

Punitive Restoration and Restorative Justice

Thom Brooks

Durham Law School, Durham University, Durham, UK

Abstract. 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 are counterproductive to greater crime reduction. How to achieve greater crime reduction without sacrificing public confidence? While restorative justice approaches offer a promising alternative to traditional sentencing with the potential to achieve these goals, they suffer from several serious obstacles not least their relatively limited applicability, flexibility and public support. Punitive restoration is a new and distinctive idea about restorative justice 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 is *restorative* insofar as it aims to achieve the restoration of rights infringed or threatened by criminal offences. 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. Punitive restoration sheds new light on how we may meet the twin challenges of improving our efforts to reduce reoffending without sacrificing public confidence demonstrating how restorative practices can be embedded deeper within the criminal justice system.

Key words: Crime Reduction, Public Confidence, Punishment, Punitive Restoration, Restorative Justice, Stakeholding

Introduction

How can we create *less* reoffending with *greater* public confidence? These twin goals have proven elusive for criminal justice policymakers. While crime rates remain relatively low historically, sentencing decisions are increasing criticised by the public for being overly lenient and providing insufficient deterrence. Policymakers face two challenges. First, measures that reduce reoffending do not always satisfy public demands for tougher sentencing. Secondly, more onerous punishments can make reoffending more likely and so prove counterproductive.

Restorative justice approaches are a promising alternative to traditional sentencing practices. Studies have found that restorative justice can produce up to 25% less reoffending with much higher participant satisfaction – all at much reduced costs. These approaches have

the potential to achieve the elusive twin goals. It is hardly surprising that restorative justice is increasingly popular across the political divide in Britain.

Nonetheless, there are several obstacles that threaten to limit their wider use. The diversity of restorative approaches ranging from in-school rehabilitative programmes to victim-offender mediation that can make it difficult to identify any one model for implementation. Restorative justice is usually restricted to less serious offences that may constrain its application to more types of offending. This constraint is a product of limited confidence in the use of restoration for more serious crimes because imprisonment is always ruled out. Finally, there is disagreement about what is “restored” through any specific restorative approach.

I will argue that the twin goals of achieving less reoffending with greater public confidence can be achieved through a distinctive restorative approach that I will call *punitive restoration* overcoming the many obstacles facing most other restorative approaches. The next section begins by explaining the appeal of restorative justice. The following section discusses the obstacles restorative justice approaches face and the problems that arise. I then turn to explaining how my alternative approach of punitive restoration can improve on other restorative approaches. This final section concludes by specifying what punitive restoration might entail in practice.

The Diversity of Restorative Justice

The term “restorative justice” refers to a range of approaches and not any single practice.¹ 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.”²

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.³ Restorative justice approaches are applied in schools,⁴ prison interventions⁵ and South Africa’s Truth and Reconciliation Commission.⁶ 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.⁷

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.⁸ 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.”⁹

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

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

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.¹¹ 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 step can include a transfer to having the alleged offence considered in the courtroom where potential outcomes can be more punitive.¹²

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.¹³ 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.¹⁴

Restorative approaches are found to improve our ability to address 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 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.¹⁵

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.¹⁶ 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.¹⁷

Restorative justice is not one practice, but a broad tent encompassing a wide diversity of practices. This article focuses on restorative justice approaches that are an alternative to sentencing. These approaches demonstrate significant promise as restorative meetings might achieve the benefits of improved victim satisfaction through greater participation opportunities, less reoffending through better targeting of offender needs and promotion of constructive engagement at much reduced costs. Restorative justice may be an important first step towards meeting the twin challenges of improving public confidence while reducing reoffending.

The Problems with Restorative Approaches

Restorative justice approaches suffer from several problems. This section identifies the more significant problems and the first—the fact of the diversity of restorative practices—has already been stated above. Perhaps what most restorative approaches have in common is in what they are not: they are not held in a courtroom, they do not follow formal procedures of traditional courtroom practices, they do not exclude victims from participation and so on.¹⁸

The fact of restorative justice's diversity of practices leads to the problem that to speak of 'restorative justice' is to discuss not any one single approach. This plurality of practices extends to the forms they can take from mediation to conferencing, but also to differences in dynamics in how these practices are delivered. The informality of restorative meetings is a key to its strength – making it easier to target offender needs – but also a weakness as some part of its success depends on the specific dynamics from the particular participants involved. While facilitators are trained to minimise such differences, they can and do exist.¹⁹

A second problem is the limited application of restorative justice approaches. Generally, these are restricted to less serious crimes by young offenders and only rarely used for adults.²⁰ Restorative justice approaches are limited to a relatively modest set of offenders and crimes and so may be considered an incomplete view of punishment that does not cover all or even most types of offenders or crimes.²¹

Perhaps the reason for this limited applicability is a third, related problem 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 a “soft” option for more serious offences. So even if restorative approaches were proved to be more effective at reducing reoffending, the problem they would have is that they might be politically unpalatable.

There are many recent examples of criminal justice policies receiving popular support that undermined crime reduction efforts. The most prominent illustration is probably 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.²² Studies confirm this law led to an explosion in the prison population and its associated cuts with only a negligible deterrent effect of no more than two per cent.²³ 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 and at less cost – neither of which came true.²⁴

Restorative justice's problems of limited application and limited application are connected to a fourth problem, 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.²⁵

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.²⁶ 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.²⁷

While imprisonment can often make crime reduction more difficult, imprisonment is not always counterproductive to this purpose. The problem here is not that the prison is used, but how it is used – and how it can and should be improved. Restorative justice highlights the many attractions of an alternative criminal justice process where prison is not an available option. These approaches show that another model is possible—sometimes even preferable. For most proponents of restorative justice, its opposition to imprisonment is viewed as a

strength of its “abolitionist” position.²⁸ 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 problem: 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.”²⁹ 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.

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 argue this claim “remains shrouded in mystery.”³⁰ For example, Andrew Ashworth 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.³¹

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. Restorative justice requires a restoration of the members within that community, but we each identify with multiple and sometimes overlapping communities and so it is 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.³²

A further problem concerns the idea of “restoration” itself. Restorative justice aims at a restoration of an offender with the wider community. This is built on a view that there is a wrong to be made right and an injustice between affected persons requiring closure. If this is the case, then it is unclear why restorative justice requires a criminal offence where there may be injustices requiring repair. For example, restoration may bring benefits to individuals and communities despite no crime has taken place. There may be a need for providing support to overcome addictions or enable greater financial independence – yet this support might only be available to “restore” those affected should there have been a crime. Short of offending, individuals may lack access to support they need benefiting themselves and their community. Another 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.

Restorative justice approaches bring several potential benefits that include 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 provide anything but broad comparisons given their diversity. They have limited applicability, limited public confidence, operate with limited options by excluding prison and subject to a serious problem concerning what is “restored” and by which community.³³

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 Punitive Restoration Alternative

This section presents and defends a particular approach to achieving restorative justice in a novel way: the idea of *punitive restoration*.³⁴ Punitive restoration offers a distinctive view about restorative justice. It is a single practice taking the form of a conference setting where 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.³⁵ 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.³⁶ 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.³⁷ 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.*³⁸

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.

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.”³⁹ Restorative justice has often been understood as a process that brings “stakeholders” together.⁴⁰ 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, including the support networks of victims and offenders whose voices are regularly left out.⁴¹ 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.⁴² 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.

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 an important obstacle—the diversity of restorative approaches. It can do this because our speaking of “punitive restoration” is linked with a particular, informal use of restorative justice. We can then better compare the dynamics and outcomes from punitive restoration given the more specified content. When referring to “punitive restoration,” we know which restorative practice we are talking about.

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.⁴³ There is no need to consider 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.

It should be noted that orthodox restorative justice approaches typically require both victims and offenders to participate. 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, crimes are public wrongs where the public have a stake in how criminal offences are managed no matter their degree of seriousness. Punitive restoration’s principle of

stakeholding better helps us identify persons to participate in conference meetings and expand their applicability to a wider range of offences than alternative restorative approaches.

The public's having a say on penal outcomes is subject to several safeguards as found in current restorative justice practices that punitive restoration builds upon.⁴⁴ Offenders have a right to legal representation throughout. Participation by everyone from offender to victim and community members is voluntary. The public can contribute already to penal outcomes through serving on a jury or submitting a victim impact statement so having a voice on sentencing is not unknown.⁴⁵ Flexibility is constrained by national guidelines providing necessary discretion but all outcomes must be overseen by a trained facilitator and agreed to by the offender to be confirmed.⁴⁶

Further problems 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 by *increasing* the kind and range of available 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.⁴⁷

For example, restorative contracts regularly include an obligation on offenders to undertake treatment for any drug or alcohol abuse and to participate in programmes designed to develop their employability and life skills.⁴⁸ There is no reason to accept these activities could never be delivered successfully within a prison or some other secure facility for particular offenders. Perhaps hard treatment should be used sparingly because its use can be counterproductive: this is still not grounds for avoiding custodial sentences altogether. It is a

realistic possibility that prisons may prove the best environment for some offenders in specific cases.⁴⁹ 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.⁵⁰

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 months and about 60% will reoffend within weeks of their release.⁵¹ 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 drugs and offending were found to benefit from “significant gains in knowledge, attitudes and psychosocial functioning.”⁵² 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.⁵³ These policies suggest prisons can be reformed to better support offender rehabilitation and improve post-release crime reduction efforts without sacrificing cost-effectiveness.

Reforms like these have important relevance for punitive restoration. This is because offenders who have committed more serious, even violent, crimes may require more punitive outcomes than currently available to restorative justice approaches. For example, in England and Wales, the currently available restorative practices 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. Despite having admitted guilt in a restorative setting and apologised to the victim, the offender is permitted to plead not guilty where his or her failure to honour a restorative contract cannot be raised at trial. This current practice fails to fully respect the integrity of the restorative process as neither apologies nor promises are supported by any available sanction.

Punitive restoration might permit the inclusion of a suspended sentence for noncompliance of a contract within the contractual agreement—this would be made clear to offenders upfront.⁵⁴ 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. 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 could 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.⁵⁵

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: this permits sufficient time for these programmes to be effective.

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.⁵⁶ 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.⁵⁷ Thus, the vast majority of 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.⁵⁸

Restoration might not be for everybody. Restorative justice—as an alternative to traditional sentencing—is typically only available to offenders with little to no past criminal record. Punitive restoration attempts to create a space whereby more offenders can be brought into a restorative approach. While more punitive options can enable restoration and expand potential applicability, it is not argued that punitive restoration is appropriate for all crimes, including the most serious violent offences. If it was used, it might undermine its goal of winning over public confidence. Social reality matters and punitive restoration must “restore”—strong public opposition to its use could damage its ability to provide some form of restoration.

Moreover, punitive restoration requires a time commitment. Not all victims or offenders will want to take part. Community members may not wish to participate. If punitive restoration is to work, then its conference format requires stakeholders to come together. It is my contention that since restorative conferences are shown to create more strongly positive experiences for victims and offenders than alternatives that their wider use could extend these experiences for more people. Over time punitive restoration might become more regularly practiced as the public becomes more supportive both through positive experiences and results.⁵⁹

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 than an improvement over alternative approaches to restorative justice, but a concrete

realization 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.⁶⁰ This is illustrated well in Britain 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.⁶¹ 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.⁶²

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.⁶³ 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 consistent with deterrence and rehabilitation.⁶⁴ 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.⁶⁵

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 improving crime reduction. How to achieve more 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.

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.⁶⁶

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: by making restorative practices potentially more punitive we also may render the system less punitive overall.⁶⁷ Punitive restoration is an idea whose time has now come.⁶⁸

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¹ See Braithwaite, *Restorative Justice and Responsive Regulation* and Brooks, *Punishment*, 64—85.

² Johnstone and Van Ness, "The Meaning of Restorative Justice."

³ See Shapland, Robinson and Sorsby, *Restorative Justice in Practice*, 4 ("The restorative justice agenda . . . encompasses a very broad range of practices and approaches, such that a definitive definition has proven elusive"). See also Cunneen and Hoyle, *Debating Restorative Justice*.

⁴ See Morrison, "Schools and Restorative Justice."

⁵ See van Ness, "Prisons and Restorative Justice."

⁶ See Llewellyn and Howse, "Institutions for Restorative Justice."

⁷ 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.

⁸ Shapland, Robinson, Sorsby, *Restorative Justice in Practice*, 4.

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- ⁹ Marshall, *Restorative Justice*.
- ¹⁰ Gardner, "Crime: In Proportion and in Perspective," 31.
- ¹¹ See Restorative Justice Council, "Best Practice."
- ¹² 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.
- ¹³ See Shapland, et. al., *Restorative Justice in Practice: The Second Report* and Shapland, et. al., *Restorative Justice: The Views of Victims*, 27.
- ¹⁴ See Shapland, et. al., *Does Restorative Justice Affect Reconviction? The Fourth Report* and Restorative Justice Council, *What Does the Ministry of Justice RJ Research Tell Us?*.
- ¹⁵ Christie, "Conflicts as Property," 314.
- ¹⁶ See Shapland, et al, *Does Restorative Justice Affect Reconviction?* 25-26.
- ¹⁷ See Shapland et al, *Restorative Justice in Practice: The Second Report* and Restorative Justice Council (n13).
- ¹⁸ I use restorative approaches and restorative practices interchangeably.
- ¹⁹ See Roche, *Accountability in Restorative Justice*.
- ²⁰ See Brooks, *Punishment*, 173—188 and Dignan, "Juvenile Justice, Criminal Courts and Restorative Justice."
- ²¹ See Brooks, *Punishment*, 67—68.
- ²² See Cullen, Fischer and Applegate, "Public Opinion about Punishment and Corrections," and Zemring, Hawkins and Kamin, *Punishment and Democracy*.
- ²³ See Durlauf and Nagin, "Imprisonment and Crime," 28 and *Brown v. Plata*, 563 U.S. (2011).
- ²⁴ See Williams, "Beyond the Retributive Public."
- ²⁵ See Ashworth, "Sentencing," 822.
- ²⁶ See Brooks, *Punishment*, 179—187.
- ²⁷ See Durlauf and Nagin, "Imprisonment and Crime," 14, 21-23. See also Lippke, *Rethinking Imprisonment* and Tonry, "Less Imprisonment is No Doubt a Good Thing," 138, 140-41.
- ²⁸ Braithwaite, *Restorative Justice and Responsive Regulation*.
- ²⁹ Ibid.
- ³⁰ Ashworth, *Sentencing and Criminal Justice*, 94. See Braithwaite, "Setting Standards for Restorative Justice."
- ³¹ Ashworth, "Responsibilities, Rights and Restorative Justice," 583.
- ³² See Parekh, *A New Politics of Identity*, 1, 21—26.
- ³³ 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."
- ³⁴ See Brooks, *Punishment*, 123, 132, 136, 142-43, 147-48 and Brooks, "Stakeholder Sentencing."
- ³⁵ Criminal offences infringe, or threaten the infringement, of rights. For example, theft is a violation of an individual's right to property. Attempted offences are instances where the violation of rights is threatened. An attempted robbery is an instance where my rights to property and self are in jeopardy. Punishment as a restoration of rights recognises offences, including attempts, as the infringements, or threatened infringements, of rights that they are and it seeks to render their maintenance and future protection more secure by acknowledging just deserts and addressing underlying causes to rehabilitate if necessary and deter where possible. See Brooks, "Criminal Harms."
- ³⁶ See von Hirsch and Ashworth, *Proportionate Sentencing*, 110—111.
- ³⁷ See Brooks, "Punitive Restoration: Rehabilitating Restorative Justice."
- ³⁸ See Brooks, "Justice as Stakeholding."
- ³⁹ Marshall, *Restorative Justice*.
- ⁴⁰ See Braithwaite, *Restorative Justice and Responsive Regulation*, 11, 50, 55.
- ⁴¹ 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, *Restorative Justice in Practice: The Second Report*, 20.
- ⁴² See Shapland et al, *Restorative Justice in Practice: The Second Report*, 20.
- ⁴³ See Brooks, "Punitive Restoration: Giving the Public a Say on Sentencing."
- ⁴⁴ See Restorative Justice Council, "Standards and Quality," url: <https://www.restorativejustice.org.uk/standards-and-quality>.
- ⁴⁵ An objection to this argument might be that the people rarely express their voices in the criminal justice system. With over 90% of trials in the US and UK never going to trial, victims rarely get much opportunity to

speak. It might be objected that making their voices heard more regularly is problematic because they should be heard no more than they are already. However, it should be countered that the minority of cases where their voices are heard – in both the jury box or witness stand – are the most serious cases. If the public’s voice matters for the most serious criminal cases, then it could be argued their voice should be heard in less serious cases as well. See Brooks, “The Right to Trial by Jury.”

⁴⁶ See Restorative Justice Council, “Standards and Quality,” url: <https://www.restorativejustice.org.uk/standards-and-quality>.

⁴⁷ See Liebling, *Prisons and Their Moral Performance*.

⁴⁸ See Brooks, *Punishment*, 66-67, 73-75. On prison-based programmes designed to improve tackling drug and alcohol abuse, see Towl, “Drug-Misuse Intervention Work.”

⁴⁹ See Perez and Jennings, “Treatment Behind Bars.”

⁵⁰ See Chapman and Smith, “Cutting Crime and Building Confidence,” 215, 228.

⁵¹ See Ministry of Justice website.

⁵² See Joe, et. al., “An Evaluation of Six Brief Interventions.”

⁵³ See Daly, et. al., “Cost-Effectiveness of Connecticut’s In-Prison Substance Abuse Treatment.”

⁵⁴ The fact that a restorative contract might include hard treatment for any breach of contract need not mean offenders would be very unlikely to agree to such a contract. This is especially true for when failure to agree a contract would entail hard treatment anyway.

⁵⁵ It is not suggested that probation officers always get this correct and no one has a crystal ball providing perfect predictions of the future. Yet officers may be able to ascertain where offenders are subjected to a strongly negative support network that could warrant a disruption as offered by punitive restoration, such as a cooling off period.

⁵⁶ See Joe et. al., “An Evaluation of Six Brief Interventions” and Daly et. al., “Cost-Effectiveness of Connecticut’s In-Prison Substance Abuse Treatment.”

⁵⁷ See Ashworth and Redmayne, *The Criminal Process*, 6—7.

⁵⁸ It might be objected that some victims may see the opportunity to confront offenders as a chance to lavish anger and hostility. This is not what happens most often in practice. Yet even if it were so, the conference setting gives victims a voice but not the only say—and any contract (punitive or otherwise) must be acceptable by the offender to have any effect. Furthermore, contracts are not constructed in some anything goes fashion. There are guidelines to ensure that flexibility is restrained to ensure some consistency.

⁵⁹ This is why it is claimed that if we want to find an approach that reduces crime more and increases public confidence then punitive restoration is a possibility we should consider because of its likely results and by the positive experiences by participants. Yet this is not about grafting punitive restoration onto an already criminogenic criminal justice system—it is the aim to help launch a shift towards more, not less, restorative justice within the criminal justice system thereby reducing the system’s criminogenic features.

⁶⁰ See Brooks, *Punishment*, 89—100.

⁶¹ For example, see Sentencing Council, “Download a guideline,” url: <http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=definitive-guideline&topic=&year>.

⁶² On penal pluralism, see Brooks, “On F. H. Bradley’s ‘Some Remarks on Punishment’” and Brooks, “In Defence of *Punishment* and the Unified Theory of Punishment.”

⁶³ 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, *Punishment*, 123—48 for a defence of the unified theory of punishment.

⁶⁴ If satisfied, these conditions may be consistent with the idea of “empirical desert.” See Robinson, “Competing Conceptions of Modern Desert.”

⁶⁵ See Brooks, “Punishment: Political, Not Moral” and Brooks, “Hegel and the Unified Theory of Punishment.” It is not argued here that other approaches could not also be consistent with a unified theory of punishment—only that punitive restoration is one illustration of it.

⁶⁶ While it is suggested that expanding penal options would extend the applicability of punitive restoration, I am silent on how far this might extend. Yet whatever limits there might be and crimes that cannot be incorporated into a restorative framework for whatever reason, the claim is that more would be incorporated and not that all would or must be incorporated.

⁶⁷ It has been suggested to me that this argument for punitive restoration is akin to a Trojan Horse strategy: restorative justice is dressed up in something more punitive, but if let through the thick impenetrable walls of the

criminal justice system there is a swift appearance of less punitiveness overall. This characterisation aptly captures a part of my strategy except that my aim in making criminal justice less punitive is not intended to be a surprise, but an achievement. I am grateful to Albert Dzur for this view.

⁶⁸ Earlier versions of this paper were 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; the School of Social Sciences, Law and Business at Teesside University; the School of Public Policy at University College London; a Punishment and Prisons conference at Bowling Green State University and the City University of Hong Kong. I have benefited from comments from an anonymous referee for this journal and from Jacob Abolafia, Hilary Benn, Chris Bennett, Nick Bowes, Frances Crook, Albert Dzur, Douglas Husak, Sadiq Khan, Rick Lippke, Matt Matravers, Martha Nussbaum, Nicky Padfield, Bhikhu Parekh, Avia Pasternack, Andrei Poama, Harvey Redgrave, Julian Roberts, Paul Robinson, Michael Rosen, Avital Simhony, Astrid von Busekist and Albert Weale.