

# Emotions, Crime and Justice

EDITED BY

Susanne Karstedt, Ian Loader and Heather Strang



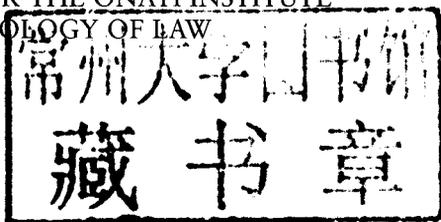
ONATI INTERNATIONAL SERIES IN LAW AND SOCIETY

# Emotions, Crime and Justice

Edited by  
Susanne Karstedt, Ian Loader  
and  
Heather Strang

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# *Handle with Care: Emotions, Crime and Justice*

SUSANNE KARSTEDT

## I. CROWDING OUT EMOTIONS

**I**N JUNE 2008, the British Government received a report from an advisor, Louise Casey, on the future of criminal justice and crime prevention, that instantly captured the imagination of the media and the public (Cabinet Office 2008). Although the report did not use the term itself, its propositions on informing the public, and making criminals performing community ‘payback’ more visible, were widely debated as a return of ‘shame’. The report proposed that the visibility of punishment and offenders, and information on crime, are major factors in restoring public confidence in the criminal justice system and the capacities of government to deal with the crime problem. Not entirely without reason, the suggestion of ‘naming criminals’ was instantaneously transformed into ‘shaming’ them in the ensuing public debate. This echoed similar demands and practices that had spread in the US, Australia and New Zealand during the past decade (Karstedt 1996; Pratt 2006; see also Elster 2004). But, more remarkably, the report and subsequent debate established a link between individual and collective emotions: that shaming individuals in the public sphere, and the public display of individual shame, should not only attenuate public sentiments on crime and criminals, but also might be capable of dispersing anger and discontent directed towards the government—and thus re-establish a new and stronger emotional bond between the government and its citizens. The relationships between citizens, government and the criminal justice system seemed in need of a strong injection of emotions.

Criminologists watch such debates with disquiet.<sup>1</sup> Emotions are suspicious to them, and criminology’s approach to emotions has been cautious and circumspect. Criminology as a science is a descendant of the Enlightenment, and is as such committed to the ideals of reason and reasonable discourse. This

<sup>1</sup> For the response of one of the editors of this volume to the Louise Casey report, see Loader (2008).

equally applies to modern penal law, and to the practice of criminal justice and its institutions as they developed since the Enlightenment in the late eighteenth century, and within modern liberal democracies. Just as exuberant emotions in the political sphere of democratic societies threaten to disrupt the whole system (and are typically observed in a breakdown of the political system), so the legal system strives to curb the strong emotions that it routinely and inescapably confronts. Yet for a long time it has ignored their undeniable presence and strength. Consequently, the presence of emotions in public debates about criminal justice has deepened the uneasy feelings of criminologists. Collective emotions and their expressions are seen as capable of being manipulated in the interest of politicians and other groups, and in particular by the media, in an irresponsible way. Criminologists tend to deny authenticity to outbursts of collective emotions, and they are more inclined to perceive them as manifestations of a popular 'false consciousness' (see Burkitt 2005; see also Loader, this volume). Emotions around crime and justice in the public sphere are viewed as the outbursts of a populace that 'does not know better'.

With the Enlightenment, criminology set itself on the same path as jurisprudence, penal law and criminal justice. The conventional story of modern penal law portrays a narrowly delineated list of, and proper roles for, emotions in the legal realm, so that emotions do not intrude into the true preserve of law: reason (Bandes 1999: 2). Such a juxtaposition of reason and emotion, one that is deeply embedded in modern social and political thought, seems to ignore the subtle recognition of the actual role of emotions in crime, law and legal procedures (Douglas 1993). The conventional story is, in other words, thoroughly misleading. As Nussbaum (2004: 46) points out, emotions have entered into the penal law under the disguise of 'reasonable emotions'. They are acknowledged in so far as they represent a reasonable evaluation and reaction, as in mitigating circumstances for crimes of passion (Wiener 2004). In fact, the whole edifice of penal law is erected on the assumption of strong emotions: fear of sanctions should instill compliance, and vengeance has to be channeled by legal procedures (Elster 1999). Both popular wisdom and criminological theory have posited fear of sanctions as a cornerstone and powerful mechanism of the criminal justice system. The institutions of criminal justice thus find themselves in a paradoxical situation. They offer a space for the most intensely felt emotions—of individuals as well as collectivities—while simultaneously providing mechanisms that are capable of 'cooling off' emotions, converting them into more sociable emotions, or channelling them back into reasonable and more standardised patterns of actions and thoughts. Indeed, the range of diversity among institutions of criminal justice throughout human history and across human societies testifies to humanity's efforts to contain the emotions that inevitably flare up in victims, offenders and bystanders.

Criminology's Enlightenment inheritance was thus fraught with contradictions and discrepancies as to the role and importance of emotions,

and their relation to reason in the realm of criminal justice. In a recent analysis, Sherman (2003) shows that the Enlightenment model, proposing that law and the collective it represented should (and would) react *rationaly* towards the offence of a *rational* offender, was deeply 'irrational' and bound to fail. Criminal justice today is characterised by what Sherman terms 'expressive economics'; this implies emotional reactions by the public and through criminal justice policies towards offenders who are assumed to act rationally (ie, are susceptible to harsh punishment). The report and debate referred to at the start of this chapter are exemplars of 'expressive economics'—based on harvesting expressions of public sentiment and on the assumption that offenders will react 'rationally' to the sanctions that the public demands to assuage its own anger.

How can these contradictions and discrepancies be resolved? The solution, Sherman points out, might be a rational reaction by criminal justice towards an emotional offender, or more precisely an 'emotionally intelligent' reaction. Emotionally intelligent justice would, he argues, acknowledge the emotions and emotional needs of both offenders and victims. It would provide institutionalised mechanisms to deal with these emotions, and design forms of justice and reactions towards crime that prevent the detrimental effects of unacknowledged emotions (Scheff, this volume). Proper acknowledgment of emotions might, in other words, avert some of the more detrimental effects of unrestrained emotions gushing into the arena of criminal justice (see also Walgrave 2008: chs 3 and 6).

## II. THE RETURN OF EMOTIONS

Sherman's proposal for a more emotionally intelligent justice is timely. It grasps the essence of a process that started at the beginning of the 1990s, and which has since then signified the surprisingly abrupt end of the secular movement and modern project of the 'rationalisation' and 'de-emotionalisation' of criminal justice (see Pratt 2000, 2002). The 're-emotionalisation of law' (Laster and O'Malley 1996; see also de Haan and Loader 2002) shows itself in several signal events and processes: the return of shame into criminal justice procedures, in particular through restorative justice (Braithwaite 1989); a stronger focus on victims and their emotional needs, as evidenced eg in the US by their presence at executions or statements in courts (Rice, Dirks and Exline 2009); further the return of ostensibly humiliating public punishments as in the US in the 1990s; and finally highly emotionalised public discourses on crime and justice in western democracies (Karstedt 2002). The main trajectories of the return of emotions seem to have been embedded in the major movements that have changed the face of criminal justice over the past two decades: the victims' movement, restorative justice and the emergence of a highly emotional and mostly punitive public and political discourse on crime and justice.

As Pratt (2006: 64) argues, both the restorative justice movement and the simultaneous emergence of a more punitive climate, owe their existence to the 'decline of the welfare state' and 'the particular arrangements of penal power' that were its signature feature. These power arrangements relied on and were shaped by professional elites and a 'criminal justice intelligentsia' who were in charge of penal policies (Garland 2001; Loader 2006). The retreat of the welfare state opened the floodgates for the return of emotions back into the criminal justice system, within restorative justice procedures as well as in the public sphere. It turned the clock back towards those allegedly pre-modern forms of 'ostentatious' and 'emotive' punishment (Pratt 2000) that figure in the accounts of Durkheim and Elias. The fact that restorative justice thrives within a more punitive climate (such as New Zealand, with its strong restorative justice movement and high imprisonment rates) does not testify to opposing developments, but to a subterranean common ground (Pratt 2006: 61; see also Crawford 2006).

The discrepancy between allegedly rational offenders and emotionally charged reactions, as noted by Sherman (2003), seems to have increased concomitantly with the re-emotionalisation of law. Simultaneously, and contrasting with the developments described above, new strategies of situational crime prevention, risk-based sentencing and other procedures emerged that are unambiguously based on the rationality of offenders and victims. The move towards 'actuarial justice' (Feeley and Simon 1994) permeated criminal justice with the rational calculation of risks. However, it seems that this move profoundly miscalculated the impact of perceived risks in terms of their emotional equivalents, namely fear, anger, and blame. Thus, when 'actuarial justice' imposed risk-calculation on criminal justice and risk crowded out justice, criminal justice and crime prevention transmuted into a highly emotionalised sphere, and to just the opposite of what a dominating risk-framework would have created (see Hope and Karstedt 2003). Actuarial justice ends up with a victory of emotions (fear) over rationality (risk), and collective emotions tend to elbow rational reactions in the criminal justice system to the sidelines (Freiberg 2001).

The re-emotionalisation of law seems to be the final stroke for the project of modernisation of criminal punishment, and to signify the end of the modern period which denied emotions and their expressions a proper place and stage. It also seems to indicate the demise of the processes that drove the project of modernisation of punishment, as described by Emile Durkheim and Norbert Elias, the classical writers on the sociology of punishment. This process is embedded and part of a broader movement or 'emotional turn' in post-modern societies (eg Barbalet 2002). Cas Wouters has aptly described the two facets of this process as 'informalization' and 'emancipation of emotions'. Emotions that had been increasingly disciplined and controlled en route to modernity (and ruthlessly exploited by authoritarian regimes), re-entered both individual consciousness and public discussion as

'the long-term process of formalization gave way to a long-term process of informalization' (Wouters 2004: 209). Instead of being repressed and denied, emotions became valuable assets in social exchange, and required recognition as expressions of individual identity. The emancipation of emotions is more demanding in terms of their management, and informalisation nonetheless gives rise to subtle rules of feeling and display of emotions (Hochschild 2003). Consequently, it is a distinctive feature of the 'emotional turn' in societies that expressive values overtake more instrumental orientations. These changes are perfectly visible in large comparative surveys covering the last three decades in several waves. Welzel and Inglehart (2005; 2008) show with data from the World Values Survey that values of self-expression have not only become more prominent in many western countries, but have rapidly gained ground in transitional societies.

The process of re-emotionalisation seems to share some common features with the process of de-secularisation that brought religion back to the fore during the same period. Secularisation did not make religion disappear; to the contrary, religion re-emerged and took new forms when it became a matter of individual choice and thus an expression of individual and cultural identity. Like religion, emotions are defended as expressions of individual identity, and religious choice demands recognition, as does the individual expression of emotions. Simultaneously with religion, emotions emerge as a strengthened force on the post-modern stage.

The process of re-emotionalisation of justice consequently created and was driven by demands for the recognition of emotions that were contrasted with a cold, calculating and 'emotion-ignorant' model of justice. This is succinctly illustrated by statements made in the Willie Horton case in 1988 who while on furlough (temporary release) had kidnapped a couple and raped the woman (Garland 2001; Simon 2007: 57). When confronted with expert testimony and calculations of risk on which the policy of furlough had been based, the partner of the victim simply demanded that their own emotional experience had to take centre stage, not figures and calculations. Justice could only be done if 'real' people and their emotions were to be accounted for, and neither experts nor figures should interfere with that.

The demand for recognition of emotions in criminal justice might be a defining feature of post-modern societies. However, the reasons for acknowledging emotions in criminal justice are often traced back to the very nature of humans. In a recent article in *The New Yorker*, anthropologist Jared Diamond argued that modern criminal justice ignores the 'thirst for vengeance' that is 'among the strongest human emotions'. He deplored that modern states 'permit and encourage us to express our love, anger and grief, and fear, but not our thirst for vengeance' (Diamond 2008). Modern criminal justice dispossesses us of our feelings of vengeance, and alienates us from our deep-rooted feelings, instead of encouraging us to

acknowledge them. In a similar vein, Cass Sunstein (2009) has recently argued that (criminal) law is based on ‘moral indignation’, and as such on the ‘intuitive system of cognition’ rather than the ‘reflective system’ through which morality as a system of abstract rules can be understood and is subject to reasoned arguments. Rather than being ‘anchored in reasons’, moral emotions and intuitions are expressed in ‘automatic’ responses to crime and (in)justice that people often are unable to justify in a ‘rational’ way. Anger, disgust and contempt are the main forms of expressing moral indignation and of automated responses to crimes, perpetrators and criminal justice. Notwithstanding that legal institutions aim at moral *reasoning* and at checking moral intuitions, they have to acknowledge the ‘compelling demands’ that the system of cognition and moral intuitions is making on them. Re-phrasing Sherman (2003), what is needed is an ‘intuitively’ intelligent system of criminal justice.

### III. ENCOUNTERING EMOTIONS

Do these developments in post-modern societies simply reveal the enduring presence of emotions within criminal justice, or did emotions actually become a more powerful force? Do we really need to give more space to vengeance in criminal justice on the grounds that it is one of the strongest human emotions? Are not emotions of forgiveness and regret equally strong, and should they not equally have a proper space in criminal justice (Walgrave 2008; see Sherman and Strang in this volume)? The re-emotionalisation of criminal law and justice indeed is asking tough questions and demands reasoned decisions.

Criminal procedures—particularly in court—provide formal mechanisms that limit and govern emotions. Simultaneously, expectations are defined as to ways in which emotions should be expressed and displayed. ‘Feeling rules’ and ‘display rules’ (Hochschild 2003) are both decisive parts of proceedings in court, and they represent a broader culture of emotions and society’s expressive values. Judges on the other hand might not be aware of the intuitive nature of their moral judgments and the ways these inform the legal conclusions that they draw (Sunstein 2009). Encounters with criminal justice—in particular with police—are emotionally fraught events, often for both parties involved, and can easily slip out of control (van Stokkom, this volume). Victims require space and recognition for their emotions in the procedures of criminal justice. They express their emotions in victims’ statements, which are granted in cases involving violent crime, including capital punishment cases, in the US, in murder cases in the UK and also increasingly in international criminal justice (Sarat 2001; Karstedt 2010; Rose, Nadler and Clark 2006; Rice, Dirks and Exline 2009). The institutions of criminal justice—ranging from the police to prison—are