Is Restorative Justice Compatible with Sentencing Uniformity?

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I am grateful to the coordinators of this symposium for the opportunity to offer a few comments inspired by the thought-provoking article of Mark Umbreit, Betty Vos, Robert Coates, and Elizabeth Lightfoot. The authors have given us an unusually thorough and engaging assessment of the research on restorative justice ("RJ"). My own scholarship has focused primarily on sentencing within the conventional criminal justice framework; not surprisingly, then, my comments will be those of one who wonders to what extent we can look to RJ as the foundation for a reformed sentencing process.

As Umbreit and his colleagues put it, RJ represents "an entirely different way of understanding and responding to crime and conflict," one that offers "a far more accountable, understandable, and healing system of justice and law." Their vision of a transformed criminal justice system holds considerable appeal, if only because the conventional system seems such a dismal failure. It is a system that manages to alienate both offenders and victims. It is a system that incarcerates Americans at rates that are unrivaled among western democracies, and African American males, in particular, at rates that...
ought to be regarded as a national scandal. Yet, recidivism remains the norm, the system is widely perceived as too lenient, and the public continues to believe that crime rates are on the rise. What, then, could we possibly have to lose in restructuring the system as RJ envisions?

Among skeptics of RJ, one of the standard answers is that we may sacrifice uniformity in sentencing. Broadly speaking, uniformity means that similarly situated offenders are sentenced similarly, while differently situated offenders are sentenced appropriately differently. Since the 1970's, uniformity has emerged as a—perhaps the—leading objective of American sentencing systems. Accordingly, RJ advocates cannot afford to ignore claims that RJ is incompatible with uniformity. In this Essay, I aim to examine such claims in a more analytically rigorous fashion than has previously been attempted.

As Umbreit and his colleagues observe, RJ can take many different forms. For present purposes, I will identify RJ with its “most widely practiced” form, that is, RJ “dialogue” (encompassing such overlapping categories of practices as victim-offender mediation, group


6. As of the end of 2003, the incarceration rate for black males was 3405 out of every 100,000, as compared to only 465 for white males. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003, at 9 (2004).

7. See PATRICK A. LAGAN & DAVID J. LEVIN, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002) (determining that, among prisoners released in 1994, more than two-thirds were rearrested for a new offense within three years).


9. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, at tbl.2.31 (31st ed. 2003) (reporting survey data showing that, in 2003, sixty percent of respondents felt that crime had increased in the past year).


13. Umbreit and his colleagues do not discuss this issue in depth, but note its significance. Umbreit et al., supra note 1, at 304.
As a component of the sentencing process, I take it that the essential features of RJ dialogue would include the following: (1) the offender meets face-to-face with the victim, representatives of the victim, and/or representatives of the community; (2) the meeting involves a facilitated dialogue in which all participants are given an opportunity to share their views of the offense and its consequences; (3) participants seek consensus as to appropriate restorative measures to repair harm caused by the offense, which might include apology, restitution, and community service, in addition to (or in lieu of) more traditional penal sanctions; and (4) mechanisms are put into place to ensure the offender's accountability in performing agreed-upon restorative measures. The RJ dialogue occurs prior to judicial sentencing. If the dialogue is unsuccessful, or if the offender chooses not to participate, then the offender might be sentenced in the conventional manner. If the dialogue produces an agreement, then the agreement might take the place of a formal judgment or, alternatively, be embodied in the terms of the formal judgment, possibly along with additional judicially-determined sanctions or conditions.

Is this model of RJ compatible with uniformity? The answer, I conclude, is a resounding "it depends." Elsewhere, I have argued that the term "uniformity" means quite different things to different people. It turns out that the notion of similar treatment for the similarly situated (and different treatment for the differently situated) is not nearly as simple as it sounds. The uniformity ideal merely begs the question: What exactly makes two offenders similar in ways that matter to us? Uniformity is an empty concept without some underlying theory about the purposes and priorities of the criminal justice system. In particular,

14. Umbreit et al., supra note 1, at 254. I emphasize here what Professor Braithwaite refers to as the “process idea of restorative justice,” which sees RJ as “a method of bringing together all stakeholders in an undominated dialogue about the consequences of an injustice and what is to be done to put them right.” JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 12 (2002). Braithwaite has identified some tension between “restorative process” and “restorative values,” inasmuch as the restorative process, in any given case, might produce a harshly punitive result that does not reflect important restorative values “such as apology, repairing of harm, forgiveness, and reconciliation.” Id. If RJ were not viewed chiefly as a process, but, rather, viewed as a system that constrains or mandates particular outcomes, then the question of its compatibility with sentencing uniformity would have to be analyzed quite differently than I have done here.

15. Some alternative RJ models pose no apparent difficulty from a uniformity standpoint, such as post-sentencing victim-offender mediation. Without dismissing the value of such alternative models, I focus on a pre-sentencing model because this sort of approach seems to offer the most direct and compelling method of bringing fundamental change to the criminal justice system.

I have identified five distinct (and sometimes conflicting) paradigms of uniformity, each of which contemplates a somewhat different analytical methodology to distinguish "warranted" from "unwarranted" sentencing disparity. They are: (1) pre-offense predictability; (2) retributive proportionality; (3) in-system predictability; (4) purposeful sentencing; and (5) anti-subjugation.\footnote{These are not necessarily the only ways of thinking about uniformity, but they have played an especially important role in the development of American sentencing policy since the 1970s. \textit{Id.} at 4.} Some of these versions of uniformity seem quite compatible with RJ, while others are much less so.

Elaborating on this point, the Essay proceeds as follows. Part I considers the compatibility of RJ with the two "static" uniformity paradigms. These paradigms (pre-offense predictability and retributive proportionality) emphasize reliance at sentencing on conduct and circumstances that are external and antecedent to the processes of the criminal justice system. Part II considers the three "dynamic" paradigms (in-system predictability, purposeful sentencing, and anti-subjugation), which permit consideration of the interactions between offenders, victims, and criminal justice professionals within the system. I conclude that the dynamic paradigms are more compatible with RJ than the static. I also suggest some reasons to view the static paradigms (which pose relatively greater difficulties for RJ) with skepticism. In short, I do not believe that uniformity concerns provide a compelling reason to reject RJ.

\section{I. The Static Paradigms of Uniformity}

Under the static paradigms, offenders should be differentiated based chiefly on factors that exist outside and antecedent to the operation of the criminal justice system. For instance, in a bank robbery case, the sentence might be determined by reference to such factors as whether the offender was armed, whether anyone was physically hurt by the crime, and whether the offender played a major or minor role in planning the crime. The sentence, however, would not be determined by such considerations as whether the offender apologized, pled guilty, or successfully addressed a drug dependency problem after arrest.

There is a necessary tension between RJ and the static paradigms, inasmuch as RJ permits dialogue (involving victim, offender, and possibly other interested parties) to play a meaningful role in
determining sentencing outcomes. RJ dialogue, as understood here, occurs within the system, and should accordingly be viewed (under the static paradigms) as irrelevant in determining the sentence.

In principle, there are at least three potential mechanisms for wedding static views of uniformity to RJ. First, the sentence severity demanded by the uniformity regime might be regarded as a minimum, with the actual sentence determined, in whole or part, through RJ procedures (subject to the uniformity-based minimum). Second, the uniformity regime might instead establish a maximum sentence, with the actual sentence again determined through RJ procedures (subject to the uniformity-based maximum). Finally, the uniformity regime might establish both a maximum and a minimum. This might mean one specific severity level or (recognizing some unavoidable imprecision in implementing concepts like retributive proportionality) a severity range. If a range, RJ procedures might be used to determine the location of the sentence within the range. If a specific severity level, then RJ would have a lesser role, but might be used to help select one of a number of sentencing options with roughly equivalent bite (e.g., 5 days in jail versus $1000 in financial penalties versus 100 hours of community service). In order to assess the workability of these sorts of approaches, though, some further elaboration of the two static paradigms is necessary.

A. Pre-offense Predictability

Under the pre-offense predictability ("POP") paradigm, sentencing laws should be structured such that a prospective criminal may determine with some specificity prior to the commission of the crime the sentence that he or she will receive if convicted.18 This paradigm rests chiefly on the long-standing view that certainty of punishment contributes more to deterrence than does severity.19 The paradigm might also be justified as a matter of fair notice to prospective criminals.20 In any event, from this perspective, uniformity demands

18. Id. at 46.
19. For instance, this view was central to the criminology of the great eighteenth-century Italian reformer Cesare Beccaria. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764). It has also been articulated in recent years by influential sentencing reformers like Senator Edward Kennedy. See, e.g., Senator Edward M. Kennedy, Forward, in PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM viii (1977).
20. This view was suggested, for instance, by Judge Marvin Frankel, who is considered
above all else that sentences be based on the objective features of the offender's conduct and the foreseeable consequences thereof. We should thus avoid sentencing disparities that are based on unforeseeable contingencies, post-offense conduct, or subjective assessments of the offender's character or culpability.

There is no reason to believe that RJ processes would typically produce results conforming to the requirements of the POP paradigm. Indeed, there are at least four reasons to expect the contrary. First, RJ provides for the consideration of actual harm, not just hypothetical, foreseeable harm. Thus, the offender may be held accountable for harm that is idiosyncratic, in degree or kind, even though this may result in sentencing consequences that are unpredictable in advance of the crime. Second, RJ gives weight to the wishes of victims, even though victims may prefer unexpected, idiosyncratic consequences. Third, RJ also gives weight to the wishes of offenders, which may evolve in unexpected directions as a result of participation in the RJ dialogue. Fourth, other participants in the dialogue (facilitators, community representatives, family members, etc.) may also make their own unique, individual contributions that move the sentencing process in unforeseeable directions.

Despite the inherent theoretical tensions between RJ and the POP paradigm, could they nonetheless be combined in a satisfactory fashion in practice? In order to answer this question, we must appreciate that, in practice, the POP paradigm has long been closely linked with the ideal of deterrence. This suggests another point of tension between RJ and POP: sentences determined through a POP regime will likely be much more severe than sentences determined through a pure RJ process. Recall that RJ is, in essence, about repairing harm, suggesting (if we assume the RJ dialogue is shaped around this principle) that sentence severity should generally be constrained by the degree of actual harm caused. By contrast, deterrence theory calls for a

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one of the chief progenitors of federal sentencing reform. O'Hear, supra note 12, at 12-13, 46.


22. Umbreit et al., supra note 1, at 255.

23. I assume a general tendency in this regard. Because I employ a procedural view of RJ, I must concede the possibility that in some cases victims (and perhaps other participants in the RJ process) will insist upon hyper-punitive responses that far exceed the harm done. I assume that such cases will not be the norm, however, because I assume that the dialoguing process itself will help to check such sensibilities, see infra text accompanying note 44, particularly if the circle of participants is broader than just offender and victim. See Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 235 n.161 ("Whatever imbalances of power might result from a dyadic
multiplier effect based on the (generally low) likelihood that the crime will be detected, reported, and successfully prosecuted. In other words, the sentence determined in a POP regime will not be constrained by harm, and might, in fact, be several times more severe than the harm caused.

Consider the implications for a hybrid system in which the POP principle operated merely as the basis of a maximum sentence. The POP-based maximum would likely be high enough to give RJ processes plenty of room to operate comfortably. These processes, however, are unlikely to produce sentences on a consistent basis that are sufficiently severe to satisfy the proponents of POP.

What if, by contrast, the POP-based sentence were a minimum. This would satisfy the demands of deterrence theory, but likely undermine the effectiveness of the RJ processes. If the offender faces, say, a twenty-year mandatory minimum, the range of restorative options will be severely cramped. (For instance, the offender will not likely have sufficient income in prison to make meaningful financial restitution.) Moreover, the offender, aggrieved by the extraordinary harshness of the system, is not likely to be in an appropriate frame of mind to recognize and respond to the harm suffered by his or her victims. Indeed, victims themselves may view harsh minimums as excessive and have little desire to participate in a program that imposes further burdens on the offender, or that denies them the opportunity to "get the grace of [showing] mercy." There seems, in short, a profound incompatibility between RJ and the POP version of uniformity.

Should we view this incompatibility as an important argument confrontation between the offender and his victim can be avoided by surrounding the key parties with those most concerned with their well-being.") Additionally, much empirical research casts doubt on the assumption that revenge is a principle objective of victims. Heather Strang, Is Restorative Justice Imposing Its Agenda on Victims?, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 95, 96 (Howard Zehr & Barb Toews eds., 2004).

24. Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. REV. 453, 458-60 (1997). For instance, Professors Robinson and Darley calculate that perpetrators of assault, burglary, larceny, and motor vehicle theft face only a 100-to-1 chance of going to prison for the crime. Id. at 459. Deterrence theory requires that sentence lengths be increased to account for such low odds. Moreover, social science research points to various cognitive distortions that might further undermine the deterrent threat of criminal sanctions, thereby requiring even greater sentence lengths in order to achieve desired levels of deterrence. Id. at 460-63.

25. O'Hear, supra note 5, at 250-52.

26. Indeed, empirical research indicates that helping the offender is one of the principal reasons that victims choose to participate in RJ programs. Umbreit et al., supra note 1, at 271.

against RJ? I think not. Despite its political salience,\textsuperscript{28} the POP paradigm does not withstand scrutiny as a useful way to think about uniformity. The difficulty, in essence, is this: with so many important sources of uncertainty prior to sentencing—will the victim report the offense, will the police apprehend the offender, will the prosecutor decide to pursue the case, will the crucial evidence be suppressed, will the jury convict, etc.—predictability at the sentencing stage seems a futile gesture. Indeed, given the low risk of successful prosecution, a prospective criminal would have to be extraordinarily risk-averse to be deterred by even the certain prospect of a tough sentence after conviction.\textsuperscript{29} There is no reason to believe that prospective criminals are so risk-averse; indeed, if anything, there is good reason to believe that most are overly optimistic about the risks they face.\textsuperscript{30} Thus, if embracing RJ means sacrificing the speculative and dubious benefits of the POP paradigm, this should not be a matter of particular concern.

\textbf{B. Retributive Proportionality}

Under the retributive proportionality paradigm, offenders should receive a sentence proportionate to the blameworthiness of their conduct.\textsuperscript{31} Blameworthiness is assessed by reference to two types of variables: (1) the amount of harm risked or caused by the offender’s conduct, and (2) the offender’s personal culpability with respect to the harm, encompassing such considerations as \textit{mens rea} and role in the offense.\textsuperscript{32} Which specific harm and culpability variables count, and how

\begin{itemize}
\item \textsuperscript{28} O’Hear, \textit{supra} note 12, at 54.
\item \textsuperscript{29} See Robinson & Darley, \textit{supra} note 24.
\item \textsuperscript{30} Id. at 460-62. In theory, of course, punishment could be raised to such an extraordinarily high level of severity that even risk-preferring criminals would pay heed. We could return, for instance, to the common law rule of capital punishment for all felonies, including minor thefts. The problem here is enforcement. If mandatory sentences are perceived as greatly disproportionate to the gravity of the crime, then police will not arrest, prosecutors will not prosecute, and juries will not convict. Dan M. Kahan, \textit{Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem}, 67 U. Chi. L. REV. 607, 607-08 (2000). Moreover, there are also all of those crimes of passion, desperation, and impaired mental faculties that have never been thought effectively deterrable.
\item \textsuperscript{31} Elsewhere, I have discussed a broader “purposes paradigm” of uniformity and identified inclusive and discriminating variations. O’Hear, \textit{supra} note 12, at 45, 48. For present purposes, I think it helpful to disaggregate the inclusive and discriminating approaches more fully. What I refer to here as the “retributive proportionality” paradigm is one especially influential form of the discriminating approach.
\item \textsuperscript{32} Paul H. Robinson, \textit{A Sentencing System for the 21st Century?}, 66 TEX. L. REV. 1, 7 (1987).
\end{itemize}
much weight they are given, are determined by reference to public opinion and/or moral theory.\textsuperscript{33} In any event, offenders who are personally responsible in similar ways for a similar amount of harm should receive similar sentences. Likewise, offenders who differ in significant respects as to harm or culpability should receive different sentences.

This approach to uniformity has been advanced as a moral mandate, that is, a valuable end in and of itself, without regard to any other resulting social benefit.\textsuperscript{34} The approach has also been justified on consequentialist grounds. Specifically, this paradigm is said to result in sentences that reflect public preferences and hence increase public respect for—and obedience of—the law.\textsuperscript{35} More succinctly stated, proponents argue that the retributive proportionality paradigm reduces crime rates.\textsuperscript{36}

As noted by Umbreit and his colleagues, this approach is in some tension with the sensibilities of RJ.\textsuperscript{37} Retributive sentencing always looks backward, requiring a consideration of what the offender did in the past as the method for determining how much pain to impose on the offender in the present. RJ, by contrast, is more forward-looking: a sentence does not inexorably follow from past conduct, but, rather, from present needs for repairing harm, as presently understood by participants in the RJ dialogue. Moreover, retributive proportionality, like the POP paradigm, treats cases in an abstract fashion, permitting little consideration of idiosyncratic circumstances and perspectives, perhaps most notably the victim's willingness to show mercy.

At the same time, as Umbreit and colleagues also note, it is easy to exaggerate the differences between retributive and restorative justice.\textsuperscript{38} In particular, both approaches—in contrast to the POP paradigm—indicate that sentence severity should be closely related to harm. This

\begin{itemize}
\item \textsuperscript{33} Robinson, \textit{supra} note 10, at 380 n.11.
\item \textsuperscript{34} Robinson & Darley, \textit{supra} note 24, at 454.
\item \textsuperscript{35} \textit{Id}.
\item \textsuperscript{36} \textit{Id}. Influential proponents of uniformity have often claimed that a consistent system of proportionate sentencing will enhance public respect for the law. For examples, see O'Hear, \textit{supra} note 12, at 23-24, 26.
\item \textsuperscript{37} Umbreit et al., \textit{supra} note 1, at 257. \textit{See also} Braithwaite, \textit{supra} note 14, at 16 (discussing theoretical debate over whether retributive emotions ought to be accommodated within RJ framework).
\item \textsuperscript{38} Umbreit et al., \textit{supra} note 1, at 257. \textit{But see} Lode Walgrave, \textit{Has Restorative Justice Appropriately Responded to Retribution Theory and Impulses?}, in \textit{CRITICAL ISSUES IN RESTORATIVE JUSTICE}, \textit{supra} note 4, at 47, 48-49 (arguing that intentionality in inflicting pain constitutes a "critical" difference between restorative and retributive approaches).
\end{itemize}
similarity suggests the possibility of workable retributive-restorative hybrids.\footnote{39}

Consider first the retributive sentence as a \textit{maximum}, with the RJ process employed to determine the actual sentence within the maximum. Such a system would function as a type of "limiting retributivism," an approach to sentencing with considerable theoretical support.\footnote{40}

Would a retributive cap offer sufficient room, though, for RJ to operate effectively?\footnote{41} There are good reasons to believe that RJ processes would typically produce outcomes within the maximum. First, both approaches give considerable weight to harm. Second, the expectations of participants in the RJ dialogue would be conditioned, to a greater or lesser extent, by the cap. The psychological "anchoring effect"\footnote{42} of the cap (assuming participants are told of the cap) should help to ensure that sentences within the cap are perceived to be satisfactory by participants.

Third, retributive proportionality determines sentences on an abstract, categorical basis, while RJ permits consideration of the actual offender as a real human being. Empirical evidence suggests that, when people think about sentencing in the abstract, they tend to assume the worst about the offender.\footnote{43} RJ processes, by contrast, will tend to humanize the offender, creating realistic possibilities of empathy and mercy.\footnote{44}

\footnote{39. Notably, a number of prominent punishment theorists have been writing in recent years about ways of bridging the gap between restorative and retributive paradigms. For examples, see R.A. Duff, \textit{Guidance and Guidelines}, 105 COLUM. L. REV. 1162, 1185-87 (2005); Andrew von Hirsch et al., \textit{Specifying Aims and Limits for Restorative Justice: A "Making Amends" Model?}, in \textit{RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?} 21, 38 (Andrew von Hirsch et al. eds., 2003); Robinson, \textit{supra} note 10, at 384-87; Luna, \textit{supra} note 23, at 206.}

\footnote{40. See, \textit{e.g.}, NORVAL MORRIS, \textit{THE FUTURE OF IMPRISONMENT} 73 (1974).}

\footnote{41. This is a slightly different question than the question of whether RJ processes \textit{must} be made subject to some sort of proportionality limitation—a question that has divided RJ theorists. For a discussion of the debate, see von Hirsch, \textit{supra} note 39, at 30.}


\footnote{43. See St Amand & Zamble, \textit{supra} note 42, at 516-17 (discussing research showing that, when surveyed regarding sentencing, "people tend to think of hardened and vicious criminals rather than the typical offender").}

\footnote{44. See John Braithwaite, \textit{Principles of Restorative Justice, in RESTORATIVE JUSTICE}
Finally, as Professor Whitman has suggested in a recent and provocative body of scholarly work, retributive approaches to punishment may have an intrinsic tendency to harshness. Whitman's argument is subtle, complex, and deeply informed by his comparative studies of punishment in American and European history, but goes something like this. The practice of punishment necessarily establishes a relationship of inequality between the punisher and the person being punished, and hence diminishes the social status of the offender. This inescapable degradation, unless counterbalanced by a self-conscious and robust commitment to the offender's well-being, tends to unleash negative emotions towards the offender that may easily "spin out of control" into vengefulness and extreme harshness. To the extent this is true, then retributive proportionality may tend to produce more severe outcomes than RJ, whose processes do self-consciously seek to humanize and valorize the offender.

This is not to say that RJ processes will always operate comfortably within a retributive cap. There may be some cases, for instance, in which the victim does not feel the cap fairly reflects the harm that he or she has actually suffered, which may undermine the victim's motivation to participate in the RJ dialogue or even leave the victim feeling, not "restored," but insulted and revictimized. On the whole, though, there

AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?, supra note 39, at 1, 3 ("[Restorativists] can also be correctly accused of advocating breach of what many retributivists view as proper lower constraints [on punishment] by advocating mercy as a value for those who 'deserve' punishment.").

46. Id. at 106.
47. Id. at 107; James Q. Whitman, Making Happy Punishers, 118 HARV. L. REV. 2698, 2701, 2716-17 (2005).
48. See, e.g., Braithwaite, supra note 44, at 2-3 (describing debate over whether retributive or restorative theory provides better assurances that sentences will not breach upper limit of moral punishment); Jim Dignan, Towards a Systematic Model of Restorative Justice: Reflections on the Concept, its Context, and the Need for Clear Constraints, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?, supra note 39, at 135, 140 ("[T]here can be no guarantee that even restorative justice conferences will be able to avoid unjust outcomes in which authoritarian figures . . . call the shots.").
49. There is an important debate in the RJ literature, however, as to the extent to which punitive emotions have an appropriate role to play in the RJ process. See, e.g., BRAITHWAITE, supra note 14, at 16 (discussing debate); Lode Walgrave, Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?, supra note 49, at 61, 63-64 ("[T]he intentional obligation to make up is ethically superior to the intentional infliction of pain . . . .") Thus, some RJ theorists might
is reason to believe that such cases would not be the norm, and that a retributive-cap system could operate in a manner that is reasonably respectful in practice of the values embodied in the RJ process.\(^{50}\)

Many retributivists, however, will object that retributive proportionality should not be relegated to providing merely a maximum sentence, but should also provide a minimum.\(^{51}\) Is this approach compatible with RJ? My concern is that a retributive minimum might work like a deterrence-based POP minimum: so harsh that restorative options would be cramped and dialogue participants demoralized.\(^{52}\) The risk would be greatest with respect to the more serious categories of crime. Indeed, the tension between RJ and the minimum severity demands of retributive impulses in serious cases may help to explain why RJ has been much more successful in penetrating the criminal justice system with respect to juvenile and misdemeanor crimes than

argue that the possibility that RJ outcomes will exceed the retributive cap is not a point against the cap, but a point against the purely procedural conception of RJ. See, e.g., Dignan, supra note 48, at 141-42. Professor Walgrave has argued, though, that the need for some sort of “just and reasonable limits” on responses to crime does not necessarily imply a cap based on the principle of retributive proportionality. Walgrave, supra note 38, at 53.

50. I have focused here on the possibility that a retributive cap will unduly constrain the severity of RJ responses to crime. There is also a possibility that the cap will unduly enhance the severity of responses. If retributive thinking tends towards harshness, then the anchoring effect might pull RJ responses higher than they would otherwise be, and perhaps contribute to a punitive atmosphere in the RJ dialogue that is counterproductive to RJ’s healing and reintegration objectives. Such concerns might be addressed by concealing the retributive cap from RJ participants. This approach, however, might increase the likelihood that the RJ process would produce outcomes exceeding the cap. In other words, if RJ participants have no “anchor” in their deliberations, there may be a greater incidence of both very high and very low sentences, as opposed to a clustering around the cap. It is not immediately clear which distribution is preferable.

51. The noted retributivist Andrew von Hirsch, for instance, has asserted that, if case dispositions are negotiated, “it would not seem feasible to impose the kind of rigorous ordinal-proportionality requirements that a [retributive] model envisions for criminal punishments. . . . This is because a considerable leeway would be needed for the parties to choose a disposition they feel conveys regret in a satisfactory manner.” Von Hirsch et al., supra note 39, at 31. Von Hirsch has himself proposed a hybrid retributive-RJ sentencing scheme, with “loosened” proportionality requirements in order to accommodate the need for negotiating flexibility. Id. at 38. He has not, however, endorsed this proposal as something that is actually “worth implementing.” Id. at 40. Professor Duff has taken a more positive view of a system of negotiated sentencing in which principles of proportionality would establish a range of permissible sentences with firm upper and lower limits. Duff, supra note 39, at 1188.

52. Walgrave has made a similar point. Walgrave, supra note 38, at 49 (“The procedure to determine punishment often interferes with the attention to the harm and suffering caused; the threat of punishment makes genuine communication about harm and reparation impossible; and the penalty itself seriously hampers the offender’s effort to repair and compensate.”).
with adult felonies.

Let us assume, at least for the sake of argument, that RJ is incompatible with retributive minimums. Does this provide a good reason to reject RJ? The question implicates the rich and long-running theoretical debate between retributive and restorative justice, which I certainly cannot hope to resolve in this short Essay. I will suggest, however, a few reasons why even committed retributivists might find it acceptable to let RJ processes take their course in lieu of insisting on uniform minimums derived from principles of retributive proportionality.

First, retributive proportionality, as a system of uniform sentencing, necessarily shoehorns cases into crude abstract categories, while RJ processes permit more nuanced consideration of the moral significance of the actual conduct (and resulting harms) of the real-life human being who committed the offense. To be sure, RJ processes also permit the sentence to be affected by other considerations (like mercy) that may not jibe well with retributive theory. Additionally, the RJ dialogue may itself fail to operate at a morally sophisticated level, resulting in a consideration of harm and culpability no less crude than that embodied in a retributive uniformity scheme. Still, RJ does not seem necessarily any less capable of taking retributive sentencing factors into account in a meaningful, thoughtful fashion. Indeed, our concerns about the

53. This seems, for instance, to be Braithwaite’s position:

I cannot see how one can nurture restorative values like mercy and forgiveness while taking retributive proportionality seriously. Upper limits against the imposition of disproportionately high punishment can and should be part of a synthesis of just deserts and restorative justice. But lower limits are a roadblock to victims being able to get the grace of mercy when this is what they see as important to their own healing. Braithwaite, supra note 27, at 391.

54. See, e.g., Walgrave, supra note 38; von Hirsch et al., supra note 39.

55. See, e.g., O’Hear, supra note 11, at 253 (discussing shortcomings of United States Sentencing Guidelines as a coherent proportionality scheme and suggesting that proportionality “in any truly rigorous form is probably unattainable”).

56. Luna has made a similar point. Luna, supra note 23, at 237 n.168 (“The current approach to criminal sanctioning seeks equality of punishment for similar offenders grounded in the ideal that two like crimes should receive like punishments. What this theorem misses, however, is that two ostensibly identical crimes can have widely different harms and consequences for their victims.”).


58. Cf. Dignan, supra note 48, at 144 (“[T]he challenge for desert theory that is presented by restorative justice processes is that they provide an alternative, and arguably far
ability of a system of retributive proportionality to live up to its own moral ambitions in practice might be heightened by Professor Whitman’s observations about retributivism “spinning out of control,” as well as the unavoidable realities of police, prosecutorial, and judicial discretion in the criminal justice system.

Second, while retributivism is often justified on the ground that it (unlike other approaches to punishment) embodies respect for the autonomy and dignity of offenders and victims, conventional criminal justice procedures, which typically treat the offender as a passive object to be processed and which often ignore the victim altogether, undercut the message of respect. RJ procedures, by contrast, give offenders and victims a greater opportunity for voice and choice, and thus seem more consistent with a humanizing agenda.

Third, retributivism is also justified based on its supposed consistency with public preferences; outcomes based on retributive principles are thus thought to enhance the perceived legitimacy of the legal system. There are, however, at least two important difficulties with this argument. First, it disregards process—even though we know that the perceived legitimacy of the legal system depends not only on just outcomes, but also on fair process. Thus, it is not clear that a system of retributive proportionality can deliver the legitimacy that it promises if it employs processes that fail to give victims and offenders a meaningful opportunity to be heard. RJ, of course, provides a framework for doing just that. Second, the argument may assume a static, homogenous set of public preferences. Different communities,
however, have quite different views of crime and punishment, and these views may evolve considerably over time. For this reason, I am particularly skeptical of efforts to implement retributive proportionality through a monolithic set of national sentencing guidelines. Instead, if our goal is a system that produces outcomes matching community preferences, we ought to have a more flexible sentencing process that seeks community input on a localized basis. Once again, RJ provides a framework for accomplishing this, through the participation of community representatives in the RJ dialogue.

II. DYNAMIC UNIFORMITY PARADIGMS

The dynamic versions of uniformity seem less intrinsically prone to conflict with RJ, as they do not insist so rigidly on basing the sentence on factors that are antecedent to the RJ dialogue. At the same time, there are important and varying practical challenges in implementing these paradigms within an RJ-based criminal justice system. The three versions of dynamic uniformity are considered separately below.

A. In-system Predictability

Under the in-system predictability ("ISP") paradigm, sentences need not be predictable at the time the crime is committed (as under the POP paradigm), but the consequences of the offender's conduct and choices while he or she is in the criminal justice system must be clear. If the offender enters into a particular plea deal with the prosecutor, for instance, the offender must be able to determine the sentencing consequences of that deal in advance. In all events, there should be no surprises when the sentence is formally pronounced; the offender will have effectively determined the sentence through his or her choices in

68. I have made a number of specific proposals along these lines. See, e.g., O'Hear, supra note 66, at 766-70; Michael M. O'Hear, Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure, 27 HAMLINE L. REV. 358, 377-80 (2004).
69. The growing political support for RJ, see Umbreit et al., supra note 1, at 291-98, provides some support for the view that RJ is itself capable of inspiring public confidence and respect.
the system.

RJ seems quite compatible with the ISP paradigm. RJ dialogue gives offenders an opportunity to participate actively in the determination of the sentence; the sentence emerges from the offender's interaction with others in the system, and is not imposed unilaterally by a judge. Of course, RJ also gives offenders a right to opt back into the conventional sentencing process. Under the ISP paradigm, then, it would be important for the offender to know the sentencing consequences of this decision in advance. It would also be important to limit the discretion of the sentencing judge to override dispositions achieved through RJ dialogue. These limitations demanded by ISP, however, do not appear unduly problematic from the RJ perspective.

There is, however, an additional point of greater concern. The ISP paradigm has been justified as a means to create reliable incentives for cooperation with prosecutors, particularly by entering a guilty plea (which saves the government the burdens of a trial) and providing testimony against other offenders. Restorative justice programs, by contrast, have traditionally focused primarily on the interests of victims, who may have quite different interests than prosecutors. Where a prosecutor's overriding objective may be a quick guilty plea, for instance, the victim's overriding objectives may be a face-to-face apology and financial restitution. What is to be done if a generous "guilty plea discount" leaves the offender with a "slap on the wrist" and no real incentive to enter into dialogue with the victim? In short, victims may not welcome an intrusion by the prosecutorial agenda into the victim-offender dialogue, while prosecutors may not welcome an intrusion by victim agendas into their negotiations with offenders.

This is not necessarily a theoretical dilemma: restorativists often discuss the need to include a broader set of community interests and voices in the dialogue beyond those of the most immediate victims of an offense. There seems no reason these interests could not include an

70. O'Hear, supra note 12, at 47, 68-69.
71. See Umbreit et al., supra note 1, at 256 ("From a restorative perspective, the primary stakeholders are understood to be individual victims and their families, victimized communities, and offenders and their families. The state and its legal system also clearly have an interest as a stakeholder but are seen as more removed from direct impact. Thus the needs of those most directly affected by the crime come first.").
72. Cf. Braithwaite, supra note 14, at 34 ("Very few criminal offenders who participate in restorative justice processes would be sitting in the room absent a certain amount of coercion.").
73. See Umbreit et al., supra note 1, at 268. The Marquette University Law School Restorative Justice Initiative, for instance, describes itself as "supporting victims and
interest in efficient law enforcement. At the same time, it is not entirely clear whether a system with robust cooperation incentives will truly leave enough room in practice for victim-centered RJ processes to operate effectively.

B. Purposeful Sentencing

Under the purposeful sentencing paradigm, sentences must be linked in an explicit, deliberative manner to publicly accepted purposes of punishment. This is a view of uniformity as an analytical process. Disparities must be justified by reference to some general objective of the criminal justice system, such as crime control or retribution. The point of this approach is, in part, to advance such objectives, balancing them against each other as necessary in a pragmatic fashion. But this approach may also serve other ends. For instance, purposeful sentencing may enhance public perceptions of the rationality, and hence trustworthiness, of the legal system. This approach may also help to


74. The tension here exemplifies the potential conflicts of interest in the RJ process between what Paul McCold has termed the “micro-community” (those most directly affected by a crime) and the “macro-community” (the wider society). Paul McCold, What Is the Role of Community in Restorative Justice Theory and Practice?, in CRITICAL ISSUES IN RESTORATIVE JUSTICE, supra note 4, at 155, 155, 158. McCold would emphasize the needs of the micro-community, except where “dangerous and uncontrollable offenders need to be restrained.” Id. at 169.

Underscoring the challenges of a multilateral RJ process, involving a variety of divergent perspectives, empirical research suggests that satisfaction rates have typically been higher with victim-offender mediation than with group conferencing, which typically has a greater number of participants. Umbreit et al., supra note 1, at 274-75. See also id. at 298 (discussing “pitfall” of attempting to balance many distinct needs in an RJ program), 299-300 (warning against “attempts by the formal criminal justice system to take over the movement and fashion it to meet the traditional needs of the system and its bureaucracy”).

There is also a risk that attempts to integrate cooperation-inducement and RJ may run into the same sort of problem that would likely undermine a deterrence-RJ scheme: in order to achieve desired levels of cooperation, it may be necessary to make baseline sentences so harsh, and cooperation discounts so steep, that the RJ process would seem like a trivial afterthought. More empirical research is necessary to determine whether this concern is justified.

75. This linkage may be made on a case-by-case basis by individual sentencers, or on a categorical basis by a policy-making body, like a sentencing commission. O’Hear, supra note 12, at 45.

76. Thus, a system structured so as to achieve retributive proportionality would be consistent with the purposeful sentencing paradigm. However, a sentence need not be retributive in order to be purposeful in this sense.
persuade offenders that their sentences are not wholly unjust or meaningless, and hence contribute to their cooperativeness in custody and eventual reintegration into the community.77 Purposeful sentencing may also contribute to dialogue and learning inside and outside the system concerning the nature of crime and the objectives of criminal justice.

The purposeful sentencing paradigm seems compatible with RJ, which also has a pragmatic sensibility in its skepticism of absolutist claims of "just punishment" and in its desire to repair harm and "put things right."78 If there are compatibility problems, they may lie more in implementation than theory.79 Specifically, the purposeful sentencing paradigm contemplates a process that persuades the public that sentences are appropriate and meaningful in light of public interests. There may be some important operational tensions between this objective and RJ processes that emphasize private, idiosyncratic offender-victim interactions. The challenge is to prevent RJ in the criminal justice system from becoming, in the eyes of the public, the functional equivalent of the out-of-court settlement process that is so common in civil litigation. Indeed, even in the civil realm (where the public interest is typically considered much less compelling than in the criminal realm), privately negotiated dispute resolution has been frequently criticized as unprincipled, tainted by bargaining inequality, and otherwise destructive of important public policy objectives.80

77. This perspective played an important role in the thinking of Judge Marvin Frankel, whose writings played a particularly influential role in the sentencing reform movement of the 1970s and 1980s. O'Hear, supra note 12, at 14.

78. See, e.g., Umbreit et al., supra note 1, at 257 (identifying desert as “central focus” of retribution, while “victim needs and offender responsibility for repairing harm” are central focus of RJ); Walgrave, supra note 38, at 56 (arguing that punitive retributivism merely increases total suffering in the world; RJ is preferable because it takes suffering away).

79. I assume here that the restoration of victims would “count” as an appropriate public purpose of the criminal justice system. One might argue, however, that restoration is not the business of a criminal justice system, but of a tort or social insurance system. Yet, restitution is a commonly accepted component of criminal sentencing, and neither the tort nor the social insurance system in this country is designed to address the needs of crime victims in a comprehensive fashion. (For instance, success in the tort system may require hiring a lawyer, which discourages the pursuit of tort recovery in cases lacking either the prospect of a large monetary judgment or a defendant with a deep enough pocket to satisfy the judgment.) In any event, if restoration does not count, RJ might nonetheless be understood as a way to advance the public interest in reducing recidivism and reintegrating offenders into the community. See, e.g., Umbreit et al., supra note 1, at 284-89 (discussing studies on RJ and recidivism).

80. For instance, private dispute resolution may be inconsistent with the public interest in safety, as when confidentiality agreements in product liability settlements prevent the public from learning the dangers of a product still on the market.
In light of such concerns, it may be especially important for RJ to ensure that community interests are addressed in an explicit and systematic fashion in the RJ process, such that RJ does not take on the appearance of purely private dispute resolution. There are a number of ways this might be accomplished. For instance, community representatives might be included in the RJ dialogue along with the victim and the offender. Or a judge (perhaps employing sentencing guidelines) might establish parameters within which dialogue would occur, in light of the community interest in such objectives as incapacitation and rehabilitation.\textsuperscript{81} Or a judge might be required to ensure that any negotiated resolution is explained on the record by the RJ participants and reflects consideration of pertinent community interests.

As with the ISP paradigm, there is a potentially difficult balancing act to accomplish. While RJ contemplates some role for inchoate community interests, there is a possibility that, in order to satisfy the requirements of the purposeful sentencing paradigm, community interests will be addressed in a manner that undermines RJ’s primary emphasis on victims. For instance, sentencing guidelines based on crime control interests might routinely demand long prison sentences, to the detriment of meaningful victim-offender dialogue. In this regard, the studies, discussed by Umbreit and his colleagues,\textsuperscript{82} that indicate RJ has important crime control benefits give hope that the public can be reassured that RJ advances public, not merely private, interests.\textsuperscript{83}

\textbf{C. Anti-subjugation}

Under the anti-subjugation paradigm, the offender must not be made subject to the unfettered will of another individual.\textsuperscript{84} In a nation committed to ideals of democracy and social equality, the experience of subjugation degrades the offender, sending the message that the offender stands outside the community of citizens and merits no higher

\textsuperscript{81} Of course, to the extent that RJ is successful in reducing recidivism rates, as much research indicates it may do, see Umbreit et al., supra note 1, at 284-89, there will be correspondingly less need to pursue incapacitative and related crime-control purposes in ways that constrain RJ processes.

\textsuperscript{82} Umbreit et al., supra note 1, at 284-89.

\textsuperscript{83} Similarly, McCold argues that the needs of the “macro-community” are generally best served by RJ processes focused on the needs of the “micro-community” of individuals most directly affected by an offense. McCold, supra note 74, at 169-70.

\textsuperscript{84} O’Hear, supra note 12, at 58.
regard than, say, a domestic pet. Subjugation may, therefore, provoke strong resentment and impair the eventual reintegration of the offender into the community. More generally, subjugation may diminish respect for the law, as subjugation establishes important spheres of government activity in which the rule of law is replaced by the individual will.

To the extent that RJ functions as a consensual process, it seems quite consistent with the anti-subjugation paradigm. On this view, of course, RJ ought not be implemented in such a manner that the victim can effectively dictate the sentence unilaterally. The offender should have a genuine opportunity to be heard. Further, the offender should be able to withdraw from the RJ process if the offender does not believe that it is being carried out in a fair manner. These do not seem especially problematic constraints. Quite the contrary, the RJ vision of a genuine dialogic response to crime, including victim, offender, and community voices, seems far more in tune with anti-subjugation than do conventional criminal justice processes, which place tremendous amounts of unilateral power in the hands of prosecutors and/or judges. Indeed, some RJ theorists have argued that a program does not even qualify as restorative "if it fails to be active in preventing domination."

III. CONCLUSION

Professor Umbreit and his colleagues make a compelling case for RJ, while appropriately recognizing a number of potential pitfalls. In order for RJ to gain more widespread acceptance in the criminal justice system, especially with respect to the most serious categories of adult crime, proponents will need a persuasive response to the uniformity question. Proponents should first bear in mind that sentencing uniformity has a range of different meanings and that RJ is more

85. This view was prominent in the thinking of some reformers at the time that sentencing uniformity emerged as a dominant policy objective in the 1970s. Id. at 58-59.
86. See Umbreit et al., supra note 1, at 256 ("Restorative justice . . . emphasizes the need to treat offenders with respect . . . ."); Braithwaite, supra note 27, at 395 ("[R]estorativists must reject a radical vision of victim empowerment that says any result the victim wants she should get . . . .").
87. See Luna, supra note 23, at 248 ("[W]hen compared to the dominance of prosecutors and judges in the traditional system, restorative justice appears far more balanced in its distribution of power."). For a critique of the power of prosecutors in the federal sentencing system, see O’Hear, supra note 12, at 61-64.
88. See, e.g., Braithwaite, supra note 44, at 9.
89. See Umbreit et al., supra note 1, at 303 (discussing risk that RJ will be marginalized by being limited to "only the most minor types of criminal and delinquent offenses").
compatible with some versions of uniformity than others. If uniformity means anti-subjugation, for instance, then RJ likely does far more to advance the ends of uniformity than does the conventional criminal justice system. If uniformity means that sentences are transparently and systematically purposeful, then RJ can probably be implemented in a reasonably uniform fashion. Likewise, if uniformity means that offenders are given the ability to make well-informed choices while they are in the criminal justice system, then RJ need not pose insurmountable obstacles to uniformity.

On the other hand, if uniformity makes rigorous demands of sentencing outcomes, and particularly to the extent that those demands include long prison terms, then RJ may be harder to reconcile with uniformity. The difficulties are likely greatest with respect to the POP paradigm. This paradigm, however, faces important conceptual and practical difficulties, and RJ proponents may appropriately argue that this version of uniformity holds much less appeal than competing approaches.

Retributive proportionality presents a greater challenge. The prospects for reconciling RJ with retributive proportionality seem greatest if: (1) retributive proportionality establishes only a maximum, rather than a minimum, punishment; (2) to the extent that retributive proportionality also supplies a minimum, a concerted effort is made to err on the lenient side in setting the minimum; or (3) RJ is limited to relatively minor crimes.

Even outside of these circumstances, however—where there is apt to be some systematic conflict between a serious commitment to RJ and a serious commitment to retributive proportionality—one may reasonably favor RJ. In particular, there are plausible reasons to conclude that retributive proportionality cannot truly accomplish what it sets out to do without the use of processes that embody respect for offender dignity, give a meaningful opportunity for all interested parties to be heard, and give voice to community values on a localized basis. RJ provides a framework for addressing these needs. Thus, even committed proponents of retributive proportionality might find some appeal in RJ processes and common ground with RJ proponents who seek a transformative restructuring of the criminal justice system.