Are Conflicts Property? Reexamining the Ownership of Conflict in Restorative Justice

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Abstract:

Nils Christie's concept of 'conflicts as property' has become axiomatic within restorative justice (RJ) as justification for victim involvement and redress, offender accountability and reintegration, and community involvement in RJ conferencing practices. In this paper, we revisit the concept of conflicts as property as a theoretical premise for the use of RJ. We suggest that restorative conferencing practices used to address criminal matters in most English-speaking countries or jurisdictions evidence many of the same concerns voiced by Christie four decades ago in his critique of the 'stealing' of conflicts more rightly owned by victims, offenders, and communities. We further argue that the institutionalisation of RJ has embedded its practices into highly unequal justice systems, with little evidence of how RJ may enable people or communities to 'own' conflicts in ways that do not mirror existing lines of social marginalisation and inequality.

Keywords:

Restorative justice, conflicts, property, victims, offenders

In 1977 Nils Christie published 'Conflicts as Property' in the *British Journal of Criminology*, an article which he saw as unlikely to raise much interest. The article did more than raise interest, however, and was quickly translated into theoretical justification for then nascent and disparate justice approaches in Canada, the US, and elsewhere that sought to bring offenders and victims together in face-to-face dialogue as an alternative to traditional youth and criminal justice practices under the rubric of what is now called 'restorative justice' (RJ).

Within RJ the influence of this article is difficult to overstate. Braithwaite (1999: 5), perhaps modestly, has called it 'the most influential text of the restorative tradition.' Other notable RJ scholars have likewise pointed to its influence in the development and

legitimisation of RJ practices (c.f. Johnstone, 2011; Marshall; 1999; Maruna 2006). Since its publication, the concept of conflict as property has become axiomatic within RJ literature as justification for direct victim involvement and redress (c.f. Doak and O'Mahony, 2011; Wenzel et al, 2008); offender accountability, amends to victims, and reintegration (c.f. Braithwaite and Mugford, 1994; Maruna, 2006); and for local community involvement and participation in restorative practices (c.f. Dzur and Olson, 2004; McCold, 1996).

In this paper, we revisit the concept of conflict as property as used for theoretical justification and/or description of RJ practices within criminal or youth justice settings. There is little question that Christie's concept of conflict as property remains a provocative one some forty years later. However, we argue the subsequent absorption of this concept into contemporary forms of RJ conferencing is far different to what Christie proposed in terms of people 'owning' their own conflict. Specifically, we suggest that RJ practices today evidence many of the same or similar concerns voiced by Christie (1977) in his critique of the criminal justice system's 'stealing' of conflicts more rightly owned by victims, offenders, and local communities. We also argue that the institutionalisation and integration of RJ into criminal and youth justice has increasingly embedded restorative practices into highly unequal justice systems, with little evidence of how RJ may enable people or communities to 'own' conflicts in ways that do not mirror or even perpetuate existing lines of social inequality and marginalisation within such systems.

Conflict as Property

Modern criminal justice systems, argued Christie (1977), deprive victims, offenders, and communities from participation in their own conflicts. 'In a modern criminal trial, two important things have happened. First, the parties are being *represented*. Secondly, the one

party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing' (Christie, 1977: 3, emphasis in the original). The victim, he argues, 'is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own case' (Christie, 1977: 7).

Christie (1977) argued that the offender is also deprived of important things. These include the possibility of being able to respond to the victim in discussion of what could be done to 'undo the deed' (p. 9); the ability to act and been seen as more than the sum of biological, psychological, or social deficits; and the possibility of having a role in what might happen to them as a result of their actions.

Finally, Christie (1977) noted other losers as well in the state's appropriation of conflict. Communities lose the ability to participate in supporting victims in more direct ways, or in providing avenues for offenders to make amends. Societies lose ability to use conflict as a means of participatory demonstration of norm clarification where experts, not laypeople, are those whom get to decide the outcomes and normative frameworks of justice.

The novel argument Christie (1977) set forth was centred on the *loss* of conflict as a means of participation in things that matter most to people when they have been harmed, have harmed others, or when there is disagreement about harms. The opportunities of conflicts, he argued, are myriad. They present opportunities for redress between those most immediately involved. They function as a means of potentially confronting social problems that often play a role in their germination. They afford an opportunity for participation in social life. Christie argued that given the opportunities conflicts present for people to

collectively solve their own problems, we should be careful in giving them away to institutions and professionals that stand to benefit from depriving us of this opportunity.

However, Christie was less than clear in what he meant by 'conflict'. On the one hand, Christie was referring to conflict in a broad sense—those things that bring people into discord with one another in ways that cause significant social or personal harms. On the other hand, he was clearly referring to conflict in terms of actions the state has defined as criminal. Indeed, Christie's focus was centred on conflicts between people that have *become* the domain of criminal justice professionals.ⁱ

The concept of 'property' as used by Christie (1977) is perhaps equally oblique, and he offered only a few evocative but also ambiguous affirmations of what he meant by property. Christie employed this term largely in the negative, referring to the 'property' of victims or communities that have been taken over by the state; lawyers or other justice professionals, or to refer to the historical deprivation of offender's property. The closest Christie (1977: 7, emphasis in the original) came to defining property is when he noted, 'Material compensation is not what I have in mind with the formulation "conflicts as property". It is the *conflict itself* that represents the most interesting property taken away, not the goods originally taken away from the victim, or given back to him'. Elsewhere, in his proposition of a 'lay-oriented court', Christie (1977: 11) noted that conflicts should be 'seen as property that ought to be shared'.

Christie was thus not using 'property' in any strict legal sense. The legal concept of property in most western countries, either in terms of real property (i.e. land) or personal property (i.e. chattels and goods), involves not only things that can be 'owned' to the exclusion of others, but also things that can be transferred to another party (Reed, 2004). However, victims of crime cannot sell or transfer their 'victimhood' to someone else. And nowhere did Christie suggest this concept of property as commodity. Indeed, Christie (1977)

referred both to conflict and property in various places as types of social relations, not as things to be 'owned' as legal property. Elsewhere, he notes that conflicts represent '*potential for activity, for participation . . . for involving citizens in tasks that are of immediate importance to them*' (Christie 1977: 7, emphasis in the original). Thus, what Christie seems to have been referring to was a notion of property as a 'collective capacity' of laypeople to decide what is to happen in conflicts that directly affect them, outside of formal legal domains when possible, or with the least amount of involvement of such domains when necessary.

The Taming of Restorative Justice

If Christie meant something less legalistic than real or personal property, but more akin to a collective capacity of vested parties (what some RJ advocates call 'primary stakeholders') to redress conflict, this raises a problem noted by Bottoms (2003) and Johnstone (2011), namely that RJ today looks far less radical in terms of ownership of conflict than what Christie proposed. Christie (1977: 11) advocated for processes where those most directly involved could 'find a solution [to the conflict] between themselves', or when this is not possible, 'the judges ought also to be their equals'. His criticism of justice professionals was most trenchant in regards to their taking away of people's ability to collectively act or decide what ought to happen in their own conflicts. He argued that these roles should be eliminated when possible, and severely curtailed when not, for example in cases where victims have clear need of protection.

Christie's notion of 'shared ownership' where people 'find a solution between themselves' is evocative of contemporary RJ conferencing practices (Christie, 1977: 11). However, there remains a decisive caveat. Within most English speaking countries, RJ conferencing is used primarily as a diversionary (Zinsstag et al., 2011) or post-adjudicative

process (Daly and Marchetti, 2012), where the legal nature of the conflict in terms of criminal culpability has generally been determined prior to RJ meetings or agreements. There are some exceptions to the state-centric use of RJ conferencing. In South Africa, RJ conferences can be used 'pre-reporting' and discharged with no further action when resolved to the satisfaction of the parties (Skelton and Batley, 2006). In Northern Ireland, community-based restorative justice projects were implemented in 1998 to function outside of the criminal justice system as part of the peace process, but have since been expanded for use in more general community mediation, victim support, and offender reintegration (Eriksson, 2015). And the most primary exception to the state-centric use of RJ is New Zealand, where legislation allows for the use of family group conferencing (FGC) prior to the court referral process (New Zealand Ministry of Justice, 2004).

But these are exceptions, both in size and in the overall scope of how RJ conferencing is used to deal with criminal matters in most English-speaking countries. Even in New Zealand, which is often mischaracterised as having a 'restorative' youth justice system, FGCs are used for only a smaller number of overall total youth offenses. Only about 6 to 8 percent of overall youth cases are referred to FGC as 'pre-charge' (i.e. prior to court referral), whereas between 16 to 20 percent of all youth cases are referred FGC after being charged by the court (Becroft, 2009).

It is not a unique observation that RJ has become increasingly institutionalised since its inception in the late 1970s. With this has come a set of increasingly proscribed and standardised roles for 'primary stakeholders' in RJ practices. Judges, probation officers, police officers, and other professionals largely decide what the charges will or will not be (Archibald and Llewellyn, 2006; Shapland, 2014), which cases may or may not merit referral to RJ (Ashley and Nixon, 2007; Campbell et al., 2006; Larsen, 2014; Shapland, 2014), and to some extent

the framework or limits of agreements between victims and offenders (Hayes et al., 2014; Hoyle and Rosenblatt, 2016).

In these contexts, victims, offenders, or other stakeholders do not own their conflicts in a manner envisioned by Christie (1977), where ownership was seen as occurring largely beyond the auspices of the state and its professionals. Rather, victim involvement in RJ has emerged more in line with the evolution of victims' rights in many western industrialised countries – rights to participation, information, restitution, and so on (Bottoms, 2003; Van Ness and Strong, 1997). In the case of offenders, most English speaking countries or jurisdictions have folded RJ into other formal or informal justice processes—cautioning, diversion, and probation or community corrections (Bazemore and Schiff, 2005; Hoyle and Rosenblatt, 2016; Larsen, 2014). Far from Christie's vision of a process that returns the ownership of conflict to those directly involved, most RJ conferencing practices today have themselves become institutionalised within state youth or criminal justice systems where many of the old professionals remain, and a new host of 'restorative justice' professionals – convenors, mediators, trainers, and a veritable 'restorative justice industry' (Tauri, 2014) – has emerged.

What is left to be resolved, then, is not the nature of the conflict, at least not in any legal sense. What is left are processes of victim redress and the amends of the offender, however these can be meted out within larger legal and administrative justice frameworks. These are not unimportant things, and we do not suggest these may not be meaningful to those involved. On the other hand, neither are these akin to what Christie appeared to suggest in terms of ownership of conflict, particularly where a growing amount of research on the institutionalisation of RJ has brought forth evidence of many of the same or similar problems Christie initially identified in his article—RJ practices that do not adequately take

account of victim needs or involvement in favour of offender rehabilitation (Choi et al., 2012; Hoyle and Rosenblatt, 2016; Zernova, 2007); RJ practices in which police or convenor interests override those of victims or offenders (Campbell et al., 2006; Cutress, 2015; Laxminarayan, 2014; Maxwell, 2005); referral processes where judges or other professionals may be guided by other factors than who 'owns' the conflict or who should participate in its outcomes (Archibald and Llewellyn, 2006; Gavrielides, 2007; Suzuki and Wood, 2017); or RJ practices that 'include' victims and offenders but leave little to be figured out in terms of proscribed outcomes of such meetings (Choi et al., 2012; Hoyle et al., 2002).

How often or frequent are these problems within the larger growth and use of RJ conferencing in the last three decades? We do not know. No one does, since so many RJ conferencing programs are never captured in research. But we have cited only a smaller number of the existing studies that highlight such problems, suggesting they are not infrequent enough to question the degree to which Christie's notion of conflict as property has been subsumed into practices that give nod to this concept as theoretical justification for RJ, while moving more directly into the institutionalised settings Christie was wary of that steal these conflicts away from people.

The Paradox of Conflict as Property

Some of the earliest RJ approaches looked more like what Christie (1977) envisioned. Victim Offender Reconciliation Programs in Ontario and Minnesota in the 1970s and 1980s largely sidestepped youth or adult criminal justice systems in lieu of meetings where victims and offenders met directly and informally. Indeed, where Christie set out a framework for victim-driven and lay courts as alternative to formal justice processes, this was influential in

the establishment of early RJ programs that sought to create alternatives to existing youth and criminal justice system processing.

What was never made clear in Christie's (1977) article, however, and what has been a mostly ignored but sticky problem is the question of *who* identifies such conflicts, and *how* such parties in such conflicts are identified and given standing. Christie (1977) envisioned that such questions could be better left to the participants themselves, except in cases of gross injustices of power or victimisation. But today, outside of the exceptions in RJ conferencing mentioned above, fact-finding of causes and determination of guilt is usually left to the police or the courts (Aertsen and Peters, 1998; Daly, 2006). This is particularly notable for the use of RJ conferences in youth justice, where RJ tends to be used most predominately (Zinsstag et al., 2011). Whereas youth justice systems in English speaking countries were initially developed, for better and worse, with a high degree of informality and discretion on the part of youth justice workers and judges or magistrates, since the late 1960s youth justice practices have become increasingly formalised with the extension of due process to youth offenders (Hazel, 2008). In adversarial justice systems especially, questions of due process and legal culpability have usually been asked and answered prior to RJ practices being used or made available to victims or offenders. As such, while Braithwaite (1999), Zehr (1990) and others have depicted RJ processes as preferable to traditional criminal justice practices insofar as the nature of the conflict itself may be addressed in face-to-face meetings between victims and offenders, as used today most RJ participants have little power to decide the nature of the conflict legally, or administratively, even where outcomes for various stakeholders may still be in part determined in such meetings. Stenning (2010) argues that RJ practices are more accurately viewed as alternatives to sentencing hearings (after a plea of guilty) than alternatives to criminal trials. Daly (2000b) has similarly argued that RJ practices are not

alternatives to punishment, but rather alternative forms of punishment. Both insights recognise the institutional limitations in place from which RJ conferencing functions.

The integration of RJ into youth and adult criminal justice system elicits another problem in thinking about such practices as the 'owning' of one's conflict. Particularly in countries such as Australia, New Zealand, the UK or the US—countries with more decidedly punitive social responses to corrections and reintegration—the resolution of offender's conflicts with victims does not usually end their resolution of 'conflict' with the state. Even in diversionary schemes or with lesser offenses, sanctions such as community service, fines, and community supervision are regularly imposed, and the offender may be referred back to the court for further prosecution or punishment for failure to complete their conference agreements. More serious criminal convictions may be a social and legal albatross, carried for years or throughout a lifetime. RJ is hardly the reason for this. At the same time, if not in theory then certainly in practice, there are today two sets of conflicts that exist where RJ is used as either a diversionary or post-adjudicative process, namely those between the victim and the offender; and those that remain between the offender and the state such that conflict itself has not become 'owned' as much as expanded between the offender and a larger number of parties.

State Offenses and Systemic Injustices

The problem Christie (1977) sets forth is largely one of the stealing of conflicts and the diminished capacity of people to act for things that are of significance for them. Yet RJ literature has been mostly silent on the problem of state crimes or systemic injustices *within* western industrialised countries, especially when compared to the large amount of research

that has been done on the use and problems of RJ within transitional justice or in post-conflict states.

This is a problem particularly where the state as 'offender' or as complicit in systemic injustices may impact the use and legitimacy of RJ practices and claims to ownership of conflict. This is perhaps nowhere as clear as in the 'color line,' to borrow from DuBois' (1903) use of the term, of criminal justice. Research demonstrating the prevalence of systemic racism or bias in policing of racial, ethnic or Indigenous peoples in Australia (Cunneen, 2001), Canada (Closs and McKenna, 2006), New Zealand (Elers, 2012), the UK (Barrett et al., 2014), and the US (D'Alessio and Stolzenberg, 2003) is substantial, and we only list a smaller number of studies due to limitations of space. Research also provides evidence of systemic racism in sentencing in the US (Spohn, 2000), Canada (Commission on Systemic Racism in the Ontario Criminal Justice System, 2003), New Zealand (Fergusson et al., 2003), the UK (Hood, 1992), and in some Australian states (Bond and Jeffries, 2012). Also problematic is the use of law itself as a means of racial or ethnic discrimination, as in the case of the War on Drugs in the US (Nunn, 2002) and UK (Eastwood et al., 2013), or the criminalisation of traffic offenses in parts of Australia that have resulted in large increases in Indigenous incarceration (Wood, 2014).

How then are offenders to 'own' conflicts where the primary conflict before them may not necessarily be the content of their character, but the colour of their skin? The same questions can be raised for victims of crime, where research has found evidence of police and criminal justice system biases against racial and ethnic minority victims (Briggs and Opsal, 2012; Smith et al., 1984). Yet RJ research and literature remain beset with the problem of what Gavrielides (2014: 223) has identified as the 'the scarce extant literature on the interaction of restorative justice with race'. The overrepresentation of racial, ethnic and

Indigenous peoples in the justice system most directly raises the question of how these communities and individuals are to 'own' the conflicts of what Georges-Abeyie (2001) has called the 'petit apartheid' of criminal justice practices that demonstrate such overrepresentation is not explainable through corresponding differences in offense rates or 'risk factors' between groups (Cesaroni et al., 2019; Cunneen, 2006; Mitchell, 2005; Uhrig, 2016).

Following on this, Daly (2000a, see also Braithwaite, 1999) has rightly argued RJ cannot be expected to solve such injustices. Rather, the better question isn't if RJ eliminates structural inequalities in justice outcomes, but whether or not RJ does less harm this way when compared to traditional court processes (Daly, 2000a). To date, there is weak evidence that RJ has made impact in this regard. A smaller number of studies demonstrate improved outcomes for racial, ethnic, or Indigenous offenders in RJ conferencing compared to traditional court practices and sanctions (de Beus and Rodriguez, 2007; Luke and Lind, 2002; Maxwell et al., 1999; Rodriguez, 2005)ⁱⁱ But more comparative studies have found no difference (Allard et al., 2010; Bergseth and Bouffard, 2007; Fitzgerald, 2008; Jones, 2009; Poynton, 2013; Smith and Weatherburn, 2012) or worse outcomes for non-white offenders (Strang and Sherman, 2015). Variation and experimental studies on RJ conferencing have also found no differences (Hayes, 2005; Hipple et al., 2015) or worse outcomes for non-white offenders (Hayes and Daly, 2003; Hipple et al., 2014; Little et al., 2018; Stewart et al., 2008). More generally, as Wood (2015) has detailed, there is also little evidence that RJ conferencing has made any real impact on reducing incarceration, including for overrepresented racial, ethnic, or Indigenous groups, particularly where there are few examples of RJ being used today as an alternative to incarceration.

Similar deficiencies exist in terms of the paucity of research into the interaction of RJ and gender. The last three decades has witnessed significant advancements into understanding the specific needs and problems facing women that often precipitate highly gendered pathways into offending and/or victimisation. Yet as Österman and Masson (2018: 5) note, ‘the currently expanding field of restorative justice has remained firmly outside of these advancements. There is a consequently a “woeful lack of evidence” regarding female offenders’ interactions with, and experiences of, restorative justice conferencing [Miles, 2013: 8]’. Beyond these gendered pathways (or perhaps as a part of them) is the problem of justice system responses, or lack thereof, to women as victims of crime and in particular to domestic violence (Hannah-Moffat, 1995; Hartman and Belknap, 2003). Stubbs (2002: 52) argues ‘Rather than stealing the conflict, the criminal justice system had long ignored women's calls for protection’. Domestic and family violence moreover bring up the problem of cases where what Christie (1977: 8, emphasis in the original) called ‘*opportunities for normalisation*’ occur within a framework where normative or at least ‘accepted’ values are supportive or permissive of such violence (c.f. Carlson and Worden 2005; Leibrich et al. 1995; Taylor and Mouzos 2006).

It is not the case that RJ scholars have ignored race and ethnicity, gender, or the intersection of both. Many works have grappled with these questions theoretically; often attentive to the specific vectors of power or social control facing marginalised groups (c.f. Daly and Stubbs 2006; Gavrielides 2014; Tauri, 1998). Yet there has been far less in the way of grounded empirical analysis of how either, or both, work within and subsequently affect RJ practices within settings, let alone the almost total absence of work on the question of the social geography of RJ. Does RJ follow the contours of other justice system practices stratified along racial and ethnic, gendered, and social class lines? It would be surprising if it did not,

given RJ's high degree of institutionalisation into unequal justice systems. Is it the case that white people are more able to fully 'own' their conflicts? Or middle class people? Or men?ⁱⁱⁱ

Community Ownership of Conflict

Christie (1977) did not address problems of state crimes or systemic injustices, but in his concept of 'lay courts' he did suggest that removal of conflicts from the auspices of criminal justice systems may have possibility of redressing problems of social stratification and social marginalisation. Christie (1977: 12) noted particularly the problem of a 'lack of neighbourhoods', a phenomenon he described as 'a consequence of industrialised living; segmentation according to space and age. Much of our trouble stems from killed neighbourhoods or killed local communities'. He further offered that 'one of the major ideas behind the formulation "Conflicts as Property" is that it is neighbourhood-property. It is not private. It belongs to the system. It is intended as a vitaliser for neighbourhoods' (Christie, 1977: 12).

This argument follows Christie's thinking of property (discussed above) as shared opportunities for involvement at the individual level, into collective opportunities at the meso-level. Following on this, some RJ scholars and advocates have argued that restorative interventions or programs (including face-to-face meetings, but also community programs such as accountability boards) have the capacity to build or increase collective efficacy (Abramson and Beck, 2010; Bazemore, 2000); community cohesion (Bazemore and Schiff, 1996; Warner et al., 2010); and even community autonomy over criminal justice practices, particularly in the case of Indigenous communities (Gilbert and Settles, 2007; Jarrett and Hyslop, 2014).

There are problems with these assumptions. First, Christie was not suggesting that face-to-face meetings, nor his notion of 'lay courts', be used as a mechanism of crime control per se. His argument was more nuanced than this when he suggested rather 'the goal for crime prevention might be to re-create social conditions which make the conflicts visible and thereafter manageable' (Christie 1977: 7). Lay-courts, in his estimation, were one possible means of neighbourhood revitalisation through which such conflicts could be made more visible. But for all the attention given in RJ literature to the importance or role of community, there remains, as Rosenblatt notes (2015: 3), little in the way of research as to 'how "community involvement" translates into practice' (see also Gerkin 2012). This has nevertheless not stopped some policymakers and scholars from promoting community involvement in RJ as viable strategies of crime control or community crime prevention,^{iv} even where 'much restorative justice over-exaggerates the role that communities can play in responses to, and preventing, crime' (Crawford 2002: 110).

This is not surprising given there is weak evidence that neighbourhood associations, community panels, or other civic groups focused on crime control result in increased collective efficacy or effective informal social control for communities (Mazerolle et al., 2010; Morenoff et al., 2001; Sherman, 1997). Moreover, communities that do develop effective community crime programs or achieve higher degrees of informal social control tend to be those that already evidence relatively higher levels of social cohesion or collective efficacy (Hope and Lab, 2001; Rosenbaum, 1987; Sampson et al., 1997). Thus, 'ownership' of conflict in terms of a community's ability to collectively respond to crime appears to depend more on the existing social capital of community members, and less on their ability to utilise associations or programs to achieve greater efficacy towards the goal of crime control.

A second problem with this assumption is within RJ, appeals to 'community' are not infrequently wrought with problems of increased community cohesion at the expense of those seen as outsiders (Crawford, 1999; Weisberg, 2003), or at the expense of some community members over others. Crawford (1999: 515) in particular has been critical of such assumptions within RJ and other strategies of community justice in terms of what he characterises as an 'ideology of unity', which he argues, 'often results in the acceptance of the views of the most powerful or well organised interests within a given community'. Research on the implementation of RJ in Australian and Canadian Indigenous communities exemplifies this problem, where there have been significant tensions out of concern for the ways that it might empower some groups over others—particularly men over women (Christie, 2001; Dickson-Gilmore and LaPrairie, 2005; Stubbs, 2009).

The third problem is the frequently repeated, but also heavily criticised notion that RJ practices are somehow intrinsically better or more appropriate for Indigenous people and communities as a way to better own their own conflicts. Existing research finds limited support for such claims. Australia has probably produced the most research on this question, and by and large the consensus is that RJ has not worked particularly well as a mechanism for enhancing Indigenous community ownership of conflict towards goals of increased self-determination, crime reduction, or community capacity building (Blagg, 2001; Cunneen, 1997; Larsen, 2014). Research from New Zealand also suggests that for all of the focus given to Māori justice as a central part of FGCs, Māori may be disadvantaged or marginalised through the use of such practices (Maxwell et al., 2004; Tauri, 1998; Vieille, 2013). Overall, there remains scant empirical research to date demonstrating the use of RJ as a mechanism of empowerment of 'conflict ownership' for Indigenous people or communities, particularly in relation to processes of self-determination.

Conditions of 'Ownership'

At its core RJ reflects an 'accountability model' (O'Mahony and Doak, 2017; Roche, 2003) of justice where successful conference interactions and outcomes depend in large part on the ability of offenders to adequately demonstrate responsibility and remorse for harms they have caused (Braithwaite and Roche, 2001), and to follow through with these in making amends. Since the publication of Christie's article in 1977, however, research on offending has continued to demonstrate that a large number of serious offenses are committed by a smaller number of youth or young adult offenders (Moffitt, 1993), and that the cognitive abilities and fully-formed decision-making of these offenders are often lacking (Cauffman and Steinberg, 2012; Scott and Steinberg, 2008). What we know now about serious and particularly malicious offending also suggests that many of these offenders evidence substantial histories of trauma, abuse, and neglect—such that appeals to normative moral or behavioural frameworks often fundamentally miss the underlying causal factors related to serious offending (Farrington, 2015).

Beyond problems of trauma or abuse, the fact that RJ is used predominately for youth offending brings up similar questions regarding a young offender's ability to 'own' his or her conflict, even if we view ownership as shared social relations or a type of shared opportunity among participants. Youth justice systems exist on the principle of diminished capacity. Most Australian states however, to give an example, allow for the use of youth conferences for offenders as young as ten years of age (Larsen, 2014), and other English-speaking countries or jurisdictions are not dissimilar (Doak, 2015; Ireland National Commission on Restorative Justice, 2009; New Zealand Ministry of Justice, 2010).

The ability and capacity of younger offenders especially to 'own' their own conflicts is thus not self-evident, although it is regularly set forth in RJ literature as such. It seems unlikely that any but the most precocious of ten, twelve, or even fourteen year olds would be able to decide for themselves what is relevant, what is to be debated or discussed, or what is meant by terms of accountability. Hayes and Snow (2013) have found that many youth offenders in conferences lack normal verbal and communication skills for children their age. Thus, when Christie (1977: 9) suggests that in such a scenario that, 'The offender gets a possibility to change his position from being a listener to a discussion—often a highly unintelligible one—of how much pain he ought to receive, into a participant in a discussion of how he could make it good again', the reality of such discussions for younger offenders is often far less one of dialogue and reflection than confusion and attempts to do or say whatever needs to be said or done (Hayes and Hayes, 2008; Maruna et al., 2007; Newbury, 2011). It is perhaps one of the reasons many victims of young offenders do not feel that apologies are sincere in restorative conferences (Choi and Severson, 2009; Daly, 2002; Morris and Maxwell, 1998).

Ideally, RJ practices should work to allow young offenders to be supported by their families and/or other community members within conferences towards goals of both normative socialisation and reintegration. This has been one of the strongest arguments in favour of RJ as an alternative to traditional court processes (Dünkel et al., 2015; Gavrielides, 2008), and one where the concept of conflict as property is particularly germane—where conflict can be owned *in* social relation such that younger offenders have support from family and community towards these goals. Yet for the ideal of 'communities of care', there exists no empirical research we are aware of that demonstrates the claims that RJ engenders such communities any more, or any less than traditional court sanctions. Rather, research suggests that at least some parents of young offenders are not necessarily 'good supporters' (Hoyle

and Noguera, 2008; Prichard, 2002), which may not be very surprising as a large amount of existing research finds that offending is highly correlated to family and/or community settings where social bonds or support are weak or absent (Dong and Krohn, 2017; Sampson and Laub, 1993). The question then is how often or to what degree do such ‘communities of care’ occur within or in support of RJ interventions? What do these communities of care look like? How do they function to create or enhance the ability of young people to develop empathy, make amends, and reintegrate in ways that do not simply ‘responsibilise’ (Muncie, 2006) them as culpable and accountable for their actions, while providing them with something qualitatively different than the same conditions or environments that precipitated their offending?

Concluding Remarks

Nils Christie was surprised at the level of attention and impact that his article received. But with four decades of hindsight, the question of why this article has become so influential in the RJ tradition is not a difficult one. Christie’s (1977) article came only three years after Martinson’s (1974) now famous ‘nothing works’ report. Martinson’s report served to coalesce a wide and divergent number of stakeholder views around agreement that the criminal justice system was broken, even while there was disagreement about what was broken, and why. Crime was up. Belief in the efficacy of social institutions was down. Conservative policymakers and victim’s rights groups decried a system that ignored crime victims and failed to hold offender accountable. Political liberals decried the lack of attention to poverty, racism, and weak neighbourhoods that limited opportunity and fostered crime.

Christie’s article offered a salient possibility that something *could* work in a way that arguably appealed to an equally diverse range of stakeholders focused on victim’s rights and victim participation in the criminal justice system, increased accountability of offenders,

enhanced community involvement in justice initiatives, and limiting the role and power of criminal justice professionals. It is thus hardly surprising that many of the themes Christie (1977) spoke to in his article—direct victim involvement and redress, offender accountability and the making of amends, local community involvement in justice practices, and the de-professionalisation of justice—form the foundations of RJ practices (Doak and O'Mahony, 2011; Dzur and Olson, 2004; Maruna, 2006). It is also clear that Christie was being evocative, not systematic in his proposition of how to turn 'conflicts as property' into practices that better met people's needs more directly as they are immediately involved and vested in what happens to them as a result of crime. He noted that he did not have a clear sense of how this will all look, and we have tried to be mindful of the fact that it is disingenuous to systematically critique a work that was never intended to be a systematic proposal of justice reforms.

But much of RJ today in English-speaking countries is systematically embedded in youth and criminal justice system responses to crime. In this respect, the question of whether, in what cases, and to what degree RJ practices within youth and criminal justice settings may afford the possibility of people owning their own conflicts goes to the heart of two crucial problems facing RJ in the 21st century.

The first of these is the legitimacy of RJ as it has become more institutionalised. As Christie (1977) argued, the state very often has other interests than allowing people to carry on with the resolutions of their own conflicts outside of its auspices. Particularly problematic is the significant amount of empirical research pointing to justice system goals focused less on participant 'ownership' than on RJ as a viable means of crime control or reduction. Also problematic is research pointing to the institutional management of participant roles, referrals, and outcomes of RJ practices. Indeed, Christie's concluding remarks to his article that has become so central to the theoretical justification of RJ may be read somewhat

ironically in the context of the institutionalisation of RJ over the last three decades. They are worth considering once again some forty years later:

Who is not at least made slightly uneasy in the handling of her or his own social conflicts if we get to know that there is an expert on this very matter at the same table? I have no clear answer, only strong feelings behind a vague conclusion: let us have as few behaviour experts as we dare to. And if we have any, let us for God's sake not have any that specialise in crime and conflict resolution (Christie, 1977: 12).

A second problem facing RJ today is lack of critical and grounded analysis to social and historical forces that shape conflict not only structurally, but also interpersonally. Christie was not ignorant of this. He noted in several places in his 1977 article, and even more in later works (Christie, 1986) the role that social class, gender, race, age, and other social factors play in conflict, and in the determination of the social and legal roles and capacities of those in such conflicts.

Unfortunately, Christie's attentiveness to these issues has not been central to RJ in the literature or research. Stubbs (2009: 107) noted almost a decade ago the degree to which 'Few empirical studies have examined how social relations such as gender, race, class or age are expressed in RJ'. Things have not much changed in the interim. This presents a challenge to the use of 'conflict ownership' as a theoretical justification for RJ practices in the assumption of a disembodied and ahistorical space where 12 year olds and 40 year olds, Blacks and Whites, men and women, rich and poor, can remain 'outside' the political and social realities of existing criminal justice systems and 'own' their conflicts in ways that do not parallel or replicate existing inequalities of social control and marginalisation.

The degree to which RJ conferencing practices may afford people ownership of their conflict is thus far less clear than is often assumed in the literature—on individual, interpersonal, and social levels. Conflict is not ahistorical, even where in many cases it may be intensely personal. Conflict ownership is highly dependent upon the autonomy of

individuals to act and decide in a collective capacity how to solve their own problems. But today, RJ conferencing functions within institutional settings that arguably delimit such autonomy in ways we have discussed throughout this article.

Such autonomy also depends, as Christie (1997) noted, on the state itself to the degree it should function to support and increase such autonomy when necessary, particularly in cases where offenders or victims lack capacity for such autonomy. Braithwaite (2000: 233) has remarked as much when noting 'Restorative justice founders when the welfare state is not there to support it,' suggesting it makes little sense to expect restorative outcomes when people face significant social-structural impediments such as poverty, access to necessary health and mental health services, poor educational and employment opportunities, and so on. But RJ conferencing in Anglophone countries has evolved in an era where these states have become more deeply unequal in the last forty years, particularly in terms of wealth inequality, but also in terms of the reconfiguration of social welfare provisions that have been significantly curtailed and realigned with workfare and other schemes designed to discipline and punish the poor, particularly poor racial and ethnic minorities (c.f. Mendes, 2008; Soss et al, 2011; Wacquant, 2009; Wood, 2015). The ability to own one's conflict in the context of state-based RJ practices within highly unequal societies is thus a concept we should be wary of without explication of how, and for whom conflict ownership actually occurs, including close attention to whether such ownership ameliorates institutional forms of injustice, or rather is abetting of them.

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ⁱ A significant problem remains then, in Christie's proposition as to the question of what counts as 'crime'? Is crime simply conflicts thus identified by people who have been harmed? Presumably not, since this creates a tautology where conflicts are crime, and crime is conflicts. Or is crime a violation of community norms and standards that brings people into significant conflict with each other – something he suggests when he notes that conflicts present opportunities for norm clarification. This too may be problematic in ways that Christie himself anticipated when he noted types of 'conflicts' that require the involvement and resources of the state to address gross power imbalances or to protect victims.

ⁱⁱ However, in Rodriguez's (2005) study she also found that African Americans were less likely to be selected into the RJ program than whites, and that community level factors (i.e. percent Spanish speaking, and racial heterogeneity) also predicted lower involvement in the RJ program.

ⁱⁱⁱ See recent research from Österman and Masson (2018: 21) on the use of RJ conferencing in England and Wales where they note, 'restorative justice shares many of the problems faced in wider criminal justice settings, with the legacy of female victimization experiences presenting a huge concern in contemporary penalty'.

^{iv} See Clamp and Paterson (2011) and Woolford and Ratner (2003) for two examples of such initiatives in England and Wales, and British Columbia respectively.