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## Listening to Victims

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## LISTENING TO VICTIMS

*Jayne W. Barnard\**

[Bernie Madoff's] crimes were extraordinarily evil, and . . . this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but . . . is instead, as we have heard, one that takes a staggering human toll.<sup>1</sup>

On Monday, June 29, 2009, I was privileged to be in Judge Denny Chin's courtroom to observe the sentencing of Bernard L. Madoff. I had requested the opportunity to be present at this historic event, based on some earlier academic work I had done advocating liberalization of the rules regarding the use of victim impact statements (also known as victim allocution) at sentencing in financial crime cases.<sup>2</sup>

I had never (nor have I since) met Judge Chin, and there was no reason for him to grant my request. He certainly must have known that the demand for seats in the courtroom would exceed the supply. Indeed, it was probably Judge Chin who authorized the creation of two video-overflow rooms and a press room elsewhere in the courthouse on the day of Madoff's sentencing.<sup>3</sup> I was therefore deeply honored and grateful when Judge Chin extended an invitation to me to be one of his guests.

Judge Chin might not have anticipated, however, the magnitude of the media encampment that set up outside the Moynihan Federal Building on the morning of Madoff's sentencing. When I arrived at the courthouse before 7:00 a.m., as pre-arranged with the judge's clerk, there were already long lines of people—both victims and gawkers—who wanted to see Bernie Madoff sentenced. Reporters from media outlets from as far away as Australia were working the crowds, trying to elicit a prediction, a curse, a

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\* Cutler Professor of Law and Kelly Professor of Teaching Excellence, William & Mary Law School. Thanks to Bradley Mainguy, class of 2011, for his research assistance on this Essay. Thanks also to Judge Denny Chin and his clerk, Gina Castellano, for affording me the opportunity to attend the Madoff sentencing.

1. Transcript of Sentencing Hearing at 47, *United States v. Madoff* (June 29, 2009) (09 CR 213) (comments of Judge Denny Chin), available at <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf>.

2. Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

3. Judge Chin seems to have been quite sensitive to the concerns and desires of Madoff's victims throughout the criminal proceedings. In a profile of him in his alumni magazine, the Princeton Alumni Weekly, the author mentioned that Judge Chin had placed Madoff in custody as soon as he pleaded guilty. "'I didn't like that [Madoff] was spending tens of thousands of dollars for private security when that money could be going to victims,' the judge said." Spencer Gaffney, *Judge Helps To Revisit Historic Civil-Liberties Case*, PRINCETON ALUMNI WKLY., Oct. 13, 2010, at 17.

first-hand account of a victim's betrayal, a new insight into how Madoff operated, a tearful rebuke, or at least a useable quotation from *someone*. Media vans and cameramen were scattered all over the block.<sup>4</sup>

While the atmosphere outside the courthouse was electric, the process of getting from the media scrum on the streets and sidewalks to the quiet of the courthouse was tedious. The lines of victims and would-be spectators inched along. The security personnel inside the courthouse seemed perturbed and impatient at having to deal with so many visitors so early in the morning.

The courtroom itself was both inviting (with rich polished wood) and imposing (with a high ceiling and elaborate bench). The presence of numerous U.S. Marshals kept the chatter in the courtroom to a minimum. Ahead of the bar, the left side of the courtroom was filled with representatives from the U.S. Attorney's office, some invited guests and clerks of the Judge, and several people who did not want to be identified, but were from the office of the Trustee handling the liquidation of Bernard L. Madoff Investment Securities, Inc. (BLMIS).<sup>5</sup> The right side of the courtroom was less well populated. The victims who had elected to present victim allocution were assembled with their family members near the jury box. Counsel table for the defense was empty until minutes before the proceeding began.

As the benches in the back of the courtroom filled up, several U.S. Marshals stood in front of the bar looking backward, somewhat menacingly, toward the assembled spectators at the back of the courtroom, most of whom were Madoff's victims. It seemed foolish to imagine that these well-dressed spectators would rise up and advance on Madoff when he finally arrived. The conversation among the spectators focused little on Madoff, in fact, and largely on what the Inspector General's report would say about the Securities and Exchange Commission's failures in investigating Madoff over a twenty-year period.<sup>6</sup> Several of the victims

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4. Judge Chin described the media invasion in testimony before the United States Sentencing Commission a week after the Madoff sentencing.

The sentencing was scheduled for a Monday, Monday morning, and news trucks started jockeying for parking spots outside the courthouse over the weekend.

By early Sunday afternoon, there were fifteen news trucks up and down Worth Street [waiting for the sentencing]. [By 6 a.m. Monday,] the street was filled with victims and members of the media waiting to get into the Courthouse for the proceedings scheduled for 10:00.

Statement of Denny Chin, U.S. District Judge, Southern District of New York, before the U.S. Sentencing Commission, at 126-27 (July 9, 2009), available at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20090709-10/Public\\_Hearing\\_Transcript.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf).

5. The Trustee, Irving Picard, was already widely reviled by many of the Madoff victims. After the sentencing proceeding concluded, many of the victims assembled outside for a rally in Foley Square with placards, bullhorns, and slogans condemning Picard and the SEC.

6. The Inspector General's Report was finally published at the end of August. See U.S. SEC. & EXCH. COMM'N, INVESTIGATION OF THE FAILURE OF THE SEC TO UNCOVER BERNARD

speculated on whether they would be able to recover any of their losses by suing the SEC.<sup>7</sup>

When, shortly before 10:00 a.m., two of the Marshals at the front of the courtroom approached the door at the right of the judge's bench, few in the back of the courtroom realized that Madoff was about to enter the room. There was no fanfare and no heads up. Judge Chin was not yet on the bench.

Nevertheless, when Bernie Madoff shuffled through the door, his suit hanging shapelessly and his hair looking lank, every eye in the courtroom was on him. Madoff approached the defense table and acknowledged his lawyers. He sipped a little water and sat down at the table. The two U.S. Marshals stood closely behind Madoff. Madoff looked at that moment like a broken man.

A few minutes later, Judge Chin entered the courtroom. Without any further theatrics, the sentencing proceeding began.<sup>8</sup> Within ninety minutes, the proceeding was concluded. The spectators offered a muted cheer, then swarmed out of the courtroom to pick up their cellphones and tell their stories to the reporters assembled in the street. Judge Chin and his clerks retreated into the anonymity of his chambers.

Surprisingly, perhaps, given the shambling and tentative way he had entered the courtroom, Bernie Madoff then straightened himself up and strode through the door that led back to his cell. He looked, once again, like the business leader he once had been. He walked faster than the Marshals who were escorting him. Unlike Judge Chin, Madoff's job for the day was done.

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One of the most memorable segments of the Madoff sentencing was the victim allocation of nine of Madoff's victims. The victims' presentation took approximately one hour. This Essay examines several aspects of the victim allocation at the Madoff sentencing: (1) a brief review of the legal origins and purposes of victim allocation in economic crime cases, (2) the problems raised by the self-selection of those individuals who wish to provide victim allocation, (3) the appropriate role of emotion in victim allocation and the challenge to judges in curbing inappropriate displays of emotion, and (4) the need to acknowledge victims' experiences and concerns in crafting an appropriate sentence.

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MADOFF'S PONZI SCHEME—PUBLIC VERSION (2009), *available at* <http://www.sec.gov/news/studies/2009/oig-509.pdf>.

7. Many such lawsuits have since been filed.

8. The proceeding began with prepared remarks by Judge Chin followed by some preliminary skirmishing among the lawyers; then the victim allocation; a response by Madoff's lawyer, Ira Sorkin; allocation by Madoff, and rebuttal by the U.S. Attorney's Office. Finally, Judge Chin announced his sentencing ruling from a prepared document. Transcript of Sentencing Hearing, *supra* note 1.

## THE ORIGINS AND PURPOSES OF VICTIM ALLOCATION

The right of victims of economic crimes to be heard in open court before their victimizer is sentenced may be traced to the article *Allocation for Victims of Economic Crimes*, published in 2001.<sup>9</sup> The proposal in that article—to permit victim allocation in all federal felony cases, including economic crime cases—was ultimately included in the Crime Victims' Rights Act of 2004 (CVRA).<sup>10</sup> The CVRA gave to victims of all federal crimes several specific statutory rights, including the right to be “reasonably heard” in connection with the defendant’s sentencing.<sup>11</sup>

The right to be given the opportunity to provide victim allocation as provided by the CVRA was reinforced in the decision of the U.S. Court of Appeals for the Ninth Circuit in *Kenna v. District Court (Kenna I)*.<sup>12</sup> In that case, one of scores of victims of an investment fraud scheme had already submitted a written victim impact statement and had previously testified at the sentencing hearing of the key defendant’s father. Still, the victim insisted on being heard once again at the sentencing hearing for the key defendant. The court declined to hear him again, stating that the court had read the victim impact statements, recalled his earlier testimony, and “there was nothing more to say that would have a further impact [on the court’s decision].”<sup>13</sup>

The victim sought relief in the Court of Appeals. In the ensuing decision, the court reaffirmed that victims are entitled to be “reasonably heard” at sentencing, which does not necessarily mean that all victims may speak or that any victim may speak for an unlimited period of time, or repetitively. Limits on excessive victim allocation in multiple-victim cases are left to the discretion of the district court. Importantly, the right to provide victim allocation does not include the right to present evidence or legal argument.<sup>14</sup>

Some critics have suggested that the CVRA lacks the tools to curb abuses of victim allocation.<sup>15</sup> These critics raise concerns about both judicial economy and the constitutional protections which should be afforded defendants. Still, victim allocation in some form is now a commonplace component of the sentencing procedure utilized in economic crime cases. It is no longer an exclusive privilege of the victims of violent crimes.

There are three important reasons for permitting victim allocation in economic crime cases:

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9. *Supra* note 2.

10. Pub. L. No. 108-405, 118 Stat. 2260 (codified at 18 U.S.C. § 3771 (2006)).

11. Victims have the right “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” 18 U.S.C. § 3771(a)(4).

12. 435 F.3d 1011 (9th Cir. 2006).

13. Amy Baron-Evans, *Traps for the Unwary Under the Crime Victim’s Rights Act: Lessons from the Kenna Cases*, 19 FED. SENT’G REP. 49, 49 (2006).

14. *Kenna I*, 435 F.3d at 1014–15 & n.2.

15. See, e.g., Julie Kaster, Note, *The Voices of Victims: Debating the Appropriate Role of Fraud Victim Allocation Under the Crime Victims’ Rights Act*, 94 MINN. L. REV. 1682 (2010).

(1) [it permits] the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed; (2) [it requires] defendants to confront—in person and not just on paper—the human consequences of their illegal conduct; and (3) [it compels] courts to fully account in the sentencing process for the serious societal harms—harms that go well beyond issues of money—that economic crimes often impose.<sup>16</sup>

Squeezing the losses and pain of individual victims into one or more of these categories sometimes asks more of victims than victims can bear.

#### THE PROBLEM OF SELF-SELECTION

There were thousands of victims of Bernie Madoff's Ponzi scheme.<sup>17</sup> Some of these victims were so-called direct investors—that is, they had placed their money directly with Bernard L. Madoff Investment Securities. Others were so-called indirect investors—they had entrusted their money to fund managers or investment advisers who, in turn, had invested their clients' funds with BLMIS. Regardless of the legal relationship between the investors and Madoff (though these relationships have significant legal consequences for investor recovery under the Securities Investors Protection Act), all of those investors who lost money to Madoff, directly or indirectly, considered themselves "victims."

Under the CVRA, a victim is one who is "directly and proximately harmed" by the federal crime committed by the defendant.<sup>18</sup> Presumably, victims include institutional as well as individual victims. So, let us assume that all of Madoff's victims, both direct and indirect, and institutional and individual, were victims for purposes of the CVRA. But for this Essay, let us exclude both the institutional investors and the indirect investors. Let us further exclude the many duplicate accounts at BLMIS that made the list of victims look even longer than it was. There were still thousands of documented direct investors in Madoff's Ponzi scheme.<sup>19</sup> Of that number only 113 consented to have their statements submitted to Judge Chin and made part of the public record.<sup>20</sup> Only a few hundred of them, at best, showed up at the courthouse to attend Madoff's sentencing. And only a handful of them—nine in total—actually stood up to provide victim allocution.<sup>21</sup> These victims presented their statements; they expressed their sadness, befuddlement, or fury. Many of them were interviewed on TV both before and after the sentencing proceeding.

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16. Barnard, *supra* note 2, at 41.

17. See Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernard Madoff*, 2009 MICH. ST. L. REV. 947, 968 (noting that 15,870 claimants filed applications for restitution).

18. *United States v. Sharp*, 463 F. Supp. 2d 556, 563 (E.D. Va. 2006) (quoting 18 U.S.C. § 3771(e) (2006)).

19. See Hurt, *supra* note 17, at 968 (during the period 2000–2008, BLMIS had 8,094 active customer accounts).

20. *Id.* at 960–61.

21. Two of the victims who had requested an opportunity to speak later withdrew. And, where both a husband and wife requested to speak, Judge Chin ruled that only one person per household could speak.

Who were these victims?

Dominic Ambrosino is a 49-year-old retired New York City Correctional Officer. He was accompanied in court by his wife, Ronnie Sue, who now spends her days as a full-time organizer and lobbyist for Madoff victims. He told Judge Chin how he and his wife had sold their house and entrusted the proceeds to Madoff while they traveled around the country in a recreational vehicle.

We had ideas of traveling the country. It all stopped abruptly on December 11. As a result, we are left with no permanent house, a depreciating motor home, we are upside down on the loan and an income from my pension that is our life. This pension used to be perceived as spending money before December 11 and now, although it doesn't cover our monthly expenses, we rely on it fully. It is all we have.<sup>22</sup>

Maureen Ebel is a 61-year-old widow who has been featured on the cover of *New York Magazine* as the "face" of Madoff's many victims.<sup>23</sup> She memorably told Judge Chin of her physician husband's hard work.

It pains me so much to remember my husband getting up in the middle of the night. He was a very fine physician. He would get up in the middle of the night year after year in all kinds of weather to go to the hospital to save someone's life in rain, ice, and snow.

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He would save someone's life so that Bernie Madoff could buy his wife another party rock.<sup>24</sup>

Tom FitzMaurice, 63, was accompanied to court by his wife, Marcia. He did not speak much about himself except to say "my wife and I are not millionaires. [Madoff] has taken our entire life savings. . . . His was a violent crime without the use of a tangible weapon."<sup>25</sup>

Carla Hirschhorn is a physical therapist and her husband owns a small business.

We lost our entire life savings. This money was being used to provide our children with a college education they have worked so hard to deserve and provide us with savings for a secure retirement. . . . We have no idea how we will continue to pay for college without it being a terrible financial burden and worry on all of us.<sup>26</sup>

Sharon Lissauer was a media favorite in the days leading up to the sentencing proceeding. In her gauzy dresses and breathy voice, the former model was eager to tell her story to anyone with a microphone. She told one reporter that she had lost her life savings and an inheritance from her mother. "I can't sleep," she said. "I'm always crying. I feel almost like

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22. Transcript of Sentencing Hearing, *supra* note 1, at 6.

23. See Robert Kolker, *The Madoff Exiles*, N.Y. MAG., Oct. 5, 2009, at 36.

24. Transcript of Sentencing Hearing, *supra* note 1, at 9. The court reporter heard Ebel's phrase as "party rock," but in fact she said "Cartier watch."

25. *Id.* at 12–13.

26. *Id.* at 15–16.

I've been raped."<sup>27</sup> She warned Judge Chin "I am very emotional, so please bear with me if I break down into tears."<sup>28</sup> She continued, "[m]y life and my future have been ruined."<sup>29</sup>

Burt Ross is a lawyer and real estate developer who appeared in court with his wife, Joan. Like Lissauer, Ross had also been a media favorite in the days leading up to Madoff's sentencing. The former Mayor of Fort Lee, New Jersey, Ross gave many interviews and wrote a series of columns about his experiences for *The Daily Beast*.<sup>30</sup> He talked to Judge Chin about the impact of Madoff's crimes on the Jewish community.<sup>31</sup> He also invoked Dante's *Divine Comedy* to describe the suitable punishment for people who betray their friends.<sup>32</sup>

Michael Schwartz, 33, spoke on behalf of his parents, who had invested their trust fund with Madoff.

Your Honor, part of the trust fund wasn't set aside for a house in the Hamptons, a large yacht or box seat [sic] to the Mets. No, part of that money was set aside to take care of my twin brother who is mentally disabled, who at 33, he lives at home with my parents and will need care and supervision for the rest of his life.<sup>33</sup>

Miriam Siegman is a 65-year-old retiree who lives alone. She spent her life working for non-profit organizations and lost her retirement savings to Madoff. Like Lissauer and Ross, Siegman was a regular fixture in the press. She told Judge Chin she was living on food stamps. "At the end of the month, sometimes I scavenge in dumpsters. I cannot afford new eyeglasses. I long to go to a concert, but I never do. Sometimes, my heartbeats [sic] erratically for lack of medication when I cannot pay for it."<sup>34</sup>

Sheryl Weinstein, the last victim to speak, was the Chief Financial Officer of Hadassah when she invested the organization's funds, as well as her own, with Madoff. She said her allocution was particularly important because she was not an anonymous victim but had known Madoff

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27. Walter Hamilton, "Sorry" Is Not Enough, Madoff's Victims Say, L.A. TIMES, Mar. 13, 2009, at A1.

28. Transcript of Sentencing Hearing, *supra* note 1, at 17.

29. *Id.*

30. Burt Ross, *How the Government Screwed Madoff Victims Again*, THE DAILY BEAST (Mar. 8, 2009, 07:07 AM), <http://www.thedailybeast.com/blogs-and-stories/2009-03-08/bernie-madoff-and-the-phantom-tax-problem/>; Burt Ross, *My \$500,000 Madoff Check*, THE DAILY BEAST (May 22, 2009, 12:52 PM), <http://www.thedailybeast.com/blogs-and-stories/2009-05-22/my-500000-madoff-check/>; Burt Ross, *Stop Hating on Madoff Victims*, THE DAILY BEAST (Apr. 18, 2009, 7:03 AM), <http://www.thedailybeast.com/blogs-and-stories/2009-04-18/stop-hating-on-madoff-victims/>; Burt Ross, *What I'd Like To Tell Bernie in Court*, THE DAILY BEAST (Mar. 12, 2009, 12:19 PM), <http://www.thedailybeast.com/blogs-and-stories/2009-03-12/what-id-like-to-tell-bernie-in-court/>.

31. Transcript of Sentencing Hearing, *supra* note 1, at 19–20.

32. *Id.* at 20–21.

33. *Id.* at 21–22.

34. *Id.* at 23.



personally for more than twenty years.<sup>35</sup> In fact, Weinstein had been Madoff's lover for several of those years, an experience she revealed and exploited in a book she published after the sentencing proceeding was completed.<sup>36</sup>

Needless to say, this grab bag of victims was by no means representative of the wider universe of Madoff victims, many of whom were wealthy and diversified enough not to be destroyed by their victimization by Madoff and many of whom were too old or too poor to travel to New York. The victims who provided allocution in the Madoff case were not hand-picked and choreographed by the U.S. Attorney's Office like the victims who provided allocution in the Oklahoma City bombing case or the Zacarias Moussaoui case.<sup>37</sup> Instead, they volunteered to speak and were motivated by who knows what? Narcissism, boredom, a chance to be on CNN? One was an out-of-work model whose bookings had dried up. One was a politician who loved the sound of his own voice. One was hoping to create a scene for her soon-to-be-published kiss-and-tell book.

Still, the presence of so many seemingly "normal" victims was fortuitous and helped transform the image of Madoff's victims from the wealthy Euro set or the tanned and toned members of the Palm Beach Country Club to hard-working prison guards and physical therapists. This transformation helped humanize the Madoff victim class. It also helped set the stage for Judge Chin's sentencing opinion.<sup>38</sup>

Here is the problem, though. When victim allocution is the product of an open casting call—when anyone and everyone who has something to say is invited to speak, the sentencing process may be turned into a sideshow of grievances, tics, and rants. That it wasn't in the Madoff case is a product of Judge Chin's sober management of his courtroom, his admonitions to stick to the business at hand,<sup>39</sup> and the general self-control of most of the victims who chose to show up. In multiple victim cases, however, it makes far more sense for the U.S. Attorney's office to play an active role in orchestrating victim allocution. A theme, a narrative arc, some particularly telling anecdotes, and above all, some self-discipline, would better serve the goals of victim allocution than having a free-for-all. I would say with respect to Madoff's victims, Judge Chin got lucky.

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35. E-mail from Sheryl Weinstein, Chief Financial Officer, Hadassah, to Wendy Olsen, Victim/Witness Coordinator, U.S. Attorney's Office (June 1, 2009, 03:56 EST).

36. See generally SHERYL WEINSTEIN, MADOFF'S OTHER SECRET: LOVE, MONEY, BERNIE, AND ME (2009).

37. See Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT'G REP. 5, 6 (describing the carefully-selected victims who provided allocution at the sentencing phase of these trials).

38. See *infra* notes 48–54 and accompanying text.

39. For example, when victims started complaining about the shortcomings of the Securities and Exchange Commission or Securities Investor Protection Corporation, Judge Chin reminded them that "this is not the time to criticize the agencies. That is not before me. What is before me is what sentence to impose, so if you would address that, please." Transcript of Sentencing Hearing, *supra* note 1, at 11.

## THE PROBLEM OF EMOTION

Often, victims who provide allocution at the sentencing of their victimizers find themselves crying, or shouting, or rising up out of their seats. This behavior has often been seen when victims provide allocution in cases of violent crimes or capital crimes. It can also be seen when victims provide allocution in economic crime cases.

What is the problem with emotional allocution? After all, the sentencing judge, not an untrained jury, is the audience for victim allocution. The judge should be able, as in other aspects of her work, to insulate herself from the most wrenching of the victims' emotional expressions. She also has available a number of tools—time limits, the advance exclusion of certain subjects, confining the victims' comments to pre-screened written statements—that can keep a lid on victims' emotional outbursts.<sup>40</sup>

Still, the kind of naked emotion often seen in victim allocution—the finger pointing, the name-calling, the raining down of curses—can lead, as one federal judge suggested, to “some kind of lynching.”<sup>41</sup> In the Madoff case, for example, the victims called Madoff a “psychopath,” an “evil lowlife,” and “the most despised person living in the United States today.”<sup>42</sup> Several of the victims cried; all of them urged that Madoff should die in prison. Let “his jail cell be his coffin,” said one of the victims.<sup>43</sup>

Madoff, of course, was entitled to his own allocution. He began by speaking directly to Judge Chin.

I live in a tormented state now knowing of all the pain and suffering that I have created. I have left a legacy of shame, as some of my victims have pointed out, to my family and my grandchildren. That's something I will live with for the rest of my life.<sup>44</sup>

Then, after keeping his back to his victims throughout their presentations and his own allocution, Madoff finally turned and addressed his victims directly: “I am sorry,” he said. “I know that doesn't help you.”<sup>45</sup>

Once again, there is nothing to fault in the specifics of the Madoff sentencing. Judge Chin, known for his insistence on decorum,<sup>46</sup> maintained an appropriate tone in the courtroom throughout the sentencing proceeding. He was courteous to Madoff and rigorous with the victims.<sup>47</sup> The participants' emotions, though always on display, never got out of hand.

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40. See Barnard, *supra* note 2, at 70–71.

41. Tom Kenworthy & Lois Romano, *Death-Penalty Testimony Limited; Judge Seeks to Prevent “Lynching,”* CHI. SUN-TIMES, June 4, 1997, at 33 (quoting Judge Richard Matsch, who presided over the Oklahoma City bombing trials).

42. Transcript of Sentencing Hearing, *supra* note 1, at 9, 13, 20.

43. *Id.* at 22.

44. *Id.* at 37.

45. *Id.* at 38.

46. See Nicholas Varchaver, James Bandler & Doris Burke, *The Man Who Gave Madoff the Max*, CNNMONEY.COM (June 29, 2009), [http://money.cnn.com/2009/06/25/magazines/fortune/madoff\\_judge\\_denny\\_chin.fortune/index.htm](http://money.cnn.com/2009/06/25/magazines/fortune/madoff_judge_denny_chin.fortune/index.htm) (noting that Judge Chin “is not a stickler for anything, except maybe decorum”).

47. See *id.*

The risk remains, however, that, when victims gather to provide allocution, there will be a cascade of emotions. This is especially true when the victims have not been pre-screened, rehearsed, or had the opportunity to purge themselves of some of their anger. Class and upbringing plays a role in this scenario. Insofar as all of the Madoff victims who provided allocution were well-educated, well-spoken, and generally well-controlled, I would say, once again, that Judge Chin got lucky.

THE NEED TO CONSIDER VICTIMS' NEEDS AND CONCERNS IN  
DETERMINING THE CORRECT SENTENCE

Judge Chin was at his best at the end of the sentencing proceeding when he specifically acknowledged the Madoff victims' stories and addressed the depth of the victims' suffering.

In an example of "active listening," Judge Chin played back some of the victims' stories and used them in support of his decision to sentence Madoff to 1,800 months in prison.<sup>48</sup> He specifically rejected the defense characterization of the victims as a "mob."<sup>49</sup> He recognized that the harm to the victims involved more than losing their money.<sup>50</sup> In so doing, he validated the legitimacy and complexity of fraud victims' concerns.

Judge Chin also recognized the need in sentencing not only to provide for the traditional values of retribution and deterrence. He expressly recognized an additional need to provide some "symbolism" for victims. "[S]ymbolism is important," he said.<sup>51</sup> "A substantial sentence, the knowledge that Mr. Madoff has been punished to the fullest extent of the law, may, in some small measure, help these victims in their healing process."<sup>52</sup>

Judge Chin recognized that Madoff's fraud had touched some thousands of victims.<sup>53</sup> Importantly, he personalized these victims in the text of his ruling:

[Madoff's] victims include individuals from all walks of life. The victims include charities, both large and small, as well as academic institutions, pension funds, and other entities. Mr. Madoff's very personal betrayal struck at the rich and the not-so-rich, the elderly living on retirement funds and social security, middle class folks trying to put their kids

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48. Transcript of Sentencing Hearing, *supra* note 1, at 48 ("I was particularly struck by one story that I read in the letters. . . . She will have to sell her home, and she will not be able to keep her promise to help her granddaughter pay for college.").

49. *Id.* at 42 ("Despite all the emotion in air, I do not agree with the suggestion that victims and others are seeking mob vengeance. The fact that many have sounded similar themes does not mean that they are acting together as a mob.").

50. *Id.* at 44 ("[T]his is not just a matter of money. The breach of trust was massive. . . . As the victims' letters and e-mails demonstrate, as the statements today demonstrate, investors made important life decisions based on [Madoff's] fictitious account statements—when to retire, how to care for elderly parents, whether to buy a car or sell a house, how to save for their children's college tuition.").

51. *Id.* at 47.

52. *Id.* at 49.

53. *Id.* at 43.

through college, and ordinary people who worked hard to save their money and who thought they were investing it safely, for themselves and their families.<sup>54</sup>

By describing Madoff's victims in this personal, empathic way, Judge Chin was able to put a human face—his own—on an otherwise mechanical and disembodied process—the application of the Sentencing Guidelines. A week later, Judge Chin had the opportunity to reflect on his experience:

In the days since [June 29], the sentence I imposed has been dissected and debated both in the popular press and the academic media.

I think the discussion has been healthy: What are the goals of punishment? Did the sentence further those goals? Should helping victims heal be a goal of punishment? Is a financial crime such as securities fraud really evil?

....

Is there any point to a sentence of years far longer than a defendant is expected to live? Is such a sentence merely pandering to the public?<sup>55</sup>

These questions will outlive the memory of a brief, though powerful, sentencing proceeding in the summer of 2009. They will probably even outlive the man at the center of the inquiry: Bernie Madoff. Judge Chin, in his new role as a Judge of the United States Court of Appeals for the Second Circuit, will have ample opportunity to consider these questions further.

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54. *Id.* at 47–48.

55. *See* Statement of Denny Chin, *supra* note 4, at 127.