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Citation: Tiarks, Elizabeth (2019) Restorative Justice, Consistency and Proportionality: Examining the Trade-off. Criminal Justice Ethics, 38 (2). pp. 103-122. ISSN 0731-129X

Published by: Taylor & Francis

URL: https://doi.org/10.1080/0731129X.2019.1638597 <https://doi.org/10.1080/0731129X.2019.1638597>

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Restorative Justice, Consistency and Proportionality: examining the trade-off

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Restorative justice conferences which operate as sentencing mechanisms involve the making of a trade-off. This is between empowering lay participants to make their own decisions, and the requirements of consistency and proportionality, which are established principles of sentencing. In current restorative justice practice, this trade-off tends to be made more in favour of consistency and proportionality, at the expense of the empowerment of lay participants.

Empowerment is central to key benefits of restorative justice, such as reducing recidivism and increasing victim satisfaction. However, its importance to the effectiveness of restorative justice is not always properly acknowledged. In addition to this, there are both conceptual and practical problems with the principles of consistency and proportionality (particularly in the way that they are presented when considered in relation to restorative justice) which are often overlooked. As a result, the tendency is for assumptions to be made about the necessary supremacy of these principles over empowerment.

This paper urges more acknowledgement of the importance of empowerment in restorative justice, together with a greater appreciation of the problems with consistency and proportionality, with a view to challenging assumptions about the way that the trade-off must be made.

Keywords: sentencing; punishment; restorative justice; proportionality; consistency; empowerment.

Restorative Justice and the importance of empowerment

A trade-off occurs in restorative justice ("RJ") conferencing which is used to help determine sentence. This is between the empowerment of lay participants, a key goal for RJ, and the established sentencing principles of proportionality and consistency. Insufficient attention has been paid to the problems with proportionality and consistency and this has led to state-run RJ tending to undermine empowerment in favour of these principles. The trade-off is thus currently made without full understanding of proportionality and consistency and this has resulted in the favouring of these principles at the expense of empowerment.

RJ has become widespread in many areas, including criminal justice. The focus here is on state-run RJ conferencing[1] when used post-conviction as an alternative sentencing mechanism. Such RJ conferences are used in various jurisdictions, including New Zealand and Northern Ireland (discussed in more detail below). These types of RJ conferences draw on Tony Marshall's definition: "restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future".[2] This emphasises the empowerment of lay individuals as key decision-makers in the process.

A RJ conference takes place once guilt has been accepted by the offender and only if the parties voluntarily agree to participate. It brings together the victim, offender and others affected by the offence, including community and family members. The conference is facilitated by a trained coordinator who ensures that everybody has an opportunity to speak about the offence and the circumstances surrounding the offending behaviour. The

conference operates as a sentencing mechanism: participants can agree on what the offender should be subject to as a result of the offending behaviour. The agreement must be consensual, with all relevant parties, including the victim and offender, in agreement for this plan to be finalised.[3]

Unlike traditional sentencing, RJ lets lay participants act as key decision-makers. This reflects debates about the ownership of justice and the role of the state in the resolution of conflicts which informed the development of RJ. For example, Nils Christie argues that the state tends to "steal" the conflict from stakeholders - the victim, offender and affected community - and that this should be restored to them. He highlights the importance of those most affected retaining control of decision-making, and downplays the significance of the content of the decision:

> Except for execution, castration or incarceration for life, no measure has a proven minimum efficiency compared to any other measure. We might as well react to crime according to what closely involved parties find is just and in accordance with general values in society.[4]

Whilst Christie's work did not expressly address RJ, it has influenced RJ theorists, including Barton,[5] whose "empowerment model" maintains that the strength of RJ is its ability to engage key stakeholders in decision-making rather than pursuing a particular outcome. Like Christie, Barton holds that a fundamental problem with the current criminal justice system is its disempowerment of key stakeholders[6] and the most critical feature of RJ

is its ability to address this problem and empower stakeholders "who are best placed to address *both* the causes *and* the consequences of the unacceptable behaviour in question".[7]

Similarly, Dzur and Olson argue that the traditional criminal justice process leads to the way the offence is dealt with becoming "more abstracted, more alienated from the actual experiences of victim, offender, and community"[8] and have argued for something akin to Christie's restoration of the conflict to the stakeholders. In terms of who "stakeholders" are, the well-known model proposed by McCold and Wachtel divides participants into direct and indirect stakeholders.[9] Victims, offenders and family members are direct stakeholders; whereas community members and wider society are indirect stakeholders. Whilst indirect stakeholders should support RJ processes, direct stakeholders should determine the outcome of the case: "[t]hese indirect stakeholders have a responsibility to support and facilitate processes in which the direct stakeholders determine for themselves the outcome of the case".[10] This has implications for the role of the state in relation to RJ, which will be discussed further, below.

The importance of direct stakeholders having control in determining the outcome is highlighted in the empowerment theory proposed by O'Mahony and Doak, which emphasises agency and accountability[11] in RJ. They point out the benefits of participants who lack control in their lives being able to gain some kind of control through participation in decisions that impact them and argue that the result can be a change in their states of mind, lasting beyond the conference.[12] The benefits of empowerment are outlined in more detail below and whilst considerable, they work uneasily with the application of the established sentencing principles of consistency and proportionality.

The concern is that the more lay participants are empowered to make their own decisions, the greater the risk of undermining consistency and proportionality, due to increased variability in the decision-making process. These are significant concerns, as consistency and proportionality are widely held to be important – even central – to sentencing policy and practice. For example, one of the aims of the Sentencing Council in England and Wales (which produces detailed guidelines on sentencing, which courts must follow[13]), is to increase consistency in sentencing[14] and guidance to sentencers emphasises proportionality. The principles of proportionality and consistency are usually implemented by placing restrictions on judicial discretion, through the introduction of statutory minimum and maximum penalties; sentencing guidelines; and other miscellaneous sentencing legislation and policy.

Proportionality has been defined by Von Hirsch as the principle that "penalties be proportionate in their severity to the gravity of the defendant's criminal conduct", and this "seems to be a basic requirement of fairness".[15] This reflects general sentiment about the concept of proportionality and, alongside consistency, it is heavily linked to notions of justice and fairness in sentencing. In relation to consistency, Von Hirsch and Ashworth state: "[s]entence inequality sacrifices an important value of justice".[16] Consistency in sentencing is the idea that "similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes",[17] or as more commonly put: like cases should be treated alike.

The importance of these principles in sentencing might stem from their connection to rule of law considerations of preventing arbitrariness and ensuring equality before the law.[18]

The rule of law is by no means a settled concept, as remarked on by Lord Bingham: "well-respected authors have thrown doubt on its meaning and value",[19] it even being suggested by some to have been rendered a political tool and almost meaningless.[20] Despite such criticisms, there is general acceptance of the importance of the rule of law and hence proportionality and consistency as important in upholding it. It is worth noting, however, that such rule of law ideals are capable of interpretation in line with empowering restorative justice conferences, which can guard against arbitrariness and ensure equality before the law through pursuit of *procedural* justice[21] (discussed further below in the section on the wider context). The contested nature of the rule of law provides room for such adaptations to more conventional modes of conceptualising the pursuit of these safeguards.

The continued importance of proportionality and consistency in sentencing may also be linked to their role in reducing cases to particular categories and types, to increase measurability. This can be viewed as useful for increasing the efficiency of processing cases, as well as budgeting for prison places, rehabilitative courses (such as drug treatment) and so forth. It has been argued, for example by Scott, that states have a tendency towards such simplification and standardisation of complex matters.[22] Whilst potentially useful, Scott notes that such state tendencies can also be detrimental, as they usually occur at the expense of important context: "We have repeatedly observed the natural and social failures of thin, formulaic simplifications imposed through the agency of state power …".[23] Such concerns are reflected in some of the criticisms of consistency and proportionality addressed later in this paper.

A full exploration of the reasons for the perpetuation of consistency and proportionality as important ideals in sentencing is outside the scope of this paper, but their widely accepted importance is noteworthy and their role in relation to RJ is important to consider. This helps to explain the substantial weight given to criticisms of RJ which suggest that the empowerment of lay participants can undermine proportionality and consistency. [24] Consistency and proportionality are not, however, as straightforward, necessarily beneficial or philosophically and politically neutral, as is sometimes assumed, as discussed further below. It is not suggested that these principles be disregarded altogether, but that their shortcomings should be acknowledged when considering how these principles are applied in relation to RJ and particularly in how the balance is to be struck between empowerment of individuals, versus pursuance of these principles.

Trade-Off

RJ conferences involve a trade-off between consistency and proportionality on one hand, and the empowerment of participants on the other. Currently, the trade-off tends to favour proportionality and consistency at the expense of empowerment. This is unsurprising given they are long-standing principles embedded in many sentencing systems, whereas the empowerment of lay participants is largely foreign to traditional methods of sentencing. The centrality of proportionality and consistency to conceptions of sentencing and delivering justice is such that even many proponents of RJ prioritise proportionality and consistency over empowerment and so suggest various measures to uphold these principles,[25], as discussed in more detail below.

The New Zealand case of *R v Clotworthy*[26] demonstrates the way in which empowerment is subordinated to proportionality and consistency. The offender had slashed the victim with a knife causing injuries to the victim's face, chest and stomach, which required surgery and left permanent scarring. The offender pleaded guilty and sentencing was suspended whilst a RJ conference took place. During the conference, the offender was remorseful and the victim accepted his apology. It was agreed between them that the offender would pay a large sum of money towards the victim's cosmetic surgery for the scarring. The victim was opposed to the offender going to prison.

In the District Court, Judge Thorburn incorporated the views expressed in the RJ conference into his decision-making, imposing a suspended sentence, meaning the offender did not go to custody and could pay the agreed amount. However, when the matter was appealed, the Court of Appeal imposed an immediate sentence of imprisonment, prioritising state notions of proportionality over the parties' wishes. Therefore, the offender could not work and the victim did not receive the payment, meaning that he did not receive the required surgery. The trade-off between proportionality and empowerment in this case thus favoured proportionality.

The Court of Appeal's decision in *Clotworthy* may strike one as either deeply unfair, or entirely proper. The reaction one has to this case is probably a reasonable indicator of where one considers the trade-off should be made between proportionality and consistency; and empowerment. This paper aims to encourage proper consideration of the benefits of empowerment in RJ, a more developed understanding of both proportionality and consistency, and ultimately to encourage the favouring of empowerment more than is

currently seen in most state-run RJ. Whilst empowerment has been considered in the RJ literature in some detail, the problems with the principles of proportionality and consistency have been somewhat neglected.

The next section summarises the key benefits of empowerment, after which the problems with proportionality and consistency are explored. This will then be examined in relation to RJ practice and the tendency of states to over-emphasise proportionality and consistency and in doing so undermine empowerment. Here, the wider context within which these principles are employed highlights further issues, particularly in respect of proportionality. The social and political context within which proportionality operates tends to mean its co-option as a tool for increasing punitiveness, rather than as a limiting mechanism, as is usually assumed in RJ debates.

Empowerment

As outlined above, empowerment is central to RJ, which promises to deliver decision-making power into the hands of lay participants. As noted by O'Mahony and Doak, empowering RJ processes can provide for a sense of ownership of the process and democratic participation in justice, thereby increasing the legitimacy of the proceedings.[27] Relatedly, RJ can also increase penal legitimacy by aligning stakeholders' understandings of justice with resulting sentences.[28] This is particularly important in light of current concerns about penal legitimacy, with some authors referring to the existence of a "penal crisis".[29]

Empowerment also contributes to reducing reoffending rates. Following a detailed review of the available evidence on the link between RJ and its effectiveness at reducing recidivism, O'Mahony and Doak found that active involvement in the RJ process, including feeling ownership over the process and being involved in consensual decision-making,[30] were key factors in reducing reoffending rates.[31] It has also been demonstrated that empowering RJ processes increases victim satisfaction.[32] [33] [34] For victims, recognition as a key stakeholder and involvement in decision-making processes can help them regain a sense of autonomy and control which, as mentioned above, can resonate beyond the conference itself.[35] This is important following the often severely disempowering effects of crime[36] and accords with other findings about the benefits of victim involvement and dissatisfaction experienced by victims who feel *dis*empowered through lack of involvement or insufficient consultation about the outcome. [37]

Increasing legitimacy, increasing victim satisfaction and reducing recidivism are all important benefits of RJ which stem from empowerment. This is perhaps why empowerment has been considered the "fundamental starting point of restorative justice".[38] A related and considerable benefit of empowering RJ processes is the potential for a reduction in the use of imprisonment. It could help tackle increasing prison populations, and resulting capacity issues and rising costs. Overcrowding in prisons adversely impacts prisoners' physical and mental health, as well as leading to unsafe working conditions for prison staff.[39] The prison population in England and Wales quadrupled between 1900 and 2017 (with the sharpest increase from 1990) and prison sentences were longer in 2018 than they were in 2010.[40] There are projected further increases in the prison population,[41] meaning there is no indication of the problem resolving over time without a significant change in approach.

There is evidence to suggest that RJ participants tend to be less punitive.[42] This is perhaps because RJ allows for more information about the offence and the circumstances to be considered, which links with other findings about public attitudes to sentencing: that, where individuals have more detail individuals have about a particular crime, their responses become more nuanced and less punitive. RJ might thus encourage less punitive ways of dealing with offenders and more limited use of imprisonment.

The potential of empowerment through RJ considerable. It is therefore crucial to understand the benefits of empowerment when considering whether to trade if off against proportionality and consistency. Equally, one must consider the less well-acknowledged problems with consistency and proportionality.

Consistency and Proportionality

Problems with consistency

The problems with consistency can be divided up into conceptual problems and practical problems. A key conceptual difficulty lies in determining which factors should be taken into account when deciding what makes cases similar or different. For example, consider two hypothetical cases of theft: Case A and Case B. On a simplistic level, they are similar because the same offence has been charged, and a crude interpretation of the consistency principle might be that each offender should receive the same punishment. However, most systems are more nuanced than that and take into account certain features of the offence and offenders. Suppose Case A involves theft of expensive diamond jewellery; whereas Case B involves

theft of a sandwich. The former might be the result of months of planning; whereas the latter might have been a spur of the moment theft, motivated by hunger. The characteristics of the respective offenders might also differ. Perhaps Offender A is only 15 and has been influenced by an older family member to carry out the theft; maybe Offender B is in her 70s and homeless, and is a chronic alcoholic. These are factors which might be taken into account in deciding whether the two cases are similar or differ.

The nuances of each case can be many: "sentencing as currently practised is an unavoidably value-laden process … reflecting the fact that the court process as a whole … centres on the complex human stories of the accused and those affected, as much as on the law."[43] There are therefore value judgments to be made in deciding the factors which "count" in determining whether cases are alike. This judgment having been made, consideration must be given to what difference each factor should make to sentence: which factors should be treated as aggravating, which should be treated as mitigating and which will not affect sentence at all. For example: intoxication; addiction; and social background can be treated as both aggravating and mitigating – or make no difference to sentence.[44] Once a factor has been evaluated as either aggravating or mitigating, there remains the question of the *extent* to which it should reduce or increase the severity of sentence – further value judgments.

Consistency also experiences practical difficulties in obtaining complete and objective information about a case. Sentencers have limited information on which to base their assessment of what a case is like, so meaningful comparisons of cases are necessarily limited at the outset, even aside from the conceptual issues raised above. Sentencers have particularly limited information available to them where there has been a guilty plea – and depending on

the jurisdiction, this can be the majority of cases. For example, 67% of Crown Court cases in England and Wales resulted in a guilty plea in 2017 (the lowest guilty plea rate since 2006).[45]

To illustrate how limited the information given to judges and magistrates can be, it is useful to consider sentencing procedure. In many jurisdictions, including England and Wales, the prosecutor summarises the offence and then the defence advocate mitigates on behalf of the defendant, before the court decides on sentence. Ideally, plenty of time has been made available for prosecution and defence advocates to familiarise themselves with the case and their clients or witnesses, the defendant is a wonderful communicator and arrives at court in plenty of time to consult with his or her advocate, and unlimited time is allowed in court for the case to be heard and considered. The reality is often quite different. The prosecution and defence representations to the court can be short – as little as a few minutes long in more straightforward cases. The prosecutor might only have received papers for the case that morning and not have met any of the witnesses. Likewise, the defence advocate might have spoken to the defendant for the first time shortly before the hearing and had little chance to find out about their personal circumstances – possibly because the client was late to court, but perhaps also because the client may have difficulty communicating.[46] There may also be pressures on the court to get through cases as quickly as possible. In addition to hearing representations, sentencers will sometimes also be given a pre-sentence report to assist the decision-making process, which might be afforded more or less weight, depending on the disposition of the sentencer.[47]

Even in the ideal scenario outlined above, the information available to sentencers will be limited. Neither advocate has full knowledge of what offending behaviour actually

occurred, as they will not have been present at the time of the offence. Finally, many guilty pleas are the product of negotiation between prosecution and defence advocates,[48] which sometimes focus more on likely sentencing outcomes than getting to the truth of the matter.

These practical problems are important to consider, as arguments for increasing consistency in sentencing are often centred on limiting judicial discretion and improving the strength of sentencing guidelines. This may in fact further reduce the capacity for like cases to be identified and treated alike, particularly at the more extreme end of attempts to increase consistency through stricter guidelines: grid-style sentencing. Such guidelines take the form of a two-axis grid.[49] Along one axis is offence seriousness; and along the other axis is criminal history. The sentencer follows across and down the grid to find the recommended sentence for the offender, thus removing much contextual information from the decision-making process, with the aim of increased consistency. The result, however, can be self-defeating, as pointed out by Tonry:

> [the two-axis grid] produces unjust results and conduces to needlessly harsh sentences. … in the interest of treating like cases alike, they lead to disregard of other ethically relevant differences between offenders – like their personal backgrounds and the effects of punishments on them and their families – and thereby often treat unlike cases alike. [50]

Ultimately, the facts on which an offender is sentenced are highly unlikely to be equivalent to the offending behaviour. Even the most perfected balance between discretion

and guidelines can at best only provide an approximation of consistency. This undermines the idea of consistency as it is conceptualised in RJ debates – as a tool for ensuring equal offenders are treated equally. Where consistency is pursued, it is not like cases being treated alike, it is one rough approximation of what probably happened aligned with another, with equivalence determined by a few select features of those cases. The comparison of cases is not therefore the same thing as a comparison of actual offending behaviour.

Problems with proportionality

Proportionality calculations in sentencing are often imagined as simple, mathematical and objective, and this is particularly the case in literature which is critical of RJ on the basis of its alleged failure to uphold proportionality.[51] Weighing proportionality is, in fact, a deeply subjective assessment. Calculating proportionality involves evaluating how serious the offence is (usually by assessing harm and culpability); and deciding what punishment equates to that level of seriousness.

These issues can be approached in a variety of ways. Assessing culpability involves the same subjectivity as has been highlighted in relation to consistency above, such as determining how much more or less culpable one should hold an intoxicated offender to be. Assessing harm also involves subjectivity in deciding what constitutes harm and what the level of harm is. Calculating harm is particularly problematic for inchoate crimes, such as attempted rape,[52] with some theorists arguing that inchoate crimes should be considered less serious than completed offences;[53] and others disputing this approach.[54] Evaluation of these different conceptualisations of the level of harm to attribute to inchoate crimes is outside the scope of this paper, but the diversity of approaches demonstrates the plurality of views which

exist surrounding harm calculations. This is also shown by the existence of different systems for measuring harm.

Two prominent and differing theories for assessing harm are Von Hirsch and Jareborg's living standard; and Feinberg's choice-based standard. The living standard analysis involves ranking harms according to how they typically reduce or restrict a person's means or capability for achieving a particular standard of living (including both economic and non-economic interests). Von Hirsch and Jareborg expressly pit themselves against Feinberg, whose choice-based standard assesses the harm done by reference to the extent that victims' choices are limited as a result of the offence, e.g. physical incapacitation limiting a large number of life choices. It might be that one or the other of these views is more persuasive, but these opposing views are still suggestive of the subjective nature of proportionality calculations.

Once harm and culpability have been assessed, there is then the issue – highlighted by Hart – of how harm and culpability can meaningfully be combined to produce a single evaluation of seriousness: "it is not clear what … is to be the measure of 'seriousness'. Is negligently causing the destruction of a city worse than the intentional wounding of a single policeman?".[55] Depending on the individual weighting of culpability and harm, radically different assessments of seriousness for these two hypothetical cases are possible. The subjectivity inherent in assessments of harm; culpability; and how these two assessments should be combined, undermines the current simplistic conceptualisation of proportionality when used as an argument against empowerment in RJ.

After the above assessments have been made and the seriousness of the offence has been decided upon, it remains necessary to match offence seriousness with a relevant punishment. Von Hirsch has suggested ranking offences on a sliding scale in order of gravity, and penalties in order of severity, then matching these two scales up. Here a further issue arises: to what extent should the subjective experience of punishment be taken into account? Whether subjective experience is factored in or not will alter the scale – potentially radically. If the aim is proportionality that is in some sense "true" or "right", then it should follow that the proportional punishment of the offender will take into account the subjective experience of the offender, in receiving that punishment.

There are problems with factoring in subjective experience, however, and not just because it is likely to be difficult to predict. Kolber highlights the problem of undesirable outcomes, where subjective punishment is prioritised: that actual proportionality may not be as intuitively desirable as it is often assumed to be. He argues that equating severity of prison sentence with its length amounts to a "duration fetish" and points out that "sentence severity also depends on other prison hardships".[56] He goes on to suggest that it is reasonable to assume that a rich person who has started from a baseline of a plush lifestyle will suffer more (in terms of deprivation, economic loss, etc.) than a poor person starting from a worse baseline. Therefore, if the rich and poor person were to be sentenced for the same crime and both are to suffer the same amount of proportional harsh treatment, then the rich person should – argues Kolber – receive a shorter sentence. This may not be a particularly inviting conclusion and is worth considering in relation to oft-stated objectives of proportionality, such as equal treatment of offenders and the limiting of discrimination.

In summary, what is considered proportional can vary substantially, and it is extremely difficult – perhaps impossible – to identify an objective standard of proportionality by which cases can be assessed. Likewise, there are conceptual and practical problems with the principle of consistency, as outlined above. The problems with these principles should affect the trade-off between the empowerment of participants in RJ conferences; and consistency and proportionality.

Implications for RJ practice

As earlier stated, RJ conferencing when used post-conviction as an alternative sentencing mechanism is the focus in this paper. Examples of state-run RJ of this kind of model include Family Group Conferencing in New Zealand and Youth Conferencing in Northern Ireland. Whilst conferencing is used in a number of other jurisdictions on a discretionary basis (including in Australia and Europe), these two jurisdictions are unique in that they provide for RJ as a mandatory, statutory, state-run response for most forms of juvenile offenders who accept guilt.

State-run RJ

Family Group Conferencing was established in New Zealand by what was originally known as the Children, Young Persons and Their Families Act 1989.[57] It was the first legislated example of this form of RJ being incorporated into a state's criminal justice system.[58] A Family Group Conference ("FGC") must be held in most types of case, where guilt is admitted,[59] although participation is voluntary. Participants can include: the young person and his or her family; the young person's advocate; the victim or victim representative; a police officer; and the youth justice co-ordinator.[60] The model of decision-making intended

for FGCs is group consensus, with the outcomes "shaped by the families themselves and agreed to by all the participants, including the victims".[61] The FGC can make whatever recommendations it sees fit, as long as all relevant parties, including the victim and offender agree. The plan agreed to during the FGC is binding (as long as it has been accepted by the court or prosecuting agency).

The introduction of state-run RJ conferencing in Northern Ireland was heavily influenced by FGCs in New Zealand and operates in a similar way. FGCs tend to have more focus on the offender and their family; whereas youth conferencing in Northern Ireland tends to have a greater emphasis on the needs of the victim. However, in both models, the victim and offender can contribute to, and need to agree consensually on, the outcome. Legislative backing for youth conferencing in Northern Ireland is provided by the Justice (Northern Ireland) Act 2002[62] and one of the key concerns was to maximise participation in the Criminal Justice System, as a way of increasing the legitimacy of criminal justice institutions.[63]

State precautions

The consensual agreement of the lay participants is not – as will be apparent from the above – the end point of the process of sentencing the offender in state-run RJ. There are measures put in place which ensure that the state retains substantial control over the process. These measures can be divided into those employed *during* the conference; and those utilised *after* the conference.

During the conference, coordinators/facilitators are encouraged to have input into the decision-making process. This might be because criminal justice professionals are viewed as having expertise which lay participants do not (for example: how many hours community service would be appropriate; or what types of programmes might be available); or because they are charged with ensuring proportionality of outcome. In Northern Ireland, the Youth Conference Service Practice Manual provides guidance to practitioners and requests that co-ordinators ensure proportionality in conference outcomes.[64] The 2011 *Review of the Youth Justice System in Northern Ireland* further emphasised proportionality,[65] and following policy changes, co-ordinators were encouraged to ensure that the conference plan was proportionate and relevant to the offending.[66] The successful implementation of such moves to increase focus on proportionality was confirmed in a later report by the Criminal Justice Inspection Northern Ireland.[67] The effect is to put co-ordinators under more pressure to influence the process and place more emphasis on proportionality.

The state can also exercise control during the conference by participants being aware that plans need to be ratified before they are finalised. In their evaluation of youth conferencing in Northern Ireland, Campbell et al[68] identified that awareness of the court or prosecutors having to accept the plan might exert some form of coercion on participants:

> As plans must be ratified by either the PPS or court, these bodies may be seen as exerting an 'external' influence. On some occasions, this was explicitly observed where conference participants emphasised the importance of devising a plan which would satisfy the Magistrate. Pressure to come up with a proportionate plan can detract from the restorative philosophy of the process, and may result in the

> young person agreeing to something they are not entirely comfortable with. It is vital that any plan agreed within a conference is a result of genuine consensus amongst conference participants and not as a result of external pressure.

The state's control over the process is exercised *after* the conference, by criminal justice professionals (the court or the prosecution service) having the final say in whether the conference plan is suitable. This is where the influence of the principles of consistency and proportionality are most apparent. In both New Zealand and Northern Ireland, the court can accept, reject or vary plans[69] which are put before them following a RJ conference and therefore retain power over the final decision. Lay participants may find that their efforts are undermined where the court subsequently varies or even rejects the plan, and may wonder whether they really held the decision-making power after all.

Other evaluations support this view. Hoyle and Rosenblatt indicate that little has been learned in state-run RJ in the UK over the last 10 years, pointing to problems of professional domination and lack of stakeholder involvement (particularly victims): "there has been no paradigm shift; indeed there appears to be a lack of imagination for envisaging a significant move toward 'fully' restorative processes."[70] State-run RJ is incorporated into a state's criminal justice system, funded by the state and involves criminal justice professionals in the process. The concern for RJ in this context is that "the goals and values of restorative practices will be supplanted by 'system' goals and outcomes, such as case-processing targets, efficiency and growth."[71] Such "system" goals are best served by the prioritisation of consistency and proportionality – values which promise measurability.[72]

The perceived need for state intervention both during and after RJ conferences has its roots in concerns about proportionality and consistency – the idea being that left unchecked, lay participants may come up with disproportionate outcomes, and inconsistent outcomes for like cases.[73] The tendency is therefore to favour these values over empowerment in the trade-off between empowerment; and consistency and proportionality. A useful tool for understanding the level of empowerment that lay participants typically have in state-run RJ is to consider Sherry Arnstein's "Ladder of Citizen Participation",[74] which is a useful scale for assessing the extent to which people are truly empowered. In the context of RJ, this will not always be an easy assessment (although the participants themselves can of course be consulted) but it is less complicated than the more abstract notions of consistency and proportionality.

Arnstein's scale has "nonparticipation" at the bottom of the ladder; in the middle is "tokenism", including consultation and placation by the state; and the top is true empowerment. The top part of the ladder has three levels of increasing empowerment: "partnership"; "delegated power"; and "citizen control". Current state-run RJ in many cases might only achieve "tokenism", depending on the extent of input from criminal justice professionals.

The wider context

The measures which limit the empowerment of participants, taken by states who have implemented RJ, are largely driven by concerns about consistency and proportionality, which are well-established and ingrained principles of sentencing. In striking the balance between

these principles and empowerment in state-run RJ, the state will tend to favour consistency and proportionality.

The current social and political climate within which proportionality and consistency are being employed is important to note as well. Proportionality is often considered important in limiting potential extremes to which participants in RJ conferences might resort.[75] Recent research, however, casts doubt on this argument:

> [I]n our social and political world – a world no longer organised around a moral order structured in terms of symbolically anchored notions of desert or appropriateness – there is no agreed mechanism for anchoring the penalty scale according to cardinal proportionality … Particularly under conditions of a highly politicised climate for criminal justice policy-making, the commitment to just deserts all too easily produces insatiable demands for hard treatment. [76]

This is reflected in the rising rates of imprisonment in England and Wales[77] and the US[78] which has coincided with an increasing focus on proportionality and consistency over the last quarter of a century.[79] The effectiveness of proportionality as a limiting mechanism is therefore questionable,[80] and – as Lacey and Pickard point out, proportionality could currently be viewed as a tool for *increasing* punitiveness. This has also been suggested of grid sentencing and its promise of consistency, which has been criticised for leading to "needlessly harsh sentences".[81]

This weakens the argument that proportionality restrictions are necessary in RJ to limit excessive punishments – indeed, it suggests these may not operate as restrictions at all. Braithwaite's assessment of the empirical evidence about RJ practice appears to support this:

> the empirical evidence of the courts intervening to overturn the decisions of restorative justice processes, which has now been considerable … has been overwhelmingly in the direction of the courts increasing the punitiveness of agreements reached between victims, offenders and other stakeholders.[82]

This undermines the idea that the proportionality principle is essential in RJ to limit excessive punitive impulses by participants. Rather, it suggests that where proportionality is applied to RJ, it is used to increase, not limit, sentences (as seen in *Clotworthy* – discussed above). This suggests RJ participants tend to be *less* punitive than the courts, as discussed above in relation to the benefits of empowerment.[83]

Together with the problems outlined earlier, this should counsel those who wish to see the maximally effective implementation of RJ *away* from strict allegiance to consistency and proportionality. This requires a different, less intrusive role to be assumed by the state. A detailed discussion of precisely what the state's role should be in the process is outside the scope of this paper, but it is worth briefly highlighting one promising reconceptualisation of the role of the state in RJ, which has been put forward by Roche,[84] which moves away from the state as guardian of consistency and proportionality in outcomes. He suggests that the

state should instead have an administrative function, ensuring the fairness of the *process*.[85] The state's public function is reimagined as being to facilitate the consensual resolution of offences (where possible) and ensure fairness in the process of doing so. In terms of the trade-off, Roche's model would allow a balance more in favour of empowerment.

The oversight provided by the system of review recommended by Roche, would safeguard participants by checking that decisions were truly consensual (meaning participants considered the outcome fair). The state would only intervene where there was a procedural error, for example where power imbalances were identified, such as one participant being dominated by another. Alongside this, any decision reached would need to be within the bounds of responses that the state could provide, to align with the capabilities and resources of the criminal justice system. The checks and balances provided by the administrative role of judges, promoting procedural fairness, would ensure high standards are maintained, without unnecessary interference with the participants' decision-making. This links with the substantial research available on the importance of procedural fairness, particularly in relation to promoting legitimacy and engendering support for outcomes:

> the primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure … Research clearly shows that procedural justice matters more than whether or not people agree with a decision or regard it as substantively fair.[86]

This is a different interpretation of fairness, focused on the procedural aspect, and a different positioning of considerations of proportionality and consistency. Instead of trying to align different RJ conferences with each other in terms of content and outcomes, consistency and fairness of approach in how the conferences are run is the focus. For example: ensuring no one party dominates; ensuring facilitators are appropriately trained; ensuring equal access to RJ; and perhaps also consistently maximising empowerment, by ensuring stakeholders have adequate opportunity to air their views and take part in decision-making.

Conclusion

Empowerment is at the heart of RJ and its benefits,[87] which include increased victim satisfaction and reduced offender recidivism. Currently, it is undermined in state-run RJ by the trade-off (outlined above) favouring the pursuit of proportionality and consistency. However, these are problematic principles. They rely on the establishment of equivalences which are, if not arbitrary, at least contestable[88] and both require a level of knowledge that sentencers will never attain in practice.

The problem is the unclear grounding for value judgments, together with the pretence of objectivity: proportionality and consistency are often treated as if they do *not* involve substantial and contestable value judgments. This is problematic, as such subjectivity, especially where unexamined or hidden, enables prejudices to be smuggled into the decision-making process. RJ also involves value judgments in the decision-making process, but there is a clear genealogy of where such judgments come from (the stakeholders) and a rationale for why they should emanate from that source: they are most affected by the offence.

Acknowledgement of the problems with consistency and proportionality is important, as is acknowledgement of the existence of the trade-off: the fact that in RJ, current methods of attempting to increase consistency and proportionality come at the expense of empowerment, a fundamental benefit of RJ. There is therefore an increased need for revised thinking on consistency and proportionality in the context of RJ. Proper consideration of the problems with these principles shows that they are not the ideal principles they are commonly portrayed as when considered in relation to empowerment in RJ.

The idea that consistency and proportionality are somehow *necessary* to fairness[89] and the associated assumption of the primacy and unimpeachable nature of these principles are untenable positions once the problems with them are acknowledged. Empowering RJ offers a different but well-rounded vision of fairness. This is true both in the narrow context of what it means to those most affected by the offending behaviour (the particular manifestation of fairness thereby being connected to individuals with a real stake in that offence) and in the broader context of public perceptions of fairness, which RJ promotes by pursuing high standards of procedural justice. The trade-off should therefore be made more in favour of empowerment.

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[2] Marshall, “The evolution of restorative justice in Britain,” 37.

[3] Maxwell, et al, *Achieving Effective Outcomes in Youth Justice*.
[4] Christie, "Conflicts as property," 9.
[5] Barton, "Empowerment and retribution in criminal justice".
[6] Ibid., 55.
[7] Ibid., 55.
[8] Dzur and Olson, "The Value of Community Participation in Restorative Justice," 91.
[9] There are other models, but this is a popular one and relied on, for example, by the International Institute for Restorative Practices.
[10] McCold and Wachtel, "Restorative Justice Theory Validation," 114.
[11] O'Mahony and Doak, *Reimagining Restorative Justice*, 74.
[12] Ibid., 60.
[13] Section 125 Coroners and Justice Act 2009 (England and Wales).
[14] Sentencing Council.
[15] Von Hirsch, "Proportionality in the Philosophy of Punishment," 55.
[16] Von Hirsch and Ashworth "Not Not Just Deserts," 96.
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[21] Tyler, *Why People Obey the Law*.
[22] Scott, *Seeing Like A State*.
[23] Ibid., 309.
[24] Ashworth, "Responsibilities, Rights and Restorative Justice".
[25] Cavadin and Dignan, "Reparation, Retribution and Rights"; Garvey "Restorative Justice, Punishment and Atonement"; and Van Ness "New wine and old wineskins".
[26] R v Clotworthy (1998).
[27] Christie "Conflicts as property"; O'Mahony and Doak, *Reimagining Restorative Justice*.
[28] Tiarks, "Can Restorative Justice provide a solution".
[29] Cavadino, Dignan and Mair, *The Penal System*; Henham "Penal ideology, sentencing and the legitimacy of trial justice".
[30] Hayes and Daly, "Youth justice conferencing and reoffending".
[31] O'Mahony and Doak, *Reimagining Restorative Justice*, 190.
[32] Bazemore and Schiff, *Juvenile Justice Reform and Restorative Justice*.
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[35] O'Mahony and Doak, *Reimagining Restorative Justice*, 60.
[36] Ibid., 61.
[37] Newburn, Crawford, et al, "The introduction of referral orders"; Maxwell and Morris, *Families Victims and Culture*.
[38] Barton, "Empowerment and retribution in criminal justice," 70.
[39] MacDonald, "Overcrowding and its impact on prison conditions and health," 65–68.
[40] Sturge, "UK Prison Population Statistics," 4.
[41] Ministry of Justice (UK) bulletin, "Prison Population Projections 2018 to 2023," 1.
[42] Sherman and Strang, "Repairing the harm: Victims and restorative justice," 15.
[43] Millie, Tombs and Hough, "Borderline sentencing," 256–7.
[44] Bagaric and Pathinayake, "The Paradox of Parity in Sentencing in Australia," 411; Padfield, "Intoxication as a Sentencing Factor".
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[47] Tata, Burns et al, "Assisting and advising the sentencing decision process".
[48] Brook, Fiannaca, et al, "A Comparative Look at Plea Bargaining in Australia," 1147.
[49] E.g. US Federal Sentencing Guidelines.
[50] Tonry, *Sentencing Matters*.
[51] Ashworth, "Responsibilities, Rights and Restorative Justice".
[52] Tonry, "Purposes and Functions of Sentencing".
[53] Von Hirsch and Jareborg, "Gauging Criminal Harm".
[54] E.g. Ashworth, "Criminal Attempts and the Role of Resulting Harm under the Code," 725.
[55] Hart, *Punishment and Responsibility*, 162.
[56] Kolber, "Against Proportional Punishment," 1159.

[57] Now called the Oranga Tamariki Act 1989.
[58] Maxwell and Morris, "Youth Justice in New Zealand: Restorative justice in practice?" 243; Maxwell et al, *Achieving Effective Outcomes*.
[59] Section 246 Oranga Tamariki Act 1989.
[60] The full list can be found at s.251 Oranga Tamariki Act 1989.
[61] Maxwell et al, *Achieving Effective Outcomes: Youth Justice in New Zealand*, 14.
[62] Justice (Northern Ireland) Act 2002.
[63] Doak and O'Mahony, "In search of legitimacy".
[64] Youth Justice Agency, *Conference Service Practice Manual*, 2.
[65] Graham, Perrott and Marshall, *A Review of the Youth Justice System in Northern Ireland*.
[66] Criminal Justice Inspection Northern Ireland, *Monitoring of Progress*, 27.
[67] Criminal Justice Inspection Northern Ireland, *The effectiveness of youth conferencing*.
[68] Campbell, Devlin, et al, *Evaluation of the Northern Ireland Youth Conference Service*.
[69] Ibid.; McElrea, "The New Zealand Model of Family Group Conferences".
[70] Hoyle and Rosenblatt, "Looking Back to the Future," 45.
[71] O'Mahony and Doak, *Reimagining Restorative Justice*, 39.
[72] Wood and Suzuki, "Four Challenges in the Future of Restorative Justice," 156.
[73] Ashworth, "Responsibilities, Rights and Restorative Justice".
[74] Arnstein, "A Ladder of Citizen Participation". Whilst this relates to town planning, her model is applicable more widely.
[75] Ashworth, "Responsibilities, Rights and Restorative Justice"; Dignan, *Understanding victims and restorative justice*.
[76] Lacey and Pickard, "The Chimera of Proportionality," 238.
[77] Ibid.; Prison Reform Trust, *Prison: The Facts*.
[78] Bagaric, Wolf and Rininger, "Mitigating America's Mass Incarceration Crisis".
[79] E.g. the Criminal Justice Act 1991; see also Cavadino, et al, *The Penal System: An Introduction*; Lacey and Pickard, "The Chimera of Proportionality".
[80] Lacey and Pickard, "The Chimera of Proportionality", although cf. the response to this criticism by Ashworth, "Prisons, Proportionality and Recent Penal History".
[81] Tonry, *Sentencing Matters*.
[82] Braithwaite, "In search of restorative jurisprudence," 150; *Clotworthy* being just one example of this.
[83] Sherman and Strang, "Repairing the harm: Victims and restorative justice".
[84] Roche, *Accountability in Restorative Justice*.
[85] Ibid.
[86] Meares and Tyler, "Justice Sotomayor and the Jurisprudence of Procedural Justice".
[87] O'Mahony and Doak, *Reimagining Restorative Justice*.
[88] See also Lacey and Pickard, "The Chimera of Proportionality". They argue that proportionality is in fact a political and social construction, rather than a naturally existing relationship.