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Philosophical Insights for a Theory of Restorative Justice

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Philosophical Insights for a Theory of Restorative Justice

Book Reviews

RESTORATIVE JUSTICE AND THE PROBLEM OF INCOHERENCE IN SENTENCING

by Elizabeth Tiarks*

Abstract. *The decision-making process in current sentencing practice is incoherent due to the arbitrary way in which different purposes of sentencing are selected. I focus on England and Wales, where judges choose between five purposes of sentencing, based on conflicting philosophies of punishment. Judges can choose to be more retributive or utilitarian, with no particular process in place for how this decision should be made. The choice affects the resulting sentence, particularly where it is a borderline case for a custodial or non-custodial sentence. This arbitrariness is problematic, as sentencing is one of the most intrusive powers of the state; such decisions should be made in a clear and coherent way. I propose a process-based model of restorative justice as a way of improving coherence in sentencing. The process of stakeholders coming together to decide what should happen following an offence can reconnect the philosophies of punishment to particular and relevant individuals. This is more coherent, as there is a clear reason why these people are making the decision about which purpose of sentencing to prefer: they are most closely connected to, and most affected by, the offence. This decision is also based on better knowledge about what happened and using a better process for developing moral ideas about what should happen, through mediated discussion. The outcome, or sentence reached, will be the optimal expression of the preferred purpose of sentencing held by the stakeholders.*

Keywords. *Restorative Justice; Philosophy of Punishment; Sentencing; Criminal Justice; Incoherence*

1. *Introduction*

In this paper I explore the problem of incoherence in the decision-making process of sentencing, looking at how it arises and why it is problematic. I will focus on the jurisdiction of England

* University of Northumbria

and Wales, which incorporates both retributive and utilitarian philosophies of punishment in an *ad hoc* way. This is the basis of incoherence in the process. By 'incoherence', I mean that the decision-making process is not clear, and it is difficult to discern any meaningful connections leading to the selection of a particular purpose of sentencing[1]. The incoherence arising from the *ad hoc* use of retributive and utilitarian purposes stems from two main sources: firstly, there is no identifiable origin of the philosophy of punishment expressed in sentencing decisions; and secondly, decisions about which purpose of sentencing to prefer are made using a limited knowledge base. In contrast, I will argue that restorative justice (RJ) processes are more coherent primarily because they can offer an identifiable origin of philosophies of punishment, and the knowledge base from which such decisions are made is better.

I rely on a particular conception of RJ, which is relevant in the context of sentencing practice. This relies on the well-known definition by Marshall: «Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future»[2]. I also draw on Luna's procedural understanding of RJ as a process which incorporates different philosophies of punishment:

> Restorative justice need not be seen as just another substantive theory of punishment […] but instead can be viewed as a procedural approach that includes all stakeholders in a particular offense in a process of group decision-making on how to handle the crime and its consequences for the future. This procedural conception of restorative justice would allow all modern punishment theories to contribute to the decision-making process[3].

[1] I am focusing on this particular problem in sentencing, rather than dealing with broader issues of coherence in legal reasoning.

[2] T. Marshall, *The evolution of restorative justice in Britain*, «European Journal on Criminal Policy and Research», IV (4), 1996, pp. 21-43, p. 37.

[3] E. Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, «Utah Law Review», I, 2003, pp. 205-302, p. 288.

The understanding of RJ I employ here is *process*-focused, rather than outcome- or value-focused[4]. The debate between these approaches stems from the conflict between empowering stakeholders and ensuring restorative outcomes[5]. Promoting particular outcomes limits the empowerment of stakeholders to make their own decisions. Conversely, increasing the empowerment of stakeholders decreases external control over the outcome. I have chosen a process-focused model, as this is most relevant to, and has the most potential for resolving, the problem of incoherence in sentencing.

Marshall's definition, outlined above, is one of the most well-known process-focused definitions. This has been criticised by outcome-focused proponents as «vulnerable to diversion towards non-restorative ends»[6]. However, this assumes that the decision about what is restorative in a particular set of circumstances lies with people other than the stakeholders. Unlike outcome-focused RJ, which imposes particular values on participants, process-focused RJ allows for a more open, subjective meaning to «restorativeness»[7]. This avoids a potential disconnect between values outcome-focused proponents would impose on participants in pursuance of restoration, and what would actually be perceived as restorative by those participants. For example, empirical research has suggested that a common externally-imposed RJ outcome – reparation – is not always highly valued by participants[8].

[4] J. Braithwaite, H. Strang (eds.), *Restorative Justice and Civil Society*, Cambridge, Cambridge University Press, 2001.

[5] M. Zernova, M. Wright, *Alternative Visions of Restorative Justice*, in G. Johnstone, D. Van Ness (eds.), *Handbook of Restorative Justice*, Cullompton, Willan, 2007.

[6] K. Doolin, *But What Does It Mean? Seeking Definitional Clarity in Restorative Justice*, «Journal of Criminal Law», LXXI (5), 2007, pp. 427-440, p. 428.

[7] J. Dignan, *Restorative justice and the law: the case for an integrated, systemic approach*, in L. Walgrave (ed.), *Restorative Justice and the Law*, Cullompton, Routledge, 2011.

[8] J. Shapland, G. Robinson, A. Sorsby, *Restorative Justice in Practice: Evaluating what works for victims and offenders*, London, Routledge, 2011, pp. 142-143.

More recently, Daly has argued that RJ should be «defined concretely as a *justice mechanism*»[9] and «not an alternative to retributive justice, not a new way of thinking about crime and justice, and not a set of aspirations for social change»[10]. This is relevant to my approach, which situates RJ as a mechanism which allows for access to both retributive and utilitarian philosophies of punishment, depending on the wishes and needs of the stakeholders. I do not, however, adopt quite as strong a position as Daly. My reliance on a process-focused conception is not intended to undermine, or reclassify as «innovative justice»[11], other iterations of RJ. I recognise that there may be benefits to other, more outcome-focused approaches[12]. However, process-focused RJ is best-suited to the current enterprise, examining incoherence in sentencing. The solution I propose simply would not work with an outcome-focused version of RJ, as the solution depends on maximising the empowerment of the participants.

The RJ and punishment debate is also relevant here. Some argue that RJ is an alternative to punishment; and others that RJ can incorporate punishment – both sides usually meaning *retributive* punishment. I distinguish between *retributive* and *utilitarian* punishment, exploring them as different justifications for punishment, below. I treat *punishment* as effectively synonymous with *sentencing*[13] instead of the common conflation of punishment with retribution. This allows for a more value-neutral understanding of punishment, which is useful when considering philosophical justifications[14]. For

[9] K. Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, «Victims and Offenders», XI (1), 2016, p. 11.

[10] *Ibidem*.

[11] *Ibidem*.

[12] For example, reducing reoffending rates: G. Maxwell, A. Morris, *Understanding Reoffending: Full Report*, Institute of Criminology, Victoria University of Wellington, 1999; and allowing for emotional redress: J. Doak, *Honing the stone: refining restorative justice as a vehicle for emotional redress*, «Contemporary Justice Review», XIV (4), 2011, pp. 439-456.

[13] See also N. Walker, *Why Punish?*, Oxford, Oxford University Press, 1991.

[14] See on this point, T. McPherson, *Punishment: Definition and Justification*, «Analysis», XXVIII (1), 1967, pp. 21-27; and H. Bedau, *Punishment*, in E.N. Zalta (ed.),

the purposes of the incoherence problem I explore RJ as a sentencing mechanism, in which RJ allows for punishment insofar as punishment is considered synonymous with sentencing.

Further, my argument is that this particular conception of RJ can and should allow for either retributive or utilitarian forms of punishment (or sentencing), depending on what is desired by the stakeholders making the decision. Daly has recently argued that:

> *the juxtaposition of 'retributive and restorative justice' is a nonsense.* Its use should cease for two reasons. First, retributive justice, as a coherent system or type of justice, does not exist. What people are referring to, in fact, is conventional criminal justice, which has many aims and purposes, some of which are contradictory. Retribution is just one aim[15].

I agree with this assessment, although full exploration of these issues is outside the scope of this paper. Outcome-focused RJ seeks specific outcomes and is therefore more inclined towards the view that RJ is an alternative to retributive punishment and should seek non-punitive goals. In contrast, a process-focused understanding of RJ aligns well with a view of RJ as able to incorporate retributive punishment, rather than being opposed to retribution. That said, it does not necessitate retribution, if that is not the wishes of the stakeholders[16].

My approach views RJ as a decision-making process which has no objectively 'right' answer, but can have a more or less fair process. Those most affected by the offence – usually the victim,

The Stanford Encyclopaedia of Philosophy, 2010 (available at: http://plato.stanford.edu/archives/spr2010/entries/punishment).

[15] Daly, *What is Restorative Justice?*, p. 15. See also D. Roche, *Retribution and Restorative Justice* in Johnstone, Van Ness (eds.), *Handbook of Restorative Justice*, pp. 75-90.

[16] See C. Barton, *Empowerment and retribution in criminal justice*, in H. Strang, J. Braithwaite (eds.), *Restorative justice: Philosophy to practice*, Ashgate-Dartmouth, Aldershot, 2000, pp. 55-76.

offender, family members and sometimes also community members (the stakeholders)[17] – come together and discuss their different ideas of justice and opinions about what the outcome should be. There is opportunity for mediation between ideas, followed (in successful cases) by a consensually agreed upon outcome, which can constitute the sentence. I present a theoretical account, but there are similar versions operating in practice which use RJ conferencing post-conviction as an alternative sentencing mechanism, e.g. Family Group Conferencing in New Zealand and Youth Conferencing in Northern Ireland[18].

Empowering stakeholders to contribute to the outcome is important in this understanding of RJ and what I argue about its ability to offer a more coherent process. That individual views may change during the discussion does not undermine what I will argue here about increased coherence, but rather is illustrative of the process allowing for the development of participants' moral ideas. An agreed-upon outcome should be equivalent to the parties acknowledging that having heard all (possibly opposing) views, they are satisfied that this outcome best meets their understanding of justice

[17] I adopt the definition of 'stakeholders' set out by P. McCold, T. Wachtel, *Restorative Justice Theory Validation*, in E.G.M. Weitekamp, H.J. Kerner (eds.), *Restorative Justice: Theoretical Foundations*, Cullompton, Taylor and Francis, 2012, pp. 110-142, who call victims, offenders and family members the *direct* stakeholders; and community members and wider society *indirect* stakeholders. Indirect stakeholders «have a responsibility to support and facilitate processes in which the direct stakeholders determine for themselves the outcome of the case» (p. 114). Direct stakeholders are therefore the key decision-makers.

[18] See respectively: G. Maxwell, A. Morris, *Youth Justice in New Zealand: Restorative Justice in Practice?*, «Journal of Social Issues», LXII (2), 2006, pp. 239-258, together with the more recent evaluation carried out for the Ministry of Social Development, *Final Recommendations on Improving Family Group Conferences to Achieve Better Outcomes for New Zealand's Most Vulnerable Children*, REP/12/6/562, 2012; and C. Campbell, R. Devlin *et al.*, *Evaluation of the Northern Ireland Youth Conference Service*, Belfast, Statistics and Research Branch, Northern Ireland Office, 2005. In both of these jurisdictions, the outcome reached must be verified by a court or prosecutor before it is confirmed as the sentence. More recently, a summary of both jurisdictions is found in S. Masahiro, W. Wood, *Restorative Justice*, in A. Deckert, R. Sarre (eds.), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, London, Palgrave Macmillan, 2017, pp. 393-406.

as it then is at the point in time the agreement is reached – bearing in mind that some mediation and moderation may have taken place.

Importantly, this conception of RJ relies on participation being voluntary and any agreement reached by the stakeholders being voluntary as well, so as to maximise empowerment. This is in contrast to the requirements of outcome-focused RJ, which can allow for coercive measures where agreement cannot be reached, including enforced reparation [19]. 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. RJ as a solution to the problem of incoherence in sentencing simply does not work, if participants are coerced. This suggested solution will therefore only apply to cases where the offender has accepted guilt and stakeholders have voluntarily agreed to take part in the process. It will also only succeed where an outcome, or sentence, is mutually agreed upon. This solution is therefore limited, as it will not apply to all cases coming before the courts. Further research is needed to decide how best to improve coherence in remaining cases, but lies outside the scope of this paper.

I will present the argument by outlining in more detail the problem of incoherence, which stems from the *ad hoc* combination of utilitarian and retributive purposes of sentencing. I will then explore the main philosophies of punishment and briefly consider mixed theories, highlighting the incompatibility of retributive and utilitarian philosophies. I will then consider the validity of the argument that coherence could be improved by prioritising a single philosophy of punishment, instead of allowing for multiple purposes of sentencing. I will argue that this is a limited response, which does not resolve the core issues. I will then propose RJ as a better response to the problem of incoherence, which both allows

[19] L. Walgrave, *Restorative Justice, Self-interest Responsible Citizenship*, Oxon, Routledge, 2013.

for multiple purposes, and provides a more coherent process for deciding between them[20].

2. *The problem of incoherence*

The key source of the problem of incoherence is the lack of any sound rationale for deciding between conflicting theories of punishment in the sentencing process. I will focus on England and Wales, but many jurisdictions incorporate both retributive and utilitarian rationales into their sentencing systems in a somewhat ad hoc manner[21]. In England and Wales, there are five statutory purposes of sentencing adults:

> 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[22].

These five purposes are based on a combination of retributive and utilitarian justifications for punishment. For example, (b) and

[20] I am arguing for improvements at the stage of the sentencing hearing. I acknowledge that there is also work to be done on other aspects of the criminal justice process, as sentencing outcomes are the result of more than just the sentencing hearing itself (see A.S. Roach, R. Brewer, K. Mack, *Locating the judge within sentencing research*, «International Journal for Crime, Justice and Social Democracy», VI (2), 2017, pp. 46-63), e.g. charging decisions and plea deals.

[21] M. Bagaric, *Sentencing: The Road to Nowhere*, «Sydney Law Review», XXI (4), 1999, pp. 597-626.

[22] Section 142 *Criminal Justice Act*, 2003 (England and Wales).

(c) are both aimed at producing good future consequences and are utilitarian; whereas (a) looks to what the offender deserves and is retributive in nature. These different philosophies of punishment will be considered in more detail below, but at this point it is sufficient to note that these five purposes of sentencing pull in different directions and will often be in conflict with one another[23]. Reliance on one purpose of sentencing may lead to a different sentence than reliance on another. For example, if I were a judge sentencing someone who had committed an offence under the influence of drugs and had an addiction, I could opt for (c) and impose a community order with a drug rehabilitation requirement. Alternatively, I could opt for (a) and impose a fine or sentence of imprisonment, depending on the severity of the offence.

The conflict between these purposes is openly acknowledged in sentencing guidelines, which confirm that there is no hierarchy between the five purposes:

> 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[24].

There is no clear procedure in place for sentencers to use to determine when they should prefer one purpose over another in any instance of sentencing, which results in incoherence in the decision-making process[25]. The origin of the particular aim of sentencing (or philosophy of punishment) expressed in sentencing decisions is hard to determine. Whilst sentencers must give brief reasons for their decision[26], this does not have to address which

[23] A. Ashworth, E. Player, *Criminal Justice Act 2003: The Sentencing Provisions*, «The Modern Law Review», LXVIII (5), 2005, pp. 822-838.

[24] Sentencing Guidelines Council, *Overarching Principles: Seriousness guidelines*, Sentencing Guidelines Council, 2004, p. 3.

[25] See also Bagaric, *Sentencing: The Road to Nowhere*.

[26] Section 174 *Criminal Justice Act*, 2003.

purpose(s) of sentencing they have relied on. Even where this is mentioned, it is usually accompanied by a brief statement about it being 'appropriate in the circumstances', rather than a detailed genealogy of the purpose expressed being provided. Brevity of explanation is encouraged, with recent Court of Appeal guidance confirming that sentencing remarks should be brief and «in general terms»[27]. Sentencing remarks may be relied on when considering any appeal against sentence, but the selection of a particular purpose is not, by itself, a recognised head of appeal.

Sentencers might be relying on a number of possible sources when determining which purpose to prefer. Judges might be second-guessing what the state's currently preferred philosophy of punishment is[28]. However, this seems almost impossible to determine accurately, as there is no one consistent approach to punishment which has been adopted, as highlighted by judges and magistrates interviewed in the study carried out by Millie, Tombs and Hough:

> sentencers in England and Wales […] 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'[29].

[27] *R v Chin-Charles* (2019), EWCA Crim. 1140.

[28] A. Millie, J. Tombs, M. Hough, *Borderline sentencing: A comparison of sentencers' decision making in England and Wales, and Scotland*, «Journal of Criminal Law and Criminal Justice», VII (3), 2007, p. 258.

[29] Ivi, p. 259.

The problematic nature of attempting to identify the state's preference may result in a sentence which expresses a philosophy of punishment originating from no identifiable person or body.

Alternatively, when sentencing, judges might instead be pursuing their own personal preferences, attempting to gauge what is best for the parties in question, or indeed drawing from a mixture of the aforementioned factors. As such, various sources are possible, but it is unclear which prevails in any particular sentencing decision. The origin of the philosophy of punishment expressed in the sentence is therefore unclear; there is no obvious, identifiable place it comes from. There are no meaningful connections underlying the selection of one particular purpose of sentencing over another; the process lacks clarity and coherence.

A further issue affecting coherence relates to the information required for deciding which purpose of sentencing to prefer, who might possess that knowledge and how it can best be utilised. In arriving at a sentence, a judge considers matters such as the offender's character, likely future behaviour and level of contrition, as well as the harm done to the victim and the impact of the crime on the community. Sentencing guidelines provide suggested ranges of sentencing, based on these and other factors, but the final determination and in particular which purpose of sentencing to choose is left to the sentencer. Whilst a judge might be expected to possess superior knowledge concerning sentencing law and procedure compared with the average member of the public, the same claim of superior knowledge cannot be made in relation to such non-legal issues as the offender's personality and likelihood of reoffending. It is also notable that judges make such determinations based on limited information[30], particularly as the vast majority of cases do not go to trial[31], meaning that many sentences follow guilty pleas and are based on a summary of the case rather

[30] E. Tiarks, *Restorative Justice, Consistency and Proportionality: Examining the Trade-off*, «Criminal Justice Ethics», XXXVIII (2), 2019, pp. 103-122.

[31] This is the case in England and Wales: UK Ministry of Justice, *Criminal Court Statistics Quarterly, England and Wales, January to March 2018 (Annual 2017)*, June 28, 2018 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720026/ccsq-bulletin-jan-mar-2018.pdf).

than direct evidence of those involved in the offence. It is unclear that judges are best placed to determine the numerous value judgments required in sentencing and unlikely they have the best available information on which to base such decisions[32]. Where a more coherent alternative exists, as I believe is the case in the form of RJ, the decision-making prerogative is not obviously held by a judge.

The lack of a coherent procedure for deciding between different purposes of sentencing is deeply problematic. Sentencing is one of the most intrusive powers of the state and requires strong justification. This can most clearly be seen in the use of the death penalty, but is also significant in the use of imprisonment – the most severe sentence used in England and Wales. Imprisonment can have a negative effect beyond the offender themselves, most notably where the offender has caring responsibilities for a child or children[33]. The impact on such children can be significant[34], including adversely affecting a child's physical or mental health[35]. It is concerning that for any case in which an offender may or may not go to prison depending on which purpose of sentencing is prioritised, the process by which a judge makes this determination is opaque and arbitrary. There is also a risk that such a process will undermine penal legitimacy[36].

[32] See A. Lovegrove, *Intuition, structure and sentencing: An evaluation of guideline judgment*, «Current Issues in Criminal Justice», XIV (2), 2000, pp. 182-204.

[33] See *R v Petherick* (2012), EWCA Crim. 2214 in which the impact on a young child of the imprisonment of his mother was considered.

[34] L. Baldwin, B. Raikes (eds.), *Seen and Heard: 100 poems by parents and children affected by imprisonment*, Hook, Waterside Press, 2019; and C. Jardine, *Eroding Legitimacy? The Impact of Imprisonment on the Relationships between Families, Communities, and the Criminal Justice System*, in R. Condry, P. Scharff Smith (eds.), *Prisons, Punishment, and the Family: towards a new sociology of punishment?*, Oxford, Oxford University Press, 2018, pp. 167-180.

[35] O. Robertson, *The Impact of Parental Imprisonment on Children*, Quaker United Nations Office (QUNO), 2007, p. 9.

[36] R. Henham, *The Philosophical Foundations of International Sentencing*, «Journal of International Criminal Justice», I (1), 2003, pp. 64-85.

I have given a brief hypothetical example above of sentencing an offender addicted to drugs and how choosing a different purpose of sentencing could radically alter the sentence. One real-life example of this is the English Court of Appeal case *A-G's Reference No 92 of 2005* (*Stephen Patrick Harmon*) EWCA Crim 3049. Mr Harmon pleaded guilty to extensive drug-related offending. The sentencing judge acknowledged that this level of offending would normally result in a sentence of about four years imprisonment. However, the judge imposed a 12-month drug treatment and testing order (a non-custodial sentence), as the offender had shown commitment to dealing with his drug addiction. The purpose of the sentence was therefore rehabilitation, which was prioritised over retributive punishment. The sentence was appealed as unduly lenient, but the Court of Appeal upheld the non-custodial sentence. Had either the Crown Court judge or the Court of Appeal been more retributive-minded, the offender would have been sent to prison.

The opaque process of selecting a purpose of sentencing carries the risk that decisions are made on the basis of conscious or unconscious prejudices[37]. Whether prejudices have informed the decision-making is not easy to establish, because there are no clear criteria by which the fairness of the decision-making process can be judged, given that there is effectively no process in place for decision-making between purposes of sentence. Suspected prejudice may be difficult to challenge, unless notable remarks are recorded when sentence is handed down.

The *ad hoc* selection of different purposes of sentencing is therefore deeply unsatisfactory. I do not doubt that most judges deliberate very carefully when sentencing. However, the selection of one purpose over another is not tethered to any particular process and the resulting opaqueness means that an element of arbitrariness will always be present. This incoherence is unacceptable in the context of sentencing, particularly when the process might yield either imprisonment (and all the harms to the offender, their family and their friends that accompany that) or a non-custodial sentence, depending on the selected purpose.

[37] See Roach, Brewer, Mack, *Locating the judge within sentencing research*, p. 52.

I will next consider the main philosophies of punishment, to better explain why different purposes of sentencing can result in quite different sentences. This provides important background to the problem of incoherence, and explanatory context as to why RJ might offer a more coherent process of sentencing.

3. *Philosophy of punishment*

Current sentencing practice in England and Wales incorporates different philosophies of punishment in an *ad hoc* manner, leading to incoherence in sentencing. I will further explain why this is problematic by briefly discussing the broad categories of retributive and utilitarian theories of punishment, and looking at mixed theories. Whilst there is substantial variety within these categories, an overview will be sufficient to outline the relevant issues – most notably that retributive and utilitarian philosophies of punishment are opposing theories which are fundamentally different and pull in different directions. I will argue that mixed theories, which seek to reconcile these opposing theories into one coherent theory, do not succeed and this is therefore not a suitable way out of the problem of incoherence.

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[38]. Retributivists such as Kant, Morris and Murphy[39] hold that offenders should be punished to an extent equal to their just deserts. There are different

[38] A. Alexander, M. Moore, *Deontological Ethics*, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2007 (http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological).

[39] I. Kant, *Critique of Practical Reason*, trans. by L.W. Beck, Chicago, University of Chicago Press, 1949 (first published 1788); H. Morris, *On Guilt and Innocence*, Berkeley, University of California Press, 1976; and J. Murphy, *Repentance and*

iterations of this amongst different retributivist thinkers, but this is the core idea of retributivism[40].

Retributive theories are 'backward-looking', focusing on the act done and punishing in accordance with the seriousness of that act. This is sometimes conceptualised by retributivists as a kind of abstract «moral balance»[41] which is upset by offending and can be rebalanced by the punishment of the offender. Importantly, the consequences of punishment are irrelevant for the purposes of retribution. In contrast, the consequences of punishment are central to utilitarian theories of punishment, which aim to maximise beneficial future effects through punishment. They are 'forward-looking' and focus on the consequences of punishing an offender[42]. Utilitarian theories therefore include rehabilitation and deterrence, which aim to reduce the likelihood of future offending.

Unlike retributive theories, utilitarian justifications of deterrence and rehabilitation do not rely on «desert»[43]. Deterrent punishment does not aim to give an offender what he or she deserves, but instead is imposed with the intention of deterring the offender from committing future crimes (individual deterrence); or others from committing future, similar crimes (general deterrence)[44]. Likewise, rehabilitative punishment is not imposed because it is deserved, but for the anticipated positive consequences benefitting both the offender and society, the aim being to resolve the problem which caused the offender to commit the crime, resulting in a reduction in future crime.

There are also differences between retributive and utilitarian philosophies in their respective understandings of what people are

Criminal Punishment, in H. LaFollette (ed.), *Ethics In Practice: An Anthology*, Malden, Blackwell, 1997.

[40] R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, «Crime and Justice», XX, 1996, pp. 1-97, p. 7.

[41] See Morris, *On Guilt and Innocence.*

[42] G. Scarre, *After Evil: Responding to Wrongdoing*, Aldershot, Ashgate, 2004.

[43] A. von Hirsch, *The 'Desert' Model for Sentencing: Its Influence, Prospects, and Alternatives*, «Social Research: An International Quarterly», LXXVII (2), 2007, pp. 413-434.

[44] H. Rashdall, *The Theory of Good and Evil*, Whitefish, Kessinger, 2005.

like[45]. For example, retribution entails a notion of individuals as essentially free and rational moral agents, indeed retributive theorists often see this as a key virtue of their philosophy[46]. This is a considerably different understanding of human nature than that assumed by utilitarian theories, particularly rehabilitative approaches, which acknowledge that various factors can impact on an individual's capacity to act freely and rationally, such as social circumstances and drug or alcohol addiction[47].

3.1 Mixed theories of punishment

Mixed theories seek to reconcile these two opposing philosophies of punishment, combining them into one theory justifying punishment. Two of the most well-known mixed theories are those of Rawls[48] and Hart[49], who share a core idea that the question of how punishment should be justified is to be separated into distinct issues: the justification of the institution of punishment (Rawls) or the general justifying aim (Hart); and the justification of individual instances of punishment. There are some differences between the arguments of Rawls and Hart, but both view the former as justified by utilitarianism and the latter as justified by retributivism. As Honderich[50] points out, the fact that separate questions can be identified does not itself indicate that they should be answered by different theories, e.g. utilitarians could argue that utilitarianism should justify both the institution and

[45] See on this point R.L. Lippke, *Mixed Theories of Punishment and Mixed Offenders: Some Unresolved Tensions*, «The Southern Journal of Philosophy», XLIV (2), 2006, pp. 273-295.

[46] E.g. Morris, Kant and Hegel.

[47] G. Caruso, *Public Health and Safety: The Social Determinants of Health and Criminal Behavior*, London, ResearchersLinks Books, 2017.

[48] J. Rawls, *Two Concepts of Rules*, «The Philosophical Review», LXIV (1), 1955, pp. 3-32.

[49] H.L.A. Hart, *Punishment and Responsibility: Essays In The Philosophy Of Law*, Oxford, Clarendon Press, 1968.

[50] T. Honderich, *Punishment: The Supposed Justifications revisited*, London, Pluto Press, 2006.

individual instances of punishment. However, these mixed theories have been seen as attractive, due to their attempt to combine the best of both utilitarianism and retributivism.

A fundamental problem with such mixed theories is that it remains unclear how retribution and utilitarianism interact when they come into conflict. The identification of separate questions does not mean that the issues addressed occur in isolation from each other: individual instances of punishment occur within the context of the institution of punishment and there will be interplay between instances and institution. It is entirely unclear why individual instances of punishment imposed on the basis of retributive calculations of who deserves to be punished and to what extent, will also serve the overarching goal of the institution of producing the best consequences. To revisit the example given above (as well as the *Harmon* case): if a drug addict is punished for offending behaviour on retributive grounds, this might be a fine or imprisonment; whereas a utilitarian punishment aiming to rehabilitate would address the underlying causes of the behaviour and provide support for the addiction. If individual instances of punishment are to be retributive, then the former would be selected. Yet it is unclear how this furthers institutional utilitarian aims of producing the best consequences. Mixed theories do not explain how imposing retributive punishment at an individual level can further utilitarian goals of an institution.

I have discussed the different nature of retributive and utilitarian theories of punishment and the difficulties reconciling them in a mixed theory. The fundamentally opposed nature of these philosophies of punishment makes it difficult and perhaps impossible to satisfactorily combine them into a clear and transparent theory of punishment. I will next consider possible solutions to the problem of incoherence, looking initially at the idea of preferring one single purpose of punishment over others – an idea which I view as problematic. I will then explain why RJ promises a better solution.

4. *A primary purpose?*

I have identified the problem of incoherence in the process of sentencing, which arises from the *ad hoc* combination of retributive and utilitarian philosophies of punishment. In England and Wales, sentencers must decide whether to prefer a more retributive or utilitarian approach in any given instance of sentencing, but the selection between different purposes lacks a clear rationale of approach. As I have outlined above, retributive and utilitarian philosophies of punishment are fundamentally different and whilst mixed theories of punishment seek to coherently combine these philosophies, they have thus far been unsuccessful. We cannot therefore, with any confidence, turn to mixed theories to provide a coherent approach to sentencing which combines different philosophies of punishment.

An alternative approach to resolving the problem of incoherence would be to identify one primary purpose for all sentencing decisions[51]. This acknowledges the different nature of retributive and utilitarian goals and would be more coherent to the extent that there would be an identifiable origin of the philosophy of punishment expressed (the state) and this would remain constant[52]. However, such a restrictive system is problematic. Given the seemingly perpetual nature of philosophical debates about which philosophy of punishment should be preferred[53], it is unclear how the primary purpose would be selected. A sentencing system run

[51] E.g. Ashworth suggests retribution should be the primary aim of sentencing – see A. Ashworth, *Sentencing and Criminal Justice*, Cambridge, Cambridge University Press, 2010.

[52] For example, Art. 27 of the *Italian Constitution* states that rehabilitation is the main aim of punishment. However, incoherence may still be a problem, as it has been noted that Italy's Constitutional Court maintains an «emphasis on the so-called 'polyfunctional theory of punishment' [and] there remains general obfuscation and irrationality in the articulation and implementation of the purposes for punishment» (R. Henham, G. Mannozzi, *Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis*, «European Journal of Crime, Criminal Law and Criminal Justice», XI (3), 2003, pp. 278-317, p. 303).

[53] Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*.

primarily on one particular understanding of justice may face problems of legitimacy[54], and may be politically unworkable, e.g. Frase's argument 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»[55].

This lack of flexibility is also problematic, as the decision about which single purpose to prefer would need to be decided prior to knowledge of any particular case to which it would apply. As such, it is something of a worst-case scenario for the second part of the coherence problem: the limited knowledge base from which decisions are made. In the single purpose approach, the appropriate purpose of punishment has been selected based not just on limited information, but on no information at all about a particular offender and offence. Hough and Roberts[56] found that the more information people have about an offence, the more their attitude to what would be an appropriate punishment changes, and people's moral values can vary, depending on the context to which they are asked to apply them[57], so particulars are important. Practical problems also arise from such a lack of flexibility, as the particular aim may not be achievable in every case, e.g. a sentencing system based on a single aim of rehabilitation may not cope well with an intransigent offender.

This approach cannot accommodate the nuances of particular cases and narrows the scope for sentences to be optimally effective. A system which is limited to one purpose of punishment is also unlikely to be consistently successful in meeting the needs of victims, who may have particular understandings of justice which fail

[54] Henham, *The Philosophical Foundations of International Sentencing*.

[55] R.S. Frase, *Just Sentencing: Principles and Procedures for a Workable System*, Oxford, Oxford University Press, 2013, pp. 29-30.

[56] M. Hough, J.V. Roberts, *Sentencing trends in Britain: Public knowledge and public opinion*, «Punishment and Society», I (1), 1999, pp. 11-26.

[57] See, for example, the famous 'trolley problem' in P. Foot, *The Problem of Abortion and the Doctrine of Double Effect*, «Oxford Review», V, 1967, pp. 5-15.

to be represented by the particular aim adopted[58]. For example, a system which prioritises retribution, as argued for by Ashworth[59] may not be perceived as providing justice to those victims and members of the public who hold a utilitarian understanding of justice.

A «primary rationale» approach which allows for «other aims having priority in certain types of case»[60], has been suggested by Bagaric, who argues that «[i]n order to have a coherent, transparent and justifiable sentencing system, the relevant principles must not only be articulated, but also prioritised»[61]. This is also recommended by the Council of Europe: «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»[62]. This might offer more flexibility than a single purpose, but still fails to avoid the problem of deciding which philosophy of punishment to prefer as the primary rationale, together with a new problem of how to decide which purposes should be in which order and when they should supersede the primary rationale. It is unclear how this could be arranged in such a way as to be sufficiently nuanced to account for a wide variety of offenders, victims and circumstances, whilst also being workable.

The single purpose approach is a limited response to the incoherence problem, due to the lack of any clear 'winner' in philosophical debates between retributivists and utilitarians; and the need for flexibility and responsiveness to different circumstances of different cases, for the purposes of both workability and penal legitimacy. This means that the solution is likely to be one which preserves access to different philosophies of punishment and purposes of sentencing. I think the answer lies in finding a

[58] See H. Strang, L. Sherman *et al.*, *Victim Evaluations of Face-to-Face Restorative Justice Experiences: A Quasi-Experimental Analysis*, «Journal of Social Issues», LXII (2), 2006, pp. 281-306.

[59] Ashworth, *Sentencing and Criminal Justice.*

[60] Ivi, p. 77.

[61] Bagaric, *Sentencing: The Road to Nowhere*, p. 626.

[62] Council of Europe *Recommendation No.R(92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing*, adopted by the Committee of Ministers on 19 October 1992, p. 1 (https://rm.coe.int/16804d6ac8).

coherent way of selecting between competing rationales on a case-by-case basis. Unlike the current sentencing system, there needs to be a rationale for particular philosophies of punishment coming to the fore in the process.

5. *A better solution: restorative justice*

Restorative justice could allow for different philosophies of punishment to remain available in sentencing decisions[63] without needing to artificially combine them into one single theory – thus avoiding the problems of mixed theories of punishment. This relies on a particular process-focused conception of RJ, as outlined in the introduction. Understood in this way, it is driven by the justice needs of the stakeholders. As such, the process does not prefer or predict an outcome aligned with any one theory, but allows the stakeholders to discuss and deliberate between themselves as to what outcome most accords with their notions of justice. This may require compromise, where there are opposing views, and it is particularly important in this model that no one party dominates and that the agreement reached is truly consensual.

I have argued above that mixed theories are not in and of themselves coherent and a sentencing system based on such a theory will not have a more coherent process. It is important to point out the difference with what I am suggesting here. Stakeholders may choose to include retributive elements or utilitarian elements in any particular RJ outcome, but I am not arguing that any outcome reached by a RJ process needs to be a coherent combination of sentencing purposes. This conception of RJ provides a space whereby multiple theories may be operationalised in a practical setting, without them being combined into one theory. It is the *process* by which purposes are selected that is more coherent here, even where the outcome contains both utilitarian and retributive elements.

Restorative justice represents a more coherent method of sentencing decision making, as it allows for multiple aims of

[63] See also Luna, *Punishment Theory, Holism.*

sentencing and theories of punishment, but with a clear and meaningful process for deciding between them. The process allows for an identifiable origin of the philosophy of punishment expressed in the decision: it is that most preferred by the stakeholders, following a process of mediation between ideas about justice; and it allows for a better knowledge base from which this decision is made, as the victim, offender and others closely affected by the offence are able to contribute their knowledge about the offence and the circumstances surrounding the offence to the discussion.

My argument relies on the practical implementation of RJ emphasising the empowerment of stakeholders as key decision-makers. The improved coherence offered by RJ depends substantially on the process being both voluntarily entered into and the agreement being consensually reached by the stakeholders. It is therefore worth noting briefly, that current iterations of this type of RJ (e.g. in New Zealand and Northern Ireland) do not maximise the empowerment of stakeholders, as they allow for judges or prosecutors to consider the proposed outcome reached by participants and potentially reject or amend this. The improvement in coherence that I have argued for is only effective to the extent that the final decision is that of the stakeholders. One possible way of improving the role of judges and prosecutors in RJ processes, which would maximise empowerment in this way is that suggested by Roche[64]. He argues that the state's role should be an administrative one – ensuring that no participant dominates the process, and checking that the procedure is fair, rather than assessing, and potentially changing, outcomes.

5.1 Identifiable origin of philosophies of punishment

In current sentencing practice, it is often unclear why a judge has preferred a particular purpose of sentencing over another. Part of the problem is the difficulty in locating where the preference for one philosophy of punishment or another originates from. In contrast with traditional sentencing, where stakeholders decide in a RJ

[64] D. Roche, *Accountability in Restorative Justice*, Oxford, Oxford University Press, 2003.

process as I have conceptualised it here, the origin of the philosophy of punishment expressed in the sentence is much clearer: it comes from the stakeholders' personal notions of justice. Unlike judges expressing their personally held views, or attempting to second-guess the views of others, this has a clear rationale – stakeholders are most closely linked to the offence. In other words, the philosophies of punishment in RJ are selected by identifiable and relevant people.

The importance of decision-makers being closely related to the offence is highlighted by Luna: «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»[65]. A decision made by stakeholders is more coherent than judges deciding, as with stakeholders, meaningful connections exist between the individuals making the decision and the decision to be made: the understandings of justice and philosophies of punishment which inform the sentencing decision are directly connected to, and indeed come from, those most affected by the offence.

5.2 Knowledge

Restorative justice, as I have outlined it here, is also a more coherent method of deciding on a sentence because it both encourages a wider knowledge base from which to make the decision about which rationale should be preferred, and also provides a particularly good process for the development and deployment of such knowledge. Much of the decision-making in sentencing involves weighing matters which stakeholders are more likely to be in a position to assess effectively – and this is particularly so because of the knowledge that stakeholders bring to the discussion[66].

[65] Luna, *Punishment Theory, Holism*, pp. 286-287.

[66] This better knowledge relates to matters which go to the core of sentencing decision-making and which purpose of sentencing to prefer. However, it does not extend to all aspects of state-run RJ processes, in particular where stakeholders may need to rely on criminal justice professionals to advise them on the availability of various orders that the state would have the resources to support:

This means that the opportunity for decisions to be meaningfully related to the circumstances of the case is greater than in traditional sentencing[67]. I am not suggesting that stakeholders are better versed in sentencing law than judges. However, much of the decision-making in sentencing is about non-legal matters (as discussed above) and it is here that stakeholders may have better knowledge. It is also worth noting that these non-legal assessments, such as likelihood of reoffending, can be made based on prejudicial assumptions:

> Because recidivism is never fully predictable, and defendant character cannot be known entirely, court actors make assessments of dangerousness, blameworthiness or other relevant factors, partially based on attributions about the defendant according to their gender, employment status, family situation and race[68].

That is not to say that prejudices cannot surface in RJ. However, there is at least the opportunity to challenge this by the person being assessed (whether that be the victim or offender) – and any stakeholder may veto a decision, as outcomes can only be confirmed following consensual agreement[69].

Non-legal factors can influence the decision as to which philosophy of punishment might be suitable in a particular case. My suggestion that stakeholders would be more likely to have, and be able to further develop as part of a RJ process, the knowledge and understanding to make decisions concerning these non-legal issues, is based on broader claims about the value of local knowledge. I am also relying on a particular view of the state as usually unwilling

J. Shapland *et al.*, *Situating restorative justice within criminal justice*, «Theoretical Criminology», X (4), 2006, pp. 505-532.

[67] Tiarks, *Restorative justice, consistency and proportionality*.

[68] Roach, Brewer, Mack, *Locating the judge within sentencing research*, p. 52.

[69] The appropriate length of time spent before it is conceded that agreement cannot be reached will be a matter for the stakeholders, guided by a professional facilitator. Availability of resources will also be relevant, particularly for state-run conferences.

or unable to engage with such knowledge. The importance of this type of local knowledge, and the problem with states failing to take it into account, has been highlighted by James C. Scott[70], who argues that states refusing to engage with local knowledge can be a fundamental cause of failure in state-centric schemes. He argues that states have a tendency to ignore and often suppress local, «practical» knowledge, and that important information is lost through state attempts to make it easier to organise and measure matters: «We have repeatedly observed the natural and social failures of thin, formulaic simplifications imposed through the agency of state power»[71].

The sentencing process is currently prone to simplification of matters so that they fit certain categories and legal criteria, thereby suppressing potentially important information. This is particularly the case where a guilty plea has been entered, as discussed above. At a sentencing hearing the input from the offender and victim is minimal. Whilst judges will sometimes have the assistance of a pre-sentence report compiled by probation and have heard mitigation from the offender's advocate (highlighting factors which are alleged to make the offence less serious) these are limited opportunities for judges to form an opinion about the character of the offender. This is also true for the victim and other affected parties. Judges might take into account any victim personal statement – a document in which victims can explain how they have been affected by the crime. However, the victim need not be present for the sentencing hearing and his or her role is largely passive[72].

[70] J.C. Scott, *Seeing Like A State*, New Haven-London, Yale University Press, 1998, p. 309.

[71] *Ibidem*.

[72] The 2015 Code of Practice for Victims of Crime enacts measures from the EU Victims' Directive 2012/29/EU, but there is no substantial alteration of the victim's role in sentencing. Victim personal statements are limited to detailing the impact of the crime and victims are not permitted to express an opinion about sentence.

In contrast, stakeholders in RJ 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 engaged with. It could be argued that the traditional sentencing process provides a more rational, disinterested decision-making process, which might be preferable to knowledge which may not always be rationally-derived. However, this misrepresents current sentencing; there is subjectivity in both sentencing[73] and RJ, and neither can be described as a purely rational process. Contrary to current sentencing practice, however, RJ creates a positive way of handling this subjectivity. It allows those with more relevant, local knowledge (the stakeholders) to engage in the decision-making process, which allows for the subjective decisions to be based on better knowledge and be more closely connected to the people affected by those decisions. Woolford and Ratner describe how this can broaden the discussion:

> 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)[74].

The knowledge that stakeholders can bring to the RJ process enables mutually agreed upon decisions to be much more meaningfully related to the circumstances of the case than in the traditional sentencing process. In particular, this knowledge can have an important bearing on stakeholders' conceptions of which philosophy of punishment or purpose of sentencing should have priority in a given case. However, it is not just the knowledge that

[73] Millie, Tombs, Hough, *Borderline sentencing*, p. 258.

[74] A. Woolford, R.S. Ratner, *Nomadic Justice? Restorative Justice on the Margins of Law*, «Journal of Social Justice», XXX, 2003, pp. 177-194, p. 188.

stakeholders bring to RJ that increases the coherence of the process, but also the way in which the process allows for this knowledge to be used.

Restorative justice provides opportunities for discussion and debate, as well as enabling more information about the offence and the offender to be used in the discussion and is a useful process for the development of individuals' moral ideas, rather than simply a forum to which they bring rigid moralities which are then applied to the context of the offence. It allows scope for conflicting moralities to be adapted and compromise to be reached between stakeholders. This is an important reflection of, and allowance for, the way that moral opinions can alter according to the context to which they are applied, as mentioned above[75]: «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»[76].

Stakeholders have a better claim to being the ones whose value judgments are preferred in dealing with the offence, due to their close connection to the offence and being most affected by it. Through both *who* RJ processes entrust with the decision-making, and *how* this allows for those decisions to be made, RJ offers a more coherent process of sentencing. The origin of the preferred philosophy of punishment expressed in sentencing decisions is clearer, and this decision is reached through a more effective process for developing moral ideas and is based on better knowledge.

6. *Conclusion*

I have argued that the sentencing process in England and Wales is incoherent, because of the *ad hoc* combination of different philosophies of punishment and purposes of sentencing, with no sound rationale in place for deciding between them. There is no

[75] Foot, *The Problem of Abortion*; Hough, Roberts, *Sentencing trends in Britain*.

[76] Shapland *et al.*, *Situating restorative justice within criminal justice*, p. 522.

identifiable origin of the philosophy of punishment expressed in sentencing decisions and the knowledge base from which decisions about which purpose of sentencing to prefer are made is limited. This lack of coherence in sentencing is problematic because sentencing represents a significant intrusion by the state into the lives of individuals. It is important that there is a clear and coherent procedure for deciding between different purposes of sentencing, as the sentence selected can vary – sometimes significantly – depending on which purpose is chosen.

Restorative justice offers the most promising solution to the problem of incoherence in sentencing. It can provide for an identifiable origin of the philosophy of punishment or purpose of sentencing preferred and meaningful connections exist between the individuals making the decision and the decision to be made. There is also a better knowledge base from which to make the decision, and a better process for utilising this knowledge. Those most affected by the offence and who were present at the offence and know first-hand the context of the offence, are making the decisions and have the opportunity to discuss and develop their moral ideas about what the outcome should be. RJ, as I have conceptualised it here, offers a more coherent approach to sentencing. Where it is possible to implement RJ in such a way that the empowerment of the participants is maximised, participation is voluntary and any agreement is reached consensually, there is a strong case that it should be preferred to traditional sentencing processes.

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