

Empathy for Victims in Criminal Justice: Revisiting Susan Bandes in Victimology

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I. Introduction

Where in other areas of legal scholarship the notion of law and emotions might meet enduring resistance, this is certainly not true for Victimology. Indeed the understanding that emotions play a key role in the way victims of crime and abuse of power experience legal processes all but goes without saying. Assuaging the burden—the 'secondary victimisation'¹—of the criminal justice process has from the outset been couched in emotional terms, while the positive value of participation is increasingly portrayed in such a way as well.² A victimologist therefore, with an interest in justice processes, is automatically involved in law and emotions scholarship, even without any explicit awareness of this fact.

This is not to say that the debates surrounding the role of emotions in law are unfamiliar terrain to scholars involved in victimological research; indeed it is a recurrent phenomenon. However, the perception of an emotional essence to victims' issues, combined with the relative novelty of considering the position of victims within criminal justice processes, means that the kernel and outcome of these debates are understood as concerning the appropriate place *for victims* in law rather than the appropriate place *for emotions*. Both the victims' (supposed) nature as emotional beings, as well as particular emotions associated with victimisation deemed particularly problematic—anger, outrage, hatred and their

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¹ See JE Williams, 'Secondary Victimisation: Confronting Public Attitudes About Rape' (1984) 9 *Victimology* 66.

² See A Pemberton and S Reynaers, 'The Controversial Nature of Victim Participation: The Case of the Victim Impact Statements' in E Erez, M Kilchling and JA Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives* (Durham, NC, Academic Press, 2011).

connection to revenge—often feature in these discussions.³ The questions at issue are whether it is true, problematic and/or valuable that the victim's input in the process is emotionally charged,⁴ and similarly whether it is true and/or problematic that the emotions victims experience are vengeful in nature.⁵

One of the upshots of this is that much of the normative discussion about victims' emotions in criminal justice focuses on the issue of revenge, which, although it is an important topic, drowns out consideration of the more subtle and complex ways in which victims' emotions can interact with or be expressed in justice processes and the extent to which legal processes can and should respond to these emotions. A classic text in the Law and Emotions canon that deals with a victimological subject does so, and much of its line of thinking merits renewed attention. It is Susan Bandes' *Empathy, Narrative and Victim Impact Statements* (ENV) that appeared in the *University of Chicago Law Review* in 1996.⁶

In this paper Bandes offers an incisive analysis of two concepts—empathy and narrative—which are of lasting importance in understanding the complexities of the position of victims of crime in criminal justice.⁷ As I will argue, this value only increases when divorced from the immediate topic of concern to Bandes, whose 'interest in victim impact statements was originally propelled by concern about—or, more accurately, outrage over—the result in *Payne*'.⁸ This, of course, refers to the landmark US Supreme Court decision in *Payne v Tennessee*,⁹ which allowed victim impact evidence at the sentencing phase in capital cases.

³ See for instance, the contributions to the edited volumes of A Crawford and J Goodey, *Integrating a Victim Perspective Within Criminal Justice* (Aldershot, Ashgate, 2000); and A Bottoms and J Roberts, *Hearing the Victim. Adversarial Justice, Crime Victims and the State* (Cullompton, Devon, Willan Publishing, 2010).

⁴ E Erez, M Kilchling and JA Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives* (Durham, NC, Academic Press, 2011).

⁵ For instance, JJM Van Dijk, 'Free the Victim: A Critique of the Western Conception of Victimhood' (2009) 16 *International Review of Victimology* 1; L Sherman and H Strang, 'Empathy for the Devil' in S Karstedt, I Loader and H Strang (eds) *Emotions, Crime and Justice* (Oxford, Hart Publishing, 2011); BAM Van Stokkom, 'Victim Needs, Well-Being and Closure: Does Revenge Satisfy?' in E Erez, M Kilchling and JA Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives* (Durham NC, Academic Press, 2011); A Pemberton, 'Too Readily Dismissed? A Victimological Perspective on Penal Populism' in H Nelen and JC Claessen (eds), *Beyond the Death Penalty* (Antwerp, Intersentia, 2011).

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

⁷ See also, A Pemberton, 'Respecting Victims of Crime. Key Distinctions in a Theory of Victims' Rights' in I Vanfraechem, A Pemberton and FN Ndahinda (eds), *Justice for Victims. Perspectives on Rights, Transition and Reconciliation* (Oxford, Routledge, 2014); A Pemberton, PGM Aarten and E Mulder, 'Beyond Restoration, Retribution and Procedural Justice: The Big Two of Agency and Communion in Victims Perspectives on Justice' (manuscript under review, 2016); A Pemberton, PGM Aarten and E Mulder, 'Stories as Property. Narrative Ownership as a Key Construct in Victimology' (manuscript under review, 2018). The way I understand narrative and empathy and the latter's distinction from sympathy will be discussed below.

⁸ See ENV 361. See also, A Sarat, 'Vengeance, Victims and the Identities of Law' (1997) 62 *Social & Legal Studies* 163.

⁹ *Payne v Tennessee* 501 US 808 (1991). This was a mere four years after the Court had ruled the opposite in *Booth v Maryland* 482 US 496 (1987).

This is so for a number of reasons. At the most general level the relevance of re-examining Bandes' insights applies to a wider context, other jurisdictions and to a broader conception of victims' rights. In particular, the reasoning in *Payne* can stifle debate by setting up a straw man, that can and should be criticised, but has the unfortunate by-effect of skewing discussion towards issues that only arise in or are intimately connected with the particular context of the death penalty. Any trial that can lead to capital punishment should be viewed with concern, but it also casts a long shadow over the purpose of the proceedings, including the framing of the perspectives of participating actors, whether the judge, the jury or indeed the victim. Given the issues at stake in a capital case, the value of debating *Payne* is difficult to overstate for legal practice in the United States; however the portability of this specific context is limited, which in turn restricts the contribution to victimological theory elsewhere.

In this chapter I shall recapitulate and build on some of the main observations made by Bandes. As we shall see in the next section, Bandes first argues the impossibility of excluding emotion and narrative in (criminal) legal processes, unmasking the argument for such an exclusion as instead privileging certain emotions and narratives over others. Second, she points to the necessary connection between empathy and narrative, which I will extend to include a wider emotional pallet. Third, she argues for the importance of context in normatively assessing empathy and narratives. Agreeing that neither is necessarily benign, I will extend the understanding of context to include the distinction between the normative evaluation of empathy and narrative as underlying a certain *practice/institution*, from doing the same concerning particular *actions* within that *practice/institution*. Finally, Bandes notes the importance of understanding the way the legal context interacts with empathy and narrative. Criminal law imposes particular frames on victims' narratives, and the criminal legal context shapes the stories victims choose to tell about their experience. This is not only due to the formal processes of participation and the goals and ends criminal law foresees for victims' input, but also to the meaning victims ascribe to criminal processes and interacting with its actors.

I will draw upon these arguments in the section which follows. Drawing on Bandes' original title, the key issue here is first that fully *empathising with victims* will lead to an understanding of the *essentially narrative nature* of their experience. Sense and meaning making after victimisation involve narration, while the impact of relatively severe forms of victimisation can be understood in the challenges it poses towards victims' sense of continuity and coherence in their life story, throughout time and in conjecture with collective narratives in their social environment. Victimisation poses a threat to victims' sense of personal agency, and to connection with others, including the community as a whole, while victimisation narratives have the tendency to stretch forwards and backwards in time.

This will lead me to argue, secondly, that the criminal justice process is a *part* of rather than a *reaction to* the narrative of victimisation. The legal context has particular narrative qualities, not only due to its specific organisational characteristics, but also because it contributes to the victim's narrative both when it is

and when it is not involved in the reaction to victimisation. Whether victims' narratives feature in criminal justice or not, criminal justice features in victims' narratives. Much of the underlying motivation of victim participation in criminal justice can therefore be helpfully reinterpreted as a means to connect the victim's narrative to the criminal justice process. We will develop the importance of inclusion of such *communion*-based motives in this desire and argue how this can give rise to new ways of conceiving of practice and purpose of victim input.¹⁰

Finally, I will show that understanding the competing narratives surrounding victim input in criminal justice can illuminate some of the negative experiences subsumed under the term *secondary victimisation*. Similarly, the imposition of these competing narratives upon the victim's perspective underlies practices that are victimological in name only. The victim impact statements (VIS) in the aftermath of *Payne* are one particular example of this phenomenon.

This will lead me to conclude that although I concur with Bandes' position in the discussion of *Payne v Tennessee*, including her adoption of empathy and narrative to make her case, they can also support a decidedly more positive evaluation of victim participation in criminal justice.

II. Revisiting Empathy, Narrative and Victim Impact Statements

A. The Impossibility of Excluding Emotion and Narrative in Legal Proceedings

In line with a large body of research, Bandes argues that neither emotion nor narrative can be excluded from legal proceedings.¹¹ She argues that 'There can be no debate about whether narrative belongs in the law. Such an argument would begin from the faulty assumption that we have a choice about whether to permit narratives into legal discourse'.¹²

Indeed, the argument against emotion and narrative in law turns out, on closer inspection, to be a manner of privileging certain narratives and certain emotions over others, under the pretext of speaking in 'an universal voice of reason'.¹³ It is a

¹⁰ See Pemberton, Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (n 7). The particular meaning of 'communion' in this context and its juxtaposition with agency will be discussed in detail below.

¹¹ See also, P Ewick and SS Silbey, 'Subversive Stories and Hegemonic Tales' (1995) 29 *Law & Society Review* 197; J Bruner, *Making Stories: Law, Literature, Life* (Cambridge, MA, Harvard University Press, 2000).

¹² ENV 385.

¹³ ENV 387.

particular instance of the *hegemonic character* of certain narratives.¹⁴ This hegemony applies not only to the content of the story, but also concerning the kind of story that is appropriate, the question of who is entitled to tell stories, the settings in which stories are appropriate and the way stories are perceived. Hegemonic narratives pre-empt other narratives, in which their quality of appearing self-evident is an important factor. As Bandes notes, 'Often, one story (usually the dominant story) drowns out or pre-empts another (usually the alternative story). Because it is the dominant story, its character as narrative is invisible. The tale appears to tell itself'.¹⁵

This rhetorical strategy derives its force in part from the juxtaposition of two main modes of cognition: the *logico-paradigmatic* mode and the *narrative* mode.¹⁶ The former attempts to fulfil the ideal of a formal, mathematical system of description and explanation, and deals in general causes and their establishment, while making use of procedures attempting to ensure verifiable reference and empirical truth. Narratives, on the other hand, explain events in terms of human or human-like intention and action, concerning the particular, the emotional and the idiosyncratic. Instead of abstraction from the particulars of a given situation, narrative seeks to make sense and give meaning to the experience contained in that situation, including the motives and intentions of the actor's behaviour. The seeming self-evidence of dominant narratives offers the possibility to retain the authority afforded to logico-paradigmatic-type arguments—rationality, efficiency, effectiveness¹⁷—within the rhetorical strategy, while positioning counter-narratives as mere 'stories'.

This strategy exploits the inherent *janus-face* that Francesca Polletta analyses in narratives.¹⁸ She emphasises that the same stories may be seen as unique and special versus idiosyncratic and unrepresentative; universal and of interest to us all versus mundane and uninteresting; authentic versus deceptive and manipulative; and as an expression of potency versus an expression of powerlessness.¹⁹ Bandes finds the reasoning of the US Supreme Court to be inconsistent in the way it allow emotions and narratives to play a role. Where emotions are endorsed they are portrayed as universal, authentic and special, where they are opposed they are portrayed as unrepresentative, distortions of reason and manipulations of justice. Her outrage flowed from several sources, including

¹⁴ Ewick and Silbey (n 11); F Polletta, *It Was Like a Fever: Storytelling in Protest and Politics* (Chicago, IL, University of Chicago Press, 2006); F Polletta et al, 'The Sociology of Storytelling' (2011) 37 *Annual Review of Sociology* 109.

¹⁵ ENV 386.

¹⁶ J Bruner, *Actual Minds, Possible Worlds* (Cambridge, MA, Harvard University Press, 1986).

¹⁷ As recently and rightly lampooned in David Graeber's profound critique of bureaucracy in his *The Utopia of Rules: On Technology, Stupidity and the Secret Joys of Bureaucracy* (New York, Melville House, 2015).

¹⁸ See Pemberton Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (n 7) and Polletta, *It Was Like a Fever* (n 14).

¹⁹ See Polletta, *It Was Like a Fever* (n 14) 24–25.

indignation at the inconsistency of Chief Justice Rehnquist, who denounced compassion toward a civil rights plaintiff as an invalid ground for decision in *DeShaney v Winnebago County Department of Social Services*, yet invoked compassion toward crime victims in support of the Court's holding in *Payne*.²⁰

B. Coincidence of Empathy and Narrative

Bandes considers empathy and narrative to be intimately connected. In her own words,

the two strands should be more explicitly intertwined. Ordering events into a narrative is a key component of the ability to empathize with another's suffering: One [must] be able to run a narrative through one's mind about what happened to the sufferer to bring the individual to his or her current state, and what might be done to help. To empathize is to understand beginnings, middles and possible ends.²¹

A main issue that will be further elaborated below is that the coincidence of narrative and emotion can be generalised and enlarged in two ways. First, narrative is not only a key concept in the ability to empathise with another's suffering, but more generally to empathise with the meaning other persons grant to experience, situations and their lives in general.²² The narrative mode of cognition is used in the situations where individuals try to make sense of and give meaning to the events and occurrences in their own lives.²³ Second, the unity of emotion and narrative runs deeper. Narrative relies on a dialectic relationship with expectations. The combination of expectations about the world with an event that is at odds with them functions as a main driver of the plot of a story, in which the characters attempt to cope with, resolve, integrate or overcome the unexpected event and its consequences.²⁴ Moreover, and relevant to the situation of victims of crime in particular, those deviations from the canonical that have moral consequences—relating to legitimacy, moral commitments and values—form the basis of stories.²⁵

An event that stands out sufficiently from daily routine can also form the trigger for the type of appraisal that is characteristic of emotions.²⁶ This appraisal is inherently evaluative, in that it relates probable outcomes of the unexpected event to the individual's concerns.²⁷ In doing so it implicitly positions the event

²⁰ ENV 362.

²¹ ENV 363.

²² See J Bruner, *Acts of Meaning* (Cambridge, MA, Harvard University Press, 1990).

²³ Ibid. See also, D McAdams, *The Stories We Live By: Personal Myths and the Making of the Self* (New York, Guilford Press, 1993).

²⁴ See Bruner, *Actual Minds, Possible Worlds* (n 16); T Habermas and V Diel, 'The Emotional Impact of Loss Narratives: Event Severity and Narrative Perspectives' (2010) 10 *Emotion* 312.

²⁵ See Bruner, *Making Stories* (n 11) and Bruner, *Acts of Meaning* (n 22).

²⁶ See RS Lazarus, 'From Psychological Stress to the Emotions: A History of Changing Outlooks' (1993) 44 *Annual Review of Psychology* 1; K Oatley 'A Taxonomy of the Emotions of Literary Response and a Theory of Identification in Fictional Narrative' (1994) 23 *Poetics* 53.

²⁷ See Habermas and Diel (n 24).

in the individual's past and future selves, simultaneously redoubling the connection between emotion and narrative. Not only does this mean that narrative and emotion share the same nuclear episode, but it also underlies the characteristic of narrative as the main vessel for actively transmitting emotions, with narrative being crucial in the formation of collective emotions.²⁸ Understanding meaning therefore necessitates narrative, while transmitting meaning does so as well: narrative forms the bridge between both parties involved in an empathic relation.

C. The Importance of Context in the Normative Assessment of Empathy and Narrative

The main immediate conclusion made by Susan Bandes is that empathising with the victim's narrative in VIS in capital cases is morally undesirable. She expresses support for a positive presumption towards 'outsider' narratives, that is to say, narratives that dominant discourse chooses to neglect or suppress.²⁹ However, she argues that victims' narratives in VIS in capital cases are only superficially 'outsider' narratives; instead they reinforce what is already the dominant narrative of the trial, while endangering empathy for the even more 'outsider' narrative of the convicted offender. In the words of Bandes:

Victim impact statements evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger. These emotional reactions have a crucial common thread: they all deflect the jury from its duty to consider the individual defendant and his moral culpability.³⁰

Given the stage of the trial in which VIS are submitted—following the guilty verdict of the offender—the offender's perspective is necessarily an 'outsider' narrative, not because his perspective is excluded, but because of the way the offender, his actions and often his other characteristics are viewed. The knowledge of the extent of his wrongdoing leads to psychological processes of increasing or maintaining a distance, of 'otherising' the offender, which places pressure on the extent to which empathic understanding is possible.³¹ Again, as Bandes stated:

More often, for the jury to empathetically connect with the defendant during the sentencing phase of a capital trial is an extremely difficult task. Not only has the defendant been convicted of a heinous crime—a fact that by itself sets him very much apart from the jury's experience—but he may be from a radically different socioeconomic milieu as well. Thus, the jury has difficulty making an empathetic connection.

²⁸ See B Rimé, 'Emotion Elicits the Social Sharing of Emotion: Theory and Empirical Review' (2009) 1 *Emotion Review* 60; K Oatley and PN Johnson-Laird, 'Basic Emotions in Social Relationships, Reasoning, and Psychological Illnesses' (2012) 3 *Emotion Review* 424.

²⁹ See Polletta, *It Was Like a Fever* (n 14).

³⁰ ENV 395.

³¹ See JM Darley 'Social Organization for the Production of Evil' (1992) 3 *Psychological Inquiry* 199.

The more general point is to challenge the understanding that certain emotions are automatically benign, while similarly unsettling ideas that move too quickly from the observation of a silenced narrative to the conclusion that this narrative should be included. In both instances their value cannot be assessed outside the context. What narratives? Empathy for whom and why? Two issues merit preliminary attention in considering answers to these questions in the case of victims of crime. First, there is the variety in manners in which empathy is understood, including maintaining sufficient conceptual distinction from sympathy. Second, there is the level of abstraction upon which the concepts of empathy and narrative are deployed. I will discuss each of these issues in turn.

One very useful definition of empathy in the study of victimisation sees it as 'the attempt of one self-aware to understand the subjective experiences of another self'.³² It involves the recognition of another world of experience, acknowledging another's reality and humanity and the awareness that the self is not exempt—at least in principle—from finding oneself in the same position.³³ However, as Bandes notes, in much of the literature empathy resembles 'something of a moving target'. In a similar vein Henderson explains that the word has several definitions, in particular: '1) feeling the emotion of another; 2) understanding the experience or situation of another, ... often by imagining oneself to be in the position of the other; [or] 3) action brought about by experiencing the distress of another'.³⁴

Where empathy is focused on the victim's narrative, repeated confusion of empathy and sympathy further complicates matters.³⁵ Bandes notes that 'Ordering events into a narrative is a key component of the ability to empathize with another's suffering',³⁶ showing that she already understands victims' experiences in justice in a sympathetic manner. Sympathy is defined by Wispé as 'the heightened awareness of the suffering of another person as something to be alleviated'.³⁷ It is hard to envision sympathy without a measure of empathy: one can only reasonably be assumed to be moved by another's suffering if one can at least partially understand the other's plight. In turn, empathising with the experience of a victim will often, if not always, include increased awareness of what he or she has suffered, with the necessity of action to alleviate this suffering as a close corollary. However, this concurrence should not lead us to overlook the crucial distinction: empathy is concerned with understanding the point of view of the other, while

³² See L Wispé 'The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word is Needed' (1986) 50 *Journal of Personality and Social Psychology* 314, 318; Pemberton, 'Respecting Victims of Crime' (n 7).

³³ See MC Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, Cambridge University Press, 2001).

³⁴ ENV 373.

³⁵ Pemberton, 'Respecting Victims of Crime' (n 7).

³⁶ ENV 363 (emphasis supplied).

³⁷ Wispé (n 32) 318.

sympathy is concerned with increasing the wellbeing—from a negative point of departure—of the other, *irrespective* of the other's own view. Although sympathy is caused by the perception of another person's suffering, it is driven by the *distress felt by the observer*, upon viewing this suffering, rather than the perspective of the person suffering. Moreover, it predetermines the focus and direction of the victim's perspective. As Wispé notes, it is exactly the psychological process that involves the painful awareness of someone else's affliction as something that needs to be relieved. This precludes sympathising with someone's happiness, because why, except for malicious reasons would one want to terminate someone's happiness?³⁸

I will return to some of the different potential upshots of this below, but for now it is sufficient to recognise that the focus of sympathy presupposes that victims' needs should be cast in a therapeutic guise, even when it relates to their position within criminal justice.

The importance of the level of abstraction in weighing the moral issues about victim involvement can be helpfully understood by a proposition put forward by John Rawls, whereby the moral argument concerning a *practice* might be of a different nature from the moral argument concerning *actions* under that practice.³⁹ For instance, according to Rawls punishment could be driven by retribution in individual cases (action), while the overall institution of punishment for crimes (practice) could be motivated by utilitarian calculi. Much of what Bandes finds disagreeable about VIS in capital cases involves empathising with victims within the action of sentencing. It becomes apparent however from her arguments that empathising with victims at the level of the *development of practice* is another matter. As she says: 'Quite to the contrary, though, victim impact statements may actually disempower, dehumanise, and silence victims. In short, victim impact statements offend human dignity—the victim's as well as the defendant's'.⁴⁰ In other words, involving empathy for the victim's position in arguments at the level of justifying *practice* can be deployed as an argument against VIS, even though and in fact *because* this practice involves the *action* of empathising with a victim's views.

As will be argued below, the general issue of empathising with victims' narratives cannot be settled on the particular practice of using VIS in capital cases. Rather, empathising with the victim's position in understanding and shaping practice can lead to the conclusion that other forms of victim input do not warrant the dismissal Bandes affords to VIS in her article.⁴¹ To this end, it is necessary to understand the manner in which legal context interacts with victims' emotions and narratives. It is to this issue that we now turn.

³⁸ Ibid, 319.

³⁹ J Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3.

⁴⁰ ENV 405.

⁴¹ See also, Pemberton, 'Respecting Victims of Crime' (n 7).

D. The Particular Impact of Legal Context on Emotions and Narratives

A final important issue raised by Bandes is the understanding that the legal arena is a particular context for emotions and narratives. In this connection she notes the distinction between the legal and therapeutic contexts. The therapist has considerable leeway in following the shape and form of the narrative of those who seek help, does not have to analyse their narratives in terms of veracity, and will view the narrative primarily in terms of its contribution to certain psychological outcomes. But the legal context can only allow narratives that follow a particular format, has to scrutinise them for their evidentiary value and cannot prioritise the emotional impact of the process, although it pays to refrain from being completely oblivious to 'therapeutic' impacts.⁴²

Moreover, as Bandes amply demonstrates, the law has its own narrative with which participants will have to engage.⁴³ Certainly, this also applies to the therapeutic context, as the debates around False Memory Syndrome and the proposals of the positive psychology movement amply demonstrate.⁴⁴ Nevertheless, therapy's narrative context is considerably less explicit and dominant than that associated with the law. Legal narratives and the emotions that they prioritise can also vary from one context to the next. Reading Bandes' characterisation of the dominant narrative in capital cases in the American criminal law system from the vantage point of Dutch legal practice makes this point abundantly clear. Not only the practice of capital punishment, but also other structural features of the American criminal justice system—such as the draconian sentences, the widespread involvement of laypeople, the politicised nature of the process, including elected magistrates, the adversarial character of the process, the use of victim impact evidence after the guilty verdict—influence the dominant narrative of the criminal process at this point.⁴⁵ In any case it is hard to imagine making the same argument concerning Dutch criminal proceedings, with its inquisitorial process, and highly professionalised and appointed magistrates, whose years of legal training have instilled a deep dislike for anything related to vengeance and a natural tendency to

⁴² In Pemberton and Reynaers (n 2), we referred to adequate understanding of therapeutic constructs in legal proceedings as *therapeutic coherence*.

⁴³ See Ewick and Silbey (n 11); and Bruner, *Making Stories* (n 11).

⁴⁴ For instance, Elizabeth Loftus' work on false memory syndrome, which concerns the way in which therapists succeeded in imposing a particular narrative of childhood trauma on the ambiguous memories of their clients: see E Loftus, 'The Reality of Repressed Memories' (1993) 48 *American Psychologist* 518. In the same way, the presidential address to the American Psychological Association of Martin Seligman in 1999, was a rallying cry against the negative slant in the framing of psychological experience in general, and of therapeutic narratives in particular: MEP Seligman (1999) 54 *American Psychologist* 552.

⁴⁵ See for instance, D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford, Oxford University Press, 2001); and J Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford, Oxford University Press, 2007), both on the developments in the past decades in American criminal justice.

counteract populist pleas for ever increasing sentences.⁴⁶ The normative questions concerning emotion and narrative in the legal sphere therefore need to factor in the context in which they are deployed.

These specific features of the legal context interact with the narratives spoken and the emotions expressed, even beyond the extent of conformity with the dominant, hegemonic narratives. To a certain extent narratives are always socially constructed, while the experience of emotions cannot be fully grasped without reference to their social and cultural environment, but the legal context brings this social construction into sharp relief.⁴⁷ In this particular sense there is not a single victim narrative possible in a given situation, but a variety of narratives that are in part framed by the legal context in which they are elicited.

This is also part of the reason why drawing a direct analogy of the therapeutic setting to the legal process is mistaken. It overlooks the obvious fact that victims involved in the act of narrating are also aware of the place in which they tell their stories, as well as the function of the process in which they are offering their account, and will adjust their narrative accordingly.⁴⁸ This would already be true if the only difference was the public nature of the legal process, compared with the private and confidential nature of the therapist's consultation room, but it is further enhanced by the particular *meaning* of the justice process, including the extent to which the justice process and its actors form important representations of some of the most important norms and values that members of a community, including the victims, hold dear.⁴⁹ Where the criminal justice process does not act, in full or in part, this also conveys meaning: the importance of access to justice, or rather the lack of it, is particularly pronounced in the experience of victims of crime.⁵⁰ One upshot of this, as I will discuss below, is that it is not accurate to conceive of the criminal justice process as a reaction to a victimisation experience in the past; instead it is better understood as a part of the still unfolding narrative of the victimisation experience itself.

⁴⁶ See for instance, R Kool and M Moerings, 'The Victim Has the Floor' (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 46 on the reception of VIS in the Netherlands by the legal profession, which can be characterised as somewhere between lukewarm and overtly hostile.

⁴⁷ For the social construction of narratives see J Best, *Social Problems* (London, WW Norton & Company, 2008).

⁴⁸ I have been repeating this theme for a number of years now—see for instance, Pemberton and Reynaers (n 2); Pemberton, 'Respecting Victims of Crime' (n 7); A Pemberton and RM Letschert, 'Justice as the Art of Muddling Through: The Importance of Nyaya in the Aftermath of International Crimes' in C Brants and S Karstedt (eds), *Engagement, Legitimacy, Contestation: Transitional Justice and its Public Spheres* (Oxford, Hart Publishing, 2015).

⁴⁹ The norms transgressed by crime are those by which the 'political community defines itself as a law-governed polity': see RA Duff, *Punishment, Communication and Community* (Oxford, Oxford University Press, 2001).

⁵⁰ Ibid. See also, MS Laxminarayan, *The Heterogeneity of Crime Victims: Variations in Procedural and Outcome Preferences* (Nijmegen, Wolf Legal Publishers, 2012); MS Laxminarayan, J Henrichs and A Pemberton, 'Procedural and Interactional Justice: A Comparative Study of Victims in the Netherlands and New South Wales' (2012) 9 *European Journal of Criminology* 260; MS Laxminarayan and A Pemberton, 'The Interaction of Criminal Procedure and Outcome' (2014) 37 *International Journal of Law and Psychiatry* 564.

III. Empathy for the Victim's Narrative

A. Understanding the Narrative Nature of the Experience of Victimisation

Recently my colleagues and I argued the importance of narrative in the experience of victimisation.⁵¹ We did this drawing on insights from personality psychology concerning cognition, identity and motivation. As noted above, the psychologist Jerome Bruner distinguished two main ways in which people attempt to understand the world around them: the *logico-paradigmatic* mode and the *narrative* mode. The former employs categorisation, abstraction, rationality and logical deduction, while its language does not admit contradiction and requires consistency. The latter, by contrast, deals in human or human-like intention and action and concerns the particular, the emotional and the idiosyncratic. Instead of viewing causality in abstracted and universal causes, it locates them in the actors' purposes in a storied manner and in a given situation: abstraction would make it harder rather than easier to understand the unfolding events. The driver of a story is most often the extraordinary or at least the unexpected. As literary theorist Kenneth Burke's analysis of the dramatic Pentad suggests, narratives deal with the situations where the actions driven by an agents' intentions do *not*—at least at first—succeed in reaching the intended goal.⁵² Burke described the Pentad as an Agent who performs an Action to achieve a Goal in a recognisable Setting by the use of certain Means. A mismatch between two of these elements (Trouble), lies at the heart of narrative. Without this element of Trouble, a report rather than a narrative of events will do. Victimisation by crime and other forms of severe wrongdoing is a key example of this Trouble. As Burke himself summarised: 'If action, then drama; if drama, then conflict; if conflict, then victimage.' This is all the more so due to the essentially moral nature of the experience of victimisation. Theodore Sarbin's 'narratory principle', 'that human beings think, perceive, imagine, and make moral choices according to narrative structures' further summarises this connection.⁵³

Narrative not only applies to particular instances in people's lives, but also to their lives as a whole. A main issue is the function of life narratives in the construction and maintenance of identity and personality. This perspective can be helpfully understood in personality psychologist Dan McAdams' theory of the threefold psychological self: the self as social actor, motivated agent and autobiographical

⁵¹ See Pemberton, Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (in 7); A Pemberton, *Victimology with a Hammer: The Challenge of Victimology*, inaugural lecture, Tilburg University (Tilburg, Prismaprint, 2015).

⁵² K Burke, *A Grammar of Motives* (New York, Prentice Hall, 1945).

⁵³ TR Sarbin, 'The Narrative as a Root Metaphor for Psychology' in TR Sarbin (ed), *Narrative Psychology: The Storied Nature of Human Conduct* (New York, Praeger, 1986).

author.⁵⁴ The latter emerges in late adolescence and early adulthood, and refers to the self as storyteller, who ultimately aims to synthesise episodic information about the self into a coherent life story. The task of this autobiographical author is to maintain a sense of self-continuity. The self of today is the self of yesterday and the self of tomorrow. In addition it offers the means to maintain a sense of coherence with the wider cultural narrative of the group to which the individual belongs.⁵⁵ The connection between narrative identity and a person's culture is twofold: culture supplies the narrative scripts that individuals use to frame their own life story, while it is the means by which individuals embed their own experience within wider society. Within a life story certain 'nuclear episodes', autobiographical episodes of a particular and enduring relevance, play a key structuring role.⁵⁶ Negative life events, more so than positive ones, require narrative attention in one's life story; they demand an explanation, including the causes, the consequences and the meaning for the self and its relationship with others.⁵⁷ Severe forms of victimisation are clear examples of these nadir experiences. Beyond the negative impact on a victim's self-esteem and sense of self-control, they pose a particular narrative challenge, which can be summarised as a shattering of bed-rock assumptions about continuity in their own lives and with the wider cultural narrative surrounding them.⁵⁸ As we have explained elsewhere:

The narrative rupture in severe trauma not only concerns the continuity in one's life history, both backward—how to maintain a sense of continuity and connection with the past—and forward—including the sense of foreshortening or unpredictability about one's future—, it also endangers the implicit sense of connection and belonging with others.⁵⁹

The shattering of assumptions in terms of victims' life stories can also be conceptualised in terms of the threat victimisation poses to both of what David Bakan has termed 'the fundamental modalities of human existence', namely *agency* and *communion*.⁶⁰ Where the former is apparent in the threat victimisation poses to

⁵⁴ McAdams, *The Stories We Live By* (n 23); DP McAdams, 'The Psychological Self as Actor, Agent and Author' (2013) 8 *Perspectives on Psychological Science* 272.

⁵⁵ E Erikson, *Identity and the Life Cycle* (New York, WW Norton & Company, 1959); DP McAdams and JL Pals, 'A New Big Five: Fundamental Principles for an Integrative Science of Personality' (2006) 61 *American Psychologist* 204; PL Hammack and A Pilecki, 'Narrative as a Root Metaphor from Political Psychology' (2012) 33 *Political Psychology* 75.

⁵⁶ See McAdams, *The Stories We Live By* (n 23).

⁵⁷ M Crossley, 'Narrative Psychology, Trauma and the Study of Self-Identity' (2000) 10 *Theory & Psychology* 527.

⁵⁸ R Janoff Bulman, *Shattered Assumptions: Towards a New Psychology of Trauma* (New York, Free Press, 1992).

⁵⁹ Pemberton, Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (n 7).

⁶⁰ D Bakan, *The Duality of Human Existence: Isolation and Communion in Western Man* (Boston, MA, Beacon Press, 1966). More recently they have been re-christened as the 'Big Two' of human motivation: see AE Abele and B Wojciszke, 'Agency and Communion from the Perspective of Self Versus Others' (2007) 93 *Journal of Personality and Social Psychology* 751. This so-called Big Two of human motivation also doubles as the two main meta-themes in life narratives: see for instance, DP McAdams et al., 'Themes of Agency and Communion in Significant Autobiographical Scenes' (1996) 64 *Journal of Personality* 339.

a victim's sense of control, esteem and respect⁶¹ the latter is often neglected.⁶² However, the threat to communion is of at least equal importance. Any existing or symbolic relationship with the offender is damaged, but the impact on communion can also concern more symbolic matters of unity and togetherness, love and friendship. As Neil Vidmar explains, 'an offence is a threat to community consensus about the correctness—that is the moral nature—of a rule and hence the values that bind social groups together'.⁶³ The significance of this is that the trauma of victimisation cannot be fully understood through the metaphor of something that is broken or in need of repair. This medicalised model neglects the dynamic quality of victimisation in which the autobiographical narrative will have to absorb or adapt to the victimisation experience.⁶⁴ In this respect the victim's self has changed, irrespective of any enduring impact on the victim's psycho-social functioning.

The narrative connection between past, present and future is reflexive. New information about the past can lead to reinterpretation of the present, while the past is open to review in the light of experiences in the present. This reflexive nature is particularly true of victimisation narratives, as the experimental research by social psychologist Roy Baumeister and his colleagues demonstrates,⁶⁵ and has been described by Stephen Pinker in terms of the 'moralization gap'.⁶⁶ The 'moralization gap' refers to the differences in moral tone, impact, importance of context factors and time frame between the narratives of victims and of perpetrators. The latter tend to offer justifications for what happened, attribute the event to outside causes, minimise the impact on the victim and see the event as a moment in time. Victims, in contrast, emphasise the moral nature of the experience and its injustice, even to the extent of seeing intentions and malevolence where there is none; they may locate the cause in the person of the offender and his intentions, and will often highlight the impact of the offence, while stretching its time frame both forwards and backwards in time.

The first important upshot of this is that victim experience maintains a strong perceptual link between the past, present and future. Severing the link with the past entails a process involving a conscious decision of forgiveness, which as Trudy

⁶¹ N Shnabel and A Nadler, 'A Needs-Based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation' (2008) 94 *Journal of Personality and Social Psychology* 116; I Simantov-Nachlieli, N Shnabel and A Nadler, 'Individuals and Groups' Motivation to Restore Their Impaired Identity Dimensions Following Conflict: Evidence and Implications' (2013) 44 *Social Psychology* 129; M Wenzel et al, 'Retributive and Restorative Justice' (2008) 32 *Law and Human Behavior* 375.

⁶² See Pemberton Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (n 7).
⁶³ N Vidmar, 'Retribution and Revenge' in J Sanders and VL Hamilton (eds), *Handbook of Justice Research in Law* (New York, Plenum Press, 2000).

⁶⁴ See also, LC Hyden, 'Illness and Narrative' (1997) 19 *Sociology of Health & Illness* 48.

⁶⁵ RF Baumeister, *Evil: Inside Human Violence and Cruelty* (New York, Henry Holt & Company, 1997).

⁶⁶ S Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and its Causes* (London, Allen Lane, 2011).

Govier has emphasised means that 'The past shall not be forgotten, but it will be the past'.⁶⁷ The second is that the victim's views on the sentence of the offender will be predictably biased and therefore should not be seen as an independent source of evidence to determine that sentence. The victim may have a unique and relevant perspective to offer on the harm suffered, but cannot lay claim to a similar perspective on the sentence the offender should undergo.⁶⁸

B. Narratives of Victimisation and Criminal Justice

The extended time frame of victimisation narratives—which in the case of a collective trauma can literally span millennia⁶⁹—also means that the aftermath of the victimisation experience, including the criminal justice reaction, is often better understood as *part* of the victim's narrative, rather than something that merely follows it. In this way, the victim's experience within the criminal justice process offers ample opportunity for reinterpretation of the victimisation event itself. This is particularly clear in the cases in which the end result of a case is an acquittal, particularly if the victim witnessed the commission of the crime. This has been well documented in intimate partner violence and rape cases.⁷⁰ Acquittal is particularly painful in these cases, as it calls into question whether what happened to the victim was actually a crime at all.⁷¹ More generally, the outcome of the trial influences the experience due to what it signals to and about the victim. In this connection, Kenworthy Bilz argues that criminal punishment is essentially a referendum on the social standing and worth of the victim. A successful punishment indicates that the community values the victim. A failure to punish indicates something less—perhaps indifference towards the victim, perhaps even disdain.⁷² The question posed by crime's transgression of the worth or even existence of these shared values is answered affirmatively in the former case, negatively in the latter. In narrative terms the tragedy of victimisation can transform into the plot

⁶⁷ T Govier, 'Public Forgiveness: A Modest Defense' in B Van Stokkom, N Doorn and P Van Tongeren (eds), *Public Forgiveness in Post-Conflict Contexts* (Antwerp, Intersentia, 2012) 26. I have noted elsewhere that 'forgiveness as a counterpoint to victimisation also relates to the way it changes the temporal perspective on an event. More precisely, it entails situating wrongdoing in the past, and that 'forgiveness means that wrongdoing will not steer our course in the present, nor does it have moral implications for the future. Full forgiveness implies that the victim of an act, "wipes the slate clean": A Pemberton, 'Terrorism, Forgiveness, Restorative Justice' (2014) 4 *Onati Socio-Legal Series* 369. See also, L Allais, 'Wiping the Slate Clean: The Heart of Forgiveness' (2008) 36 *Philosophy & Public Affairs* 33. In this sense it serves as an end point to the narrative of victimisation. The only way in which the victimisation experience can resume to have purchase on the present, is by the wrongful deed being unforgiven anew.

⁶⁸ Pemberton, 'Respecting Victims of Crime' (n 7).

⁶⁹ V Volkan, *Bloodlines: From Ethnic Pride to Ethnic Terrorism* (New York, Farrar and Strauss, 1997).

⁷⁰ See for instance, PA Frazier and B Haney, 'Sexual Assault Cases in the Legal System: Police, Prosecutor and Victim Perspectives' (1996) 20 *Law and Human Behavior* 607.

⁷¹ SF Colb, 'Whodunit' Versus 'What Was Done': When to Admit Character Evidence in Criminal Trials' (2001) 79 *North Carolina Law Review* 939.

⁷² JK Bilz, 'The Puzzle of Delegated Revenge' (2007) 87 *Boston University Law Review* 1059, 1108.

of 'overcoming the monster' in the former case, or the irony of the meaningless of the victim's circumstances in the latter.⁷³

Having said this, interpreting the impact of the criminal justice process on the experience of victims solely as a function of retribution asserts a too narrow frame on a victim's justice experience. In this connection, we argue that the framework of agency and communion can illuminate this issue. Victimisation by crime threatens the victim's agency and sense of communion, which in turn produces a mirror image of motivations to rebuild them. This rebuilding of agency and communion is largely an exercise in sense- and meaning-making, and therefore a necessarily narrative endeavour. Narrating the experience serves to understand the events, for instance the offender's intentions, the victims' own reactions and subsequent experience.⁷⁴

Retributive justice or a desire to commit acts of revenge can be part of this rebuilding of agency, but are not the only avenues to do so. Reasserting the victim's agency and status can also proceed without any involvement of the offender. Elements of restorative justice,⁷⁵ particularly concerning value restoration—that is to say, reaffirming the consensus about the moral nature of the rule transgressed by the crime⁷⁶—can also be conceptualised as communion. In a more general sense, the damage to a victim's sense of communion triggers the motivation to reconnect, to re-establish a sense of unity and togetherness, in line with the repeated finding that the experience of social support and acknowledgement are among the main factors that help victims cope.⁷⁷

An important issue is that in some cases behaviour may be guided by motives that are obviously agency or communion related, but that in others this distinction is often more subtle. In the same way behaviour may also be guided by a mix of agency and communion depending on the meaning a person gives to this behaviour. Given the fact that the same behaviour might result from very different motives, Horowitz and others argue that 'the goal-directed act itself may be unclear. Only when we can locate the behavior in the person's hierarchy of motives do we understand its meaning'.⁷⁸ Instead of attempting to locate behaviour in a hierarchy of motives, it is often assumed or asserted to be agency-driven. The rational actor of economics is a particularly clear and egregious example.⁷⁹

⁷³ For an analysis of plotlines, see C Booker, *The Seven Basic Plots: Why We Tell Stories* (New York: Continuum, 2004). For the application to the situation of victims of crime, see Pemberton, Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (n 7).

⁷⁴ See Bruner, *Acts of Meaning* (n 22).

⁷⁵ See generally, G Johnstone, *Restorative Justice: Ideas, Values, Debates* (Cullompton, Devon, Willan Publishing, 2002).

⁷⁶ See Wenzel et al (n 61).

⁷⁷ CR Brewin, B Andrews and JD Valentine, 'Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder' (2000) 68 *Journal of Consulting and Clinical Psychology* 748.

⁷⁸ LM Horowitz et al, 'How Interpersonal Motives Clarify the Meaning of Interpersonal Behavior: A Revised Circumplex Model' (2006) 10 *Personality and Social Psychology Review* 67.

⁷⁹ K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1948/2001).

but Bernard Rimé's discussion of the inability to understand the social sharing of emotions between adults as a means to connect with others rather than achieving some self-focused goal or other reveals that the 'fallacy of the solely agentic human', to coin a phrase, is a much more widespread phenomenon.⁸⁰

Understanding the focus of victims on criminal justice as solely agency based frames both academic debate and official narratives concerning the purpose of their participation. The fact that most research indicates that victim input does not impact sentences⁸¹ might have given sighs of relief to those who deemed such influence unwarranted anyway, but also repeatedly ignites debate about the point of victim participation: 'victim impact statements don't work, can't work', as one contribution concluded.⁸² In similar vein, more recent research has reconceived victim participation as a means to achieve personal emotional benefit, with the expression of emotions leading to reduction of fear, anger, stress symptoms and even to closure or healing.⁸³ Indeed, the Dutch VIS programme explicitly mentions such emotional consequences—'a beginning of emotional repair'—as its primary victim-oriented goal.⁸⁴

The issue here is not so much that the empirical evidence for these agency-oriented goals is very thin,⁸⁵ but instead that communion-based motivations are neglected. Nevertheless, there is already good reason to view victims' desire to participate in criminal justice processes as largely if not predominantly communion-driven, with the results from research into victims' experience in restorative justice programmes and VIS emphasising the importance of 'expressive or communicative motives'⁸⁶ and 'other-oriented motives', which are both communion-oriented in nature.⁸⁷ Indeed José Mulder's recent research on the experience of victims with criminal injuries compensation reveals that even with monetary outcomes, the main issue is the symbolic expression of belonging and acknowledgement that accompanies it, rather than monetary gain per se.⁸⁸

⁸⁰ The way Rimé juxtaposes the wealth of research into communion concepts (for instance attachment) in children and young adolescents, with its dearth in similar research into adults is highly illuminating. It gives rise to the misunderstanding that adults emote solely to achieve catharsis from emotions, and/or to influence the people with whom they are communicating: see Rimé (n 28).

⁸¹ See 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; JV Roberts 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' (2009) 38 *Crime and Justice: A Review of Research* 347.

⁸² A Sanders et al, 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Criminal Law Review* 447.

⁸³ KME Lens et al, 'Delivering a Victim Impact Statement: Emotionally Effective or Counterproductive?' (2015) 12 *European Journal of Criminology* 17.

⁸⁴ KME Lens, A Pemberton and S Bogaerts, 'Heterogeneity in Victim Participation: A New Perspective on Delivering a Victim Impact Statement' (2013) 10 *European Journal of Criminology* 479.

⁸⁵ Lens et al, 'Delivering a Victim Impact Statement' (n 83).

⁸⁶ Roberts (n 81); Lens et al, 'Delivering a Victim Impact Statement' (n 83); JV Roberts and E Erez 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 *International Review of Victimology* 223.

⁸⁷ D Bolivar, 'For Whom is Restorative Justice?' (2013) 1 *Restorative Justice* 190.

⁸⁸ JDWE Mulder, *Compensation: The Victims' Perspective* (Nijmegen, Wolf Publishing, 2013).

One communion-based element that is often conspicuously absent is understanding the potential difference in the meaning of seemingly identical outcomes, depending on participation. This has of course been repeatedly highlighted by research on procedural justice.⁸⁹ More to the point here, the work of Mario Gollwitzer and others shows that what is important in revenge and vengeance is not the degree of suffering of the offender, but instead the extent to which the message contained in the hard treatment and censure of the offender is connected to the harm previously visited on the victim.⁹⁰ There is a large chasm in meaning between 'the offender received a fair sentence for the crime' and 'the offender received a fair sentence for the crime he committed *against me*'.⁹¹ Understanding the outcome of the process in the latter sense is contingent on the sense of connection felt by the victim towards the process. Excluding victim narratives from the process is a clear challenge to this sense of connection. Here the notion of narrative entitlement is important.⁹² It concerns the narrative privilege normally afforded to people with first-hand knowledge of events.⁹³ This sense of entitlement is brought into sharp relief due to the narrative challenges posed by victimisation; maintaining a sense of coherence depends upon the construction of a 'successful' story.⁹⁴ Denying this narrative entitlement in a justice process disconnects victim experience from the process, while simultaneously sending a negative message concerning the value society affords the victim, thereby diminishing the victim's sense of agency.

C. Narrative and Emotional Issues in Framing Victim Participation

Elsewhere my colleagues and I have discussed some of the main points in this section at greater length, calling for *narrative ownership* as the main prism to understand victims' issues in justice processes.⁹⁵ We have argued that different social-psychological and sociological phenomena, as well as institutional processes, place predictable pressure on the victims' attempts to develop a coherent narrative of their experience. The same phenomena are also helpful in understanding the framing of victim participation, which can in turn have the much

⁸⁹ T Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law' (2003) 30 *Crime and Justice: A Review of Research* 283.

⁹⁰ M Gollwitzer, 'Justice and Revenge' in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (Hoboken, Wiley, 2009); M Gollwitzer, M Meder and M Schmitt, 'What Gives Victims Satisfaction When They Seek Revenge?' (2011) 41 *European Journal of Social Psychology* 364.

⁹¹ Bilz (n 72).

⁹² E Ochs and L Capps, 'Narrating the Self' (1996) 25 *Annual Review of Anthropology* 19.

⁹³ Ibid.

⁹⁴ See more extensively, Pemberton, Aarten and Mulder, 'Beyond Restoration' and 'Stories as Property' (n 7).

⁹⁵ Ibid.

maligned consequence of using victims for ends which are not in their interest: that is to say, victimological in name only.

The latter point is hardly new. In the 1980s Robert Elias argued that the way 'law and order' campaigns deploy victims' interests can be tantamount to political manipulation.⁹⁶ In the same way, Stuart Scheingold and others viewed with much concern the use of individual anecdotes of a small number of high-profile victims as a means to frame crime problems, and to suggest how the criminal justice system should respond in a far wider range of situations.⁹⁷ More generally, political campaigns involving victim policy can often use stereotypical depictions in the way they frame issues⁹⁸ This also applies to social movements, for instance victim support or proponents of restorative justice whose frame has considerably more empirical support.⁹⁹

Beyond the lack of connection between the stereotypical narrative and the actual experience of large groups of individual victims, the frame can readily transform from a shorthand depiction of social reality to a normative demand, in which acknowledgement and recognition are dependent on the extent to which victims live up to the demands of the stereotype.¹⁰⁰ The notion of *following the plot* is a particular element of this.¹⁰¹ Francesca Polletta's analysis of the relationship between the narrative structure of victims' accounts and the extent to which they are supported or believed demonstrates the limited leeway victims have in straying from the story affixed to their experience. An example is the use of the frame of the 'battered women' of the 1980s in the struggle to gain sufficient attention for the phenomenon of intimate partner violence. Here the main narrative adopted cast the victims in terms of a mental health problem—that of 'battered women syndrome'—which enabled victims to accrue benefits in terms of help and compensation in the criminal justice system, as well as reduction of any culpability for retaliatory violence towards their erstwhile tormentor, but also reduced the

⁹⁶ R Elias, *Victims Still. The Political Manipulation of Crime Victims* (London, Sage Publications Ltd, 1993).

⁹⁷ S Scheingold, T Olson and J Pershing, 'Sexual Violence, Victim Advocacy and Republican Criminology: Washington's Community Protection Act' (1994) 28 *Law & Society Review* 729.

⁹⁸ See Joel Best's excellent analysis in his book: J Best, *Random Violence: The Way We Talk About New Crimes and New Victims* (Berkeley, CA, University of California Press, 1999). I should add that this is not peculiar to victimisation issues or even to crime policy more generally, as the literature on the phenomenon of framing illustrates. The importance of painting a straightforward causal and moral picture is also observed elsewhere within social movements and political agenda setting: see RD Benford and DA Snow, 'Framing Process and Social Movements: An Overview and Assessment' (2000) 26 *Annual Review of Sociology* 611; R Entman 'Framing Bias: Media Distribution in the Distribution of Power' (2007) 571 *Journal of Communication* 163.

⁹⁹ See A Pemberton 'Victim Movements: From Diversified Need to Varying Criminal Justice Agendas' (2009) 22 *Acta Criminologica* 1.

¹⁰⁰ Pemberton, 'Respecting Victims of Crime' (n 7).

¹⁰¹ Polletta, *It Was Like a Fever* (n 14); F Polletta, 'How To Tell a New Story About Battering' (2009) 15 *Violence Against Women* 1490; F Polletta et al, 'The Limits of Plot: Accounting For How Women Interpret Stories of Sexual Assault' (2013) 1 *American Journal of Cultural Sociology* 289.

extent to which they would be taken seriously or understood as reasonable. As Polletta explains:

So the woman who has killed her abuser faces two equally unacceptable options. She can assert her agency, telling a story of her actions in which she appears and in control of herself. But then she might not be seen as victimised at all. Or, she can emphasize her victimisation. But then her actions may be seen as unreasonable. They are to be excused through an act of judicial solicitude rather than justified by her experience of abuse.¹⁰²

In the latter case any benefits of being a victim come at the cost of being substantially disempowered, in the sense of being seen as weak and vulnerable, feeble and passive. Rather than the subject of empathic respect, the victim becomes the object of sympathy. In the former case she might not be seen as feeble or weak, but it is likely she will be blamed for her actions, and seen as an offender rather than as a victim. Polletta's analysis reveals how difficult it is to switch roles midstream: the victim is expected to stick to the narrative throughout the procedure on pains of suspension of belief and credibility. This applies not only to the victim's story, but also to the victim's display of emotions.¹⁰³

This duality of sympathy and blame can also be understood through the lens of what has been called the 'justice motive'.¹⁰⁴ The basic tenet of this is that people have an innate need to believe that the world is just: good things happen to good people and bad things happen to bad people. The occurrence of an event that conflicts with this need (something bad happening to a good person, or vice versa) leads to justice-related distress, which in turn elicits cognitive, affective and/or behavioural reactions on the part of observers of this event. The justice motive can lead to helpful behavioural responses to injustice and misfortune, such as compensation, reparation and support, but also to negative reactions to those suffering from the consequences, like distancing, re-evaluation of the outcome, negative re-evaluation of appearance and character, and blaming. The narrative consequences of the negative reaction are clear.¹⁰⁵ Victim blaming for instance remakes the victim from the positive protagonist, to someone who, if not villainous himself or herself is at least sufficiently reckless to warrant moral censure. Positive re-evaluation of the outcome transforms the damaging experience into a difficult, but ultimately worthwhile, opportunity to learn and grow.

However, even in the more positive sympathetic reactions, the main driver of action—the desire of the observer to relieve the distress of the victim—can have negative narrative consequences. In particular, it recasts the victim into a supporting role, becoming the subject in the observer's endeavour to alleviate his or

¹⁰² Polletta, *It Was Like a Fever* (n 14) 134.

¹⁰³ KME Lens et al, 'You Shouldn't Feel That Way!: Extending the Emotional Victim Effect Through the Mediating Role of Expectancy Violation' (2014) 20 *Psychology, Crime & Law* 326.

¹⁰⁴ See M Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York, Plenum Press, 1980); C Hafer and L Begue, 'Experimental Research on Just-World Theory: Problems, Developments and Future Challenges' (2005) 131 *Psychological Bulletin* 128.

¹⁰⁵ *Ibid.*

her suffering.¹⁰⁶ In the unfolding of this tale the contribution of the victim to the story lies in the extent to which this suffering can be alleviated. Jan van Dijk coined the phrase 'secondary victim blaming' to describe the phenomenon of negative reactions to victims who opt for a more active position and/or do not care to be defined solely in terms of suffering.¹⁰⁷ Sympathy is contingent on the victim playing the role defined by the observer. As van Dijk himself observes, angry and active victims do not fit this mould.

This sympathetic stance also lays a claim on the expectations of how the narrative of justice can or should unfold. In particular, the widespread use of the term 'closure' is revealing in this respect.¹⁰⁸ The final verdict in the trial is often supposed to be an end point in the victim's narrative, who subsequently is enabled to 'move on' with his or her life. Although victims may indeed experience some benefit from this, the view that this could amount to 'closure' in this sense has neither empirical nor theoretical foundation. What makes this issue even more poignant is that the expectancy of closure becomes stronger the more severe the crime is, even though the crime's severity will make closure less likely to emerge.¹⁰⁹ Instead of closure and moving on, the reality of the outcome of the trial is better understood as making the best of an extremely bad situation. Not only is closure too much to expect, but this is also true for more than a modicum of justice.¹¹⁰ The term 'closure' is better viewed as a projection of what third parties want than of a realistic prospect for victims. As Rianne Letschert and I have argued elsewhere:

Part of the reason that our reaction to crime remains so heavily focused upon (punishing) the offender, rather than 'restoring' the victim, is that the former can be more readily conceived in terms amenable to the justice motive than the latter. Our distress at the murder is easily reconciled with the outrage at the murderer; not so much with sympathy for the victim's family. Our need for closure in respect to this distress might be quenched by the cathartic act of sentencing the murderer and his subsequent removal to prison; it is instead contradicted by viewing the enduring pain and the often life-long recovery process of the victim's family.¹¹¹

¹⁰⁶ Pemberton, 'Respecting Victims of Crime' (n 7).

¹⁰⁷ Whereas 'primary' victim blaming is rooted in the victimisation itself, 'secondary' victim blaming concerns a negative reaction to the victim's reaction following victimisation: see van Dijk (n 5).

¹⁰⁸ Pemberton and Reynaers (n 2). See also, SA Bandes, 'Victims, "Closure", and the Sociology of Emotion' (2009) 72 *Law and Contemporary Problems* 1.

¹⁰⁹ In this connection Harvey Weinstein devoted his final editorial of the *International Journal of Transitional Justice* to the misuse of 'closure' in transitional justice processes following large-scale political conflict, including crimes against humanity and genocide: HM Weinstein, 'Editorial: The Myth of Closure: The Illusion of Reconciliation. Final Thoughts on Five Years as Co-Editor in Chief' (2011) 5 *International Journal of Transitional Justice* 1.

¹¹⁰ As Rianne Letschert and I have noted, 'fully acknowledging the victimological reality of the aftermath of severe crime rapidly brings to the surface the difficulty of conceiving what might plausibly be viewed as justice. Hannah Arendt noted that the reality of the Holocaust "explodes the limits of the law", a highly accurate description. However, the limits of the law—but also other institutions of justice—are breached at less extreme levels of injustice as well. One of the key problems with the notion of restorative justice is precisely that where the need for restoration is the greatest, the impossibility of actually doing so is most keenly felt': Pemberton and Letschert (n 48).

¹¹¹ Pemberton and Letschert (n 48).

There are therefore two reasons why victims' narratives should be seen as the type of 'outsider' narratives that Bandes finds meriting inclusion in the legal process. One is that they offer a clear insight into the limits of justice in countering wrongdoing. Excluding the victims from view reinforces the need to believe that justice can always be done. The neat fit between sentencing the offender and the resolution of third parties' distress at injustice can give rise to the misunderstanding that everything is essentially 'back to normal'. In an insightful analysis of the way media portrays crime, sociologist Jack Katz described this as the 'moral workout'.¹¹² The way newspaper readers process, and the way media ends up portraying severe cases of crime, entails focusing our emotional energy on confirming the rightness of our existing view of the world. The victims, even as heroes and angels, figure in a scripted role play that ends up confirming that our existing point of view was morally right. The anguish is neutralised, the crime or victimisation is objectified and society moves on. This however is not an avenue that is open to the victims themselves, for whom the moment that society does move on is often one of great distress.¹¹³

Beyond the general tension between society's need for closure and the victim's enduring narrative, many individual victims' stories can also be viewed as 'outsider' narratives due to their lack of conformity to that which is imposed on their experience. As Bandes has rightly understood, left to itself the hegemonic narrative of criminal law is not likely to offer much leeway; where it allows victims input in the process it will seek to do so in a manner in keeping with this hegemonic narrative. That the narrative in VIS in capital cases is a particularly unappealing instance makes this poignantly clear. Other criminal legal contexts will be more critical of vengeance; indeed the angry, vengeful victim is most often the one whose contribution is viewed with concern.¹¹⁴ The more general denominator is however that victims whose reality does not follow the plot laid out for them by the hegemonic narrative will suffer negative consequences.

IV. Conclusion

Susan Bandes' insights concerning victims within criminal justice processes, including her emphasis on the importance of empathy and narrative in doing so,

¹¹² See J Katz, 'What Makes Crime News?' (1987) 9 *Media, Culture & Society* 144: 'Crime is in today's newspaper, not because it contradicts the beliefs readers had yesterday, but because readers seek opportunities to shape up moral attitudes they will have to use today. Like vitamins useful in a body only for a day, like physical exercise whose value comes from its recurrent practice, crime news is experienced as interesting by its readers because of its place in a daily moral routine.'

¹¹³ M Peel, 'Framing Homicide Narratives in Newspapers: Mediated Witness and the Construction of Virtual Victimhood' (2006) 2 *Crime, Media, Culture* 159.

¹¹⁴ See van Dijk (n 5).

are fundamental in gaining a clearer understanding of the main issues in offering victim input in criminal justice. In a variation on her original ideas, I have sought to clarify that empathising with victims' experience means understanding its essentially narrative nature, and that any discussion of the appropriate place for victims' emotions in the practice of law needs to incorporate this fact. Victimisation poses a challenge to a victim's sense of continuity, forwards and backwards in time, but also in conjuncture with his or her surroundings. As people maintain this sense of continuity through life narratives, rebuilding the story of their lives in a way which accommodates or assimilates their experience is of vital importance. A key issue is that victimisation poses a threat to both agency and communion; the mirror image of this is to seek to rebuild both agency and communion in the way victims use narrative in an attempt to come to terms with their experience.

What I have argued is that we have been too keen to interpret the victim's involvement in criminal justice in terms of agency, and that rethinking his or her views on criminal justice from a communion-oriented standpoint offers important insights. Rather than, or in addition to getting back at the offender, connecting to other members of community and symbolic representations of shared group values are important concerns. Criminal justice, as a representation of our shared morality, is a particularly important vessel for such a sense of communion. Experiencing a connection with this process in this sense in itself contributes to recovering something that was lost or damaged by the experience of victimisation. It is the act of empathy itself that offers this connection, rather than empathising with the victim as a means for the victim to achieve some ulterior goal.

Narrating is similarly important in and of itself. Offering the victim the possibility to share his or her narrative in a legal context connects the victim's narrative both to the process and to the actors involved in it. This is so whether this is focused on the sentence of the offender or on a more therapeutic goal. Indeed, these types of goals appear to be a function of the hegemonic narrative of criminal justice itself, and of the attempts of third parties to assuage their distress at injustice, rather than an expression of the emotional needs of victims. Instead of framing victim participation in criminal justice in general, and VIS in particular, as a means to influence the sentence of the offender, it is better understood and conceived of as a way of re-establishing communion between the victim's actual and lived experience and the criminal justice process.