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## Chapter 6. Punitive Restoration: Giving the Public a Say on Sentencing

**Thom Brooks**

*Abstract.* Mass incarceration is at near pandemic proportions and yet there is evidence of poor public confidence in how sentencing is handled by the criminal justice system with many finding the courts too lenient. This chapter considers this problem about public confidence and sentencing from a distinctive angle: if public confidence in sentencing is so poor, then why not include the public more in sentencing decision-making? Restorative justice is a welcome first step about how the public can participate effectively with high satisfaction and lower reoffending at less cost. The chapter argues that restorative justice should be expanded to include more punitive outcomes, including hard treatment, in what I call “punitive restoration.” More punitive options for restorative justice may increase its applicability and positive outcomes like improved public confidence while embedding it further into the criminal justice system.

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

### **Introduction**

Mass incarceration is at near pandemic proportions. Over half the world’s nine million prisoners are either in the United States, Russia or China. The US leads the world in mass imprisonment with 737 in 10,000 incarcerated. England and Wales imprisons 148 in 10,000 and Scotland 134 in 10,000, but still these British figures are historically high.<sup>1</sup> These alarming statistics contribute to evidence of poor public confidence in how sentencing is

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<sup>1</sup> See BBC, ‘World Prison Populations’, <http://news.bbc.co.uk/1/shared/spl/hi/uk/06/prisons/html/nn2page1.stm>. url:

handled by the criminal justice system with most finding the courts too lenient.<sup>2</sup> This is because these high prison rates appear to do little to dispel concerns that sentencing practices remain too lenient and ineffective only exacerbated by correspondingly high recidivism rates.

This chapter considers this problem about public confidence and sentencing from a distinctive angle: if public confidence in sentencing is so poor, then why not include the public more in sentencing decision-making? Greater public inclusion in determining sentences might help improve public confidence in sentencing decisions more generally.<sup>3</sup> There have been other measures attracting popular support that give the public a voice in the criminal justice system, such as the jury trial and the use of victim impact statements.<sup>4</sup> But should we go further?

There are several reasons for why decisions about incarceration are not made by the public. The most common concerns are that the public would exercise its judgement poorly choosing counterproductive punishments of greater severity made worse through inconsistent sentences. Imprisonment is a serious infringement of a person's liberties and should be determined by a professional judge as an important safeguard, or so it has been argued.<sup>5</sup> Taking the public's voice more seriously compounds one problem on top of another in a tragedy of errors. But does it?

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<sup>2</sup> See Mike Hough, Ben Bradford, Jonathan Jackson and Julian Roberts, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales* (London: Home Office, 2013), 2 and Julian V. Roberts, "Public Opinion and Sentencing Policy" in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing* (London: Routledge, 2011), 26. These same studies find public attitudes become more lenient the more that they learn about individual cases.

<sup>3</sup> See D. Smith, *Confidence in the Criminal Justice System: What Lies Beneath?* (London: Ministry of Justice, 2007).

<sup>4</sup> For example, see Thom Brooks, "The Right to Trial by Jury," *Journal of Applied Philosophy* 21 (2004): 197—212 and Paul G. Cassell, "In Defense of Victim Impact Statements," *Ohio State Journal of Criminal Law* 6 (2009); 611—48.

<sup>5</sup> See House of Commons Justice Select Committee, 'Democratic and Judicial Voices' in *Sentencing Guidelines and Parliament: Building a Bridge* (url: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/715/71506.htm>).

This chapter defends a different approach to sentencing. Restorative justice is best understood as a big tent encompassing several related approaches rather than a single approach to managing criminal justice outside the more strict confines of the formal courtroom. These approaches will be shown to have the key to unlocking the problems associated with permitting the public to have a voice on outcomes. Restorative justice can secure the necessary safeguards for offenders with the promise of improving crime reduction efforts at lower costs.

It could be argued that restorative justice is the wrong place to look for defending an approach to sentencing. This is because imprisonment and other forms of hard treatment are not normally a part of restorative contracts. In fact, proponents of restorative justice sometimes self-identify as “abolitionists” insofar as they support greatly restricting, if not abolishing, the use of prisons.<sup>6</sup> Some even speak of abolishing “the prison paradigm” through promoting restorative justice.<sup>7</sup> So to speak of a restorative approach to sentencing policy might seem like a betrayal of what restorative justice is fundamentally about.

Restorative justice is about a kind of restoration, if nothing else. What is restored is a matter of controversy, but the approach’s outcomes receive their justification, in part, according to how well they enable a restoration to take place. Mass incarceration may often make offenders’ situations much worse. But my point is that hard treatment, including the use of prisons, need not do so and there is evidence that they can support restoration under certain conditions. A restorative justice that is open to using a wider variety of outcomes, including punitive measures, I call and defend as “punitive restoration.” One part of my discussion

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<sup>6</sup> See Barbara Hudson, “Restorative Justice: The Challenge of Sexual and Racial Violence,” *Journal of Law and Society* 25 (1998), 237—56, Theo Gavrielides, “Restorative Justice—the Perplexing Concept: Conceptual Fault-lines and Power Battles within the Restorative Justice Movement,” *Criminology and Criminal Justice* 8 (2008), 165—83 and Vincenzo Ruggiero, “An Abolitionist View of Restorative Justice,” *International Journal of Law, Crime and Justice* 39 (2009), 100—10.

<sup>7</sup> See Judy C. Tsui, “Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago’s Juvenile Justice System,” *Journal of Criminal Law and Criminology* 104 (2014), 635—666.

argues that punitive restoration provides a more plausible view of restorative justice with a greater variety of applicability to more cases. Those looking for a way to better embed restorative justice in the criminal justice system should look to punitive restoration, where citizens come together and determine sentences in a deliberative setting.

A second part of my discussion focuses on punitive restoration's justification. I argue for a principle of stakeholding: those with a stake should have a say in outcomes.

Stakeholding is an idea embedded in the restorative justice literature, but rarely developed in any philosophical depth. Stakeholding helps us answer important questions about membership in the restorative process and highlight important linkages between stakeholding and civic membership in the criminal justice system. In conclusion, stakeholding is a crucial element to punitive restoration by providing a civic justification for the practice and its membership.

The chapter begins examining the diversity of approaches falling under the restorative justice tent and their conceptual and practical limits. The following section presents punitive restoration as a more coherent view of restorative justice and why it should be preferred. The chapter then considers the importance of stakeholding for this account and how it provides a crucial civic justification for restorative practices and the membership on restorative forums.

### **Restorative Justice and Its Limits**

I will argue that restorative justice is a promising first step towards including the public in sentencing decisions. We should begin by clarifying what is restorative justice and why it does not currently normally extend to sentencing decisions. This section provides this crucial background.

“Restorative justice” is not one thing, but many and refers to a wide-range of approaches rather than any single practice.<sup>8</sup> There are significant differences about how these approaches are understood and applied.<sup>9</sup> For example, restorative justice is applied in schools,<sup>10</sup> prison interventions<sup>11</sup> and South Africa’s Truth and Reconciliation Commission.<sup>12</sup> This diversity and disagreement about what restorative justice is about can make it difficult to discuss without a sharp focus.<sup>13</sup> One person’s understanding of restorative justice can be very different in form and content from another’s. It might appear that restorative justice is in the eye of its many beholders, but this is untrue and our discussion will be focused on a particular use of restorative justice in order to avoid the problems that the diversity of restorative approaches can create.

My discussion focuses narrowly on the uses of restorative justice approaches as *an alternative* to traditional sentencing practices. I understand traditional practices to be sentencing decisions determined in a formal courtroom process, like Magistrates’ Court or the Crown Court in England and Wales. Restorative justice is an alternative to these practices because it is an informal process outside the courtroom. Typically, restorative justice adopts one of two forms in this specific context: victim-offender mediation or restorative

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<sup>8</sup> See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) and Thom Brooks, *Punishment* (London: Routledge, 2012), 64—85.

<sup>9</sup> Gerry Johnstone and Daniel W. Van Ness, “The Meaning of Restorative Justice” in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (London: Routledge, 2007), 5.

<sup>10</sup> See Brenda Morrison, “Schools and Restorative Justice” in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (London: Routledge, 2007), 325.

<sup>11</sup> See Jennifer Brown, Sarah Miller and Sara Northey, *What Works in Therapeutic Prisons: Evaluating Psychological Change in Dovegate Therapeutic Community* (Basingstoke: Palgrave Macmillan, 2014) and Kimmett Edgar and Tim Newell, *Restorative Justice in Prisons: A Guide to Making It Happen* (Winchester: Waterside Press, 2006).

<sup>12</sup> See Jennifer J. Llewellyn and Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission,” *The University of Toronto Law Journal* 49 (1999), 355—88.

<sup>13</sup> See Joanna Shapland, Gwen Robinson and Angela Sorsby, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (London: Routledge, 2011), 4 (“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* (London: Hart, 2010).

conferencing.<sup>14</sup> Instead of proceeding to a courtroom trial, restorative justice is an option that permits relevant persons to conduct a meeting outside of the formal trial process to determine penal outcomes.

The wide diversity of restorative approaches should not mask the golden thread, or “conceptual umbrella,” that unites most restorative approaches. This is their focus on bringing closure to a conflict through informal, but not unstructured, deliberation with the aim of enabling understanding and healing.<sup>15</sup> T. F. Marshall’s classic working definition of restorative approaches is that: “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>16</sup> We shall come to his use of stakes and stakeholding later, but Marshall’s focus on restorative justice as a *process* illuminates a distinctive difference with traditional sentencing. Judges and magistrates determine sentencing outcomes from their courtroom benches following a set of formal procedures, such as the use of sentencing guidelines.

The use of restorative justice for determining an offender’s punishment works differently. There is no judge or magistrate to conduct proceedings. Instead, there is a trained facilitator who conducts meetings more informally than in any courtroom setting. Normally, the offender is required to admit before a restorative meeting can take place. Offenders are permitted a legal representative, but they are not usually requested to be present and

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<sup>14</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>15</sup> Shapland, Robinson and Sorsby, *Restorative Justice in Practice*, 4.

<sup>16</sup> T. F. Marshall, *Restorative Justice: An Overview*, Home Office Occasional Paper (London: Home Office, 1999).

offenders are expected to engage directed with others. A key element of restorative justice is that there is dialogue between the victim, offender and others.

Both mediation and conferences begins by the facilitator clarifying the parameters and purposes of the meeting with guidance available from the Restorative Justice Council.<sup>17</sup> The victim is then provided an opportunity to speak next to address the offender and explain the impact of the offender's crime on her. Restorative conferences next permit any members of the victim's support network, such as friends and family present, as well as select members of the local community to discuss how the offender's crime impacted on them. The offender speaks last and expected to account for his crimes, typically including an apology to the victim. These meetings conclude by participants confirming a restorative 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.<sup>18</sup> But the contractual terms exclude hard treatment and, if terms are honoured in full, the offender will not have a criminal record.

Restorative approaches are more than a process: they aim to provide real benefits in terms of their outcomes. 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>19</sup> Restorative outcomes are not

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<sup>17</sup> See Restorative Justice Council, "Best Practice," url: [http://www.restorativejustice.org.uk/quality\\_assurance/](http://www.restorativejustice.org.uk/quality_assurance/) (2014).

<sup>18</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>19</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* (Sheffield: Centre for Criminological Research, University of Sheffield, 2006) and Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James Dignan, Marie



imposed from above by a judge or magistrate like in courtroom sentencing, but agreed between all parties after deliberation.

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>20</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 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>21</sup>

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Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, *Restorative Justice: The Views of Victims and Offenders* 27 (London: Ministry of Justice, 2007).

<sup>20</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* (London: Ministry of Justice, 2008) and Restorative Justice Council, *What Does the Ministry of Justice RJ Research Tell Us?* (RJC, 2011).

<sup>21</sup> Nils Christie, "Conflicts as Property" in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (London: Hart, 1998), 314.

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>22</sup> While victims regularly report feelings of alienation for their 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. Likewise, offenders are encouraged to engage through apology and dialogue which can assist them finding closure, too. 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>23</sup> Not all might agree that significant savings are a sufficient justification for the use of restorative justice. However, the high rate of agreeing restorative contracts, the lower recidivism rates and the higher satisfaction of all participants along with major cost savings are a potent combination that speak to the positive potential of restorative justice as a more attractive model of punishment. In particular, specific additional benefits were found with the use of restorative conferences over victim-mediation: conferences were more likely to lead to higher participant satisfaction. This may speak to the less confrontational and informal setting of the conference than the victim-offender meeting.

Restorative justice has much promise, but also several limits that also merit close scrutiny. We have already noted the fact of the diversity of restorative approaches. Perhaps what most approaches hold in common is what they are not: they are not conducted in

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<sup>22</sup> See Shapland et. al., *Restorative Justice*, 25—26.

<sup>23</sup> See Shapland et. al. , *Restorative Justice in Practice: The Second Report* and Restorative Justice Council, *What Does the Ministry of Justice RJ Research Tell Us?* (RJC, 2011).

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 precisely 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 work.<sup>24</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>25</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>26</sup> It is not an approach considered for use in many or indeed most criminal cases.

The reason for limited applicability may be 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

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<sup>24</sup> See Declan Roche, *Accountability in Restorative Justice* (Oxford: Clarendon, 2003).

<sup>25</sup> See Brooks, *Punishment* 173-88 and James Dignan, "Juvenile Justice, Criminal Courts and Restorative Justice" in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (London: Routledge, 2007), 269.

<sup>26</sup> See Brooks, *Punishment*, 67—68.

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>27</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>28</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>29</sup> Public support for greater punitiveness is counterproductive to why it is supported: more punitiveness has not delivered less offending. So the worry about popular support is that restorative justice's benefits are counterintuitive to the public's generally held beliefs about what kinds of punishment might be most effective and justified.

The problems of limited application and limited confidence are connected to a fourth obstacle, namely, that restorative alternatives to traditional sentencing are constrained by their limited available options. The restorative justice approaches considered here like restorative conferences 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>30</sup>

Not all proponents of restorative justice would agree about how these problems should be addressed. For example, the exclusion of hard treatment as an option for restorative

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<sup>27</sup> See Francis T. Cullen, Bonnie S. Fischer and Brandon K. Applegate, "Public Opinion about Punishment and Corrections," *Crime and Justice* 27 (2000), 1—79 and Franklin E. Zimring, Gordon Hawkins and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford: Oxford University Press, 2001).

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

<sup>29</sup> See Monica Williams, "Beyond the Retributive Public: Governance and Public Opinion on Penal Policy," *Journal of Crime and Justice* 35 (2011), 93—113.

<sup>30</sup> See Andrew Ashworth, 'Sentencing' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1994), 822.

contracts is justified on the grounds that it is counterproductive to reducing reoffending. If the aim of restorative justice is to resolve conflicts between those with a stake in them, the concern is that some alternative *both* to the formal courtroom *and* to the use of hard treatment is the way forward in order to better promote healing and “restoration.” If restorative justice is limited—as it is—to only some cases and not others, then the way forward is to deliver the same process in these new areas. We require more of the same, not something different. Or so it could be argued.

Restorative justice proponents make such claims based on well-founded concerns about the problems that imprisonment can impose on reducing reoffending. Too often imprisonment is not the start of an individual’s longstanding problems, but a confirmation of them and where bad situations can often become much worse. Consider the common risk factors for reoffending, such as economic insecurity, employment insecurity, financial insecurity and housing insecurity to name only a few.<sup>31</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>32</sup>

But the fact that hard treatment can be and often is counterproductive to reducing crime does not entail that it must always be true. The problem is not that prisons are used at all, but the ways in which they are used and should be improved. Perhaps most proponents of restorative justice celebrate its promise as an alternative to prisons where hard treatment is not on offer. This is often held to be a compelling feature of this broadly ‘abolitionist’

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<sup>31</sup> See Brooks, *Punishment*, 179—87.

<sup>32</sup> See Durlauf and Nagin, “Imprisonment and Crime,” 14, 21-23. See also Richard L. Lippke, *Rethinking Imprisonment* (Oxford University Press, 2007) and Michael Tonry, “Less Imprisonment is No Doubt a Good Thing: More Policing is Not,” *Criminology and Public Policy* 10 (2011), 138, 140—41.

approach. The use of restorative approaches might not apply to every case, but at least can help 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>33</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.

Restorative justice approaches claim they enable a “restoration” of the damaged relationship between an offender and the wider community. This raises several questions unique to restorative justice, such as which community and who are the relevant members? Many, following Andrew Ashworth, argue this claim ‘remains shrouded in mystery’.<sup>34</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>35</sup>

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<sup>33</sup> See John Braithwaite, *Restorative Justice and Responsible Regulation* (Oxford: Oxford University Press, 2002).

<sup>34</sup> Andrew Ashworth, *Sentencing and Criminal Justice*, 5<sup>th</sup> ed. 94 (Cambridge: Cambridge University Press, 2010). See John Braithwaite, ‘Setting Standards for Restorative Justice’, *British Journal of Criminology* 42 (2002), 563—77.

<sup>35</sup> Andrew Ashworth, ‘Responsibilities, Rights and Restorative Justice,’ *British Journal of Criminology* 42 (2002), 583.

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>36</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, 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.

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

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<sup>36</sup> See Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Interdependent World* (Basingstoke: Palgrave Macmillan, 2008), 1, 21—26.

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>37</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.

### **Punitive Restoration: Bringing the Public Back In**

This section presents and defends a particular approach to achieving restorative justice in a novel way: the idea of *punitive restoration*.<sup>38</sup> 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. 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.

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<sup>37</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?* (Oxford: Hart, 2003), 219.

<sup>38</sup> See Brooks, *Punishment*, 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), 183—203.



Restorative justice approaches lack clarity about what is to be restored and how it should be achieved. Its claim to bring restoration to a community may be criticised because restorative approaches do not all insist on the community's 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>39</sup> Stakeholding has direct relevance for sentencing policy.<sup>40</sup> Stakeholders are those individuals with a stake in penal outcomes. These persons include victims, if any, their support networks and the local community of stakeholders. 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 noted earlier that is used by most proponents of restorative justice 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>41</sup> Restorative justice has often been understood as a process bringing "stakeholders"

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<sup>39</sup> See Thom Brooks, "The Stakeholder Society and the Politics of Hope," *Renewal* 23 (2015), 44—54 and Thom Brooks, "Justice as Stakeholding" in Jay Drydyk and Krushil Watene (eds), *Theorising Justice: New Directions and Future Insights* (London: Rowan & Littlefield, 2015), forthcoming.

<sup>40</sup> My defence of restorative conferences and not victim-offender mediation is partly because conferencing alone recognises that stakeholders are more than victims and offenders, but it is also partly because conferencing has been found to be more effective at reducing reoffending and achieving higher participant satisfaction. So my proposal for a form of conferencing would itself mark a significant departure from standard practice, but it has the potential to yield greater benefits. See Shapland and Robinson, *Restorative Justice in Practice*, 98—100.

<sup>41</sup> Marshall, *Restorative Justice*.

together.<sup>42</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 feasible 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>43</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>44</sup>

We should take the idea of stakeholding as 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. It is the normative importance of stakeholding, that those with a stake in outcomes should have a say about them, that drives inclusion in restorative conferences. Opportunities for public participation are key because of stakeholding's normative force—and the use of conferencing better facilitates the major successes of restorative justice than victim-offender mediation at achieving less reoffending and higher participant satisfaction. We can achieve the goods of

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<sup>42</sup> See Braithwaite, *Restorative Justice and Responsive Regulation*, 11, 50, 55.

<sup>43</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., *Restorative Justice*, 20.

<sup>44</sup> See Shapland and Robinson, *Restorative Justice in Practice*, 98—100.

restoration best through including stakeholders and this favours the conferencing model of punitive restoration.

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. Some stakeholders are more easily identifiable than others. Victims and offenders clearly have a stake in outcomes. Their families and close friends may also have a stake as the support networks for victims and offenders. The public members of their local community have a stake as well, but there is no need to include all. One reason is that requiring everyone in the community to have a say on every case of criminal conduct would be unworkable and impractical. We need not require every individual in the community to participate in a restorative conference for the community’s voice to be heard. A working model in restorative practice is to allow the public to voluntarily participate in conferencing as a representative of

the public—and a model that appears to work well.<sup>45</sup> So the criticism that restorative justice has trouble identifying participants is not a problem for my stakeholder

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. So unlike other forms of restorative justice like victim-offender mediation, an account of restorative justice based on stakeholding does not require that there be identifiable victims that can participate for punitive restoration to take place.<sup>46</sup>

The principle of stakeholding informing punitive restoration better helps us identify persons to participate in conference meetings and expand their applicability to a wider range of offences. Not all persons we might name as stakeholders may wish to participate. But this is in line with the principle of stakeholding. Those who have a stake should have a say, but it is up to stakeholders to speak. Individuals may not choose whether they have a stake, but they can choose what they wish to do with it. It is important that opportunities exist for individuals to become educated and receive information about the restorative process and participation in it, but participation should remain voluntarily. Elections are a legitimate procedure for

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<sup>45</sup> See Lawrence C. Sherman and Heather Strang, *Restorative Justice: The Evidence* (London: Smith Institute, 2007).

<sup>46</sup> My point is that a process like victim-offender mediation presupposes that there are victims and that they will participate. But not all crimes have victims, or have identifiable victims, and not all victims may want to take part. Restorative practices can still take place within the stakeholder framework of punitive restoration because what we require are stakeholders—and they may or may not be victims.

choosing political leaders even if not everyone with a vote cast it. Likewise, stakeholding remains legitimate even if not all stakeholders wish to take part.

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>47</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>48</sup> There is no reason to accept these activities could never be delivered successfully within a prison or other secure facility. Perhaps hard treatment should be used sparingly: 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>49</sup> Prisons might also be reorganized so that prison officers could become Personal Support Officers if provided suitable training: these

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<sup>47</sup> See Alison Liebling, *Prisons and Their Moral Performance: A Study of Values, Quality and Prison Life* (Oxford: Clarendon, 2006).

<sup>48</sup> See Brooks, *Punishment*, 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 Graham J. Towl (ed.), *Psychological Research in Prisons* (Oxford: Blackwell, 2006).

<sup>49</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* 35 (2012), 435—50.

persons have most frequent contact with imprisoned offenders and this relationship could be harnessed to produce an improved system of pastoral support.<sup>50</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 months and about 60% will reoffend within weeks of their release.<sup>51</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>52</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>53</sup> These policies suggest prisons can and should be reformed to better support offender rehabilitation and improve post-release crime reduction efforts without sacrificing cost-effectiveness. Prisons must better accommodate restoration. But my point is that restoration and hard treatment need not always be at cross purposes. Instead, hard treatment may be a useful option for enabling restoration in some cases, such as through intensive treatment.<sup>54</sup>

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<sup>50</sup> See Jenny Chapman and Jacqui Smith, “Cutting Crime and Building Confidence” in Robert Philpott (ed.), *The Purple Book: A Progressive Future for Labour* (London: Biteback, 2011), 215, 228.

<sup>51</sup> See Ministry of Justice website, url: <http://open.justice.gov.uk/home/>.

<sup>52</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,” *Journal of Offender Rehabilitation* 51 (2012), 9—33.

<sup>53</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,” *Journal of Offender Rehabilitation* 39 (2004), 69—92.

<sup>54</sup> While we differ on other points, I agree with Lucia Zedner that reparation is reconcilable with retribution. I also agree that there is a danger that attempting to accommodate reparation to more punitive measures puts at risk its rehabilitative potential. This is why any punitive measure is only permitted if it contributes to restoration.

These reforms 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. 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

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This offers an important threshold acceptable measures must pass. See Lucia Zedner, "Reparation and Retribution: Are They Reconcilable?" *Modern Law Review* 57 (1994), 228—50.

networks and render an individual's road to sustainable prosperity tenuous. This is a significant problem for most offenders, but not 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.

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>55</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>56</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. A recent study on the length of time spent in prison and employment prospects found that offender prospects worsened only for sentences in excess of 6 months. So using prison for shorter, more intensive periods for rehabilitative purposes may yield additional benefits for acquiring employment on release.<sup>57</sup>

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<sup>55</sup> See Brooks, *Punishment*, 142—43.

<sup>56</sup> See Joe et. al., “An Evaluation of Six Brief Interventions That Target Drug-Related Problems in Correctional Populations” and Daly et. al., “Cost-Effectiveness of Connecticut’s In-Prison Substance Abuse Treatment”.

<sup>57</sup> See Anke Ramakers, Robert Apel, Paul Nieuwbeerta, Anja Dirkzwager and Johan van Wilsem, “Imprisonment Length and Post-Prison Employment Prospects,” *Criminology* 52 (2014), 399—427. See also Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland and Hilary K. Whitham, “The Edge of Stigma:



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>58</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 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>59</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

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An Experimental Audit of the Effects of Low-Level Criminal Records on Employment,” *Criminology* 52 (2014), 627—54.

<sup>58</sup> See Andrew Ashworth and Mike Redmayne, *The Criminal Process*, 3<sup>rd</sup> ed (Oxford: Oxford University Press, 2005), 6—7.

<sup>59</sup> See Brooks, *Punishment*, 89—100.

be brought together in a coherent, unified account. This “penal pluralism” may be legally possible, but its practicality remains questionable.<sup>60</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>61</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 consistent with deterrence and rehabilitation.<sup>62</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>63</sup>

### **Conclusion: letting the public have a say**

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<sup>60</sup> On penal pluralism, see Thom Brooks, “On F. H. Bradley’s Some Remarks on Punishment,” *Ethics* 125 (2014), 223—25.

<sup>61</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, *Punishment*, 123—48 for a defence of the unified theory of punishment.

<sup>62</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,” *Cambridge Law Journal* 67 (2008), 145—75.

<sup>63</sup> See Thom Brooks, “Punishment: Political, Not Moral,” *New Criminal Law Review* 14 (2011), 427—38 and Thom Brooks, “Hegel and the Unified Theory of Punishment” in Thom Brooks (ed.), *Hegel’s Philosophy of Right* (Blackwell, 2012), 103—123.

Mass incarceration is at historic highs and public confidence in sentencing is at historic lows. Current prison policies are not making the public feel any safer and its beneficial effects on reducing reoffending are minimal. Restorative justice offers a promising alternative. It shows how public confidence might be improved while reducing reoffending at lower costs. But this is not to say it does not require important reforms. A 2015 public opinion polls by Ipsos-Mori found the public was more aware about restorative justice than only a couple years ago, that the public were positive about restorative justice, but clear concerns that outcomes may be too soft and ineffective.<sup>64</sup>

This chapter has argued that restorative justice can become more deeply embedded in the criminal justice system—and used much more widely across more types of offences and offenders—if its range of options were expanded to include more punitive outcomes. Hard treatment can often be counterproductive, but it need not always be so. There is evidence that well-targeted intensive drug and alcohol treatment can improve crime reduction at lower costs. Hard treatment can be made to work. This does not only benefit offenders who may no longer come into contact again with the criminal justice system, but benefits victims and the wider community by taking their views as stakeholders seriously and providing a forum whereby their voices might be heard.

Punitive restoration is a model for how restorative justice can be transformed from a process for a few can be extended to the many—and potentially yield the promising benefits of restorative justice to far more cases. Part of this story is better ensuring prison is a last resort and where it is used ensuring that prisons are reformed to better address risk factors. Perhaps the key to reducing the increasing use of counterproductive imprisonment and low public confidence is to bring the public in, provide the public a voice on penal outcomes

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<sup>64</sup> See Restorative Justice Council, “New polling demonstrates overwhelming support for restorative justice” (15 July 2015, url; <http://restorativejustice.org.uk/news/new-polling-demonstrates-overwhelming-support-restorative-justice>).

within the informal structure of restorative justice and ensure that any use of hard treatment is more focused and, in a word, “restorative.”<sup>65</sup>

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