily, in the down-regulation of situationally inappropriate or unhelpful emotions. This help is provided primarily within the context of a therapeutic relationship. As distinct from the literature on child and adolescent resilience, this cognitively based view of coping tends to focus on the individual and his or her response to stressful circumstances rather than the institutions or relationship in which he or she is embedded; it seeks to alter cognitive appraisals through a therapeutic relationship (and ultimately, through self-regulation) rather than by addressing the individual's surrounding environment.

The role of positive emotions in building resilience: new developments

Over the two last decades, however, theorists have shown a new awareness of the special role played by the positive emotions in explaining patterns of resilience. Their work was inspired by Barbara Fredrickson's 'broaden-and-build' theory, which offers a general

18 Lazarus and Folkman (n 16).

19 Ibid 35.

20 Ibid 319.

21 Ibid 374.

understanding of the unique importance of the positive emotions.[22] The broadening influence of the positive emotions allows people to think or act in ways that were not previously available to them. For example, a person who is experiencing joy or gratitude may consider engaging in new or unfamiliar activities, such as seeking the company of others, or engaging in a creative project.[23] The building effect follows when the exploration of such expanded possibilities results in a growth of new personal resources. A social interaction might lead to establishing friendships, or an artistic project could develop into a hobby or a field of interest. Although Fredrickson's theory was not originally developed in the context of resilience, the broaden-and-build model has the potential for explaining individual differences in coping with negative events and prolonged hardships; it therefore offers an important dimension to the analysis of resilience.

One way the broadening effect of the positive emotions contributes to resilient trajectories is by interrupting and tempering the negative emotions that inhere in adversity and exacerbate it. The presence of positive emotions in conjunction with negative emotions has the power to 'undo' some of the negative emotions and thereby enable better and easier adaptation. For example, one study of coping with bereavement documented better adjustment by those individuals who, in the course of grieving, experienced and expressed some positive emotions, as demonstrated by smiling and laughing.[24] In other words, having access to *some* positive emotions, even if they are only briefly and moderately experienced, can assist in handling times of crisis by down-regulating the negative emotions produced by the crisis.

The broadening effect of the positive emotions also expands access to cognitive and behavioural pathways that tend to be blocked or limited by the 'tunnel vision' that typifies the distressed. If effective coping requires cognitive reappraisal of the meaning of a problem, for example, as many scholars have suggested,[25] then positive emotions can facilitate such cognitive effort. By offering a break from the negative orientation that tends to be produced by a personal crisis or a more sustained form of distress, positive emotions can make the affected individual more available for, and capable of engaging in, the long-term thinking and problem-solving that are essential to resilient coping.

The building effect of the positive emotions is also a vital component of the resilient response. Positive emotions have the potential to create and enhance resources that are requisite to successful coping. Supportive relationships and higher levels of self-esteem, for example, have consistently been correlated with resilience.[26] Recurrent positive emotions play a major role in developing and restoring these interpersonal resources; they also contribute to the building and sustaining of physical resources, such as health and energy, and mental resources, such as motivation and attentional focus.[27]

These valuable contributions of the positive emotions to resilience suggest the need for interventions that can increase positive affect. Until very recently, the small group of scholars interested in the effects of positive emotions on coping focused on deliberate, self-administered efforts to elicit positive emotions. These strategies included keeping gratitude

22 B L Frederickson, 'What Good are Positive Emotions?' (1998) 2 Review of General Psychology. Special Issue: New Directions in Research on Emotion 300.

23 B L Fredrickson and C Branigan, 'Positive Emotions Broaden the Scope of Attention and Thought-action Repertoires' (2005) 19 Cognition and Emotion 313.

24 D Keltner and G A Bonanno, 'A Study of Laughter and Dissociation: Distinct Correlates of Laughter and Smiling during Bereavement' (1997) 73 Journal of Personality and Social Psychology 687.

25 Lazarus and Folkman (n 16).

26 Masten (n 5).

27 Moskowitz (n 13).

journals, meditating, exercising and trying to find positive meaning in negative events. These individual strategies situate interventions primarily within a therapeutic paradigm. They operate on individuals and they produce change by addressing the cognitive or behavioural patterns of individuals, rather than addressing their surrounding environment.

A recent work by Michele Tugade adds a new and promising path to the cultivation of positive emotions.[28] Arguing that generating positive emotions does not necessarily require conscious efforts, Tugade illuminates the possibility of 'automatic activation' of such emotions. He begins by observing that certain 'bottom-up' stimuli automatically produce positive emotions: a cup of hot tea may fuel contentment; or a random smile from a passerby may engender a sense of social connectedness. He then argues that such automatic responses can be triggered not only by random interactions, but by habituation: from repeated, deliberate efforts to generate positive emotions. Practising loving kindness meditation, which intentionally evokes positive emotions, can produce a state in which positive emotions emerge naturally, without purposive effort.[29] Purposefully distracting oneself from negative emotions over years and decades, as work cited by Tugade demonstrates, may trigger among older adults an automatic shift of attention from negative stimuli to positive stimuli.[30] Another recent work by Judith Moskowitz supports Tugade's new emphasis on the power of deliberate efforts to produce *automatic* activations of positive emotions. As Moskowitz argues, 'for an intervention to be effective, the individual needs to make the targeted behaviors a *habit*'.[31] For example, interventions that led individuals to integrate meditation, volunteering work, art classes or social meetings into their routine have been shown to increase positive affect. Importantly, although many interventions may yield temporary positive emotions, only *continuing the patterns described above* can defeat individuals' inclination to adapt back to their set point.

These recent works of Tugade and Moskowitz remain within the individual or therapeutic frame: they support cognitively based self-regulation by individuals, but do not aim to cultivate positive emotions in others by intervening in their surrounding environments. But they offer a new direction that, in our view, reflects promise, namely the enhancement of coping or resilience by purposeful efforts to cultivate positive emotions through habituation. In the following section, we consider a different means of cultivating habituation to positive emotion, namely by external regulation of the individual's environment *through the vehicle of law*. In this context we discuss work that we have done on the cultivation of hope in individuals and groups suffering systematic disadvantage. In this account, law serves to structure environments which engender 'habits of hope': these habits, over time, foster in individuals or groups an independent ability to activate hopeful emotions.

Cultivating hope through law

In our 2007 article, 'Law in the Cultivation of Hope', we examined the role of law in supporting the emergence of one positive emotion, hope, in groups facing adversity, particularly race-based stigma and socio-economic disadvantage.[32] We described hope as the capacity to 'aspir[e] to a goal that is arduous and difficult but possible' and work toward the means of its achievement. The complex combination of the affective and the cognitive that

28 See n 13.

29 B L Frederickson et al, 'Open Hearts Build Lives: Positive Emotions, Induced through Loving-kindness Meditation, Build Consequential Personal Resources' (2008) 95 Journal of Personality and Social Psychology 1045.

30 Tugade (n 13).

31 See n 13.

32 K Abrams and H Keren, 'Law in the Cultivation of Hope' (2007) 95 California Law Review 319.

is involved in hope includes the courage and imagination necessary to grasp a future prospect that departs from one's present circumstances, the means–ends rationality necessary to formulate means to this end, the persistence to move forward in the face of failures, missteps and opposition, and the willingness and resourcefulness to draw on or mobilize the support of others. As one hopes – or pursues particular hopes over time – one develops a disposition of hopefulness, which not only fuels particular actions but conditions the ways that one looks at difficulties or challenges. Drawing on the insight of pragmatist philosopher Patrick Shade that hope and hopefulness can emerge or can be supported by a process of habituation,[33] we considered the possibility that individuals or institutions can engage in the 'cultivation of hope' – that is, can engender hope in those who lack it. Highlighting examples both inside and outside of law, we described a process by which one individual, already possessed of a hopeful disposition, can cultivate hope in others.

In this context, we proposed a framework for this process of cultivation which proceeded in several steps. First, the cultivator must 'communicat[e] recognition and vision'. Recognition means signalling that he or she sees the prospective hoper as a full human subject, with multifaceted capacity and individual personality. Vision means helping the prospective hoper to see that aspects of his or her situation could be different. Second, the cultivator must 'introduc[e] an activity that allows for individuation'. This step helps the prospective hoper to recognize his or her own capacity or talent, and to begin to express it in concrete ways that the hoper and others can see. In the examples we develop, this 'activity' could be as varied as taking notes in a group meeting, depicting one's immediate environment through photography, or telling one's story of legal injury to the media. As the hoper's activity begins to unfold, the cultivator must also 'provide resources' where necessary to help the hoper develop a sense of possibility or efficacy in relation to his or her endeavour: this might mean providing material resources, or access to networks or other communities with similar interests. The cultivator must also 'support [the] agency' of the prospective hoper. Those who lack hope often believe that they are not capable of directing their own course, or of efficacy in implementing even short-term goals. In this phase, the cultivator fosters a sense of greater capability and control by setting tasks or offering opportunities that demand progressively more self-assertion or self-direction, or supports the new hoper in meeting comparable challenges when they are presented by the surrounding environment. Finally, the cultivator must 'foster [a sense of] solidarity' with the new hoper, and among all the other hopers with whom the cultivator may be involved (if the cultivation effort is proceeding with a group larger than one). A sense of isolation is central to the despair, enervation and paralysis that are the opposite of hope. A feeling of solidaristic connection with others counters that sense of isolation, as well as providing the hoper with mentors and fellow-travellers: it may also permit the hoper to re-activate earlier phases of the cultivation process (reliance on resources or supports for agency, for example) when he or she encounters obstacles or disappointments.

Although we initially describe the cultivation of hope as an individual effort, we subsequently argue that the same framework can be particularly well utilized by the law. This is sometimes because lawyer–client relationships provide the occasion for an individual cultivation of hope. For instance, Julie Su, an attorney with the Asian Pacific American Law Center of Southern California, helped to cultivate hope among the workers whom she represented in an action against the distributors of items produced by sweatshop labour. Su framed the action as one dimension of a community-organizing campaign, in which she supported workers in telling their own stories to the media, enlisted them in particular aspects of the litigation effort and fostered connections among Thai and Mexican workers

33 P Shade, *Habits of Hope: A Pragmatic Theory* (Vanderbilt University Press 2001).

who laboured under different conditions and spoke different languages. Lawyers who represent clients on death row, as we have discovered in another research project,[34] may also engage in this kind of individual cultivation, supporting the hopes of their clients not simply for parole or a new trial, but for a meaningful life that can be lived in prison – by supporting their interests in continuing education, in hobbies or artistic efforts, or in mentoring other prisoners, and by helping them to achieve as much agency as possible in relation to prison conditions and contact with friends and family. More often, however, the law becomes a potent instrument in the cultivation of hope because it is capable of structuring institutional environments that can support a habituation to hope and hopefulness.

In our 2007 article, we explored the example of Project Head Start, a nationwide preschool programme that was initiated by law under the Johnson Administration. Head Start not only offered an educational foundation to children living in circumstances of systematic deprivation, but also fostered the hope of their mothers, as it involved them in programmes of local Head Start centres. The requirement that the mothers volunteer to take part in the administrative work of the centres and assist with classes gave them a set of responsibilities that permitted them to draw on whatever strengths they possessed, and over time habituated them to feelings of capability, contribution and greater control. The structure of mentorship that the centres provided through ongoing contact with supervising teachers and other mothers offered newer mothers supports for their growing agency; they could rely on information, advice and reassurance as they took on increasingly demanding roles. Mothers could also draw on resources: the material resources of the school, the social networks provided by other parents and teachers and emotional resources for addressing challenges both inside and outside of the school environment. Finally, gradual immersion in the educational and administrative work of the centre, buttressed by supportive mentoring from teachers and other mothers, created both vertical and horizontal bonds of solidarity, trust and affection among members of the Head Start community.

Legal hopes and the psychological literature of resilience

The framework for cultivating hope that we advanced is in some ways a hypothesis – based on a series of case studies that we investigated at length – about how interventions structured by law might be used to foster the positive emotion of hope.[35] Our review of the emerging literature of resilience suggests important relationships between that literature and our thinking about the cultivation of hope.

Although our understanding of how we might cultivate hope through law was drawn from distinct philosophical, legal and sociological literatures, we see it as reflecting many of the insights embodied in the psychological literatures on resilience. With the literature on coping with stress, and on the value of the positive emotions, we share the insight that emotions (whether understood as the products of cognitive appraisal or as emerging in more automatic ways) are critical to the way that one responds to adversity. Like these literatures, our work suggests that positive emotions might have particular value: first, in broadening perceptions of one's circumstances and possible responses; and second, in helping one to develop and sustain resources crucial to coping, such as social support and a sense of self-efficacy. Yet, like the developmental literature on the determinants of resilience, our work recognizes that the individualized or therapeutic emphasis of these

34 Work currently in progress.

35 Our perhaps atypically broad understanding of hope means that it encompasses other affective responses described as positive emotions in the psychological literature: interest, joy, love. So the application of something like the steps we describe could potentially result in the cultivation of a number of positive emotions (as they are characterised in the literature), and not simply hope.

more emotionally focused literatures on coping needs to be supplemented with an emphasis on the environmental factors that can condition adversity and enable a response. Our analysis shares with a sociological literature on coping the recognition that many forms of adversity are neither random nor wholly individuated but rather the product of structural factors, such as systemic forms of inequality.[36] It also acknowledges, with the developmental literature on resilience, the insight that how individuals respond to adversity is not simply a function of internal capacities (including cognitive response), but also of their connection with various resources in the surrounding environment.[37] This last insight makes the turn to law, which is capable of structuring or regulating relations between individuals and their environments, a plausible and necessary move. Finally, with the emerging literature on positive emotions, our work shares a modus operandi: the notion that habituation may be a key in supporting the emergence of positive emotions. Yet, it moves that emphasis on fostering habituation beyond the therapeutic environment, into settings where individuals and groups work, learn and dispute the conditions under which they live.

In this section, we offer three themes that characterize those relationships. First we argue that the literature on resilience offers support for our hypothesis, including our focus on habituation and several dimensions of our framework of cultivation. Second, we suggest that our work adds a dimension that is currently not developed in the resilience literature, in that it highlights the use of external intervention to foster positive emotions, either by the individual or through the design of institutions. Third, we suggest that our focus on the cultivation of positive emotions through law – particularly those contexts in which law structures programmatic interventions – may provide social scientists with an opportunity to investigate the generation and the effects of positive emotions in practical settings aimed at responding to circumstances of adversity. Each of these relationships suggests that law may be of value in cultivating the positive emotions that may support the development of resilience.

Support for the framework of external cultivation

Given these common premises, the literatures on resilience elaborate on, and offer empirical support for, a number of the hypotheses we have drawn from our particular cases or examples. First, the recent research on positive emotions and habituation reinforces a central theme in our work, namely the need to foster *habits* of hope. The cultivation of hope operates through a sustained process, that is as much about fostering confidence and a sense of possibility through repetition and practice as it is about inciting purposeful cognitive readjustments.

Second, the literatures on resilience also support specific dimensions of our framework of cultivation. For example, these literatures underscore the importance of providing to prospective hopers an activity allowing for individuation. This is in some ways the most surprising dimension of our theory: how does hope arise from learning to use a camera, or helping with litigation documents, or assisting in a preschool class? The resilience literature points to several dynamics that support this connection. One is the centrality of engagement. Hobfoll notes, for example, that a sense of engagement is critical to the experience of many positive emotions, such as excitement and fulfilment.[38] Finding an activity in which prospective hopers can take part is a way of bringing forward their capacities for attention, enjoyment and commitment – in short, engaging them. The focus

36 L I Pearlin, 'The Sociological Study of Stress' (1989) 30 Journal of Health and Social Behavior 241.

37 Masten (n 5); S E Hobfoll, 'Conservation of Resources Theory: Its Implication for Stress, Health, and Resilience' in Folkman (n 13) 127.

38 Hobfoll (n 37).

on an activity allowing individuation also permits them to deploy what they perceive as their strengths, another strategy that is associated in the resilience literature with the emergence of positive emotions.[39] One Head Start mother illustrated this effect in describing her decision to run for secretary of her local centre's policy council: 'You see, I'm good with paperwork. I'm good. And I got my notebooks together. And I got the plastic covers . . . and I had categories set up, and I had it just perfect . . . I conducted my little position like a professional.' Finally, sustained focus on a specific activity can be a vehicle for helping people to see their prospects differently, through the process of habituation. This dynamic is consistent with Tugade's 'dual processing' theory of positive emotions – that they are capable of emerging both deliberately and automatically.[40] But our work suggests that the vector may move in both directions. Not only do repeated efforts at reappraisal lead to a more habitual affective response; but the habitual performance of a particular activity or task may prompt affective responses that then lead to a gradual cognitive reappraisal. As another Head Start mother observed:

> It's built my self-esteem up . . . I feel better about myself . . . Like going to Governing Board meeting and sitting beside the superintendent . . . Then you feel, well you are worth something. And I didn't used to feel like that.

The psychological literature on resilience also confirms a second element of our framework, namely the importance of providing resources in fostering hope. Hope may not intuitively seem to be connected with resources, but when it is defined as the ability to conceive and project oneself toward a distant and difficult goal, the value of resources becomes more apparent. Both the developmental literature on resilience and the work on adult coping highlight the centrality to successful adaptation of various forms of resources. These may be material resources, or experience with navigating institutions, or social network-based support.[41]

Yet another theme in the resilience literature correlates with the element of 'solidarity' in our framework. Forms of interpersonal connection, such as responsive parenting and effective mentorship, are critical in the developmental literature on resilience;[42] connection with others is both required for and enhanced by the broaden-and-build framework of positive emotions.[43] Solidarity is a key to cultivation in all of our examples, whether the connections among Head Start mothers, and their relations with their teacher–mentors, or the relationship between Julie Su and the immigrant workers, or the relation of Thai workers to their Mexican counterparts. Solidarity defeats the main enemy of hope – isolation: it permits these prospective hopers to grow in competency and find emotional support to sustain them in the face of obstacles.

Finally, these literatures affirm the support for agency which is a central dimension of our framework. Cultivators from Zana Briski, who brought cameras to the children of the red-light district in Calcutta, to the teacher–mentors of Head Start support new hopers as they expand the scope of their activity and independence, gaining a sense of efficacy and self-direction. The contribution of self-efficacy to resilience in the face of adversity is a

39 M E P Seligman et al, 'Positive Education: Positive Psychology and Classroom Interventions' (2009) 35 Oxford Review of Education 293; K J Reivich, M E P Seligman and S McBride, 'Master Resilience Training in the US Army' (2011) 66 American Psychologist 25.

40 Tugade (n 13).

41 Masten (n 5); Luthar et al (n 5); Conrad and Hammen (n 7); Hobfoll (n 37).

42 Luthar et al (n 5); Masten (n 5); Egeland et al (n 6).

43 Frederickson (n 22); Frederickson and Branigan (n 23).

point made across the various psychological literatures.[44] It is correlated with greater resilience among children who experience disadvantage,[45] contributes to adult capacity to cope with trauma[46] and is regarded in some work as a critical resource in coping.[47] Our work reflects the additional 'dual process' insight that agency may be fostered both through cognitive reappraisal and through habituation.[48] Julie Su helped workers to understand that their own voices – which the workers had devalued for their lack of English fluency and legal expertise – in fact offered the most compelling account of the abuses they had endured.[49] This cognitive reappraisal fuelled a greater sense of efficacy as well as feelings of pride, confidence and hope. In the main, however, workers' agency grew through habituation: the workers developed a sense of competency and control over their lives, as they helped, day after day, in the production of litigation documents, or spoke, again and again, to members of the press.

The external cultivation of positive emotions

As we have seen, psychologists have recently argued that the value of positive emotions in building resilience justifies deliberate efforts to foster such emotions in times of distress. However, these calls for intervention have focused on efforts by individuals to up-regulate their own positive affect: independently, through practices such as meditation or gratitude diaries, or with the guidance of a therapist.[50] Our own work builds on this effort, by moving the emphasis on deliberate cultivation beyond the individual self-regulation or the therapeutic relationship. We describe and theorize the ability of individuals and institutions to *cultivate positive emotions in others, using law as a vehicle*. By examining the work of lawyers, such as Julie Su, and legislated programmes, such as Head Start, we have come to believe in the feasibility of *external* contributions that utilise the robust personal and social resources of some to develop better coping resources in others who lack them. Our work suggests that society cannot rely solely on the resources available to individuals – particularly those who face circumstances of adversity – but rather should extend to its more vulnerable members a purposeful, active effort to enrich and strengthen their affective resources.

The framework we suggest can be perceived as extending recent work done by Hobfoll on resources and resilience.[51] Highlighting the importance of environmental factors, such as socio-economic status, race and education, Hobfoll argues that disenfranchised individuals and families are limited in their ability to develop the resources that are essential to resiliency. Stating that 'for families who lack resources, the question of whether the future is bright or threatening takes a completely different meaning', Hobfoll suggests that some 'sociocultural ecologies' are so poor and demanding that they cannot provide any resources or support to their members and may in fact tax or erode the resources available to members to cope with specific challenges. Hobfoll goes so far as to observe that, under conditions of extreme deprivation, 'it is the greater social unit that must provide support':

44 Masten (n 5); S Folkman and J T Moskowitz, 'Positive Affect and the Other Side of Coping' (2000) 55 American Psychologist 647.

45 Masten (n 5); Luthar et al (n 5).

46 Folkman and Moskowitz (n 44).

47 Hobfoll (n 37).

48 Tugade (n 13).

49 J A Su, 'Making the Invisible Visible: The Garment Industry's Dirty Laundry' (1998) 1 Journal of Gender, Race, and Justice 405.

50 N L Sin and S Lyubomirsky, 'Enhancing Well-being and Alleviating Depressive Symptoms with Positive Psychology Interventions: A Practice-friendly Meta-analysis' (2009) 65 Journal of Clinical Psychology: in Session 467.

51 Hobfoll (n 37).

he references a legal intervention by the state of Mississippi in response to Hurricane Katrina, which produced a positive effect on mental health by regulating insurance payments. Yet, even Hobfoll stops short of explaining *how* greater social units can become supportive environments that have the capacity to enrich resources and expand them beyond the limited capacity of vulnerable individuals. A framework of external cultivation of hope through law can be seen as extending this recent idea: it explains the dynamics and specifies the elements that are likely to characterize effective external interventions. For example, by observing and theorizing the ability of the most reflective and innovative legal practitioners to cultivate hope in their clients by providing them with vision, activity, means and solidarity, our framework may assist those who are planning or designing external, legal interventions and point to new directions in the training of lawyers.

Practical settings for investigating the generation and effects of positive emotions

If the literatures on resilience offer explanation and empirical support for many of the patterns we identified in the cultivation of hope, the use of law in fostering positive emotions may offer a resource to social scientists as well. Studying environments structured by law that facilitate habituation to positive emotions may offer psychologists a means of testing and elaborating their claims about positive emotions. Thus, as Folkman and Moscowitz have observed:

> [l]aboratory studies have provided provocative suggestions regarding the ways positive emotions may help people endure stress. But because constraints of the laboratory limit researchers' ability to simulate the meaning or duration of serious real-life stressors, we strongly encourage pursuing research under real-life circumstances, with all their complexity.[52]

Thus far, most research has focused on individuals suffering trauma or loss, such as the recently bereaved,[53] caregivers for people with AIDS,[54] or New Yorkers following 9/11.[55] Because these individuals are not part of any purposeful effort to foster positive emotions, their differences with respect to positive emotions and resilience are more likely to be the result of random stimuli, deliberate cognitive efforts, or serendipitous forms of habituation. Other studies have analysed the effects of 'positive psychology interventions' – that is, interventions aimed at fostering positive emotions through habituation – in the context of controlled therapeutic relations.[56] Examining programmes structured by law to foster positive emotions, such as hope, might provide psychologists with an opportunity to study the effects of habituation 'under real life circumstances, with all their complexity'. Because legal theorists and actors are only beginning to discover this strategy, psychologists may need to begin with programmes such as Head Start, whose cultivation of hope in mothers was in some respects serendipitous, or at least secondary to its primary goal of educating preschool children. But as legal actors begin to experiment more purposefully with this framework, there may be new opportunities for psychologists to examine the processes by which lawyers and legally structured institutions help to foster positive emotions among groups who are their clients and beneficiaries.

52 Folkman and Moscowitz (n 44).

53 Tugade (n 13).

54 Folkman and Moscowitz (n 44).

55 B L Fredrickson et al, 'What Good are Positive Emotions in Crises? A Prospective Study of Resilience and Emotions Following the Terrorist Attacks on the United States on September 11th, 2001' (2003) 84 Journal of Personality and Social Psychology 365.

56 Sin and Lyubomirsky (n 50).

In closing, we want to underscore our own hopefulness about the potential of law to enhance resilience by cultivating positive emotions. Two features of law work in concert to confer this potential. The first is that 'law' is a powerful social institution that may impact individuals' lives in numerous ways. Legislation, judicial decisions, statutorily-enacted programmes, legal representation, organisations established under law, legal incentives, legal declarations, special tribunals, legal instruments (such as contracts and trusts) and many more legally based tools together create the 'legal practice' in the broadest and richest sense of the term. The second promising feature of law, as broadly defined, is that it can be purposefully deployed to play this role in cultivating positive emotions and resilience, especially in distressed communities. Examples beyond those discussed here, drawn from our previous work,[57] include: prison re-entry programmes, such as the Ready4Work Program; community lawyering efforts; international tribunals and truth commissions; alternative legal processes; and cohabitation agreements of same sex couples who are still prevented from marrying each other. Overall, we believe, in times of trouble, when resilience is essential, the law is too strong a tool to be left behind.

57 Abrams and Keren (n 32).