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# Can Restorative Justice provide a solution to the problem of incoherence in sentencing?

Elizabeth Tiarks

## ABSTRACT

Current sentencing practice in England and Wales is incoherent. This stems from the combination of conflicting philosophies of punishment, with no clear method adopted by sentencers in choosing between them. This presents a significant challenge as sentencing can have a profound impact on an offender's life, as well as having wider implications for family members. Therefore, a coherent decision-making process is essential in order to limit arbitrary sentencing and support the legitimacy of the penal system.

This thesis argues that Restorative Justice might offer a more coherent decision-making process. Restorative Justice is hypothesised to operate as a kind of mediation process between the philosophies of punishment and understandings of justice held by participants. Their voluntarily agreed outcome should therefore represent the best possible compromise between participants' ideas of justice and philosophies of punishment.

Analysis of existing empirical research has been undertaken, involving the examination of existing studies of Restorative Justice in Northern Ireland, England and Wales, Australia and New Zealand. This empirical research has explored problems which can arise in practice for the theoretical conception of Restorative Justice as a mediation process between ideas.

The thesis concludes that Restorative Justice can in theory offer a more coherent process of sentencing, but that there are a number of obstacles to realising this in practice.

# Can Restorative Justice provide a solution to the problem of incoherence in sentencing?

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## Declaration

Some of the material in Chapter 3 is based on, and develops, work submitted as part of my MA thesis in Philosophy.

## Statement of copyright

The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.

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## CHAPTER 1: Introduction

### 1. Context of the thesis

Current sentencing practice in England and Wales is incoherent. This is mainly because there are multiple competing purposes of sentencing: punishment; deterrence; rehabilitation; protection of the public; and reparation (section 142, Criminal Justice Act 2003), and no particular method by which sentencers decide between these purposes when they conflict.<sup>1</sup> Sentencing reforms over the past quarter of a century have tended to focus on efforts intended to increase consistency in sentencing. It will be argued that the focus should instead be on coherence in sentencing – specifically, the coherence of the decision-making process. In chapter 2, consistency in sentencing – the treatment of like cases as like – is argued to be ultimately unachievable, and even self-defeating when it is pursued too vehemently (e.g. U.S.-style grid sentencing). In contrast, coherence in sentencing is argued to be desirable and achievable. For the purposes of this thesis, coherence in sentencing refers to whether the decision-making process of sentencing makes sense, i.e. whether meaningful connections exist in the reasoning behind each individual sentencing decision.

The lack of coherence in current sentencing practice is problematic because the purpose selected by the sentencer can impact significantly on the resulting sentence. For example, an offender who was – according to the sentencing guidelines – a borderline case for either going to prison or not, might find themselves imprisoned by a judge who was more inclined to punish; or given a community order by a judge who was more inclined to rehabilitate. This is problematic, because it is unclear by what means this decision is arrived at. This incoherence is particularly concerning given that it subsists in the context of one of the most intrusive powers of the state – at its extreme depriving individuals of their liberty. As O'Malley states (2008, p.4):

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<sup>1</sup> See *Overarching Principles: Seriousness Guidelines*, Sentencing Guidelines Council, 2004.

[S]entencing practices affect a great many of our citizens in profound ways. Rights to liberty, property and freedom of choice are among the more treasured values of Western democracies, and criminal punishment almost invariably restricts or removes the enjoyment of at least one of these rights. ... respect for fundamental rights demands that penal measures should be grounded on rational policies and implemented in accordance with coherent principles.

A coherent decision-making process for sentencing is therefore desirable, not least for the legitimacy and fairness of the penal system.<sup>2</sup>

It will be argued in this thesis that Restorative Justice (“RJ”) has the potential to offer a more logical, coherent, decision-making process. There are many different conceptions of what RJ is and what it can do. This thesis adopts an understanding of RJ as a form of punishment – or, to be precise, a method of arriving at a punishment (or sentence)<sup>3</sup> – and focuses on RJ conferencing in particular. Full reasons for why RJ conferencing is focused on are given later in this chapter, but in brief, it is because conferencing most closely fits the conception of RJ adopted for the purposes of this thesis, as well as because there is substantial consensus that conferencing fully encapsulates RJ (Kurki, 2004; McCold, 2001; O’Mahony, 2012).

It is argued in this thesis that RJ conferencing can operate as a kind of sentencing process, whereby the victim, offender and others affected by the offence, such as community members, are empowered to decide what the outcome should be – this process being mediated and legitimised by the state. This is hypothesised to operate as a kind of mediation process between the philosophies of punishment held by participants, i.e. what they think the purpose of the outcome should be and what accords with their understanding of justice. In an RJ conferencing process, all participants should voluntarily agree to the outcome and this

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<sup>2</sup> See Cavadino, Dignan and Mair (2013) in relation to the importance of legitimacy in relation to the penal system.

<sup>3</sup> See Chapter 3 for a full explanation of why in this thesis *punishment* is understood as roughly equivalent to *sentencing*.

therefore represents the best possible compromise between participants' ideas of justice and philosophies of punishment.

This thesis explores the idea that, unlike traditional sentencing, RJ represents a coherent process by which the purpose of punishment is selected and makes clear that the notion of justice being done is that held by those most affected by the offence. The extent to which this hypothesis reflects what is happening in practice is examined empirically, through secondary research looking at Northern Ireland, England and Wales, Australia and New Zealand.

### Current Sentencing Practice in England and Wales

It is important for the context of this thesis to note that of the criminal cases dealt with by the courts in England and Wales, only approximately 5% end up in the Crown Court.<sup>4</sup> The vast majority of cases are dealt with in the Magistrates Court and involve lower level offending. Sentencing statistics reflect this: for example, according to the *Criminal Justice Statistics Quarterly update to June 2014*, the most common sentence is a fine, with just over two-thirds of all offenders sentenced in the 12 months covered by the report, receiving a fine (Ministry of Justice, 2014a, p.14).

In any discussion concerning the emotive topic of punishment, it is easy to forget that the majority of offending dealt with by the courts is of a generally minor character. This is important particularly where retributive ideas such as people "getting their just deserts" are being employed in the debate. Such ideas might carry more weight in terms of serious crimes such as rape or murder. However, there is something intuitively odd about saying that a homeless alcoholic who has stolen a sandwich, or a 10 year old child who has thrown pebbles at a stationary vehicle, should "get what they deserve".<sup>5</sup> This is not intended to trivialise the 95%

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<sup>4</sup> Her Majesty's Court Service <<http://www.hmcourts-service.gov.uk/infoabout/magistrates/index.htm>> Accessed 18<sup>th</sup> March 2011.

<sup>5</sup> These examples are taken from my practice of criminal law.

of crimes dealt with in the Magistrates Courts, rather it is intended to contextualise the debate. It is particularly useful to bear in mind in the discussion of the traditional philosophical justifications for punishment in Chapter 3, where retribution's "stranglehold" on conceptions of punishment is highlighted and criticised.

In terms of the incoherence in the current sentencing system, notable criticism has come from the Justice Committee (the Parliamentary Select Committee) in relation to the five statutory purposes of punishment in s.142 CJA 2003 (referred to at the start of this chapter). The Justice Committee has argued that the purposes are inconsistent with each other, stating (at 2009, p.21):

The Government also seems to struggle with the five purposes of sentencing it set out in the Criminal Justice Act 2003. The Secretary of State for Justice and Lord Chancellor, in a speech accompanying a policy statement as to how the Government deals with offenders, stated "We should not shy away from the fact that the sentences of the court are first and foremost for the punishment of those who have broken the law". This may suggest that the purposes of sentencing set out in the Criminal Justice Act 2003 were meant to be in a hierarchy, but the title of the Government's policy statement, *Punishment and Reform*, takes the first and third in the list. This confusion over the purposes of sentencing may reflect confusion over the purposes of the criminal justice system as a whole.

The government's response to the Justice Committee's report roundly rejected suggestions that the five purposes of sentencing were incompatible with one another (Ministry of Justice, 2009), stating:

The Government does not accept that these considerations are contradictory and we do not believe that sentencers are unable to consider the range of purposes of sentencing when dealing with an individual case (2009, p.7).

There has since been a change of government (in 2010), but since no steps have yet been taken to revise the operation of s.142 CJA 2003, it is reasonable to assume that the government's stance remains the same. The problem with this position, is that it fails to recognise that the five purposes of punishment are grounded in incompatible philosophies of punishment, with no basis for reconciling them. This issue is explored further in Chapters 3 and 4.

### Restorative Justice

This section will critically discuss the nature of RJ, looking at different ways of understanding this concept and addressing some of the key areas in which there is disagreement and debate as to the nature of RJ. This is necessary at this stage before proceeding to the substantive arguments in the thesis, so as to set out early on the particular conception of RJ which is relied on for the purposes of the thesis. This is important because there are many different ways of conceptualising RJ, and because this particular conception departs from some of the more common understandings of RJ (as will be outlined below). That said, it is still based on well-established thinking about RJ (e.g. Marshall, 1996).

RJ has been described as a “global social movement” (Johnstone and Van Ness, 2007, p.5) and this movement has carried with it a diverse array of ideas and values. Important to identify here are two prominent themes, which have the tendency to work against each other. On the one hand, and no doubt at least partly because RJ has emerged in its modern form out of reparation and mediation initiatives,<sup>6</sup> RJ is often associated with certain ideas and values, such as the importance of reparative measures, the importance of taking responsibility, and the importance of apology. There is, however, variation in which values are deemed important, e.g. Pranis (2007, p.61) states: “Just as there is no single agreed definition of restorative justice, so there is not a single definitive list of values”.

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<sup>6</sup> Such roots of RJ are explored in more detail in Chapter 5 in relation to the emergence of RJ in England and Wales.

On the other hand, RJ has also developed in the context of debates about the ownership of justice, through critiques of the role of the state in the resolution of conflicts (Christie, 1977). This second theme of the RJ movement emphasises the importance of the empowerment of stakeholders of a conflict, elevating them to a position of being major decision-makers as to how that conflict should be resolved.

The tension between these two prominent themes is essentially between the top-down imposition of values and the bottom-up (stakeholder empowering) method of arriving at values (see Braithwaite, 2002b). This tension is explored in more detail below in the discussion of outcome-focused and process-focused understandings of RJ (see also Zernova and Wright, 2007), but is important to raise here, to highlight a crucial point at which this thesis departs from common conceptions of RJ – in particular those which link themselves directly to particular values and outcomes. The conception of RJ adopted here is aligned with process-focused accounts of RJ, and is concerned more with the debates about the ownership of justice (see in particular Chapter 4), than which values should be attached to RJ.

It should also be clarified that the approach of this thesis differs in its starting point from most other literature which proposes RJ as a preferable alternative to current sentencing practice.<sup>7</sup> Firstly, RJ is not often explicitly proposed as an alternative to sentencing practice *per se* and is more commonly portrayed as an alternative (more broadly) to the approach taken in the current criminal justice system as a whole. For example, Dzur and Olson (2004) have summarised three main problems with the current criminal justice system that restorative justice proponents tend to highlight.

Firstly, that the current criminal justice system is too state-oriented and overly procedural, i.e. that the dominance of state officials in proceedings can hinder

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<sup>7</sup> Luna (2003) being one notable exception.

satisfaction of victim needs and that the procedure leads to the way the offence is dealt with becoming “more abstracted, more alienated from the actual experiences of victim, offender, and community” (Dzur and Olson, 2004, p.91; see also Mannozi, 2012). Secondly, that the current criminal justice system is too punishment and offender-focused, with the victim being neglected and unable to obtain answers to why they were victimised and emotions not able to be expressed. Thirdly, that the current criminal justice system neglects the needs of offenders to be reintegrated into their communities, as they are not very involved in their own cases; criminal justice professionals make determinations of responsibility; and there are minimal opportunities for offenders to recognise and accept responsibility for harm they have caused, which is necessary for reintegration.

Whilst all of the above issues raised are important and valid criticisms of the current criminal justice system, none of these form the basis for the starting point of this thesis. This thesis identifies a specific problem with the current sentencing system, which restorative justice might offer a solution to. This is the problem of incoherence outlined in Chapter 2, which focuses particularly on the five conflicting purposes of sentencing which judges and magistrates must have regard to. It is probably worth reiterating that the coherence which is at stake is not the coherence of the outcome, but the coherence of the process.

Overall, there are numerous, often competing theories of RJ and this means that anyone seeking to deploy a theory of RJ in their work therefore has to make some choices about which theories they will rely on. Having emphasised the lack of a single “right” theory of RJ – as Gavrielides has said: “[t]he coining of a consensual definition is not the answer to RJ’s ambiguity” (2007, p.168) – the understanding of RJ adopted for the purposes of this thesis will be outlined. It should be stressed that this is not meant to imply that this is the only logical way of determining the various debates within RJ and it is therefore not intended as the only possible understanding of RJ. That said, the choices made are entirely defensible, and indeed make the most sense, given the subject matter being investigated.

The nature of the problem being examined in this thesis is one reason for the particular understanding of RJ which has been adopted, e.g. sentencing is the primary concern and therefore RJ aimed at resulting in outcome agreements is preferred, as most closely representing a process ending with a sentencing decision. In some cases, however, one side of the debate in relation to a particular aspect of the definition of RJ seemed to resonate more strongly and was therefore adopted, e.g. this thesis argues that RJ need not be viewed as an alternative to punishment (see the extensive discussion of this important issue in Chapter 3).

Having established a basic framework which fits well with established notions of RJ, this thesis goes on to develop that understanding of RJ, as a way of testing new ideas. The result is a conception of RJ as a kind of mediation process between ideas of justice and philosophies of punishment, which might offer a more coherent way of arriving at a sentence (i.e. a more coherent process, rather than making any claims about the objective coherence of the outcome). This is not discussed at length in this section, but is developed throughout the thesis, in particular in Chapters 3 and 4.

There are many other things that RJ has the potential to achieve which are not the focus of this thesis and which are therefore not engaged with at length. For example, RJ has been presented as an effective way of reducing reoffending rates (Maxwell and Morris, 1999); strengthening communities (Kurki, 2000); increasing public engagement in sentencing (Brooks, 2012); and allowing for emotional redress (Doak, 2011). It is also worth clarifying here that whilst it has been pointed out that “[t]here is already a wealth of empirical support which says that engaging stakeholders in determining solutions produces better outcomes than non-restorative approaches” (McCold and Wachtel, 2012, p.117). It is not the purpose of this thesis to pursue this point – the thesis concentrates on the coherence of the decision-making process, rather than an evaluation of RJ outcomes.

The lack of focus in this thesis on the above identified, and other, potential benefits of RJ is not intended to undermine their importance, but dealing with such issues in a substantial way is outside the scope of the research questions addressed in this thesis (which are outlined in the next section). The focus of this thesis is the capacity of RJ to resolve the problem of incoherence in sentencing. The particular conception of RJ adopted is conceptualised as the best possible model of RJ for tackling this particular problem. Another form of RJ might be better suited to, say, reducing recidivism; but this model of RJ best tackles the problem of incoherence in sentencing. This is – in brief – because it allows for a more coherent process of decision-making due to the devolution of power to stakeholders of an offence. The precise details of why this particular model of RJ offers a more coherent approach to sentencing is expounded significantly in Chapter 4.

*The various models and applications of RJ*

The term *Restorative Justice* is used to describe a wide range of practices conducted in a variety of institutions, including schools, prisons and in the workplace (Johnstone and Van Ness, 2007; Restorative Justice Council, 2014).

There is a huge variety of opinion as to what RJ is and how it should be defined:

It is now an accepted truism to say that restorative justice is an ‘umbrella concept’, sheltering beneath its spokes a variety of practices, including mediation, conferencing, sentencing circles and community panels, and with no universally acclaimed definition. This situation itself promotes a proliferation of potential tasks and roles for restorative justice, such that different schemes or commentators can stress the importance of different aspects, and continue to disagree about what is its ‘essence’. (Shapland et al, 2006, p.506)

This thesis focuses on the criminal justice context as it is RJ’s possible contribution to debates around sentencing which constitutes the main concern of this thesis.

The diversity of practice within this context is noted here by Daly (2002, p.57):

Restorative justice is not easily defined because it encompasses a variety of practices at different stages of the criminal process, including diversion from court prosecution, actions taken in parallel with court decisions and meetings between victims and offenders at any stage of the criminal process (for example, arrest, pre-sentencing and prison release).

Likewise, Miers et al (2001, p.12) talk of “a plethora of descriptors for the varying practices that claim to fall within its ambit”, for example: victim awareness sessions; referral orders; direct and indirect conferencing.

For the purposes of this thesis, one particular model of RJ will be the primary focus: restorative justice conferencing following a criminal offence, where guilt has been admitted and where RJ forms part of the sentencing process (rather than taking place post-sentence). Conferencing involves a meeting attended by the victim and offender, together with their supporters (often family members) and sometimes also members of the community. Participants discuss the circumstances and consequences of an offence before agreeing to a plan as to what the offender should do (effectively the offender’s “sentence”). This is accomplished through the assistance of a trained independent facilitator.

The reasons for concentrating research on this model are: firstly that it most closely aligns with the conception of RJ adopted for the thesis – which will be elucidated in greater detail in the following sections; secondly that this model of RJ best represents an empowering process leading to a voluntarily agreed upon outcome/sentence and therefore promises to contribute the most to issues concerning sentencing; and thirdly, because RJ conferencing is widely held to fully encapsulate RJ (Kurki, 2004; McCold, 2001; O’Mahony, 2012). Kurki sees the following as essential criteria for RJ: “inclusive dialogue in face-to-face meetings, consensus decision-making, agreement on offenders’ responsibilities, and commitment to restorative values.” (2004, p.294), all of which can be satisfied by conferencing. Similarly, McCold holds that:

Restorative Justice processes, in their purest form, involve victims and their offenders in face-to-face meetings and it is these participants (along with their respective communities of care) who determine how best to deal with the offence. Only three practices – mediation, conferencing and circles – currently fully meet these requirements. (2001, p.41)

As pointed out by Kurki and McCold, above, RJ conferencing has the capacity to satisfy key principles of RJ.<sup>8</sup> For example, when good practice is followed, RJ conferencing: properly engages with the victim; allows those most affected by the offence (victim, offender, community members) to contribute to decision-making about what should happen; and participation is voluntary (Dignan, 1999; Shapland, 2014).

This thesis is concerned with sentencing and therefore, RJ conferencing when used pre-sentence to decide what should happen to the offender as a result of the offending, is of most interest for the purposes of this research, as opposed to conferences taking part post-sentence, e.g. those undertaken in prisons. It is worth pointing out that the narrow focus on the decision-making process of RJ conferences and the focus on the formulation of outcome agreements / plans is not intended to suggest that the sole value of RJ lies in its ability to perform this function, as outlined above.

The focus on RJ conferencing, as well as the positions taken below in respect of key issues for RJ, mean that the conception of RJ adopted for the purposes of this thesis accord well with one of the most widely-used definitions of RJ: “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.” (Marshall, 1996, p.37). For example, Shapland et al in their extensive study of RJ in England and Wales adopted this

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<sup>8</sup> As will be elaborated on in the sections which follow, there is significant variance in how RJ is understood and hence restorative values or key principles of RJ may be differently conceived. However, it is significant that there is such broad agreement that conferencing encapsulates RJ well.

definition: “both we, and the Home Office in the funding schemes themselves, have taken the commonly accepted definition of restorative justice by Marshall” (Shapland et al, 2006, p.506).

#### *Key issues for Restorative Justice*

There are a number of debates within the RJ literature surrounding key issues. As with the definition of RJ itself, the list of points of contention about the definition tends to differ from author to author as well. However, there does appear to be general consensus that the following are key issues for RJ:

- (a) Whether RJ is best viewed as outcome-focused or process-focused (Dignan, 2011; Gavrielides, 2008; Van Ness, 2005; Zernova and Wright, 2007)
- (b) Whether RJ is a punishment or an alternative to punishment (Gavrielides, 2008; Johnstone, 2011)
- (c) Who the stakeholders are (Dignan, 2011; Gavrielides, 2008; Johnstone, 2011)
- (d) The scope of RJ practice (Johnstone, 2011)
- (e) The relationship between RJ and the criminal justice system (Dignan, 2011; Gavrielides, 2008; Johnstone, 2011)

In what follows, the above issues will be briefly examined and the position adopted for the purposes of this thesis will then be outlined and reasons given as to why this makes the most sense, particularly given the concerns of the thesis.

(a) Whether RJ is best viewed as outcome-focused or process-focused  
On one side of this debate are those who argue that RJ should aim at achieving particular restorative outcomes, even if this means imposing outcomes on stakeholders; and on the other side of the debate are those who focus on the process and emphasise the importance of the empowerment of stakeholders, with as few constraints as possible on stakeholders and what they can agree to. It has been suggested by Zernova and Wright (2007, p.99) that: “this is a debate resulting from a potential conflict of two restorative values – empowering stakeholders and ensuring restorative outcomes”. These values are in conflict,

because the promotion of particular outcomes necessitates some degree of limitation of the empowerment of stakeholders – and likewise a focus on empowerment, where stakeholders are the key decision-makers, does not necessarily support particular restorative outcomes, as the outcomes will vary according to the values of the stakeholders involved.

One of the most prominent process-focused definitions of RJ is that given by Marshall (Dignan, 2011; Zernova and Wright, 2007), which has been outlined above. Marshall emphasises the empowerment of stakeholders in coming to a decision as to what they themselves think would be an appropriate outcome, rather than being guided to particular outcomes, or having certain outcomes imposed on them. McCold (2000) adopts Marshall's definition and emphasises the importance of a voluntary process-focused conception of RJ. Shapland et al (2006) also expressly adopt Marshall's definition as a starting point (as pointed out above) and would appear to agree that empowerment of stakeholders is crucial to RJ. In particular, they point out that it is problematic for RJ to demand particular outcomes from victims:

we would take issue with the idea that healing, in the sense of reducing a sense of conflict, is invariably positive, to be expected, or correct. ... neither criminal justice nor restorative justice can, we feel, 'demand' that a particular victim should forgive the offender at a particular point. Doing so both demeans the harm caused to the victim and goes against the democratic nature of restorative justice, by compelling the victim to serve others' interests. (2006, p.519)

Likewise, Braithwaite (2002a, p.571) points out:

It is cruel and wrong to expect a victim of crime to forgive. ... Apart from it being morally wrong to impose such an expectation, we would destroy the moral power of forgiveness, apology or mercy to invite participants in a restorative justice process to consider proffering it during the process. ... Similarly remorse that is forced out of offenders has no restorative power.

This highlights something else crucial to the process-focused model: voluntariness and a rejection of judicial or other forms of coercion. These are important values underpinning the process-focused conception of RJ, as outlined by Dignan (not himself a proponent of this model of RJ, as will be discussed below):

the need for consensual participation on the part of the principal stakeholders; for dialogue based on the principle of mutual respect for all parties; for a balance to be sought between the various sets of interests that are in play; and for non-coercive practices and agreements. (2011, p. 172)

It should be pointed out here, that the conception of RJ preferred in this thesis is a process-based model, which also (as will be addressed in the next section) sees RJ as a form of punishment – or rather, a process for arriving at a suitable punishment. As far as the involvement of the offender is concerned, it may not appear immediately obvious that a process which results in punishment can be voluntary. However, it should be stressed that *punishment* is here intended to mean effectively the same as *sentence*<sup>9</sup> and not *retributive punishment*. The sentence may be more or less onerous, depending on the agreement reached by the parties (including the offender). Further, where an offender has admitted an offence and is aware that s/he is to be disposed of in some manner, it is likely that s/he will find it less concerning and less likely to lead to undesirable outcomes if s/he is involved in the decision-making, rather than having a sentence imposed on him/her. That said, there are issues for voluntariness – some linked to the role of the state (discussed in Chapter 4), such as how genuinely voluntary a process can be where the default, should agreement not be reached, is state-imposed punishment.

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<sup>9</sup> Issues surrounding the definition of punishment and questions of terminology in relation to *punishment* and *sentencing* are examined in detail in Chapter 3, where substantial reasons for taking the position outlined here are given.

The nature of the outcomes is of secondary importance to those who adhere to the process-focused model, and this draws strongly on the work of Christie (1977, p.9) and his argument against conflicts being “stolen” from stakeholders:

Let me be quite explicit on one point: I am not suggesting these ideas out of any particular interest in the treatment or improvement of criminals. I am not basing my reasoning on a belief that a more personalised meeting between offender and victim would lead to reduced recidivism. ... I would have suggested these arrangements even if it was absolutely certain they had no effects on recidivism, maybe even if they had a negative effect. I would have done that because of the other, more general gains.

Whilst process-focused RJ proponents place less emphasis on the nature of the outcomes, that is not to say that the outcomes will necessarily lack ‘restorativeness’. However, the restorativeness involved is likely to be of a more subjective nature (see Dignan, 2011)<sup>10</sup> and reflect the participants’ own particular values (Pranis, 2007). The benefit of this conception has been indicated in empirical research which has found that one common externally imposed RJ outcome – reparation – is not always highly valued by RJ participants (Shapland, Robinson and Sorsby, 2011). This highlights the potential disconnect between values outcome-focused proponents would impose on participants in pursuance of restoration, and what will actually be perceived as restorative by those participants.

In contrast to the above, Zernova and Wright (2007, p.93) explain that outcome-focused RJ:

clearly attaches primary importance to the achievement of restorative outcomes – in particular, reparation of harm caused by crime. Its proponents acknowledge that these can be best achieved through a voluntary and empowering restorative process, but believe that where

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<sup>10</sup> Although the outcomes arrived at may also of course coincide with externally-held perceptions of restorativeness.

such a process is either impossible or undesirable it is acceptable to employ judicial coercion.

Proponents of outcome-focused RJ include Walgrave, who has argued for RJ to be understood as “an option on doing justice after the occurrence of a crime which gives priority to repairing the harm that has been caused by that crime” (2004, p.552). He goes on to say (at 2004, p.552):

In my view, restoration is the goal, and voluntary processes are means only, though crucial ones. ... Deliberative processes appear to hold the highest potentials for achieving restoration, but if voluntary agreements cannot be accomplished, coercive obligations in pursuit of (partial) reparation must be encompassed in the restorative justice model.

Whereas process-focused proponents would argue that once agreement has not been reached voluntarily then the RJ process is at an end, outcome-focused proponents would see coercive measures as being within the scope of RJ. The above quote highlights that whilst the outcome-focused view accepts the importance of what process-focused proponents advocate, for outcome-focused proponents the process is of lesser importance than the outcomes reached, which can be imposed on participants if necessary (undermining empowerment).

Proponents of outcome-focused RJ criticise process-focused RJ, mostly concentrating on the following grounds: (1) arguing that it is too restrictive, as it limits the scope of RJ to cases where both parties are willing to participate and abide by the procedural rules (Dignan, 2011); and (2) arguing that process-focused definitions are incomplete, lacking any reference to restorative outcomes (Dignan 2005; 2011; Clamp and Doak, 2012; Walgrave, 2004).

In relation to point (1), it seems right to suggest that process-focused RJ – particularly as envisaged by Marshall – restricts RJ to cases where the victim and offender can meet. However, valuing this form of RJ most highly need not also

necessitate arguing against alternative models where, for example, the victim is not present. It simply implies that such alternatives are not the optimal choice – it does not imply that they offer nothing at all. However it is probably fair to accept that the process-focused model in and of itself does not account for precisely what it is these alternative models offer. For Dignan, this is a serious problem, in fact he refers to it as the biggest problem with process-focused RJ, saying:

it leaves restorative justice advocates with nothing to say regarding the way cases should be dealt with that – for whatever reason – do not lend themselves to some form of informal offence resolution process. More specifically, it represents a missed opportunity to consider whether, and if so how, restorative justice thinking might contribute to a broader and much more far-reaching programme of reform encompassing the entire penal system. (2011, p.175)

This seems a little unfair, as whilst process-focused models are indeed not prescriptive about which philosophy of punishment should be adhered to, they are still – by preferring a particular model of resolving criminal offences – subscribing to some important values about criminal justice, highlighting the importance of victim involvement; the importance of the empowerment of stakeholders where possible, and so forth. These values are transferrable to other criminal justice models. In any event, it is not essential to a definition of RJ that it incorporates the ambition or ability to completely reform the penal system (and it is still possible to conceptualise it in this way even if it is empirically unlikely to be achieved). It should also be pointed out that subscribing to Marshall's definition as an optimal conception of RJ, does not mean that one cannot also support other forms. It just means that this might be on other grounds, e.g. involving a separate argument for the benefits of reparation.

In criticising process-focused definitions on the basis of point (2), above, Dignan argues that it is important for people other than just the parties themselves to be able to judge what is and is not a restorative outcome:

In principle it seems desirable to be able to do this with reference to criteria that may be derived either from the definition itself, or from objective normative standards that are accepted as underpinning the definition. This may be particularly important where juvenile offenders are concerned ... (2011, p.174)

Dignan is concerned here with both power imbalances and proportionality. In an earlier work, he talks of “the need for restorative justice advocates to acknowledge that concerns raised by sceptics with regard to issues such as proportionality and fairness are well founded and do need to be addressed.” (2005, p.3). The argument is that by controlling outcomes and having an objective standard by which to measure them, concerns about proportionality might be addressed. However, efforts made in this respect in relation to conventional criminal justice models have tended to fail (Roberts, 2002). Measurement of proportionality is no straightforward task, as discussed in Chapter 3. Indeed there is an argument that participants themselves are in the best position to assess whether an outcome is proportional to those particular set of circumstances.<sup>11</sup>

Power imbalances in RJ, in particular, are a serious concern – and have been regularly highlighted as problematic in the empirical research examined in this thesis (see Chapter 6). However, it is arguable that this is something equally manageable through procedural safeguards, rather than ensuring particular outcomes (see Morris, 2002; Roche, 2003). Indeed, Dignan himself accepts that the values underpinning the process-focused model “provide an important and welcome acknowledgement of the potential abuses to which informal restorative justice processes might otherwise be subject.” (2011, p. 172). In addition, the point made above about the potentially disconnect between externally-held notions of restoration and what the parties themselves find to be restorative is relevant here. An over-emphasis on the importance of externally-held values of restoration, which can, if necessary, be imposed on participants, could in theory

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<sup>11</sup> The contested concept of proportionality is discussed at much greater length in Chapter 3.

lead to a situation where those other than the parties view them as being restored, whereas this is absolutely not the experience of the participants.

Dignan (2005; 2011) also suggests that this need to determine what counts as a restorative outcome is even more important in cases of non-standard RJ, such as where the victim is not present. Whilst this may be the case, this is irrelevant to Marshall's process-focused definition, which envisages all relevant parties being involved. Perhaps an alternative process is required when, for example, the victim is not present, but this does not invalidate the process as envisaged by Marshall.

The different perspectives of a more process or outcome-focused approach to RJ have been examined above. For the purposes of this thesis, a process-focused account of RJ will be preferred. This is partly because of the nature of the investigation: the research is concerned with what RJ can contribute to debates about sentencing. The process-focused view of RJ is something that fits well with the conception of RJ as a different process of sentencing offenders and something which might therefore offer a new perspective on sentencing.

However, the process-focused approach is also being adopted here as the arguments for a process-focused account seem stronger. The outcome-focused approach purports to value stakeholder participation, but this is not guaranteed to be genuine empowerment, and is liable to be overridden by external values and expectations.<sup>12</sup> Arnstein (1969) famously set out a "ladder of citizen participation"<sup>13</sup> which ranked various levels of participation from those which were really "empty rituals" of participation – where the citizens had no real power to affect the outcome, through to "citizen control" where participation is meaningful and participants have real power to affect the outcome. She argued

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<sup>12</sup> See Chapters 3 and 4, where it is argued that there is no one objective notion of justice. This is important to note here, as outcome-focused proponents of RJ presumably hold that the posited norms accord with what is just, whereas it is argued in this thesis that the lack of a single notion of justice means that such posited norms simply accord with a *particular notion* of justice – i.e. that held by the outcome-based proponent who advocates it.

<sup>13</sup> Arnstein's article concerned urban planning, however it applies broadly to citizen participation and can therefore be applied to the context of RJ.

that “[t]here is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.” (1969, p.216)

Where participants’ views differ from the prescribed norms posited by outcome-based RJ proponents, the level of participation of stakeholders can be said to sit towards the lower end of Arnstein’s ladder, as participants have limited power to affect the outcome. In outcome-based RJ, the powerholders might no longer be the state, but might not necessarily be the stakeholders either. Those who have predetermined the “desired” outcomes are the real powerholders. In contrast, process-based RJ allows participants real power to affect the outcome and can therefore avoid the charge of “tokenism”, i.e. “allow[ing] the powerholders to claim that all sides were considered” (Arnstein, 1969, p.216) without redistribution of power to the stakeholders.

The process-focused approach is important to what will be argued in this thesis: in particular, the development of Barton’s (2000) argument that a lack of externally imposed overriding aims is one of the key benefits of (process-based) RJ, as it empowers stakeholders to make their own decisions. This thesis seeks to show how empowerment of stakeholders is key to RJ’s potential for resolving the problem of incoherence in sentencing (see Chapters 2 and 4). However laudable the outcomes identified for an outcome-focused conception of RJ are, the prioritisation of these outcomes has the unfortunate consequence of removing at least some power from the stakeholders, as they are constrained in their decision-making – at best having expectations placed on them to reach certain types of agreement; and at worst having outcomes they have not agreed to imposed upon them.

**(b) Whether RJ is a punishment or an alternative to punishment**

The adoption of a process-focused approach to RJ for this thesis, as has been outlined above, impacts on this particular debate as well. Process-focused RJ inclines itself towards the view of RJ as a punishment, or rather a type of process

for arriving at a punishment or sentence. This can be contrasted with outcome-based RJ which highlights the importance of specific outcomes and hence might be more easily aligned with the view that RJ is an alternative to punishment (usually intended in the retributive sense), i.e. should be seeking particular, non-punitive goals. With this in mind, but also for a number of other reasons, this thesis adopts the former view. These reasons are expounded in Chapter 3, but they can be summarised as follows: RJ can be seen as a process which results in punishment insofar as this is effectively synonymous with sentencing (as is argued in Chapter 2). Further, RJ can and should allow for either retributive or utilitarian forms of punishment, depending on what is desired by the stakeholders making the relevant decision. As such, RJ should not be portrayed as being situated in opposition to what is commonly perceived to be a retributive or punitive criminal justice system (which, in any case, is a fallacy: see Roche, 2007).

This particular debate within RJ is afforded a lengthy examination in Chapter 3, as the determination of this debate is of crucial importance to the conceptual development of RJ undertaken in this thesis. For the purposes of this section, therefore, it is sufficient to outline that there are those who argue that RJ is an alternative to punishment – meaning, usually, *retributive* punishment; and then those who argue that RJ in fact can incorporate punishment – also usually meaning *retributive* punishment. These authors often also state that RJ *should* or *needs to* incorporate *retributive* punishment. In this thesis, a clear distinction is made between *retributive* punishment and *utilitarian* punishment. As such, the definition of punishment adopted is more akin to *sentencing* (see also Walker, 1991; and see Chapter 3 for the full discussion on defining punishment). For the purposes of this thesis, it is argued that RJ can be understood as a way of imposing punishment (or sentence), though one which does not necessitate any one particular purpose of punishment (such as retribution or rehabilitation). Substantial discussion of this particular issue is in Chapter 3.

### (c) Who the stakeholders are

As has been stated above, the model of RJ which will be focused on for the purposes of this thesis is RJ conferencing, and Marshall's definition has been endorsed: "Restorative justice is a process whereby all 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" (Marshall, 1996, p.37). It is important to examine who these stakeholders might be.

The debateable nature of who the stakeholders of a particular conflict are has been highlighted by Johnstone (2011, p.128) who suggests that "there can hardly be an objective answer to the question of who has a direct stake in the outcome of a particular conflict. Rather, the issue seems inherently contestable".

Nevertheless, various attempts have been made to define who these stakeholders should be. Marshall suggests: "[p]arties with a stake in an offence include, of course, the victim and the offender, but they also include the families of each, and any other members of their respective communities who may be affected" (1996, p.37). Whilst determining who victims, offenders and family members are would seem relatively straightforward, it is much less clear who would be included under "members of their respective communities". Indeed, it is widely accepted that determining the meaning of community is an extremely difficult task (Eriksson, 2009; Johnstone, 2011).

One promising method of approaching the issue of the identification of stakeholders has been put forward by McCold and Wachtel (2012). They suggest that participants in RJ be divided into direct and indirect stakeholders:

The principals, victims and offenders, are the most directly affected while their family and friends who comprise their 'community of care' are also directly affected. Then there are indirect stakeholders who live nearby or who live in the wider society. The injuries, needs and obligations of direct stakeholders are different than those of the indirect stakeholders. (2012, p.114)

For McCold and Wachtel, community members, who do not have an emotional connection to the victim or offender, are “indirect stakeholders”. This could include neighbours, as well as: “members or officials of government, religious, social or business organisations whose area of responsibility includes the place or people affected by the incident” (2012, p.114). McCold and Wachtel are adamant that whilst these indirect stakeholders have a responsibility to support RJ processes, it should be direct stakeholders who determine the outcome of the case: “[indirect stakeholders] must not steal the conflict by usurping the responsibilities of those directly affected (Christie, 1977)” (McCold and Wachtel, 2012, p.114). The role of indirect stakeholders is, according to McCold and Wachtel, as follows: “[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” (McCold and Wachtel, 2012, p.114).

Criticism of this model (in an earlier incarnation: see McCold, 1996) has been raised by Johnstone (2011), who argues that it still does not clearly define where the boundary of the community should be drawn. However, Johnstone does appear to support a general point made by McCold:

[McCold] does make a very important point. He argues that within the restorative justice paradigm, ‘community’ cannot be defined ‘a priori’; rather, what counts as community depends on the nature of the conflict. For purposes of restorative justice, the relevant community does not exist independently of the conflict, it is brought into being by the conflict. (Johnstone, 2011, p.127)

The issue remains, however, as to how the community should be determined on each occasion. In practice it is likely that the facilitator of a conference would have a leading role in determining what is feasible in terms of involvement of the community, assessing this in light of, e.g. resource constraints; the likelihood of bringing those people together within a reasonable time period, etc. Perhaps the most that can be said is that the nature of the conflict determines what counts as

community and this, interacting with the involvement of the particular facilitator constructs the community for a given conference.

McCold and Wachtel's general approach – which draws on Marshall's definition – will be largely adopted for the purposes of this thesis. Direct stakeholders, i.e. victims, offenders and their supporters, are the ones who “own” the conflict and should have a say in how the conflict is resolved, with victims and offenders being the “principal” stakeholders.<sup>14</sup> The involvement of indirect stakeholders is conceived as being supervisory, supportive and administrative (see also Roche, 2003) in relation to ensuring the fairness of the process, rather than contributing to any outcome (as per McCold and Wachtel, 2012). The role of the direct stakeholders will be the focus of this thesis, as the main concern is with the decision-making process as to what the outcome of RJ should be. Therefore it is slightly less problematic for the purposes of the research questions addressed, that indirect stakeholders are less clearly defined.<sup>15</sup>

**(d) What the scope of RJ practices should be**

RJ is sometimes considered unsuitable for more serious offences (Criminal Justice Joint Inspection, 2012), although this is not a universal view (Brooks, 2012a; Hudson, 1998). Certainly, RJ as conceived in this thesis would not necessitate the exclusion of more serious offences, partly because it is not understood as an alternative to punishment (as per (b) above).

However, this does not mean that the conception of RJ preferred for this thesis would be a suitable way of dealing with all criminal matters. RJ, as it is understood in this thesis, is a voluntary process and can therefore only take place where the offender has admitted guilt, something emphasised by Shapland et al (2006, p.507):

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<sup>14</sup> The empirical research in Chapter 6 mostly focuses on victims and offenders as the primary parties – and also often the only direct stakeholders from whom data has been gathered for the studies looked at.

<sup>15</sup> Chapter 4 deals with some of the issues relating to stakeholders and their identification in further detail.

It is important to realise that all restorative justice between individuals is predicated upon the 'offender' having acknowledged that the offence has occurred and having taken at least some responsibility for having committed the offence. The relevant stage in criminal justice is hence sentencing or the penal process, not the trial process/determination of guilt.

This means that, whilst RJ is being proposed as a solution to the problem of incoherence in sentencing, it cannot entirely replace the court process and judicial decision-making. Cases where participants in an RJ conference fail to reach agreement as to the outcome would need to default to the court process. Additionally, where an offender does not accept guilt, then a trial would need to take place, with the court performing its fact-finding role.<sup>16</sup> If the offender is found guilty, then whether RJ would be appropriate to perform the sentencing exercise would depend on whether the offender accepted responsibility following the trial. Voluntariness is particularly important to the conception of RJ preferred for this thesis. RJ's potential as a more coherent decision-making process for sentencing offenders rests on participants being able to freely contribute their views about justice, rather than being coerced by criminal justice professionals (see Chapters 4 and 6).

Having raised the issue of cases where RJ fails or is not suitable, the question arises as to what could be done to increase the coherence of the court's sentencing process (see also Chapter 2). This thesis does not deal with those circumstances where RJ is not viable, although the arguments advanced in Chapter 3 would support a preference for a single, utilitarian purpose of sentencing.<sup>17</sup>

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<sup>16</sup> Developments in RJ have not yet identified an appropriate mechanism for fact-finding which would be capable of supplanting the criminal trial. However, there is an argument to be made that discussion of facts in an RJ encounter by the principal parties may in some respects be preferable to the negotiation of a basis of plea by criminal justice professionals. Chapter 4 touches on related issues, although a full examination of this aspect of RJ is outside the scope of this thesis.

<sup>17</sup> A problem for Luna (2003) in suggesting a holistic approach to sentencing by using RJ is that having dispensed with "linear arguments" for retributive or utilitarian justifications for punishment (unlike this thesis), he is left with a problem as to how to justify the approach which should be taken where RJ is not suitable or available, e.g. where agreements fail, or offenders do not accept responsibility.

However, this warrants much further consideration and discussion and is an area requiring further research beyond the remit of this thesis.<sup>18</sup>

(e) The relationship between RJ and the criminal justice system

This particular issue is dealt with more fully in Chapter 5. To summarise, there is substantial discussion about whether RJ can operate better within or outside the criminal justice system, i.e. whether it is better in its community-led form, or state-run form (O'Mahony and Doak, 2008). There are those who argue that involvement by the state will necessarily undermine key aspects of RJ (such as empowerment of participants), e.g. Boyes-Watson (1999); whereas others suggest that the state can better support RJ – particularly in situations where the state is strong, but communities are weak (Roche, 2003; Shapland, 2003).

This thesis focuses more on state-run RJ, partly because of the overall concern being sentencing, the responsibility for which – on a formal level at least – lies exclusively with the state. Roche's argument about the precise role that the state should have has also been found to be persuasive. Roche (2003) suggests that the state should not operate as it commonly does in state-run RJ, where it is responsible for assessment and ratification of the outcome (e.g. as happens in the youth justice systems of Northern Ireland and New Zealand). In contrast, Roche suggests that the state's role should be limited to an administrative one – ensuring that no one participant dominates the RJ conference and checking that the procedure is fair. This view is endorsed in this thesis, and as mentioned above, is explored in greater detail in Chapter 5.

This can also be conceived of as representing a different understanding of how the state should discharge its duty – particularly in ensuring stability – to its citizens. This duty has been raised by (*inter alia*) Crawford, who talks of “[t]he contemporary growth of citizens' demands for order and security” (2012, p.109) as well as Ashworth (2001, p.357) who states: “it is the responsibility of the State to

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<sup>18</sup> See Chapter 7 for more in relation to this and other areas for future research.

ensure that there is order and law-abidance in society, so that citizens are not at the mercy of ruffians, thieves, terrorists, etc”.

Rather than the assumption of an over-protective, but not necessarily effective role by the state, which involves the hoarding of responsibility for sentencing outcomes; the state’s role and responsibility in this respect could be re-imagined as more administrative. The state’s responsibility to provide stability for its citizens and protect the public might instead mean – in the context of penal law – that it has a duty to set up and ensure effective implementation of RJ, as well as monitor processes and ensure good practice.

It has been argued by Mannozi (2012, p.242) that “crime amounts to a blow to the stability of the system, because criminal actions go beyond the limits of what is permissible”, but that it is mediation (such as RJ) which has a better claim to restore stability:

From the point of view of penal law, the relationship between the offender and the victim is not so important: what counts when a crime is committed is finding an offender to punish. The crime remains a substantially incomprehensible act, no one is interested in why it was committed or what events led to it ... the field of observation of penal law is not large enough to include the context from which the crime sprang. In this respect, mediation provides more wide-ranging and sophisticated instruments. In fact, mediation can widen the field of investigation to cover the origins of the crime, the effects that the crime may have on other individuals, the reactions of others to the criminal behaviour and the context in which all this occurs. (2012, p.242)

This particular point indicates both the importance of the dialogue in RJ (see Chapter 4 for more discussion on this point), as well as pointing to the connection between stability and legitimacy. The increases in legitimacy that might result from widespread implementation of RJ would in turn create more stability due to the decreased likelihood of challenge to state authority. This is especially so, if it can be shown that RJ is indeed a more coherent method of decision-making in

terms of sentencing. With this in mind, it can be argued that RJ as conceived here does not deny the “public” aspect of a crime, because it is still acknowledged that the state will have some role in the pursuance of stability for its citizens.<sup>19</sup> These points are explored in more detail in Chapter 4.

### *Summary*

In the discussion above, the understanding of RJ adopted for this thesis has been explained by systematically working through commonly identified key issues for restorative justice and indicating where in these debates the conception of RJ employed in this thesis is located. In summary, a process-focused approach to RJ is preferred, which endorses Marshall’s well-known definition. Reasons have also been given as to why RJ is viewed as an alternative punishment (something explored in greater detail in Chapter 3). The conception of RJ which will be relied on for the purposes of this thesis will largely adopt McCold and Wachtel’s (2012) approach to determining who the stakeholders are, i.e. victims, offenders and their supporters as direct stakeholders and primary parties, who are responsible for the decision-making process (the main concern of this thesis). The scope of RJ will be understood to include serious offences and imprisonment as an available option in terms of RJ outcomes. However, the understanding of RJ adopted requires cases to be limited to those where participation of all parties is voluntary and the offender has admitted responsibility for the offence.

This conception of RJ is to be viewed not as some kind of “ultimate” definition of RJ, but rather as one particular conception of RJ (see Johnstone and Van Ness, 2007), and the most valid conception to rely on for the purposes of the current research. That said, the classification method used by O’Mahony (2012) and Sherman, Strang and Newbury-Birch (2008), explained below, is useful as a short-hand method of distinguishing between what – for the purposes of this thesis – does and does not meet the criteria for this conception of RJ.

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<sup>19</sup> With the added benefit for the state and its politicians of insulating themselves from challenges of undue leniency or severity. Their role is no longer the setting of penalties (apart from perhaps in relation to resource constraints), but of ensuring procedural fairness.

O'Mahony (2012) and Sherman, Strang and Newbury-Birch (2008) draw a distinction between "restorative practices" and "restorative justice". Schemes based on "restorative practices" are those which fail to fully embrace key principles of RJ (as conceived by these authors). An example of restorative practices would be referral orders, which are mandatory for the offender and often do not involve the victim at all (see Newburn, Crawford et al, 2002, p.41). In contrast, RJ conferencing is viewed as restorative justice (O'Mahony, 2012, p.94–5), as it incorporates a full set of RJ values. Of course, there will be variation in how restorative schemes are implemented – i.e. how many of the key values they incorporate – and so this might be best characterised as a spectrum of restorativeness (McCold, 2000).<sup>20</sup> This established terminology will be adopted in this thesis, but should be understood as shorthand in the following way: "restorative justice" is taken to mean that which falls within the conception of restorative justice as has been outlined for the purposes of this thesis; and "restorative practices" is taken to mean that which falls outside this scope.

The conception of RJ relied on for the purposes of this thesis has been outlined in detail. The following section will briefly describe the current practice of RJ in the jurisdictions which will be examined in this thesis: England and Wales; Northern Ireland; New Zealand and Australia. A full examination of the practice of RJ in these jurisdictions is contained in Chapter 5 and the analysis of secondary empirical research concerning RJ in these jurisdictions is in Chapter 6.

#### *The practice of RJ*

In terms of the practice of RJ, this is something which has developed piecemeal over time in England and Wales. Whilst there are currently a variety of restorative-based initiatives in operation across England and Wales (Sherman and Strang, 2007; Wilcox and Hoyle, 2004), there is as yet no legislation in place which is

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<sup>20</sup> Chapter 5 explores various practices on this spectrum in more detail.

comparable to Northern Ireland or New Zealand's integration of RJ into the criminal justice system.

New Zealand was the first of these jurisdictions to legislate for state-run RJ and this has been running (for youths) since 1989. Australia developed police-led RJ in the 1990s and by 2001 had legislation in place for RJ (for youths) in all states apart from the Australian Capital Territory (Larsen, 2014, p.8). Northern Ireland legislated for state-run RJ through the Justice (Northern Ireland) Act 2002 and by 2006 RJ conferencing (for youths) was operating across Northern Ireland.

## **2. Research Aims**

The section above has outlined in detail the position to be adopted in this thesis in relation to RJ. That position had been influenced in part by the research aims of this thesis. This section sets out these aims, explaining the problem tackled in this thesis and its proposed solution, and going on to outline the contribution to scholarship. The research questions are then set out and this section concludes by describing how the thesis is structured.

### The problem of incoherence in sentencing

The thesis critically reflects on the current state of the sentencing system in England and Wales and aims to elucidate the reasons for an over-emphasis on consistency in sentencing, which has helped sideline the problem of incoherence. In particular, an increasing focus on consistency in sentencing over the last quarter of a century is identified. This increasing focus on consistency is argued to be problematic, as argued fully in Chapter 2.

This thesis aims to explain why shifting the focus away from *consistency* towards *coherence* is desirable and may help resolve tensions inherent in the pursuit of consistency in sentencing. The five purposes of sentencing set out in s.142 CJA

2003 are identified as a key factor leading to incoherence in the process of sentencing. Writing before this legislation was enacted, Henham argues:

an important first step towards coherence in sentencing policy should be a statement of carefully drawn principles and purposes reflecting agreed sentencing objectives and the priority to be accorded to competing interests. (1998, p.601)

Whilst s.142 CJA 2003 could be said to encapsulate “purposes reflecting agreed sentencing objectives”, there is no agreement over “the priority to be accorded to competing interests” and as such, this legislation results in incoherence in the sentencing process. In particular, the sentencer chooses which of the purposes to prioritise in any given case. Due to the improbability of being able to satisfy all five aims each time a sentence is passed, the problem arises as to how sentencers are to decide when certain purposes apply and when they do not. Sentencing guidelines provide ranges for different offences, but these purposes of punishment outlined in s.142 CJA 2003 are always to be adhered to and in respect of these purposes, there is no guidance as to when one aim should be selected over another.

The thesis aims to explain in detail why the five purposes of sentencing set out in s.142 CJA 2003 are incompatible, which involves substantial discussion of the traditional philosophical justifications for punishment: retribution, rehabilitation and deterrence (which are grouped into retributive and utilitarian justifications). This is important to understanding the philosophical foundations of these five aims and the reasons why they are incompatible. In many cases these aims pull in different directions. For example, retributive punishment is backward-looking, focusing on what an offender deserves; whereas utilitarian punishment is forward-looking, focusing on the future consequences of punishing the offender. Theories of punishment which attempt to combine these two opposing justifications are also examined, but it is argued that they do not successfully achieve a coherent method of doing so.

The problem of incoherence is significant, as it poses a threat to public confidence in sentencing and thus poses a challenge to the legitimacy of the sentencing system. The importance of public confidence in sentencing is acknowledged in the legislated role of the Sentencing Council (s.128 Coroners and Justice Act 2009), which includes promoting awareness amongst the public of sentencing practice. This has also been promoted via the Ministry of Justice's *You Be The Judge* scheme (Ministry of Justice, 2012a), which aims to develop public understanding of judicial decision-making through role playing sentencing scenarios both online and at public events. Additionally, unless the sentence is fixed by law, sentencers have to give reasons for the sentences that they impose (s.174 CJA 2003):

#### **174 Duty to give reasons for, and explain effect of, sentence**

(1) Subject to subsections (3) and (4), any court passing sentence on an offender—

(a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, ...

As can be seen, significant store is placed in the transparency of judicial decision-making and public confidence in the sentencing system. It is therefore problematic that the conflicting purposes render the decision-making process of sentencing incoherent.

The significance of this incoherence can also be understood by considering that the purpose prioritised by the sentencer can affect both the type and extent of the sentence imposed. For example, it could mean the difference between a drug addict who shoplifts being given a sentence of imprisonment or not (where the case is borderline in terms of sentencing guidelines). A sentencer prioritising the aim of punishment would be likely to impose a sentence of imprisonment, whereas a sentencer who prioritises rehabilitation is more likely to impose a community order with a Drug Rehabilitation requirement. The significance of this

is particularly salient given recent attempts to curb spending on criminal justice (Ministry of Justice, 2013) and the prioritisation of considering the resource implications of sentencing (the assessment of which is one of the duties of the Sentencing Council: s. 127 Coroners and Justice Act 2009). The conflicting purposes of sentencing and the lack of a coherent process by which judges decide between them might undermine such aims, as identified by the Justice Committee (2009, p.29):

It is set out in statute that sentencing guidelines should be drawn up with regard to the cost of different sentences and their relative effectiveness. ... We acknowledge that this is made difficult by the lack of clarity as to the purposes of sentencing, because there is no clear and consensual standard as to how effectiveness should be determined.

Such financial issues are perhaps secondary to the overwhelming need for punishment to be based on coherent decision-making. Sentencers wield the power to (*inter alia*) impose sometimes crippling financial penalties (e.g. courts can deduct fines directly from “minimal subsistence” benefits). Moreover, sentencers have the power to deprive citizens of their liberty – for the rest of their lives in some cases. Importantly, sentences often do not just impact on the offender, and can have serious implications for family members, particularly dependent children (see *R v Petherick* [2012] EWCA Crim 2214 in which the impact on a young child of the imprisonment of his mother was considered). Lack of clarity in decisions which can have such an enormous impact on citizens is unsupportable and this thesis aims to explore ways in which coherence in sentencing can be improved.<sup>21</sup>

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<sup>21</sup> Chapters 2 and 4 develop this notion of coherence in the process of sentencing further.

## The proposed solution: Restorative Justice

The thesis aims to explore the extent to which RJ might solve the incoherence problem in sentencing, through providing an alternative decision-making process which operates as a kind of mediation process between stakeholders' philosophies of punishment and understandings of justice. This represents a new approach to the problem of incoherence in sentencing since it still allows for different philosophies of punishment, but avoids the problems inherent in the selection of different purposes by sentencers. With RJ, there is a coherent process for the selection, and the philosophies of punishment can be linked to stakeholders' understandings of justice. As such, it is clear whose notion of justice is being done (see Chapter 4 for the full development of this argument).

Another way of tackling the incoherence resulting from the combination of conflicting purposes of punishment would be to prioritise one particular purpose, which is usually recommended to be retribution (Ashworth, 2010a). This might be coherent in the sense of all sentencing decisions being based on one clearly stated aim, but it might lead to problems of legitimacy, through failing to adequately account for the variety of views held by the public concerning what would constitute justice in a particular case. Further, a single approach might not fit every case, being too inflexible to adequately respond to the vast array of offence and offender characteristics (see further Chapter 2 on this point).

RJ can potentially offer a coherent way of deciding between different aims of punishment, avoiding the problem of singling out one aim. The following hypothesis is proposed and then explored in this thesis:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

The thesis aims to examine the extent to which this occurs in practice through exploring the existing empirical research, highlighting issues which can impact on the practical realisation of this conception of RJ. One of the stumbling blocks for the implementation of RJ is the enduring influence of the notion of proportionality – i.e. the idea that sentences should be proportional to the offence. The empowerment of participants as decision-makers is suggested by some (e.g. Ashworth, 2002) as undermining the principle of proportionality, as participants are – in theory – allowed to make decisions which are not constrained by centralised ideas of justice. Whilst there is an argument to be made that the nature of RJ in fact allows for more factors about a particular offence to be taken into account and in this way might lead to more accurate proportionality, this thesis prefers an alternative line of reasoning. It is argued that proportionality – like consistency (with which it is ideologically intertwined) – is not the incontestable principle it is commonly held to be and in fact is decidedly problematic. Chapter 3 explores this argument in substantial detail, highlighting: the problem of measuring proportionality; the problem of undesirable outcomes flowing from proportionality; and the problem of proportionality's ties to the problematic philosophy of retribution.<sup>22</sup>

#### Contribution to scholarship

The original contribution of this thesis is the development of a conceptual and structural argument for RJ, going well beyond its practical applications, as a vehicle by which previous incoherence in the process of sentencing can be resolved. Importantly, this is without the need to engage with or supersede particular philosophies of punishment, since stakeholders in this conception of RJ are empowered to pursue any philosophy of punishment which they hold, be that more retributive or utilitarian. Therefore, different philosophies of punishment can be brought to bear in specific cases (i.e. a kind of situated justice), yet without the incoherence which results from the attempts to allow for different

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<sup>22</sup> N.B. The arguments concerning proportionality refer to the proportionality of sentencing outcomes.

philosophies of punishment in the current sentencing system in England and Wales (see Chapter 2).

This differs from conceptions of RJ as an alternative to punishment (see Zehr, 1990), and also diverges from existing scholarship arguing that RJ is a form of punishment (see Daly, 2002).<sup>23</sup> Those who argue that RJ is a form of punishment tend to assume the *necessity* of a retributive element to the process, which the theory of RJ preferred in this thesis does not. Barton's (2000) work is an exception, identifying the importance of the empowerment of stakeholders' views and moving away from the idea that RJ as a form of punishment *must* incorporate any particular philosophy of punishment. This thesis builds on this conception, developing it into an understanding of RJ as a mediation process between ideas, which has the potential to operate as a more coherent process for sentencing offenders than current sentencing practice.

#### Research questions

The research questions engaged with in this thesis stem from one overarching question: *Is the restorative justice process more coherent than the decision-making process in the traditional sentencing system?* This broad question may be broken down into the following questions:

1. To what extent is the current sentencing system (particularly the process of arriving at a sentence) incoherent? (Chapter 2)
2. Where does this incoherence stem from? (Chapter 2; Chapter 3)
3. What mechanisms are there for resolving this incoherence? (Chapter 3)
4. Can restorative justice be conceptualised in such a way that promises to overcome these problems? (Chapters 1 and 4)

Following working through these theoretical issues, the following questions concerning the particular conception of restorative justice arrived at were formulated, concerning what happens in practice:

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<sup>23</sup> Chapter 4 discusses this in substantial detail.

5. Do stakeholders mediate between different theories of punishment and ideas of justice during the restorative justice conference? (Chapters 5 and 6)
6. Are the stakeholders the main decision-makers as to the outcome? Why/why not? (Chapters 5 and 6)

### Structure of the thesis

Chapter 2 explores current sentencing practice in England and Wales over the last quarter of a century, looking in particular at the increasing focus on consistency in sentencing. It is argued that this is misdirected because it can only achieve crude, rather than “true” consistency. It is argued that instead of pursuing consistency in sentencing, the primary goal should be the coherence of the decision-making process. The chapter then moves on to explore in more detail the incoherence of the current sentencing system in England and Wales. A particular focus is on the five competing purposes of sentencing (in s.142 CJA 2003) which sentencers must take into account every time they sentence, yet with no guidance as to how they should prioritise these aims. It is accepted that a plurality of aims is necessary, and it is then suggested that RJ might offer a more coherent way of deciding between these purposes.

Chapter 3 expands on the issue of coherence in sentencing, going into substantial detail concerning the underlying philosophies of punishment. This entails an exploration of the traditional philosophical justifications of punishment: retribution and utilitarianism (rehabilitation and deterrence). The aim is to elucidate the underlying differences between these philosophies. Mixed theories of punishment are also examined and it is explained why these fail to successfully combine different philosophies of punishment.

The discussion is tied in with the current application of philosophies of punishment in the criminal justice system, which involves exploration of problems concerning terminology relating to punishment, including an examination of different

interpretations of the term *punishment* itself. This chapter then elaborates on the possibility of RJ providing a solution to the problem of how to coherently combine different philosophies of punishment into the criminal justice system. This involves examining the relationship between RJ and punishment, including a discussion of RJ and proportionality.

Chapter 4 explains in significant detail why the conception of RJ arrived at for the purposes of this thesis can serve to increase coherence in the process of sentencing, focusing on three main factors which lead to RJ offering a more coherent process: that RJ can provide an identifiable genesis of the notion of justice being done in each instance of sentencing; that RJ provides for a better knowledge base from which to make sentencing decisions; and that RJ offers a better process for arriving at a sentence. This builds on the discussion of RJ undertaken in this chapter and Chapter 3, as well as going on to further differentiate RJ from other forms of public engagement in sentencing.

Chapter 5 examines the development, and current practice, of RJ in the four jurisdictions with which the secondary empirical research is concerned: England and Wales, Northern Ireland, Australia and New Zealand. Notably, it highlights that England and Wales, unlike the other three jurisdictions, has implemented RJ in a slightly *ad hoc*, piecemeal manner. This chapter provides important background information relating to the relevant jurisdictions for Chapter 6, which sets out the findings from the empirical analysis. It also contains a section exploring more broadly factors affecting the implementation of RJ into a state-run criminal justice system.

Chapter 6 sets out the research findings from the secondary research on existing evaluations carried out in Northern Ireland, England and Wales, Australia and New Zealand. The aim behind the analysis of this empirical research was to explore the issues which arise in the translation of RJ theory into practice. There were some discrepancies in the data, which was unsurprising given that the empirical research collated data from across four different jurisdictions. However, despite these

discrepancies, key findings were identified concerning the operation of RJ in practice, and the implications of these findings for the hypothesis (formulated through the theoretical research) are explored in this chapter. This includes the highlighting of some interesting issues for RJ in practice, such as the difficulty of getting the balance right between state interests and the empowerment of stakeholders. Finally, the thesis is concluded in Chapter 7.

### **3. Methodology**

The methodology was selected to address two categories of research questions: theoretical and practical. As set out above in the section outlining the research questions, the theoretical questions which were posed required investigation into incoherence in the process of sentencing and the extent to which RJ could be conceptualised in a way which would be likely to address the shortcomings of traditional sentencing processes and therefore serve to increase coherence. The practical questions which were posed required investigation of RJ practice to explore the extent to which there was evidence of what had been identified as crucial to RJ's ability to increase coherence (i.e. the empowerment of the stakeholders as key decision-makers as to the outcome), occurring in practice.

The approach adopted in this thesis was to address the theoretical research questions first, in order to provide a normative platform upon which the practical questions might then be addressed. This task involved accessing legal, philosophical and criminological literature and utilising methods from within these frameworks which were identified as most suitable to achieving the research aims. According to Denscombe (2003, p.3):

The social researcher is faced with a variety of options and alternatives and has to make strategic decisions about which to choose. ... There is no 'one right' direction to take. There are, though, some strategies which are better suited than others for tackling specific issues.

This section seeks to explain why the above outlined approach was adopted and demonstrate that these decisions represent the best strategy for tackling the research questions, bearing in mind limitations such as available resources.

The reason for engaging with literature from across the disciplines of philosophy, law and criminology was to allow for an examination of sentencing and restorative justice from these different, but complementary, perspectives. Significant aspects of the literature examined in pursuance of the development of the argument advanced in this thesis crosses boundaries between the disciplines as well (e.g. Bean, 1981; Lacey, 1988).

It was felt that failing to engage with any one of these disciplines, would have resulted in only a narrow view of RJ and sentencing emerging from the research. For example, an analysis of RJ from a purely criminological point of view would lack an engagement with philosophical justifications of punishment and how they relate to RJ, as well as the implications of what RJ might be able to achieve in terms of providing an alternative method of deciding on the aims of punishment. An analysis of RJ from a purely philosophical perspective or a purely legal analysis would have failed to assess whether RJ actually works as hypothesised in practice, the importance of which is something which became particularly apparent during the course of this research, as a gap between theory and practice was identified (in chapter 6).

The following section explores in more detail the methods employed in answering each of the research questions with which this thesis is concerned. These methods are drawn from the above-mentioned disciplines of law, philosophy and criminology.

The methods used to investigate each research question  
Different methods were deemed more appropriate to achieve the best possible investigation of each of the research questions. These different methods were

synthesised at different stages throughout the research, e.g. both “black letter” legal methods and socio-legal methods were brought to bear on research question 1 (see below); but also by all of the methods employed having played a part in addressing the overall concern of the thesis: *Is the restorative justice process more coherent than the decision-making process in the traditional sentencing system?*

*Question 1: To what extent is the current sentencing system (particularly the process of arriving at a sentence) incoherent?*

The methods employed to investigate this research question were both legal methods (in the “black letter law” sense) and socio-legal methods. Traditional, “black-letter law” is defined here by McConville and Cui (2007, p.1):

‘black-letter law’ focuses heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside the law. Deriving principles and values from decided cases and re-assembling decided cases into a coherent framework in the search for order, rationality and theoretical cohesion has been the fodder of traditional legal scholarship.

This kind of approach was adopted to effectively lay the groundwork for answering this research question. It was deemed important to achieve a good understanding of the way things *were*, before moving on to examine arguments concerning how they *ought to be*. It involved an analysis of sentencing legislation; sentencing caselaw; sentencing guidelines; and policy documentation pertaining to sentencing.

The problem for the (black letter) legal methodological approach when used as a stand-alone method of analysing criminal justice issues is that – as pointed out by Carlen and Collison (1980, p.20): “[t]he actual administration of criminal justice ... bears very little resemblance to its imaginary conception in law”. This is particularly important in relation to the concerns of this thesis. As such socio-legal methods were also brought to bear on this question. Unlike black-letter law,

socio-legal studies can be characterised as a broader approach (Galligan, 1995), influenced by both sociology and other social science disciplines (Banakar, 2015), and which therefore allows for a perspective which takes into account the context of wider social and political issues, e.g. penal legitimacy.

Having gained a good understanding, and begun an analysis, of current sentencing law in England and Wales, it was felt important to widen the approach to answering this particular research question. Socio-legal methods were employed with the aim of furthering the analysis and allowing for a deeper engagement with the broader issues at stake. This enabled, overall, a more critical analysis of how the sentencing system operates and how it might be improved. Socio-legal literature concerning consistency and coherence in sentencing was accessed (such as Koffmann, 2006; and Lacey, 1994). This was used as a basis for developing an in-depth analysis of the current state of sentencing law in England and Wales – particularly in relation to coherence in the process of decision-making. It was necessary to adopt socio-legal methods as well as a more traditional “black letter law” approach in making a challenge to the status quo – that is, in arguing that current sentencing *is* incoherent and suggesting an alternative approach of understanding consistency as less important than coherence. The attack on the ideal of consistency in particular required a methodology outside the constraints of a “pure” legal analysis, due to consistency being a key concern of black letter law (McConville and Cui, 2007).

*Question 2: Where does this incoherence stem from?*

Some of the above methodologies were also employed in consideration of this question (see Chapter 2), but this was largely addressed through philosophical methods, i.e. immersion in philosophical literature about punishment and philosophical analysis of the five statutory purposes of sentencing in England and Wales. This involved identifying which philosophies of punishment underlay these purposes of sentencing. It also required philosophical analysis of the main theories of punishment and in particular an examination of mixed theories and whether it

was possible for multiple competing aims (as identified in the current sentencing system) to coexist in a single, coherent, theory of punishment.

There is a huge philosophical literature on justifications for punishment, with arguments for and against retribution, rehabilitation and deterrence (and so forth) examined in great detail (see for example Brooks, 2012a; Ezorsky, 1972; and Honderich, 2006). It seemed sensible to draw on these existing resources to analyse this aspect of sentencing, as well as broader legal and socio-legal methods.

*Question 3: What mechanisms are there for resolving this incoherence?*

To address this question, both socio-legal and philosophical methods were used to explore the possible ways in which the identified incoherence could be resolved, or reduced. As outlined above, the philosophical analysis explored whether a single theory of punishment could adequately incorporate conflicting philosophies of punishment – and it was concluded that this was unlikely to be achievable. A socio-legal analysis of the potential ramifications of addressing the incoherence by preferring one single philosophy of punishment was explored – and found to be an unattractive prospect, in large part due to its potential for undermining penal legitimacy. RJ was then introduced as a possible alternative method of addressing the problem of incoherence – this was arrived at following the above methods of philosophical and socio-legal analysis.

*Question 4: Can restorative justice be conceptualised in such a way that promises to overcome these problems?*

This involved accessing substantial RJ literature, particularly literature pertaining to RJ theory – most of which would fall within the categories of either criminological literature or socio-legal literature. Through an in-depth analysis of the literature, and analysis of key debates within the field of RJ theory, a conceptual argument concerning RJ was developed for the purposes of this thesis. Where relevant, certain aspects of political theory literature were also drawn on, in particular to distinguish between deliberative democracy and RJ (in Chapter 4).

*Question 5: Do stakeholders mediate between different theories of punishment and ideas of justice during the restorative justice conference? and Question 6: Are the stakeholders the main decision-makers as to the outcome? Why/why not?*

The approach to answering these research questions drew heavily on criminological empirical methods: exploratory fieldwork was conducted (although the data collected has not been included in this thesis, for reasons outlined below); and secondary research of existing studies of RJ practice in Northern Ireland, England and Wales, New Zealand and Australia was undertaken.

The fieldwork was a small-scale study of state-run RJ conferencing in Northern Ireland. In particular, this involved exploring whether victims and offenders contributed their ideas about what should go into the conference plan, with the aim of obtaining an insight into whether stakeholders do contribute their ideas and mediate between different theories of punishment in an RJ conference. Similar, but larger-scale studies of RJ practice have been carried out in various jurisdictions, e.g. Campbell et al (2005); Maxwell et al (2004); Shapland et al (2004–2008); Strang et al (2011). These studies (and others) are explored in the analysis of the secondary research. However, it was ultimately decided not to incorporate the primary fieldwork. Although this work provided a useful opportunity to gain insights into RJ practice, the findings were not extensive enough to allow for substantive conclusions to be drawn.

An analysis of existing studies of restorative justice was undertaken with the aim of answering the above question, that is, exploring the extent to which there was evidence of practice which reflected the hypothesis which had been developed during the theoretical research, i.e.:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

This secondary analysis also aimed to identify potential obstacles to RJ operating in this way in practice, which might not have been immediately apparent from a purely theoretical analysis.

A secondary analysis of existing research, rather than first-hand empirical research was carried out, so that a number of jurisdictions could be accessed with minimal resource implications (in the end four jurisdictions were included in the study: England and Wales; Northern Ireland; New Zealand and Australia). This decision was made partly due to an awareness of the existence of a large number of RJ studies already available. As mentioned above, fieldwork in Northern Ireland was also carried out, but added little to the analysis of existing studies. This adds credence to the decision to conduct the rest of the practical research through this secondary analysis. Moreover, primary empirical research covering four jurisdictions was outside the scope of the time and financial resources for this project. Dale, Arber and Procter (1988, p.44) note: “The more obvious financial savings that secondary analysis can provide are of particular value to the lone researcher”.

Similar, broader secondary analyses of existing evaluations of RJ have been carried out, looking at a wide range of issues, e.g. Sherman and Strang (2007). The comparatively small number of studies analysed for this thesis was, however, suitable to the narrowly-defined issue being evaluated in this research – the analysis being focused on the particular research questions identified above. Further, this empirical research was intended to complement the substantial theoretical work carried out in this thesis, rather than to stand alone, as with other, larger studies (which also tend to cover a much wider range of issues).

It was felt that the above decisions would facilitate the best possible outcomes for the research. It is acknowledged that there are difficulties in comparing different RJ programmes – something which is elaborated on in Chapter 6. For example, as noted by McCold (2003), not all RJ programmes involve a direct meeting between

the victim and offender and RJ can take many different forms. The research undertaken for this thesis has attempted to minimise these issues by limiting the comparisons to studies which involve a certain model of RJ, i.e. RJ conferencing, where the victim and offender do actually meet, as this is important due to the particular investigation being carried out in this thesis.

Initially, the secondary research was focused on England and Wales – so as to include any available data relating to the jurisdiction with which this thesis is primarily concerned; as well as Northern Ireland – for comparison with the fieldwork data. Relevant studies were identified by a thorough literature search. These were then filtered according to whether they addressed RJ involving a direct meeting between victims and offenders; and whether they involved RJ which produced a plan or outcome agreement, so as to ensure that the studies were likely to address issues relevant to the hypothesis. A more thorough analysis of the remaining studies was then conducted and at this stage, further studies were disregarded as not directly addressing the issue of contribution to plans or outcomes (elaborated on below). This process resulted in only one relevant study from each jurisdiction of England and Wales, and Northern Ireland. Therefore, a decision was made to access existing studies from two further jurisdictions: Australia and New Zealand, so as to accumulate sufficient data.

Identifying relevant studies was a challenging task, particularly in relation to studies of RJ in England and Wales. Most of the England and Wales studies tended to focus on issues other than contributions to the plan, such as reconviction rates: e.g. Miers et al, 2001; Wilcox and Hoyle, 2004; Strang, Sherman et al, 2006. Some schemes did look at the participation of the victim and offender in the RJ process, but did not differentiate between general participation in the conference and contribution to the plan (e.g. Hoyle, Young and Hill, 2002; Strang, Sherman et al, 2006).

In addition to this, many studies acknowledged that (at least some of) the schemes that they had evaluated could only tenuously be called RJ, or even did not amount to RJ at all (Miers et al, 2001, p.vii; p.28).<sup>24</sup> In Wilcox and Hoyle's 2004 evaluation, only a relatively small percentage (13.5%) of the restorative interventions for which data was collected involved a direct meeting between the victim and offender (2004, p.5). As this raised questions about the extent to which the evaluations could provide information about the participation of victims and offenders and their interaction, i.e. the extent to which they mediated between their ideas of justice and philosophies of punishment, such evaluations were not ultimately included in the secondary analysis. This is because where these evaluations had not taken into account the extent to which the victims and offenders had contributed to the plan, then no data relevant to the research was available. The only study from England and Wales which ultimately directly addressed the issue of participants' contributions to plans was the evaluation carried out by Shapland et al (2004–2008).

As noted above, the small amount of relevant secondary data from England and Wales which emerged during the course of the research (and Northern Ireland, although this was more immediately apparent), prompted a widening of the secondary analysis. Studies from further afield – Australia and New Zealand – were incorporated into the research. These jurisdictions were selected as they have similar RJ conferencing schemes in operation to that in Northern Ireland (which closely accords with RJ as conceptualised in this thesis: it usually involves the participation of both victim and offender and results in an agreed outcome). Indeed, RJ schemes in New Zealand and Australia provided a form of blueprint for the development of RJ in both Northern Ireland and England and Wales. Additionally, in the case of Australia, it offered the opportunity to compare statutory (Trimboli, 2000) and non-statutory (Strang et al, 2011) schemes. The particular evaluations which were examined were selected on the basis of their having covered the issue of contribution to plans – rather than the more common

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<sup>24</sup> See Chapters 1 and 4 for discussion about the meaning of RJ.

examination of general participation rates.

Ultimately, a total of six evaluations were identified as useful for secondary analysis: one from England and Wales (Shapland et al, 2004–2008); one from Northern Ireland (Campbell et al, 2005); two from New Zealand (Maxwell and Morris, 1993; and Maxwell et al, 2004); and two from Australia (Strang et al, 2011; and Trimboli, 2000). The analysis of the secondary research was straightforward, having a particularly narrow focus on the research questions outlined above. Ultimately, there was no useful information available about whether participants mediated between different ideas during the process and the vast majority of the data available (and therefore the resulting analysis) concerned research question 6, i.e. the levels of contribution to outcome agreements or plans by different participants and which participants appeared to be the main decision-makers concerning the outcome. This was not entirely unsurprising, as research question 5 represents a new way of understanding the operation of RJ and hence it was unlikely to be something commonly addressed previously. That said, the data available concerning research question 6 provided information which was useful in reflecting on question 5, as stakeholders could not have been mediating between their ideas if they had not in fact contributed their ideas to the discussion – and certainly no meaningful mediation could have taken place where stakeholders were not ultimately key decision-makers (see Arnstein, 1969).

The secondary research has been organised thematically for the analysis in Chapter 6. The themes were identified through a process of categorising the data, looking for factors which were directly relevant to the hypothesis and occurring with some frequency, in some cases being common across the jurisdictions examined.

## Conclusion

The above methodological approach was chosen as being the best possible way of addressing the research questions, which when taken together answer the overall concern of this thesis: whether RJ has the potential to offer a more coherent process of arriving at (the equivalent of) a sentence. The methodology employed for this thesis was chosen as representing the best approach to the research, whilst also being realistic in terms of available resources. For example, it was necessary to conduct secondary research on existing evaluations of RJ, so as to obtain as wide a cross-section of data as possible with limited resources.

Traditional legal methods and socio-legal methods were used to identify and define the problem of incoherence (research question 1). In exploring further the identified incoherence, philosophical methods were also employed (research question 2). Both socio-legal and philosophical methods were used to examine possible solutions for resolving incoherence in sentencing (research question 3). In working towards a conceptualisation of RJ which might overcome the problem of incoherence (research question 4), criminological and socio-legal literature on RJ was accessed and analysed. Having developed a strong theoretical analysis of issues relevant to the thesis, criminological empirical methods were used to explore the extent to which the theoretical conception of RJ arrived at reflected what was happening at a practical level (research questions 5 and 6) – and aimed to identify potential problems for such a process which might not have been apparent from a purely theoretical analysis.

The research thus adopted an approach which utilised one or more of legal, socio-legal, criminological and philosophical methods in addressing each research question. These methods were synthesised together, in all being brought to bear on the overriding objective of the thesis. It was felt that failing to engage with any one of these methods would have resulted in only a narrow view of RJ and sentencing emerging from the research. For example, an analysis of RJ from a

purely criminological point of view would lack an engagement with philosophical justifications of punishment and how they relate to RJ, as well as the implications of what RJ might be able to achieve in terms of providing an alternative method of deciding on the aims of punishment. An analysis of RJ from a purely philosophical perspective or a purely legal analysis would have failed to assess how RJ actually works in practice, the importance of which is something which became particularly apparent during the course of this research, as a gap between theory and practice was identified (in chapters 6 and 7) and obstacles to RJ as theorised operating effectively in practice were identified.

The dangers of justifying and advocating penal initiatives through reliance on a purely philosophical argument has been highlighted by Garland (1991, p.115), who points out:

[t]he sociology of punishment offers a framework for analysing penal institutions that, potentially at least, can give a fuller and more realistic account than ... the punishment-as-moral-problem approach of the philosophy of punishment.

Conversely, the importance of criminologists paying attention to philosophy has been highlighted by Braithwaite (2000, p.235):

We also need to integrate normative theory from the discipline of moral philosophy with our explanatory theory ... If we do not, we will continue to live in a world where moral philosophers do work relevant to possible worlds that do not or cannot exist.

In summary, these different methods and literature from these various disciplines have all been accessed in the course of this research, as there are particular strengths that each type of approach can bring to an examination of RJ and sentencing. Taken together, the overall approach offers the most rounded view of whether RJ can offer a more coherent approach to sentencing.

## CHAPTER 2: Sentencing in England and Wales: the primacy of the incoherence problem

### 1. Introduction

This chapter will explore current sentencing practice in England and Wales<sup>25</sup> and identify incoherence in the making of sentencing decisions as a problem. Decision-making by sentencers in the current sentencing system suffers from incoherence primarily because of the multiple competing aims of sentencing from which they must choose, and the lack of a logical, transparent method of choosing between them, as will be elaborated on below.

By way of explanatory background to the problem of incoherence, this chapter will explore how sentencing in England and Wales has developed over the past quarter of a century, i.e. from the introduction of the Criminal Justice Act 1991 until present day. This period has been criticised as seeing sentencing law become increasingly incoherent, as outlined by LJ Leveson in his recent *Review of Efficiency in Criminal Justice Proceedings* (2015, p.94):

... over the last 25 years sentencing law has been subject to frequent and substantial change. The result is that imposing a sentence on a convicted defendant has become an unnecessarily complicated and difficult process.

The Law Commission have recently (26<sup>th</sup> January 2015) launched a project aimed at tackling incoherence and lack of clarity in sentencing procedure (Law Commission, 2015). The incoherence referred to here is a slightly different –

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<sup>25</sup> It should be noted that the sentencing of adults and youths is different and for all youth cases, the court must also – in addition to the sentencing guidelines and relevant sentencing legislation – have regard to the aim of the youth justice system, set out in s. 37(1) of the Crime and Disorder Act 1998: “it shall be the principal aim of the youth justice system to prevent offending by children and young persons”. There are also some sentences only available for youths, such as referral orders and youth rehabilitation orders. The focus here will be primarily on the sentencing of adults.

though not entirely unrelated – problem to the incoherence issue focused on in this chapter. The key message though, is that sentencing law has been constructed piecemeal and incoherently and a substantial overhaul is required.

It will be argued in this thesis that some of the problems stem from the fact that over the last quarter of a century in particular, there has been a drive towards centralisation, through an increasing focus on consistency in sentencing. It will be suggested that this is misdirected for several reasons. In particular it will be argued that as sentencing becomes more and more prescriptive in efforts to increase consistency, it also becomes more apt to defeat this purpose. This is because by placing greater limitations on judicial discretion, it makes it harder for judges to adapt their decision-making to the specifics of a particular case (Krasnostein and Freiberg, 2013). As such, with a particularly prescriptive sentencing system, only a crude form of consistency may be achievable – seeming consistent with respect to broad characteristics, but failing to adequately reflect all of the intricacies of the particular case. “True” consistency, where like cases are treated as like, would allow for as many factors relating to the offence and the offender to be taken into account as possible in each instance of sentencing. Increasingly prescriptive guidelines are unlikely to achieve true consistency, as they cannot reasonably be expected to reflect all possible scenarios.<sup>26</sup>

Moreover, it will be argued that the growing focus on consistency misses the point in relation to incoherence. Currently, sentencers are left to choose for themselves between five conflicting purposes of sentencing in the Criminal Justice Act 2003 (“CJA 2003”). There is no clear guidance as to when one aim of sentencing should take priority over another. Consistency is unlikely to flourish in such a situation, where sentencers are not given guidance as to when they should prioritise, for example, rehabilitation over retribution.

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<sup>26</sup> The stance taken on consistency in sentencing in this chapter ties in with similar arguments concerning proportionality made in Chapter 3.

It is therefore surmised that an increasingly prescriptive sentencing regime cannot tackle inconsistency – or at the very least can only achieve a crude form of consistency, but not true consistency. Yet allowing wide judicial discretion has also been identified as a factor which may lead to inconsistency in sentencing (Ashworth, 2010b). It will be argued here that the focus should be moved away from consistency onto coherence, as suggested by O'Malley (2008, p.16): “Public discourse ... tends to concentrate on the issue of consistency. It is surely more fruitful and realistic to think in terms of developing a coherent sentencing policy ...”. It will be argued that rather than pursue further attempts to resolve the inherent problems with consistency in sentencing, the more important – and, as mentioned above, not entirely unrelated – issue of the coherence of the decision-making process be prioritised

## **2. The development of a consistency-focused approach to sentencing**

The last quarter of a century has witnessed various measures introduced in an effort to combat concerns about inconsistency in sentencing, which will be explored in this section. This increasing centralisation of sentencing has been linked to a growth in managerialism (Lacey, 1994), driving changes aimed at creating a more measurable, predictable penal system. It will be argued that this increasing focus on consistency can be viewed as defeating its own purpose, as well as diverting attention away from a more important issue: coherence in sentencing, which will be discussed in the next section. The aim will be to highlight coherence as a key issue for sentencing, which will form the basis of later chapters in which the problem of incoherence in sentencing will be examined further (Chapter 3) and the feasibility of Restorative Justice as a possible solution will be explored (Chapters 4, 5 and 6).

The Criminal Justice Act 1991 (“CJA 1991”) provided the first statutory framework for sentencing in England and Wales (Ashworth, 2010a). This framework was grounded in retributive theory and proportionality and included setting out restrictions on imposing custodial sentences such that they should only be imposed if the offending behaviour was “so serious that only such a sentence can be justified for the offence” (s.1(2)(a) CJA 1991). Likewise, the imposition of community orders was curbed, with sentencers instructed: “the restrictions on liberty imposed by the order or orders shall be such as in the opinion of the court are commensurate with the seriousness of the offence ...” (s.6(2)(b) CJA 1991). Clear situations where derogations from the proportionality principle were acceptable were outlined, e.g. judges could impose a longer sentence for public protection in cases of violent or sexual offences (s.2(2)(b) CJA 1991). However, as Cavadino, Dignan and Mair note, “deserts was to be the guiding principle” (2013, p.103).

Prior to the CJA 1991, the Court of Appeal had been responsible for laying down general guidelines for sentencing in its judgments and the Magistrates' Association had started to produce guidelines for road traffic offences in the 1980s, gradually widening the scope of offences included (Wasik, 2008). Before the introduction of the CJA 1991, sentencing in England and Wales (according to Lacey, 1994, p.537):

... had long been characterised by the existence of wide judicial discretion exercised within the generous bounds of statutory maximum sentences for specific offences. ... it was developed, implicitly and interstitially, by magistrates and judges.

Koffman (2006) sees the move towards greater governmental control of sentencing as resulting from the government taking a dim view of the efficacy of the Court of Appeal guidance (elaborated on below) (Koffman, 2006, p.2):

The guidance was piecemeal, sometimes unrealistic (or even counter-productive), and there was little to ensure that it was being followed by the lower courts. There was a growing realisation that sentencing policy, hitherto seen as a matter for the courts, was now too important to leave to this rather haphazard and ineffective process. This was the view of the government, which probably felt that it had exhausted other methods of trying to bring about change, and that it was left with little choice but to legislate.

The changes made by the CJA 1991 can be seen as arising from managerial motives to make sentencing more predictable and measurable, driven by the “crisis in the prison system, with overcrowding leading to escalating costs” (Lacey, 1994, p.539) which was ongoing at the time. This drew media attention particularly following the riot in 1990 at Strangeways Prison in Manchester, and a series of other riots across the country that same year, viewed by some as being “the worst ever series of prison riots” (Cavadino, Dignan and Mair, 2013, p.19), and prompting an inquiry which resulted in the report by Lord Woolf which condemned prison conditions at the time (Woolf and Tumim, 1991).

Governmental awareness of the increasing rate of incarceration and the associated resource implications<sup>27</sup> were not the only factors contributing to the passing of the CJA 1991. Other factors which probably influenced this attempt to improve consistency in sentencing, included a better knowledge of sentencing around the country (better case-reporting), which increased worries about sentencing disparities between courts (Lacey, 1994). Attempting to tackle this issue initially appears reasonable, as remarked by Alschuler in a discussion of American sentencing guidelines (1991, p.901):

there undoubtedly are both Santa Clauses and Scrooges on the bench.  
An offender's punishment should not turn on the luck of the judicial

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<sup>27</sup> Notably, in the Home Office's preceding white paper, Crime, Justice and Protecting the Public (1990), imprisonment was referred to as “an expensive way of making bad people worse”.

draw or, worse, on a defense attorney's ability to manoeuvre the offender's case before a favorable judge.

However, as discussed below, the increasing focus on consistency in sentencing which grew from these concerns is problematic.

The statutory sentencing framework created by the CJA 1991 suggests an implied acknowledgement of the link between consistency and coherence in sentencing by the government at the time, with the CJA 1991 promoting desert as the primary aim of sentencing (Ashworth, 2010a, p.98). The acknowledgement of this link can also be seen in the Council of Europe's "Consistency in Sentencing" recommendation which was adopted in 1992. As the title would suggest, the recommendation is aimed at promoting consistency in sentencing, seeing it as "one of the fundamental principles of justice that like cases should be treated alike" (Council of Europe, 1992, p.1). The recommendations are aimed at avoiding "unwarranted disparity in sentencing" (Council of Europe, 1992, p.1). However, in pursuance of this aim, recommendations concerning the rationales for sentencing are included. For example, the recommendation that: "where different rationales may be in conflict, indications should be given of ways of establishing possible priorities in the application of such rationales for sentencing." (Council of Europe, 1992, p.1); and "Wherever possible, and in particular for certain classes of offences or offenders, a primary rationale should be declared." (Council of Europe, 1992, p.2). There is therefore a clear recognition in the Council of Europe's recommendation that there is a link between consistency and coherence. Over time, however – as will be outlined below – consistency became increasingly the focus in relation to sentencing in England and Wales, whilst coherence receded into the background.

Following on from the CJA 1991, the introduction of mandatory sentences by the Crime (Sentences) Act 1997 represented clear fettering of judicial discretion for

specific cases. This legislation introduced mandatory life sentences (unless there were exceptional circumstances) for offenders convicted of a second serious violent or sexual offence. It also introduced “three strikes and you’re out” legislation. This made it mandatory for judges to impose a minimum sentence of imprisonment for three years where the offender was convicted of a third domestic burglary, or seven years where the offender was convicted of a third Class A drug trafficking offence. The Crime (Sentences) Act 1997 marked a departure from the proportionality principles of the CJA 1991. However, it can still be seen as concerned with a type of consistency – i.e. every offender who offends in a certain way (commits burglary three times, for example) gets the same sentence.

Around this time, “New” Labour came to power (in 1997) and instigated a raft of changes to sentencing. Cavadino, Dignan and Mair note (2013, p.105): “As well as wanting punishment to be tougher (for some) and less harsh (for others), New Labour also wanted it to be more consistent”. The first key move by New Labour which was aimed at increasing consistency in sentencing came with the introduction of the Crime and Disorder Act 1998, which established the Sentencing Advisory Panel (“SAP”). Prior to the SAP, the Court of Appeal had issued guideline judgments for how certain types of offences should be dealt with. After the establishment of the SAP, the Court of Appeal had to consult the SAP before issuing a guideline judgment. Importantly, the Court of Appeal did not have to accept the SAP’s recommendations, though in practice it often did (Ashworth, 2010b). As such, overall control for the final issuing of guideline judgments remained with the Court of Appeal, and this marked only a marginal increase in the limiting of judicial discretion in sentencing.

A consolidation of sentencing powers followed through the enactment of the Powers of Criminal Courts (Sentencing) Act 2000. However, this consolidation was short-lived as noted by Ashworth (2010a, p.2):

This consolidation was a wonderful idea, since it promised the great convenience of bringing the various powers together in one place. Sadly, the statute had already been overtaken by new provisions by the time it came into force, and after three years large parts of it were replaced by the now principal statute, the Criminal Justice Act 2003.

The Criminal Justice Act 2003 (“CJA 2003”) enacted a number of changes to sentencing in England and Wales and remains the main (though by no means only) piece of legislation concerning sentencing. It created a new sentencing body: the Sentencing Guidelines Council (“SGC”). This body worked alongside the SAP and took over responsibility from the Court of Appeal for issuing the final guidelines. This was a significant change, as it shifted the power of deciding final sentencing guidelines away from the Court of Appeal for the first time. The creation of the SGC had been recommended by the Halliday report (2001) in a bid to further increase consistency in sentencing. Notably, the Halliday report also included the following passage on consistency (2001, p.iii):

Consistency in sentencing should be a continuing goal, but measured by consistency of approach rather than artificial uniformity of outcomes, recognising that disparate outcomes in superficially similar cases are frequently justifiable and necessary.

Arguably, this is not quite what the CJA 2003 achieved – particularly as it enshrined contradictory purposes of sentencing in statute, thereby contributing to inconsistency of approach – there being no one defined purpose of sentencing, and no method for choosing between these purposes (explored further below and in Chapter 3).

Other changes to sentencing law enacted by the CJA 2003 included instructions to sentencers about: how to deal with reductions in sentences for guilty pleas (s.144); and how to determine the seriousness of an offence (s.143). Section 143

sets out various matters which sentencers must abide by, including instructions to sentencers to treat offences committed on bail as more serious, and to treat relevant previous convictions as aggravating factors. This represents a move to create consistency in the assessment of how serious offences are and represents a further move to limit judicial discretion.

Most importantly, for the purposes of this thesis, the CJA 2003 legislated for five purposes of sentencing (at s.142):

### **142 Purposes of sentencing**

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

As mentioned earlier, the CJA 1991 promoted desert as the primary rationale of sentencing and hence there appeared to be some cognisance of consistency requiring coherence in sentencing. However, by the time the CJA 2003 was enacted, consistency had become divorced from coherence – hence the five conflicting purposes of sentencing. These five purposes conflict as they represent different philosophies of punishment, which are not always compatible with one another. This will be discussed further in the next section on incoherence and is examined at greater length in Chapter 3.

Following Lord Carter's review of the use of custody (Carter, 2007), the Sentencing Commission Working Group was set up in December 2007 and produced a report on 10<sup>th</sup> July 2008, which made recommendations aimed at finding a way to better predict the future prison intake – i.e. increase the consistency and predictability of decision-making in this respect. The Working Group considered the idea of introducing American-style grid sentencing, which is described by Tonry (1998, p.15) as usually constituting:

two-dimensional tables that classify crimes by their severity along one axis and criminal records by their extent along the other. Applicable sentences for any case are calculated by finding the cell where the applicable criminal record column intersects with the applicable offense severity row).

Grid sentencing represents a somewhat extreme method of constraining judicial discretion. Grid systems are aimed at achieving consistency in sentencing, but are in fact unlikely to achieve true consistency, due to the elimination of numerous factors affecting both the offence and offender, thus – as Tonry states below – grid systems “often treat unlike cases alike” (Tonry, 1998, p.15):

[the two-axis grid] produces unjust results and conduces to needlessly harsh sentences. Two things happen. First, because desert theories place primary emphasis on linking deserved punishments to the severity of crimes, 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.

Perhaps perceiving these issues, the Working Group rejected the introduction of grid sentencing, giving the following reasons (2008, p.31):

9.3 The Working Group finds that structured sentencing frameworks on the US grid model increase consistency and predictability of sentences but at the cost of an inflexibility that makes them unsuitable

and unacceptable in England and Wales. The Working Group recommends that the process of introducing guidelines through the SGC be retained and the introduction of a US style grid be rejected.

Following the Working Group's report, the Sentencing Council was introduced by the Coroners and Justice Act 2009 ("CorJA 2009") – replacing, and strengthening, the role of the SGC and SAP. Consistency in sentencing is one of the key objectives of the Sentencing Council (Sentencing Council, 2011) and was pursued further in the CorJA 2009 by altering the extent to which sentencers were bound by sentencing guidelines. Courts were previously directed to "have regard" to the guidelines, whereas following the enactment of s.125 CorJA 2009, sentencers "must ... follow" the guidelines (unless it would be contrary to the interests of justice to do so):

#### **125 Sentencing guidelines: duty of court**

(1) Every court—

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.

This particular change was not popular with certain groups of criminal justice practitioners: "The Magistrates Association, the Bar Council and the Law Society all reacted negatively to the more robust language. Witnesses from these organisations ... expressed concern that the test ... was overly restrictive." (Roberts, 2011, p.1008). Similarly, the Council of Circuit Judges, which represents judges in England and Wales, argued that the imposition of mandatory guidelines would result in injustice to offenders and victims in individual cases (BBC News, 25th March 2009). These concerns are reflective of what Krasnostein and Freiberg,

in their discussion of Australian sentencing law, call the “orthodox view” (2013, p.267):

The orthodox view holds that a “broad” judicial discretion to choose between sentencing purposes and options is “vital,” because it alone safeguards individualized justice by freeing judges to tailor sentences to the “wide variations of circumstances of the offence and the offender” that are “unique” to each case. On this understanding, broad judicial discretion, individualized justice, and fair sentencing outcomes are directly related.

This highlights the difficulty in attaining “true” consistency, which is reflective of all the particularities of individual cases, when judicial discretion is overly constrained.

The CorJA 2009 also imposed a duty on the Sentencing Council to monitor the effectiveness of guidelines and this has been pursued inter alia by the Sentencing Council’s implementation of an annual study: the *Crown Court Sentencing Survey*, described in the most recent report (Sentencing Council, 2014) as a “census”. It asks judges to record reasonably detailed information about their decision-making process. This could be viewed as both a method of measuring consistency in approach; as well as a way of enforcing it, by encouraging judges to reflect on pre-defined factors set out in the survey and model their approach accordingly.

The overall current state of affairs in relation to sentencing is that for every instance of sentencing, judges or magistrates must take into account the relevant parts of CJA 2003, as well as any other relevant legislation such as offence-specific legislation setting maximum or minimum sentences, or compelling the sentencer to impose a particular order, such as disqualification from driving. In addition to legislation, judges and magistrates “must” also take into account sentencing guidelines – as per the CorJA 2009, as outlined above.

Sentencing guidelines cover cases in both the Crown Court and the Magistrates Court, with the Magistrates Court guidelines being collated into one document (Magistrates' Court Sentencing Guidelines, 2008) and therefore perhaps being the most straightforward example to use to explore procedure on following guidelines. These guidelines set out a clear process for magistrates to follow in every instance of sentencing (as well as more detailed offence-specific guidance).

The Magistrates' Court Sentencing Guidelines state that when sentencing an offender, magistrates must consider a number of factors. Firstly, offence seriousness (culpability and harm) is to be considered, which is done by identifying the appropriate starting point (having regard to the guidelines) and then considering the effect of aggravating and mitigating factors (which are set out in the guidelines for the relevant offence – although the lists provided are not exhaustive). Secondly, magistrates are instructed to form a preliminary view of the appropriate sentence, then consider offender mitigation, such as admissions to the police in interview and expression of remorse. Thirdly, magistrates must consider a reduction for a guilty plea, with the recommendation being to reduce the sentence by one third where the guilty plea was entered at the first reasonable opportunity, one quarter where a trial date has been set and one tenth for a guilty plea entered at the “door of the court” or once the trial has commenced (Magistrates' Court Sentencing Guidelines, 2008, p.18). Fourthly, magistrates are to consider ancillary orders, such as compensation and fifthly magistrates should decide sentence and give their reasons. The total sentence should be reviewed to ensure that it is “proportionate to the offending behaviour and properly balanced” (2008, p.377). It should be apparent, therefore, that there are considerable constraints placed on judicial decision-making by sentencing guidelines.

In summary, over the past quarter of a century, successive governments have sought to increase consistency by pursuing increasingly centralised decision-making and placing greater limitations on judicial discretion. As mentioned above, one of the key objectives of the Sentencing Council is to pursue consistency in sentencing and whilst the Sentencing Council themselves note that “there is no universally accepted definition of consistency in sentencing” (Sentencing Council, 2011, para 3.1), they then go on to say “[t]he general concept is clear, however: similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes” (2011, para 3.1).

The current situation is one of considerable fettering of judicial discretion, although it is not (yet) as strict as an American-style grid system. Grid sentencing has been criticised for its inflexible approach: for example, Tonry refers to them as “blunt instruments when applied to sentencing operations for which scalpels are often needed.” (1998, p.20) and argues that “desert theories and grids make crimes and criminal records distinct and the human characteristics of offenders invisible. ... in making crucial decisions about peoples’ lives, comparison only of crimes and criminal records is not enough.” (1998, p.15). In contrast, the current sentencing system retains some judicial discretion and allows for more characteristics of the offence and the offender to be taken into account than is usually the case with grid sentencing. That said, the movement over the last quarter of a century has been continuously in the direction of further limiting judicial discretion in pursuance of consistency in sentencing.

Despite such efforts, there is some evidence which would suggest that these sentencing reforms have been ineffective at achieving increased consistency. In relation to the sentencing of adults, Mason et al (2007) found that between 2003–2006:

Custody rates, average custodial sentence lengths (ACSL) and the use of life and Indeterminate sentences for Public Protection (IPPs) vary significantly across the 42 Criminal Justice Areas (CJAs) in England and Wales. ... Differences among areas in sentencing practice could not be explained solely in terms of the characteristics of the cases or of the offenders coming before the courts, and whilst these factors can contribute to sentencing variations, they did not fully account for them. (2007, pp.2–3)

Quoting Ministry of Justice statistics, the Centre for Social Justice highlighted stark variations in youth custody rates (2012, p.5):

In 2008/09 the custody rate for those aged ten-17 in Newcastle was 1.6 per cent compared to 11.6 per cent in Liverpool, a matched area with a similar demographic. These discrepancies are not explained by differences in offence patterns but variation in local practice.

These statistics are by no means conclusive, as there are well-documented problems in accurately assessing consistency in sentencing (Krasnostein and Freiberg, 2013; Padfield, 2013a). However, they go some way to supporting what will be contended here: that the increasing focus on consistency over the last quarter of a century is misguided. This is for two main reasons. Firstly, the lack of a single sentencing aim and the lack of any guidance to sentencers as to when they should prefer one of the five competing aims set out in s.142 CJA 2003, means that sentences will still vary depending on whether the sentencer prefers, for example, a rehabilitative to a deterrent sentence (discussed further in the next section).

Secondly, an increasing focus on consistency is arguably counter-productive. If judicial discretion is fettered too much (in an attempt to increase consistency in sentencing), there may be insufficient leeway for sentencers to have proper regard to the details of the case before them, having instead to make often non-standard cases conform to standardised criteria. Cooper (2008, p.280) points out: “where

the [sentencing] guidelines fail to serve the profession is in those cases which do not fit any standard pattern, and some would argue that these form the majority of criminal cases". This suggests that greater fettering of judicial discretion can achieve only a crude form of consistency – i.e. taking into account relatively few matters about cases – rather than "true" consistency, where cases which are genuinely like are treated equally.

As consistency becomes more and more the focus, it becomes increasingly likely that the scope for decision-making will not be flexible enough to allow for the peculiarities of particular cases. Whilst crude consistency might be increased, true consistency, which takes into account all of the peculiarities of a particular case (which would seem more reflective of the concept of consistency outlined by the SC, referred to above) is unlikely to be achieved.

To elaborate, the Sentencing Council website gives the example of different levels of seriousness in relation to the offence of theft: "theft could be anything from stealing a chocolate bar from a shop to stealing the Crown Jewels". If all thefts automatically attracted a seven year sentence of imprisonment, say, it could hardly be said that both the chocolate bar thief and the crown jewels thief were being given like punishments for like offences. This is what has been referred to in this chapter as crude consistency and what Krasnostein and Freiberg (2013) call "unjustified parity", which they argue rigid guideline or mandatory systems are vulnerable to (2013, p.271). The issue relates to the number of factors that sentencers take into account relating to both the offender and the offence, to ensure that similar sentences are given for cases which are as like as possible. Overly prescriptive guidelines will not allow the flexibility required for sentencers to successfully achieve this, as it is unlikely to be possible to produce a dossier of all possible scenarios and characteristics of offences and offenders in a usable set of sentencing guidelines.<sup>28</sup>

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<sup>28</sup> See also the discussion of the problem of measuring proportionality, examined in Chapter 3. This also relates to consistency in sentencing.

The increasing focus on consistency appears to be moving in a direction where true consistency is less likely to be promoted and these moves therefore appear to be self-defeating. That said, it is also apparent that the opposite end of the spectrum – no guidance whatsoever for sentencers and no legislation concerning maximum or minimum sentences, etc. – is also unlikely to promote consistency in sentencing (Ashworth, 2010b). It might be argued, therefore, that chasing consistency is ultimately a fool’s errand. Further, the increasing centralisation of sentencing will ultimately fail in its objective, where sentencers retain discretion as to which purpose of sentencing they should pursue in any given instance of sentencing. The next section will examine this issue and explore incoherence in sentencing, arguing that this should be the primary concern in relation to sentencing, rather than consistency.

### **3. Incoherence in sentencing**

The problem of achieving consistency in sentencing without a single, overriding aim of sentencing, or a coherent method for deciding between available conflicting aims has been highlighted by Padfield (2013a, pp.33–34):

In England and Wales today, judges have to apply potentially inconsistent aims and legal obligations ... Perhaps the ambition was that by legislating the purposes of sentencing, Parliament would aid consistency. I suspect (but cannot prove) that in fact this provision may have led to greater inconsistency. It allows the sentencer to choose from a list: ‘in this case reform and rehabilitation is more important’, ‘in this case, public protection gets priority’.

Here Padfield is referring to s.142 CJA 2003, which is the main focus of this thesis, although there are other examples of incoherence in the system. For example, the government announced a “rehabilitation revolution” through the *Ministry of Justice Structural Reform Plan* (2010) and the *Breaking the Cycle* green paper

(Home Office, 2010a). Yet in contradiction of this aim, retributive measures are also being pursued, such as a recent proposal (originating with Conservative MP Nick de Bois and receiving wide support in the House of Commons) to legislate for the imposition of a mandatory term of imprisonment for adults convicted of a second offence involving a knife (BBC News, 2014). General incoherence in the system has also been identified by the Law Commission (and has been referred to above), which recently announced a review of “confusing sentencing procedure” (Law Commission, 2014).

Section 142 CJA 2003 and its five purposes of sentencing is, however, the clearest example of the fundamental incoherence in the sentencing process in terms of the inclusion of competing aims without a coherent method of deciding between them. As cited in the previous section above, the five purposes of sentencing are:

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

These are competing aims of sentencing, which represent different philosophies of punishment – the fundamental incompatibility of which is discussed in detail in the next chapter. Broadly speaking, the problem with s.142 CJA 2003 is that there is no consensus over which of the aims should take priority at any particular time, and it is usually not possible to satisfy all of the aims. For example, a sentence of imprisonment might satisfy the protection of the public (at least until release) and punishment purposes, but fail to satisfy the purposes of rehabilitation and reparation – or even undermine them.

An example of this type of selection between the purposes in practice is the Court of Appeal case of *A-G's Reference No 92 of 2005 (Stephen Patrick Harmon)* [2005] EWCA Crim 3049. The offender had pleaded guilty to substantial drug-related offending, namely: eight counts of being concerned in the supply of Class A drugs, seven counts of supplying Class A drugs, two counts of possessing Class A drugs with intent to supply and one count of possession of cannabis. This level of offending would normally attract in the region of four years imprisonment – as acknowledged by the sentencing Court. However, he was sentenced at the Crown Court to a Drug Treatment and Testing Order for 12 months, as the Crown Court judge felt that the offender had shown commitment to dealing with his drug addiction. Clearly, the aim of the sentence was rehabilitation and this was being prioritised over other aims, such as punishment. This sentence, despite being markedly different from what would usually be imposed was upheld by the Court of Appeal who acknowledged (at para 15):

Sentencing, as has often been said, is an art. It is not and never should be mechanistic. The purpose of having judges rather than computers to pass sentence is so that sentences can be fine-tuned to the circumstances of the particular case. This involves the exercise of judgment in relation to often competing public interests. That exercise of human judgment is often an extremely difficult task.

It is highly likely that had the Court of Appeal been more retributive-minded on this occasion – or indeed had the Crown Court judge been less inclined towards rehabilitation in the first instance, that the offender in question would have received a sentence of imprisonment.

It is perhaps useful at this juncture to consider how the incoherent provisions of s.142 CJA 2003 came to be enacted. These provisions came about following the Halliday report on sentencing *Making Punishments Work* (2001) in which concerns were raised with the purpose of punishment being too narrowly focused on

desert, with insufficient attention being paid to utilitarian aims such as crime reduction (2001, p.2):

The present statutory framework requires those who pass sentence to concentrate primarily on the offence or offences committed by the offender and the level of punishment “commensurate” with the seriousness of those offences ... it provides a less than complete guide to the selection of the most suitable sentence in an individual case. Sentencers are not encouraged to consider crime reduction or reparation.

As a solution to this supposed problem, the Halliday report expressly recommended the incorporation of different philosophies of punishment into the sentencing framework (2001, p.164):

This strongly suggests a need for a “hybrid” model, getting the best out of “desert” and “utilitarian” theories, targeted on persistence, capable of being accepted as more sensible and coherent than what exists, and more likely to enable achievement of successful outcomes.

These proposals stemmed in part from concerns about a gap between the theory of the sentencing framework, which was at the time predominantly concerned with retributive aims; and judicial practice, whereby sentencers continued to take into account other, non-retributive, purposes of sentencing (Halliday report, 2001, p.2). The Halliday report suggested that consistency should be sought by codifying the different purposes of punishment: “The needs of crime reduction and reparation could certainly feature more prominently in the framework, in ways that would encourage a consistent approach ...” (2001, p.2).

However, what the resulting s.142 CJA 2003 actually provided was just an explicit range of choices, rather than a clear *process* for deciding between the purposes and therefore could not be said to have encouraged either a more coherent or a more consistent approach. The provisions provide no direction as to *how*

sentencers should prioritise competing aims, as pointed out by Tarling (2006, p.39):

The Act does not give any guidance on when each of the aims should be followed or when one should over-ride others. Aims are merely 'matters to be taken into account' but no guidance is given on how they should be taken into account, leaving courts discretion to develop their own interpretation and priorities.

Sentencers are expressly told to decide for themselves between these five, competing aims of sentencing in the *Overarching Principles: Seriousness guidelines* (Sentencing Guidelines Council, 2004, p.3, emphasis added):

1.1 In every case where the offender is aged 18 or over at the time of conviction, the court must have regard to the five purposes of sentencing contained in section 142(1) Criminal Justice Act 2003: ...

1.2 The Act does not indicate that any one purpose should be more important than any other and in practice they may all be relevant to a greater or lesser degree in any individual case – *the sentencer has the task of determining the manner in which they apply.*

The problem of the multiple purposes of sentencing, with no guidance as to when a sentencer should prioritise certain purposes was raised during consideration of the Criminal Justice Bill (as it then was) in the House of Lords on 4<sup>th</sup> November 2003. Baroness Anelay of St Johns tabled an amendment to the wording of what was then clause 126 of the Bill (now s.142 CJA 2003) from "have regard to" the purposes of sentencing, to "is under a duty to consider".

the Bill gives no guidance to sentencers as to how the various factors are to be weighed, especially where they may be in conflict. The implication of the words "have regard to" is that any sentence must meet all six purposes which, in practice, may be impossible. That is why I have brought forward an amendment which makes it clear that the purposes of sentencing in the Bill are to be considered by the

courts but that they are not under a duty to meet all of them in any particular case. (HL Deb 4th November 2003, col 761)

The Government, however, was dismissive of the issue and the amendment was withdrawn. Notably, Baroness Scotland of Asthal said (HL Deb 4th November 2003, col 763):

I hear what is said about the difference between the conditions and that they may pull in different directions— but that is what judgment is about. ... The court will have to take into consideration different features and factors which may pull in different directions and come to a conclusion as to how they can be balanced.

It therefore appears that s.142 CJA 2003 was enacted with an awareness of the contradictory nature of the purposes of sentencing.

Despite the reasonably formulaic nature of current sentencing practice (as outlined in the previous section) where sentencers *must* have regard to guidelines which structure their reasoning, the unregulated, incoherent application of these five purposes of sentencing has the potential to undermine any gains in consistency which might otherwise have been made. The guideline referred to above expressly encourages sentencers to determine for themselves which of the five purposes to give more or less weight to in any particular instance of sentencing, and, for example, a preference for rehabilitation over public protection, might mean the difference between a community order rather than imprisonment. As Dingwall explains (2008, p.402):

The problem is that the [2003] Act provides a list but does not provide a hierarchy between the justifications ... This matters because the sentence imposed will be influenced by what the sentencer is trying to achieve. If, for example, rehabilitation is paramount, the sentence will be determined primarily on the basis of the offender's perceived needs. Alternatively, if the main purpose is to deter others from

committing similar offences, the sentence imposed will be designed primarily to have that effect. Given the number of relevant considerations and lack of a specified hierarchy, it seems reasonable to assume that, consciously or subconsciously, sentencers will have to set their own priorities.

In other words, the “Santa Clauses and Scrooges on the bench” problem identified by Alschuler (1991, p.901) is relevant here also: the chosen sentence will depend on whether a judge is more or less retributive-minded, more or less in favour of rehabilitation, and so forth. The occurrence of this in sentencing practice has been illustrated above in the discussion of *A-G's Reference No 92 of 2005 (Stephen Patrick Harmon)* [2005] EWCA Crim 3049.

The stipulation that sentencers are to decide for themselves means that they must effectively either rely on their own interpretations of justice, or attempt to second-guess the government’s idea of justice, both of which are problematic. The former effectively means the sentencer implementing his or her own personal notion of justice – which makes little sense given their status as a party unconnected to the offence and with no more stake in the outcome than any other individual member of society (see Christie, 1977; and the discussion in Chapter 4). The latter means that sentencers will try to implement what they believe to be the state’s overriding notion of justice. This may be difficult to discern, given that the CJA 2003 provides five contradictory aims of sentencing with no prioritisation – indicating a plurality of aims with no overriding objective. In addition to this, there are intermittent governmental pronouncements which may be more rehabilitative-minded (the aforementioned announcement of a “rehabilitation revolution”), or retributive (proposed mandatory sentencing for knife crime) further obscuring the likelihood of any single, identifiable notion of justice held by the state. If the state’s notion of justice in fact exists as a constant at all, it is hugely open to interpretation. Current sentencing practice is therefore incoherent, particularly because there is no coherent method for sentencers to decide which purpose of sentencing to give primacy to in any given instance of sentencing.

It has been argued that different philosophies or purposes of punishment can coherently be combined together to form one “right” answer to the question of *the purpose of punishment*. Such a mixed theory of punishment – which can combine the different purposes together coherently – is rejected following detailed discussion in Chapter 3. An alternative would be the provision of a detailed method for sentencers to follow, which explained precisely when and in what circumstances they should choose between the different purposes of sentencing. However, it is unclear what rationale could be relied on to formulate this method and who would decide which sort of offences in which circumstances should be dealt with by means of retributive or utilitarian punishment. Even were it possible to draft such guidance with any coherence,<sup>29</sup> it would likely be extremely complex and unwieldy, as well as vulnerable to criticism for being too prescriptive.

An alternative, seemingly more straightforward solution would be to reform the sentencing system so that it operated on the basis of only one aim of punishment, e.g. either deterrence *or* rehabilitation *or* protection of the public. However, such a restrictive system would be unlikely to garner much public support, being representative of only one particular understanding of justice and thus may face problems of legitimacy.<sup>30</sup> As such, it is likely to be politically unpopular: see, for example, Frase (2013, p.29–30) who argues that “[a]ny plausible, politically feasible, and sustainable sentencing system must recognize and provide a significant role for all widely accepted punishment goals and limitations”. The variety of views held even just by those working in – or in conjunction with – the criminal justice system is illustrated well by the different views expressed by various individuals and organisations as to what the most important purpose of punishment is, in the report *Sentencing Guidelines and Parliament: building a bridge* by the Justice Committee (2009). For example, the Magistrates’ Association

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<sup>29</sup> See the arguments concerning mixed theories of punishment in Chapter 3 for why this is likely to be problematic. Robinson (2008, Ch.11) also explores these issues.

<sup>30</sup> See the discussion of coherence and legitimacy in Chapter 4

suggested that there would always be a punishment element to sentencing; Victim Support suggested that victims most wanted rehabilitation of the offender (so that what happened to the victim did not happen again); whilst NACRO expressed the view that reducing re-offending should take priority (2009, p.21).

Further, where a single aim such as rehabilitation or deterrence is relied on, the incredibly prescriptive nature of such a system is likely to run into the same problems as a sentencing system focusing too much on consistency, in that it will be too inflexible to deal adequately with the peculiarities of particular cases. Moreover, a system which limited itself to one particular aim or philosophy of punishment, is unlikely to be successful in meeting the needs of victims, who may have particular understandings of justice which fail to be represented by the particular aim adopted (see Strang et al, 2006). It also narrows the scope for sentences to be optimally effective, depending on the peculiarities of the offender and indeed the offence. For example, a purely rehabilitative system may struggle to effectively deal with a particularly intransigent offender. Even Ashworth (2010a), who argues for one aim of sentencing to be pursued, seems to accept that other aims will come into play at least on occasion when he says: "consistency will only be possible if a primary rationale is declared, and the limited circumstances under which that rationale can be displaced are made clear" (Ashworth, 2010a, p.98).

As such, it seems that sentencing should allow for different philosophies of punishment to avoid the above-mentioned problems. Whilst s.142 CJA 2003 does precisely this, it does not provide for a coherent method of choosing between them. As argued above, sentencers are left to choose for themselves when to prioritise one purpose over another and this is problematic as it can have considerable impact on the resulting sentence. Moreover, it is entirely unsatisfactory to have an incoherent decision-making process lying behind what is arguably one of the most intrusive powers of the state.

#### **4. Conclusion**

This chapter has examined the increasing focus on consistency in sentencing over the last quarter of a century. It has been argued that this is misdirected and that the focus should instead be on the incoherence in the current sentencing system. This is for two main reasons. Firstly, because consistency is likely to be unachievable as long as there remains incoherence in sentencing – those concerned with consistency should thus first tackle incoherence. Secondly, if consistency in sentencing is sought too earnestly, i.e. if guidelines become too prescriptive, it can be self-defeating. This second point suggests that consistency might even be something of a false idol, given the fundamental problems in achieving true consistency (rather than crude consistency) of either a restrictive guidelines-based system, or a system based on wide judicial discretion.

The crucial problem needing to be tackled has been identified as that of incoherence in decision-making in sentencing. It has been argued that it would be insufficient to resolve this by preferring one particular aim of sentencing, which leaves the problem of determining how to provide for competing aims of sentencing, whilst also developing a coherent method of choosing between them in individual instances of sentencing.

The next chapter delves further into this problem, explaining the differences between the main philosophies of punishment which underpin different aims of sentencing, and examining why they are incompatible. It will be argued that previous attempts to combine retributive and utilitarian philosophies of punishment are inadequate for various reasons and concluded that these distinct philosophies of punishment are irreconcilable.

If a sentencing system needs to make room for both retributive and utilitarian philosophies of punishment, yet these cannot be combined into one coherent philosophy of punishment, then there needs to be a particular method of choosing between conflicting purposes of punishment on each occasion of sentencing – a coherent method for doing so. This chapter has outlined the reasons why the current sentencing system fails to do this coherently: it is left to the judge or magistrates to decide how they prioritise conflicting aims. In the next chapter, Restorative Justice (“RJ”) is identified as possibly providing for a more coherent alternative method of arriving at a sentence. It is argued that RJ can potentially offer a way of allowing for different philosophies of punishment to remain available in any one sentencing decision, without having to find a way to combine them into one single theory.<sup>31</sup>

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<sup>31</sup> This argument is then developed significantly in Chapter 4.

## CHAPTER 3: The Philosophy of Punishment

### 1. Introduction

The previous chapter outlined the problem of an increasing focus on consistency in sentencing over the past quarter of a century. It was suggested that this was misdirected and that the more pressing problem was that of incoherence in the current sentencing system – specifically incoherence in the process of deciding sentences. This chapter expands on the issue of coherence in sentencing and seeks to demonstrate what has been argued in the previous chapter, i.e. that different purposes of punishment are based on radically different theories of punishment, which in turn has contradictory implications for sentencing practice. This is done by exploring relevant aspects of the philosophy of punishment: both the traditional philosophical justifications of punishment and general problems of terminology relating to punishment.

The chapter begins by discussing the traditional justifications for punishment and considers how they are combined in the criminal justice system in England and Wales. To demonstrate the importance of philosophical concepts to sentencing law and practice, this chapter will look at retributive and utilitarian theories of punishment in turn, including an examination of the strengths and weaknesses of these traditional justifications for punishment, which helps to make clear some key differences between the theories. This chapter will also examine mixed theories of punishment which attempt to combine both retributive and utilitarian theories together into one theory of punishment. The discussion will highlight the fundamental differences between retributive and utilitarian theories and the failure of mixed theories to adequately combine them.

This discussion will be linked to the current application of philosophies of punishment in the criminal justice system. It will be suggested that concepts which

are explored in philosophical literature on punishment are often misunderstood or misrepresented in sentencing law and policy and that this contributes to incoherence in sentencing. For example, the inconsistent usage of the word *punishment*, which may refer to both the act of *sentencing* as well as *retributive punishment* in a more abstract sense. This might make sense if all sentencing was understood to be retributive in nature; however, this occurs in tandem with both a retributive and a non-retributive interpretation of punishment. General difficulties in defining punishment will be explored to further understand how such confusion might arise.

A key issue which will be addressed is the way that the criminal justice system currently combines both retributive and utilitarian theories in an *ad hoc* manner. This involves building on the arguments advanced in the previous chapter, including in relation to the five purposes of sentencing set out in s. 142 CJA 2003. Overall, it will be argued that the current state of affairs is incoherent, as there is no coherent process by which sentencers are to determine which of the contradictory purposes of punishment (contradictory because of their incompatible underlying philosophies) to select on each occasion of sentencing.

In terms of suggesting a way forward, whilst this chapter finds much more to criticise in retributivism than utilitarian theories of punishment, it will not be argued that the criminal justice system should operate on a purely utilitarian basis. It will instead be argued that an entirely different approach to sentencing promises to offer a solution. It will be suggested that Restorative Justice (“RJ”) might have the potential to provide a more coherent method of allowing for the combination of different philosophies of punishment in sentencing by operating as a kind of mediation process between the different ideas of justice held by those taking part in the process. The precise means by which RJ can offer a more coherent process is dealt with substantively in Chapter 4. In the current chapter, this idea is simply introduced, together with an explanation of how RJ relates to

punishment and the implications of pursuing the particular notion of RJ proposed, in relation to what is often considered an essential aspect of sentencing: proportionality.

It will be argued that RJ can be viewed as a form of punishment – or rather, a means of arriving at a punishment, able to accommodate both retributive and utilitarian aims, though with neither being integral. This will draw on Barton's (2000) empowerment theory of RJ, in which he argues that one of RJ's main strengths is its capacity to empower those most affected by the offence to make decisions. The implications of this preferred understanding of RJ will then be examined, particularly what it highlights about the issue of proportionality in RJ processes. It will be argued that the supposed problem of RJ not being supportive of the ideal of proportionality in sentencing is not all it appears. It will be argued that RJ can be viewed as increasing the potential for proportionate sentencing; as well as it being suggested that, in any event, proportionality is not an incontrovertibly essential ideal of sentencing as is often argued. This discussion of RJ and punishment serves to prepare the ground for the substantial discussion in the next chapter, concerning how precisely RJ (as conceptualised in this thesis) offers a more coherent process for arriving at a sentence.

## **2. The traditional justifications**

The traditional justifications for punishment are usually divided into utilitarian (deterrence and rehabilitation) and retributive justifications (Lacey, 1988; Rawls, 1955). There are also mixed theories of punishment which combine elements of both utilitarian and retributive theories. There are numerous, more specific theories such as the moral education theory of punishment (Hampton, 1984). However, as such theories tend to entail aspects of the traditional justifications, the approach taken by Lacey has been adopted, for the same reasons she sets out here (1988, p.15):

In order to prevent this chapter running to several hundred pages I shall adopt the following method. I shall give an account of three models of justifying argument which I take to encapsulate the essentials of the various traditions. These will consist of backward-looking or desert based justifications; forward-looking or consequentialist justifications; and mixed theories which incorporate both backward and forward-looking elements.

Utilitarian and retributive theories of punishment are quite distinct from one another and see the aim of punishment as being very different things (as will be explained in what follows) and as such, these are really opposing theories of punishment. This is important for understanding why it is that the purposes of punishment discussed in the previous chapter are incompatible and can result in incoherence in sentencing. Mixed theorists, such as Brooks (2012a), Duff (2001), Hart (1968) and Rawls (1955) seek to reconcile these differences and combine utilitarian and retributive theories into a mixed theory of punishment (or “unified” in the case of Brooks).

Retributivists, such as Kant (1788; 1972), Morris (1976), Murphy (1997) and on some conceptions Hegel<sup>32</sup> (1967), are generally concerned with the idea that offenders should get their just deserts. Retributivists hold that an offender’s sentence should be equal to the seriousness of the criminal act committed and in this way are tied to the concept of proportionality (which is explored in more detail towards the end of this chapter). Retributive theories are “backward-looking”, in that the concentration is on the act done and the punishment of the individual proportionately to the seriousness of the act. Reference is commonly made, explicitly or implicitly to a kind of abstract “moral balance” (e.g. Morris, 1976) which is upset by offending and can be restored by the punishment of the

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<sup>32</sup> Brooks (2012b) argues that Hegel’s philosophy of punishment is more correctly construed as a unified approach, combining retribution, deterrence and rehabilitation.

offender - as such, the offender must be punished in order to restore the moral balance, regardless of the consequences of punishment.

It should be noted that the above simply summarises the key points which tend to be at the centre of retributive thinking. There are a huge variety of existing retributive theories, as outlined by Cottingham (1979) who identified nine different categories of retributivism – and of course, within those categories, there are variations. However, it is probably fair to hold that, as Duff says (1996, p.7):

... the central retributivist claim [is] that punishment is justified if and only if it is deserved in virtue of a past crime; the different versions of retributivism (see Cottingham, 1979) can be seen as different attempts to articulate and explain this claim.

Likewise, Brooks (2014a, p.83) states: “Desert and proportionality form the conceptual core of most retributivist theories. Retributivists claim that criminals *deserve* punishment *in proportion* to their crime” [emphasis in original].

Similarly, there are many different ways of construing utilitarian justifications for punishment as well, and what follows is just an outline of the general principles. Deterrence and rehabilitation theories are “forward-looking”, as their aims are concerned with the future consequences of a given punishment – these two justifications are often grouped together as they are both utilitarian theories (Scarre, 2004) in that they seek to maximise beneficial effects through punishment, such as a reduction in future crime. Punishment is justified under deterrent theories because of the deterrent effect, i.e. the penalty for an offence should be set at a level which will deter either an individual (individual deterrence) or members of society generally (general deterrence) from committing offences. Punishment is justified under rehabilitation theories because of the rehabilitative effect, i.e. reducing the risk of future offending by an individual.

Unlike retributive theories, the utilitarian justifications of deterrence and rehabilitation do not contain a notion of desert (Braswell, McCarthy, and McCarthy, 2014, p.175). Deterrent punishment aims to prevent future offending and punishment is therefore not imposed because it is deserved, but with the intention of deterring the offender from committing future crimes (individual deterrence); or others from committing future, similar crimes (general deterrence) – see Rashdall, 2005.

Rehabilitation is not justified because the offender deserves to be rehabilitated, but because rehabilitation has positive consequences. It has positive consequences because it can benefit both the offender (by resolving the problem which caused the offender to commit the crime) and society (through a reduction in future crime). Unlike retributive understandings of people as always free and rational beings, rehabilitation acknowledges that various factors can impact people's capacity to act freely and rationally. For example, social circumstances and drug or alcohol addiction.

Important to note for the discussion which follows is that utilitarian and retributive justifications for punishment derive from opposing ethical theories: utilitarianism, in which the morality of an action is judged by its consequences; and deontological ethics, in which the act itself is evaluated and its morality judged by how well it accords with a prescribed moral norm, the consequences of the action being irrelevant (Alexander and Moore, 2007).

### Retribution

It is necessary to critically examine retributivism (as well as utilitarianism), so that the fundamental differences between the two main justifications for punishment

are made clear. This should underline the incompatibility of the five purposes of sentencing set out in s.142 CJA 2003, outlined in the previous chapter (and explored further, later in this chapter). Additionally, the discussion in relation to the flaws in retributive theory in particular, are relevant to the matters dealt with later in this chapter concerning retribution's "stranglehold" on conceptions of punishment, as the flawed nature of retribution undermines the idea of it being somehow integral to punishment. Further, it lays the foundations for the criticism of the principle of proportionality (which owes much to retribution) towards the end of this chapter.

The backward-looking notion of offenders "getting what they deserve" is central to retributive theories, but is not found in utilitarian theories of punishment. In retributive theories, the idea of 'just deserts' is heavily linked to the principle of proportionality,<sup>33</sup> i.e. an offender should be punished proportionately to his or her level of wrongdoing:

what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other (Kant, 1972, p.104)

The principle of proportionality is in turn often rooted in the retributive idea of a moral balance or moral equilibrium – hinted at in the above quote by Kant, with its reference to a "scale of justice". The moral balance is said to be upset by criminal offending and the balance can only be restored by punishing the offender to the relevant extent. Therefore, retributivists maintain that offenders deserve punishment in return for upsetting the moral balance. The following passage

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<sup>33</sup> Whilst proportionality is commonly held to be grounded in retributivism, there are those, e.g. Frase (2004) who argue that it is at least possible to convey proportionality in utilitarian terms.

illustrates Kant's version of this principle.<sup>34</sup> He argues that even if a society dissolves, the last murderer in prison still ought to be executed:

This ought to be done in order that every one may realise the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice (Kant, 1972, p.104).

Herbert Morris (1976) developed a more nuanced version of a retributive “moral balance” theory, proposing the idea that society operates on a balance of benefits and burdens.<sup>35</sup> Morris argued that individuals in society shoulder a burden by refraining from infringing other people’s spheres of interests and receive a benefit by others not interfering with their sphere of interests. When an offender commits a crime, he or she is infringing other people’s spheres of interests and gaining a benefit to which he or she is not entitled. As such, punishment is required to impose a burden on the offender so as to restore the balance – offenders deserve punishment so that the benefit they obtained through committing a crime is cancelled out. This idea rests on Morris’s contention that offenders freely choose to commit crimes and freely choose, therefore, to be punished. He is dismissive of rehabilitation (which he calls “therapy” – see Morris, 1968) as not respecting an offender as a free and rational being. This is because, Morris argues, it implies that the offender has offended due to some kind of problem, rather than respecting the offender’s decision to offend and honouring their right to be punished.

It is contended that there are two main problems with retribution and these will be discussed below. Firstly, the claim that retribution best respects and promotes the freedom of the individual will be shown to be questionable. It will be argued that this is underpinned by what will be termed an “inherent deterrent”, i.e.

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<sup>34</sup> Note that whilst some authors (e.g. Ezorsky, 1972; Murphy, 1985) holds that Kant’s retributivism is a theory about “moral balance”; other writers would frame this as part of his theory of “moral law” (e.g. Hampton, 1984).

<sup>35</sup> His concerns, however, lie with the good of the individual, rather than utilitarian concerns about the good of society.

possesses underlying utilitarian concepts, which is problematic for a theory which eschews utilitarianism. Secondly, the idea of a moral equilibrium or moral balance, which is central to most retributive theories will be criticised.

*Problem 1: Freedom of the individual and the inherent deterrent*

Retribution is commonly portrayed as respecting the freedom of the individual, in contrast to utilitarian theories, which – it is argued – limit the freedom of the individual (Morris, 1968). The problem for retributivists is that this much-vaunted apparent respect for the freedom of the individual entails an assumption that the majority of people are entirely autonomous beings who are fully capable of rational, free, decision making. However, there is evidence to suggest that this is not in fact the case, as pointed out by Chiesa (2011, p.1404):

Recent neuroscientific experiments coupled with advances in genetics and related fields increasingly suggest that humans have little control over a wide array of acts that most people believe are freely willed. This has led some respected scholars to contend, as psychologist Daniel Wegner famously noted, that free will is nothing more than an "illusion."

Morris concedes that some exceptions should be made, where individuals are not treated as fully capable, free, rational beings (1968, pp.478 –479):

Sometimes the rules preclude punishment of classes of persons such as children. Sometimes they provide a defense if on a particular occasion a person lacked the capacity to conform his conduct to the rules. Thus someone who in an epileptic seizure strikes another is excused. Punishment in these cases would be punishment of the innocent, punishment of those who do not voluntarily renounce a burden others have assumed. Punishment, in such cases, then, would not equalize but rather cause an unfair distribution in benefits and burdens.

Having made this concession, it is difficult to understand why other factors which might impede an individual's ability to make a free and rational choice should not also be taken into account – such as an offender's social and economic background. However, acknowledgement of such factors is lacking in retributivist accounts. As such, retributivism holds a somewhat contradictory position of saying that: only those who deserve to, should be punished; accepting that in some cases people do not deserve to be punished because they are not fully responsible for their actions; but treating the majority of offenders *as though* they were fully responsible, when there is growing support for more deterministic theories of human behaviour, which indicate the possibility that many offenders might not have full responsibility for their actions.<sup>36</sup>

For retributivists, the idea is that when an individual commits a punishable offence, they are choosing to do something wrong and are therefore choosing to be punished. According to retributivists, this is an exercise of the individual's right to be treated as a person (someone with the capacity to make such choices) and it is the criminal's right to be punished. As Hegel states (1967, p.70): “[Punishment of an offender is] an embodiment of his freedom, his right ... it is also a right established in the criminal himself, i.e. in his objectively embodied will, in his action”.

The idea that offenders choose to be punished fails to allow for the vast majority of crimes which are not premeditated. Even where offenders have planned the crime in advance, rather than acting impulsively, it seems far-fetched to suggest that for every such occasion, the offender is aware of the likely punishment, but chooses to continue with the criminal action. This is especially so as sentencing law is so complex (as alluded to in Chapter 2), and has been criticised by experienced legal practitioners, including the current president of the Queen's

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<sup>36</sup> See further on this free will / determinism debate: Chiesa (2011); McKenna and Russell (2008); and Strawson (1974).

Bench Division, Leveson LJ, as being difficult to comprehend: “statutory provisions regarding sentencing in general and ancillary orders in particular are almost impenetrable.” (Leveson LJ, 2015, p. 95).

The idea of an offender choosing to be punished also fails to allow for cases where an offender has committed an offence thinking that he or she will not be caught and therefore not punished. It is difficult to suggest that this is a situation where the offender has chosen to be punished, unless one argues that offenders choose to be punished at the point of conviction – something which seems only likely to apply to extremely penitent individuals, as pointed out by Bedau (2010): “only among the Raskolnikovs of the world is one's deserved punishment welcomed as a penance”.

The idea of an offender choosing to be punished, rather than declining this right appears odd (and indeed *at odds* with the freedom of the individual – as it would appear that an offender would have more freedom if he or she could also waive their “right” to be punished). However, Morris holds that the right to be punished is inalienable. Not only is the idea of inalienable rights disputable (see Bentham, 1843), but this retributive position, once clarified, appears contradictory. The offender is said to make a choice to be punished in a situation where he or she could not have “chosen” otherwise.

Further, the retributive position appears to entail an implicit notion of deterrence, which is problematic for a theory which ostensibly renounces utilitarian ideas. As Hampton notes (1984, p.211):

if the state punishes in order to make good on its threats, then the deterrence of future crime cannot be wholly irrelevant to the justification of punishment. And anyone, including Kant, who analyzes laws as orders backed by threats must recognize that fact.

When Morris says that “There is the inestimable value ... of having the responses of others to us determined ... by what we choose rather than what they choose” (1976, p.41), he fails to address the fact that the very existence of punishment as a response to certain actions limits that initial choice – by operating as an inherent deterrent.

The retributivist argument that individuals can freely choose an action, even if it is likely to result in punishment, is similar to suggesting that if the following offer of beverages was made: “you may have either tea or coffee, but if you choose coffee, I will punch you in the face”, the person to whom the offer is made possesses an entirely free choice. In fact, assuming that they do not wish to be assaulted, this person is being steered towards choosing tea by the operation of a deterrent. Likewise, where punishments exist for certain actions, this limits individuals’ freedom to choose such actions. Whether retributivists intend this or not, the existence of sanctions in response to certain actions is going to place limitations on free choice and create an incentive not to perform those actions, i.e. act as a deterrent, whether that is the express aim or not.

In summary, therefore, the retributive claim that this theory of punishment values the freedom of the individual has been shown to be problematic. The idea that individuals are always free, rational beings is questionable – something which is even accepted to an extent by retributivists. Further, the linking of certain actions with punishments actually serves to limit the extent to which individuals can make truly free choices, as an inherent deterrent will operate, regardless of whether this is intended or not.

### *Problem 2: The Moral Equilibrium*

The idea of some kind of moral equilibrium is central to most retributivist theories (see the discussion of Kant’s retributivism, above). Offending causes the balance to be upset and this must then be restored by punishing the offender. As outlined

earlier, Morris's more advanced conception of a retributive balance entails the idea of benefits and burdens – members of society shoulder the burden of refraining from infringing others rights and in return receive the benefit of not having their own rights infringed. A key problem for Morris is that whilst refraining from committing some crimes might be burdensome to most people, there are crimes which many people do not wish to commit anyway, e.g. those who are not paedophiles shoulder no burden by refraining from committing child sex offences (Sher, 1987).

A deeper problem for the retributivist moral balance or equilibrium is that it is extremely vague in terms of its metaphysical origins,<sup>37</sup> colourfully criticised by the utilitarian philosopher Hastings Rashdall (2005, p.304):

the retributive theory ... shows a disrespect for human personality by proposing to sacrifice human life and human Well-being to a lifeless fetish styled the Moral Law, which apparently, though unconscious, has a sense of dignity and demands the immolation of victims to avenge its injured *amour propre*.

Morris's balance of benefits and burdens is less susceptible to this criticism, being based on social contract theory, however this entails an assumption about some kind of abstract measurement system whereby it is possible to accurately calculate benefits and burdens.<sup>38</sup> Ezorsky (1972) challenged this idea by arguing that to operate fairly a "whole world view" should be taken by sentencers; however they would be unable to accurately calculate exactly what an offender deserved, being unable to accurately collate and calculate all benefits and burdens across an individual's lifetime.

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<sup>37</sup> Unlike the similar Buddhist concept of karma, which is grounded in a fully-explicated Buddhist metaphysical view of the world (Siderits, 2007).

<sup>38</sup> This is linked to the problems with measurement in relation to proportionality, discussed later in this chapter.

Sher (1987) criticised this idea, arguing that there is a distinction to be made between the harm of previous hardships and punishment, making a “whole world view” redundant. However, even on this view, there is a problem for retributivists in the case of miscarriages of justice. For example, Sean Hodgson was wrongly imprisoned for 27 years, being released in March 2009 (BBC News, 2009). If – as Sher seems to suggest – the moral equilibrium is only balanced or imbalanced by the harms of crimes and punishments, then punishment imposed unfairly falls to be taken into account. Sean Hodgson therefore received 27 years’ worth of burden, without the 27 years’ worth of benefit having been received, leaving the moral equilibrium unbalanced. If only crimes and punishments can rebalance the equilibrium, the conclusion appears to be, therefore, that retributivists should encourage those who have suffered a miscarriage of justice to commit crimes until they have offended sufficiently to restore the moral balance. Further, there is the question of what effect crimes which go undetected have on the moral balance – indeed it seems difficult to imagine a way of adequately keeping track of this mystical equilibrium.

A related problem for retributivists is in explaining why the imposition of a burden in the form of punishment acts to rebalance the moral equilibrium. Moreover, it is unclear why the state should only punish for bad actions instead of also rewarding good actions. A moral equilibrium which is imbalanced by an immoral act must also be imbalanced by a morally outstanding act. Whilst society does sometimes reward morally exemplary behaviour, this is not systematically done in a way equivalent to the penal system.

Further, retributivists must hold that the moral balance or equilibrium is either a naturally existing equilibrium or something posited on a particular state. The former conception will struggle to explain why state intervention in the form of punishment is required at all if this is a natural phenomenon. The latter version which conceives of the moral balance or equilibrium as a social construct, prevents the idea of the moral balance being used to justify punishment, as it becomes

circular to argue that punishment based on the (posited) moral equilibrium is justified because of the (posited) idea of the moral equilibrium.

In this section, it has been shown that there are serious flaws in the retributive account of punishment, which are important to bear in mind in the later discussion of proportionality – a strongly retributive concept. In the next section, utilitarian theories will be examined and the key differences between the two main theories will become apparent.

### Utilitarian theories

Whilst retribution is “backward-looking” (Lacey, 1988), utilitarian theories are forward-looking, being concerned with the consequences of punishment (Scarre, 2004). Utilitarian punishment is justified by its ability to maximise overall happiness, rather than to deliver just deserts. As outlined earlier, rehabilitation does this by resolving problems for the offender and also – as with deterrence – by reducing the likelihood of future offending. As noted previously, utilitarian justifications for punishment can be contrasted with retribution at a most basic level, because they each derive from opposing ethical theories: utilitarianism and deontological ethics. Utilitarianism judges the rightness and wrongness of actions by evaluating the future consequences and effectively ignoring the act itself. In contrast, deontological ethics judge the rightness and wrongness of actions by ignoring the consequences of actions and evaluating whether the act itself accords with a prescribed moral norm (Alexander and Moore, 2007).

Utilitarian theories for the justification of punishment are subject to two main criticisms: firstly (focused on deterrentism) that utilitarianism has the capacity to support excessive punishment; and secondly that utilitarianism has the capacity to support unjust punishments, e.g. the punishment of the innocent, if this would maximise positive outcomes. Each of these criticisms will be addressed in turn and will be shown to be ultimately flawed.

*Problem 1: Support for excessive punishment*

The argument that deterrentism can support excessive punishment (if it would maximise happiness) can be straightforwardly responded to by utilitarians by pointing out that only the minimum punishment which will achieve the deterrent effect should be imposed, as any more punishment would create more unhappiness. Therefore, by utilitarian measures, no punishment will be excessive – it will always be that (in theory of course) which is sufficient, but not more than sufficient, to achieve the deterrent effect (see Walker, 1991). Only where retributive notions of fairness come into play can one begin to talk of such deterrent punishments as excessive, but of course such notions are not present in the utilitarian conception.

Nozick's (1974) criticism of deterrentism is perhaps harder to deal with. He argued that deterrence theory fails to explain the exact calculation which is made in determining the minimal penalty for a crime "necessary to deter commission of it" (Nozick, 1974, p.61). The aim might be to deter all instances of the offence, in which case – Nozick argues – the punishment is likely to be too harsh. Alternatively, if individual deterrence is all that is intended, then the punishment might be too lenient. The above response applies here, in terms of the utilitarian system of measurement being distinct from retributive notions, i.e. only by retributive standards would punishments which achieved the deterrent aim (whether that be individual or general deterrence) be too harsh or too lenient.<sup>39</sup>

However, Nozick develops his criticism further, suggesting that a key difficulty for the measurements involved in determining penalty levels to achieve the aim of

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<sup>39</sup> See also Scarre (2004) in relation to utilitarian justifications being concerned with wider notions of maximising happiness. He points out that draconian punishments may decrease net utility by putting citizens in fear of the state and are unlikely therefore to be justified on the basis of utilitarianism.

deterrence, is that the happiness of offenders and victims are not differentiated (1974, p.61):

Utilitarian[ism] ... equates the unhappiness the criminal's punishment causes him with the unhappiness a crime causes its victim. It gives these two unhappinesses the same weight in calculating a social optimum ...

Nozick argues that the happiness of victims and offenders could only be differentiated by recourse to retribution. However, this criticism implicitly assumes the value of the notion of desert. For utilitarianism, there is no issue with the offender's interests remaining as valid as the interests of any other individual in society (Rashdall, 2005). This is therefore only a problem insofar as it may seem intuitively problematic for those who possess retributive intuitions. However, it is fair to accept that where two calculations produce the same happiness calculation, yet one method prioritises the happiness of the victim and the other method prioritises the happiness of the offender, the utilitarian in this situation could be said to face the Buridan's ass problem.<sup>40</sup>

### *Problem 2: Unjust punishment*

Another common criticism of utilitarian theories is that they are capable of supporting unjust punishments, such as scapegoat punishment, i.e. the deliberate punishment of the innocent, if it will maximise happiness in society. Such criticisms stem from the fact that utilitarian punishments are exclusively forward-looking, rather than having regard to the desert of the offender.

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<sup>40</sup> Although, see Narveson (1976) for a solution to the Buridan's ass problem for utilitarians, which is simply to reconsider the choices as between: (1) selecting one of the equally good options at random; or (2) failing to decide. The solution being, Narveson argues, that the utilitarian's best option is (1).

In his criticism of utilitarian justifications, McCloskey draws a distinction between the potential usefulness of punishments and whether they are just or not (1965, p.256):

We may similarly give possible examples of useful punishments of other unjust kinds. Scapegoat punishment need not be and typically is not of a framed person. It may be useful. An occupying power which is experiencing trouble with the local population may find it useful to punish, by killing, some of the best loved citizen leaders, each time an act of rebellion occurs; but such punishments do not commend themselves to us as just and right.

Taking the scapegoating criticism as a starting point, it is perfectly possible for the utilitarian to respond by flatly refusing to accept that there is any problem with scapegoating itself, rather than to deny that utilitarian punishments could justify it. Kant was abhorred by this notion and famously argued that:

The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: "it is better that one man should die than that the whole people should perish". For if Justice and Righteousness perish, human life would no longer have any value in the world. (1972, p.104).

Even if a flat denial that there is anything wrong with scapegoating is unconvincing, it is alternatively arguable that utilitarianism would not in any event support scapegoating. For example, deterrence is unlikely to operate effectively if both offenders and non-offenders alike could be the subject of punishment. Further, where a scapegoat is punished and the offender remains free, then the wrong person is either deterred or rehabilitated, which seems contrary to utilitarian aims.

That said, there are contrived scenarios which can be imagined whereby overall net utility is increased by the scapegoating of an innocent person. For example, the thought experiment put forward by Ezorsky (1972, pp. xvi–xvii):

Suppose that D, the sovereign of a powerful nation, has a grievance against Smith, a citizen of a small nation. D demands that E, the sovereign of Smith’s country, ensure that Smith be convicted and imprisoned ... Unless innocent Smith is convicted and punished, D will launch an attack on E’s country and massacre the whole population.

As Ezorsky points out (1972, p.vii), “the massacre of a whole nation would surely have more disutility than the harmful effect of Smith’s illegal punishment” and therefore utilitarians would support the scapegoating of Smith. However, in respect of this scenario, the fact that utilitarianism would support scapegoating does not really act as an argument for or against utilitarianism. This is because one either thinks that the massacre of an entire nation is preferable to one individual getting his unjust deserts (if one is retributive); or one thinks that one individual can be sacrificed for the good of the rest of the nation (if one is utilitarian). The utilitarian stance in this respect is not obviously absurd.

The scapegoating criticism is, however, just one example. The more fundamental criticism levelled at utilitarian justifications of punishment (as indicated above, by McCloskey, 1965) is that they do not have in place a mechanism to prevent unjust punishments being imposed, as they are not linked to the offender’s desert. However, this presumes a retributive notion of justice, which of course utilitarians would not hold to, and equates to nothing more than a bald assertion of one conception of justice.<sup>41</sup> Indeed, it is just as possible to assert that what is just, is in fact what best serves utilitarian ends.<sup>42</sup>

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<sup>41</sup> See Chapter 4 for a more in-depth discussion about differing conceptions of justice and the argument that there is no one objective ideal of justice.

<sup>42</sup> One of the appealing attributes of the theory of Restorative Justice outlined later in this chapter, and expanded on in Chapter 4), is that it allows for a plurality of views on the nature of justice, without the need to prioritise or justify any of them.

## Mixed Theories of Punishment

It has been argued thus far, that the more problematic features of utilitarian justifications are surmountable, whereas the difficulties inherent in retributive justifications are more difficult to overcome. This raises the question of how valid punishments which rest on purely retributive ideals are, if the retributive philosophy is a fundamentally flawed ideology. Moreover, regardless of whether one is a utilitarian or a retributivist, the above discussion of the two theories and challenges to them, makes clear that these two theories of punishment are very different in nature, each with opposing aims and objectives.

Mixed theories of punishment seek to reconcile these two opposing philosophies of punishment, combining them into one theory which justifies punishment. The drive to do so tends to stem from a belief that both retribution and utilitarianism have positive points to contribute to the justification of punishment, and also that the combination of the two theories in a particular way, undermines the criticisms usually levelled at each distinct theory. Reconciling these very different theories has been attempted by various philosophers, including Brooks (2012a), Duff (2001), Hart (1968) and Rawls (1955). In this section, each of these mixed theories will be briefly examined, before reasons are given as to why they do not achieve what they each set out to do – i.e. successfully bring together opposing theories of punishment.

Rawls holds that the justification of the existence of penal institutions is forward-looking (utilitarian), whereas the justification for punishment of an individual is backward-looking (retributive). For Rawls, retribution and utilitarianism are not really opposed, rather they address different aspects of punishment:

one must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases. (1955, p.5)

Rawls's position is problematic, for if penal institutions are put in place in order to ensure positive consequences, then where individual instances of punishment are not decided in line with providing for the best possible consequences, then overall the justification of the existence of the penal institution is likely to be undermined. As Brooks points out: "imposing what is deserved may not always entail positive consequences: in some cases, it may even threaten political stability" (Brooks, 2012a, p.106).

Similarly to Rawls, Hart suggests that utilitarianism and retributivism address different questions concerning punishment. Hart (1968, pp. 1–27) identifies three separate issues: (1) the definition of punishment; (2) the general justifying aim of punishment; and (3) the distribution of punishment (to whom punishment may be applied and how much). Hart pointed out that in terms of the definition of punishment, this should remain separate to the aims of punishment (as discussed in this chapter in the section on terminology). Hart argues that the general justifying aim of punishment is utilitarian, i.e. general deterrence, the prevention of crime, and so forth. According to Hart, this should be distinguished from the distribution of punishment – i.e. who should be punished and how much, which could only be justified on retributivist grounds.

Hart's theory falls into similar problems to the mixed theory proposed by Rawls: if individuals are to be punished to the extent that they deserve, then this may clash with the utilitarian purposes of the general justifying aim. Similarly, if the retributive element of Hart's theory is intended to avoid problems such as scapegoating, then in a situation where scapegoating would be justified on

utilitarian grounds, it is unclear how one would decide whether the retributive part or the general justifying aim would take priority.

Hart's theory can also be criticised on the basis that it arbitrarily incorporates some utilitarian and some retributive elements. For example, utilitarians might question why particular instances of punishment must be retributive, as Honderich (2006, p.167) points out:

It remains perfectly possible, given only the fact of the separate question, to side with Bentham and declare that the answer to the question about who is to be punished is simply that those are to be punished whose punishment will prevent future offences.

As such, just because separate questions can feasibly be asked, does not automatically mean that they will be answered by different theories:

There is no reason for thinking that some separate-questions procedure inevitably or logically leads one to a compromise theory. The existence of separate questions does not constitute any argument for the conclusion that punishment must be justified by several principles. (Honderich, 2006, p.169)

Duff (2001) expressly sees his theory as a mixed theory: "Punishment will now look both back (as retributivists insist it must) to a past crime as that which merits this response, and forward (as consequentialists insist it must) to some future good that it aims to achieve" (2001, p.88). He sees punishment as a kind of secular penance achieved by communicating the deserved censure to offenders:

[punishment] should communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they wronged ... (2001, p.xvii)

A problem for Duff's theory, as highlighted by Brooks (2012a), is that of the unrepentant offender. According to the communicative theory, punishment should both communicate public disapproval of the offence, as well as entail the offender communicating their remorse back to the public. However, there will be cases where the offender expresses no remorse and is unrepentant. In such cases, Duff argues (2001, pp.81-2):

... the aim internal to censure is that of persuading the wrongdoer to recognize and repent his wrongdoing. This is not to say that we should censure a wrongdoer only when we believe that there is some chance of thus persuading him. We may think that we owe it to his victim, to the values he has flouted, and even to him, to censure his wrongdoing even if we are sure that he will be unmoved and unpersuaded by the censure. But our censure still takes the form of an attempt (albeit what we believe is a futile attempt) to persuade him.

For Brooks, this means that the fundamental idea of secular penance is entirely undermined (2012a, p.120):

The problem with this argument is that secular penance is reduced to a fiction. ... Communicative theorists claim punishment does not merely express disapproval, but includes repentance. The problem is that repentance performs no clear role in fact. If it does not matter whether any offender repents and all repentance is at minimum assumed, then what is the clear difference between retributivists and communicative theorists?

This point is also highlighted by Honderich (2006, p.186):

What the [communicative] view comes to ... is that punishment is right when it tells an offender something, and in some way he understands it, even if it and his understanding have no reformatory effect on him. The thought may incline us to suppose this is more of a retribution theory than so far supposed, purer retribution than supposed.

As such, Duff's theory is not only a little vague in pronouncing itself to combine retributive and utilitarian goals, when it seems in fact a straightforwardly retributive theory, but it is also vulnerable to the previously outlined criticisms of retributive theories.

A further theory seeking to combine utilitarian and retributive goals will be considered here: the unified theory of punishment proposed by Brooks (2012a). This theory draws on Hegel's philosophy of punishment and seeks to unify different theories of punishment within a single, coherent theoretical approach. According to Brooks: "The unified theory of punishment may address desert, proportionality, deterrence, rehabilitation, restoration, and expressivism in a coherent and unified account bringing together these multiple penal aims" (2012a, p.132).

Brooks (2012a, p.130) argues that rights are substantial freedoms that are protected by criminalising their violation and that punishment should be proportionate to the right violated in view of how best to maintain and protect rights, with some rights being more central than others and requiring more severe punishment. He argues that crime is necessary, but not sufficient for punishment, e.g. if the protection of rights does not require punishment, then it may not be necessary. Importantly, he sees crimes as being punished as legal wrongs, not moral wrongs – i.e. the crimes are punished, not the immorality.

The "restoration of rights" is used by Brooks to provide an over-arching framework within which different philosophies of punishment are located: "Punishment aims at the restoration of our rights and this restoration may take multiple shapes to achieve these aims." (2012a, p.132). Brooks sees the overriding aim of restoration of rights as providing guidance in particular instances of sentencing of the

weighting to be given to particular philosophies of punishment, i.e. their precise relevance is decided by an assessment of the extent to which they further the overriding aim of the restoration of rights: “The particular form ... punishment should take may address deterrent or rehabilitative penal goals insofar as they might contribute to the restoration and protection of rights within these proportional limits” (2012a, p.131). Brooks seems to suggest that retributive and expressivist goals will always be relevant in terms of proportionality: “The greater the threat to our rights as substantial freedoms, then the greater the punishment and the greater our disapproval of such crimes as manifest in the severity of punishment.” (2012a, p.130-131).

However, it is unclear why Brooks sees the link between deterrence or rehabilitation and the restoration of rights as one which is flexible (whereas the link between retribution and the restoration of rights is constant). Surely, either deterrence or rehabilitation further the aim of the restoration of rights, or they do not. It is difficult to see why certain circumstances would support this link and others would not, as Brooks appears to suggest (2012a, p.131). If, however, Brooks is in fact arguing that every instance of punishment must address retributive proportionality, then also necessarily address rehabilitation and/or deterrence, then there is a problem. The difficulty is that a proportional punishment assessed with reference to expressivist and retributivist concerns might not also satisfy the aim of deterrence or rehabilitation – regardless of the overriding aim. Either a sentence deters or it does not – if it deters, it might not rehabilitate, or it might be disproportionate to the right infringed and therefore not satisfy retributive goals. The fact that an overriding aim is in place, does not mean that competing philosophies within that framework can each be satisfied simultaneously in pursuance of it.

An additional problem is that the overriding objective – to restore rights – is, and must be, sufficiently vague in order to provide the flexibility to move between

different philosophies of punishment, depending on the circumstances. The unified theory promises “coherent penal pluralism”, but its over-arching framework really just provides something for sentencers to hang their biases on. Its function is akin to asserting that the overriding aim of punishment is for “justice to be done” and is just as open to wide interpretation by sentencers.<sup>43</sup>

However, the fundamental idea of unifying different philosophies of punishment within a coherent framework is – for all the reasons outlined by Brooks (2012a, pp.123–126) – an idea with strong appeal. It is not entirely dissimilar to what will be suggested in this thesis in relation to Restorative Justice (“RJ”) towards the end of this chapter: that RJ can provide access to different philosophies of punishment within the framework of the restorative process. That said, there are also differences between the unified theory and what will be suggested concerning RJ. In particular it will be argued that RJ does not bring together multiple penal goals because it “should” (see Brooks, 2012a, p.133), but rather because stakeholders should have access to the philosophies of punishment which resound with their particular notions of justice – thus they may choose to include retributive elements, or utilitarian elements in any particular RJ outcome. It is thus submitted that while RJ does not necessitate a combination of theories, it may nevertheless provide a space whereby multiple theories may be operationalised in a practical setting.

### **3. Philosophies of Punishment in the Criminal Justice System**

The fundamentally different nature of retributive and utilitarian theories of punishment and the difficulties reconciling them in a mixed theory have been discussed above. The two main philosophical justifications for punishment – retribution and utilitarianism – are both found in the criminal justice system, but this is not as part of an effort to base sentencing law on a mixed theory of

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<sup>43</sup> See further the discussion of “justice” in Chapter 4.

punishment; rather, this is an *ad hoc* combination of these opposing theories. As such, the resulting incoherence is worse than might result from the application of a mixed theory.

There are two inter-related problems occurring in current sentencing practice in England and Wales: firstly, there is confusion in sentencing law and policy over terminology relating to sentencing, in particular the confused and inconsistent usage of the word “punishment” to sometimes mean “sentencing” and to sometimes mean “retributive punishment”; and secondly there is a failure to appreciate the fundamental differences between retribution, deterrence and rehabilitation, which leads to their *ad hoc* combination in sentencing law.

#### Problems with terminology: defining punishment

*Punishment* is used to mean both *sentencing* and *retributive punishment* in sentencing policy, guidelines, legislation and by the judiciary. The idea that *sentencing* and *retributive punishment* mean the same thing is problematic, as it implies that all sentences are retributive in nature, which is clearly not the case. In any event, what is actually seen is even more incoherent. In some instances *punishment* is distinguished from *sentencing* and appears to be used to mean *retributive punishment*: for example, in the White Paper *Justice For All* (2002) *punishment* and *sentencing* are initially separated out as distinct concepts:

0.13 Sentencing must protect the public, punish offenders, and encourage them to make amends for their crime and contribute to crime reduction. (2002, p.18)

As can be seen, a separate aim of sentencing is to “punish offenders”, which would indicate a retributive usage of *punish*. Yet in the very next paragraph,

*punishment* is used to mean *sentencing*, so the two terms – in complete contradiction with the paragraph above, suddenly become synonymous:

0.14 The punishment must be appropriate to the offence and the offender, ensure the safety of the community and help rehabilitate offenders to prevent them reoffending once and for all. (2002, p.18)

This construal of the terms would lead the preceding paragraph (0.13) to be interpreted as: “Sentencing must ... sentence offenders”, which is obviously meaningless.

Legislation confusing these terms includes the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 64 of the 2012 Act, which amends s.174 CJA 2003, states:

(2) The court must state in open court, in ordinary language and in general terms, the court's reasons for deciding on the sentence. ...

(7) Where ... the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, the court must state that fact.

This appears to conflate *punishment* with *sentence*, in contradiction to the title of the Act, which sees these two concepts as separate.

The Firearms Act 1968, includes a “table of punishments” at Schedule 6, setting out the relevant range of sentence for each type of offence – thus conflating *punishment* with *sentence*. This is in contrast to the Criminal Justice Act 2003 (“CJA 2003”), s. 142 which separates out these two concepts:

## 142 Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

(a) the punishment of offenders, ...

If the punishment of offenders is one of the purposes of sentencing, then it is seen as a separate concept to sentencing – in this case, used in a retributive sense.

Section 177 of CJA 2003, concerning Community Orders, construes *punishment* in a retributive way:

(2A) Where the court makes a community order, the court must—

(a) include in the order at least one requirement imposed for the purpose of punishment, ...

Clearly, *punishment* could potentially be either synonymous with *sentencing* or be something with purely retributive connotations, but not both – otherwise sentencing would be necessarily retributive in nature and this is not the case, as rehabilitative orders and deterrent sentences are also available forms of sentencing disposal. Thus it can be seen that there is a lack of clarity surrounding the definition of punishment in the current sentencing system in England and Wales.

It might be possible to shed light on this definitional problem by considering some of the attempts by philosophers to define *punishment*. A well-known definition of punishment was outlined by Flew (1954), who held that punishment must:

- (a) Be an evil or unpleasantness;
- (b) be for an offence;
- (c) be of an offender;

- (d) be carried out by human agencies;
- (e) be imposed by special authority.

Flew's definition was subsequently adopted with minor amendments by Benn (1958) and Hart (1968) and this mode of defining punishment is known as the Flew-Benn-Hart definition.

Various problems with this definition have been identified, including it leading to statements such as "he is being punished, although he is innocent" being self-contradictory – as the person being punished is not an offender and so the act is not punishment. Scheid (1980) attempts to resolve this difficulty by suggesting that punishment is treated as a *reducible concept*, whereby one or more of the criteria in the Flew-Benn-Hart definition can be subtracted from it, depending on how one is using the word "punishment". In the above example of the innocent being punished, one can assume that the speaker was using a *reduced* version of punishment – subtracting the criterion of punishment being of an offender.

One potential problem with Scheid's interpretation is that it is in danger of making the definition too flexible, so as to render it almost meaningless. He attempts to avoid this difficulty by insisting on criteria (a); (b); and (c) as necessary and non-reducible. However, by doing so, self-contradictory statements remain possible, e.g. where a punishment is imposed and the offender does not find it unpleasant or an evil.

A more fundamental problem with the Flew-Benn-Hart definition, is that it clearly fits much more easily with retribution than deterrence or rehabilitation, as pointed out by McPherson (1967, p.22):

To define 'punishment' in a way that clearly owes much more to retributivism than it does to utilitarianism is, in a way, to honour retributivism. What could be grander than to be, to the exclusion of your rivals, set out in front as the expression of the meaning of an important concept?

As outlined above, when discussing the confused usage of *punishment*, *retribution* and *sentencing* in sentencing law, retributivism is just one justification for the imposition of punishment and it is difficult to see how it can therefore be synonymous with it. This sort of definition may be indicative of the stranglehold that retribution seems to exert on matters of criminal justice – something particularly relevant to the issue of proportionality, discussed towards the end of this chapter.

A definition of punishment as more or less equivalent to sentencing might be preferred – at least in the criminal justice context – which could then be retributive or utilitarian in nature. This sort of understanding of punishment was put forward by Walker (1991) “Punishment ... has different names. When imposed by English-speaking courts it is called ‘sentencing’”. Duff (2003) appears to endorse a similar view when he states: “Probation is now officially and formally recognised in England as a punishment: it counts as a ‘sentence’ ... rather than as a measure imposed ‘instead of sentencing’ the offender” (2003, p.181).<sup>44</sup> Bedau (2010) also supports the idea of a more value-neutral definition of punishment and the separation of the definition and justification of punishment:

Defining the concept of punishment must be kept distinct from justifying punishment. A definition of punishment is, or ought to be, value-neutral, at least to the extent of not incorporating any norms or principles that surreptitiously tend to justify whatever falls under the definition itself. To put this another way, punishment is not supposed to be justified, or even partly justified, by packing its definition in a

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<sup>44</sup> Although Duff’s exact understanding of punishment goes beyond merely equating it with sentencing – see the discussion of Duff above in the mixed theory section and also discussion of Duff’s theory in relation to RJ in the Restorative Justice Theory chapter.

manner that virtually guarantees that whatever counts as punishment is automatically justified.

This sort of approach could serve to diffuse some of the disagreements surrounding issues related to punishment. For example, the abolitionist movement tends to focus on arguing against the Flew-Benn-Hart definition (Golash, 2005). By conceiving of punishment in a less retributively-minded way, it may become more palatable to some abolitionists. Duff (1990), in putting forward his communicative theory of punishment, argued precisely this: “at least some of the abolitionists’ concerns can be met precisely by the development of alternative and more appropriate forms of *punishment*.” (1990, p.43 – 44).

A more value-neutral mode of defining punishment could also shed light on the RJ Theory debate about whether RJ is an alternative form of punishment, or an alternative to punishment. If punishment essentially means something akin to sentencing, then RJ can be seen as an alternative method of arriving at a sentence and therefore an alternative form of punishment (discussed at greater length later in this chapter). It is not suggested that this definition of punishment is ideal, nor is it suggested that it entirely resolves disputes about RJ and abolitionism. However, considering this definition in contrast to the Flew-Benn-Hart definition, may illuminate where some of the disagreement about RJ Theory resides – and much is a result of different understandings of what punishment means, rather than dispute about what RJ is and can achieve (as argued later in this chapter).

An alternative approach is that suggested by McPherson (1967), who held that whilst the definition of punishment and its justification are usually separated out into distinct questions – with it being felt necessary to consider the former question first, before deciding on the latter – this appearance of separateness is illusory. He argues that “[t]he clarification of the concept of punishment may have to be achieved by considering both together” (1967, p.25). For McPherson, the

word *punishment* is not value-neutral and he gives the example that “to those who say that punishment ought to be abolished and replaced by treatment, ‘punishment’ is a dirty word” (1967, p.26). This is certainly apt in relation to the Flew-Benn-Hart definition, which is heavily influenced by retributivism, though is not so pertinent for the alternative sentencing-based definition put forward above – and indeed is part of the reason behind suggesting a move towards that less value-laden understanding of punishment.

That said, whilst a definition of punishment as roughly equivalent to sentencing (in the criminal justice context in any event) has been tentatively put forward, this is not without its problems. McPherson might be right that “[t]here is no good reason to suppose that there is such a thing as *the* justification of punishment-in-general. (Perhaps there is no such thing as punishment-in-general anyway)” (1967, p.26). Possibly the best that can be hoped for is that in discussions of punishment and considerations of sentencing, some attempt is made to acknowledge competing definitions of punishment, take into account situations where values are packed into definitions, and understand how this might impact on debates about its desirability, or applicability in a given context.

#### The *ad hoc* combination of philosophies of punishment in the Criminal Justice System

As well as problems with terminology impacting on sentencing law and policy in the criminal justice system, the full import of the fundamental differences between different philosophies of punishment is often overlooked. This has been alluded to in the previous chapter, in the discussion of the five conflicting purposes of sentencing outlined in s.142 of CJA 2003. It is worth reiterating what these five purposes are, before discussing the underlying philosophies behind them:

## 142 Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

Looking at the philosophical justifications for punishment implicit in each of the five aims: (a) concerns retributive aims – “punishment” is here being used in a retributive sense, as mentioned above; (b) involves utilitarian aims of deterrence; (c) concerns utilitarian aims of rehabilitation; (d) has utilitarian connotations, as it is forward-looking; and (e) the notion of reparation involves a backward-looking focus on retribution.

The problem is the tension between retribution and utilitarianism, which – as has been explored at length in this chapter – are traditionally opposed philosophical justifications for punishment (Lessnoff, 1971). Retributive and utilitarian aims are fundamentally different, as has been explored in detail in this chapter. Further, no mixed theory has been identified as satisfactorily combining these opposing theories. Therefore, these five purposes together do not support coherent decision-making in sentencing, rather, they send a confusing and contradictory message to sentencers about what they should be aiming for when they decide on a particular sentence.

As raised in the previous chapter, there is an obvious difficulty in terms of the practicality of conceiving of a sentence which would satisfy all of these objectives,

i.e. what will punish will not necessarily also deter, rehabilitate, protect the public and provide for reparation. The near impossibility of satisfying all of these purposes becomes especially apparent when considered in light of the conflicting nature of the philosophies underlying each of these purposes, which has been elaborated on here.

Further, as discussed in Chapter 2, the guidance to sentencers appears to accept that a sentence may not satisfy all five of these purposes at once, and it is expressly left to the sentencer to decide between them, giving more weight to some than others in any particular sentencing decision. There is no specific guidance as to when one purpose is to be preferred over another: “the sentencer has the task of determining the manner in which they apply” (Sentencing Guidelines Council, 2004, p.3). This means that rather than s. 142 CJA 2003 providing a coherent framework for sentencing, it instead lays the groundwork for increased incoherence in the decision-making process. This is because it *demand*s (sentencers “must have regard” to the five purposes) consideration of purposes based in opposing theories of punishment, which pull in different directions and aim at different goals. There is no process set out for sentencers to follow to decide between conflicting purposes and therefore, as argued in the previous chapter, the decision-making process is incoherent.

The *ad hoc* combination of philosophies of punishment can also be seen in other areas, for example, in the Magistrates' Court Sentencing Guidelines (2008), which state: “the imposition of a custodial sentence is both punishment and a deterrent” (2008, p.164). As *punishment* is used to mean something different to *sentence* and is referred to in the context of being an aim of sentencing, it can be assumed that it is being used in a retributive sense. Here, the Magistrates' Court Sentencing Guidelines expect sentencers to find a prison sentence, the length of which will be commensurate with the aims of both retribution and deterrence. In light of the above discussion on retributive and utilitarian theories, it is difficult to see why the length of a particular prison sentence would necessarily be the same for each of those different aims. There is no reason why the length of sentence required to

restore the moral balance (retributive) would be equivalent to the length of sentence required to deter future offending (utilitarian).

The *ad hoc* combination of philosophies of punishment contributes to the incoherence of the decision-making process of sentencing. When an offender is sentenced, the lack of guidance as to how sentencers should choose between competing aims means that the sentencer must rely on either: their own understandings of what would constitute justice in that particular instance; or (arguably worse) try to second-guess parliament's idea of justice. The former would entail the sentencer relying on their own philosophical leanings, be that more retributive or more utilitarian (this has been suggested as being identifiable with the political leanings of the sentencer – see Tonry, 2004). The latter situation is concerning, as it involves the sentencer in an exercise of guessing something which might (given the incoherence of sentencing legislation) be exceptionally difficult to discern; might vary depending on the particular political climate (see, for example Squires, 2009 concerning the politicisation of knife crime); and may in any event be wrongly assumed by the sentencer. As such, the sentencer's second-guessing may ultimately end up reflecting a conception of a just sentence which is held by no identifiable person or body. This is an incoherent process, because there is no clear and meaningful way in which sentencers are choosing between conflicting purposes of punishment in arriving at a sentence.<sup>45</sup>

As argued in the previous chapter, one solution to this problem would be to have a single purpose of punishment, based on a single philosophy. However, for all the reasons set out in Chapter 2, this would not be workable. An alternative potential solution is offered in the following section, whereby no single purpose is selected, but a coherent method for choosing between purposes – or philosophies of punishment – is established. This, it is argued, offers a more coherent decision-making process (the coherence of which is elaborated on extensively in Chapter 4).

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<sup>45</sup> See Chapter 4 for development of this argument.

#### **4. Restorative Justice and punishment**

Restorative Justice might offer a solution to the problem of how different philosophies of punishment can be combined into one sentencing system in a coherent manner, as suggested earlier in Chapter 1. RJ conferencing entails decision-making for what should happen to an offender to be devolved to the victim, offender and other affected parties. RJ is defined in many ways and takes a variety of forms, but is conceptualised in a particular way for the purposes of this thesis (as outlined in Chapter 1). This relies on a version of RJ conferencing, where the victim, offender and other affected parties meet, along with an RJ facilitator who ensures everyone gets an opportunity to speak about the offence and contribute their thoughts as to what should happen as a result of the offending behaviour. In such a process, the “sentence” takes the form of a conference plan or outcome agreement. All parties must agree to the plan, including the offender. The plan is arrived at by a discussion between the parties, during which the victim, offender and other affected parties should have the opportunity to make suggestions as to the content of the plan.

It is therefore argued that RJ can be understood as a kind of sentencing process, which allows for different philosophies of punishment to be at play, as the victim, offender and other affected parties can contribute their opinions as to what should happen to the offender. The idea is that RJ can provide access to different philosophies of punishment, allowing stakeholders to express their particular notions of justice: if they are more retributive, they can recommend a retributive element be added to the plan, if they are more utilitarian then they can suggest a deterrent or rehabilitative element. Of course, all parties must agree – so the resulting plan will not necessarily represent the exact notion of justice held by the victim, or the offender, or other stakeholders. What the plan should represent – if all parties are able to contribute and then reach a consensus – is the best possible compromise which addresses all of the relevant stakeholders’ notions of justice to

the greatest achievable extent. The following hypothesis has been developed, outlined earlier in Chapter 1 and explored further in the following chapter to explain why this offers a more coherent process, and Chapter 6 in the context of RJ practice:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

What this means for the philosophy of punishment, is that where RJ is available and suitable – the determination of which philosophy of punishment is right and should take precedence might not require a static answer. This issue can be resolved on the basis of group decision-making and will be decided afresh each time a new conference is convened with new stakeholders, a new offence and new perspectives on punishment at play (see Shapland, 2014, p.120). What the decision is becomes less important than who the decision-makers are. As everyone has to voluntarily agree to the outcome, the outcome therefore represents the best possible compromise between participants' ideas. Unlike traditional sentencing, with RJ there is a clear process by which the purpose of punishment is selected. It also makes clear that the notion of justice being done is that held by those most affected by the offence.

An in-depth examination of how precisely such an RJ process might offer a more coherent decision-making process than traditional sentencing, and how it serves to increase coherence, is undertaken in Chapter 4. To lay the groundwork for the discussion in the next chapter, it is first necessary to explore the relationship between RJ and punishment, as the argument advanced here has significant bearing on why RJ can be conceived of as a type of sentencing process at all. This is best done here, as it draws on the arguments about philosophy of punishment and the definition of punishment set out earlier in this chapter.

As well as different understandings of what RJ is (as outlined in Chapter 1), there are different understandings of key concepts related to RJ, which means that there is both genuine disagreement, as well as substantial argument at cross-purposes. One long-running debate of RJ theory, is that of whether RJ is an alternative *to* or an alternative *form of* punishment. This debate usually maps on to that of whether RJ is opposed to, or entails retribution, as most RJ theorists who see RJ as opposed to punishment conflate *punishment* with *retribution*. It will be argued that some of the tensions and disagreements arising in this debate might be resolved by adopting a definition of *punishment* which does not necessarily incorporate *retribution*, as discussed earlier in this chapter. This debate is particularly important to engage with at this stage, so as to explain further why a particular conception of RJ is preferred to the many other understandings of it.

The positioning of RJ as an alternative to punishment, and the belief that this puts RJ on a better moral footing can be compared to the resistance by proponents of probation against seeing probation as a type of punishment, outlined by Duff (2003a, p.181): “Many probation officers and theorists, however, still resist this ‘punitive turn’, and insist that probation can retain either its value or its moral legitimacy only if it remains an alternative to punishment, rather than a species of punishment”. According to Duff, this stems from the roots of probation as an alternative to imprisonment and its links to the ‘treatment model’ (Duff, 1990). Similarly, many early proponents of RJ appear to have felt the need to establish RJ as opposed to punishment, to further its values.

Those who see RJ as an alternative *to* punishment include Braithwaite, who states: “I do not see restorative justice embracing retribution ... I part company with those who see punishment as a respectful way of raising our children, of dealing with criminals or with nations we disagree with.” (Braithwaite, 2003a, p.14). Notably, he here conflates punishment with retribution which is a standpoint with various

problems, as elaborated earlier in this chapter. Other authors who both conflate retribution with punishment, and also hold that restorative justice is an alternative to punishment include Wright (1991) and Walgrave (2004), who argues that “crucial differences between restorative justice and retributive punishment subsist” (2004, p.573). Originally, this was also a position shared by Zehr (1990) (who is described as the “grandfather” of RJ by Van Ness and Strong, 2006), however he changed his mind and began to see restoration as something that might involve elements of retribution (Zehr, 2002, p.58):

In my earlier writings, I often drew a sharp contrast between the retributive framework of the legal criminal justice system and a more restorative approach to justice. More recently, however, I have come to believe that this polarization may be somewhat misleading.

Zehr here touches on a real problem for theorists arguing that RJ is an alternative to punishment, i.e. their framing of the traditional criminal justice system as a retributive system and thus something which RJ should be pitted against, so as to further its values of restoration. Most criminal justice systems in fact involve a combination of both retributive and utilitarian aims (see Brooks, 2012a, p.125), and this is certainly the case in England and Wales.<sup>46</sup> Roche points out (2007, p.78):

When we start to look more closely at criminal justice systems ... we see that it is plainly absurd to suggest that they can all be characterized as pursuing a retributive approach. Criminal justice agencies have always applied a mixture of principles but this texture and variation are absent from most restorative justice accounts.

Roche sees RJ as an alternative form of punishment and something which incorporates retribution, rather than being opposed to it: “the distinction between restorative and retributive justice ... distort[s] the real meaning of retributive

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<sup>46</sup> As outlined in Chapters 3 and 4.

justice, our understanding of what modern criminal justice systems do, and also the meaning of restorative justice.” (2007, p.77). Other theorists on this side of the debate include Daly (2000, 2002) and Garvey (2003). Daly sees the idea of RJ as opposed to retributive justice as one of the “myths” of RJ, going on to say that “the contrast is a highly misleading simplification, which is used to sell the superiority of restorative justice and its set of justice products” (2002, p.59). She sees RJ as combining different philosophies of punishment, “a practice that flexibly incorporates ‘both ways’” (2000, p.4) and this is something she noted in observations of RJ conferences in practice:

When observing conferences, I discovered that participants engaged in a flexible incorporation of multiple justice aims, which included: (1) some elements of retributive justice ...; (2) some elements of rehabilitative justice ... (2002, p.59)

Daly goes further than to state that retribution can constitute a possible element of the restorative process – she in fact sees retribution as an essential component of the process:

I find that there is too quick a move to ‘repair the harm’, ‘heal those injured by crime’ or to ‘reintegrate offenders’, passing over a crucial phase of ‘holding offenders accountable’, which is the retributive part of the process. (2002, p.60)

It is unclear why retribution needs to be invoked for “holding offenders accountable”, as censure of offenders could be with utilitarian aims in mind – e.g. to make them understand that what they did was wrong and/or harmful, so that they would be less likely to repeat that behaviour in future.

In summary, for Daly, RJ processes involve retributive and utilitarian elements and, further, retributive punishment is an important part of the process. This is a

position also taken by Garvey, who holds that RJ which does not involve punishment leaves the victim unrestored (2003, p.305). He goes on to say that:

failing to impose any material burden or hardship in the face of serious wrongdoing can send the message that the offender's wrongdoing really wasn't that bad after all, a message that can only add more insult to the victim's injury. (2003, p.310–311).

For Garvey, there can be no restoration and no effective reparation without the offender suffering punishment: “Punishment ... humbles the wrongdoer and vindicates the victim. Without punishment the wrong the victim suffered would go unrepaired, and the victim would remain less than fully restored.”(2003, p.308). This idea that the victim will not be restored until the offender suffers, implies a retributive understanding of punishment – without a reliance on retribution, the concept of the victim's suffering going unrepaired until the offender has suffered some hardship is redundant. It is only in retributive thinking that there is a moral balance that needs to be restored by punishment. A key problem for Garvey’s assertion that (retributive) punishment is necessary to satisfy victims is that it assumes a norm of punitive-minded victims which is quite different from that revealed in other research:

Research over the past 20 years (Shapland, Willmore, & Duff, 1985; Lurigio & Resnick, 1990; Umbreit, 1994; Strang, 2002) is remarkably consistent in its findings that what victims want most is different from what the formal justice system assumes is important for them. Victims consistently report that they value highly the opportunity for meaningful participation in their cases, with the chance to ask the questions that are important for them, that they want information about the way their cases are being dealt with, and they want to be treated respectfully and fairly. (Strang et al, 2006, p.302.)

Both Garvey and Daly draw on Duff’s theory of punishment as communication. Duff views punishment as “a communicative system of secular penances” (2001,

p.197) and sees his account of punishment as involving retributive, communicative, reparative and rehabilitative elements:

Punishment is, on this account, retributive in that it involves the imposition of something that is intended to be burdensome or painful, because it is deserved for the offender's crime. It is not, however, merely or crudely retributive – merely an attempt to 'deliver pain' to the offender. ... what the offender deserves to suffer is the pain of remorse, and the burden of making moral reparation for her wrongdoing. ... Punishment is also communicative: it must seek to communicate to the offender the censure that her crime deserves ... it must also communicate the offender's apology to the victim and to the wider community. It is reparative: it must constitute an appropriate moral reparation for the wrong that the offender committed. It is rehabilitative: it seeks to repair the offender's relationships with her fellow citizens, through this process of penance and reparation. (Duff, 2003a, p.190)

Duff sees RJ as a valid form of punishment (rather than an alternative to punishment) as it can achieve all of these aims. He sees the retributive aspect of RJ as being the discussion itself, which he sees as being intended to be painful.

The positioning of RJ as an alternative to punishment and opposed to retribution when RJ was emerging is – as Duff said in relation to probation being positioned as an alternative to punishment – entirely understandable and probably helped to establish RJ, by presenting something new and different to the existing regime of punishment. However, this distinction is not really justifiable, and no longer serves a purpose for the promotion of RJ (Daly, 2000). It could even be seen as restricting the growth of RJ – or watering down its usage. As long as RJ is considered an alternative to punishment and something which is a non-retributive 'soft option', it will be difficult to promote its use in, e.g. serious crimes – which is unfortunate as there is some suggestion that RJ can be most effective where serious harm has been caused (Considine, 1995). A further issue particular to the positioning of RJ as opposed to retribution is the link between retributive theory and proportionality. If RJ is promoted as an alternative to retribution, this will

encourage concerns about its inability to ensure proportional sentencing – something discussed further below.

The conception of RJ presented by Daly (2000; 2002), Duff (2003a) and Garvey (2003) is much more persuasive than the model of RJ as an alternative to punishment (Braithwaite, 2003a; Walgrave, 2004). Daly, Duff and Garvey are right to hold that: retribution and punishment should not be conflated (as argued in earlier in this chapter); RJ can be viewed as an alternative form of punishment; and RJ can include retribution. However, they are wrong to see retribution as *essential* to the RJ process, particularly – as hinted at by Daly and Garvey and suggested outright by Duff (2003a, p.186) – the conception that retributive punishment is part of the RJ conference itself, which means that they see the conference as part of the actual punishment. Whilst it is acknowledged that the RJ meeting itself can have a sometimes powerful impact on participants and can be very difficult and “burdensome” for the offender, this cannot accurately be held to be part of the offender’s punishment. This is because it is the voluntary process whereby the punishment /sentence is decided upon by the participants, it cannot therefore also *be* that punishment – further, in a state setting where no decision is reached at a conference, the court decides on a suitable punishment. This makes the distinction between the conference and the offender’s punishment even more obvious. It is the conference plan/outcome agreement which constitutes the offender’s punishment and any retributive element is that which may or may not be contained in the plan. As such, retribution is not an essential element of RJ, but a possible component of the plan/outcome agreement.

Even if the insistence on the necessity of retribution is limited to the plan/outcome agreement, i.e. that it must contain retributive elements in order for RJ to be successful, this is still problematic. As mentioned above, in terms of its necessity to satisfy victims, it goes against research which shows that retribution does not feature prominently in findings about what victims want and need (Strang et al, 2006). Further, the contention that any particular philosophy of

punishment *must* play a role in RJ in order for restoration to be achieved is to undermine the autonomy of participants in deciding what idea of justice is important to them in their particular circumstances, with their particular backgrounds, in their particular community/society. Shapland (2014) and Zehr (1990) both emphasise how RJ has the capacity to present victims and offenders as primary parties, whose interpersonal dimensions are central, and also a process which recognises crime as being related to other harms and conflicts and allows for an understanding of the offence in the full moral, social, economic and political context. Shapland points out (2014, p.120):

this problem of whether punishment can coexist with restorative justice is subservient to the overriding need for restorative justice to reflect the 'justice values' of the participants brought together for that restorative justice event (Shapland et al., 2006). This means that punishment is likely to figure in outcome agreements for restorative justice to the extent to which those participating think it would be just for that particular incident, in that society, at that point in time.

Daly, Duff and Garvey's attachment to retribution as in some way necessary can perhaps be seen as an attempt to bolster the legitimacy of RJ as something that can – or, as they argue, *must* – involve the suffering of the offender, as well as something which is likely to fit well with the principle of proportionality in punishment (which, as previously mentioned has strong ties to retribution). However, retribution is hardly the essential legitimising concept that Daly, Duff and Garvey appear to hold it to be and is, rather, a difficult concept to justify at all, as argued earlier in this chapter. That said, it is not advocated that retributive elements should be removed from the arsenal of responses to offending available to stakeholders in deciding what the outcome of their RJ process should be. Rather, it is argued that stakeholders should have a wide range of options available to them, both utilitarian and retributive in nature, and including imprisonment for the offender (as held by Brooks, 2012a).

The main issue here is that Daly, Duff and Garvey's conception of RJ as something which *must* involve retribution fails to appreciate the true value of RJ: that it devolves decision-making power to the participants as to what they think the most appropriate response to the offending is, as argued by Barton (2000, p.55):

Contrary to the implied suggestion in many restorative justice critiques, the strength of restorative justice responses does not lie in their rejection of punitiveness and retribution, but in the empowerment of communities who are the best placed to address *both* the causes *and* the consequences of the unacceptable behaviour in question.

This builds on Christie's argument in his seminal paper *Conflicts As Property*, which highlights the importance of who the decision-makers are, whilst downplaying the importance of what the decision actually is:

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. (Christie, 1977, p.9)

For Christie, the value in bringing an offender and victim together to resolve a conflict is in restoring the conflict to those it belongs to: the victim, offender and affected community.

Similarly, Barton puts forward what he calls the "empowerment model" of RJ, pointing out that the strength of RJ is in its ability to engage key stakeholders in decision-making, not its opposition to retribution (nor its embracing of retribution). Barton points out that retribution cannot be blamed for all the problems of the criminal justice system (as argued by Braithwaite, 2003a; Walgrave, 2004) and argues that the main problem is in fact the disempowerment of key stakeholders - victims and offenders and their "primary circles/communities

of influence and care” that leads to the criminal justice system failing to achieve justice (2000, p.55). For Barton, the most critical feature of RJ is the empowerment of affected stakeholders. This is a view subscribed to in this thesis as well, i.e. that the key difference between RJ and the traditional criminal justice system is really one of process (Shapland, 2003) and the important issue is not to what extent RJ incorporates different philosophies of punishment, but rather the *way* in which it does so.

RJ is an alternative form of punishment – or, more precisely, and alternative way of arriving at a punishment, to the extent that we are understanding *punishment* to mean something akin to *sentencing*, as has been suggested earlier. Where the victim and offender come together to decide what should happen as a result of the offence, and where they are not artificially constrained in their decision-making, then they are free to bring their ideas of justice to the discussion.<sup>47</sup> If the victim or offender are more retributive-minded, then they are likely to seek that form of penalty; if, on the other hand, they are more utilitarian-minded, they are likely to put forward ideas for punishment based on utilitarian principles. As such, the resulting conference plan could contain either retributive or utilitarian punishments, or indeed elements of both. It is up to the participants which philosophies of punishment are brought to the table during each individual RJ process.<sup>48</sup> The removal of retribution as a possibility in RJ by both Braithwaite and Walgrave; and the insistence by Daly, Duff and Garvey on the necessity of retributive elements in RJ, both undermine the real and fundamental benefit of RJ – the empowerment of stakeholders in deciding the outcome/plan.

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<sup>47</sup> Note that this relies on the conception of RJ preferred for the purposes of this thesis, which is set out in detail in Chapter 1.

<sup>48</sup> It is argued in the next chapter why this means that the process of decision-making itself should be more coherent than the traditional sentencing process, but there is no particular claim made about the coherence of any outcome resulting from such a process. However, it is arguable that an outcome derived from an RJ process should make more sense to the participants themselves, if not necessarily appearing more coherent objectively speaking.

A further, more nuanced approach, is that of Johnstone (2014), who moves the debate on from the issue of punishment, to focus more on justice and asks whether it is necessary to punish, then – more importantly – whether it is *sufficient* to punish. Johnstone draws on the work of Talbott (1993), who argues that retributive punishment only satisfies some of the demands of justice and suggests other matters which would be required to achieve justice, such as reparation to the victim. Johnstone argues that RJ might be able to achieve this richer conception of justice and holds that RJ need not be in opposition to punishment, but can supplement punishment so as to achieve a richer conception of justice: “punishment needs to be supplemented – to some degree modified – by efforts to heal victims and undo or put right all of the harm (including the harm offenders do to themselves) brought into existence by crimes.” (2014, p.121).

This can be distinguished from what is being proposed here, as Johnstone’s account suggests that there is one particular notion of justice, whereas a plurality of notions of justice are envisaged in this thesis (see Chapter 4). What is being argued for is the empowerment of participants to contribute their particular ideas of justice to the outcome, rather than a process which aims at one particular notion of justice dictated by an external source.

Chapter 4 deals more substantially with the argument that there is no one “right” conception of justice. However, a good example of the existence of different notions of justice and differing conceptions of how different notions of justice should be prioritised in an RJ context is the New Zealand case of *R v Clotworthy* [1998] 15 CRNZ 651, 661 (CA). In this case, the judge’s notion of justice was in conflict with the victim and offender’s notion of justice. The facts of the offence were that the offender had slashed the victim with a knife causing injuries to the victim’s face, chest and stomach. The stab wounds required surgery and left permanent scarring. The offender pleaded guilty and sentencing was suspended whilst a restorative justice conference took place. During the conference, the offender was extremely remorseful and the victim accepted his apology. It was agreed between the parties that the offender would assist with the cost of the

victim's cosmetic surgery for the scarring, paying \$25,000 by way of reparation. The victim was firmly opposed to the offender going to prison. In the District Court, Judge Thorburn sought to incorporate the views expressed in the RJ conference which had taken place into his decision-making, as discussed by Bowen and Thompson (1999, para.1):

The Judge acknowledged the victim cannot determine the sentence. However, true to restorative justice principles the victim's views played a part in the 'justice' of the sentence:

“[F]or the life of Mr [C], the victim, there is, I think, more to be achieved in terms of justice from his perception by keeping the prisoner at large...The court's role goes beyond that of the wishes of a victim, but this is one case where in my view some fairly firm and noticeable emphasis on the victim's attitude and wishes are permissible”.

Judge Thorburn did also impose a suspended sentence, however he incorporated the victim's notion of justice into his decision-making. In contrast, when the matter was appealed, the Court of Appeal took an entirely different approach, essentially substituting the court's notion of justice<sup>49</sup> for that of the victim and offender by imposing an immediate sentence of imprisonment, which had the effect of the victim not receiving the payment and being unable to undergo the required surgery. This demonstrates the clear lack of any single notion of justice which is satisfactory to all. Judge Thorburn attempted to give credence to both the state's notion of justice and the victim and offender's notion of justice. However, the Court of Appeal clearly felt that the state's notion should have priority.<sup>50</sup>

In summary, it has been argued here that the key difference between RJ and the criminal justice system is not that one is retributive and one is not, nor is it that one involves punishment, whilst the other does not. The fundamental difference lies in who controls the decision-making. In the RJ process, the victim and offender

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<sup>49</sup> Or at the least some external notion of justice.

<sup>50</sup> The difficulties arising for RJ in a state setting are discussed further in Chapters 5 and 6.

(and other key stakeholders, where they are present) (Marshall, 1996, p.37) should be the ones to decide which philosophies of punishment are important to them and which should play a part in responding to the offence. This is in contrast to traditional sentencing methods employed in the criminal justice system in which it is the judges or magistrates who decide on the sentence. The difference is really one of process,<sup>51</sup> something which has been emphasised by both Judge McElrea (2007) and Morris (2002). Morris points out that: “In the 1990s it was common to see restorative justice in contrast to retributive justice. That dichotomy has somewhat broken down of late, and I suggest that the more meaningful comparison is a procedural one” (2002, p.2).

It is not for the state or academics to decide what ought to constitute justice for the stakeholders in an RJ process,<sup>52</sup> this ought to be a question for the stakeholders themselves to decide. As Barton states (2000, p.70):

Without ... all-round empowerment of the primary stakeholders concerned, restorative justice processes will be restorative only in name. They will not succeed in realising the restorative potential of individual and community empowerment, which, in the final analysis, is the fundamental starting point of restorative justice.

RJ can incorporate whatever the parties feel is important – although of course in practice, this will be limited to what is achievable in terms of available resources, and in Chapters 5 and 6, some of the potential pitfalls of translating this ideal into practice will be examined, focusing on the implementation of RJ in a state setting. This conception of RJ also highlights the importance of the issue of proportionality in terms of the implications for RJ of an over-emphasis of the importance of

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<sup>51</sup> Although of course, the process adopted can affect the content of the outcome and a particular process can either enable or constrain the reaching of certain outcomes. The RJ process, it is argued, can enable the reaching of outcomes which best represent the notions of justice held by the stakeholders.

<sup>52</sup> Who the stakeholders are in an RJ context is a contested area, but in Chapter 1, following discussion of this issue, a particular understanding of who the stakeholders are is arrived at.

proportionality, which is likely to adversely impact on the extent to which stakeholders are empowered to make free decisions, unfettered by external notions of what the proportional outcome would be. This is addressed in the next section and is also explored in terms of the practical effect of increased pressures concerning proportionality in Chapters 5 and 6.

### Proportionality

One potential criticism of this understanding of RJ as an alternative method of deciding on punishment and the resulting emphasis on the importance of the empowerment of stakeholders (as argued for above), is that such a strongly process-focused account of RJ is incompatible with the requirements of proportionality. Conflict between the needs of stakeholders and the needs of the state have been highlighted in the above discussion of *Clotworthy*. Indeed, out of a concern for ensuring proportionality in sentencing outcomes, various constraints are often placed on RJ processes, so as to reduce the decision-making power of those most affected by the offence and promote or limit certain outcomes. This section will explain why proportionality should not be valued above the empowerment of stakeholders and highlights a number of issues with the concept of proportionality.

The principle of proportionality demands that sentences are proportional to the offence committed and is linked to the idea of consistency,<sup>53</sup> that like sentences be given to like offenders committing like offences (Kirchengast, 2010). Both Ashworth and Von Hirsch have argued forcefully for the importance of the principle of proportionality, going so far as to state that “Sentence inequality sacrifices an important value of justice” (Von Hirsch and Ashworth, 1992, p.96). For Von Hirsch and Ashworth, proportionality is a primary concern and any deviance from the principle requires special justification (Von Hirsch and Ashworth, 1992, p.96):

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<sup>53</sup> See Chapter 2 for criticism of the pursuit of consistency.

proportionality represents an important value, so that departures from it stand in special need for justification. It remains open to debate what those special justifications might be, and how much departure from proportionality they could warrant.

The most detailed explanation of why proportionality is so essential is found in Von Hirsch's work. He defines proportionality as the principle "that penalties be proportionate in their severity to the gravity of the defendant's criminal conduct" (1992, p.55) and argues that this "seems to be a basic requirement of fairness" (1992, p.55). Indeed much of his writing about proportionality seems to rest on the idea that proportionality is essential to justice and underpins fairness in sentencing:

Why should the principle of proportionality have this crucial role as a principle that any sanctioning theory needs to address? It is because the principle embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not. (1992, p.56)

Von Hirsch grounds his idea that punishment should be proportional in an expressive theory of punishment, i.e. he holds that punishment should be proportional, so as to express the correct amount of censure, depending on the offender's blameworthiness (1991, p.262):

Even if punishment exists wholly for preventive reasons, one of its principal features is to censure or condemn. Such a condemnatory sanction should be allocated according to how blameworthy the conduct is. When the principle of proportionality is disregarded, offenders are unfairly visited, through the penalties imposed on them, with more implicit blame (or less) than the actual blameworthiness of their conduct warrants.

For Von Hirsch, the offender's blameworthiness correlates with how serious the offending behaviour is: "According to the principle of proportionality, punishment is supposed to comport with the seriousness of the crime" (1991, p.282).

Von Hirsch sees proportionality as a "retributive constraint" (1991, p.262) and in promoting this, he relies on a particular definition of punishment, which packs into the definition a notion of censure: "Punishment ... consists of doing something unpleasant to an offender under circumstances and in a manner that conveys blame or disapprobation." (1992, p.69) and he goes on to say that "[c]ensure is integral to the very conception of punishing" (1992, p.71). It has been argued earlier in this chapter that such loaded definitions of punishment should be avoided, as they beg the question: by incorporating the justification for punishment into the definition, it assumes what needs to be proved.

Before moving on to look at some general problems with the theory of proportionality, particularly in its implementation, it is worth exploring some difficulties with Von Hirsch's argument for its importance. Firstly, his argument for proportionality is underpinned by an insistence on the censuring aspect of punishment. This is problematic as there are issues with the expressive theory of punishment itself (some of which have been outlined earlier in this chapter, such as the problem of offenders who do not accept their blameworthiness and who are unrepentant (see also Brooks, 2012a). Hence, it is not necessarily apparent that censure is necessary to punishment, as suggested by Von Hirsch. Other theories of punishment do not rely on censure as integral to punishment in the way suggested by Von Hirsch, e.g. rehabilitation. Even if censure is deemed necessary, it is unclear what censure in terms of severity of punishment achieves that censure by other means would not. Indeed, it has been argued by Braithwaite and Pettit (1990) that censure can be decoupled from the scaling of punishments and expressed separately.

Secondly, there is a question over how blameworthiness is to be assessed and, therefore, how the seriousness of an offence is to be assessed. This is dealt with

more substantially below, in relation to the general problem of measurability for proportionality. However, it is worth pointing out here that Von Hirsch's conception of proportionality does limit the number of factors pertaining to personal mitigation which are to be taken into account when sentencing to those which are directly relevant to the culpability of the offender. As such, important features of a case and factors relating to an offender may not be considered at all in arriving at a sentence (Lovegrove, 2011). This is rather a restrictive understanding of proportionality and may not always accord with general notions of fairness, as Von Hirsch suggests proportional sentencing does. For example, Lovegrove (2011) found considerably different understandings from members of the public as to which factors were relevant in assessing sentence severity to those set out in sentencing guidelines.<sup>54</sup>

Despite these and other difficulties (outlined below), proportionality is an almost revered concept by many and underpins much sentencing law and policy (as alluded to in Chapter 2; see also Kolber, 2013). As such, it is important to engage with arguments raised against RJ in relation to its supposed difficulty supporting the principle of proportionality – especially as these criticisms are particularly pertinent to the process-focused conception of RJ preferred in this thesis. Firstly, key problems with proportionality will be identified and discussed. This will be followed by an examination of RJ and proportionality, which will seek to explain why the proportionality criticism of RJ, outlined above, does not carry as much weight as it might at first appear.

#### *Problems with proportionality*

The main problems with proportionality can be summarised as: the problem of measurement; the problem of undesirable outcomes (that *actual* proportionality may not be as intuitively desirable as it is often assumed to be); and the problem of its ties to retribution, which – as has been argued in Chapter 3 – is an inherently troubled concept.

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<sup>54</sup> See further the comments about consistency in sentencing in Chapter 2.

The problem of measurement<sup>55</sup> concerns how one logically gets from a particular offence to a particular punishment. It may make some sense where it is possible to be literal about it, e.g. “an eye for an eye” – so murderers being sentenced to death might be obvious. However, there are problems with other crimes, e.g. what the state should do in the case of someone charged with attempted rape (Tonry, 2006, p.19). Because of this difficulty, what most sentencing systems instead try to do is to impose a punishment equivalent to the level of harm done by the offence – and usually also taking into account the offender’s culpability in committing the offence. This requires at least two calculations: deciding how serious the offence is; and deciding what punishment equates to that level of seriousness. It should be immediately apparent that this is not going to be an exact science. In terms of deciding on the seriousness of a particular offence, there are numerous methodologies out there (see Roberts, 2010, for a summary) – and this is borne out in there being different punishments available for the same offences in different jurisdictions, as well as different punishments in the same jurisdiction at different points in history. So even before the second part of the calculation is reached, there could be numerous different answers to the first part – and indeed there are, as noted below.

With respect to the second question and the issue of translating the harm or seriousness into an equivalent punishment, this means deciding, e.g. how many years in prison equate to a burglary, which is by no means immediately obvious. Von Hirsch (1992) suggests solving this problem by ranking offences on a sliding scale in order of gravity, and penalties in order of severity, then matching these two scales up. Of course, this does not immediately solve the issue of how one measures these things in the first place, nor does it explain how or why one moves

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<sup>55</sup> See also the earlier criticism of the retributivist idea of a moral balance (in Chapter 3) and discussion of the problems of how such an equilibrium weighs desert and hence how the state’s system of punishment should weigh desert.

from harm done to penalty imposed. Walker (1992, p.534), in his rather scathing critique of Von Hirsch's proportionality theory asks:

How is the unit of severity to be measured? How many units of severity correspond to one unit of wickedness? How many more years should the assumed standard rapist serve "inside"?

The "living standard analysis" put forward by Von Hirsch and Jareborg (1991) provides one method of measuring harm, which 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 (1991) expressly pit themselves against Feinberg (1984) who provided a different method of measuring harm, using a choice-based standard which involves assessing the harm done by criminal offending by looking at the extent to which victims' choices are limited as a result – e.g. physical incapacitation limiting a large amount of life choices.

Von Hirsch and Jareborg (1991) expressly say that the point of the exercise is not to analyse particular victimisations but to develop standardised rankings from typical cases:

The living standard, however, does not focus on actual life quality or goal achievement, but on the means or capabilities for achieving a certain quality of life. It is also standardized, referring to the means and capabilities that would ordinarily help one achieve a good life (1991, p.10).

As such, it is not *actual* harm done that is measured – which means that sentences are not *actually* proportional sentences. They are representations of averages which may or may not reflect the realities of a particular case and could feasibly lead to sentences which are *actually* disproportionate and unfair – something

which has been identified by Tonry (2006), who also points to the problem that unless potential harm is included in calculations, then it is unclear how one reaches a proportionate sentence for inchoate offences.<sup>56</sup>

From the arguments raised above, it appears that proportionality has substantial problems. It does not seem viable to advocate imposing punishment that literally *matches* the crime, yet there is a lack of consensus and in any event various problems with calculating punishment which is *equivalent to* the crime. In addition, Von Hirsch and Jareborg's system for calculating punishment only allows for measuring "standard harm" rather than "actual harm", which leads to the odd conclusion that their framework for proportional punishment could lead to *actually* disproportionate punishment.

Perhaps advocates of proportionality should therefore seek *actual* proportionality. However, as well as presenting problems in terms of calculating the *actual* harm done to each individual victim, this leads on to the problem of undesirable outcomes. If proportional punishment is to be inflicted on an offender, then the severity of sentence must be measured. In terms of assessing the severity of sentences of imprisonment, Kolber (2013) points out that there is an obsession with the *duration* of prison sentences. He calls this the "duration fetish" and points out that "sentence severity also depends on other prison hardships" (Kolber, 2013, p. 1159). He goes on to argue that it is reasonable to assume that a rich person who has started from a baseline of a plush lifestyle is likely to suffer more (in terms of deprivation, economic loss, etc.) than a poor person, who starts from a worse baseline. This being the case, 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 receive a shorter sentence. This is not a particularly inviting conclusion.

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<sup>56</sup> This is similar to what is raised in Chapter 2 concerning consistency – i.e. that often through its pursuance, only a crude form of consistency is achieved.

The third main problem of proportionality is that it is heavily linked to retribution.<sup>57</sup> The concern with the punishment fitting the crime and the offender being punished to the extent that they deserve: no more, no less, is really a retributive concern. This is problematic insofar as retribution itself is a problematic principle, as argued earlier in this chapter.

#### *Restorative Justice and Proportionality*

Those concerned about RJ in relation to proportionality suggest that unlike the traditional sentencing process, the flexibility afforded to RJ means that it does not support the principle of proportionality in punishment (Ashworth, 2002). This is because RJ (in theory) allows for those most affected by the offence to collectively decide what should happen to the offender, with the only limitation being that all relevant parties must voluntarily agree to the outcome (effectively the offender's sentence). It is argued that there is therefore the potential for huge variation in outcomes for like offences. Responses to this by RJ proponents usually fall into one of two categories. The first response is to suggest ways in which external safeguards can be imposed on a RJ conference to ensure proportionality, such as courts ratifying plans and provision for additional punishment to be imposed (Cavadino and Dignan, 1997; Garvey, 2003; and Van Ness, 1993<sup>58</sup>), e.g. Garvey argues that:

The informal processes associated with restorative justice ... cannot be left entirely divorced from the formal processes associated with courts and public authority. Law must form bookends, so to speak, around restorative justice. ... law must be on hand to ensure that the terms of an offender's penance are fair, both to the offender and the victim. Similar wrongs should receive similar penances. ... Some system of

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<sup>57</sup> The prevailing view is that it is in fact *solely* a retributive principle, although this is not unanimously held, e.g. Frase (2004) argues that it is possible to convey proportionality in utilitarian terms.

<sup>58</sup> Notably, where RJ is portrayed as necessarily incorporating retribution, this may in some cases be an attempt to assuage concerns about proportionality, as proportionality has strong ties to retributive theories of punishment.

formal review should ... be in place to catch those cases in which the process has for whatever reason gone awry, resulting in agreement to a sanction that's either too harsh or perhaps too lenient. (2003, p.316 - 317)

A second, alternative response is that RJ conferences do support proportionality – and may even be able to achieve greater proportionality than traditional sentencing methods (see on this point Erez (1999), who makes the point that greater victim involvement can lead to more proportional punishment, whilst discussing victim impact statements). The idea is that more relevant information is available in an RJ conference about the offence, offender and victim, meaning that there is more scope for the outcome to be more accurately proportionate to the offending behaviour.

The problem with both of these responses is that they assume the validity of the principle of proportionality, whereas in fact, it is – as discussed above – problematic. As Kolber states (2013, p.1143):

Even though retributivist notions of proportionality are central to sentencing systems around the world and are widely thought to undergird core notions of criminal justice, proportionality has profoundly counterintuitive implications.

In supporting the particular conception of RJ proposed in this thesis, it is important to raise these issues with the principle of proportionality, as the previous two responses are problematic in certain respects.

The first response risks undermining what has been suggested to be a fundamental feature of RJ – that decision-making as to the plan is devolved to the stakeholders. Empowerment of stakeholders is central to RJ's ability to increase coherence in the process of sentencing (as elaborated on in the next chapter).

External proportionality constraints can entirely undermine gains in coherence, as if the stakeholders are not the true decision-makers, then the RJ process will not necessarily be more coherent, it not being the result of mediation between ideas of justice and philosophies of punishment held by those most affected by the offence (see further Chapter 6 on this point). It is accepted that there is a difference between an emphasis on proportionality built into the RJ conference itself (e.g. pressure on conference co-ordinators to steer plans towards certain ideas of proportionality during the making of the conference plan<sup>59</sup>) and proportionality safeguards in place following the RJ event itself, such as courts ratifying plans. The latter does not interfere directly with the decision-making process (unlike the former) and may be preferable, allowing for the RJ process to remain as restorative as possible. However, the problem of course, is that parties 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 (see Campbell et al, 2005, p.115).

The second response is much more persuasive, probably more accurate and is supportive of the empowerment of participants in RJ. It highlights that far from RJ trailing behind traditional sentencing systems in the proportionality stakes, RJ may offer better conditions under which “true” proportionality in sentencing could be achieved, as more information about the offence and offender, as well as the harm suffered is usually available. It also solves the problem of explaining whose notion of proportionality is being implemented.

There are problems advancing argument based on the presupposition that there is some independently existing, identifiable proportionality scale out there in the world that instances of sentencing either satisfy or not (e.g. different jurisdictions have different penalties for similar offences – see Walker, 1992).<sup>60</sup> When

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<sup>59</sup> See Chapters 5 and 6, in relation to Northern Ireland in particular.

<sup>60</sup> There are parallels in the arguments for and against the existence of one objective, “right” notion of justice, discussed in Chapter 4.

considering proportionality, it is a particular interpretation of it – be that the interpretation given by parliament, the Sentencing Council, judges or magistrates.<sup>61</sup> This may of course differ depending on which judge or magistrates hear the case and what their interpretation of proportionality is (or indeed what they perceive to be the understanding of proportionality as held by Parliament or the Sentencing Council). Essentially, the same problems arise in respect of proportionality as this thesis argues arise concerning notions of justice and coherence in sentencing (see Chapters 2 and 4). In contrast, in the context of RJ it is easily identifiable whose notion of proportionality takes priority: those most affected by the offence.<sup>62</sup>

Whilst there are the above points in favour of this second response, it is by no means an ideal position to take, as it fails to challenge the idea of proportionality as an incontrovertible, essential legal principle. This particular challenge is necessary in order to demonstrate the importance of a “reshuffle” of a commonly-held conceptual hierarchy of sentencing principles, which places proportionality somewhere near the top (as advocated by Von Hirsch and Ashworth, 1992) – and certainly above any moves to empower stakeholders. Hence, there can be an over-weighting of proportionality to the detriment of the RJ process (Youth Justice Agency of Northern Ireland, 2013).

The importance of the above discussion of proportionality and the highlighting of problems with the concept, is not to advocate the sweeping away of proportionality in sentencing. That would be unrealistic for budgetary concerns if nothing else – not to mention the need to safeguard human rights and give due consideration to the potential impact of power imbalances in some RJ conferences, particularly those involving youths (Campbell et al, 2005). The key point is that proportionality is not – as it is often portrayed to be – self-evident: it

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<sup>61</sup> Something which is usually acknowledged by proponents of proportionality.

<sup>62</sup> Effectively, the argument advanced here is as for the question of whose notion of justice should take priority, dealt with most fully in Chapter 4.

is a vague, amorphous concept which does not warrant undying loyalty. As Kolber notes, "[s]ince proportionality is a troublesome concept, any view that relies on it less is correspondingly less troublesome" (2013, p. 1174). What is proposed here is a reduced reliance on proportionality, thereby moving away from the problems associated with it, outlined above.

In relation to RJ, the above discussion of proportionality highlights that caution should be had as to the over-emphasis of proportionality at the expense of undermining the empowerment of stakeholders. In practice, there will be a balancing act to be carried out: maximising the empowerment of stakeholders, whilst limiting scope for excessive (and expensive) punishments. A particularly promising way of conducting this balancing exercise is put forward by Roche (2003) and is explored further in Chapter 5. The potential for proportionality to override the decision-making power of stakeholders is particularly a concern in state-run RJ, where RJ is integrated into a criminal justice system. Most criminal justice systems rely heavily on the principle of proportionality in their sentencing policies and this is likely to influence the operation of RJ in a state setting. In Chapter 5, it will be suggested that over-emphasis of proportionality does indeed appear to be one of the problems for state-run RJ in practice.

## **5. Conclusion**

This chapter has examined the traditional justifications for punishment, finding that there are significant problems with retribution, and fewer problems with utilitarianism. More importantly, this discussion has highlighted the fundamental differences between these two philosophies of punishment: one being backward-looking and grounded in deontological ethics; and the other being forward-looking. As Luna states (2003, p.206): "Because each theory is committed to foundational principles that cannot coexist with those of rival approaches, it should come as no surprise when traditional punishment theories become locked in relentless conflict with one another". In other words, attempts to combine

these distinct philosophies are likely to be unsuccessful, as has been argued in the section on mixed theories of punishment.<sup>63</sup>

With the differences between retributive and utilitarian theories in mind, the role of philosophies of punishment in the criminal justice system has then been explored. Looking at the current sentencing system in England and Wales revealed an extremely confused approach to sentencing. Not only are key concepts such as *punishment* and *sentencing* used to mean different things at different times, but there also appears to be misunderstanding about the differences between retribution, deterrence and rehabilitation and the fact that they aim at different things and pull in different directions. As such, the current sentencing system is a confused and incoherent combination of different philosophies of punishment, and sentencers are invited to interpret this as best they can. This might either be in terms of their own ideas of justice and whether they incline more towards retributivism or utilitarianism; or in terms of their second-guessing of the government's intention – neither option being satisfactory.

A possible solution to this problem of incoherence in the process of sentencing has been introduced here. It is the idea that RJ, as a process which devolves decision-making power to those most affected by the offence, might operate as a kind of mediation process between philosophies of punishment. RJ conferences might therefore be able to result in the formulation of a plan which best represents an identifiable notion of justice: that held by the stakeholders. This chapter has also dealt with a common criticism of this sort of heavily process-focused understanding of RJ: that it can undermine the requirements of proportionality. Reasons were given as to why proportionality is not as fundamental and unimpeachable a principle as it is often deemed to be. It was suggested that the

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<sup>63</sup> Note that Luna (2003) sees the “linear reasoning” involved in arguing for either utilitarian or retributive justifications of punishment as fundamentally flawed and the question of whether one is superior to the other as effectively irresolvable. In contrast, it has been argued here that utilitarian justifications are preferable in many respects to retribution. It is for reasons of legitimacy that a CJS based solely on utilitarianism is not promoted here (see Chapter 2).

devolution of decision-making power to stakeholders should not necessarily be subordinated in favour of proportionality, particularly as this is likely to result in the loss of any potential gains in terms of coherence in the decision-making process.

In the next chapter, the idea of RJ increasing coherence in the decision-making process of sentencing will be elaborated on significantly, detailing why it is suggested that this is more coherent than traditional sentencing processes, as well as explaining why this is a coherence of value. Further, in Chapter 6, the hypothesis outlined here will be explored through secondary empirical research on RJ in practice, across four different jurisdictions to gain an understanding of issues which might arise in practice for such a conception of RJ.

## CHAPTER 4: Restorative Justice and the problem of incoherence

### 1. Introduction

The previous chapters have identified a problem with current sentencing practice in England and Wales: the traditional sentencing system incorporates both retributive and utilitarian philosophies of punishment in an *ad hoc* way, which leads to incoherence in the process of sentencing. Restorative Justice has been introduced as a possible way to provide a more coherent method of deciding how to deal with an offender.

The conception of RJ which has emerged thus far has been constructed with the research aims of this thesis in mind, as well as through a consideration of the weight arguments for certain understandings of RJ have. It should be reiterated here, that this is simply one possible conception of RJ, that is, a process-based conception, but one which should have particular relevance to the problem of incoherence in sentencing. This conception of RJ formed the basis of the hypothesis which has been outlined previously, reiterated here:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

The main concern of this chapter is to explain the reasons for such hypothesising, considering what it is about this conception of RJ which makes it a more coherent process. Having concluded in Chapters 2 and 3 that multiple purposes of punishment should remain available to those making the sentencing decision, but

that a mixed theory of punishment is unlikely to be forthcoming, the solution to the problem of incoherence would seem to lie in finding a coherent process for purposes of punishment to be selected on each occasion of sentencing. In other words, the heart of the problem of incoherence is the lack of a coherent method for the selection between purposes of punishment and a coherent process of decision-making as to what would be “just” in any particular case. Here it will be explained why RJ has the potential to bring increased coherence to the sentencing process.

The difficulties for sentencers in identifying a particular notion of justice have already been touched upon (in Chapter 2). Their adoption of a particular notion of justice might be the result of second-guessing what the government is currently championing; or be based on individually-held beliefs (which may in turn stem from particular religious or moral positions); or some combination of these factors. The genesis of the notion of justice expressed through sentencing will be unclear and may be arbitrary and hence pose problems in terms of the legitimacy of the sentencing process (see further the section on legitimacy, below).

If the state were able to garner a consensus on justice, e.g. that it is always achieved through retributive punishment; or alternatively that justice is done through utilitarian means (etc.) then a single and static notion of justice would be clearly identified and could be pursued in all instances of sentencing by the state. However, no such consensus exists. As Hampshire states (1999, p.38):

All modern societies are, to a greater or lesser degree, morally mixed, with rival conceptions of justice, conservative and radical, flaring into open conflict and needing arbitration. ... No state will realise a perfect fairness in the representation of the conflicting moral outlooks within it. (1999, p.38)

Hampshire argues that this state of conflict in terms of differing conceptions of justice and what is right, is essential and unavoidable:

the diversity and divisiveness of languages and of cultures and of local loyalties is not a superficial but an essential and deep feature of human nature – both unavoidable and desirable – rooted in our divergent imaginations and memories. (1999, p.43)

Having identified that moral conflict in society is inevitable, Hampshire argues for a focus on procedural justice<sup>64</sup>:

Justice and fairness in substantial matters, as in the distribution of goods or in the payment of penalties for a crime, will always vary with varying moral outlooks and with varying conceptions of the good. Because there will always be conflicts between conceptions of the good, moral conflicts, both in the soul and in the city, there is everywhere a well-recognized need for procedures of conflict resolution, which can replace brute force and domination or tyranny. (1999, p.18)

There is much to recommend Hampshire's conception of justice and the plurality of moral norms. Indeed, such value-pluralism has been earlier recognised by key thinkers such as Rawls (1985) and Rorty (1991). For example, Rawls states that "a workable conception of political justice ... must allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable, conceptions of the good affirmed by the members of existing democratic societies." (1985, p.225).

Certainly there is evidence that society is morally mixed – daily experience of living in society supports this contention, as well as the continuing existence of the field of moral philosophy and, more specifically to this thesis, the seeming inevitability of debates and disagreement about sentencing and the disposal of offenders (at various levels in the criminal justice system). For example: prosecutors when making charging decisions adopt a plurality of views on justice when exercising

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<sup>64</sup> See also Shapland et al (2006), who cite the study carried out by Thibaut and Walker (1975), which "showed that the general public judged an adequate and fair process more important than a particular outcome in relation to criminal justice" (Shapland et al, 2006, p.511).

their discretion (Padfield, 2013b); courts routinely impose judgments which accord with a variety of notions of justice (Alschuler, 1991); and politicians also display a range of notions of justice – even those within the same political party: for example, the dispute between the then Conservative Justice Secretary Ken Clarke and the Home Secretary, Theresa May concerning mandatory sentencing for knife crimes (The Guardian, 2011). All of this points towards the truth of the idea that there is no single state-held notion of justice.<sup>65</sup> The plurality of views both over time (seen in changes to sentencing legislation and guidelines), and co-existing concurrently (expressed through differing approaches of state actors), indicates that consensus on one notion of justice that can be agreed upon, pursued through the adoption of particular philosophies of punishment, and enforced across all levels of the criminal justice system, is extremely unlikely.

Given that there is no consensus on justice, the important questions would therefore seem to be not those concerning which philosophy of punishment is “right”, but rather:

- (a) *How* should the decision between competing philosophies of punishment and differing notions of justice be made?
- (b) *Who* should make this decision?

Hampshire’s argument that “bringing into existence institutions and recognised procedures should have priority over declarations of universal principles” (1999, p.45) is similar to what is argued for here. In particular, it is suggested that rather than battling over which philosophy of punishment should take priority, or which conception of justice should be aimed for in sentencing, the social reality of there being no consensus on justice should be acknowledged. The solution to the problem of incoherence in sentencing lies in finding the best process for reaching a compromise between differing ideas of justice – i.e. the solution is indeed to focus on fostering procedural justice. However, a different form of procedural justice than that suggested by Hampshire will be advocated here, attuned to the particular problem of sentencing (one that is less focused on the adversarial

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<sup>65</sup> This is in addition to the conflicting purposes of punishment in s.142 CJA 2003 which have been discussed at length in this thesis.

system). As pointed out by Menkel-Meadow in her discussion of Hampshire (2002, p.1766): “‘conflict’ or arguments exist in more than polarized, binary forms (there are many ‘sides’ to a conflict so we will have to hear more than ‘both sides’); ... [and] the processes or forms of ‘conflict handling’ ... need not be exclusively ‘adversarial’”.

The solution potentially lies in restorative justice which, it is hypothesised, can operate as a kind of mediation process between stakeholders’ ideas of justice and philosophies of punishment. The questions posed above will therefore be answered as follows: the decision between competing philosophies of punishment and differing notions of justice should be made through restorative justice conferences (where possible); and the decision-makers should be the stakeholders of the offence. The following sections explore in more detail the reasons for adopting this solution and why this represents a more coherent process of decision-making than current sentencing practice.

In summary, it has been argued that a decision has to be made between competing philosophies of punishment and notions of justice in each instance of sentencing. The following sections elaborate on why stakeholders of the crime are better placed to make this decision than judges or magistrates – particularly in the context of a restorative justice conference. This will be done by explaining what it is about stakeholders making this decision that renders the process more coherent, focusing on three main points: that RJ can ensure that the genesis of the notion of justice expressed through the decision is clearer; that RJ provides for a better knowledge base from which to make the decision; and that RJ is a better process for using this knowledge and making the decision. RJ will then be distinguished from other forms of public engagement in sentencing, which may go some way to addressing the above concerns, but cannot achieve what RJ can. This involves a particularly in-depth differentiation of RJ and deliberative democracy. Further, a particular benefit of adopting RJ and its increased coherence in the process of sentencing will be explored: its potential for increasing penal legitimacy.

## **2. Identifiable genesis of the notion of justice**

Chapter 2 has discussed at length the incoherence arising from judges and magistrates selecting between the conflicting purposes of sentencing in s.142 CJA 2003. The lack of guidance to sentencers as to when they should prefer one purpose over another results in decisions where it is often unclear how or why a sentencer has preferred a particular purpose of punishment over another. In terms of the notion of justice to which sentencers are adhering, this is even more difficult to identify, since, as outlined above, there is no one obvious state-held notion of justice to which sentencers subscribe. It is therefore not clear whether sentencers are pursuing their own personal notions of justice or trying to second-guess what notion of justice the government might currently be championing, or whether sentencers are attempting to gauge what is best for the parties in question, or indeed drawing from a mixture of the aforementioned factors. Evidence of the latter was found through empirical work carried out by Millie, Tombs and Hough (2007, p.258) who interviewed sentencers about their decision-making: “Especially in England and Wales, sentencers were very much aware that their decisions were not made in a court vacuum, but in a highly pressured political and social context”.

This research also touched upon the near-impossible task of correctly identifying what the government’s notion of justice might be, due to the conflicting messages given (Millie, Tombs and Hough, 2007, p.259):

sentencers in England and Wales also argued that they were being given ‘mixed messages’ on sentencing, both from politicians and from the senior judiciary. Not only did they perceive the Home Office, Lord Chancellor’s Department/Department for Constitutional Affairs and the Lord Chief Justice as contradicting each other, they also argued that they had been aware of inconsistencies in the messages from within departments.

A Magistrate commented that when the Government talks about being tough on crime, ‘we are then told in the next breath, don’t send

anybody to prison'. Thus a Crown Court Judge commented: 'One minute they're shouting because you're not being hard enough with them—and the Court of Appeal are increasing sentences, and then they're telling us we shouldn't send people to jail.'

As such, confused notions of justice are filtered through judges and magistrates who may themselves be confused as to how to employ them and integrate them with their own personal intuitions of justice.

However, where stakeholders<sup>66</sup> decide, the decision-making process is less arbitrary in that the genesis of the resulting notion of justice or purpose of punishment aimed at is relatively clear, i.e. the discussion and the resulting decision can be linked to notions of justice held by identifiable *and relevant* people – relevant due to being closely linked to the offence: having a “stake”.<sup>67</sup> The importance of sentencing decision-makers being closely related to the offence is highlighted by Luna (2003), who here draws a contrast not between stakeholders and sentencers, but between stakeholders and the legislature (2003, p.286–7):

As a general matter, the people who are best able to reveal and assess the unique background and impact of a given crime, as well as appropriate consequences for the offense, are those who are closest to the criminal event. In comparison, legislatures must address the issue of punishment at a high level of abstraction, enacting statutes without regard to a specific crime or criminal.

Judges and magistrates are also removed from the “criminal event” and are of course bound by the decisions of the legislature.

A decision made by stakeholders is more coherent than judges or magistrates deciding, as with stakeholders, meaningful connections exist between the

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<sup>66</sup> See Chapter 1 for discussion about the meaning of “stakeholders” and the position taken in this thesis.

<sup>67</sup> This of course only applies where a consensus is reached – something which will not always be possible. Whilst there has been brief discussion of what should happen where a consensus is not reached in Chapter 1, substantial consideration of this is outside the scope of this thesis.

individuals making the decision, and the decision to be made – the understandings of justice and philosophies of punishment which inform the sentencing decision (or outcome), are directly connected to, and indeed come from, those most affected by the offence. In contrast, it is difficult to discern the genesis of notions of justice relied on by judges and magistrates and this undermines the coherence of the process.

### **3. A better knowledge base**

The RJ process is also more coherent because the decision-making is based on a broader range of knowledge. A large proportion of the decision-making in a sentencing process involves weighing matters which stakeholders are more likely to be in a position to assess effectively – and this is particularly the case because of the knowledge that stakeholders bring to the discussion. This means that the opportunity for decisions to be meaningfully related to the circumstances of the case is greater than in traditional sentencing (Mannozi, 2012). This point relates to the decision-making with which this thesis is primarily concerned – i.e. between conflicting purposes of punishment – but also more generally to the whole process and other associated decisions. Millie, Tombs and Hough (2007, p.256–7) remark that:

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. In both studies sentencers' accounts of borderline decisions involved social and moral reasoning as well as expertise in applying the law. Decisions were framed within a set of explicitly ethical—and subjective—concepts, assessments of an offender's intentions and capabilities, as well as attitudes towards the offence and signs of remorse.

This analysis of sentencing highlights the amount of non-legal, highly subjective decision-making which constitutes the sentencing process. A sentencer is expected to make assessments of (*inter alia*) an offender's character, likely future behaviour and level of contrition, even before the big ethical decision of which

purpose of punishment to prefer. One example of the subjectivity of sentencing given by Millie, Tombs and Hough demonstrates when a judge's non-legal, personally held notions can affect whether imprisonment is used (2007, p.257):

One Recorder in England and Wales, for example, commented that he did not use custody in a particular case because, 'prison is reserved for evil people and in this case the offender wasn't evil so I could be merciful'.

This Recorder is stating several highly subjective ethical positions which have influenced his decision: that he believes in the existence of evil; that he believes only evil people should go to prison; and that he felt able to assess whether the offender was or was not themselves evil.

Whilst a judge might be expected to possess superior knowledge concerning sentencing law and procedure compared with the average member of the public, it is unclear whether the same claim of superior knowledge can be made in relation to: the assessment of an individual's character; predictions about an individual's future behaviour; and the assessment of how sorry an offender is.<sup>68</sup> All of these factors can be conceived of as capable of influencing the decision as to which purpose of punishment might be suitable in a particular case, and indeed what would be just – and this is not an exhaustive list.

In other words, whilst the current sentencing process might be supposed by some to be a sanitised method by which experts (the judiciary) logically arrive at the just sentence for a particular offence, this is something of a myth. As argued in Chapter

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<sup>68</sup> A further point which might be raised is that judges and magistrates are representatives of the people and power for them to decide such matters has therefore been devolved to them. This does not, however, translate to the judiciary being in possession of special knowledge giving them an insight into such issues, as is argued to be the case with stakeholders. Moreover, the important feature of RJ is that stakeholders have a *direct* stake in the offence, whereas judges and magistrates are more distantly related to an offence and reasonably far removed from democratic accountability. For example, Zimring, Hawkins and Kamin, (2003) point out that "[a]s a matter of practice, the punishment decisions in complex modern democracies are made one or more steps removed from electoral controls." (Zimring, Hawkins and Kamin, 2003, p.186).

2, sentences are not mathematical calculations, however strict and detailed sentencing guidelines might be. There are inevitably a number of value judgments which must be made which can influence the outcome, and there is a strong case to be made that the judiciary are not best placed to make these judgments, having less experience of the relevant people and circumstances than the stakeholders involved. They may have substantial experience in applying sentencing law and guidelines, but this does not translate into experience of particular people and particular circumstances which make up any one offence.<sup>69</sup>

There is much to suggest that stakeholders, i.e. the victim, offender and community members,<sup>70</sup> would be more likely to have, and be able to further develop as part of a restorative justice process (as expanded on below), the knowledge and understanding to make decisions concerning these non-legal issues. This contention rests partly on broader claims about the value of local knowledge, together with the suggestion that problems can be created by the state's unwillingness or inability to engage with such knowledge.

In their discussion of the view of "the State as idiot", Loader and Walker (2007, p.117) say that this position holds that the state:

lacks the situated knowledge and therefore the capacity to deliver security across a diverse array of local settings. ... The state, moreover, is not merely deficient in the knowledge of local circumstances ... It also tends towards obduracy – being both unreflexive about its own cognitive limitations and determined to press on with its purposes, ... in wilful disregard of its own ignorance.

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<sup>69</sup> It might be argued that judges (and magistrates) have extensive experience of cases that will very often be comparable to the circumstances of the offence, and are thus better positioned to assess any given case than the parties to it, even once judges' more limited knowledge of the facts of that particular case are taken into account. In-depth discussion of this point is beyond the scope of this thesis. However, it is at least worth noting that judges rarely receive feedback on their decisions (in the broad sense of learning whether a particular sentencing decision led to better results than the potential alternatives). In these circumstances it is at least arguable that repeated experience is unlikely to lead to significant improvements in judgment, certainly not to the degree that would compensate for the lack of specific knowledge of circumstances.

<sup>70</sup> As pointed out above, full discussion of who the stakeholders are takes place in Chapter 1.

James C. Scott (1998) is one well-known proponent of this kind of view. Scott argues for the importance of local knowledge and highlights a key cause of failure in state-centric schemes as resulting from the state refusing to engage with local knowledge. He suggests that modern states tend to ignore and often suppress local, “practical” knowledge, and that important information is lost through the state’s quest to simplify matters to fit its criteria for organisation and measurement:

We have repeatedly observed the natural and social failures of thin, formulaic simplifications imposed through the agency of state power. ... Any large social process or event will inevitably be far more complex than the schemata we can devise, prospectively or retrospectively, to map it. (1998, p.309)

The sentencing process can be viewed as a prime case where matters are simplified to fit certain categories and legal criteria, thereby suppressing potentially important information. Particularly where there has been a guilty plea – or where a different bench has conducted the trial – the judge or magistrates might only hear a truncated version of the facts – and that is the facts as organised by state officials (see Padfield, 2013b). Further, they might only hear the offender speak to confirm his or her name and whilst they will sometimes have the assistance of a pre-sentence report compiled by probation, and will have heard mitigation from the offender’s advocate, these are limited opportunities for sentencers to form an opinion about the character of the offender first-hand. This is also true for the victim and other affected parties: “Throughout the whole process the parties to the conflict – the victim, offender and the community – usually remain passive, silent and uninvolved” (Johnstone, 2011, p.113).

In contrast, stakeholders in a restorative justice conference have the opportunity to talk about what happened, why it happened and provide their perspectives on such issues. An important type of local, practical knowledge is brought to the

conference – not least from the offender themselves. It could be argued, to the contrary, that rational, disinterested decision-making can provide a more solid basis for sentencing, in contrast to a process which allows for knowledge which may not always be rationally-derived. However, the contrast between RJ as conceptualised here and the current sentencing process is not one of a rational process and an irrational process. The current sentencing process is *not* a rational, disinterested decision-making process.

On the contrary, with current sentencing practice, there is evidence of considerable variation and subjectivity, as summarised by Millie, Tombs and Hough, (2007, p.258):

The inevitable subjectivity of the process of assessing hope or failure, and indeed an offender's character, can help to explain the sharp inconsistencies in sentencing practice among sentencers who all assert they use custody only as a last resort. ... one of the consequences of an emphasis on personal mitigation in borderline decisions, and the moral and ethical narratives used by sentencers to explain this, is that offenders who are already economically and socially disadvantaged are likely to suffer further disadvantage in the sentencing process. Some of the sentencers interviewed were fully aware that socio-economic background had had an impact on the sentence given

As argued in Chapter 2, increased measures to make sentencing less subjective and more consistent are problematic. For example, where – in the pursuit of consistency – sentencing guidelines become too prescriptive, or at the extreme, where a sentencing grid is introduced, these measures can be self-defeating. This is because of the limits imposed as to what information about the offence and offender can be taken into account in any given instance of sentencing. As these measures at best only increase crude consistency, and may operate to prevent cases which are *actually* like being treated alike, it is difficult to then claim that the process is underpinned by rationality. Whilst it could be claimed that there is a rational process by which it is decided what information should and should not be taken into account, this returns the discussion to the problem of who should be

deciding this, and whether it can be decided in the abstract, absent the facts of a particular case (see the above discussion in the preceding section).

The RJ process does not seek to eliminate subjectivity, but rather allows those with more relevant, local knowledge: victim, offender and members of the community – to engage in the decision-making process,<sup>71</sup> which lends coherence to the manner in which subjective decisions are being made:

Restorative justice, in its ideal sense, brings together community members, victims, and offenders all of whom would likely go unheard in the formal justice system. The inclusion of these voices in a public dialogue about justice enables the justice process to extend beyond the mere consideration of the "criminal event" and to consider the deep-rooted social factors that led to the crime (e.g., poverty, racism). (Woolford and Ratner, 2003, p.188)

Overall, the knowledge that stakeholders can bring to a restorative justice conference enables decisions which are mutually agreed upon to be much more meaningfully related to the circumstances of the case than in the traditional sentencing process.<sup>72</sup> In particular, this knowledge can have an important bearing on stakeholders' conceptions of which purpose of punishment should have priority in a given case. The next section explores why the RJ process enables this local, practical knowledge to be utilised and developed in a particularly beneficial way.

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<sup>71</sup> See Hough and Roberts (1999) for the importance of the availability of sufficiently detailed information in reaching decisions about sentencing. This is discussed below in the section "Linking coherency and legitimacy".

<sup>72</sup> It is worth pointing out that in some respects RJ participants may have a "knowledge gap" in terms of what might actually be workable: "[participants] did not necessarily know what programmes might exist or be available." (Shapland et al, 2006, p.517). However, with state-run RJ this knowledge gap is relatively straightforward to address, through the provision of information to participants from criminal justice professionals – as indeed happens in state-run RJ conferencing in Northern Ireland (see Chapter 5). Further exploration as to what information should be provided to participants, which is additional to what they themselves bring to the conference, might prove useful. This, however, lies outside the scope of this thesis.

#### **4. A better process**

This section expands on why RJ in particular can claim greater coherence in its decision-making process. As with the above section, the reasons developed here are aimed mostly at the decision-making concerning purposes of punishment, but are also applicable more broadly. This section will build on what has been argued above, explaining how RJ in particular (as opposed to other forms of public engagement in sentencing – which are addressed further, below) allows for this local, practical knowledge to emerge and how the process itself utilises this knowledge. It is important to identify precisely what is unique about the RJ process in its ability to both encourage a wider knowledge base, and to provide a particularly good forum for the development and deployment of such knowledge.

In advocating a more participatory style of penal policy making, Johnstone has argued that “[a]s people become more practically involved in the criminal justice process, they will tend to regard doing justice as a *practical problem*” (2000, p.171). According to Johnstone, individuals’ absolutist moral ideas can be tempered by increased awareness of practical realities:

In particular, as people are given more information, as the questions they are asked become more concrete, as they are given more time to think and as they are given the opportunity to discuss and debate things with others, their initially severe and intemperate ‘solutions’ to problems of crime and disorder tend to become more moderate. (Johnstone, 2000, p.170–1).

Whilst Johnstone’s comments are aimed at penal policy making generally, rather than specific instances of sentencing, these observations could feasibly be extended to such decisions. RJ provides opportunities for discussion and debate, as well as enabling more information about the offence and the offender to be at play and could therefore be seen as a forum for the development of individuals’ moral ideas.

As well as more information being available in an RJ process, more types of dialogue are also permitted than in the traditional sentencing process: “Hearsay, reputations, gossip relating to the offence, group dynamics and community politics are all potential subjects for discussion” (Shapland et al, 2006, p.509). It should be clarified, however, that it is not any potential that RJ might possess to encourage moderation in sentencing that is the focus here – rather its capacity to provide a forum for the debating and development of ideas. Shapland supports this contention: that RJ can allow for practical reasoning:

In creating this future orientation, often expressed in an outcome agreement, people’s original ideas are often modified or amplified through the discussion, as they respond to the concrete situation of the offender and victim. (Shapland et al, 2006, p.522)

It is perhaps worth noting at this point, that RJ as conceptualised here, could even work well for theories which do not support a view of the plurality of justice (as is argued for in this thesis). For example, Robinson and Darley (2007) argue that people share intuitions about the appropriate punishment for crimes – at least, broadly and in relation to scales of seriousness. They hold that these intuitions are pre-rational in the Kahneman sense (see Kahneman, 2011), and are more retributive in nature (what they term “empirical desert”). However, they also hold that people can choose to act more rationally and give less credence to these intuitions: “by enlisting reasoning processes, it is possible for persons to override the products of their intuitive system” (2007, p.67). Therefore, were one to subscribe to such a view, rather than what has been proposed here in relation to a plurality of views, it is arguable that RJ could provide an ideal forum for encouraging reasoning processes to balance any intuitive views which may exist.<sup>73</sup>

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<sup>73</sup> Note however, that the arguments put forward by Robinson and Darley (2007) are not supported here. See Kolber (2009) for a criticism of their views, including allegations of cherry-picking the data used to suggest a largely retributive shared intuition.

Notably, however, Sunstein (2000) points to a rather different phenomenon in relation to the development of ideas in group decision-making (which RJ is a form of). Whilst he focuses his critique on democratic theory, rather than RJ in particular, it is nevertheless ostensibly applicable to RJ and hence needs to be engaged with.<sup>74</sup> It is also useful to discuss here, as the particular understanding of RJ adopted for this thesis avoids a serious flaw in group decision-making which is identified by Sunstein.

Sunstein suggests that in group decision-making, individually-held positions tend to polarise and become more extreme, and it is hence important in trying to achieve the “right” decision, that a group consists of people holding a wide cross-section of views:

In a finding of special importance to democratic theory, group polarization is heightened if members have a sense of shared identity. And in an equally important finding, group polarization is diminished, and depolarization may result, if members have a degree of flexibility in their views and groups consist of an equal number of people with opposing views. (2000, p.118)

Sunstein goes on to say (2000, p.118):

the mechanisms that underlie group polarization raise serious questions about the view that deliberation is likely to yield correct answers to social questions. Like-minded people engaged in discussion with one another may lead each other in the direction of error and falsehood, simply because of the limited argument pool and the operation of social influences.

In an RJ process, there is no scope to ensure that there are equal numbers of participants with opposing views involved. There are pre-defined stakeholders who will be the participants regardless of their views. They may therefore, for

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<sup>74</sup> See below for further discussion on the similarities – and differences – between RJ and deliberative democracy.

example, all be retributivists, in which case utilitarian theories of punishment might not be engaged with in the discussion at all. Sunstein's argument would indicate that this is not, therefore, a desirable way of achieving the "right" answer. As Sunstein says, his account "does raise real questions about the widespread idea that deliberation is the best way of producing right answers" (2000, p.107).

However, the contention in this thesis is not that the RJ process is best able to achieve the "right" answer – indeed, it has been argued above (see the discussion of Hampshire, 1999) that it makes little sense to talk in terms of one correct sentencing outcome which meets an objectively correct version of justice (see also Luna, 2003).<sup>75</sup> There is therefore no need to ensure a diversity of views, such as Sunstein suggests is necessary to guard against a "limited argument pool". The reason for the limitation of the argument pool to specific people in RJ is because they are the stakeholders of the offence and it is their notion(s) of justice which are relevant in deciding the outcome for that particular offence (as argued in the section above on the genesis of the justice of the decision). Gathering unconnected individuals together to ensure a cross-section of views would undermine the coherence being sought in terms of why particular theories of punishment and justice have relevance to a particular case. What is sought in the model of RJ outlined in this thesis is not a mean average notion of justice, but the best representation of the notion(s) of justice held by those most affected by the offence.

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<sup>75</sup> This is important to note when bearing in mind the potential criticism that the values stakeholders bring to the process might not be objectively desirable. For example, Shapland et al point out that "[a]s local, cultural values, they are also subject to all the criticisms correctly made of local justice ... which can be intolerant of minorities and highly punitive" (2006, p.523). The response could simply be that there is no valid external evaluation of an agreed RJ outcome and its associated values, as the point is for the values of the stakeholders to come to the fore. This is a somewhat stark reply, which could be softened by suggesting that whilst this is the case (seeing as no claim is made that RJ outcomes coincide with any "right" decision or objective notion of what is just) it is also important that certain practical measures be put in place, such as judicial oversight of decision-making processes. These measures should reduce the potential for RJ to become subject to the same criticisms as other local justice initiatives. Such measures have been advocated by Roche (2003) and are discussed in more detail in Chapter 5.

Interesting to note is that Sunstein’s argument might be problematic for outcome-focused conceptions of RJ. It would need to be explained why particular restorative outcomes are likely, if it cannot be guaranteed what views stakeholders begin the process with, and if it cannot be guaranteed that stakeholders will hold a wide cross-section of views. In contrast, the approach to and understanding of RJ adopted here is a decision-making process which has no objectively “right” answer, but can have a more or less coherent process. The important point is that the views of the stakeholders are heard and that the process yields an outcome which best caters to those views. That individual’s views may change during the discussion does not undermine this account – the agreement of all parties to the outcome should be equivalent to them acknowledging that having heard all (possibly opposing) views, they are satisfied that this outcome best meets their understanding of justice as it then is at the point in time the agreement is reached – bearing in mind that it may have to have been moderated to accommodate other participants with dissimilar views.

### **5. Other forms of public engagement in sentencing**

This section aims to explain why the particular model of RJ outlined here differs from other forms of public engagement in sentencing. Firstly, it will be explained in substantial detail why RJ as conceptualised in this thesis differs from deliberative democracy. Whilst deliberative democracy is a broad field and not necessarily focused on sentencing, it is important to differentiate it from RJ as it is intended to be understood here. This is because whilst there are areas of similarity, there are also differences of significance, which are important to elucidate as they should clarify the position being taken in respect of RJ in this thesis and emphasise the points which have been made above. There then follows a more general discussion, exploring certain areas in which this understanding of RJ differs from other forms of public engagement in sentencing in particular in its ability to increase coherence in sentencing.

### Restorative justice and deliberative democracy

It is important to differentiate between RJ and deliberative democracy, as this conception of RJ moves away from focusing on and aiming towards particular values in the outcomes, and places much more emphasis on the decision-making process. That being the case, it could be said to share characteristics with the broad field of deliberative democracy. However, this section explains why the conception of RJ outlined here differs in important ways from deliberative democracy and fits well within established modes of thought about RJ, rather than deliberative democratic literature.

Deliberative democracy has been defined as “any one of a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision making and self-government” (Bohman, 1998, p.401). Some authors have identified similarities between RJ and deliberative democracy (and indeed, other forms of public engagement in sentencing). For example, Dzur and Olson (2004) identify the involvement of the community in RJ as linking it to deliberative democracy: “The element of community participation in restorative justice dialogue is particularly intriguing because of its similarity to idealized accounts of public deliberation in deliberative democratic theory” (2004, p.93). They also point out that some RJ theorists (e.g. Braithwaite, 1999; 2002) explicitly link their RJ theories to deliberative democracy. However, Dzur and Olson also note that “there are also important differences between these theories, in guiding assumptions and also in the level of analysis” (2004, p.100).

The link between deliberative democracy and RJ has also been identified by Parkinson and Roche who suggest that “restorative justice belongs on the list of deliberative democratic practices” (2004, p.515). They see the potential for RJ to make use of deliberative democracy literature in pursuance of resolving issues which deliberative democracy has explored extensively, such as power imbalances. Likewise, they suggest that deliberative democracy can make use of RJ literature – particularly empirical evidence about practices.

Another indicator that there are some similarities between deliberative democracy and RJ, is the fact that some debates within deliberative democracy mirror those in RJ. Most notably, there is debate within the field of deliberative democracy between those who adhere to the notion of pure or ideal proceduralism which “permits no standard of assessment or revisability of an outcome that is correct by definition if produced by a fair, ideal deliberative procedure” (Bohman, 1998, p.404); and those who see this as insufficient to explain why this produces the best outcomes and instead hold that procedure-independent standards are required.<sup>76</sup> This is very similar to the process-focused / outcome-focused debate within the field of RJ, discussed in Chapter 1.

In terms of the particular model of RJ which is proposed in this thesis, there are certainly similarities between this and aspects of deliberative democracy – particularly concerning proceduralism, which has been associated with Habermas (Bohman, 1998). Habermas developed the idea of a “communicative morality”, which according to Hudson (1998, p.250) is: “a dialogic view of morality, in which a plurivocal evolved consensus replaces the monologic voice of law”. This clearly resonates with the idea of RJ as a process for allowing a plurality of views to be expressed and a consensus to be reached following discussion of these views. Although, as noted below, rationality is emphasised by Habermas, and indeed deliberative democrats more widely (Cohen, 1997), but is not as central for the model of RJ proposed in this thesis. Another similarity between RJ and deliberative democracy is the idea that participants are equal (Cohen, 1997). This is perhaps less so in an RJ process, where there are certain labels attached to the main stakeholders, i.e. “victim” and “offender”. Nevertheless, there is a shared idea here that all participants should be afforded an equal say in the discussion.

Whilst there are some similarities, the model of RJ proposed in this thesis does not fit squarely within the field of deliberative democracy for a number of reasons. Firstly, the two concepts differ in their respective aims: deliberative democracy

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<sup>76</sup> See Bohman (1998) further on this and other tensions within deliberative democracy

tends to be concerned with increasing democratic legitimacy. Whilst it is argued that a potential increase in legitimacy is one of the benefits of the model of RJ proposed in this thesis, it is not the *aim*, nor the primary concern, which is instead its potential to increase coherence in the process of sentencing. Secondly, deliberative democracy emphasises public deliberation and participants should “seek to foster a public perspective on issues” Dzur and Olson (2004, p.100). In contrast, RJ identifies particular stakeholders as relevant participants, whose views are to be taken into account in the process (Parkinson and Roche, 2004). Whilst there is a public aspect in the form of community involvement in RJ, this is limited in scope. In any event, RJ as conceived here does not aim to align sentencing decisions with what is deemed most popular with the public, but rather to align decisions with specific people: the stakeholders of the relevant offence. This is not because they are representatives of the public, but because they are the stakeholders who have “ownership” of the offence (see Christie, 1977).

In addition, the decision made through an RJ process is not – as would be the case with deliberative democracy – “right” by virtue of it according with the view of the public. It is also not “right” by virtue of it resulting from rational discourse (Habermas, 1984). Whilst deliberative democracy emphasises the *rationality* of the decision; the model of RJ proposed here effectively de-emphasises this. Participants do not need to hold rational reasons for their particular views, they simply need to hold those views – and whilst those views may indeed change due to “rational discourse” during the process, they may equally change or develop due to “irrational discourse” rooted in emotions, as well as “[h]earsay, reputations, gossip” (Shapland et al, 2006, p.509). On this point, Barrett (2013, p.339) points out that Habermas – and by extension some other deliberative democratic writing – can appear idealistic about how people actually interact:

The rationality that Habermas envisions in his writings presents as sober thought, when in reality persons, especially those in conflict, rely significantly on their feelings and emotions and create and respond to a myriad of both verbal and non-verbal dynamics in dialogue.

In contrast, RJ acknowledges this, effectively making a virtue of it, allowing for participants to use different modes of dialogue within the RJ process.

The decision reached in RJ is also not “right” due solely to it resulting from a particular kind of process – although this adds credence to the decision. It is “right” – or more accurately, the best possible decision of its kind (so as to avoid the intimation of an objective truth being reached) – because it best represents the notions of justice and philosophies of punishment held by the relevant stakeholders to the offence (as discussed in detail earlier in this chapter).

A further way in which the model of RJ proposed here differs from deliberative democracy is due to what happens where no consensus is reached. Deliberative democrats hold that where a consensual decision cannot be reached, “deliberation concludes with voting, subject to some form of majority rule” (Cohen, 1997, p.75). This is not the case in RJ, where the RJ process comes to an end when no agreement can be reached, and the matter is diverted to a different process altogether, i.e. the court process.

In conclusion, there are similarities between RJ and deliberative democracy, which have been identified by, amongst others, Dzur and Olson (2004) and Parkinson and Roche (2004). Whilst there are likewise similarities between the conception of RJ put forward in this thesis and some aspects of deliberative democracy, it is right to situate the theory of RJ proposed here within an RJ framework, rather than more broadly in a deliberative democratic framework. This is because it is situated comfortably within established modes of thought within RJ scholarship, as identified in Chapter 1, and also because there are – as highlighted in this section – places where this conception of RJ differs from deliberative democracy.

The following three sections explore more broadly how RJ as conceptualised in this thesis differs from other forms of public engagement in sentencing, focusing on three main areas: who the decision-makers are; the decision-making process

itself; and the outcome. These are key areas where RJ is better suited to furthering coherence in sentencing.

### The decision-makers

The first major point of differentiation between RJ and public engagement in sentencing generally relates to who the decision-makers are. RJ promotes particular stakeholders as the decision-makers, rather than members of the general public, who may have a potentially limited stake in the offence. For example, jury sentencing expressly leaves both the victim and the offender out of the decision-making process. This also means that the sentence is not agreed upon by the offender (and the victim), but *imposed* on the offender. Other forms of public engagement in sentencing, which do not empower specific stakeholders therefore cannot claim to effectively account for the genesis of the justice of a decision (see the discussion of this above) in a meaningful, coherent way. This is because the members of the public who make the decision do not have any stronger claim to have their notion of justice done than other members of the public who might hold alternative views of justice.

One model for public engagement in sentencing which does rely on the notion of stakeholders is Brooks's "stakeholder sentencing" which is based on what Brooks terms "punitive restoration". For Brooks, one of the key points about stakeholder sentencing is the involvement of the general public. This is partly because the problem he is attempting to solve is what he terms "the problem of the public": that the public lacks satisfactory information to form valid judgments about sentencing; that greater involvement of the public can lead to more arbitrary sentencing decisions; and that greater involvement by the public can lead to increased severity of sentencing (Brooks, 2014, p.189). His argument is that stakeholder sentencing involves the public, whilst avoiding these issues.

The model of RJ supported in this thesis differs from Brooks's stakeholder sentencing in a number of ways. Most notably, Brooks's starting point is to ask how public confidence in sentencing can be improved and how victims can have a

greater role in criminal justice, without sacrificing justice. In contrast, the starting point in this thesis has been to ask what can be done about the problem of incoherence in sentencing – in particular, how access to multiple purposes of punishment can be retained, whilst resolving or minimising the problem of incoherence resulting from combining competing philosophies. This has involved an acceptance that there is no one notion of justice.

Brooks's model views stakeholders as those having a stake in the outcome, i.e. in what the sentence, or penal outcome, is. In contrast, the account given in this thesis of who the stakeholders are follows both Marshall (1996) and Christie (1977) in understanding the stakeholders to be those most affected by, and having a stake in, the offence.<sup>77</sup> As such, the role of the general public is minimised greatly in the model of RJ preferred in this thesis – they have much less “stake” in the offence than in the outcome.

Brooks sees the general public as having a role in “setting the parameters for permissible penal procedures and outcomes”, something which he views as achievable through the role of the facilitator and legal representation for the offender (Brooks, 2014, p.192). This differs from the understanding of the facilitator's role concerning the model of RJ outlined in this thesis (discussed further in Chapter 6) which does not view the facilitator as a stakeholder and hence sees facilitators as parties which should be involved in the process in as neutral a way as possible.

Perhaps the most significant difference between what is proposed by Brooks and the model of RJ presented in this thesis, is that Brooks views stakeholder sentencing as capable of pursuing different penal goals “within an overall restorative framework that helps avoid conflict between principles”. He frames this as follows:

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<sup>77</sup> See Chapter 1, for substantial discussion on who the stakeholders are.

desert is satisfied because offenders must accept guilt prior to participation. The penal goals of crime reduction ... and enabling offender rehabilitation are achieved through the restorative conference ... Restoration is secured through the high satisfaction of participants in restorative conferences, including both victims and offenders. (2014, p.196)

This thesis does not understand RJ as functioning in this way in relation to philosophies of punishment. As outlined in Chapter 1, RJ is instead viewed as a process-focused model whereby the stakeholders are able to represent their particular philosophies of punishment, which may be based in theories of retribution, deterrence, rehabilitation, and so forth.

#### The decision-making process

Another area where the model of RJ outlined in this thesis differs from other forms of public engagement in sentencing is in its mediation process, leading to consensual agreement. As outlined above, in relation to deliberative democracy, the outcome of an RJ process must be voluntarily agreed on by all participants. This differs from other forms of public engagement in sentencing which might also value consensual decision-making, but will ultimately resort to a majority vote on the final decision (Cohen, 1997).

The lack of a “fall-back” position of a majority vote, means that there is more opportunity in an RJ process for, and more emphasis on, discussion which can challenge and change people’s perceptions about what would be a just outcome in that particular case. Participants do not necessarily walk into and leave a conference with the same ideas about justice (for that particular case). The mediation process between ideas of justice which the RJ process involves and the opportunity for ideas to be reflected upon and changed during the course of the process, has substantial importance. Johnstone is surely right to identify the inaccuracy of the assumption “that people possess a fairly coherent and stable set of beliefs about how problems of crime and disorder should be handled – and that ascertaining this opinion is a straightforward task” (2000, p.170). Stakeholders will

bring certain ideas to the conference, but their ideas of what would be just in the particular case might change during the process, as matters are debated. This space for reflexivity allows outcomes to be tailored to particular circumstances and the particular needs of those stakeholders as they develop during the process. Shapland et al here emphasise the individualised nature of RJ (2006, p.507):

restorative justice ... is created anew each time a set of participants come together to consider that offence and what should happen as a result. So, restorative justice is not a ready-made package of roles, actions and outcomes that can be plucked off the shelf, but has to be, often quite painfully, made from its basic ingredients by the particular participants who have been brought together as a result of the offence.

The form of deliberation in jury sentencing is similar to RJ in its emphasis on considering the views of all participants and coming to a consensus (see Gastil, Burkhalter and Black, 2007). However, RJ differs in that there is a facilitator involved, who plays an important role in promoting equality of opportunity for each participant to raise their views. The lack of a facilitator in jury sentencing (and other deliberative models) may result in certain voices dominating and minority views being overlooked, or paid insufficient heed.<sup>78</sup> Additionally, the way that the RJ process operates, together with who the decision-makers are, enables a better knowledge base to be brought to bear on sentencing decisions (as argued above). It may be that jury sentencing can also allow for more detailed consideration of sentencing decisions, based on more informed public opinion, as suggested by Dzur (2012, p.140):

a jury sentencing system would produce sentences that are more attuned to the individuality of the case and are more reflective of considered public opinion than those under the current system, in which legislatures and sentencing commissions have developed sentencing formulas to be applied by judges.

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<sup>78</sup> Note, however, that these problems may come to the fore in an RJ process as well, depending on the approach of the facilitator and other participants: see Chapter 6.

However, this would not be as “attuned” as a sentencing decision by those who have been directly affected by, and in some cases, a part of, the offence. Jury sentencing values random selection of members of the public to become decision-makers, which is not the case with RJ, where the stakeholders are selected because of their association with the offence.

#### The outcome

One further area in which the RJ process outlined here differs from other forms of public involvement in sentencing is in whether the outcome is in some way objectively “right” or not (see also points made concerning this in relation to deliberative democracy, above). It is not suggested that there is an objectively “right” answer in instances of sentencing, which is best arrived at through greater public involvement. Rather, it is argued that there is a plurality of views about justice which exist, and no one objectively “right” view about justice which precedes – or exists independently of – the decision made through RJ. The RJ process does not aim to enable the “correct” version of justice to be arrived at, rather it aims to allow for the notions of justice held by those most affected by the offence – the stakeholders – to come to the fore.

The fact that RJ as conceptualised in this thesis does not seek a “right” answer is one of the reasons why it avoids a problem highlighted by Sunstein about deliberative decision-making (discussed above). Sunstein’s findings suggest that there are problems which deliberative democracy and other forms of public engagement in sentencing fall foul of which may prevent the “right answer” being arrived at, such as a “limited argument pool”, which the RJ process avoids by making no such claims at arriving at the “right answer”. Further, the victim, offender and affected community members have a stake in the offence and will be engaged in the discussion in a different way than an uninterested, unconnected party or random members of the public. Victims are likely to bring a different attitude to, and perspective on, the process to offenders – each being quite

distinctive and offering a unique perspective (see also the arguments advanced in the above section concerning “A better knowledge base”).

The avoidance of the problems raised in Sunstein’s argument, together with the preceding discussion differentiating RJ from other forms of public engagement in sentencing should therefore demonstrate why the particular RJ process which has been preferred in this thesis is uniquely placed to offer a viable solution to the problem of incoherence in sentencing. Where the arguments for increased public engagement in sentencing do share much in common with the arguments raised above for RJ as a more coherent approach, is the further benefit of increased legitimacy. Similar arguments apply as to why increased public engagement in sentencing and the proposed model of RJ would serve to increase penal legitimacy, as will be outlined in the next section.

## **6. Linking coherency and legitimacy**

The above sections have explored why RJ is a more coherent process than traditional sentencing. It will be argued in this section that this more coherent process also serves to increase the legitimacy of the penal system.<sup>79</sup> The potential for increased legitimacy adds credence to the overall thesis – in particular serving to explain why this is the best method for resolving the problem of incoherence in sentencing, and why this is a coherence of value.

The alternative method for resolving incoherence, which has been outlined in Chapters 1 and 2 was to prefer one particular philosophy of punishment to underpin all sentencing decisions. This was dismissed partly due to concerns about such a restrictive system not being flexible enough to adequately account for the wide variety of offence and offender circumstances. More importantly, however, this was dismissed as being liable to undermine penal legitimacy, due to failing to

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<sup>79</sup> There is substantial literature which supports the general contention that RJ can increase the legitimacy of criminal justice institutions (Braithwaite, 2007; Doak and O’Mahony, 2012; Roche, 2003). However, this section relates specifically to how the increased coherence which the proposed conception of RJ outlined in this thesis might be able to achieve could also serve to increase legitimacy.

give voice to different ideas of justice and therefore potentially failing to accord with the notions of justice held by a proportion of the population. For example, were retribution favoured as the main purpose of punishment (as advocated by Ashworth, 2010a), then citizens whose notion of justice centres around rehabilitation or deterrence would deem the penal system to be unjust and operating on an unsound basis.

The issue of penal legitimacy is particularly pertinent, as recently having been identified as a pressing issue by various scholars, including Cavadino, Dignan and Mair (2013, p.23): “The [penal] system has found itself in dire need of new ways of legitimating itself.” They go on to state: “we are saying that the penal crisis [of legitimacy] is in essence a *moral* crisis. By this we do not just mean that many people *believe* that the system is unjust. ... the penal system is indeed in our opinion the source of very substantial injustice” (2013, p.31). Henham (2012, p.78) has also raised concerns about penal legitimacy:

the aims of punishment and their realisation through sentencing are becoming increasingly divorced from what individuals and communities perceive as ‘justice’ for certain types of behaviour and offender. Since legitimacy is directly related to effective governance in criminal justice, loss of faith, or lack of moral empathy by citizens with the ideologies, processes and outcomes of punishment compromises the ability of criminal trials to function effectively in maintaining the ‘rule of law’.

A widely argued-for method of increasing penal legitimacy is through better alignment of penal ideologies with public moral consensus (Henham, 2012; Roberts, 2008b). This is one reason for the array of writing on public engagement in sentencing, referred to above and dealt with also in Chapter 1.

What is suggested here is slightly different. The argument pursued is that increased coherence in the process of sentencing is likely to increase penal legitimacy. This is achieved partly because of the increase in coherence itself: the

process of decision-making is less *ad hoc* and related better to identifiable notions of justice, plus members of the public can be satisfied that should they become a stakeholder of an offence, their views about justice will be taken into account. It is also achieved because of the *way* in which an increase in coherence is achieved through RJ, i.e. because it engages with the ideas of justice and understandings of punishment held by the stakeholders of an offence and therefore should increase stakeholders' perceptions of penal legitimacy.

The argument advanced here does not – as arguments for greater acknowledgment of public opinion do – therefore rest on any contention that public opinion can be accurately gauged and then implemented into policy. There are some reasons to suppose that increasing penal legitimacy through the implementation of RJ as conceptualised in this thesis might be more easily achievable. For example, the idea that the opinion of the public is a constant is problematic because it is arguable that there is in fact a substantial diversity of opinion amongst the public in terms of which justifications for punishment should be preferred and what would constitute justice being done (Hampshire, 1999; Luna, 2003). Even those studies which purport to show consensus amongst the public, do not reveal *absolute* consensus (Hough and Roberts, 1999). It is therefore slightly problematic to talk of the opinion of the public, as though this were a single identifiable value. We may know something about what “the public” think (despite the flaws in many public opinion polls, highlighted by Hough and Roberts, 1999), but it is problematic to assume that aggregating these views is without flaw.<sup>80</sup>

Where an increase in legitimacy is sought simply through aligning traditional sentencing practice with the aggregate views of the public, there remains a real possibility that key stakeholders will not have their views represented in sentencing outcomes. Giving a voice to the aggregate views of the public will not guarantee that in a particular case, the key stakeholders will have their notions of

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<sup>80</sup> See further Kolber's (2009) criticism of Robinson and Darley's suggestion that there is a shared public intuition about justice.

justice done. Dissatisfaction of a victim of crime will certainly undermine penal legitimacy for that victim; but might also undermine penal legitimacy more generally for those who hold that victims should have more stake than random members of the public.

The difficulty in accurately gauging public opinion as a value which can be usefully used in developing sentencing policy is compounded by the way moral opinions can alter according to the context to which they are applied (as highlighted by numerous philosophical thought experiments, e.g. the perennial “trolley problem” – see Foot, 1978). That is, individual views on the morality of punishment may vary from case to case, depending on the particular offence and offender characteristics and indeed the life experiences of the individual engaging in moral judgment which have been accrued by that particular point in time. This makes it difficult to talk in terms of a stable, unchanging moral stance for any one individual, let alone for an aggregate of individuals, i.e. “the public”. This is particularly so in relation to criminal offending:

As no two individuals will have the exact same viewpoint on punishment, no two crimes will be exactly alike. At a bare minimum, different crimes obviously occur in different places and at different times. More importantly, distinct offenses will involve parties with unique backgrounds and perspectives: different offenders, victims, family members, witnesses, and so on. (Luna, 2003, p. 286)

Attempting to identify “public opinion” on sentencing is therefore problematic, as “the public” holds a plurality of views about justice and punishment; and even individual views on the morality of punishment may vary from case to case.

Hough and Roberts recommend an approach to gauging public opinion on sentencing which can improve the accuracy of the data. They point out that some opinion polls can represent distorted results due to being based on quite abstract questions and therefore recommend measuring public attitudes to sentencing through less generalised means (1999, p.19):

if people are asked a general question about the severity of sanctions, most – but not all – will respond by considering the punishment of a specific offender, usually a violent recidivist. A less ambiguous approach to measuring public punitiveness would involve providing a description of a specific offender.

They explain that the more detail individuals are given about a particular crime, the more nuanced responses become – and in fact the less punitive. It is difficult to see how the provision of detailed information can effectively and efficiently be provided to “the public” for all individual cases in any way which could provide a sound and workable basis for aligning public opinion on outcomes with sentencing policy. However, RJ would provide an excellent way of doing precisely what Hough and Roberts suggest, though the public whose views were being engaged with would of course be limited to the stakeholders (arguably something in RJ’s favour).

As argued above, the RJ process optimises the amount and quality of the knowledge available to those making the sentencing decision – both as a result of who the participants are, as well as by virtue of the process itself. Insofar as individual views of the public are relevant to instances of sentencing, this is a superior method of accurately assessing these views, rather than aggregating (sometimes disparate) views of the general public and using this to provide general guiding principles for sentencing policy, which is substantially more abstracted from the nuances of a particular case.<sup>81</sup>

RJ is more attuned to specific justice needs, both in terms of who is consulted in the decision-making process (stakeholders, rather than random members of the public); and how closely the decision is related to the individual facts and circumstances of that particular offence (rather than being based on generalisations at a much more abstract level). It can therefore be argued that RJ is a good way of increasing penal legitimacy because it is adept at engaging with

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<sup>81</sup> See also comments made on consistency in Chapter 2.

the ideas of justice and understandings of punishment held by the stakeholders of an offence, thus increasing their perceptions of penal legitimacy in a very direct, identifiable way.<sup>82</sup>

More generally, RJ can increase legitimacy through its overall promotion of a more coherent process – and not just because of the *way* in which this increase in coherence is sought. Hough and Roberts suggest that (1999, p.23):

a successful strategy for tackling public misperceptions will ... have to identify key audiences, such as opinion formers, victims, potential offenders and people at risk of offending, and convey in media appropriate to each audience an accurate portrayal of current sentencing practice.

In terms of increasing penal legitimacy, Hough and Roberts suggest that “correcting public misperception about sentencing in this country will promote public confidence in judges and magistrates.” (1999, p.22). Arguably, the best method of achieving this is by emphasising *procedural* fairness. This avoids the problem of how to portray all of the peculiarities of each particular case, i.e. sufficient information, to ensure that the public is “on board” with particular decisions. As noted by Hough and Roberts, if the public are polled in too abstract a manner, this tends to result in rather more punitive thinking than they might otherwise employ. Promoting procedural fairness avoids this problem, as it is not reliant on the peculiarities of particular offences, but on a fair procedure being employed in the reaching of a sentencing decision.

The importance of procedural justice in increasing legitimacy in criminal justice systems is well-documented:

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<sup>82</sup> This, and much of the preceding discussion, relates to RJ which is operating successfully, e.g. with fully engaged participants who are voluntarily participating in the process. Chapters 5 and 6 explore the translation of RJ into practice, and engage in more detail with the problems which can arise in practice.

Tyler and Huo (2002) show that people are more willing to consent to the directives of legal authorities ... when police and court procedures are more in accord with people's sense of a fair process for handling a dispute. (Shapland et al, 2006, p.512)

Therefore, even where members of the public disagree with an outcome decided on by stakeholders in a conference, the process can still be valued as fair and therefore serve to increase legitimacy. There is substantial research supporting this contention – that where the procedure is viewed as fair, the resulting outcomes are more likely to be supported as legitimate (Tyler, 2014, pp.526–7):<sup>83</sup>

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.

The fact that RJ offers a more coherent process should promote the perception of RJ as more fair than traditional sentencing. A process which is incoherent and makes little sense in the way it is structured is much less likely to garner general public support and be perceived as just – particularly where it is a function of the state which can have such an immense impact on the lives of citizens (O'Malley, 2008).

In summary, RJ therefore increases legitimacy because of its promotion of a more coherent process; as well as the particular process itself due to its engagement with the ideas of justice and understandings of punishment held by the stakeholders of an offence, thus serving to increase their own perceptions of penal legitimacy.

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<sup>83</sup> See also Tyler (1988) particularly p.103 where he references numerous other studies supporting this contention.

## 7. Conclusion

This chapter has explained why the conception of RJ developed in the course of this thesis is particularly well-suited to increasing coherence in the process of sentencing. Three main points have been made: firstly, that RJ can ensure that the genesis of the notion of justice expressed through the decision is clearer; secondly, that RJ provides for a better knowledge base from which to make the decision; and thirdly, that RJ is a better process for using this knowledge and making the decision. It has further been explained why RJ in particular, rather than alternative forms of public engagement in sentencing, is able to achieve this increase in coherence. This has involved differentiating RJ as conceptualised in this thesis from deliberative democracy.

It has been made apparent during this chapter in particular that in the RJ process, the views held by the stakeholders<sup>84</sup> are represented, heard, debated and an outcome decided upon which best represents an agreed consensus of those particular stakeholders. That is not to say that the outcome will necessarily be objectively more coherent; however, the process by which such an outcome is reached is more coherent, and even an “incoherent” outcome can make sense to all those participating.<sup>85</sup>

This should be differentiated from the idea of a consensus reached following a discussion of all competing ideas – there is no suggestion here that a whole spectrum of views needs to be represented in the RJ conference. This refers back to the earlier point which was argued towards the start of this chapter: that there is no one concept of justice; and that there is no “right” answer as to what justice is (Hampshire, 1999). There is only what justice means to particular people and

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<sup>84</sup> The stakeholders may hold different views, or they may all be, for example, retributivists.

<sup>85</sup> Of course, unlike most instances of traditional sentencing, an outcome is not always reached in RJ and at that stage, the matter may be diverted to a non-RJ process. However, detailed examination of what should happen where RJ is not successful is, as had been mentioned previously, outside the scope of this thesis. The fact that RJ is not always successful in reaching an outcome does not, however, detract from the argument that when it does operate successfully, it is more coherent than traditional sentencing.

even this can be transient and adaptable to the peculiarities of a situation (Luna, 2003).

In the case of a criminal offence, stakeholders have the best claim to have their notions of justice discussed and debated and a consensus reached as to what would best achieve justice in that case, for those stakeholders. They are most affected by the offence and can achieve the most from their notions of justice being done in that particular case, being the individuals most affected by the offence. It is more coherent for stakeholders to decide as this clarifies whose notion of justice is being done, and stakeholders have access to a better knowledge base than members of the public or criminal justice professionals who are less connected – or even unconnected entirely – to the offence. Restorative justice conferencing affords the best process for this knowledge which stakeholders bring to be debated and mediated between and developed into a consensual agreement.

In making clearer why this particular increase in coherence is of value, this chapter has also explored the link between increasing coherence in sentencing and penal legitimacy, arguing that RJ has the potential to increase penal legitimacy because of the very fact of it being a more coherent process; as well as through increasing stakeholders' perceptions of legitimacy by engaging with their notions of justice and philosophies of punishment.

The next chapter explores RJ practice, and contains a discussion of how the ideals outlined in this Chapter can be incorporated into a criminal justice system. This involves drawing on the work of Roche (2003) to suggest a way in which a balance can be struck between the empowerment of stakeholders on the one hand and the needs of the state on the other, particularly in terms of safeguarding human rights and ensuring due process.

## CHAPTER 5: Restorative Justice Practice

### 1. Introduction

This chapter explores RJ practice in England and Wales, Northern Ireland, New Zealand and Australia. This provides important background information to the empirical research carried out and helps contextualise the analysis of the four jurisdictions (detailed in the next chapter). It is important to examine how RJ works in practice, to see how the theory is currently being applied and explore the extent to which the hypothesis developed in earlier chapters is viable. In particular, an investigation of the context of RJ practice in these four jurisdictions helps to identify the sorts of factors which might affected the practical application of RJ theory, which is an important issue for this thesis.

The importance of empirical research on RJ has been highlighted by – amongst others – Barton (2000, p.72):

The extra thing needed is results, consistently good results, from the restorative justice programs that have already been established. Without them, no restorative justice critique of the status quo can hope to maintain credibility in the long run, let alone make a difference in the face of bureaucratic priorities, inertia, and the understandable resistance to change by professionals who find it difficult to re-conceptualise and re-define their roles in terms of a different paradigm of justice.

In this chapter, an overview of RJ practice in New Zealand and Australia will be provided, as background for the secondary analysis of evaluations of RJ in these jurisdictions (in Chapter 6). Additionally, practices in these jurisdictions informed many of the developments in both England and Wales and Northern Ireland and this therefore also helps to contextualise the discussion of these two jurisdictions. The history of RJ in England and Wales is then explored in detail with relevant links elicited to more general developments in sentencing theory and practice, which were discussed in Chapter 2. The chapter then proceeds to consider RJ practice in

Northern Ireland.

The variety of theoretical conceptions of RJ have been discussed in Chapter 1, where it was also explained why the focus would be on restorative conferencing. This was because RJ conferencing most closely accords with RJ as conceptualised for the purposes of this thesis, which has been outlined and justified in detail in Chapter 1. It also accords well with one of the most widely-used definitions of RJ, the Marshall definition: “Restorative justice is a process whereby all 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.” (1996, p.37). Additionally, RJ conferencing is widely acknowledged as being a genuine form of RJ (Kurki, 2004; McCold, 2001; O’Mahony, 2012), rather than a restorative practice. The same understanding and terminology will be adopted here, in terms of a contrast between RJ<sup>86</sup> and restorative-based practices and is particularly important in relation to the discussion of RJ in England and Wales.

Having considered the development of RJ in each of the four jurisdictions, this chapter will go on to examine more general issues which arise in the translation of RJ into practice – particularly in its incorporation into a criminal justice system.

## **2. Restorative Justice in New Zealand and Australia**

### New Zealand

Family Group Conferencing (Restorative Conferencing) was established in New Zealand by the Children, Young Persons and Their Families Act 1989 and was part of a reform agenda aimed at diverting young offenders away from criminal justice interventions and at improving the treatment of young people in the criminal justice system, particularly the Maori and Pacific Island Polynesians (Maxwell and

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<sup>86</sup> Note, however, that this is shorthand – as outlined in Chapter 1 – for RJ *as conceptualised in this thesis*.

Morris, 1993; O'Mahony and Doak, 2008). It was the first and most fully developed example of restorative justice being incorporated into a state's criminal justice system: "the New Zealand system represents the first legislated example of a move toward a restorative justice approach to offending which recognizes and seeks the participation of all involved in the offending" (Maxwell and Morris, 2006, p.243; see also Maxwell et al, 2004).

The introduction of RJ into the New Zealand criminal justice system has drastically altered the way that youths are dealt with in criminal cases. Family Group Conferences must be held whenever proceedings are contemplated (non-arrest cases). Where proceedings are brought (arrest cases), a FGC must be held unless there is a denial of guilt, or the offence is murder, manslaughter or a traffic offence not punishable by imprisonment (Maxwell and Morris, 1993, p.10).

The participants of an FGC include: the young person and his or her family, plus those the family invites to the FGC; the young person's advocate; the victim or victim representative; a police officer; the youth justice co-ordinator; and sometimes a social worker. The family of the young person has a more central role in FGCs than, for example, in RJ Conferences in Northern Ireland. For example, the family and those the family invites to the FGC are entitled to a private discussion during the FGC to talk about the plan and can seek an adjournment to continue the discussion elsewhere before reaching a decision (Maxwell and Morris, 1993, p.10).

The model of decision-making intended for FGCs is group consensus:

The aim is to move away from the adversarial and confrontational procedures apparent in courtrooms towards outcomes shaped by the families themselves and agreed to by all the participants, including the victims. (Maxwell et al, 2004, p.14)

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, in cases where this is necessary).

### Australia

Police-led restorative cautioning schemes were developed in Australia in the early 1990s, the first pilot scheme being introduced in Wagga Wagga in New South Wales in 1991. This “Wagga model” was ostensibly based on the New Zealand approach, however it has been criticised by Blagg as “orientalist appropriation [...] of a Maori process ... repackaged as a model of communitarian justice” (1997, p.497). One of the key problems raised with the scheme was the police involvement:

while the New Zealand movement sought to empower families, our own has tended to empower the police and other, already powerful, agencies such as justice ministries. It has consolidated and extended a new 'knowledge/power' process which marginalises Indigenous justice issues. Indeed it had the potential, I believed, to actually invert the New Zealand system by increasing state power at the expense of families. (Blagg, 1998, p.8).

In 1993, restorative justice legislation was introduced in South Australia and by 2001, all Australian jurisdictions, apart from the Australian Capital Territory (ACT) and Victoria, had legislation in place for restorative justice conferencing for youths, with Queensland, Western Australia and the ACT also running RJ schemes for adults (Strang, 2001). All but one of the statutory-based schemes rejected the Wagga model in favour of non-police-run conferencing models (Daly and Hayes,

2001).<sup>87</sup> Currently RJ is mainstreamed in the youth justice system in Australia and has also been extended for use with adult offenders (Larsen, 2014).<sup>88</sup>

In Chapter 6, evaluations of RJ in both New Zealand and Australia are examined to see how RJ is operating in practice in these two jurisdictions. The Australian evaluations are of both police-led (Wagga model) RJ and non-police-run, statutory RJ.

### **3. The development of Restorative Justice in England and Wales**

This section will give an overview of the development of both RJ and restorative practices in England and Wales. Restorative Justice in England and Wales can be traced at least as far back as Anglo-Saxon times, when crimes were viewed as transgressions against individuals rather than against the state (Graef, 2000; Hostettler, 2009). Following the Norman invasion, there was a move away from this towards the idea of crimes being committed against the state: “William the Conqueror turned the justice system in England away from the restorative model. He defined crime as disruption of ‘the king’s peace’ and fined offenders in the King’s Courts, in part to benefit the king’s pocket” (Graef, 2000, p.22).

This section will focus on more recent history: from the 1970s onwards, when RJ started to come to prominence. There has been much political rhetoric by successive governments indicating their support for RJ, particularly from the 1990s through until present day. However, restorative-based legislation is notably sparser than said rhetoric. Whilst it is fair to say that there has been a steadily increasing incorporation into the criminal justice system of restorative practices

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<sup>87</sup> For more detail on jurisdictional variation in Australia as of 2001, see table 1 in Daly and Hayes (2001, p.3).

<sup>88</sup> Table 2 of Larsen’s report provides a full breakdown of restorative conferencing available in Australia as of 2014, including the relevant legislation (see 2014, p.8).

through legislative measures, even the most recent and promising development introduced by the Crime and Courts Act 2013 – pre-sentence restorative justice – falls short, it is argued, of “true” RJ.<sup>89</sup>

### 1970s – 1980s

Looking at more recent history, there has been a slow and somewhat disparate growth of practices involving certain restorative elements from the 1970s onwards, such as the establishment of Compensation Orders by the Criminal Justice Act 1972. Compensation Orders allowed the court to order the offender to pay money to the victim where the crime had resulted in injury, loss or damage. Whilst not a fully-blown restorative model, it was a small move toward recognising injury, loss or damage to victims – so represents a small concession to the view of crime as being perpetrated against an individual, rather than just the state. Outside England and Wales, the first recorded victim-offender mediation took place in Ontario, Canada in May 1974 and was conducted by Mennonite Central Committee workers (Crawford and Newburn, 2003; Zehr, 1990). This was the same year that, in England and Wales, the first Victim Support scheme was started (Graef, 2000) and the Advisory, Conciliation and Arbitration Service was set up by the government (Liebmann, 2007). In 1977 Nils Christie's influential paper *Conflicts As Property* was published and at around the same time and heading into the early 1980s, the first forays into mediation in criminal justice occurred in England and Wales, with individual probation officers or social workers identifying suitable opportunities for mediation (Marshall, 1996). During this time, the neglect of crime victims also became more visible (Shapland, Willmore and Duff, 1985), with Victim Support expanding its services considerably during the early 1980s.

The first systematic use of victim-offender mediation in England and Wales started in 1979 and was set up by the Exeter Joint Services Youth Support Team (Marshall,

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<sup>89</sup> see Chapter 1 for a full explanation of how the terms RJ and RJ practices are to be understood

1984; Marshall, 1996). This inter-agency group involved *inter alia* the police, youth workers and social services and aimed to assist in decision-making about whether a young person should be cautioned or prosecuted. The group arranged for cautions to be supplemented, where suitable, with meeting the victim, or indirect contact with the victim in the form of an apology or offer of reparation being passed on.

A similar, more developed scheme which may be viewed as an early forerunner of RJ in England and Wales was the Northants Juvenile Liaison Bureaux, which were set up in the early 1980s. The first bureau was established in 1981 in Wellingborough and this was later extended to Corby and Northampton. The scheme involved an inter-agency approach and was staffed by probation, social services, police, education and youth service. There was a strong commitment to diversion from prosecution and this extended to the scheme aiming to influence the existing practice of contributing agencies (Hinks and Smith, 1985, p.48). Following referral from the police, a home visit was usually made and the offence and circumstances were discussed with the offender and his or her family. The bureau only proceeded if the offender admitted guilt and the bureau would then look at what form of resolution was appropriate. Notably, the scheme was not conceived of as a straightforward reparation scheme: "We are not a reparation scheme, and hence feel under no pressure to contrive artificial 'happy endings'" (Hinks and Smith, 1985, p.48). Indeed, there was an emphasis on the voluntary nature of the offender's participation (Davis et al, 1989), similar to RJ.

Where relevant, various other offender needs were identified (which did not need to relate to the offence) and steps were taken to address them. The assessment process culminated in a report to the police, aimed at encouraging the police not to prosecute. As with RJ, the emphasis was more on the offence than the offender, and on steps which needed to be taken to restore both the victim and offender. To this end, the scheme distanced itself from the tariff approach, with offenders able

to be offered a caution even where they had previously had a sentence of imprisonment imposed.<sup>90</sup>

In the same period, the first court-based victim-offender mediation project was set up in England and Wales by the South Yorkshire Probation Service (in 1983), which operated with adults in conjunction with prosecution (Graef, 2000). By 1984, there were a number of mediation and reparation projects in existence or planned in England and Wales (Marshall, 1984; Marshall and Walpole, 1985) and in this year, the Forum for Initiatives in Reparation and Mediation (which later became Mediation UK) was set up to form an umbrella organisation for the various schemes already running (Liebmann, 2007).

The government started to take more of an interest in the 1980s, following the ascendancy of the victims' movement, which had gathered momentum during the late 1960s and 1970s (Green, 2007). The Home Office funded four pilot projects: one diversionary project in Cumbria and three court-based projects in Coventry, Wolverhampton and Leeds. The interest taken by the government waned and funding was withdrawn at the end of the two year pilot period, despite overall positive findings from the evaluation by Marshall and Merry (1990, p.239):

the experiments demonstrate that victim/offender mediation can be carried out, that a good many victims welcome the opportunity to meet their offender, and that most participants were satisfied with the experience.

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<sup>90</sup> A similar bureau was set up in Swansea in 2009, "[p]roviding individualised, flexible, multi-agency service delivery, located within a preventative, prosocial model that avoids blaming/responsibilising young people and their parents is a central objective of the Swansea Bureau process." (Haines et al, 2013, p.174)

However, the evaluation did also discuss various problematic issues which would need to be addressed and conceded: “None of the schemes studied seemed to supply a perfect model for future practice” (Marshall and Merry, 1990, p.240).

Despite some interest shown by the government, there was no move to legislate for RJ during this period, which may have been due to the political climate of the time (Dignan, 1999). The lack of legislation in England and Wales around this time was in contrast to both New Zealand and Australia, as identified above – i.e. New Zealand introduced the Children, Young Persons, and Their Families Act 1989, establishing Family Group Conferences for young offenders which provided for restorative conferencing (with or without the victim). A few years later, Australia introduced the Young Offenders Act 1993 (South Australia jurisdiction) and the Young Offenders Act 1997 (New South Wales jurisdiction) which offered similar restorative conferencing provision for youths.

### The 1990s

Whilst no legislation for RJ in England and Wales had yet emerged, non-statutory restorative initiatives continued to develop. For example, the Milton Keynes Shop Theft Initiative was set up by Thames Valley Police in 1994 and utilised RJ conferencing for shop theft, where offenders could meet with store managers (Young, 2002). The 1990s also saw the introduction of police-led restorative cautioning, which was developed by the then Thames Valley Chief Constable, Charles Pollard and had been inspired by police-led RJ cautioning in Wagga Wagga, Australia. Following experimentation in the mid-1990s, this initiative began formally in 1998 (Hoyle, Young and Hill, 2002).

During the 1990s, governmental awareness of and interest in RJ in England and Wales increased and the first steps towards legislating for restorative practices

were taken. The 1997 white paper *No More Excuses: A new approach to tackling youth crime in England and Wales* expressly proposed restorative principles:

9.21 ... proposals for reform build on principles underlying the concept of restorative justice:

restoration: young offenders apologising to their victims and making amends for the harm they have done;

reintegration: young offenders paying their debt to society, putting their crime behind them and rejoining the law abiding community; and

responsibility: young offenders - and their parents - facing the consequences of their offending behaviour and taking responsibility for preventing further offending.

These principles emerged in the form of reparation orders which were legislated for in the Crime and Disorder Act 1998. However, whilst reparation orders involve ostensibly restorative elements such as repairing harm caused and writing a letter of apology to the victim, they fall distinctly short of RJ. Not only is there a lack of emphasis on meeting with the victim, but consent to the reparation order being made is only sought from the victim and not the offender (see Dignan, 1999). Commenting on *No More Excuses*, Walgrave (1998, p.603–4) points out that “[r]estoration means much more than simple reparation. The White Paper does not seem to include sufficiently the experience that British practitioners and researchers have acquired already with different kinds of victim-offender mediation.”

As of 1999, according to Dignan:

the restorative justice approach could finally be said to have ‘taken root’ within the criminal justice system in England and Wales, albeit after a rather protracted germination process. But even so, the reforms hardly amount to a ‘restorative justice revolution’. (1999, p.58)

This seems a fair assessment of the situation at that time. As to why there was not a “restorative justice revolution”, this might to some extent be explained by looking more broadly at the Crime and Disorder Act 1998. There appears to have been an overall move towards a harsher line being taken with offenders, such as: the abolition of *doli incapax* (see Falck, 1998); the introduction of child curfew orders; and the introduction of Anti-Social Behaviour Orders. The move towards greater punitive measures is indicative of a political environment in which RJ is unlikely to flourish – it potentially being viewed as a “soft option” – and may go some way towards explaining the limited manner in which restorative measures were introduced at this point. As Dignan argues (1999, p.54): “the broader policy context within which the [Crime and Disorder Act’s] restorative justice measures are being introduced suggests a rather timid reluctance on the part of ‘New Labour’ to reverse many of the failed exclusionary policies of the past for fear of being portrayed as ‘weak on crime’”.

That said, referral orders were introduced shortly after the Crime and Disorder Act. They were legislated for in the Youth Justice and Criminal Evidence Act 1999 and contained more restorative elements than reparation orders, such as meeting the victim and apologising and can be seen as a move towards the expansion of restorative practices. However, referral orders do not fully conform to RJ principles, with Crawford and Newburn (2003, p.19) calling them “a restorative justice-influenced disposal”. As noted by O’Mahony (2012, p.95), “only a small minority of referral orders involve direct participation by victims in the process, ... there is little evidence that referral orders allow victims a meaningful role in deciding how the offence is dealt with”.<sup>91</sup> Referral orders only allow for restorative elements rather than fully embracing the principles of RJ. By the end of the 1990s, whilst there had been legislation for restorative practices, there remained no

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<sup>91</sup> See also Newburn, Crawford et al (2002)

legislative provision for RJ. In addition, what had been introduced remained limited in terms of being restricted to young offenders and minor crime.

#### 2000 – present day

The Halliday Report, *Making Punishments Work*, recommended the piloting of RJ (2001, p.66). Following the Halliday Report, the Home Office funded three RJ projects – those evaluated by Shapland et al (2004 – 2008) (see Chapter 6 for discussion of this evaluation). This was part of the Home Office’s “Crime Reduction Programme”, which has been criticised as being over-ambitious in scale, operating on unfeasible timescales, and possessing low commitment to project integrity (Maguire, 2004). However, it did demonstrate an increased interest in RJ by the government and this interest appeared to grow, as shown by the 2002 white paper, *Justice For All*, which promised “a better deal for victims and witnesses” and which makes numerous mentions of RJ. Plans were included to expand the use of restorative justice (2002, p.39) and to develop community involvement in restorative justice schemes (2002, p.117). *Justice For All* also details the provision of finances to assist Youth Offending Teams in increasing their work with victims, including the introduction of Victim Liaison Officers to cover all 154 Youth Offending Teams in England and Wales “as resources become available”, which “will mean more victims being contacted and encouraged and supported to get involved in restorative justice, if they wish.” (2002, p.49).

The resulting Criminal Justice Act 2003 did not match the preceding rhetoric in terms of restorative provisions within the legislation, but did introduce conditional cautions, which could include RJ. The Code of Practice for conditional cautions, which was relevant at the time, stated that RJ could be employed either as a condition of the caution or as a decision-making process whereby the conditions of the caution would be agreed by the parties. This was significant, as it was the

first attempt at placing RJ for adults on a statutory footing. However, there is an important limiting codicil included (Home Office, 2004, p.9):

the 'outcome agreement' arising from the process forms a basis for conditions to be approved or formulated by the prosecutor. Notwithstanding the outcome agreement, the prosecutor retains a duty to ensure that the conditions are proportionate to the offending and meet the public interest requirements of the case.

As such, the victim and offender do not have the final say and may not ultimately decide the conditions for the caution, or may only do so partially. This is not dissimilar to the operation of RJ conferences in Northern Ireland, where the agreement must be ratified by either the PPS or the Court. However a further limiting factor was in place (up until the changes to cautioning effected by amendments to the CJA 2003 made by the Police and Justice Act 2006) whereby the conditions of a caution could only be rehabilitative or reparative. As such, prior to these amendments, the possible outcomes which victims and offenders could agree during any RJ process would have to have fallen within one or both of those categories. Section 17 of the 2006 Act amended section 22(3) of the CJA 2003 to allow for punitive conditions to be attached to cautions in the form of a financial penalty:

(3) The conditions which may be attached to such a caution are those which have one or more of the following objects–

- (a) facilitating the rehabilitation of the offender;
- (b) ensuring that the offender makes reparation for the offence;
- (c) punishing the offender.

Thus, the scope of available conditions was widened. However, this is limited to £250 or 25% of the fine available on summary conviction in a Magistrates' Court, whichever is the lower, as well as only being available for certain offences (section 23A Criminal Justice Act 2003).

Overall, the CJA 2003 consolidated the use of restorative cautioning which was already being undertaken by the police, but legislative backing for RJ, rather than restorative practices, remained absent from the Act. This is not to say that the government was lacking interest in RJ at this time. In 2003 the government published a consultation document, *Restorative Justice: the Government's Strategy – A Consultation document on the Government's Strategy on Restorative Justice* and after receiving a considerable response from various organisations, published a follow-up document in 2004: *Restorative Justice: The Government's Strategy – Responses to the Consultation Document* in which a strong commitment to restorative practices was outlined.

From 2008 – 2009, interest in RJ from the government continued to grow and the youth restorative disposal was piloted in eight police forces in England and Wales (it has since been used more widely). The aim was to provide a quick means of dealing with minor offending, providing an alternative to arrest and formal criminal justice processes for first time young offenders. The youth restorative disposal is mostly carried out almost instantly “on the street”, with minimal preparation of the parties (Rix et al, 2011) and involves the use of restorative techniques by specially trained police officers and police community support officers holding the young person to account, encouraging them to face up to the impact of their offence and to offer an apology and look at why the offence occurred. In their evaluation of this disposal, Rix et al (2011), found it to be common for the young person to have no parent or other supporter present, and likewise for the victim. Outcome agreements are not enforceable and whilst Rix et al found that the victim was commonly consulted as to the contents, offenders were not (2011, p.27). The youth restorative disposal therefore offers elements of a restorative nature, but falls short of RJ. As O’Mahony notes (2012, p.91–2):

despite being called restorative disposals, there is little to suggest that they involve any significant restorative intervention or process. In many respects, the disposal simply provides the police with another mechanism to informally deal with minor offending, on the spot, by way of an immediate warning that includes an apology.

The 2010 Green Paper *Breaking the Cycle* strongly advocates RJ, but there was no great leap forward in terms of legislating for RJ in the following Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The debate in the House of Lords concerning two amendments which would have expressly incorporated RJ into LASPO are illuminating. In relation to both of the amendments, the government – through Baroness Northover – signalled that it would reject the amendments and both amendments were withdrawn. Amendment 177DA was moved by Lord Ponsonby of Shulbrede and read as follows:

177DA: After Clause 78, insert the following new Clause-

"Youth rehabilitation order: restorative justice requirement

(1) In section 1(1) of the Criminal Justice and Immigration Act 2008 (youth rehabilitation order: requirements), after paragraph (o) insert-

"(p) the court may include in a youth rehabilitation order a restorative justice requirement."

(2) Schedule (Restorative justice requirement: Criminal Justice Act 2003) shall have effect.

Lord Ponsonby withdrew this amendment following reassurances by Liberal Democrat peer Baroness Northover that the government were taking RJ seriously and that "a court already has sufficient powers under the existing requirements of the youth rehabilitation order and community order to make restorative justice activity a formal part of those orders" (HL Deb 7th February 2012, col 239). Baroness Northover also made the following comments: "it is much better for the courts to retain discretion to decide when and in what circumstances restorative justice can be effectively undertaken" (HL Deb 7th February 2012, col 239); and:

Before we can make any determination as to whether further, specific legislation is necessary for restorative justice, we must make significant steps to build capacity to deliver it. ... Although I understand noble Lords' enthusiasm to enshrine this now in statute, there is work to do before we reach such a stage. (HL Deb 7th February 2012, col 239)

So, whilst the government expressed strong support for RJ in the Green Paper, it appears that they were not prepared to promote this through legislating for RJ at this stage.

A further amendment to include RJ in LASPO was proposed by Lord Woolf – amendment 177DAA – which would have enabled courts to remand cases following a guilty plea, to give victims the opportunity to participate in a process of restorative justice. Following the comments made by Baroness Northover indicating that the government would reject this amendment, Lord Woolf withdrew the proposed amendment. Whilst doing so, he raised concerns that the government were continuing to postpone the proper implementation of RJ, saying: “I have the strong impression ... that there is a danger that we are putting off everything until another time” (HL Deb 7th February 2012, Col 240).

Lord Carlile of Berriew had earlier in the debate predicted the government’s response to these amendments, saying: “I strongly support the view of the noble and learned Lord, Lord Woolf, that this should be put into statutory form. I have a feeling that we might hear that it is not necessary to do so because it is, after all, open to judges and magistrates to adjourn cases for good reasons in any event.” (HL Deb 7th February 2012, Col 235). He went on to explain why giving RJ statutory backing was important:

[P]lacing this in statutory form will have a number of effects. ... there will not be a judge in England and Wales – magistrate or judge at every level – who does not begin to focus on the potential of restorative justice conferences and opportunities. It seems to me that the key to this measure in many ways is putting it into statutory form, as that would highlight its potential throughout the judiciary. (HL Deb 7th February 2012, Col 235 - 6).

Despite these arguments and despite the promotion of restorative measures in *Breaking the Cycle*, LASPO was enacted without any mention of RJ. However, shortly after the government's rejection of legislating for RJ in LASPO 2012, the Crime and Courts Act 2013 introduced perhaps the most significant restorative provision contained within English legislation to date. Schedule 16 to the Crime and Courts Act 2013 amends the Powers of Criminal Courts (Sentencing) Act 2000 to allow for courts to defer passing of sentence to allow for RJ (courts could already defer sentence for other reasons):

(1) ... the requirements that may be imposed under that paragraph include restorative justice requirements.

(2) Any reference in this section to a restorative justice requirement is to a requirement to participate in an activity—

(a) where the participants consist of, or include, the offender and one or more of the victims,

(b) which aims to maximise the offender's awareness of the impact of the offending concerned on the victims, and

(c) which gives an opportunity to a victim or victims to talk about, or by other means express experience of, the offending and its impact.

(3) Imposition under section 1(3)(b) of a restorative justice requirement requires, in addition to the offender's consent and undertaking under section 1(3), the consent of every other person who would be a participant in the activity concerned.

...

This means that courts now have the express power to defer sentence specifically to allow for RJ to take place. This is a significant step towards greater integration of RJ in the criminal justice system and embraces many key aspects of RJ, including emphasising the value of face-to-face meetings. The Ministry of Justice guidance states: “Wherever possible, a face-to-face meeting should be the aim, but if the trained facilitator does not assess it as suitable then an alternative type of RJ activity should be considered.” (Ministry of Justice, 2014d, p.6). Unlike most previous restorative measures, pre-sentence RJ is not limited to minor offending and indeed the guidance acknowledges that the greater the harm, the more effective RJ can be (Ministry of Justice, 2014d, p.6). However, despite the guidance demonstrating an understanding of, and commitment to, key RJ values, pre-sentence RJ still falls short of “true” RJ. Whilst voluntariness is emphasised in the guidance (2014d, p.9), there is much to suggest that offenders have a lot to lose by refusing to participate in RJ, such as the following: “2.33 At the sentence hearing the court may have regard to the report and the offender’s participation, willingness or lack of willingness to participate in a RJ activity ...” (Ministry of Justice, 2014d, p.11). Likewise, the guidance explicitly states that offenders might be looked on favourably if they do agree to participate: “2.34 If a RJ activity does not go ahead through no fault of the offender ... It would be open to the court to take into account the fact that the offender had indicated willingness to participate in a restorative justice activity.” (2014d, p.11). As such, offenders may feel coerced into participating for fear of the impact on sentence that refusing to participate might have.

Moreover, the final outcome, i.e. the sentence is up to the court, rather than the parties taking part in pre-sentence RJ (Ministry of Justice, 2014d, p.11):

2.33 At the sentence hearing the court may have regard to the report and ... any outcome agreement. However, these considerations, together with considerations of other factors of the case remain entirely a matter for the courts to interpret and come to a sentencing decision about.

As such, a fundamental aspect of RJ is not upheld, as the stakeholders are not empowered to decide what should happen as a result of the offending. Discussing the crucial nature of this aspect of RJ, Shapland notes (2014, p.120): “[there is an] overriding need for restorative justice to reflect the ‘justice values’ of the participants brought together for that restorative justice event”.

In summary, there has been increasing interest in RJ in England and Wales expressed by successive governments from the 1980s onwards. However, this interest has not remained constant and has not always translated into moves to legislate. When legislation has been enacted, this has been for restorative practices, rather than RJ. As stated by O’Mahony:

despite all of the public rhetoric and sustained calls for restorative justice ... the development and delivery of actual services that can be described as 'restorative justice' has simply not materialised (2012, p. 104).

Since O’Mahony’s article was written in 2012, the aforementioned provision for pre-sentence RJ has been introduced by the Crime and Courts Act 2013. Whilst this latest development comes closer to RJ than previous legislative attempts, it still does not fully embrace the values of RJ (Shapland, 2014). As noted by Cavadino, Dignan and Mair (2013, p.264), RJ in England and Wales has developed in a piecemeal manner and currently only “supplements rather than supplants” the existing system. The government appears to remain unwilling to fully endorse RJ in the same way as has been done in Australia, New Zealand and Northern Ireland. This could be a result of the current penal policy, summed up by Cavadino, Dignan and Mair (2013, p.315):

The story so far of the Coalition’s penal policy is largely one of well-intentioned proposals for reform (notably by Kenneth Clarke) being

stymied by political forces (including the Prime Minister), the media and law and order ideology.

It might also be reflective of a tension between Coalition goals such as the “Big Society” (HM Government, 2010) which aims to devolve power to local communities; and the increasing drives towards centralisation in sentencing (see Chapter 2). This would make attempts to empower participants in RJ both appealing and difficult to achieve, which might be a further cause of the pursuit of RJ, but a reluctance to fully embrace its principles.

#### **4. Restorative Justice in Northern Ireland**

##### Background

State-run restorative justice in Northern Ireland was established following the Good Friday Agreement in 1998. A review of the criminal justice system in Northern Ireland was carried out (Criminal Justice Review Group, 2000) and made 294 recommendations, which included recommending the adoption of restorative justice conferencing, based on the New Zealand model, for all eligible youth cases. The idea was “to maximise participation within the criminal justice system as a means to boosting legitimacy” (Doak and O’Mahony, 2011, p.306). Community RJ practices also came to prominence following the Good Friday Agreement, emerging as an alternative to paramilitary punishments (Eriksson, 2009; McEvoy and Mika, 2002) and there are ongoing developments in the relations between state and community-run RJ in Northern Ireland (Campbell et al, 2005; Doak and O’Mahony, 2011).

Unlike in England and Wales, state-run RJ in Northern Ireland was not something that developed piecemeal over a number of years, constituting mostly restorative practices rather than RJ. The introduction of RJ in Northern Ireland was the result of a drastic overhaul of youth justice and was given firm legislative backing by the

Justice (Northern Ireland) Act 2002 (the relevant provisions coming into force on 1<sup>st</sup> December 2003). 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 (Doak and O'Mahony, 2011).

The Northern Ireland Youth Conference Service was launched in Belfast in December 2003 and was extended to Fermanagh and Tyrone in April 2004, then to Newry, Banbridge and Armagh in June 2005. By December 2006, the Youth Conference Service was running across Northern Ireland (CJINI, 2008).

The Justice (Northern Ireland) Act 2002 made provision for both court-ordered conferences and diversionary conferences. For court-ordered conferences, where a young person has admitted guilt or been found guilty the court must refer the case for a conference unless it falls within one of the exceptions (the sentence for adults being mandatory life imprisonment; the offence(s) being indictable only for adults; or the offence(s) falling under certain provisions of the Terrorism Act 2000). The court, however, retains a discretion to refer the case for a youth conference should they wish to, in any case where the sentence for an adult would not be life imprisonment. The young person must agree to take part in the conference, otherwise the court cannot make the referral.

The conference must involve the following people: a youth conference co-ordinator; the young person; a police officer (the Youth Diversion Officer); and an appropriate adult, who acts as a supporter for the young person. The aim is usually for the victim or victim representative to participate as well, and others who might also attend include: victim supporter, youth worker, community representative and legal representative. The conference plan has to be ratified by the court and the court can accept, reject or vary the plan.

Diversory conferences may take place only where proceedings would otherwise be instituted against the young person. The decision lies with the PPS as to whether a case is suitable to be referred for a diversory youth conference. Two prerequisites are in place: the young person must have admitted guilt and agreed to take part. Any plan agreed by participants in a diversory conference must then be ratified by the PPS. The PPS has the power to either accept or reject the proposed plan. If a plan is ratified and the young person consequently successfully carries out the plan, then that is the end of the matter and the PPS cannot then institute proceedings against the young person for the relevant offence(s), i.e. the young person does not receive a criminal conviction.

The changes to youth justice made by the 2002 Act marked a radical change to the way that young people were treated in the criminal justice system in Northern Ireland. Previously, victims had played little role in proceedings and offenders did not have to directly participate in proceedings, unless giving evidence. As Doak and O'Mahony note (2011, p.315):

The youth court is highly formalised and dominated by professionals, who generally speak for the parties. The structure of the court is very formal (albeit usually less formal than an adult court), with the defendant facing the bench, and the process is tied up in a strict and formal set of legal procedures which are often experienced as exclusionary by those most directly affected by the crime. In court the offender rarely speaks, other than to confirm his or her name, and the victim is usually excluded from the process unless they are required to give evidence.

Further, in the traditional court process, sentencing was a matter for the judge or magistrates, rather than the victim and offender. In contrast, in youth conferencing, young offenders were now able to take an active role in decision-making as to what should happen to them following admission of guilt, and in the case of diversory conferences, would no longer be hampered by a criminal record. Victims were also now being offered a much more central role, having the

opportunity to be involved in decision-making, rather than having a peripheral role and virtually no input as to sentence.

### Evaluation and direction of Youth Conferencing in Northern Ireland

The *Evaluation of the Northern Ireland Youth Conference Service* (Campbell et al, 2005) examined the translation of the youth conference service into practice. This was a major evaluation and is examined in further detail in Chapter 6. The evaluation found that, overall, the implementation of youth conferencing was progressing well. It made various recommendations, including for further training of Youth Court Magistrates, following observations made in court that the value of a youth conference outcome was at times assessed according to the quantity or level of content within the plan and that plans were sometimes being rejected on the grounds that they were too short, and were insufficient to address offending (Campbell et al, 2005, p.114):

A number of observations did suggest that the courts measured the severity of the plan according to the number of points or elements agreed ... This is perhaps a matter for further development given that the meaning and value of a conference outcome may rest in the nature of a plan rather than the number of elements appearing within it.

By 2011 however, the *Review of the Youth Justice System in Northern Ireland* raised concerns about the increasing length of plans and the reduction in the use of no plan (Graham et al, 2011, p.96). The 2011 review recommended, *inter alia*, ensuring that conference outcomes were proportionate and relevant to the offending. However, overall the review was positive about youth conferencing, stating:

Restorative justice now plays a crucial part in the response to youth crime in Northern Ireland. Now internationally renowned, youth

conferences offer an inclusive, problem-solving and forward looking response to offending in which the victim plays an important role. Re-offending rates are lower than for most other sanctions and victim satisfaction is high. (2011, p.12).

The report on the progress made concerning the 2011 recommendations (CJINI, 2013) found that efforts towards ensuring that conference outcomes are proportionate had been commenced with substantial progress (CJINI, 2013, p.27). This had been implemented through the production by the YJA of a proportionality position paper, instructing co-ordinators and other relevant staff to ensure that their recommendations to the PPS or the court are proportionate and relevant to the offending. The YJA had also set targets for a baseline number of conferences which would not exceed 6 months, to ensure that conference plans lasting longer than this would only be made in exceptional circumstances (CJINI, 2013, p.27).

The YJA appear to be continuing in this direction – emphasising proportionality in plans and therefore encouraging greater influence on the decision-making about plan content by criminal justice professionals, in particular conference co-ordinators. This can be seen in the YJA Business Plan (2013–2014), in which performance targets include: monitoring 50% of diversionary plans for proportionality; 10% of diversionary youth conferences to result in no youth conference plan; and 80% of diversionary youth conferences to result in a youth conference plan of 6 months or less. In addition to this, the Business Plan proposes that “an appropriate assessment ... will be completed alongside the youth conference process. This will ensure that plans/recommendations presented back to the PPS or Court have been informed by this assessment in addition to the outworkings of the youth conference” (YJA, 2013, p.18). The encouragement of formulating plans based on performance targets and professional assessments of the young person will serve to further limit input from the victim and offender as to the content of the plan.

State-run RJ conferencing in Northern Ireland thus appears to be moving steadily in the direction of taking more and more decision-making power away from “those most affected by the offence” (Marshall, 1999, p.5), which may ultimately lead to the model in practice becoming less of a fully-fledged model of RJ than previously.

## **5. Incorporating Restorative Justice into a Criminal Justice System**

Having explored the development of RJ practice in the four jurisdictions examined in the secondary empirical research, it is useful to consider more general issues for the translation of RJ into practice – particularly in its incorporation into a criminal justice system. The restorative idea of empowering lay participants: victims, offenders and community members, to make key criminal justice decisions, necessarily involves taking away some of the powers that would ordinarily be wielded by the state. One of the most pressing challenges is thus to consider how RJ can be incorporated into a state setting without compromising either some of the state’s key values, in particular due process and rule of law considerations (for example proportionality and equality before the law) or some of RJ’s key values (such as stakeholder decision-making). The questions as to how these different values can or should be balanced remains contentious:

Despite the proliferation of state-led restorative programmes in recent years, the role that the state ought to play remains uncertain, and views diverge considerably as to what role the state should assume in respect of restorative justice initiatives. (O’Mahony and Doak, 2008, p.20).

The alternative to state-run RJ is community-led RJ. On the face of it, it seems viable that RJ practice unfettered by the concerns of the state would have the capability to better reflect key values expounded in RJ theory (Eriksson, 2009; McEvoy and Mika, 2002). It has been argued that RJ operating outside the criminal justice system is more likely to be entered into truly voluntarily: “[o]nly when restorative programs are separate from the legal system can the offender be

genuinely free from coercion” (Boyes-Watson, 1999, p.274). That said, even in the case of community-led RJ, this does not operate in isolation from all existing legal rules and there is likely to be some coercive force exerted by the possibility of action being taken through the criminal justice system if RJ fails. Other benefits of community-led RJ are that there are likely to be fewer external constraints on the stakeholders’ decision-making, and there is no obvious external notion of proportionality to which the participants would need to conform. However, it has been argued that locating RJ in a community setting does not guarantee such openness and freedom from external constraints. Woolford and Ratner argue (2003, p.187):

in endeavoring to establish public spaces in which individuals can enact new justice norms and in which new justice values can flourish, restorative justice practitioners need to recognize that locating programs within "the community" is not a sufficient guarantee for creating open and democratic dialogue.

Some problems for RJ which is not mainstreamed include the fact that it is less likely to be properly funded and will be less widespread, as well as practice potentially being inconsistent. Additionally, community RJ is also vulnerable to the charge of being unable to guarantee the protection of fundamental human rights (such as the Article 6 right to a fair hearing by an independent and impartial tribunal – see Ashworth, 2002) or to uphold the rule of law and ensure due process.<sup>92</sup> Empirical research has identified these and other problems for RJ projects which are non-statutory. In the evaluation of RJ schemes in England and Wales carried out by Shapland et al (2006), they identified various problems for the schemes arising from the fact that they were all non-statutory, including: low referral rates (see also Miers et al, 2001); the schemes being “used” by statutory agencies, who outsourced work to the RJ schemes, when it was really work which

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<sup>92</sup> Cf. McEvoy and Mika (2002, p.544): “Certainly the Northern Irish variants of community-based restorative justice with their published standards of good practice, guidelines, attempts at drawing up protocols with the statutory agencies and emphasis on international human rights standards appear an altogether different animal [from standard critical characterisations of informal justice]”.

should have been done by the statutory agencies (Shapland et al, 2006, p.16); and funding issues, with schemes being dependent on project funding, so that when funding ran out, schemes closed and skills which had been built up were lost (Shapland et al, 2006, p. 22).

The state, in comparison, can – in theory – ensure consistency in the way that RJ is delivered (Shapland, 2003) and can assist in upholding international human rights standards and oversee basic rule of law and due process protections. The state can also ensure the accountability of those running the RJ process, uniformity of access and quality of service provided, as well as the neutrality of the facilitator. However, this of course assumes a perfectly-functioning, benevolent state. As Boyes-Watson points out, whilst there are inequalities within communities, such as adults dominating children and homogenous groups dictating to other groups how to live correctly, “these biases operate within the justice system as well.” (Boyes-Watson, 1999, p.272). What she does not address, is that in the criminal justice system there tend to be safeguards in place to reduce the likelihood of these biases operating, such as the monitoring of outcomes, standardised training of facilitators and some form of accountability. It is probably fair to accept, however, that these safeguards do not always achieve the complete elimination of biases in the system.

Whether RJ is best-suited to a community-led setting or a state-run setting will depend substantially on the nature of the state and community within which it is to operate.<sup>93</sup> Obviously a corrupt state with a poorly-functioning criminal justice system is unlikely to be able to add much to an RJ process in the way of rule of law and due process protections and so forth. That said, a state with a well-functioning and fair criminal justice system, but with people living in weakened communities,

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<sup>93</sup> See McEvoy and Mika (2002) for an argument as to why the unique situation of Northern Ireland might be particularly well-suited to community-based RJ schemes. Cf. Dignan and Lowey (2000).

might favour state-run RJ, as community-led RJ might flounder in such circumstances.<sup>94</sup>

In terms of how RJ could feasibly work within a criminal justice system, the integration of RJ into a state-setting will – as is highlighted well in the empirical research in Chapter 6 – be a difficult process, requiring a careful balancing act. This will unavoidably be a form of compromise involving weakening the state’s control of, *inter alia*, proportionality (so as to empower participants) on the one hand, whilst also placing constraints on conference participants’ decision-making, so as to provide an adequate level of safeguards to protect, in particular, vulnerable victims and offenders (as well as taking into account budgetary concerns). This could be conceived of as a partnership between the state and the community (Boyes-Watson, 1999), rather than the state centralising or absorbing RJ practice, which might lead to a failure to draw on important local knowledge and an oversimplification of the process (McEvoy, 2007; Scott, 1998).

A particularly promising way of achieving this balance has been expounded by Roche (2003). Importantly, his solution avoids a reliance on proportionality and consistency:

The ideal is that restorative justice and state justice are mutually supportive: restorative justice programmes can gain benefit from state guardianship, while citizens’ deliberations in restorative justice meetings offer the potential to reinvigorate the justice of the state. (2003, p.239)

In terms of what RJ must concede to the state, Roche accepts some constraints on participants’ freedom to decide outcomes, but would limit this to the imposition of upper and lower limits for RJ outcomes (so as to avoid cruel, unusual and

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<sup>94</sup> See Eriksson (2009, pp.11-16) for a discussion on the meaning and role of community in an RJ context.

degrading treatment on the one hand and to ensure public safety on the other).

Roche suggests that these limits would rarely be necessary:

In most of these cases ... close examination will in all probability raise doubts about the decision-making process, such as whether the offender really agreed to the sanctions or whether the interest of the affected community was represented (2003, p.236).

In terms of what the state must concede to RJ, Roche finds a way of retaining the empowerment of participants, whilst still allowing the state to monitor decision-making. This is based on Roche's understanding of RJ as a process involving what he calls "deliberative accountability": "[w]hen victims, offenders, and their supporters deliberate in a restorative justice meeting, they can hold each other accountable. ... This process of negotiation contains its own in-built form of mutual accountability" (2003, p.230). Roche argues that deliberative accountability does not automatically occur in all RJ programmes. It only works when participants are empowered and no one party dominates. It is here, argues Roche, where the role of the state is particularly important:

The state has a crucial role to play in informal justice, especially in minimizing domination which otherwise could threaten the deliberative accountability in restorative justice meetings; at the same time, every effort must be made to avoid its becoming itself a source of domination. (2003, p.239)

The role Roche sees for the court does not interfere with participants' decision-making power to as great an extent as in, for example, Northern Ireland: it does not involve checking the outcome against notions of proportionality and consistency. Roche points out that "restorative justice agreements do not involve the technical application of rules, but rather, highly contextualized, personal, and often emotional negotiation." (2003, p.235) and he is critical of the idea of courts substituting their own decisions for restorative outcomes. As such, Roche argues that judges' role in reviewing RJ outcomes should be limited to a form of

administrative review of the decision-making process – i.e. assessing the legality of the decision-making process. Judges should, argues Roche, therefore not be able to substitute their own decisions, but rather quash the decision and refer the matter back to the original decision-makers.

Roche's ideas offer a good balance between the interests of the state and important aspects of RJ – and indeed would seem to harness the powers of the state to positively enhance the practice of RJ. However, as Roche himself notes (2003, p.239), current practice departs from this ideal in many respects. Indeed, the empirical research (see Chapter 6) found evidence of the state becoming a source of domination in many cases – particularly in Northern Ireland and New Zealand.<sup>95</sup> That said, Roche's ideal offers a promising conception of how RJ in a state setting might retain what are argued in this thesis to be crucial aspects of RJ – in particular the empowerment of the participants by devolving to them the decision-making power.

## **6. Conclusion**

This chapter has examined RJ practice in four jurisdictions, so as to provide for an understanding of the different contexts in which RJ theory has been translated into practice and highlight some of the reasons why this has not always been done fully or effectively (particularly in England and Wales). It has also examined more generally, key issues surrounding the incorporation of RJ into a criminal justice system. This provides important background for the following chapter, which details the findings from the empirical study of RJ carried out for this thesis.

New Zealand has had legislation for state-run RJ in place since 1989 and RJ is well-established and integrated into the criminal justice system in that jurisdiction. Similarly, Australia has been developing RJ since the 1990s and had legislation in

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<sup>95</sup> These and other practical realities of RJ are explored further in Chapter 6.

place for RJ in most Australian jurisdictions by 2001. State-run RJ in Northern Ireland is slightly more recent, and came about following a complete overhaul of the criminal justice system in Northern Ireland, rather than in increments as in Australia. Northern Ireland has been operating state-run RJ since 2003 and across all areas since 2006. RJ for youths is properly integrated into the criminal justice system in Northern Ireland – although this has come with possible side effects concerning reductions in the extent to which stakeholders are empowered to make decisions, related to greater input from criminal justice system professionals.

England and Wales is in a category of its own in relation to these four jurisdictions. There is as yet no legislation in place in England and Wales which aims to integrate RJ into the criminal justice system in a similar way to that in New Zealand, Australia or Northern Ireland. The development of RJ in England and Wales has been a case of *ad hoc* development – or, as O’Mahony (2012) terms it, “one step forward, two steps back”. Legislative measures in England and Wales have repeatedly fallen short of fully embracing RJ and even the latest development in the Crime and Courts Act 2013, legislating for pre-sentence RJ, can really only be viewed as promoting restorative practices.

The failure of England and Wales to wholeheartedly endorse RJ could be a result of various differences in the political and cultural make-up of this jurisdiction in comparison with Northern Ireland, New Zealand and Australia. For example, an important impetus behind Northern Ireland’s introduction of RJ was the perceived need to increase state legitimacy. New Zealand and Australia both have important cultural factors which have influenced the development of RJ in each jurisdiction, as noted by Doak and O’Mahony (2008, p.6):

... cultures where there is a tradition of deeply embedded restorative traditions may prove fertile ground for the successful roll-out of contemporary mainstream restorative justice programmes. Tauri

(1999), for example, notes that the widely perceived success of the contemporary youth justice system in New Zealand ... clearly owes something to the indigenous restorative justice practices of the Maori people. Similarly, the widespread use of restorative practices within aboriginal communities has arguably served as a catalyst for the relatively rapid development of restorative programmes across Australia.

The more tentative nature of engagement with RJ in England and Wales may also be indicative of successive governments in England and Wales being particularly concerned about appearing soft on crime (Dignan, 1999; Newburn, 2007). RJ can suffer from the assumption that it is not a “proper” punishment – it being a common view that RJ is an alternative to punishment and opposed to retribution (Walgrave, 2004; Wright, 1991) and RJ can therefore be viewed as encountering similar problems to probation in its earlier days, in being taken seriously as a punishment (Duff, 2003). It has been argued in Chapter 3, that this understanding of RJ is flawed, and – as Daly (2000) points out – it does not help its promotion. If RJ is considered a non-retributive ‘soft option’, which is an alternative *to* punishment, it could end up being difficult to promote as something which could be integrated wholesale into the criminal justice system in the way that it has been in Northern Ireland, New Zealand and Australia. Without the added impetus found in these three jurisdictions in terms of the underlying political and cultural situations, there may be insufficient drive to overcome this unhelpful, but prevailing view.

The next chapter details findings from empirical research carried out in relation to these four jurisdictions, and aims to examine how RJ is operating “on the ground” in Northern Ireland, England and Wales, New Zealand and Australia.

## CHAPTER 6: Empirical research findings

### 1. Introduction

This chapter details the findings of empirical research undertaken relating to the practice of RJ in England and Wales, Northern Ireland, Australia and New Zealand. Particularly in the analysis of the empirical research, this chapter draws on the background information concerning RJ in these jurisdictions, which was provided in Chapter 5. Chapter 2 described the problem of incoherence in sentencing in England and Wales (“EW”) and a review of the literature on RJ (see chapters 1 and 5) led to the formulation of the idea that RJ in a certain form – in particular RJ conferencing – might offer a more coherent decision-making process. The following hypothesis was devised:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

It was deemed important to evaluate empirical research to see whether this was what was happening “on the ground”. Secondary empirical research was undertaken looking at RJ practice in England and Wales, Northern Ireland, Australia and New Zealand. As identified in the Methodology in Chapter 1, primary fieldwork in Northern Ireland was also undertaken, but the findings added little to the secondary analysis and have therefore not been included here. It is important to emphasise that the assessment of the empirical research carried out is intended as exploratory, rather than as constitutive of definitive findings on RJ practice. The most important contribution, perhaps, of the secondary research undertaken for this thesis has been the identification of a number of obstacles to the empowerment of participants in RJ processes.

The secondary research focuses primarily on levels of contribution to the plan by participants, i.e. research question 6 (see below). This is because, as identified in the Methodology, no useful data was available concerning participants' ideas of justice and philosophies of punishment (or beliefs about punishment) which they expressed at the conference. The levels of contribution to the plan by participants therefore became the main focus of the evaluation. This is still useful for reflecting on research question 5 (see below), since where victims and offenders did not contribute to the plan, their ideas about punishment were unable to be taken into account in the decision-making process. It is obviously crucial to the efficacy of RJ as a mediation forum for different philosophies of punishment that the victim and offender do actually contribute their ideas to the outcome. Where there is an imbalance between the parties, or where the criminal justice professionals involved make a greater contribution to the plan than the stakeholders, this raises questions as to the extent to which such an RJ process solves the incoherence problem (identified in Chapter 2) at all.

It should be clarified that a distinction is being drawn here between the participants' conceptions about what the *outcome* should be (their ideas about punishment); and their ideas about the justice process more broadly, e.g. whether they should be the ones to decide on the outcome or not. Some participants who did not contribute may well have been expressing their view that they should not be the decision-makers. However, this is distinct from the participant not having their own individual notion of what would have been a just outcome.

## **2. Evaluation of existing studies**

A selection of empirical studies on RJ will be examined in this section, which have been analysed in an attempt to address the following research questions:

*Research question 5: Do stakeholders mediate between different theories of punishment and ideas of justice during the restorative justice conference?*

*Research question 6: Are the stakeholders the main decision-makers as to the outcome? Why/why not?*

These studies have been drawn from amongst a large number of important RJ evaluations and have been selected as containing the most relevant data available, as outlined in the methodology in Chapter 1. The aim was to explore the extent to which there was evidence of practice which reflected the hypothesis which had been developed during the theoretical research (reiterated above). The analysis also identifies obstacles to RJ operating in the hypothesised way in practice.

As outlined in the introduction to this Chapter, no evaluations could be found which had recorded participants' philosophies of punishment and the extent to which the RJ process mediated between these views. Therefore, the focus has been broadened to an examination of the extent to which participants contributed their ideas to the outcome. Four jurisdictions have been studied for the secondary research: England and Wales; Northern Ireland; New Zealand and Australia.

#### The selection of the studies

This section will explain why the studies which are incorporated into the secondary research were selected. There is a particular focus on the selection of studies in England and Wales, as there is a plethora of studies of RJ in England and Wales and yet only one study has been identified as directly relevant for the purposes of this research, which requires some explanation.

#### *England and Wales*

Whilst there is currently no RJ scheme running in England and Wales which matches the integration of RJ into the criminal justice system found in Northern Ireland (as outlined in the previous chapter), there are numerous and varied RJ schemes running in England and Wales and there have been a number of studies undertaken of these schemes. The Methodology in Chapter 1 outlines briefly why most evaluations of RJ in England and Wales were ultimately not incorporated into

the secondary research, i.e. the studies which were not included in this secondary research were those which did not contain any identifiable information about contribution to the outcome agreement or plan (e.g. did not contain this information at all; or failed to distinguish between general participation in the conference and contribution to the outcome or plan); those which did not regularly involve participation of both victims and offenders; and those which addressed a model of RJ which was in any other way too far-removed from the conception of RJ preferred for the purposes of this thesis.

Ultimately, the only England and Wales study identified as relevant and which examined the issue of contribution to the plan was the evaluation carried out by Shapland et al (2004–2008). It will, however, be useful to provide some more detail about some of the key studies which are not incorporated into the secondary research, partly to fully explain the rationale behind not including them, and also because, whilst they do not provide data directly relevant to the focus of this research, there are important issues identified which provide useful background information.

A key evaluation undertaken by Newburn, Crawford et al (2002) on referral orders has not been included in the secondary analysis. This is because – as has been suggested in Chapter 1 – referral orders can more accurately be called “restorative practices”. Part of the reason for this stems from a finding in Newburn, Crawford et al’s evaluation, concerning the low levels of victim engagement:

The involvement of victims and in particular their attendance at panel meetings across the pilot areas has been both lower than was originally anticipated and significantly lower than comparative experiences from restorative justice initiatives around the world (Newburn, Crawford et al, 2002, p.41)

Even in the small numbers of panel meetings where victims were in attendance, their involvement was very limited – in fact more than half of the victims did not stay for the whole panel meeting. Of these, four-fifths were asked to leave by a YOT officer or panel member, rather than leaving of their own accord (2002, p.46). Newburn, Crawford et al found a difference in victim satisfaction levels between those who had felt more engaged in the process and those who had not:

Several victims said they were “annoyed” or found it “totally unacceptable” that they were asked to leave, particularly in cases where they received no further feedback about the outcome of the panel. Those victims who stayed for the entire panel meeting or who were subsequently informed about the contents of the contract largely agreed (78%) that the contract was fair. This suggests that where victims are included within all deliberations over contractual outcomes and informed about their contents they are more likely to be satisfied. (2002, p.46)

Therefore, whilst this study is not included in the secondary research, it did yield important findings about the importance of victim involvement in restorative processes, including deliberations as to outcomes, and its link to levels of victim satisfaction with the process.

Miers et al (2001) conducted a study focused on reconviction rates and cost-effectiveness, finding mixed results in relation to both issues: some schemes were cost-effective, some were not and likewise for their effect on reconviction (2001, p.82). The seven schemes varied in the type of RJ they employed (which may account for the mixed nature of the results), and included: family group conferences; face-to-face meetings between victims and offenders; general ‘victim awareness’ sessions; and initiatives in which offenders wrote letters.

The evaluators themselves regarded many of the schemes to fall outside the scope of RJ:

... most schemes made unambiguously 'restorative' interventions in relatively few cases. Direct (face to face) mediation was, as a proportion of all the referrals identified, a rare event, and even 'shuttle diplomacy' tended to occur in only a minority of referred cases. (Miers et al, 2001, p. ix).

Miers et al went on to state that "[w]here contact with victims was not a high priority there are serious doubts as to whether they could reasonably be called restorative justice schemes at all." (2001, p.vii). The scarcity of cases which were deemed even by the researchers themselves to constitute RJ, together with the minimal data available on contributions as opposed to general participation (which is unsurprising, given the focus of the evaluation), led to the decision not to incorporate this evaluation into the secondary analysis.

The evaluation in Miers et al did, however, cast some light on key issues for non-statutory schemes. In particular, there were funding issues for the schemes, mostly due to the fact that the schemes were not statutorily necessary and were not properly incorporated into the criminal justice system. They were "fragile":

Although some schemes have survived for many years, the overall impression was one of fragility. Schemes were vulnerable to funding cuts and often dependent on work 'beyond the call of duty' by small numbers of exceptionally committed individuals. Mediation work also became a low priority for some agencies when faced with problems in meeting statutory requirements ... As a result, numbers of referrals and interventions were often volatile from year to year. (2001, p.79)

Similar issues for the non-statutory schemes evaluated by Shapland et al were identified (Shapland et al, 2006, p.16), and are discussed further below.

The evaluation of Thames Valley Police Restorative Justice cautioning scheme by Hoyle, Young and Hill (2002) has also not been included in this secondary research. This was because there was not always a “reparation agreement” at the end of the session, with only one third of offenders interviewed having entered into written agreements at the restorative cautioning meeting (Hoyle, Young and Hill, 2002, p.44). Of these, many just involved a commitment to writing an apology letter (which also suggests that the victim may not have been present). There was also – unsurprisingly, given the minimal number of agreements – no data on contributions to the outcomes, all of which led to the decision not to include this evaluation in the secondary research.<sup>96</sup>

The evaluation of 46 RJ projects funded by the Youth Justice Board carried out by Wilcox and Hoyle (2004) focused mainly on reconviction rates. This evaluation has not been included in the secondary analysis because only a small percentage (13.5%) of interventions for which data was collected involved a direct meeting between the victim and offender (2004, p.5). Wilcox and Hoyle themselves noted that the 46 projects were varied and “not equally restorative” (2004, p.5), as well as going on to state: “the types of intervention offered by the 46 projects range from the ‘fully’ restorative (e.g. family group conference) to ‘mostly’ restorative (e.g. victimless conferences) to ‘partly’ restorative (e.g. victim awareness)” (2004, p.16). Additionally, whilst the evaluation did seek the views of participants where there had been a meeting, there was no data available in the report on participants’ contributions to any outcome agreement.

Another large-scale study not included here is that carried out by Strang, Sherman at al (2006), who conducted an evaluation of RJ conferences across four sites: Canberra (Australia), London, Thames Valley, and Northumbria. The aim of the studies was to test the effectiveness of RJ in reducing repeat offending and in

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<sup>96</sup> It is not suggested that a process without an outcome agreement cannot be “restorative”. These modes of RJ are simply not useful studies to use in evaluating the process of reaching outcome agreements.

providing victim benefits. This evaluation was not included in the secondary analysis because it looked at victims' views only and in addition, whilst for two of the studies examined there is data on victims' perception of their general participation in the process, there is no data on whether victims felt that they had contributed to the outcome agreements.

The more recent evaluation of the South Yorkshire Restorative Justice Programme by Meadows et al (2012) has also not been incorporated, as it mostly examined "street RJ" interventions rather than conferences and there was no relevant data available on contributions by participants in relation to the plan / outcome agreement. To clarify, it is not argued that agreements are crucial to any form of RJ, but that they are crucial to what is being examined about RJ in this thesis, i.e. its ability to offer a more coherent process of sentencing. Where there is no sentence equivalent in terms of an outcome agreement, then this means that there is no opportunity to consider the process by which an outcome was reached, and accompanying contributions by participants.

The only evaluation from England and Wales that is examined in this secondary analysis is therefore, as mentioned above, that conducted by Shapland et al (2004 – 2008). This evaluation looked at three RJ schemes: CONNECT; Justice Research Consortium (JRC); and REMEDI. The schemes were funded by the Home Office from 2001 to develop RJ under the Crime Reduction Programme, which had been launched in 1999. The evaluation ran from August 2001 until December 2006 and involved both interviews with participants and observations by the researchers. Only JRC ran a scheme routinely involving outcome agreements and therefore only the evaluation of JRC is relevant to the issue of the contributions of participants (Shapland et al, 2006, p.71), and it is hence this part of the evaluation which is analysed here. The referrals to JRC conferences were post-conviction and mostly pre-sentence and were made by probation or the court.

### *Northern Ireland*

One study from Northern Ireland will be examined in this section: that conducted by Campbell et al (2005). This extensive evaluation deals with conferences from 2004 – 2005, shortly after the implementation of Youth Conferencing in Northern Ireland (at the time of the research only in Greater Belfast, Fermanagh and Tyrone). Another key study of Youth Conferencing in Northern Ireland by Maruna et al (2007) was conducted shortly after the Campbell et al evaluation. This study has not been included in this section, as it focused on the long-term impact of conferences on participants, rather than their level of contribution to outcomes. However, Maruna's study did identify the importance of respect for stakeholder decision-making in conferences (2007, p.63) and is referred to in relation to this point in the secondary analysis.

### *New Zealand*

In respect of New Zealand, two particularly relevant studies have been identified, each of which provide information on rates of participation in conferences and in particular, the extent to which participants contributed to the outcome. Firstly, Maxwell and Morris (1993) carried out a study to assess Family Group Conferencing ("FGC"), shortly after it was introduced in New Zealand. This included interviews with victims as well as young people and their parents who had attended FGCs, asking questions such as: did you feel that you made the decisions?; how involved were you in reaching the decisions?; and in your view, who really decided? Secondly, Maxwell et al (2004) conducted research to identify features of best practice in the youth justice system in New Zealand and determine the extent to which the goals of the Children, Young Persons and Their Families Act 1989 were being met (2004, p.xv). The research involved interviews with young people, co-ordinators, families and victims as well as examination of file data in both a retrospective and a prospective study.

A further study of FGCs in New Zealand conducted by Maxwell and Morris (1999) looked at FGCs from 1990–91 and focused on whether or not FGCs can contribute

to the reintegration of offenders and to the prevention of reoffending (1999, p.6). Data was collected only from young people and their families for this study and the evaluation has not been included in the secondary analysis relating to rates of contribution. However it is referred to concerning the important link which was identified in this study between a lack of participation in the process, and an increased likelihood of reoffending.

### *Australia*

The Australian studies which have been examined are the RISE evaluations (*final report* Strang et al, 2011); and the evaluation of statutory youth conferencing in New South Wales by Trimboli (2000). These have been selected from a large number of Australian studies as significant evaluations each looking at one of the two main types of model used in Australia: the police-led, Wagga Wagga model (the RISE evaluations); and the statutory non-police-led model (the evaluation by Trimboli). They were also selected as including data on contributions to the outcome/plan, rather than just data on general participation in conferences.

The RISE evaluation of non-statutory, police-led RJ (Strang et al, 2011) compared the effects of standard court processing with the effects of non-statutory, diversionary, restorative justice conferences. The research focused on four types of offending: drink driving; juvenile property offending with personal victims; juvenile shoplifting offences detected by store security officers; and violent crimes committed by offenders aged under 30. The diversionary conferences involved a meeting between the offender and supporter(s), the victim (there was a personal victim in only the Juvenile Personal Property and Youth Violence conferences: Strang et al, 1999, p.119), a community representative, and a police officer who facilitated the conference and a written agreement was arriving at during the conference.

The RISE study involved both observations of the conferences and interviews with participants, with the data being collected for conferences held between 1995–2000. Overall, observations carried out found higher levels of coercion and domination of the offender in court, together with lower levels of offender contribution and overall time spent speaking. It is perhaps unsurprising that compared to the court process, restorative conferences allowed more contribution from the offender.

There were direct, personal victims in Juvenile Personal Property and Youth Violence cases only and so references to data about victims from the RISE evaluation concerns these two groups. The RISE final report does not contain detailed information on victims' responses and therefore figures relating to the contribution of victims in the analysis below are taken from the earlier RISE progress report (Strang et al, 1999).

Trimboli's (2000) report focused on New South Wales Youth Conferences, for which the legislatively-defined purpose is to make decisions and to determine an outcome plan regarding the young person (Young Offenders Act 1997, Part 5, Division 1, Section 34(2)). The study carried out by Trimboli involved a total of 969 participants (263 victims, 353 offenders and 353 support persons of offenders) from 391 conferences held in NSW between 24<sup>th</sup> March and 20<sup>th</sup> October 1999. Information on the contribution of conference convenors was not collected as part of this study, so there is only information available on victims and offenders. A short questionnaire was completed at the end of their conference and participants were asked, *inter alia*, whether the conference took account of what they said in deciding what should be done.

Having identified the studies which are to be examined, the following section sets out the key themes which were identified during the research.

## Contribution to the outcome by victims

In England and Wales, observations by Shapland et al found high levels of contribution by victims, with nearly all victims (92%) contributing to the discussion of the conference outcome (2006, p.62). Similarly, in Northern Ireland, Campbell et al found high levels of victim involvement. They found that nearly all victims (96%) were engaged either “a lot” or “a bit” in devising the conference plan (2005, p.80–1). In terms of deciding the plan, victims were observed to be involved in 87% of cases (43% “a lot” and 44% “a little”) (2005, p.97). Only a small percentage (13%) of victims were observed to be involved in making suggestions for the plan “not at all” (2005, p.96).

In Australia, both the research carried out by Strang et al (1999; 2011) and Trimboli (2000) found reasonably high levels of contribution by victims. The research carried out by Trimboli (2000) included asking participants whether the conference took account of what they said in deciding what should be done, with 93.7% of victims agreeing or strongly agreeing (52.5% strongly agreed).

There was some variability identified by Strang et al between the categories of victims they had examined. The majority (91.2%) of Juvenile Personal victims reported feeling as though the conference took account of what they said in reaching a decision, whereas only 69.2% of Youth Violence victims reported this (Strang et al, 1999, p.122–3). A possible link could be drawn between this and the higher expectations of being able to contribute indicated by Youth Violence victims: victims were asked whether they attended the conference to have a say in the resolution and 82.9% of Juvenile Personal Property victims said that they did so. A higher percentage of 92% of Youth Violence victims said that they did so (Strang et al, 1999, p.121). It may be that Youth Violence victims did not have their higher expectations met.

Unlike the other jurisdictions, the early evaluation of Family Group Conferences in New Zealand carried out by Maxwell and Morris (1993) found low levels of

contribution by victims, who were hardly ever seen as having been involved in making the decision: “The victim was rarely identified by either the parents, young people or researchers as having made the decision” (Maxwell and Morris, 1993, p.114).

Low levels of offender contributions were also found by Maxwell and Morris (1993), as detailed below. However, notably there were much higher levels of victim dissatisfaction: only 9% of offenders were dissatisfied with the outcome, compared with about half of the victims interviewed being dissatisfied. This might indicate a difference in levels of expectation as to their role in the conference, with victims perhaps having higher expectations of being able to influence the outcome, as well as reflecting the fact that victims tended to be even less involved than offenders. Maxwell and Morris note:

since for a significant number (40%) of FGCs attended by victims, there were strong reservations expressed about the FGC outcome, this raises questions about the extent to which they were fully informed that, when they were present at an FGC, their agreement was necessary for the outcome to be accepted. (1993, p. 121).

Observations backed this up – the researchers found that a failure to ascertain whether or not the victims agreed was fairly common. The high rate of overall agreement found is therefore odd, as remarked on by Maxwell and Morris: “[t]hus, although 95% of the FGC cases in our sample are recorded as having had an ‘agreed’ outcome, this does not sit well with the high levels of dissatisfaction expressed by victims” (Maxwell and Morris, 1993, p. 121).

The low levels of victim involvement in New Zealand did appear to improve over time as conferencing became more established (Maxwell et al, 2004). This improvement, however, was not as substantial as the improvement in the rates of contribution of offenders (discussed below). In the 2004 evaluation, observers recorded the victim as being one of the main people making decisions in 68% of

cases (2004, p.157), whilst only 55% of the victims interviewed agreed that they felt involved in making the decision (although they only actively disagreed with this statement in 25% of cases: 2004, p.251). Slightly different results from observations were obtained when researchers recorded who they felt were the main people involved in determining the final decision, with the victim being named in only 45% of cases. This is compared with the young person being identified in 72% of cases; the family in 84% of cases; the co-ordinator in 56% of cases; and the police officer in 75% of cases. Whilst victims appeared to have become more involved in FGCs by the 2004 evaluation, they still appeared to be the least involved of all participants.

#### Contribution to the outcome by offenders

In England and Wales, high numbers of adult offenders (90%) contributed to the discussion of the conference outcome (Shapland et al, 2006, p.62). However, young offenders in the Northumbria youth final warning conferences were less likely to contribute than adult offenders, with 79% doing so (2006, p.62). This might be indicative of the difficulties in ensuring that young people involved in conferences have their say. Indeed, concerns about power imbalances in a conference setting involving young people was something touched on by Campbell et al (2005, p.143) and has also been highlighted by Maxwell and Morris (1993).

Observations of Northern Ireland youth conferences by Campbell et al (2005) showed high levels of contribution by offenders, finding 89% of young people were engaged either "a lot" or "a bit" in devising the conference plan (2005, p.80–1). Similarly, in 92% of cases, offenders were observed to be involved in deciding the plan "a lot" (51%) or "a little" (41%) (2005, p.97). However, when it came to contributing their own ideas, whilst the majority of offenders were observed to do so, there were still 22% of cases where they were "not at all" involved in making suggestions for the plan.

Overall, whilst the amount of involvement of offenders in Northern Ireland was often “a bit”, rather than “a lot”, there do seem to be generally high numbers of offenders engaged at some level. However, the relatively high numbers of offenders contributing needs to be read alongside the findings by Campbell et al of a general imbalance between the levels of contribution by participants, as explored further in relation to the contribution rates of the Criminal Justice officials, below.

High levels of contribution by offenders were found in the Australian research carried out by Trimboli (2000). This showed 89.2% of offenders agreeing or strongly agreeing that the conference took account of what they said in deciding what should be done. Notably, however, offenders were significantly less likely to say that they strongly agreed: only 28.4% of offenders strongly agreed, in contrast with 52.5% victims and 46.5% support persons strongly agreeing.

The research carried out by Strang et al (2011) in Australia found reasonably high levels of contribution by offenders, with between 69.8% – 73.1% of conference offenders feeling that their treatment took account of what they said. In addition, 70.7% – 81.1% of Drink Driving, Youth Violence and Juvenile Property (security) conference offenders felt that they had some control over the outcome. However, the figures for Juvenile Personal Property offenders showed only 60.5% of conference offenders felt that they had some control over the outcome (compared with 62.2% of court offenders) (Strang et al, 2011, Chapter 5). The positive results were therefore not across the board for offenders, with some variation in relation to offence type. The fact that the vast majority (91.2%) of Juvenile Personal Property victims felt that the conference took account of what they said in reaching a decision, together with the lower numbers of offenders from this category who felt that they had some control over the outcome, indicates that these conferences may have been weighted towards contributions by the victim.

Low levels of contribution by offenders were found in New Zealand by Maxwell and Morris (1993). In particular, when interviewed, young people mostly thought that it was their family who had decided on the outcome (32% of young people thought this), and only 16% of young people said that they themselves had made the decision (although notably there was a relatively high rate of missing information, as some of those interviewed gave no clear response to these questions). Maxwell and Morris concluded: “[t]he FGC process, therefore, can not generally be said to be empowering young people” (1993, p.113). However, despite concerns about the process of decision-making, overall levels of satisfaction with the outcomes were high, with only 9% of young people expressing dissatisfaction with the outcome.

The 2004 evaluation by Maxwell et al found an improvement on rates of contribution for offenders from the earlier study by Maxwell and Morris (1993). Maxwell et al found reasonably high numbers of young people able to have their say in both observations (86%) (2004, p.131) and interviews (75%) (2004, p.123). High levels of agreement were also apparent: observers recorded that the young person agreed with the decision in 94% of cases (2004, p.131) and in interviews, 73% of young people said that they did so (2004, p.123). Notably, however, there was a substantial discrepancy between observed and self-reported levels of agreement, which – it is argued below – might indicate some degree of coercion being exerted on some young people. As such, a distinction can usefully be made between formal involvement and substantive involvement in determining and agreeing to outcomes.

#### Contribution to the outcome by criminal justice officials

There was no particularly relevant Australian data relating to this issue in the evaluations by Strang et al (2011) or Trimboli (2000). The evaluation by Shapland et al in England and Wales did not find any particular over-involvement by criminal justice officials. They looked at the extent to which JRC facilitators stepped back and allowed participants to arrive at an outcome and found that participants were

mostly able to discuss the outcome without much direction from the facilitator. However, they did find that “facilitators clearly played some part: in 26 per cent they had stepped back to some extent and in 36 per cent they had stepped back quite a lot - but not totally” (2006, p.60). As noted by Campbell et al (2005), some level of involvement might be expected, given that facilitators are required to help participants agree to an outcome. Similarly, Shapland et al point out that facilitators may not step back entirely because lay participants may not easily adapt to their role in the outcome stage:

Participation by lay people in deciding what should happen is not generally encouraged in criminal justice decision making in England and Wales. So this part of the conference or mediation may be particularly unusual for participants. (Shapland et al, 2006, p.60)

More generally, Shapland et al found that participants were happy with the level of involvement of the facilitator. Most participants felt that the facilitator had let everyone have their say (88% of offenders and 93% of victims); and only 5% of offenders and 2% of victims thought that the facilitator was in control of the conference “too much” (2007, p.26).

Unlike in England and Wales, criminal justice officials in Northern Ireland appeared to have a substantial role in contributing to outcomes. Observations carried out by Campbell et al identified the co-ordinator as having the most input in devising the plan (in over a third of conferences) (2005, p.79). This tallied with the views of participants, who were asked to identify the person who they thought had most say in agreeing the plan. The most commonly named participant was the co-ordinator, held to have had the most say by 41% of young people and 37% of victims. This suggests that even where victims and offenders were engaged and contributing to the plan, criminal justice professionals were more vocal.

Further, in over half of the conferences where there was an imbalance in contributions, this was caused by a greater than expected contribution by a

criminal justice professional. Observations found that in a small number of conferences (24, or 14%), one or more participants should have had less say. Of these 24 conferences, it was found that in seven the co-ordinator should have had less say, and in a different seven, the police officer should have had less say (Campbell et al, 2005, p. 79).

Additional observations found that co-ordinators were involved in making suggestions for the plan in most cases, with only 2% involved “not at all”. Similarly, co-ordinators were only involved “not at all” in deciding the plan in 1% of cases (they were involved “a lot” in 79% and “a little” in 20% of cases) (Campbell et al, 2005, p.96). For their part, police officers were observed to be involved in making suggestions for plans to a lesser extent than co-ordinators, but still more than might have been anticipated, with 58% of police officers involved “a little” and 18% involved “a lot”. Police officers were also involved in deciding the plan, although not to the extent that co-ordinators were: 48% were involved “a little” and 16% were involved “a lot”.

Overall, both co-ordinators and police officers appeared to have had more input into decision-making concerning the plan than might be expected, with Campbell et al noting: “though it is crucial to facilitate contributions when devising the plan, it is important that this does not remove from others the more restorative or healing elements of involvement and decision-making power” (2005, p.79). Co-ordinators appeared to contribute more than police officers, although police “over-involvement” was still an issue, and included occasions of police officers being observed to suggest more plan content (2005, p. 97). As Campbell et al remind us, the co-ordinator having a lot of input “might be expected given that the co-ordinator is required to facilitate agreement of the plan” (2005, p.79). However, over-involvement by police officers – whilst occurring less frequently – is more difficult to explain.

In New Zealand, Maxwell and Morris found that a number of parents interviewed (19%) thought that the professionals alone had decided the outcome (1993,

p.113), although it should be noted that there was considerable variation in answers across different geographical areas: a range of 9%–31% saying that professionals made the decision (1993, p.114). The variability in experiences suggests that at this stage, RJ practice was not particularly uniform in terms of the role of the professionals and the extent to which families were involved in decision-making (this was early days in terms of the implementation of RJ in New Zealand).

The area variations in relation to the content of the outcomes are also interesting in relation to the role of the professionals, with Maxwell and Morris noting (1993, p.99–100):

area variations in outcomes were considerable. Curfews, for example, were never used in one area but were imposed in close to a half of the cases in another. ... To some extent, variations in both type and severity of outcome can be explained by differences in the FGC cases in each area ... But other differences in outcomes must reflect the different approaches of the professionals in the various areas in either the type of information they provided to the families or the way in which that information was presented ... In this way, parents' 'decisions' can be constructed through professionals' management of information.

The influence of the professionals was identified by Maxwell and Morris at various stages in the FGC process. For example, co-ordinators steering families in a particular direction by suggesting certain penalties during the conference, or through the professionals' selection of information used for briefing prior to the FGC (1993, p.100). Maxwell and Morris did, however, also find that some co-ordinators provided no information about penalties, saying that they cannot influence the decision at all (1993, p.101).

The sometimes starkly different approaches by co-ordinators could be partially explained by the conflicting nature of co-ordinators' duties. On the one hand, their role requires neutrality and as such, they should not contribute to outcomes;

however, they might be motivated in practice to exert influence on the decision-making process for various reasons, such as to ensure that the plan was accepted by the court.

The later New Zealand study by Maxwell et al (2004) found high levels of contribution from both co-ordinators and police officers in determining the final decision. The contribution of police officers appeared to have increased since the earlier (1993) study, with police officers observed to be one of the main people determining the final decision in 75% of cases, compared with co-ordinators in 56% of cases.

The role of the co-ordinator was examined in detail in this evaluation, with Maxwell et al being critical of the inappropriate domination of the conference by some co-ordinators (which happened in about one in ten conferences: 2004, p.169), as well as criticising the number of conferences in which the co-ordinators were seen as one of the main people involved in determining the final decision:

in over half the conferences the youth justice co-ordinator was seen as one of the main people involved in determining the final decision. This perhaps suggests a rather more central role in the outcome than is appropriate for one facilitating a process designed to ensure others' involvement in it. (2004, p.169)

Similarly, the over-involvement of police officers at the conferences was also criticised by Maxwell et al:

Observers rated [police youth aid officers] as being one of the main people involved in the decision in three-quarters of the conferences. Again, this apparent extent of involvement in decisions seems, on the face of it, contrary to the intention of the 1989 Act to give the responsibility for decisions, as far as is possible, to those most affected by the offending ... In one in ten of the conferences, the youth aid officer was seen as inappropriately dominating the discussions. (2004, p.170)

Whilst, overall, Maxwell et al observed that things had improved since the previous research in 1993, with those most affected by the offence having more say in decision-making, this was still only reported by about half of young people interviewed. Further, the criminal justice professionals involved still appeared to play a significant role in decision-making.

### Coercion of participants

In JRC cases in England and Wales, both the victim and offender had to agree on the contents before the agreement was finalised. However, when interviewed months later there was a percentage of victims (20%); and a small percentage of offenders (10%) who said that they thought the agreement was not really fair or not at all fair (Shapland et al, 2007, p. 30). This may be indicative of some level of coercion, whether intentional or not.

Whilst observations of conferences found that in 94% of cases there was a lot of, or quite a lot of, agreement on the outcome (2006, p.62), participants' satisfaction with the conference dropped over time.<sup>97</sup> Weeks after the conference, satisfaction levels were between 80% and 90%, but several months after the conference these levels had dropped to between 70% and 80% (2007, p.36). This could be for a number of reasons, however one possibility is that participants were not fully committed to the outcome, which in turn might bring into question the extent to which there was truly voluntary agreement on the plan. This may have led to a gradual decline in satisfaction once there had been time for reflection away from the influence of criminal justice professionals. However, it is unclear whether this was the case for these particular participants.

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<sup>97</sup> Shapland et al point out that theirs is not the only study to find this decrease in levels of satisfaction over time: "Previous studies have suggested that memories of restorative justice fade and become slightly more negative over time (Ministry of Justice, 2005)" (2007, p.36).

In Northern Ireland, Campbell et al (2005) found relatively low levels of obvious coercion into agreement. Very few victims interviewed said that they felt they “had to” agree to the plan (5%); and 14% of young people felt that they “had to” agree (2005, p.83). Whilst these figures are not high, the number of young people feeling coerced into agreement is noticeably more than victims – nearly three times as many. Campbell et al suggest that this could be indicative of a power imbalance in some conferences, due to age (as outlined earlier, above), as the majority of victims in their sample were adults (2005, p.83).

During their evaluation of youth conferencing in Northern Ireland, Campbell et al identified that awareness of the court or PPS having to accept the plan might exert some form of coercion on participants:

... in several conferences it was apparent that pressure to agree derived from knowledge that the court required a significant content before the Magistrate would approve the plan. In one instance the young person agreed to engage with a local community service whilst remarking, “Don’t want to do it...does my head in”. The context of negotiations indicated that though the young person did not wish this activity to be included s/he nevertheless hoped for court approval of the plan. (2005, p.84)<sup>98</sup>

This was something which was also identified during the course of the fieldwork in Northern Ireland, and suggests that the outcome was not always voluntarily agreed to: “In these instances, questions arise as to the authenticity of the young person’s consent” (Campbell et al, 2005, p.84).

In relation to the early study of FGCs in New Zealand undertaken by Maxwell and Morris (1993), lack of participation appeared to be the key problem, rather than coercion into agreement. However, Maxwell and Morris do note:

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<sup>98</sup> Cf. Maruna et al (2007).

it is likely that the professionals' influence on the decision operated in more subtle ways. Professionals may have shaped the information given to families in a way which 'constructed' that decision and which in effect gave the families little real choice or voice. That is, parents may have been operating within a pre-defined framework. Davis (1985) refers to this as a kind of 'theft' of decision-making. (1993, p.114)

The study does not make explicit the extent to which this happened, but where this kind of influence on decision-making occurred, this could be construed as a subtle form of coercion being exerted on lay participants, steering them in a particular direction. This indicates that there were occasions when matters moved beyond subtle coercion into agreement, to a complete failure to involve victims in decision-making, which has been identified above in terms of the more general low levels of victim involvement.

The differences between observed agreement and participants' own views about their level of agreement may also indicate some degree of coercion of participants. Maxwell and Morris observed that young people had the opportunity to have their say in 86% of cases (2004, p.131), whilst only 75% of young people reported this in interviews, and even fewer (56%) felt involved in making decisions (2004, p.123). More starkly, in terms of agreement with the decision, observers recorded that the young person agreed with the decision in 94% of cases (2004, p.131), which is in sharp contrast to the 73% of young people who said in interview that they did so (2004, p.123). The victim was recorded as being one of the main people making decisions in 68% of cases (2004, p.157), whereas only 55% of victims interviewed agreed that they felt involved in making the decision (2004, p.251).

Notably, this interview data is taken from the prospective sample who were interviewed either at the conference or as soon as practicable afterwards. Therefore these results cannot be explained by the levels of satisfaction with conferences deteriorating over time (as noted by Shapland et al). Rather, these results show that a number of victims and offenders may have been agreeing with

some reservations and potentially feeling some degree of coercion; this could have led them to say in interview that they did not in fact agree.

In Australia, a small proportion of victims interviewed in the evaluation by Strang et al (1999) said that they felt pushed into things that they did not agree with at the conference: 2.9% of Juvenile Personal Property victims and a higher proportion of 12.5% Youth Violence victims (Strang et al, 1999, p.122). However, in contrast to these relatively low figures, are the reported levels of satisfaction with the outcome. Whilst 80% of Juvenile Personal Property victims said that they were satisfied with the outcome, only 56% of Youth Violence victims agreed with this statement (1999, p.126). Therefore nearly half of Youth Violence victims were not satisfied with the outcome, which may indicate some level of subtle coercion where they felt that they had no alternative but to agree, or a failure to adequately ensure all parties truly consented to the outcome.

#### Analysis of the secondary research

##### *Contribution of victims and offenders*

Very high levels of contribution by both victims and offenders were found in England and Wales and Northern Ireland. The Australian studies found reasonably high levels of both victim and offender contributions. However, in the early study of New Zealand FGCs (Maxwell and Morris, 1993), very low levels were found, with victims and offenders hardly ever contributing. The later (2004) New Zealand study found that the number of victims contributing had increased, but not to the levels found in the other jurisdictions. The number of offenders contributing, however, had increased dramatically to levels similar to those found in the other jurisdictions.

The discrepancy between New Zealand and the other jurisdictions might be due to its earlier inception than the schemes from the other jurisdictions, with the results from the 1993 evaluation being attributable to a large extent to breaking new ground and associated "teething problems". The RJ process would be unfamiliar to participants, even including the professionals involved in the earlier days of its

implementation, and there might have been wide variance in expectations as to the aims and scope of the process.

The muted improvement in contribution rates for victims found in the later New Zealand evaluation is likely to be explicable by reference to the nature of FGCs - there is a strong emphasis on the involvement of the offender's family in the decision-making process and this may mean that decision-making is focused more around the offender and his or her family, which may leave less room for the views of victims.

In relation to the high rates of contribution by victims and offenders in the other jurisdictions (and offenders in the later evaluation of New Zealand FGCs), this seems on the face of it evidence of the achievement of the empowerment of participants: they appear to have the opportunity (in most cases) to contribute their philosophies of punishment and ideas about justice to the outcome/plan. However, on closer examination, a more complex picture emerges. In particular, whilst contribution rates were high for these jurisdictions, the *level* of contribution was often minimal – this raises the issue of the balancing of the levels of contributions amongst participants.

For example, Campbell et al's study of Northern Ireland (2005) found that 92% of offenders were involved in deciding the plan. However, only 51% were involved "a lot"; and figures for whether offenders contributed their own ideas were much lower, with 22% of offenders "not at all" involved in making suggestions for the plan. In addition, in Northern Ireland, in over half of the conferences where there was an identified imbalance in contributions, this was caused by a greater than expected contribution by a criminal justice professional. Plus, both observations and interviews identified the co-ordinators as having the most input in devising the plan.

For an RJ conference to operate as a mediation process between stakeholders, the participants must have an equal voice. Whilst there were high rates of

contribution by victims and offenders identified across most of the secondary data, the contributions were not always on an equal footing with other participants. Where there was an imbalance in the contributions – particularly where (as discussed further below), the views of the criminal justice officials carried more weight – then the conference cannot reasonably be said to have operated as a mediation process between stakeholders' ideas – or at least, not a fair mediation process.

#### *Contribution of criminal justice officials*

There was no data for Australia and this was not identified as an issue in England and Wales, where some involvement by criminal justice officials in decision-making was identified, but not over-involvement (although the data on their exact contribution was not particularly detailed). In Northern Ireland, however, substantial contribution by co-ordinators was found, together with more contribution than expected by YDOs. Similarly, both New Zealand studies found high levels of contributions by both co-ordinators and, to an even greater extent by the 2004 evaluation, police officers.

Where this was identified as an issue (in Northern Ireland and New Zealand), this could have been due to the factors such as criminal justice officials being aware that the plan would need to be ratified by the court (in the case of both New Zealand and Northern Ireland) or the PPS (in the case of Northern Ireland). More generally their very position as criminal justice officials, with all the expertise which goes with that, might have created a kind of “knowledge imbalance” as identified by Campbell et al (2005, p.144):

‘Knowledge imbalances’ may occur when the young person and their supporter(s) have little idea on what to suggest for a conference plan, in terms of what is both available and appropriate. In several conferences, the co-ordinator and/ or other professionals were observed to dominate on occasions where other participants were not forthcoming in making suggestions for the plan.

It might have been difficult for the professionals in such circumstances to refrain from offering more contribution than was perhaps ideal for the process. As Maxwell et al point out (2004, p.172): "These data indicate that the role of helping people to make their own decisions is easily converted by professionals into that of becoming a principal decision-maker". Where the criminal justice officials are the principle decision-makers, then the RJ process is not operating as a mediation process between the philosophies of punishment and ideas of justice held by the stakeholders.

#### *Coercion of participants*

There were varying levels of coercion found across the four jurisdictions. There was some possibility of coercion being an issue in England and Wales, suggested by the rates of satisfaction with the conference declining over time. In Northern Ireland, relatively low levels of overt coercion were found, although coercion through awareness that the Court or PPS would have to accept or reject the plan was identified as a possible issue. In Australia there was a degree of coercion indicated by the fact that nearly half of Youth Violence victims were not satisfied with the outcome. Similarly, in New Zealand, coercion was indicated by the fact that in 40% of FGCs attended by victims, the victims were not happy with the outcome. There were also concerns expressed by Maxwell et al about professionals constructing the decision, as well as differences identified between observed agreement and participants' own views about their level of agreement which could indicate subtle coercion into agreement.

Coercion of participants is probably linked to the influence of criminal justice officials and therefore deriving from the same reasons. For example, coercion might take place where participants are not forthcoming with their own ideas, or where they are suggesting elements which seem disproportionate to the offence.

Another key issue in relation to the coercion of participants is the balance of power in a conference. For example, whilst low levels of overt coercion were found in Northern Ireland, it is notable that nearly three times as many young

people felt coerced into agreeing than victims. This suggests that there was more often a power imbalance which worked against offenders.

Clearly, where participants are not freely agreeing to the outcome/plan, but are being coerced in some way, then they are not free to express, and have properly taken into account, their own views about punishment and justice. An RJ conference featuring coercion of participants, whether that be due to efforts to devise a plan which will be acceptable to the Court, or whether that is due to a power imbalance, is not operating as a fair mediation process between the philosophies of punishment and ideas about justice held by the stakeholders. It is either prioritising external notions of justice (in the case of concerns about the plan being ratified, or proportionate); or giving unequal weight to stakeholders' views (in the case of a power imbalance).

### **3. Discussion**

The secondary research undertaken was aimed at exploring the hypothesis:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

It has been argued in earlier chapters, and in most detail in Chapter 4, that where RJ operates as such, it has the potential to be a more coherent process of decision-making than the traditional sentencing process. For the mediation process to operate fairly and effectively, the stakeholders must be equally empowered to contribute their ideas to the outcome/plan, and the criminal justice officials should play a limited role (not being parties most affected by the offence).

## Synthesising the data

Collating data from the secondary research has proved challenging. It has involved looking at a number of different evaluations from four different jurisdictions dealing with different types of RJ practices, including: statutory and non-statutory RJ; RJ conferences for youths; RJ conferences for adults; and conferences dealing with different types of offences. The secondary evaluations have been carried out at different times (from 1993–2014) and have utilised different methods, asking different questions. The data on rates of contribution from Shapland et al (2007); Campbell et al (2005); the two New Zealand studies and Strang et al's RISE evaluation in Australia (2011) all come from both observations of conferences and interviews with participants. The data on contributions from the evaluation by Trimboli (2000) comes from interviews only.

The difference in the context within which each of the RJ schemes evaluated is operating is important to note and has been examined in Chapter 5. In particular, in both Australia and New Zealand the introduction of RJ was in the context of both jurisdictions having a history of indigenous restorative justice practices (O'Mahony and Doak, 2008) and efforts to make justice services more culturally appropriate (Maxwell and Morris, 1993; Trimboli, 2000).<sup>99</sup> Whilst there is an argument that cultural context is relevant to Northern Ireland in relation to Brehon law (McEvoy and Mika, 2002), the more immediately apparent issue concerning the introduction of RJ into Northern Ireland is the transitional context within which this was done – and the associated issues of state legitimacy, as highlighted in Chapter 5 (see also Doak and O'Mahony, 2011). The situation is different again in England and Wales, there being no fully-fledged RJ conferencing system in a similar vein to those in Northern Ireland, New Zealand and Australia. The RJ schemes examined by Shapland et al were non-statutory schemes operating alongside normal court processes.

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<sup>99</sup> The extent to which this has been achieved in Australia through the implementation of the Wagga Wagga model has been questioned (see Blagg, 1997; 1998).

The differences between the evaluations from these four jurisdictions do present challenges, as it is difficult to accurately collate data from such disparate sources. For example, the four jurisdictions examined have different cultural and political histories (as identified to an extent in Chapter 5), which might impact on the implementation and practice of RJ in those jurisdictions (O'Mahony and Doak, 2008). However, the schemes which were examined were selected on a particular basis, as identified at the start of this Chapter and in the Methodology in Chapter 1. That is, they were selected as featuring restorative justice conferences which produced an outcome/plan and involved both victims and offenders in the process. They were also selected as providing data on contributions to the outcome/plan (as distinct from general participation). Therefore, all schemes had these factors in common and despite variations in the schemes and jurisdictions, it was possible to collate and synthesise the data to reveal common issues across the studies, which bear on the hypothesis. It may not always be possible to gauge the extent to which these issues occur in RJ practice from the available data. However, the identification of these issues – which impact on the viability of a conference operating as a mediation process between philosophies of punishment – constitutes an important finding.

#### Discrepancies in the findings

Perhaps unsurprisingly, given the above, there were not entirely uniform findings across all of the jurisdictions. The majority of the studies examined in the secondary research showed high levels of contribution to the outcome/plan by victims and offenders, however this was not always quite as considerable a contribution as first appeared from the data.

There were discrepancies between the findings in the two New Zealand studies in that the study carried out shortly after the introduction of FGCs (Maxwell and Morris, 1993) showed low levels of contributions by victims and offenders, and the further evaluation carried out in 2004 showed a marked improvement over time (although less so in respect of victims). This is most likely to be best explained by

the early adoption of RJ in New Zealand and the fact that it was breaking new ground, globally. It appears that as FGCs became established within New Zealand's criminal justice system initial problems of empowering stakeholders became less pronounced as the operation of the new system perhaps became better understood and more developed.

#### Implications for the hypothesis

Despite the discrepancies outlined above, there was a clear pattern across the empirical research showing the difficulty in achieving RJ practice which operated in the way which has been hypothesised. Indeed, a number of factors which could undermine the operation of RJ as a mediation process between ideas were identified – to a greater or lesser extent – in each of the jurisdictions examined for the secondary research. They were: the low *level* of contribution of victims and offenders (despite ostensibly high rates of contribution, the level of contribution was often small, as outlined above in the findings); more contribution than expected of criminal justice officials and coercion of participants.

The *level* of contribution of the victims and offenders (i.e. the amount that each individual victim or offender contributed; rather than the number of stakeholders who contributed) was an obvious issue affecting the viability of the hypothesis. This is because where participants were not able to properly contribute effectively to the outcome, then the process was not operating as a fair mediation process between *their* philosophies of punishment and ideas of justice. An exception would be where participants were perhaps content with what had already been suggested by another person and therefore chose not to contribute anything further. The extent to which this was the case could not be discerned from the available data.

As discussed above, most of the secondary data (with the exception of the early evaluation of New Zealand) appeared to demonstrate reasonably high contribution rates of victims and offenders. There were, however, other indicators

in the data which suggested that even where there had been contribution by victims or offenders, this did not necessarily mean that they were empowered decision-makers. For example, the level of contribution was often minimal, e.g. Campbell et al (2005) found in Northern Ireland that 92% of offenders were involved in deciding the plan. However, only 51% were involved "a lot". This raises the issue of the *level*, or extent of a participant's contribution – and indeed the balance of contributions amongst participants. So, for example, whilst Campbell et al had found high levels of contribution of both victims and offenders, they also found through both observations and interviews that the co-ordinator often had the most input in devising the plan.

For all of the secondary research, at least one of the factors which could undermine the operation of RJ as a mediation process between ideas was identified as occurring to at least some degree. In most cases, there was more than one factor and it was to a significant degree. All of the secondary research showed that some degree of coercion of at least some participants had occurred; in both Northern Ireland and New Zealand, higher than expected contribution rates of criminal justice officials were found; and whilst reasonably high rates of contributions to plans were found in most of the secondary research, this was – as mentioned above – often of a low *level* and sometimes occurring in the context of power imbalances.

The empirical research suggests that there is a risk of decisions being constructed in accordance with external notions of proportionality, or ideas of justice held by criminal justice officials, rather than arrived at by a mediation process between ideas held by stakeholders (as suggested in the hypothesis). This is particularly evident where a combination of the above factors is at play. In such cases, the outcome/plan would be representative of a philosophy (or combination of philosophies) of punishment held by criminal justice officials, rather than the best possible representation of stakeholders' ideas of justice. The outcome might therefore reflect notions of justice held by facilitators and police officers involved in the conference, or judges and prosecutors verifying the plan, or indeed criminal

justice officials attempting to second-guess the philosophy of punishment held by *other* criminal justice officials.

The fact that the over-involvement of criminal justice professionals was such a common issue, occurring extensively in New Zealand and Northern Ireland (there simply being no data in respect of this in the Australian studies<sup>100</sup>), suggests that it is difficult for RJ not to remain tied – at least to an extent – to the state and the idea of an external, state-held notion of justice. It would appear that despite healthy-looking data on contribution of participants, there is a serious risk of only superficial decision-making power being ceded to stakeholders. As such, for some RJ practice, there is a risk of the process being an “empty ritual” of participation (Arnstein, 1969) – where the stakeholders are involved, but insufficiently empowered to affect the outcome.

Where decisions are constructed, as outlined above, then the mediation process between different philosophies of punishment is not conducted by those most affected by the offence and the process is not more coherent than traditional sentencing. This is because the process becomes about the professionals’ philosophies of punishment and notions of justice – or worse (being further removed from people actually present in the RJ process), their notion of the court’s, PPS’s or relevant business manager’s notions of justice, as they try to second guess what external notion of proportionality and justice they should try to enforce.<sup>101</sup> The plan may become “owned” by the professionals involved, rather than those most affected by the offence (Christie, 1977; Maxwell and Morris, 1993).

This means that the process becomes more akin to the traditional method of sentencing – i.e. control over decision-making lies more with the state – yet without the rule of law and due process measures which court sentencing

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<sup>100</sup> Although note Blagg’s criticism of Australian RJ as tending to give more power to police officers and other criminal justice officials, rather than stakeholders (Blagg, 1998)

<sup>101</sup> See Chapter 3 for a discussion of problems with the concept of proportionality.

enjoys,<sup>102</sup> without the benefit of trained judges or magistrates, and without the benefit of sentencing guidelines. Arguably, RJ practice can therefore sometimes represent a *less* coherent way of incorporating different philosophies of punishment in sentencing, where the empowerment of stakeholders is not achieved. This is compounded by the fact that in the traditional sentencing approach, the judge or magistrates have a clearly defined role to the extent that they are expressly supposed to be decision-makers. In contrast, the suggestion from these findings is that there is not always a clear understanding of the role of professionals in the youth conference decision-making process, there being evidence of differing practice in terms of the extent of involvement of facilitators and other professionals present, such as police officers. It could be argued that RJ conferences operating in this manner offer, in some respects, the worst of both traditional sentencing and RJ conferencing.

Overall, the findings do not entirely invalidate the idea of RJ mediating between participants' philosophies of punishment and ideas of justice, but they do make clear that there are a number of obstacles to this happening in practice. These findings would not have been identified by a purely theoretical consideration of this issue and it has therefore been useful to explore the practical operation of RJ across four different jurisdictions. This has identified areas of concern in terms of the empowerment of participants. This provides scope for reflection on the theory developed in earlier chapters, as well as highlighting areas in which practice could potentially be improved if RJ is to achieve what has been hypothesised here, i.e. provide a more coherent process for arriving at a sentence. The findings suggest the need for a fuller commitment to a process-driven model of RJ, rather than approaches which appear to view outcomes as pre-eminent and this will be highlighted in the next chapter, which concludes the thesis, synthesising the empirical research with the theoretical chapters.

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<sup>102</sup> See Ikpa (2007) for discussion of possible due process violations in RJ.

## CHAPTER 7: Conclusion

### **1. Summary of the research**

This thesis has examined the extent to which RJ can offer a solution to the problem of incoherence in sentencing in England and Wales. There is a large body of literature detailing the benefits of RJ and this includes much writing extolling the virtues of process-focused RJ (Barton, 2000; Braithwaite, 2002a; Marshall, 1999; McCold, 2000; Shapland et al, 2006). This literature tends to focus on the importance of the empowerment of stakeholders as essential to achieving restoration, usually by emphasising the voluntary nature of the process and that participants must be free either to forgive, or not; co-operate, or not; reconcile, or not; and show remorse, or not. None of these things can, it is argued, be imposed on participants and remorse and forgiveness in particular cannot be compelled (Braithwaite, 2002a; McCold, 2000).

This thesis makes a very specific contribution to this literature, by arguing that increased coherence can be added to the list of attributes of a process-focused model of RJ. This thesis addressed itself to the question of whether RJ can offer a more coherent process of sentencing (than current sentencing practice), the answer to which will be explained in more detail below in setting out the key findings (although, in short, the answer is “yes it can”). It has further been argued that a more coherent process of sentencing is a good in and of itself, i.e. that incoherence in the process of one of the most intrusive powers of the state is an inherently bad thing; and any increase in coherence is therefore fundamentally good. Beyond this, it has also been argued that such an increase in coherence can also achieve additional goods, in particular an increase in penal legitimacy. It may also be that a more coherent sentencing process will lead to other good outcomes. Ultimately, however, the main claim of this thesis is simply that process-focused RJ, particularly as conceptualised in this thesis, can increase coherence.

The thesis has been structured so as to clearly set out the conception of RJ relied on for the purposes of this thesis in the first chapter. This was important as there

are numerous different understandings and interpretations of RJ. In Chapter 2, the problem of incoherence has been identified and placed in context, and this has included consideration of different ways in which this incoherence might be tackled. Chapter 3 has developed the explanation of incoherence in sentencing, through discussion of different philosophies of punishment, advancing the argument that retribution and utilitarianism are fundamentally irreconcilable and developing Chapter 2's claims concerning the incoherence of the current sentencing process.

Having rejected other means of resolving the problem of incoherence in sentencing, RJ has been introduced as the most promising solution. Chapter 4 has explained in detail why RJ can offer a more coherent process and, in so doing, differentiates RJ from other forms of public engagement in sentencing, including deliberative democracy. This has been done to emphasise why RJ in particular, as conceptualised in this thesis, can offer a more coherent process.

Chapter 5 has explored RJ practice, looking at how the ideals relating to RJ which were outlined in Chapter 4 could be incorporated into a criminal justice system. It also examined RJ practice in the four jurisdictions which were considered in the course of the empirical research: England and Wales; Northern Ireland, New Zealand and Australia. This has provided important context for the empirical work set out in Chapter 6. This work examined existing evaluations of RJ in the aforementioned jurisdictions. The findings of the empirical research revealed a number of obstacles to RJ *in practice* mediating between participants' philosophies of punishment and ideas of justice and thereby operating in a manner which could increase coherence in sentencing. This demonstrated the importance of carrying out such empirical work, alongside the theoretical research, as such obstacles would not have been identified by a purely theoretical analysis, and these findings served to further highlight the need for, and the importance of, more emphasis on the empowerment of participants in RJ practice. This showed the usefulness of the theoretical research and its original argument

for RJ as a more coherent process of sentencing, as this provides a sound basis for the promotion of more process-focused RJ practice.

## **2. Key findings**

The key findings in this thesis are best examined in relation to the original research questions asked. The research questions and how they have been answered are set out below. These questions stem from one broad question: *Is the restorative justice process more coherent than the decision-making process in the traditional sentencing system?* Which, in short, has been answered in the affirmative.

Question 1: To what extent is the current sentencing system (particularly the process of arriving at a sentence) incoherent?

This thesis has identified substantial incoherence in the current sentencing system, particularly in the coherence of the decision-making process of sentencing. It has been argued that the increased focus on consistency over the last quarter of a century has helped to sideline the issue of coherence. Criticisms of a focus on consistency above coherence have been raised, and it has been argued that it is difficult, if not impossible, to achieve consistency without coherence in sentencing; and further that attempts to improve consistency, such as increasingly prescriptive sentencing guidelines (or, even more extreme, sentencing grids), can be self-defeating. That is, they may only serve to increase crude consistency rather than a true form of consistency. As such, it has been argued that attempts to increase coherence in sentencing should take pre-eminence over attempts to increase consistency.

Question 2: Where does this incoherence stem from?

The research undertaken has demonstrated that this incoherence mainly stems from s.142 CJA 2003 and the five purposes of sentencing. The five purposes are linked to incompatible philosophies of punishment – retribution and utilitarianism – and hence can pull in different directions, particularly in borderline cases where preferring one purpose may result in imprisonment; whereas preferring another purpose might not. It has been argued that there is unlikely to be any sentence

which could satisfy all five purposes, and this is effectively acknowledged in guidance to sentencers (Sentencing Guidelines Council, 2004). The guidance admits that sentences may not satisfy all five purposes and holds that it is up to the sentencer to decide between the purposes, and indeed decide the “manner in which they apply” (2004, p.3).

As such, s.142 CJA 2003 serves to increase incoherence in the process of sentencing, as sentencers “must” have regard to the contradictory purposes and there is no meaningful process by which they can decide between them where there is conflict. Sentencers are left to choose between competing purposes themselves and they must therefore either draw on their own notions of justice; or attempt to second-guess what notion of justice might currently be being championed by the government. In Chapter 4, it has been argued that stakeholders in an RJ process have a better claim to have their notions of justice done than other members of society (including sentencers), as they are most closely affected by the offence.

The second-guessing of the government’s notion of justice is even more problematic than sentencers employing their own notions of justice, as the government’s idea of justice is likely to be difficult to discern (if it even exists as a constant), meaning that sentencers may guess wrongly, or be guessing at something which is ephemeral or even non-existent, and the notion of justice ultimately represented in a sentence might belong to no identifiable person or body. This too is an incoherent process, as it lacks a meaningful, valid, method for selecting a particular notion of justice. Meaningful connections in the decision-making process are lacking, resulting in incoherence.

Question 3: What mechanisms are there for resolving this incoherence?

The solutions which were considered and rejected were: (a) that the sentencing system be reformed so that it operated on the basis of a single purpose of punishment; or (b) a detailed process be devised which clearly outlined all possible

scenarios for the prioritisation of different punishments. The latter was discarded as unworkable – it being questionable whether any such rationale could reasonably be arrived at, especially given the arguments identified against mixed theories of punishment in Chapter 3. Even if such a rationale could be devised, such a method would need to account for numerous variations in offences and offenders and would be likely to be far too unwieldy to be workable.

The possible solution outlined in (a) above was rejected as it was argued that preferring a single purpose would lack public support, as it would only accord with those members of the population who happened to share that ideal, and it was further argued that there are a variety of views as to which purpose of punishment is preferable (Frase, 2013; Hampshire, 1999). As such, basing the sentencing system on a single purpose of punishment would be likely to undermine penal legitimacy. It would also be overly prescriptive and thus too inflexible to be readily applicable to the vast range of offences and offenders with which the courts routinely deal.

Having discarded these two possible solutions, it has been argued that any mechanism for resolving the incoherence in sentencing would have to accept the need to allow for the different philosophies of punishment. In other words, the crux of the problem of incoherence is the lack of a coherent method for choosing between different purposes of punishment and a coherent process of deciding what would be “just” in any particular case. Restorative Justice was introduced (in Chapter 3) as a more promising way of allowing for different philosophies of punishment, as – it has been argued – it can provide for a more coherent process of choosing between them and arriving at a sentence.

Question 4: Can restorative justice be conceptualised in such a way that promises to overcome these problems?

The short answer to this research question was “yes”. This, however, relied on a particular conceptualisation of RJ which was set out in some detail in Chapter 1. This was a process-based understanding of RJ, endorsing Marshall’s popular

definition. RJ was understood not as an alternative to punishment, but an alternative method for arriving at a punishment (or sentence). Perhaps contentiously, RJ according to this conception was something which could, but need not necessarily, include retribution. McCold and Wachtel's (2012) model of determining who stakeholders in a process would be was largely adopted, i.e. victims, offenders and their supporters are direct stakeholders and have responsibility for the decision-making process. The scope of RJ was held to include serious offences and imprisonment was held to be available for participants to consider as part of, or as the sole, outcome of an RJ process. It was argued that the process would only be suitable where the offender accepts guilt and all parties voluntarily agree to take part in the conference. The outcome, likewise, was held to be something which could not be imposed, but was to be arrived at by voluntary, consensual decision-making.

The conferencing model of RJ was adopted as the focal point of analysis, as it may be regarded as being most reflective of the conception of RJ arrived at in Chapter 1, in contrast with models which might more readily be termed RJ practices (O'Mahony, 2012). It was clarified, but is worth re-stating here, that the conceptualisation of RJ in this particular way, and the narrow focus on the decision-making process of RJ conferences, was not intended as laying claim to this being the only possible way of understanding RJ. Similarly, no claim was made about the possibility of RJ offering a more coherent process being the only way in which RJ could be conceived of as having value.

The argument advanced in the thesis has relied on the idea that RJ conferencing should devolve the decision-making power for what should happen to an offender to the stakeholders, i.e. the victim, offender and other affected parties. The outcome agreement mutually agreed upon was equivalent to the offender's sentence. This should have been arrived at by discussion between the parties, all having an equal say in what went into the outcome agreement, but there being room for disagreement, mediation and the evolution of participants' ideas about justice and philosophies of punishment.

In short, RJ has been conceptualised as a kind of sentencing process in which stakeholders' ideas about justice and philosophies of punishment take prominence. The following hypothesis was devised:

Restorative Justice is a principled mediation process between people, but is also a mediation process between different theories of punishment, as the people involved bring to the conference their different ideas of justice and opinions about what the outcome should be.

The outcome agreement should therefore be representative of the best possible mediated compromise, which addresses all stakeholders' notions of justice to the greatest achievable extent. Importantly, for the purposes of this thesis, it is the *process* which is important, and from which increased coherence derives. No claim has been made here about the coherence, or lack thereof, of any *outcome*.

Precisely how RJ as conceptualised in this thesis can increase coherence in the decision-making process of sentencing was set out in detail in Chapter 4. This involved differentiating RJ from other forms of public engagement in sentencing, including deliberative democracy. Three elements of RJ's ability to increase coherence in sentencing were identified and examined. Firstly, it was argued that RJ could better identify the genesis of the notion of justice expressed in a given sentencing decision. This is because whilst it is difficult to discern the genesis of notions of justice relied on by judges and magistrates, in the RJ process, meaningful connections exist between the stakeholders making the decision, and the decision to be made, and it is therefore more coherent. That is, the understandings of justice and philosophies of punishment which inform the outcome, are directly connected to, and originate from those most affected by the offence.

Secondly, it was suggested that RJ can provide a better knowledge base from which to make decisions. This is because stakeholders, by virtue of their

connection with the offence, and by virtue of who they are in connection with the offence, have access to better knowledge than judges, magistrates or other criminal justice professionals, who are less connected to the offence, indeed who are usually entirely unconnected to the offence altogether.

Thirdly, it was argued that RJ is a better *process* for engaging with this knowledge and making the decision. This is because RJ conferencing allows for stakeholders to debate and mediate between their ideas, in the course of which they can develop these ideas and – where RJ is successful – eventually reach a consensual agreement. It is important to note that it was held that there is no one, “right” notion of justice (Hampshire, 1999; Luna, 2003) and it was not argued that a whole spectrum of views needs to be represented in an RJ process. The importance of the engagement with, and empowerment of, stakeholders is that *their particular* views are represented and mediated between.

As to why this is a coherence of value, two key points have been made in the course of the thesis: firstly and most importantly, that incoherence in sentencing is a negative thing, as it means that one of the most intrusive powers of the state is being exercised in an incoherent manner – as such, any increase in coherence is an improvement, and other possible ways of doing this were, as outlined above, discarded. Secondly, coherence is likely to increase penal legitimacy, through the fact of its increased coherence as well as the increase in stakeholders’ perceptions of legitimacy by engaging with their notions of justice and empowering them in the process.

The above way of answering research question 4, assumed an RJ process which was successful of course. What happens when RJ fails, such as when no agreement can be reached, or what happens when it is not suitable in the first place, perhaps because the offender does not accept guilt, are matters which lie outside the scope of this thesis and, as indicated below, warrant further research.

Question 5: Do stakeholders mediate between different theories of punishment and ideas of justice during the restorative justice conference?

The secondary empirical research undertaken revealed limited data which could directly answer this question. However, some conclusions could be drawn based on the findings which more directly addressed research question 6. Specifically, it was found that stakeholders were not always given the opportunity to mediate between their different ideas of justice and different theories of punishment, due to not being sufficiently empowered in the decision-making process. Where participants were not the main decision-makers and were not able to contribute their ideas, then they would have limited, if any, opportunity to meaningfully mediate between such ideas. Indeed, the analysis of the secondary research raised questions about the extent to which RJ participants contributed to outcome agreements at all (explored in more detail below).

Question 6: Are the stakeholders the main decision-makers as to the outcome? Why/why not? (Chapters 5 and 6)

The empirical research findings made a distinction between formal involvement and substantive involvement in determining and agreeing to outcomes. This involved looking both at the contribution of victims, offenders and criminal justice professionals; as well as the more opaque issue of the possible coercion of lay participants into agreement. This allowed for as in-depth as possible a consideration of whether the stakeholders really were the main decision-makers as to the outcome.

All the RJ schemes examined had the following factors in common: they featured RJ conferences which produced an outcome/plan; involved both victims and offenders in the process; and the studies contained data specifically on contributions to the outcome/plan, distinguished from general participation. As such, despite the schemes having other variations and being from four different jurisdictions, common issues were able to be identified which impacted on the above research question.

The research identified important findings which were not apparent from the theoretical work undertaken, and which were useful in answering the above research question and contributing to the overall concerns of this thesis. The secondary research was able to indicate matters which would affect the operation of RJ as a process which could increase coherence in sentencing. However, the research had some limitations in scope and the findings were not able to clearly demonstrate exactly to what extent the issues identified occurred in practice. Obtaining this level of information was outside the scope of the thesis.

The issues which were identified as likely to undermine the ability of RJ to provide a more coherent process of sentencing, by reducing the likelihood that it could operate as hypothesised, i.e. as a mediation process between ideas, were as follows: (a) whilst reasonably high numbers of victims and offenders appeared to contribute to outcomes, this contribution was often limited in extent, i.e. there were low *levels* of contribution identified; (b) more contribution to the outcome or plan by criminal justice officials than was expected was identified; and (c) the possibility of the coercion of participants during the process was highlighted as an issue.

*Low levels of contribution by victims and offenders*

Where the contribution of participants was not effective, i.e. where the extent of contribution was minimal, or there was an imbalance across contributions, then the stakeholders were either not the main decision-makers, or were not equally contributing in a way which would increase coherence, as for RJ to operate in the way outlined extensively in Chapter 4, it was important that all participants had an equal say.<sup>103</sup>

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<sup>103</sup> Although, as noted in Chapter 6, it could be that participants made minimal contributions because they agreed with something already suggested – although whether this was the case was not able to be gauged from the data.

Aside from the early evaluation of New Zealand, most of the secondary data showed relatively high contribution rates of victims and offenders. However, the level of contribution was often minimal. For example, Campbell et al (2005) found high rates of contribution of victims and offenders, but for example, whilst 92% of offenders were involved in deciding the plan, only 51% were involved “a lot”. There was also evidence of an imbalance of contributions, as they found that the co-ordinator often had the most input in devising the plan.

*More contribution by criminal justice officials than expected*

Whilst there was no data relating to this for Australia, nor was it identified as a particular problem in England and Wales, this was a significant issue for both Northern Ireland and New Zealand, where high levels of contributions by both co-ordinators and police officers involved in the RJ process were identified. This was found to be most likely caused by the criminal justice officials having more knowledge about the processes and there being a resulting “knowledge imbalance” (Campbell et al, 2005), leading to their greater contribution; or criminal justice professionals feeling external pressure to guide the outcomes/plans towards something which would be ratified by the court or (in the case of Northern Ireland) the PPS. Decisions were therefore often being constructed in accordance with external notions of proportionality, rather than being freely made by the stakeholders according to their understandings of justice. Where this was happening, the resulting plan or outcome could not be said to represent the best possible compromise between stakeholders’ philosophies of punishment and understandings of justice. Maxwell et al (2004) noted that it appeared much too easy for the role of criminal justice professionals as facilitators of the decision-making process, to be converted into the role of principal decision maker.

*Evidence of the coercion of participants*

Some degree of coercion in some conferences was identified in all of the secondary evaluations. This was identified as being linked to the contribution of criminal justice professionals and likely to result from similar causes, i.e. the

coercion was sometimes directly by the criminal justice professionals themselves (e.g. arising from their concerns about proportionality or having the plan ratified). On other occasions, coercion arose indirectly, from a participant's concern that the plan would be passed by the court, or due to the existing balance of power in a conference, which was particularly an issue for youths (e.g. Campbell et al, 2005, found that nearly three times as many young offenders felt coerced into the agreement than victims).

The coercion of participants (however subtle), which might occur due to the influence of criminal justice professionals and/or an imbalance of power in a conference, means that participants do not freely contribute their own ideas, being instead pushed towards agreeing with other notions of justice. Where this occurs in an RJ conference, that conference cannot be said to be operating as a mediation process between the philosophies of punishment and ideas about justice held by participants, and it is unlikely that the stakeholders are the key decision-makers. This is because either external notions of justice are being prioritised, or unequal weight is being given to stakeholders' views.

Overall, the answer to the above research question is essentially that stakeholders are not always the main decision-makers in RJ practice and this is because of the operation of three main obstacles to this, and hence three ways in which the potential for increased coherence in an RJ process might be undermined. The research findings were important in highlighting the need for RJ practice to more fully embrace a process-focused model of RJ which genuinely values and effectively promotes the empowerment of stakeholders, if RJ is to offer a more coherent process of sentencing, as theorised. This should also assist in avoiding the possibility of RJ becoming *more* incoherent and offering a worse option than current sentencing practice. That is, RJ which does not empower participants effectively may be argued to be vulnerable to commonly identified problems of informal justice processes, such as a failure to have sufficient regard to human rights issues, and a lack of due process (see Chapter 5), without the benefit of being more coherent. Where stakeholders are not the main decision-makers, then

the process could be regarded as only an “empty ritual” of participation (Arnstein, 1969).

### Summary

The title of this thesis asks: *Can Restorative Justice provide a solution to the problem of incoherence in sentencing?* Given the above answers to the research questions, RJ can be theorised so as to provide a potential solution, offering a more coherent process of sentencing than current practice. However, in translating RJ into practice, the empirical research identified key issues which could present obstacles to RJ operating as such a process. For RJ to operate as a more coherent process, more emphasis needs to be placed on the importance of the process-focused model and the empowerment of participants, and for the empowerment to be effective as opposed to superficial. This would avoid decisions being constructed in accordance with external notions of proportionality, or ideas of justice held by criminal justice officials, rather than representing the views of stakeholders.

There remains a role for the state in two respects: firstly, an administrative role in ensuring the procedural fairness of RJ processes; and secondly, in dealing with cases which are unsuitable for RJ (e.g. where the offender does not accept guilt), or where RJ commences, but no consensual decision can be reached as to an outcome. Substantial discussion of this latter role of the state, and more generally what should happen where RJ is unsuitable, or fails, is outside the scope of this thesis. More research into how such cases should be dealt with and how decision-making processes relating to these cases can be made more coherent is required and has been identified as an area for further research (see below).

### **3. Originality of the research**

This thesis has developed a new theoretical argument for RJ, which is original in its conceptualisation of RJ as a means by which incoherence in the process of sentencing can be resolved. This has relied on a process-focused conception of RJ,

which sees RJ as an alternative method for arriving at a punishment and not an alternative to punishment (as set out in detail in Chapter 1). In particular, this representation of RJ avoids the need to prefer one particular philosophy of punishment, without the incoherence resulting from the *ad hoc* combination of different purposes of punishment (as has been shown to occur in current sentencing practice in England and Wales). This is achieved through empowering stakeholders to mediate between their personal understandings of justice and philosophies of punishment, whatever they may be.

The empirical research, coupled with the theoretical argument which has been developed, has identified key issues for RJ, including the significance of the empowerment of stakeholders; and the importance of balancing state and individual concerns in RJ practice. This contributes to scholarship in the field as the importance and difficulty of engaging with these issues to the success of RJ, is highlighted in the context of the novel understanding of RJ and what it can achieve (i.e. improving coherence in the process of sentencing), which has been put forward.<sup>104</sup>

#### **4. Areas for future research**

This thesis has highlighted a number of areas in which future research would be of benefit. It lies outside the scope of this thesis to adequately deal with the question of how offenders should be sentenced where the RJ process fails to reach an agreement, or is an unsuitable or declined option (e.g. where there is no acceptance of guilt by the offender). It would be useful to explore the extent to which a purely utilitarian basis for sentencing was viable within the court process (where RJ was unsuitable). This might entail all court sentencing being based on considerations of future consequences – or a narrower model might be preferred, adopting only one utilitarian purpose of sentencing, such as rehabilitation *or*

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<sup>104</sup> This is in contrast to much RJ literature, which promotes RJ on the basis of other benefits, e.g. a reduction in reconviction rates (see Maxwell and Morris, 1999; Miers et al, 2001; Shapland et al, 2008; Strang, Sherman et al, 2006; Wilcox and Hoyle, 2004).

deterrence (although a contingent purpose would seem necessary where rehabilitation had little or no likelihood of success). The issue would then arise as to whether this was compatible with allowing for effectively unlimited philosophies of punishment in the RJ process. There is no immediately apparent solution to this, and further in-depth theoretical work would need to be undertaken.

As well as identifying problems which can arise where RJ operates with a reduced focus on the empowerment of stakeholders, research to date has also highlighted significant gaps in terms of how it operates in practice. In particular, there is a need for more observational research which genuinely depicts what goes on in conferences, in terms of expressions of stakeholders' ideas of justice and philosophies of punishment, and their negotiation. This is something which has not been captured well by existing studies. Such further research would be particularly useful if resources would allow for observations of conferences, as well as interviews, as this would provide much more detailed information about the content of contributions and the balance of contributions during the process. These observations and interviews could be focused so as to give more nuanced information about the extent to which an RJ process is allowing for participants to mediate between their philosophies of punishment and ideas of justice. Such future research involving observations could also usefully focus on whether individuals had preconceived ideas before the process, how such ideas were expressed during the process and whether they changed during or after the process, as this would productively build on the existing findings.

Such further empirical research could also usefully explore issues such as power imbalances in conferences and the risk of more vulnerable stakeholders (such as youths) being dominated by other parties, by focusing on the role of criminal justice professionals in RJ practice. The link between the role of criminal justice professionals and the broader role of the state in relation to RJ (expanding on issues about state-run RJ raised in Chapter 5) could also be explored. This might include consideration of what information should be provided to lay participants

by criminal justice professionals (e.g. sentencing guidelines; statistics on the effectiveness of certain sentences), in addition to what the stakeholders themselves bring to the conference.

## 5. Concluding remarks

This research and the above findings are intended to assist in informing the future development of both theory and practice in the field. In arriving at a final conclusion on the research findings, the following statement by McCold in relation to evaluating RJ is useful to have in mind:

What constitutes success? Comparisons of any new approach, such as restorative justice, must be measured against existing practice. ... To succeed, restorative justice does not need to be perfect. To be preferred, it need only demonstrate superiority, on average, to traditional adjudicatory approaches. (McCold, 2012, p. 68)

RJ has been demonstrated to be theoretically more coherent than traditional sentencing processes, however problems have been identified with its implementation into practice. The existence of obstacles to this theoretical conception being translated into practice does not undermine the theory itself, particularly when the obstacles are such that they can be overcome by a reduced focus on concepts such as consistency and proportionality<sup>105</sup> and an increased focus on the empowerment of stakeholders. A redirection of the state's role has also been advocated for RJ practice, in terms of a more administrative function, checking the fairness of the process, rather than verifying outcomes (see Roche, 2003), and this too could assist in overcoming the problems identified in the empirical research. Similarly, the fact that RJ is not always successful in reaching an outcome does not detract from the argument that when it does operate successfully, it can be more coherent than traditional sentencing – although, as indicated above, precisely what should happen in cases where RJ is not suitable, or

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<sup>105</sup> Which have been argued to be problematic concepts in Chapters 2 and 3, respectively.

fails, is a significant problem which requires further research and lies outside the scope of this thesis.

It must, however, be acknowledged that the research cannot support the contention that in practice, RJ is *always* superior to traditional sentencing processes in terms of improving coherence. Indeed, it has been suggested in the course of the thesis, that where RJ does not operate as theorised it could potentially raise more problems than traditional sentencing (see Chapter 6). The potential for RJ (in terms of the process having increased coherence) far outweighs that of traditional sentencing but this relies on the implementation of a particular conceptualisation of RJ – that is, a process-focused model. One of the key findings of this thesis has been the importance of actively promoting the empowerment of stakeholders. Such a move would enable RJ to lay claim to a significant achievement over and above what traditional sentencing can offer: the ability to operate as a more coherent process.

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