**Introduction**

Research on crime victims and their experiences within the American criminal justice system suggests that victims can be unjustly harmed throughout the criminal justice process. The criminal justice system, in an effort to remain fair and just, has inadvertently marginalized victims, treating them as less than rational, and therefore, less than human. The marginalization of victims within the criminal justice process has enabled the criminal justice system in the failure to address the needs of victims by placing them outside the range of prioritized rationality. Until victims are recognized as wholly human and given a larger participatory role, the criminal justice system cannot avoid unjustly harming victims.

Currently the victim does not have a formal status in the criminal justice process. I will argue that the larger participatory role victims need would include formally incorporating them into the criminal justice system, necessitating a conceptual shift from viewing a crime as being between the offender and the state, to being between the offender, the state, and the victim. In order to arrive at a better understanding of what this larger participatory role consists of and what this conceptual shift entails, my argument unfolds in five parts. I begin in the first section by providing a historical background tracking the progression of the victims’ movement and the changing role of the victim in the criminal justice system. We then turn to a discussion of the harm victims endure as a result of their limited role in the criminal justice system, illuminating the injustices that arise from the criminal justice system’s inability to recognize a victim’s personhood. The third section moves to an analysis of victim participation under various restorative approaches, concluding that we must utilize an approach that integrates
restorative values into the criminal justice system. Subsequently I will provide a diagnosis of the origin of the injustice victims endure, concluding that in an attempt to remain objective the criminal justice system has sidelined specific emotions, such as empathy, which has prevented the criminal justice system from acknowledging the personhood of victims, and thus, their victimization. Finally I will respond to the aforementioned diagnosis by introducing a solution to the problem at hand, which includes the implementation of sentimental education utilizing the third restorative justice approach in section three, as well as a rearticulation of what it means to be objective in the criminal justice process.

1. History

Although victims currently have no formal status in the criminal justice system, there was a time when they were front and center in the pursuit of justice. In colonial America the majority of the administration of justice was conducted by the victim with the help of a public official. The victim was responsible for investigating the crime as well as arresting and prosecuting their offender. By the American Revolution, significant changes to the administration of justice had occurred, philosophically motivated by enlightenment ideals, according to which criminal prosecutions should serve the societal interest of deterrence and retribution as opposed to the interest of the privatized victim. These changes were motivated by the urbanization and diversification occurring in American society, which found the privatized justice system to be both ineffective and potentially corrupt. Imprisonment and fines replaced capital and corporal punishment as the common criminal sanctions in an effort to move from the arguably vengeful victim to a government regulated police force. By the middle of the nineteenth century the
American criminal justice system had been entirely transformed from a private to a public system, moving the victim from center stage to the sideline of the criminal justice process.

In the 1970s the women’s movement sparked a conversation regarding problems with the victim’s status within the criminal justice process in cases of sexual and domestic violence. This led researchers to look at crimes against women, and what they found was an ill-treatment of victims: “Victims—even victims of serious violent crimes like sexual assault—were considered witnesses to a crime against the state” (Wemmers 398). Victims are harmed in certain instances when they are forced to be a witness to prove their victimization, especially in cases of sexual and domestic violence. Many victims find their minimal role as a witness to be humiliating and reminiscent of the original crime and their original victimization. Women have also articulated the need to tell their story in their own way in order to heal, yet the role of the witness requires victims to respond to yes or no questions, which act in hindering any attempt at constructing a meaningful narrative of their victimization. The rise of the women’s movement made us aware of the problems that result from the victim’s limited role in the criminal justice process, creating a new awareness of unjust harms happening to victims in the criminal justice system.

As a result of this movement, the first victim impact statement was created in California in 1976. The victim impact statement was an important step in bringing victims back into the criminal justice system by allowing victims to participate, providing the opportunity to tell the court how they were impacted by their victimization. The victim presents the victim impact statement to the court only after the defendant is proven
guilty and is introduced before sentencing begins. These statements are critical in allowing victims to play an active role and aiding victims in expressing feelings they believe are important to hear. This new participatory role for victims nevertheless continued to be a matter of controversy in American law. In 1987 the U.S. Supreme Court ruled that victim impact statements were unconstitutional and violated the 8th Amendment. In 1989, the U.S. Supreme Court reaffirmed this decision, stating that the victim impact statement violated the 8th amendment when applied to penalty phases of capital punishment. In 1991, the U.S. Supreme Court reversed its earlier decisions and ruled that victim impact statements do not violate defendants’ constitutional rights. In order to specifically address the needs of the Oklahoma City bombing, congress passed the Victims’ Rights Clarification Act, which clarified the federal law permitting victims to provide victim impact statements in capital and non-capital cases.

Despite immense progress in the victims’ movement and the implementation of the victim impact statement, the victim still fails to maintain an adequate role in the criminal justice system. The victims’ movement has begun to reintroduce victims into the criminal justice process by providing certain instances of participation in a process the victim previously dominated. In light of this reintroduction we must focus on the provisions that both have been and must still be made to adequately incorporate the victim as well as ensure this participation is both appropriate and meaningful for both the victim and society’s interest in criminal prosecution.

2. Harm Against Victims

Currently, when a crime occurs in America the criminal justice system views the crime as between the offender and the state; in the eyes of the law, the victim has no
formal role. Outside of this scope, victims still maintain some unrecognized role throughout the process, which I believe is inadequate. We must first understand these limited roles in order to understand their inadequacy, which becomes complicated by the fact that the law considers victims to be a homogenous group, yet victims maintain different limited roles in different crimes. My focus is on two specific groups of victims of violent crime: victims of sexual and domestic violence and bereaved victims.

2.1. Victims of Domestic & Sexual Assault

I will begin by addressing people who have been personally victimized. Frequently when victims first encounter the criminal justice system they expect to have a larger role in the process than their role as a witness. The witness’ role is used at the discretion of the state, deeming their testimony unworthy of consideration in itself. Mary Walsh, a survivor of domestic violence, articulates her experience as a victim in the criminal justice system:

Be prepared for the fact that you will simply be a “cog in something turning” and you had better learn early on not to take things personally. Third parties can’t be expected to take your case as seriously as you do. Even though you will know more about the facts of the case, since you are only a witness, you will not be consulted, and decisions will be arbitrarily made that end up being to the defendant’s advantage. For your own peace of mind, be prepared to throw any illusions about “justice” you might have had out the window. (Herman 582)

Many victims find their minimal role to be humiliating and reminiscent of the original crime and their original victimization. In light of this humiliation, victims expressed an extreme sensitivity to law enforcement officials attitudes. Victims articulated that when law enforcement officials treated them with casual indifference and disrespect an experience that endorsed the perpetrator’s attitude of contempt was created, revealing
how a minimal role in the criminal justice process can significantly affect the victim and their experience within the process.

Herman’s study, which contains the quote from Mary Walsh, suggests victims of sexual and domestic violence have numerous wishes and needs that are directly opposed to their experience in the criminal justice process. I will explore five needs of victims and how these needs are opposed to the reality of the criminal justice system, beginning with the victim’s need for social acknowledgment and support.

Julie Cloutier, a college student who was drugged and raped within her first week on campus, described how she felt betrayed by authorities after reporting her assault:

The DA didn’t know if she was going to win, so she didn’t want to try. She was the rudest person—I couldn’t believe she was a woman—ruthless, no heart, no sensitivity. She basically told me she didn’t believe me. She was questioning how many beers I had. She said to me, “Julie, I don’t think you really know what happened.” That hurt more than the rape. I’ll never forget that line. (Herman 582)

Cloutier’s experience is symbolic of the juxtaposition between her desire for support and acknowledgement, and her experience of betrayal. Cloutier’s experience also sheds light on how the lack of acknowledgement and support led to another harm separate from the original victimization. The correlation between secondary harm and a lack of recognition illuminates why the victim’s current unrecognized role is problematic.

Second, victims need to establish a sense of power and control over their lives, yet the court requires them to abide by a complex set of rules and procedures, which they frequently do not understand and cannot control. Ross Cheit is a college professor and attorney, as well as a survivor of childhood sexual abuse, who describes his experience of feeling powerless in the criminal justice process:
I knew as a lawyer that you file papers, and then they deny everything. I knew that. It doesn’t mean anything to lawyers, it’s a ritual, but still it affected me. I got those papers and I felt: What do you mean they’re denying it? They know this happened! On the other hand, I could stand back and say: “A lawsuit is not about emotions. This is some game I’m playing here, and it’s an adversarial game,” because I’d already done that professionally, but still it was hard to take. (Herman 583)

Cheit offers a unique perspective, illuminating the disconnect between a victim’s perception of the criminal justice process, a meaningful process regarding their traumatic victimization, and a lawyer’s perception of the same process, a ritualistic and unemotional game. Cheit’s experience is significant because it articulates the struggle for victims to grasp this disconnect in perception, and how this can contribute to feeling powerless in the criminal justice system.

The third victims’ need is the opportunity to tell their story in their own way, yet court procedures require victims to respond as witnesses to yes or no questions, which act in hindering any attempt at constructing a meaningful narrative of their victimization. In *Moral Repair: Reconstructing Moral Relations After Wrongdoing*, Margaret Urban Walker explains how victims must be able to have the truth of their victimization and what they have endured told, arguing, “serious violation occasions a ‘rupture’ in the human world and the understandings of the victim, and people seek to incorporate their experience of violation, betrayal, and terror into an intelligible part of the story of their lives” (Walker 18). A series of yes or no questions does not allow for victims to transform a violation into something that is accessible within a world of experience and the description that is shared with others, such as the court. I am not suggesting that the courtroom is always the appropriate place for victims to share their story; but I am
concerned with the way our current system can act in preventing victims from expressing their victimization.

The fourth need of victims is to limit their exposure to specific reminders of their traumatic victimization, and yet the court requires them to relive their experience. For example, Caroline, a survivor of incest, explained her apprehension to hear her brother’s testimony and to relive the trauma:

I would feel slimed again. I suspect he would enjoy talking about what he did. He wouldn’t really be sorry, in the sense of remorse or regret. And I would be wary of an apology because then I would feel pressure to forgive him and have a closer relationship. I don’t want a relationship; I want to keep him at a safe distance. (Herman 587)

This fear of reliving traumatic events closely correlates to the fifth need of victims, which deals with their fear of directly confronting their perpetrator. The court requires victims to relive their victimization in front of their offender, perpetuating feelings of powerlessness, which is a significant factor in cases of sexual and domestic assault because domination and control are strategies exhibited by perpetrators in these crimes. This can cause victims to feel harmed in a way reminiscent of their original victimization as well as made to feel as though their offender’s strategies of domination and control are well suited for the criminal justice system.

These five points highlight the contrast between the needs of the victim and the actuality of the criminal justice process, exposing the harm done to victims throughout their experience in the criminal justice system. In certain instances, these conflicts not only perpetuate trauma, but also act in hindering their ability to heal even after the criminal justice process is over. It is fair to argue that some of these harms are inevitable in the criminal justice process, yet, in light of this reality, I believe the criminal justice
system must also do everything in its power to arrive at a role for the victim that does not act in exacerbating all of the harms these five points represent. I believe that this can be done while also responsibly considering the objectivity and integrity of the criminal justice process.

2.2. Bereaved Victims

The second group of victims is bereaved victims, commonly the loved ones of murder victims. Bereaved victims are unique because they seek an elusive state they call closure, which is something different for every victim, raising the question of what exactly the law’s proper role is in helping victims achieve the closure they need. I do not believe the purpose of the criminal justice system is to provide closure for victims, but the criminal justice system should be concerned with not hindering victims’ ability to attain closure. This causes us to question what victims need in order to achieve closure, a question with answers that are both variable and complex.

Sandra Miller is the mother of a fifteen-year-old boy whom William Bonin, the Freeway Killer, raped, tortured and strangled. Sixteen years later, Sandra Miller expected a sense of closure when Bonin was given the death penalty. A victims’ advocate working with the bereaved victims of Bonin explained that in the aftermath of the emotional devastation the murders wrought, these victims virtually put their lives on hold as the appeals process dragged out. Miller explained that Bonin’s death would allow her to go on with her life. Not all bereaved victims achieve closure in the same way, but it seems clear that all bereaved victims seek closure. For Miller, the criminal justice system was able to assist her in attaining closure by sentencing William Bonin to death. For Dennis Shepard, father of Matthew Shepard who was brutally tortured and murdered, closure
was sought in a different way. Prosecutors wanted to seek the death penalty, but Matthew Shepard’s parents insisted on life without parole; “I would like nothing better than to see you die, Mr. McKinney. However, this is the time to begin the healing process, to show mercy to someone who refused to show any mercy, to use this as the first step in my own closure about losing Matt” (Bandes 1600). Shepard’s parents explained that they began to heal by the offender knowing that his life was a gift from his victim’s family.

What are we to make of these two different outcomes? It is clear that not every bereaved victim will be given the opportunity to play a role in the offender’s punishment, as they shouldn’t. If it is true, as it seems, that bereaved victims place their lives on hold as the criminal justice process drags out, how can we begin to make this process less difficult to bear? How can we begin to understand what it is about the criminal justice system that prevents bereaved victims from taking up their lives again? Perhaps one of the reasons Miller was able to go on with her life was not only because Bonin was going to be put to death, but also because Miller felt that she was able to restore power and control over her life. Miller articulated how at the moment before the injection, she would be seeing her son Rusty, thinking, “Rusty, it’s almost over. He’s finally going to pay” (Bandes 1599). Similar to Miller, Shepard could have also been able to attain closure because of the power and control he was able to restore by granting the offender life in prison. Dennis Shepard was able to speak at McKinney’s sentencing hearing, stating,

Mr. McKinney, I’m going to grant you life, as hard as it is for me to do so, because of Matthew…You robbed me of something very precious and I will never forgive you for that. Mr. McKinney, I give you life in the memory of one who no
longer lives. May you have a long life and may you thank Matthew every day for it. (Bandes 1559)

Shepard was not only able to regain control over the situation, but was also given the opportunity to articulate it during the criminal justice process, which also could have played a role in his ability to attain closure.

Closure allows victims to take up their lives again once the criminal justice process is over, yet victims are often hindered from attaining closure due to the harms endured throughout the criminal justice process, which can be represented by two conflicts in the criminal justice system. The first conflict is over the murder victim’s body. Bereaved victims frequently have an immense emotional attachment to their loved one’s body, typically demonstrating an intense desire to see and hold it¹. Allowing bereaved victims to see the body allows them to assert control over the situation as well as satisfy a very deep emotional desire, empowering victims and in turn facilitating their recovery. Without exception, law enforcement workers deny bereaved victims’ request to see or touch the body of their loved one, which is required to maintain a legitimate investigation. This first conflict is critical in illuminating the first time many bereaved victims notice that the active and involved role they expected to play is much different from their actual role. Clearly an investigation should not be compromised for the sake of empowering a victim or facilitating their recovery. Nevertheless, we can try to address the harm done to bereaved victims when they realize their loved one’s body is now seen as a piece of evidence.

¹ Fannie, the mother of a 21-year-old murder victim explained her reaction when she was told she could not see her child’s body; “I wanted to see him, and I went crazy because they wouldn’t let me. I didn’t know that once you get murdered, you can’t see them. You can’t see them” (Goodrum 742).
The second conflict that arises in the case of the bereaved victim pertains to the flow of information. There is a struggle to find a balance between a bereaved victims’ desire to learn new case information and law enforcement’s obligation to solve a murder. For example, victims describe wanting to be an informant in the case of their murdered loved one, expecting detectives to listen and consider their concerns and insights. Often when a detective exercises their discretion to consider or dismiss bereaved victims’ information, bereaved victims describe feelings of powerlessness. Bereaved victims’ testimonies suggest that their involvement in the criminal justice system, and the ability to be taken seriously would help facilitate bereaved victims’ healing and emotional well-being.

Bereaved victims endure another harm when obstacles stand in the way of victims gaining information, leaving them feeling powerless. Retributive theorist Jean Hampton sheds light on the role power plays in a crime, stating, “By victimizing me, the wrongdoer has declared himself elevated with respect to me, acting as a superior who is permitted to use me for his purposes” (Herman 597). Victims initially feel powerless upon their victimization, thus continued feelings of powerlessness throughout the criminal justice process perpetuate harm done to the victim. In order to maintain the integrity of an investigation, victims are often at the mercy of the law enforcement workers handling their cases, and there is little victims can do to change this dynamic. It is a legitimate concern for law enforcement workers to ensure that a victim’s involvement could potentially taint an investigation. In light of this concern, how do we reconcile the effects of this power dynamic and the fact that the disregard of victim involvement and acknowledgement hinders victims’ ability to attain closure?
If it is not the role of the criminal justice system to provide closure for victims, then why should we discuss these harms perpetuated by the inadequate role of the victim? We need to be careful in distinguishing what victims need and what the legal system ought to provide. Victims need closure and the legal system ought to provide a system that does not prevent victims from attaining it. Understanding the victim’s role in the criminal justice system is critical in illuminating the harms they endure throughout the criminal justice process. Some harms are inevitable and are beyond the concern of the law, but there is a difference between a harm and an unjust harm, which is that the criminal justice system is obligated to address the unjust harms.

What the harms of both groups of victims have in common is the need for social acknowledgement and support. In our current circumstance victims are harmed by our system because our system has failed to recognize that a crime has been committed against a person. For both Miller and Shepard, two bereaved victims who were able to attain closure, they were able to incorporate their children as persons into the criminal justice process. Before the lethal injection, Miller was able to express how she thought of her son and how she told him it was all over. Dennis Shepard was able to speak at McKinney’s sentencing, explaining how he would grant him life for Mathew, in memory of someone who no longer lives. Both parents were able to recognize their children’s personhood within the criminal justice process. But what happens when a victim does not have an opportunity to engage in the criminal justice process as much as Miller and Shepard were able to?

Analyzing both types of victims’ accounts of the criminal justice system suggests that a majority of the harm victims endure during the process occurs because they are not
being acknowledged. In order to acknowledge the harm done in a crime, which both groups of victims wish to establish, the criminal justice system needs to be able to perceive a crime as also against a person, which it currently does not do. When a victim of domestic and sexual assault does not have a formal status their personhood is not being recognized. When a bereaved victim does not have a formal status their personhood is not being recognized as well as the personhood of their murdered loved one. I believe this is an injustice on the grounds that when victims of either group are not recognized as persons, they are in turn being treated as less than one. Thus, it is necessary for the criminal justice system to create a system that views victims as people.

3. The Overall Approach

Restorative justice is a critical facet in determining a larger participatory role for victims because it aims to recognize victims and the harm they have suffered. In order to establish a restorative justice initiative to respond to victims’ harm we need to clarify what restorative justice is, as well as clarify the principles and values that characterize it. Once these values and principles are discussed we can begin to consider three different restorative justice approaches.

3.1. Restorative Values

In her essay, “Where Do They Belong? Giving Victims a Place in the Criminal Justice Process”, Wemmers discusses three key values that characterize restorative justice. The first value concerns respect for the dignity of the individual, which Wemmers asserts is a basic human right as recognized by the 1948 *Universal Declaration of Human Rights*. Wemmers argues that because victims are not
traditionally recognized in the criminal justice system, the ability to recognize a victim as a person with rights becomes complicated. This claim is founded on the notion that in our criminal justice system, victims’ rights are not considered human rights. A special set of rights, or human rights, exist for the accused, but not for the victim. Wemmers argues this set of rights provides a notion of dignity which, “is often interpreted to mean that the accused should be treated as a subject and not as an object of the law” (Wemmers 400). Wemmers’ first value of restorative justice incorporates a human rights perspective, which enables the accused and the victim to be considered subjects, rather than objects of the law.

The second restorative value Wemmers discusses is the inclusion or participation of victims and offenders. This second value relates closely to the first because victim participation allows for the victim to be recognized as a subject of the law. Wemmers claims, “restorative justice is a process and how outcomes or decisions are reached is important. Victims are invited into the process and given an opportunity to express their views and concerns” (Wemmers 401). Wemmers argues that due to this element of participation, victims and offenders are empowered and can act in influencing what happens in a restorative justice process. Unfortunately, this restorative value concerning participation is one of the most complicated aspects of applying restorative justice to the criminal justice system due to the difficult nature of finding a solution that provides victims with participation in respect to an appropriate balance of power between the victim and the state. This problem lies at the core of my overall question regarding what exactly a larger participatory role for the victim might include in order to provide victims
with participation that won’t act in distorting the integrity of our criminal justice system by giving too much power to the victim and not enough to the state.

Wemmers’ third value of restorative justice is reparation, which encourages offenders to be held accountable as well as recognize the consequences that have resulted from their behavior. Wemmers argues, “the restorative process overtly recognizes and validates victims and their suffering and seeks to repair the victim” (Wemmers 401). Wemmers explains that reparation can occur in a variety of forms, such as apology or symbolic reparation. Reparation is a significant restorative value because it encourages the recognition of victims’ harm, which in itself has the potential to promote victims’ healing.

3.2. Different Restorative Approaches

Upon reviewing restorative justice literature, Wemmers asserts that there are three different possibilities for how to place restorative justice in the criminal justice system. The first possibility, *abolitionism*, aims to abolish the conventional criminal justice system. Nils Christie supports an abolitionist approach, criticizing the criminal justice system for “stealing conflicts from victims and offenders” (Wemmers 403) arguing, “conflicts should be returned to their rightful owners, and victims and offenders should have the opportunity to deal with the offence themselves” (Wemmers 403). This abolitionist approach sees restorative justice and retributive justice as two completely different entities. Thus, the abolitionist approach requires a paradigm shift in which retributive justice is entirely replaced by restorative justice.

Although the abolitionist approach demonstrates all of the desirable restorative values, I do not believe it is the best restorative approach because its radical nature leaves
no room for a combination of restorative and retributive principles. This replaces one
system with another, retreating back to the privatized justice similar to before the
American Revolution. The abolitionist approach often includes diverting criminal cases
out of the criminal justice system, leaving the case to only victims and offenders, and
shifting power entirely away from the state and towards the victim, which is also
problematic because doing this loses sight of the fact that a crime is also committed
against the state. This becomes especially clear in cases of serious crime, such as murder,
where it is not enough for the offender to only address the victim; the offender has to pay
a debt to society as well. In cases of murder, the offender has not only harmed the
victim, but has also ruptured the world of others in that society. Research conducted to
determine the impact of community violence exposure on children suggests even
innocent people in a violent society can be harmed by murders, noting a correlation
between violence exposure and PTSD, depression, and anxiety. As Philadelphia District
Attorney Seth Williams stated, “A crime is against the peace, dignity, and tranquility of
all of us”. The peace, dignity and tranquility of society is disturbed in the aftermath of
violence, and can affect the physical and mental health of society. Thus, it is important to
include the state to represent the people as a whole.

The second restorative approach Wemmers introduces is the add-on model, in
which restorative justice programs are included in the criminal justice system. Similar to
the abolitionist approach, adding restorative practices means victims are recognized and
have a place in responding to their victimization. However, unlike the abolitionist
approach, which sees crime as a private matter, the add-on model provides limited
participation for the victims and sees both the victims and society’s interest in the crime.
The victim impact statement is an example of the add-on approach in the criminal justice system, providing victims with the opportunity to give a meaningful narrative about their victimization to the court. Victim impact statements are given during the sentencing portion of the criminal justice process and are given only if victims choose to provide one, making it an additional facet of the criminal justice system. The victim impact statement illuminates how the add-on model appears to demonstrate appealing restorative qualities that provide victims with participation, but, in reality, portrays how this model fails to provide victims with an adequate role.

The victim impact statement is not a sufficient way to incorporate restorative justice into the criminal justice system because there is a prima facie concern about whether or not victim impact statements address the real problem, which we will see is recognition and acknowledgement. Victim impact statements are given during sentencing and not during the trial itself, thus only providing restorative practices to victims whose offenders have been proven guilty. The victim impact statement begins to address the harms victims endure from their lack of participation, but fails to guarantee participation for all victims. I believe that in order to successfully implement a restorative justice approach that would allow for the proper recognition for victims we must provide victims with a formal status in the criminal justice system.

The third restorative justice approach would achieve this by going beyond mere restorative practices, such as mediation or the victim impact statement, by integrating restorative values: “instead of integrating mediation or conferencing or any other restorative program into the criminal justice system, restorative values such as participation and respect for the dignity of the victim would be woven into the criminal
justice process” (Wemmers 410). In this approach, in addition to the state and the accused, victims would also have a formal role in the criminal justice system providing them with participatory rights. This does not require victims to hold equal power to the state, but instead would necessitate a formal status for the victim, enabling them to achieve the recognition they need.

An example of this third approach is the International Criminal Court (ICC) in The Hague, The Netherlands. The ICC was the first international tribunal to grant rights to victims, allowing victims to participate in criminal justice proceedings and obtain reparation through the court. Section 3 of Article 68 of the Rome Statute states,

> Where the personal interest of victims are affected, the court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court and in a manner that is not prejudiced to or inconsistent with the rights of the accused and a fair and impartial trial. (Wemmers 411)

The ICC not only integrates restorative values into their court system, but also does so in a way that respects the balance of power between the victim, the offender, and the governing body. In the ICC victims do not directly participate, but are given a legal representative to represent their interests before the court. Victims’ representatives are able to intervene and speak on their behalf, providing representatives with the ability to make the courtroom aware of the victims’ views and concerns, which are an important facet of the ICC’s criminal justice process.

Providing victims with a formal status begins to weave restorative values into the criminal justice system by allowing the victims’ views and concerns to be an important and guaranteed aspect of the criminal justice process. Wemmers argues that providing victims with recognition and a clear understanding of the criminal justice system “can
help empower victims and combat the sense of powerlessness that many victims feel during criminal proceedings” (Wemmers 412). This third approach addresses the problem at hand in a way the add-on approach cannot because the third approach provides the restorative values necessary to combat the potential harms victims can face throughout the criminal justice process. Recognition cannot be seen as an add-on approach because add-on approaches cannot always guarantee the restorative values necessary to provide the recognition victims need.

3.3. The Controversial Nature of Victim Participation

Before we can address the idea of restorative values we need to address the controversial nature of victim involvement. In her work, “Empathy, Narrative, and Victim Impact Statements” Bandes provides an in-depth look at victim impact testimonies and their role in the criminal justice process, arguing that despite the appeal of victim impact statements, which seemingly demonstrate all of the progressive and pragmatic qualities we deem valuable, they should nonetheless be suppressed. Bandes questions, “Why is it wrong to give the otherwise silenced victim a voice in the proceedings? Is it necessarily inappropriate to use compassion in one type of case but not in another?” (Bandes 363) Bandes argues that victim impact statements are narratives that need to be suppressed because they evoke emotions that she deems inappropriate in the context of criminal sentencing; “Specifically, victim impact statements appeal to hatred, the desire for undifferentiated vengeance, and even bigotry” (Bandes 365). This claim is founded on the idea that because of this desire for vengeance, a sentencer is unable to perceive the defendant’s essential humanity.
Bandes’ argument regarding the controversial role of the victim is founded upon the assumption that victims will act vengefully and hatefully, which will in turn act in blinding sentencers from seeing the humanity in the defendant. Yet, it is not clear that this is correct: In her work, “Justice From the Victim’s Perspective” Herman conducted 22 in-depth interviews with victims of violent crime, which acted in discrediting the myth of the vengeful victim. In Herman’s study informants were asked to describe in detail what they thought should be done in order to hold their perpetrators responsible for the crimes they committed.

Grace Poore, a survivor of incest, explains her experience “outing” her uncle, a minister; “Exposing him is not just about getting him fired or punishing him. It’s more about protecting the next generation. The revenge motive makes it seem like I need to lash out because I’m still bleeding, and I’m not” (Herman 591). Poore’s assertion is representative of a more general claim that the myth of the vengeful victim might be unfounded. This myth dates back to ancient times where wrongs done to a person were considered a private matter in which the victim and his family sought remedial action against the offender and his family. Codes, such as the Torah, were created to address primitive legal systems in order to make the victim whole and limit private revenge. With thousands of years of history between these primitive times and now, is it fair to still support the myth of the vengeful victim?

This myth dates back as a historic philosophical question as well, morally evaluating the human passions and their cultivation. Tracing this philosophical progression represents the ethical transformation societies made in respect to views on anger, revenge, and punishment. In *The History of England*, Hume expresses “horror at
‘barbaric’ cultures where brutal forms of revenge were tolerated” (Carus 45) and welcomes a more civilized approach where brutal revenge was deemed unacceptable. This transformation of moral views on anger and punishment could be because, as Myles Burnyeat suggests, “we today are not restricted to Homeric anger, indeed few of us might admit to ever feeling or wanting anything like what Homer presents Achilles as feeling and wanting, when he was angry” (Carus 46). It does not strike people as very natural to see an appropriate place for anger and many of us feel uneasy that a desire for revenge can ever be appropriate. The image of anger is often connected to the desire for vengeance, like Achilles in Homer, yet as Burnyeat suggests this is not the only role we can give for anger. The myth of the vengeful victim is predicated on the notion that moral sentiments, like anger, are always bad or distorting, overlooking the fact that moral sentiments can also have an educative and appropriate role.

Bandes does not provide any evidence to support the claim that victims typically demonstrate emotions that appeal to hatred. Bandes also fails to consider the idea that providing victims with a voice could also provide them with an opportunity to exercise mercy and forgiveness, which could potentially act in illuminating the offender’s humanity. In order to address the participatory role for victims we must be willing to look beyond this myth, as well as recognize that a larger role does not necessarily entail providing victims with the opportunity to vengefully punish their offenders.

4. Diagnosing the Injustice

Understanding victims’ role in the criminal justice system is critical in illuminating the unjust harms they endure throughout the criminal justice process. I believe that in attempting to maintain an objective approach, our criminal justice system
has sidelined certain emotions, causing law enforcement workers to regard victims in an emotionally neutral way, leaving their victimhood unacknowledged. Because the architecture of the criminal justice system treats victims in an emotionally neutral way, victims reasonably believe they are merely instruments of the criminal justice system, rather than persons.

Law enforcement workers often express their role to maintain an objective and unemotional approach to cases in order to uphold the rule of the law. In Erez and Laster’s interviews with law enforcement workers they noted that almost all workers stressed the importance of presenting victims in a clinical manner, free of emotionality. Yet, in the discussion regarding the harms victims experience throughout the criminal justice process, numerous victims articulated the harm suffered from the lack of sentiment in their relationships with criminal justice workers. I believe that by treating victims in an emotionally neutral manner we have eliminated certain emotions from the law, which has led to an inability to recognize a victim’s personhood in the criminal justice process.

As seen in our previous discussion, victims require acknowledgement for reparation, yet the emotionally neutral treatment of victims leaves their victimhood unacknowledged, treating victims as though they have not suffered something. In “Between Vengeance and Forgiveness”, Minow is concerned with the ability to recognize the human commonality in another person, arguing that after atrocities victims require acknowledgement. Similar to Minow, I am concerned with the criminal justice system’s ability to recognize the human commonality in victims. Cheit’s previously discussed interview sheds light on this concern, serving as an example of how when victims are
treated unemotionally they are made to feel as though they are being treated as objects, hindering their ability to gain the acknowledgment they need. Cheit articulates how hard it was to grasp the emotionally neutral treatment from law enforcement workers and how difficult it was to be treated as a “pawn” in the criminal justice system; “A lawsuit is not about emotions. This is some game I am playing here” (Herman 583). Minow argues that in order to recognize a human commonality a person must not be objectified in the process where they seek acknowledgement. Cheit’s testimony highlights the harm victims endure from being treated as an object, emphasizing the importance of Minow’s notion of a human commonality. Minow’s argument suggests that participation is at the root of the current inability to recognize this human commonality, claiming that a victim’s humanity can be acknowledged and the wrongness of their violation can be reaffirmed by holding all accountable under basic norms of human rights and including all in a process of truth-telling. Yet, victims are not formally included in a process of truth-telling in our criminal justice system, which suggests that victims are not being held under basic norms of human rights. Therefore, unless we address the architecture of the criminal justice system, which acts in facilitating the emotionally neutral treatment of victims through marginalizing certain emotions, the criminal justice system will continue to treat victims as less than human as well as fail to reaffirm the wrongness of their violation. This can only be done through restorative values because this approach aims to address the values that shape our criminal justice system. This cannot be done through an add-on approach because this approach provides additional practices, failing to address the system itself.
In order to address the architecture of the criminal justice system we must begin to incorporate emotion into the criminal justice process while still maintaining objectivity. As illustrated in Susan Bandes’ argument, I also believe emotion is an inevitable aspect of the reasoning process, thus trumping the question of whether or not emotion belongs in the law.

The law perpetuates the illusion of emotionless lawyering and judging by portraying certain “hard” emotions or emotional stances as objective and inevitable. Yet even a legal process devoid of such “soft” emotions as compassion or empathy is not emotionless; it is simply driven by other passions. (Bandes 368)

Bandes describes how mechanisms, like distancing, repressing, and isolating feelings from one’s thought processes, are emotional stances that have driven mainstream thought, yet avoid the stigma of “emotionalism”. Justice Brennan illuminates the presence emotion has in the law by describing a judge’s emotional manner as “visceral temptation to help prosecute the criminal” (Bandes 369), identifying the disconnect between an inherently emotional subconscious present in the courtroom and the mechanisms we have created to eliminate emotions from a legal context. Justice Brennan’s description of how certain emotions in the law have avoided the stigma of “emotionalism” supports the claim that emotion is an inevitable aspect of the reasoning process, and thus, the criminal justice process.

Understanding the inevitable presence of emotion in the law entails questioning what distinguishes certain emotions to acquire the stigma of “emotionalism”. Bandes claims that this stigma is reserved for “soft” emotions like compassion, empathy, caring, and mercy, which are marginalized from the mainstream legal context, whereas, reasoning and objectivity fail to truly transcend emotion, and are driven by emotional
variables so engrained in the law they appear invisible; “the characterization of some emotional variables, stances, or mechanisms as ‘emotional’ and others as ‘reasonable’ is an assertion of power—a camouflaged decision to marginalize the former and privilege the latter” (Bandes 370). Scholarship on emotion exposes this assertion of power, challenging the idea of a neutral, emotionless baseline in the criminal justice process. In this instance, our criminal justice system has prioritized the emotional variables that act in marginalizing the “emotional” mechanisms that allow for the recognition of a victims’ personhood. The discussion of marginalized and privileged emotions raises the question of which emotions deserve the most weight in the criminal justice system.

I believe that empathy, a benign emotional capacity, is missing from the criminal justice system in respect to the victim, which would allow for the recognition of a victim’s personhood. Bandes believes that empathy is problematic in a legal context, yet, in light of this claim, she asserts that empathy is desirable in only one sense: “to the extent empathy is the facility to perceive the humanity of another person, it is an unmitigated good” (Bandes 374), claiming that in this sense, empathy allows for the basic recognition that all people should be treated with basic human dignity and without empathy, people can be excluded from the human community.

Bandes dismisses the inclusion of empathy in the criminal justice system on the assumption that there is already a basic recognition of human dignity, and moving beyond this basic form of empathy is problematic. Yet the exploration of the victim’s role in the criminal justice system suggests that Bandes’ assumption is unfounded. Although I agree with Bandes that empathy can become a more problematic concept in the law, I do not believe that empathy should be eliminated from the criminal justice
system entirely. Instead, I believe that the basic form of empathy Bandes describes needs to be incorporated into the law in order to perceive a victim’s humanity. This is a matter of injustice because as Bandes suggests, by excluding this unmitigated good of basic empathy, people can be excluded from the human community.

4. Solution

I believe that the best way to incorporate empathy into the criminal justice system is to do so by utilizing Wemmers’ third approach, which would incorporate empathy by integrating restorative values into the criminal justice system. I believe that Richard Rorty’s argument for sentimental education can be worked towards by integrating restorative justice values into the criminal justice system, enabling the recognition of a victim’s humanity.

In “Human Rights, Rationality, and Sentimentality” Rorty introduces his notion of sentimental education, which grounds his assertion of human rights on sentimentality. Rorty claims that throughout history we have developed different mechanisms that enable us to believe that we are not violating human rights, yet in actuality, we are discriminating between what we think of as true humans and pseudo-humans. I will apply Rorty’s argument to my own by claiming that our criminal justice system has developed mechanisms that enable us to believe that we are not violating victims’ rights, yet, in reality, our criminal justice system has acted in discriminating against victims, in turn treating them as pseudo-humans in a legal context.

In light of this argument, one could think of the justification of the lack of victims’ rights and victim participation in the criminal justice system as parallel to Rorty’s example of “Serbs who take themselves as acting in the interest of true humanity
by purifying the world of pseudo-humanity” (Rorty 168). Rorty asserts that the Serbs’ self-image resembles a moral philosopher who aims to cleanse the world of superstition or prejudice. In this case, a cleansing would “permit us to rise above our animality by becoming, for the first time wholly rational and thus wholly human” (Rorty 168). Rorty’s example correlates to the relationship between the victim and the criminal justice system. In this relationship the state can be seen as the Serbs, or the moral philosopher. The criminal justice system aims to cleanse the legal system of prejudice in order for the criminal justice system to be wholly rational. By aspiring to this wholly rational place the state and the offender have been prioritized over the victim on the grounds that victim participation could distort the criminal justice process. Rorty argues that the notion of the moral philosopher is an example of a construction we have created in order to prioritize the rationality of some and not others, arguing that when constructions create this priority they serve to construe certain groups of individuals to be subhuman or inhuman. Thus, in an attempt to arrive at a wholly rational outcome, the exclusion of victims from the criminal justice system has led to the treatment of victims as something less than wholly human.

I believe that constructions, such as Rorty’s example, have caused our criminal justice system to inadvertently treat victims as pseudo-humans. Through an emotionally neutral state of objectivity, our criminal justice system has fostered differential treatment of people in the criminal justice process. In an effort to sideline certain emotions, this differential treatment has led to the marginalization of victims in the criminal justice process, placing them outside of the range of prioritized rationality Rorty describes. This marginalization has led the criminal justice system to remain indifferent to victim
suffering and the treatment of victims as pseudo-humans, in turn unjustly harming the victim. I do not believe that the criminal justice system is intentionally treating victims unjustly, but nonetheless, an other is being excluded in the same way Rorty is arguing.

In order to address these constructions that act in construing certain groups as less than human, Rorty advocates for a culture of global human rights by introducing sentimental education. Sentimental education involves an application of a sentimental lens necessary to perceive victims as within the same range of rationality as our own. This sentimental lens speaks to the heart of Rorty’s argument, which argues that if we truly want universal acceptance and respect for human rights, then we should not try and argue for them, but instead should influence people’s sentiments and emotions. Rorty believes the best way to appeal to emotions is through telling sentimental stories, such as *Uncle Tom’s Cabin*, which causes a reader to sympathize with people whose rights have been violated. Sentimental education invites the audience to envision themselves in the victim’s shoes; “The victim, who may be of another class, race, or rationality and who seems so very different that he or she initially isn’t even considered to be of the same species and therefore cannot possibly claim to enjoy the same rights, is transformed by the story into a living human being” (Spagnoli 1). Applying sentimental education to our discussion surrounding the criminal justice system would work towards breaking down the mechanisms that enable victims to be seen as quasi-human.

A conceptual shift regarding the value of sentiments in a legal context begins with the rearticulation of objectivity. In order for victims to be legitimately considered in the criminal justice process, values must be engrained in the criminal justice system that acknowledge the victim as a facet of the process but do not act in distorting the integrity
of the case. The empathy evoked from sentimental education gives the victim a face, or the personhood necessary to be seen as worthy of the same human rights. Sentimental education convinces and motivates people to accept others under the same realm of humanity by integrating the empathy necessary to recognize that another person’s suffering is akin to their own.

Sentimental education will mitigate the harms expressed by victims by addressing their differential treatment in the criminal justice process, as well as address my concerns for victim recognition. First, sentimental education could act in addressing the harm articulated by victims who felt that law enforcement workers were insensitive. Law enforcement workers often remain “unemotional” throughout the criminal justice process in order to remain objective. Sentimental education would provide law enforcement workers with the understanding that emotion does not necessarily mean that their work is no longer objective. A different emotional approach would address the harm articulated by victims like Cloutier, who describe the lack of sensitivity from law enforcement workers to contribute to additional harm endured in the aftermath of their victimization.

In the conclusion of her work Goodrum proposes various changes to law enforcement procedure that I believe are necessitated by a sentimental lens. In respect to the first conflict regarding bereaved victims, Goodrum argues that there can be certain steps taken in order to empathetically explain procedures to bereaved victims. This conflict regards bereaved victims and their struggle with the opportunity to see and touch their loved ones’ body in conjunction with law enforcement workers’ concern with preserving a crime scene. Victims articulate a deep emotional desire to see and identify their loved one’s body in order to validate the reality of their victimization. Goodrum
proposes an empathetic explanation of why this is not possible and instead suggests potentially providing victims with a photograph of the deceased’s body in order for them to identify their loved one. This provides a sentimental approach to the first conflict, which acts in respecting the dignity of the victim as well as providing the victim with participation. These are two restorative values that work towards addressing the harms victims endure throughout the criminal justice process which hinder reparation, the third restorative value.

Goodrum suggests that a more radical change is necessary to address bereaved victims’ second conflict regarding the flow of information. This radical change would consider making bereaved victims consultants in an investigation once they have been cleared as a suspect. Goodrum states that providing victims with a larger participatory role would invite bereaved victims to give an interview to the police, receive regular updates regarding the investigation, as well as made to feel as though the police are taking their concerns seriously. I believe that this suggestion would not appear so radical through a sentimental lens because this lens would enable us to understand different victims’ needs and recognize that victims are not rationally inferior to others in the criminal justice process. Implementing empathy and restorative values into the criminal justice system is possible through the application of sentimental education, and until this application occurs, the criminal justice system will not be able to address victims’ needs or respond to the question of what the legal system ought to provide for them.

**Conclusion**

The obvious dissatisfaction crime victims have with the criminal justice system, alongside the research of crime victims’ experiences, suggests that victims can be
unjustly harmed throughout the criminal justice process. In an attempt to remain just, our criminal justice system has inadvertently marginalized victims, in turn treating them as less rational, and thus less human. Until victims are recognized as wholly human, which can be achieved by a larger participatory role, the criminal justice system cannot avoid unjustly harming victims. In light of this conclusion, in conjunction with careful considerations of victims’ experiences in the criminal justice system, the earlier question of what victims need and what the criminal justice system ought to provide becomes especially clear.

Victims still need to achieve the original goals of the victims’ movement—to address the insufficient status, power, and influence of the victim. Integrating restorative values using Wemmers’ third restorative justice approach would provide the means necessary to address these original goals, but in order for this approach to be successfully integrated into the criminal justice system, we must first reconsider the value of sentiments in a legal context. Until this occurs the criminal justice system will continue to remain indifferent to victims’ suffering and victims will continue to be treated as something less than human. The lack of sentiments in the criminal justice system is deeply rooted in the presence of power structures, legal rules, and cultural practices, yet sentiments prove to have both an educative and appropriate role in a legal context. Sentimental education would provide what is necessary to reframe the values ingrained in the criminal justice system as well as necessitate the conceptual shift of the meaning of objectivity by embedding a willingness to listen into the foundation of the criminal justice system.
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