

# **PUNITIVE RESTORATION**

Thom Brooks

*Durham University*

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## **Introduction**

The challenge for criminal justice policymakers is to deliver less reoffending with greater public confidence. This has proven more difficult in recent years where sentencing decisions are subjected to increasing criticism despite crime rates remaining relatively low historically. Penal outcomes are regularly thought by the public to be too lenient and unable to provide a satisfactory deterrent.

Restorative justice approaches appear to offer a welcome alternative to traditional sentencing practices. These approaches are found to deliver less reoffending with greater satisfaction for victims at less cost. Unsurprising, all the main political parties in the United Kingdom are united in their broad support for at least maintaining, if not increasing, the use of restorative justice approaches in the criminal justice system.

The problem is that these restorative approaches suffer from several obstacles. The first is the diversity of approaches that fall under the category ‘restorative justice’. These can range from in-prison rehabilitative programmes to various forms of victim-offender mediation and conferencing. There is no one restorative justice approach – and this makes it difficult to identify a particular model given the diversity of available approaches. The second obstacle is that restorative justice has limited applicability to less serious offences. This contributes to a third obstacle of limited confidence which has prevented restorative justice approaches being considered for more serious crimes. A fourth obstacle is that these approaches are constrained by limited options whereby imprisonment is often not a

possibility. A final obstacle is that restorative justice approaches can suffer from a lack of clarity about what is ‘restored’ through a specific restorative approach.

This essay argues that the twin challenges of delivering less reoffending with greater public confidence may be achieved by a distinctive restorative justice approach called *punitive restoration* that is able to overcome the many obstacles facing most other restorative justice approaches. The next section explains the attractiveness of restorative justice approaches. This is followed by a section detailing the many obstacles facing these approaches and why these are serious problems. The essay then discusses punitive restorative and demonstrates how it can improve on other restorative approaches. This final section concludes by specifying what punitive restoration might entail in practice.

### **The Diversity of Restorative Approaches**

The term ‘restorative justice’ refers to a range of approaches and not any single practice.<sup>1</sup> It is more an orientation than a practice favouring the informal over the formal aiming at providing victims and offenders alike with a voice. Furthermore, ‘there is no agreement on the actual nature of the transformation sought by the restorative justice movement’.<sup>2</sup> Different views abound about what is ‘restored’ and even the desired goals of restorative justice.

This can make it difficult to discuss because of the wide diversity of restorative approaches.<sup>3</sup> Restorative justice approaches are applied in schools,<sup>4</sup> prison interventions<sup>5</sup> and

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<sup>1</sup> See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) and Thom Brooks, *Punishment* 64-85 (Routledge, 2012).

<sup>2</sup> Gerry Johnstone and Daniel W. Van Ness, ‘The Meaning of Restorative Justice’ in (eds), *Handbook of Restorative Justice* 5 (Routledge, 2007).

<sup>3</sup> See Joanna Shapland, Gwen Robinson and Angela Sorsby, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* 4 (Routledge, 2011) (‘The restorative justice agenda . . . encompasses a very broad range of practices and approaches, such that a definitive definition has proven elusive’). See also Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Hart, 2010).

<sup>4</sup> See Brenda Morrison, ‘Schools and Restorative Justice’ in (n2) 325.

<sup>5</sup> RJ in prison

South Africa's Truth and Reconciliation Commission.<sup>6</sup> Restorative justice approaches are also found in applications that are the focus of this essay: restorative justice as an *alternative* to traditional sentencing, including victim-offender mediation and restorative conferencing as practiced in England and Wales.<sup>7</sup>

The golden thread—or 'conceptual umbrella'—uniting all of these diverse approaches to restorative justice is their focus on bringing closure to a conflict through informal, but not unstructured, deliberation with the aim of enabling both understanding and healing.<sup>8</sup> Perhaps the best known working definition of restorative justice approaches is by T. F. Marshall: 'Restorative justice is a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.<sup>9</sup>

Marshall's focus on the process of restorative justice approaches illuminates one distinctive difference from models of traditional sentencing. Judges and magistrates determine the sentencing outcomes for convicted offenders from their courtroom benches following a set of formal procedures. A growing concern in recent years is that these procedures exacerbate victim displacement, stated eloquently by John Gardner:

we seem to have lost sight of the origins of the criminal law as a response to the activities of *victims*, together with their families, associates and supporters. The blood feud, the vendetta, the duel, the revenge, the lynching for the elimination of these

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<sup>6</sup> See Jennifer J. Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission', 49 *The University of Toronto Law Journal* 355 (1999).

<sup>7</sup> The focus is on restorative approaches that serve as an alternative to traditional sentencing in England and Wales, such as victim-offender mediation and restorative conferencing. This specification is important. There is a need to provide a more definitive and less contested model of restorative practices. The focus on one – admittedly significant – part of restorative practices is intended to help identify this new model, in part, by its distinctive form of application for England and Wales. This new model, punitive restoration, is discussed in this context, but it is not suggested that it cannot have a wider applicability to other jurisdictions.

<sup>8</sup> Shapland, et. al. (n3) 4.

<sup>9</sup> T. F. Marshall, *Restorative Justice: An Overview*, Home Office Occasional Paper (Home Office, 1999).

modes of retaliation, more than anything else, the criminal law as we know it today came into existence.<sup>10</sup>

The challenge is to discover some process whereby the victim can play a more substantive role in criminal justice without returning to the many problems that led to victim displacement.

Restorative justice approaches, such as victim-offender mediation and restorative conferencing, suggest such a process – and they provide us with an alternative to the traditional, formal procedures for sentencing. Restorative approaches endorse a more informal means to secure outcomes located away from courtrooms led by a trained facilitator instead of a judge or magistrate. Facilitators conduct meetings that require the offender to admit guilt beforehand. Offenders are permitted a legal representative although they are not normally present and offenders are expected to engage directly with others present.

Both mediation and conferences begin by the facilitator clarifying the parameters and purposes of the meeting with guidance available from the Restorative Justice Council.<sup>11</sup> The victim is then provided an opportunity to speak next and address the offender to explain the impact of the offender's crime on her. Restorative conferences next permit any members of the victim's support network, such as their friends and family, as well as select members of the local community, to discuss how the offender's crime impacted on them. The offender speaks last and is expected to account for his crimes, typically including an apology to the victim.

These meetings conclude by participants confirming a contract that the offender is asked to agree. If the offender does not or if he fails to honour its terms in full, then the next

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<sup>10</sup> John Gardner, 'Crime: In Proportion and in Perspective' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* 31, 31 (Clarendon, 1998).

<sup>11</sup> See Restorative Justice Council, 'Best Practice', url: [http://www.restorativejustice.org.uk/quality\\_assurance/](http://www.restorativejustice.org.uk/quality_assurance/) (2014).

step can include a transfer to having the alleged offence considered in the courtroom where potential outcomes can be more punitive.<sup>12</sup>

Restorative approaches are more than a process, but aim to provide real benefits. The first is that mediation and conferences lead to ‘restorative contracts’ agreed by all parties, including offenders, in about every restorative meeting: studies have found contracts agreed in up to 98% of cases.<sup>13</sup> The second benefit is the contracts agreed improve the reduction of reoffending by offenders. These contracts can better target the specific needs of offenders because of the greater flexibility of the more informal process of restorative meetings. Standard outcomes include requirements that offenders attend treatment to overcome their substance abuse or problems with anger management, training is provided to improve employability and general life skills, some compensation to the victim is agreed and there is often some element of community sentencing included. This improved targeting of offender needs has been found to contribute to up to 25 per cent less reoffending than alternatives.<sup>14</sup>

Restorative approaches are found to improve significantly problems associated with victim displacement. Nils Christie argues:

The victim 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

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<sup>12</sup> Offenders admitting guilt to a criminal offence for the purposes of engaging in victim-offender mediation or restorative conferencing and who either do not agree a restorative contract or fail to honour its terms in full need *not* admit guilt for this offence if the case is transferred to either a magistrates’ court or the Crown Court. This would appear to undermine the sincerity of the earlier admittance and it might be preferable to end this anomaly given that any admittance of guilt remains free of coercion and legal representation for offenders continues to be available although this policy suggestion is not considered further here.

<sup>13</sup> See Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, E. Colledge, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006) and Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, *Restorative Justice: The Views of Victims and Offenders* 27 (Ministry of Justice, 2007).

<sup>14</sup> See Joanna Shapland, Anne Atkinson, Helen Atkinson, James Dignan, Lucy Edwards, Jeremy Hibbert, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes* (Ministry of Justice) and Restorative Justice Council, *What Does the Ministry of Justice RJ Research Tell Us?* (RJC, 2011).

the compensation. But above all he has lost participation in his own case. It is the [state] that comes into the spotlight, not the victim. It is the [state] that describes the losses, not the victim.<sup>15</sup>

Restorative justice approaches address these problems in a potentially fruitful way. Victims report high satisfaction with restorative approaches, especially participation in restorative conferencing—and this is true for all participants, including offenders.<sup>16</sup> While victims regularly report feelings of alienation for cases heard in courtrooms, restorative meetings outside the courts provide a more informal and less intimidating context where victims are encouraged to vocalise their experience of crime and its personal effects in an attempt to find closure in a safe and constructive environment.

This higher satisfaction for all participants is a product of the dialogue brought about through restorative meetings whereby each participant has opportunities to engage with others to better understand the wider context of a particular crime and its effects on others aimed at bringing closure. Victims gain some insight into crimes committed against them and offenders benefit from greater knowledge about the consequences of their actions. Finally, restorative approaches are much less expensive than traditional sentencing. One study found restorative approaches saved £9 for every £1 spent.<sup>17</sup>

Restorative justice approaches are a broad tent encompassing a wide diversity of practices. This essay focuses on approaches that are an alternative to sentencing. These approaches demonstrate significant promise: restorative meetings may offer a process that can achieve the benefits of improved victim satisfaction through greater participation opportunities, less reoffending through better targeting of offender needs and promotion of

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<sup>15</sup> Nils Christie, 'Conflicts as Property' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* 312, 314 (Hart, 1998).

<sup>16</sup> See Shapland et. al. (n14) 25-26.

<sup>17</sup> See Shapland et. al. (n13) and Restorative Justice Council (n13).

constructive engagement at much reduced costs. The twin challenges of improving public confidence while reducing reoffending may appear to be best met by restorative justice approaches.

### **Restorative Approaches and Their Problems**

Restorative justice approaches suffer from several serious obstacles. This section identifies the more significant problems and the first—the fact of the diversity of restorative practices—is noted above. Perhaps what most approaches hold in common is what they are not: they are not conducted in courtrooms, do not follow the same formal procedures used in traditional criminal justice practices, do not exclude victims from participation and so on.

The problem of the fact of these diverse restorative practices is it raises difficulties for any discussion of restorative justice as a single entity. This diversity extends to the forms restorative justice approaches can take from mediation to conferencing and beyond, but also to differences in dynamics for restorative meetings. Restorative justice approaches best achieve their desired benefits such as improved targeting of offender needs through their more informal structure, but it is this informality that leaves some part of the success of any restorative meeting to the specific dynamics from the particular participants involved. While facilitators are trained to minimise such differences, they can and do exist.<sup>18</sup>

A second obstacle is the limited application of restorative justice approaches. Generally, they are restricted to less serious offences by youths and only rarely used in situations where the offender is an adult.<sup>19</sup> Restorative justice approaches may be considered an incomplete view of punishment because they are limited to a relatively modest set of offenders and crimes.<sup>20</sup>

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<sup>18</sup> See Declan Roche, *Accountability in Restorative Justice* (Clarendon, 2003).

<sup>19</sup> See Brooks (n1) 173-88 and James Dignan, 'Juvenile Justice, Criminal Courts and Restorative Justice' in (n2) 269.

<sup>20</sup> See Brooks (n1) 67-68.

Perhaps the reason for limited applicability is a third, related obstacle of limited confidence which may prevent restorative justice approaches being considered for more serious crimes. There is a concern the public may view these approaches as some kind of soft option for more serious offences. The problem for restorative justice approaches is that, even if they proved more effective at reducing reoffending, they might prove politically unpalatable.

There are several recent illustrations of criminal justice policies receiving popular support while undermining crime reduction efforts. One such example is California's so-called 'Three Strikes and You're Out' law requiring offenders convicted of a third eligible criminal offence face a minimum of 25 years imprisonment.<sup>21</sup> Studies confirm this law has led to a negligible deterrent effect of no more than two per cent alongside an explosion in the prison population and its associated costs.<sup>22</sup> Populist proposals like 'Three Strikes and You're Out' indicate the public's willingness to support more punitive penal policies mistakenly believing they will lead to improved crime reduction.<sup>23</sup>

The problems of limited application and limited application are connected to a fourth obstacle, namely, that restorative alternatives to traditional sentencing are constrained by their limited available options. Restorative justice approaches considered here do not include so-called 'hard treatment' options like imprisonment nor suspended sentences as a part of their available options for a restorative contract. Indeed, some claim restorative justice approaches do not offer us a view about punishment because hard treatment is not an option for contracts agreed at restorative meetings.<sup>24</sup>

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<sup>21</sup> See Francis T. Cullen, Bonnie S. Fischer and Brandon K. Applegate, 'Public Opinion about Punishment and Corrections', 37 *Crime and Justice* 1 (2000) and Franklin E. Zimring, Gordon Hawkins and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford University Press, 2001).

<sup>22</sup> See Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and Crime: Can Both Be Reduced?' 10 *Criminology and Public Policy* 13, 28 (2011) and *Brown v. Plata*, 563 U.S. (2011).

<sup>23</sup> See Monica Williams, 'Beyond the Retributive Public: Governance and Public Opinion on Penal Policy', 35 *Journal of Crime and Justice* 93 (2011).

<sup>24</sup> See Andrew Ashworth, 'Sentencing' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* 822 (Oxford University Press, 1994).



The reason for excluding hard treatment as an option is that its use is thought to be counterproductive to reducing reoffending. Imprisonment is too often not the start of a person's longstanding social-economic and legal problems, but their confirmation – where bad situations can become much worse. Common risk factors for reoffending including economic insecurity, employment insecurity, financial insecurity and housing insecurity to name only a few.<sup>25</sup> These can often become exacerbated through even brief time spent in prison. Some research suggests the prison may even be 'criminogenic' because it may contribute to a greater likelihood an imprisoned offender reoffends on release.<sup>26</sup>

The fact imprisonment can often be counterproductive to crime reduction should not lead to the conclusion that imprisonment must always be so. The problem is not that prisons are used, but rather that their use can and should be improved. The promise of restorative justice is that it highlights the attractions of an alternative criminal justice process whereby prison is not an available option. Restorative approaches show another model is possible – and sometimes preferable. Most proponents of restorative justice might view this as a strength for their 'abolitionist' approaches.<sup>27</sup> Restorative approaches provide a promising process that might help us curtail the use of prison to ensure it is a last resort.

The reason for limiting options for restorative approaches to exclude the use of prison is connected to a final obstacle concerning the lack of clarity these approaches offer about what is 'restored' through a specific restorative approach. Strictly speaking, restorative justice approaches reject the use of prison because it is held imprisonment is a barrier to 'restoration'.<sup>28</sup> This is a contestable empirical claim that mistakes how we find many prisons with how prisons should be found while raising new questions about what is meant by restoration.

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<sup>25</sup> See Brooks (n1) 179-87.

<sup>26</sup> See Durlauf and Nagin (n22) 14, 21-23. See also Richard L. Lippke, *Rethinking Imprisonment* (Oxford University Press, 2007). Tonry 2011 – 138, 140-41.

<sup>27</sup> Braithwaite ref.

<sup>28</sup> Braithwaite ref.

Restorative justice approaches claim they enable a ‘restoration’ of the damaged relationship between an offender and the wider community. But which community and who are the relevant members? Many, following Andrew Ashworth, argue this claim ‘remains shrouded in mystery’.<sup>29</sup> He says:

If the broad aim is to restore the ‘communities affected by the crime’, as well as the victim and the victim’s family, this will usually mean a geographical community; but where an offence targets a victim because of race, religion, sexual orientation, etc., that will point to a different community that needs to be restored.<sup>30</sup>

There are two concerns here. The first is the problem of identifying the appropriate community to be restored and the second is the problem of selecting persons from that community to participate in a restorative meeting. The first problem of identifying the appropriate community affected by a crime is significant because restorative justice requires a restoration of members within that community. Yet, we each identify with multiple and sometimes overlapping communities rendering it unclear how we should choose between them. These communities are rarely static and our identities are not created in a vacuum suggesting that even if we could identify ‘the community’ this may be of limited practical benefit for the purposes of achieving restorative justice.<sup>31</sup>

A further problem concerns the general idea of restoration. Restorative justice aims at a restoration of an offender with the wider community. The claim is there is a wrong to be made right and an injustice requiring closure between affected persons. If this is the case,

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<sup>29</sup> Andrew Ashworth, *Sentencing and Criminal Justice*, 5<sup>th</sup> ed. 94 (Cambridge University Press, 2010). See John Braithwaite, ‘Setting Standards for Restorative Justice’, 42 *British Journal of Criminology* 563 (2002).

<sup>30</sup> Andrew Ashworth, ‘Responsibilities, Rights and Restorative Justice’, 42 *British Journal of Criminology* 578, 583 (2002).

<sup>31</sup> See Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Interdependent World* 1, 21-26 (Palgrave Macmillan, 2008).

then it is unclear how important a criminal offence is to justify a restorative approach. This is because restoration may bring benefits where no crime has taken place. One clear example is the case of restorative approaches used in schools for children to resolve conflicts and promote healing. If this is our goal, then crimes can be incidental to whether restoration is required.<sup>32</sup>

Restorative justice approaches bring several potential benefits, including higher victim satisfaction, more effective crime reduction and at lower costs. These benefits are not without their own costs. Restorative justice approaches are difficult to pinpoint and offer broad comparisons given their diversity, they have limited applicability, they suffer from limited public confidence, they operate with limited options by excluding prison and they are subject to a serious problem concerning what is ‘restored’ and by which community.<sup>33</sup>

Restorative justice approaches may be worth defending, but we require a new approach to yield the potential benefits while avoiding these obstacles. Otherwise, restorative justice approaches might remain an underutilised resource at the margins of mainstream criminal justice policy. This situation might change if there is a new formulation of restorative justice that could address these challenges.

### **The Idea of Punitive Restoration**

This section presents and defends a particular approach to achieving restorative justice in a novel way: the idea of *punitive restoration*.<sup>34</sup> Punitive restoration offers a distinctive view about restorative justice. It is a single practice taking the form of a conference setting where

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<sup>32</sup> NOTE

<sup>33</sup> There is a further concern that there is a gap between the rhetoric of restorative justice approaches and their practical achievements that will not be considered here. See Kathleen Daly, ‘Mind the Gap: Restorative Justice in Theory and Practice’ in Andrew von Hirsch, Julian V. Roberts, Anthony Bottoms, Kent Roach and Mara Schiff (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* 219 (Hart, 2003).

<sup>34</sup> See Brooks (n1) 123, 132, 136, 142-43, 147-48 and Thom Brooks, ‘Stakeholder Sentencing’ in Jesper Ryberg and Julian Roberts (eds), *Popular Punishment: On the Normative Significance of Public Opinion for Penal Theory* (Oxford University Press, 2014 forthcoming).

the victim, the offender, their support networks and some local community members are represented. Punitive restoration is *restorative* insofar as it aims to achieve the restoration of rights infringed or threatened by criminal offences. This is accomplished through recognition of the crime as a public wrong leading to a contractual arrangement agreed by stakeholders. Punitive restoration is *punitive* because it extends the available options for a restorative contract to achieve restoration and this may include forms of hard treatment, such as drug and alcohol treatment in custody, suspended sentences or brief imprisonment. These claims will now be defended.

Restorative justice approaches lack clarity about what is to be restored and how it should be achieved. Andrew von Hirsch and Andrew Ashworth argue that restorative justice ‘suffers from unduly sweeping definition of aims and insufficient specifications of limits’ with a conceptually incoherent model.<sup>35</sup> In fact, its claim to bring restoration to a community may be criticised because restorative approaches do not insist on community involvement and the overwhelming majority of restorative meetings are victim-offender mediations where the community is excluded.

Punitive restoration operates with a more specific understanding about restoration. The model of punitive restoration is a conference meeting, not unlike restorative conferencing. This is justified on grounds of an important principle of stakeholding: *that those who have a stake in penal outcomes should have a say in decisions about them.*<sup>36</sup> Stakeholding has direct relevance for sentencing policy. Stakeholders are those individuals with a stake in penal outcomes. These persons include victims, if any, their support networks and the local community. Each marks himself or herself out as a potential stakeholder in virtue of his or her relative stake.

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<sup>35</sup> See Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* 110-111 (Oxford University Press, 2005).

<sup>36</sup> See Thom Brooks, ‘Justice as Stakeholding’, unpub. ms.

This view of restoration endorses the primary working definition from Marshall that is used by most proponents of restorative justice considered above and restated here: ‘Restorative justice is a process whereby all parties *with a stake* in a particular offence come together *to resolve collectively* how to deal with the aftermath of the offence and its implications for the future’.<sup>37</sup> Restorative justice has often been understood as a process bringing ‘stakeholders’ together.<sup>38</sup> Its distinctive form as punitive restoration better guarantees this understanding by promoting the conference meeting and not victim-offender mediation.

Relevant stakeholders become more easily identifiable as persons immediately involved or connected with a criminal offence. This does not require *all* such persons to participate, but rather that opportunities exist for persons beyond the victim and offender to take part. Similarly, there must be opportunities for members of the general public to take part. This working idea of a conference setting is without any specific recommendation on capping the number of persons included although feasibility may render groups of ten or more impractical. The key idea is that if restoration is worth achieving, then it should not be a private affair between only the victim and offender: crimes are public wrongs that affect all members of the community, not least the support networks of victims and offenders.<sup>39</sup> These individuals have a stake in the outcome that should not be silenced. Restorative conferencing demonstrates this model is achievable and successful: participant satisfaction is higher in this setting than in mediation.<sup>40</sup> We should take the idea of stakeholding central to restorative justice approaches more seriously and ensure that any restoration of offenders with their community is enabled through including the community—as this is too often not the case.

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<sup>37</sup> Marshall (n9).

<sup>38</sup> See Braithwaite (n1) 11, 50, 55.

<sup>39</sup> One study found that restorative conferences often include friends and family of the victim and of the offender, respectively, in 73% and 78% of cases examined. Parents were far more likely to attend restorative conferences (50% of offenders and 23% of victims) than partners (3% of offenders and 5% of victims). Shapland, et. al. (n13) 20.

<sup>40</sup> Ref.

So one benefit of punitive restoration is its specifying the restorative process. Restoration is aimed at stakeholders through a conference setting. Furthermore, we should recall that our focus is on alternatives to sentencing: punitive restoration is conceived an alternative to the formal procedures of the criminal trial and sentencing guidelines. Punitive restoration can then overcome the obstacle of the diversity of restorative approaches. This is because our speaking of ‘punitive restoration’ is linked with a particular informal use of restorative justice as an alternative to the trial and sentencing. We can then better compare the dynamics and outcomes from punitive restoration given the more specified content.

Another benefit is that punitive restoration can better address the issue of community than alternative restorative approaches. This is because punitive restoration endorses the principle of stakeholding where those who have a stake should have a say. There is no need to engage in the more difficult task of discerning which type of community is most relevant for ‘restoration’, but rather focus on identifying the primary stakeholders and engage them.

Note that orthodox restorative justice approaches standardly require the participation of victims and offenders. An additional benefit of punitive restoration over these approaches is only punitive restoration can address situations of so-called ‘victimless crimes’ or where a victim is either unable or unwilling to participate. Those offences most often considered ‘victimless’, such as possession of illegal drugs, might normally be unavailable to a restorative approach and the potential benefits it can offer. While there may be no specific victim, there will be stakeholders if only some members of the local community that will have a stake in how criminal offences—irrespective of their seriousness—are managed. The principle of stakeholding that informs punitive restoration better helps us identify persons to participate in conference meetings and expand their applicability to a wider range of offences.

The remaining obstacles for restorative justice approaches concern their limited applicability to less serious offences, the limited confidence the public may have in

restorative approaches because they may be viewed as too soft an option and their limited available options by excluding any use of hard treatment. Punitive restoration takes these obstacles together. It enables *wider* applicability through *increasing* its options. Punitive restoration does not assume that restoration must never require the use of hard treatment. While incarceration may often make successful crime reduction efforts more difficult, it is also clear that prisons can and should be transformed to improve their disappointing results.<sup>41</sup>

For example, restorative contracts regularly include an obligation on offenders to participate in programmes designed to develop their employability and life skills as well as undertake treatment for any drug and alcohol abuse.<sup>42</sup> There is no reason to accept these activities could never be delivered successfully within a prison or other secure facility for some offenders. Perhaps hard treatment should be used sparingly because their use can be counterproductive: this is still not grounds for avoiding custodial sentences *tout court*. It is realistically possible that prisons may prove the best environment for some offenders in specific cases.<sup>43</sup> Prisons might also be reorganized so that prison officers could become Personal Support Officers if provided suitable training. Such a reform would make better use of prison resources: these officers have most frequent contact with imprisoned offenders and this relationship could be harnessed to produce an improved system of pastoral support.<sup>44</sup>

Prisons can and should be transformed so incarceration does not undermine offender rehabilitation. Short-term imprisonment is associated with high rates of reoffending. This is a significant problem because most offenders receive short-term sentences of less than 12

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<sup>41</sup> See Alison Liebling, *Prisons and Their Moral Performance: A Study of Values, Quality and Prison Life* (Clarendon, 2006).

<sup>42</sup> See Brooks (n1) 66-67, 73-75. On prison-based programmes designed to improve tackling drug and alcohol abuse, see Graham J. Towl, 'Drug-Misuse Intervention Work' in (ed.), *Psychological Research in Prisons* (Blackwell, 2006).

<sup>43</sup> See Deanna M. Perez and Wesley G. Jennings, 'Treatment Behind Bars: The Effectiveness of Prison-Based Therapy for Sex Offenders', 35 *Journal of Crime and Justice* 435 (2012).

<sup>44</sup> See Jenny Chapman and Jacqui Smith, 'Cutting Crime and Building Confidence' in Robert Philpott (ed.), *The Purple Book: A Progressive Future for Labour* 215,228 (Biteback, 2011).

months and about 60% will reoffend within weeks of their release.<sup>45</sup> Most offenders receiving short-term imprisonment do not receive any rehabilitative treatment. This is a major contributing factor to the likelihood these offenders will reoffend when released from prison. This problem may be overcome through providing effective treatment. Brief intensive interventions have been employed to address problems associated with drug and offenders were found to benefit from 'significant gains in knowledge, attitudes and psychosocial functioning'.<sup>46</sup> These sessions were corrections-based treatment of moderate (30 outpatient group sessions three days per week) or high intensity (six month residential treatment) has been found to yield cost savings of 1.8 to 5.7 the cost of their implementation.<sup>47</sup> These policies suggest prisons can be reformed to better support offender rehabilitation and improve post-release crime reduction efforts without sacrificing cost-effectiveness.

The reforms suggested have important relevance for punitive restoration. This is because individuals guilty of more serious, even violent, crimes may require more punitive outcomes than currently available to restorative justice approaches. For example, these approaches reject all uses of hard treatment including the imposition or its threat in contracts agreed at restorative meetings. If these contracts are not agreed or satisfied in full, the offender may have his case transferred for consideration by a magistrate where hard treatment can become a possible outcome.

Punitive restoration might permit the inclusion of a suspended sentence for noncompliance of a contract within the contractual agreement. This option would extend the flexibility of punitive restoration to more varieties of offence-types and offenders bypassing the need for a trial in cases of noncompliance and further reducing potential sentencing costs.

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<sup>45</sup> See Ministry of Justice website, url: <http://open.justice.gov.uk/home/>.

<sup>46</sup> See George W. Joe, Kevin Knight, D. Dwayne Simpson, Patrick M. Flynn, Janis T. Morey, Norma G. Bartholomew, Michele Staton Tindall, William M. Burdon, Elizabeth A. Hall, Steve S. Martin and Daniel J. O'Connell, 'An Evaluation of Six Brief Interventions That Target Drug-Related Problems in Correctional Populations', 51 *Journal of Offender Rehabilitation* 9 (2012).

<sup>47</sup> See M. Daly, C. T. Love, D. S. Shepard, C. B. Peterson, K. L. White and F. B. Hall, 'Cost-Effectiveness of Connecticut's In-Prison Substance Abuse Treatment', 39 *Journal of Offender Rehabilitation* 69 (2004).



Nor should this be problematic: offenders receiving a suspended sentence in a punitive restoration conference meeting would retain access to legal representation throughout, must confirm any guilt without coercion and agree all terms presented to him or her at the conclusion of this meeting *for committing offences where the alternative—through the traditional formal procedures of the courtroom—would include options that are at least as punitive*. Note that one major difference is that only with punitive restoration would the *possibility* of hard treatment be an issue that must be agreed by the offender prior to its use.

Let us consider two further instances where punitive restoration might justify some form of hard treatment. One is the idea of prison as a form of cooling off. Recall that imprisonment is often not the beginning of an offender's socio-economic and legal difficulties, but rather their confirmation after an extended escalation. Imprisonment is characteristically *disruptive*. A consequence is that this can end already fragile support networks and render an individual's road to sustainable prosperity tenuous. This is a significant problem for most offenders – but not for all. Perhaps for only a small, yet important minority the disruption from strongly negative support networks or difficult personal circumstances can provide an opportunity for offenders to take a break where they might become open to personal transformation possible only through a prison-like environment. And this should be readily knowable as offenders are assessed by probation officers prior to any sentencing decision anyway to ensure any allocated prison place is suitable for any offender to be considered for hard treatment.

A second form of hard treatment that punitive restoration might incorporate is the idea of *less* time in prison with *more* intensity. This addresses on the fact most offenders serve short-term sentences without receiving any rehabilitative treatment. These treatments are costly and so prison wardens normally reserve expensive rehabilitative programmes for

offenders serving more than one year in prison: it is claimed this permits sufficient time for these programmes to be effective.<sup>48</sup>

However, these programmes are rarely intensive and—as already noted above—such high intensity programmes have been found to be effective at reducing drug and alcohol abuse, for example.<sup>49</sup> More such programmes would increase costs, but these might be accounted for by reducing the overall time spent in prison made possible by intensive rehabilitation programmes: the savings from the reduced time spent in prison overall could contribute to the increased costs of ensuring all inmates have access to the appropriate intensive rehabilitative programmes. Further savings might accrue through less reoffending on release if the programmes are successful.

Punitive restoration might be objected to on the grounds that hard treatment, even for a few days, is a major curtailment of individual liberty which requires special safeguards only the formal procedures of the courtroom could satisfy. The problem with this objection is that only a relatively few cases are brought to trial.<sup>50</sup> These cases are never heard in court and so victims and others affected by a crime are not permitted opportunities to gain a better understanding of why crimes occurred or receive an apology from their offenders. It is hardly surprising to recall the widespread dissatisfaction many victims have with the traditional sentencing model. Punitive restoration is a concrete approach that can overcome this problem by providing greater opportunities for restorative meetings where victims express much higher satisfaction.

Punitive restoration might also be objected to for a lack of any stated purpose beyond its endorsing the principle of stakeholding: this may help identify relevant participants, but which penal purpose should inform their sentencing outcomes? Punitive restoration is more

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<sup>48</sup> NOTE

<sup>49</sup> See Joe et. al. (n44) and Daly et. al. (n45).

<sup>50</sup> See Andrew Ashworth and Mike Redmayne, *The Criminal Process*, 3<sup>rd</sup> ed 6-7 (Oxford University Press, 2005).

than an improvement over alternative approaches to restorative justice, but an illustration of a compelling perspective on penal purposes in practice. Punishment is often justified in reference to a justifying aim or purpose, such as retribution, deterrence or rehabilitation. Philosophers disagree about which among these is most preferable despite general agreement that hybrid combinations of two or more purposes often suffer from inconsistency.<sup>51</sup> This is illustrated well by s142 of the Criminal Justice Act 2003 which states that punishment must satisfy at least one of five penal purposes. This claim is restated in more recent sentencing guidelines. However, there has been no attempt to claim how two or more such purposes can be brought together in a coherent, unified account. This ‘penal pluralism’ may be legally possible, but its practicality remains questionable.<sup>52</sup>

Punitive restoration is one form that a *unified theory of punishment* might take. This is because it is able to bring together multiple penal purposes within a coherent, unified framework.<sup>53</sup> For example, desert is satisfied because offenders must admit guilt without coercion prior to participation in a conference meeting. The penal goals of crime reduction, including the protection of the public, and enabling offender rehabilitation are achieved through targeting stakeholder needs arising from the meeting. The satisfaction of these goals is confirmed through the high satisfaction all participants report which suggests a general unanimity that the appropriate set of contractual stipulations have been agreed by all and the improvements in reducing reoffending suggest success in crime reduction and treatment

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<sup>51</sup> See Brooks (n1) 89-100.

<sup>52</sup> On penal pluralism, see Thom Brooks, ‘F. H. Bradley’s Penal Pluralism: On “Some Remarks on Punishment”’, *Ethics* (2014): forthcoming.

<sup>53</sup> A unified theory of punishment may be constructed in different ways. The construction favoured here is to view crime as a harm to individual rights and punishment as ‘a response’ to crime with the purpose of protecting and maintaining individual rights. This model rejects the view that penalties and hard treatment have different justificatory foundations, but rather they share a common justificatory source: the protection and maintenance of rights. The model of a unified theory can then better address the fact that penal outcomes are often multidimensional and include both financial and punitive elements. See Brooks (n1) 123-48 for a defence of the unified theory of punishment.

consistent with deterrence and rehabilitation.<sup>54</sup> The argument here is not that any such unified theory is best or preferable to alternative theories. Instead, it is claimed punitive restoration is an example of how multiple penal principles might be addressed within a coherent, unified account.<sup>55</sup>

## **Conclusion**

Criminal justice policy faces the twin challenges of improving our crime reduction efforts while increasing public confidence. These challenges are exacerbated by the fact that at least some measures popular with the public, such as California's 'Three Strikes and You're Out' law, are counterproductive to greater crime reduction. How to achieve greater crime reduction without sacrificing public confidence?

Restorative justice approaches offer a promising alternative to traditional sentencing with the potential to achieve these goals. Studies have found these approaches to yield significant improvements in combatting recidivism and greater satisfaction by participating victims at much reduced costs. Yet, restorative justice approaches suffer from several serious obstacles. These problems include the diversity of restorative approaches making it difficult to speak of any single approach leading to difficulties in making comparisons. Other problems include the limited applicability of restorative approaches to primarily youth offenders for less serious crimes, the limited flexibility of outcomes to exclude the possibility of imprisonment, the limited public confidence stemming from concerns restorative approaches are a soft option and a larger question about what is 'restored' through restorative justice.

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<sup>54</sup> If satisfied, these conditions may be consistent with the idea of 'empirical desert'. See Paul H. Robinson, 'Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical', 67 *Cambridge Law Journal* 145 (2008).

<sup>55</sup> See Thom Brooks, 'Punishment: Political, Not Moral', 14 *New Criminal Law Review* 427 (2011) and Thom Brooks, 'Hegel and the Unified Theory of Punishment' in (ed.), *Hegel's Philosophy of Right* 103 (Blackwell, 2012).

Punitive restoration is a new and distinctive idea about restorative justice. It is modelled on an important principle of stakeholding which states that those who have a stake in penal outcomes should have a say about them. Punitive restoration brings relevant stakeholders together, including victims, offenders and members from the local community, to consider together the appropriate penal outcomes. Punitive restoration is *restorative* insofar as it aims to achieve the restoration of rights infringed or threatened by criminal offences. This is accomplished through recognition of the crime as a public wrong leading to a contractual arrangement agreed by stakeholders. Punitive restoration is *punitive* insofar as the available options for this agreement are more punitive than found in most restorative justice approaches, such as the option of some form of hard treatment. This expansion of options within a restorative framework overcomes the many obstacles that limit the application, flexibility and public confidence of restorative alternatives.

Punitive restoration sheds new light on how we may meet the twin challenges of improving our efforts to reduce reoffending without sacrificing public confidence. This approach further demonstrates how restorative practices can be embedded deeper within the criminal justice system. Punitive restoration is an idea whose time has come.<sup>56</sup>

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<sup>56</sup> An earlier version of this paper was presented to the annual Howard League for Penal Reform conference at Keble College, Oxford; the Political Theory Workshop at Sciences Po-Paris; the Political Theory Colloquium at Harvard University's JFK School of Government and the School of Social Sciences, Law and Business at Teesside University. I have benefited from comments by Jacob Abolafia, Chris Bennett, Nick Bowes, Frances Crook, Albert Dzur, Sadiq Khan, Rick Lippke, Matt Matravers, Nicky Padfield, Bhikhu Parekh, Andrei Poama, Harvey Redgrave, Julian Roberts, Paul Robinson, Michael Rosen, Anqi Shen, Avital Simhony and Astrid von Busekist.