

# scottish justice matters

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# RESTORATIVE JUSTICE

# JUST EMOTIONS?



## Cyrus Tata and Fiona Jamieson on the need for emotionally-intelligent justice policy

### What are the Obstacles to a Rational Criminal Justice Policy?

It is often wondered why we do not have a more rational, evidence-based system of criminal justice. All the evidence points towards a more targeted use of imprisonment, a joined up system of criminal and social justice and improved resourcing for community penalties and community services. Yet a key reason which prevents justice policy from proceeding rationally is the fear of looking 'soft' in the eyes of the public. People feel let down and angry about a system which seems uninterested in *showing* justice to be done, publicly recognising the wrong, encouraging the wrong-doer to face up to the wrong, and make amends. Is there any way out of this policy quandary?

Here we propose that a key public frustration, which drives cynicism and penal populism, lies in the failure of criminal justice to engage, *and be seen to engage*, in emotionally-intelligent communication. Too often the process appears sterile, lacking emotional meaning and participation. Mention of 'emotion' in law sometimes rings alarm bells. Our argument, however, is that emotionally-intelligent communication is not opposed to, but essential to, rational and progressive policy.

### Emotional Intelligence

Justice is a basic and universal *emotional* need. Developmental psychology shows, and every parent can attest, that it is a powerful force from very early childhood. For justice to be done, the wrong must be acknowledged, the harm validated, the parties listened to, and participate. To be legitimate, justice has not only to be done but be *shown* to be done. This necessitates much more than courtrooms being open to the public. It must mean an emotionally-intelligent conception of justice policy.

### Just Efficiency?

If it sounds obvious that justice policy should be emotionally-intelligent, consider how our justice system tends to devalue meaningful communication with court users. We have been operating on an 'outcome' driven conception of

efficiency. The overwhelming majority of criminal court cases result in guilty pleas in which neither victim nor offender barely speak. A key complaint of both victims and offenders is about not having a chance to participate and feeling processed like an object (Jacobson et al, 2015). Of course, everyday, many individual professionals make valiant efforts to communicate meaningfully with court users, but they do so *despite* the system's incentives, *not because* of it.

## It has long been recognized that the tasks of judging and sentencing are very human interactions with emotive and affective dimensions

Not only that, but in the last decade a seismic change has occurred almost without public awareness or debate. The huge expansion in out-of-court 'offers' of settlement by the Executive branch of the state (prosecution and police) means that for the first time more cases are 'disposed of' by 'Direct Measures' (DMs) than through court (Matthews 2016). Of course, there can be a place for DMs and many cases need not be prosecuted through court. Indeed, there is potential to use DMs creatively. Nonetheless, this huge expansion comes at a cost. Importantly, DMs are diversion from court *not* from the criminal justice system. Although a DM is not a criminal conviction and technically an 'offer', many people are unaware that a DM may form part of one's 'criminal history' appearing in disclosure records and barring people from employment. The drive to use DMs cannot address the sense that all the system is interested in is 'disposing' of cases rather than participation, and facing up to the harm: showing justice to be done.

Most academic, policy and practice thinking is dominated by a very narrow conception of efficiency. Yet recent research asking users of the justice system about their experience, shows that *how* people are treated matters to them as much as 'the outcome' (for example, Jacobson et al, 2014). Dig a little

deeper and it becomes apparent that victim and offender experiences of the process and how they feel about it, is an outcome as important as the formal 'disposal' such as a court sentence.

### Towards Effective Communication

While there have been some improvements in recent years to the experience of victims, there has been less policy interest in the experience of accused persons. Knowing more about their experience may help to develop rational policy. Many minor repeat offenders fail to comply with the terms of a community sentence, evoking public and professional frustration, which can result in a cycle of short-term imprisonment. Research has been guilty, until recently, of paying little attention to the experience of the accused in the justice process usually 'reading off' their experiences from what others say. If we are to address the problem of compliance with community penalties and the costly cycle of minor offenders returning to prison, we need to know much more about how they perceive and understand the justice process. For example, when someone a person is sentenced how does that person understand and interpret the terms and the purpose of that sentence? Does it accord with what was intended by the judge and by those implementing the sentence such as social workers and prison staff? One would think, and research suggests, that effective communication should develop the person's accountability for the crime, motivation to comply and try to move away from offending (Berman and Feinblatt, 2015)

Yet do we really know what makes penal communication effective or ineffective? The annual cost of the unnecessary processing and re-processing of people through the courts and of reoffending is estimated by the Scottish Government to be *at least* £3m and £10bn respectively. By improving our understanding of effective communication it may be possible to reduce the human and financial cost.

### Emotionally-Intelligent Efficiency

There have been several initiatives to make penal communication more emotionally- intelligent. Because of its focus on participation, clearly recognizing the harm done, and, crucially, requiring communicative accountability, such as an explanation, from the person who caused the harm, restorative justice exemplifies an emotionally intelligent process. Typically, in our system when a person pleads guilty there is little direct explanation offered to the person harmed. Restorative Justice has potential to *show* justice being done at least to the parties, and by raising awareness about its existence, in general terms, to the public. Of course, since restorative justice is not in a public court, there are limits to this communication being heard openly.

Another example of emotionally-intelligent justice which is heard openly can be found in the Problem-Solving Courts (PSCs) approach. A PSC seeks to address the underlying causes of the offender's behavior such as addiction, through judicial ongoing monitoring in a multi-disciplinary court (Tata, 2013) In the US, PSCs have been advocated and led by members of the judiciary frustrated by a sterile and counter-productive system obsessed with case disposal.

It has long been recognised that the tasks of judging and sentencing are very human interactions with emotive and affective dimensions. However, penal discourse about judging commonly depicts reason and emotion as opposite forces in judicial conduct. Moreover, because of the strong value placed on the neutrality and independence of the individual judge, control of judicial emotion is central to understandings about 'good' judging, perhaps to a greater extent than any other actor in criminal justice (Jamieson, 2013).

This strict separation drawn between reason and emotion is contradicted by research which points to the interconnectedness of these capacities and suggests that emotions are central to good decision-making: they help produce 'empathetic impartiality' and should not be regarded simply as obstacles in the way of rationality. Judges acknowledge the presence of emotions in their sentencing work but in difficult cases, such as serious sexual violence towards children, report a range of strategies they employed on occasion to manage the effects (Jamieson, 2013). This, and other research, supports a more rounded conception of judgement which recognizes the interconnectedness of rationality, intuition and emotions.

We can conceive of two ways of thinking about efficiency. The first can be called 'disposal efficiency'. This assumes that volume of case disposal in relation to effort equals 'efficiency'. and is simple to measure. The disadvantage is that it forgets the goal of 'efficient justice' should be self-evident: to produce justice. Efficiency is, as Utilitarian philosophy argues, always about achieving a *morally desirable goal*.

We propose a second conception of efficiency, namely: 'emotionally-intelligent efficiency'. This focuses not only the volume of 'disposals', but *value-for-money* including enabling participation, dignity, the harm being faced up to by the offender, and justice being *shown* to be done and thus seen as legitimate. 'Emotionally-intelligent efficiency' is essential to reversing public cynicism and distrust of the system. Policy cannot afford to dispense with the emotional heart of justice. It is only through emotionally-intelligent efficiency that criminal justice policy has any sustainable chance of moving forward rationally.

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[www.scottishinsight.ac.uk/Programmes/Learningfromotherplaces/RestorativeJustice.aspx](http://www.scottishinsight.ac.uk/Programmes/Learningfromotherplaces/RestorativeJustice.aspx)

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