

Restorative Justice and Civic Accountability for Punishment

Author(s): Albert W. Dzur

Source: *Polity*, Oct., 2003, Vol. 36, No. 1 (Oct., 2003), pp. 3-22

Published by: The University of Chicago Press on behalf of the Northeastern Political Science Association

Stable URL: <https://www.jstor.org/stable/3235421>

REFERENCES

Linked references are available on JSTOR for this article:

https://www.jstor.org/stable/3235421?seq=1&cid=pdf-reference#references_tab_contents

You may need to log in to JSTOR to access the linked references.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Northeastern Political Science Association and The University of Chicago Press are collaborating with JSTOR to digitize, preserve and extend access to *Polity*

Restorative Justice and Civic Accountability for Punishment

Albert W. Dzur

Bowling Green State University

Restorative justice is a normative theory and a reform movement in criminal justice that raises pressing questions for democratic theory. This paper draws attention to the core, democratic, values of restorative justice theory and practice. It argues that what is distinctive and appealing about restorative justice is not that it "restores" rather than "punishes," but that it attempts to make an inherently coercive process more consensual, transparent, constructive, and communicative. In addition to these substantive and procedural values, restorative justice offers a picture of how a democracy might become more accountable for punishment. This paper argues that the possibilities it offers citizens for understanding and owning up to the punishment that is meted out on their behalf are central to restorative justice as a normative theory. Concerns about mob justice, partiality, and disproportional sentencing are naturally raised by attempts to involve more lay people in deliberations at the sentencing stage, however. The sort of civic accountability I argue is present in restorative justice does not need to come at the cost of key substantive and procedural criminal justice values.

Albert W. Dzur is Assistant Professor of Political Science at Bowling Green State University, Bowling Green, OH 43403. His research examines the value of lay participation in professional and expert domains, such as citizen boards in criminal justice, public forums in journalism, and ethics committees in medicine. He is completing a book manuscript on this topic entitled *Democratic Professionalism*.

Before offering a critical view of a reform movement in criminal justice from the perspective of democratic theory, one has some explaining to do. Despite the fact that the United States has recently achieved premier status as the country that incarcerates the greatest percentage of its citizens, the general topic area of criminal justice and the particular subfields of punishment and sentencing are barely part of the discourse of democratic theory. This is odd for a number of reasons, the most obvious being that nearly all of the core issues of democratic theory—coercion, consent, self-determination, representation, just to name a few—are reflected in these subfields. One of my goals in this paper is to draw the attention of political theorists to both the criminal justice domain and the pressing issues of punishment and accountability raised by a reform movement within it.

A second goal is to draw attention to what I see as the core, democratic, value of restorative justice theory and practice. I argue that what is distinctive and appeal-

4 RESTORATIVE JUSTICE AND CIVIC ACCOUNTABILITY

ing about restorative justice is not that it “restores” rather than “punishes,” which is what advocates tend to argue, but that it attempts to make an inherently coercive process more consensual, transparent, constructive, and communicative. But in addition to these substantive and procedural values, restorative justice offers a picture of how a democracy might become more accountable for punishment. I argue that the possibilities it offers citizens for understanding and owning up to the punishment that is meted out on their behalf are central to and not peripheral to restorative justice as a normative theory. Restorative justice is both a case study and a normative framework for discussing how democracies punish.

Below I start by describing the main claims of the restorative justice reform movement and laying out the central features of working restorative justice programs in the United States. Then I turn to consider restorative justice as a normative theory. Not a typical theory of punishment, restorative justice places emphasis on the value of accountability, something that is interpreted differently by the leading theoreticians of the movement. Accountability can be seen narrowly as simply bringing an offender to recognize, take responsibility for, and regret a harm or loss he created for a victim, or more broadly, as involving a community in helping the victim and offender through this process, or more broadly still, as involving a community both in overcoming the effects of an offense and in itself undergoing a process of recognition and responsibility for the norms of punishment it upholds. Restorative justice offers, ultimately, a very broad, or “civic,” understanding of accountability that has considerable merit. In the final section I consider the concerns about mob justice, partiality, and disproportional sentencing naturally raised by attempts to involve more lay people in deliberations at the sentencing stage. Civic accountability, I argue, does not need to come at the cost of key substantive and procedural criminal justice values.

I. Restorative Justice in the United States: Practice and Theory

Restorative justice is a practitioner-led reform movement calling for changes in the criminal justice domain that place greater emphasis on communication and reconciliation between victim, offender, and community. In North America restorative justice is the product of informal justice experiments in the 1970s, such as victim-offender reconciliation and neighborhood justice programs, and it reflects the frustration with mainstream criminal justice experienced by victim’s rights groups, prison reformers, and other activists.¹

1. John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002); Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice* (Cincinnati, OH: Anderson, 1997).

Activists frustrated with the dominant rehabilitative and retributive models of criminal justice began to call for a new “lens”² through which persistent problems like recidivism, victim dissatisfaction, and punitiveness on the part of the public might be seen more clearly. Nils Christie, Howard Zehr, and other early proponents of restorative justice argued that the criminal justice process should shift its focus away from “fixing” or punishing the offender and should devolve responsibility for resolving conflicts and redressing harms from the state to affected communities. A less mediated process would empower the victim to address the offender, would hold the offender accountable for his actions, and would enlist the support of community members for both victim and offender. Rather than “punish” or “rehabilitate”—both offender-centric targets—the new programs would “restore” what was lost to the victim and affected community, and, ideally, would “restore” the offender’s status as a norm-abiding citizen.

The criminal justice process falls into two stages: the determination of guilt and the penalty phases. Restorative justice programs in use across the US, such as victim-offender mediation, family group conferences, circle sentencing, and reparative boards, typically take the place of traditional penalty stage proceedings. Offenders land in restorative justice programs when they plead guilty to an offense and choose a restorative justice rather than a traditional sentencing track, or because they have been steered onto that track by a judge. Because acknowledging responsibility is such a key value for restorative justice, some programs only permit offenders who have pled guilty.

In Salt Lake City’s restorative justice program, for example, defendants are offered a “plea in abeyance.” They plead guilty to the offense, but the prosecutor then requests that the court dismiss the case once the conditions established for the defendant by the restorative justice panel have been met.³

In the United States, restorative justice programs have tended to focus on young offenders who have committed non-violent offenses such as shoplifting.⁴ Rather than appear before a judge or jury for the penalty, an offender faces mediator, community panel, and victim. Together they work out a mutually satisfactory agreement through a process that aims to generate reflection about the harm caused by the offense, the means by which that harm can be compensated or rectified, and the ways such offending can be avoided in the future. An agreement may involve an offender in writing an essay on the offense, apologizing to the victim, some hours of community service, payment of restitution, and the like.

2. Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990).

3. Susan M. Olson and Albert W. Dzur, “Reconstructing Professional Roles in Restorative Justice Programs,” *Utah Law Review* (2003).

4. Gordon Bazemore and Mark Umbreit, “A Comparison of Four Restorative Conferencing Models,” *Office of Juvenile Justice and Delinquency Prevention Bulletin* (Washington, DC: U.S. Department of Justice, February 2001); Leena Kurki, “Restorative and Community Justice in the United States,” in *Crime and Justice: A Review of Research* 27, ed. Michael Tonry (Chicago: University of Chicago Press, 2000), 235-303.

6 RESTORATIVE JUSTICE AND CIVIC ACCOUNTABILITY

There is a background normative theory of restorative justice that has inspired and, in turn, has been inspired by the experiences of reformers over time and across a variety of concrete practices. In brief, advocates wish to replace the one-sided formal procedures of treatment and punishment with a many-sided communicative process outside standard criminal justice institutions, free from the domination of procedures and professionals, where victims can communicate with offenders, offenders can acknowledge wrongdoing and accept responsibility, and community members can help reintegrate offenders. Advocates of restorative justice believe it to offer more justice to victims, offenders, and affected communities because it involves laypeople in resolving their own problems and focuses on the subjects that are of interest to the so-called stakeholders of the offense rather than those issues most relevant to criminal justice professionals.

Restorative justice differs from most normative theories of punishment, but in not exactly as clear-cut a way as its advocates tend to think. Advocates see their process and values as being distinct from retributive and rehabilitative theories, but it is more accurate to see them as being a hybrid and modification of those theories.⁵ Restorative justice, like retributive theories, wants to censure the offender for past behavior and wants sanctions to be proportionate to the offense; like rehabilitative theories, it considers what can be done to curb future offending behavior.⁶ The major difference is how traditional procedures and values are modified by restorative justice, or, more precisely, how they are devolved and taken up by those most affected by a criminal offense. Kathleen Daly lists four distinct features of restorative justice:

- [1] victims are central to the process
- [2] the focus is on repairing the harm between an offender and victim, and perhaps also an offender and a wider community
- [3] community members or organizations take a more active role
- [4] the process is characterized by dialogue and negotiation among the parties.⁷

Another way restorative justice differs from traditional theories is in ignoring a major dimension of criminal justice that has intrigued philosophers of criminal justice, namely, punishment. What actions merit punishment? What kind of punishment is justified? How much punishment is warranted for what offenses? These very common questions are not given substantive answers in the restorative justice literature. One way to interpret this is to say that restorative justice, taken to its logical

5. Albert W. Dzur and Alan Wertheimer, "Forgiveness and Public Deliberation: The Practice of Restorative Justice," *Criminal Justice Ethics* 21 (2002): 3-20.

6. Kathleen Daly, "Revisiting the Relationship between Retributive and Restorative Justice," in *Restorative Justice: Philosophy to Practice*, ed. Heather Strang and John Braithwaite (Burlington: Ashgate Publishing, 2000), 33-54.

7. Daly, "Revisiting the Relationship," 36.

conclusion, is a form of abolitionism. And, indeed, some seen as fathers of restorative justice, like Nils Christie, are considered abolitionists.⁸ They advocate alternatives to punishment because there are “limits to pain” and what it can provide victims of crime.⁹ Other leading lights in restorative justice believe, at the very least, that states should follow a decremental policy of as little punishment as possible.¹⁰

Against this tendency to see restorative justice as being an attempt to replace punishment with something else, I believe it to be an effort to legitimate, not minimize, punishment. Practically speaking, restorative justice programs in place in the United States place mandatory burdens on offenders in response to breaches of specific social norms. So even if it is not called “punishment,” what occurs in restorative justice agreements is structurally identical to textbook definitions of punishment.¹¹ Further, studies of offenders and victims taking part in restorative justice programs in Australia and New Zealand, show that it feels like punishment to the respondents who experienced the program.¹² It does more justice to both the movement and the theory to say that restorative justice is a democratic theory of punishment that emphasizes accountability on all sides.

II. From Personal to Civic Accountability for Punishment: Contrasting Theoretical Approaches within Restorative Justice

The major theoreticians of restorative justice, Howard Zehr, John Braithwaite and Philip Pettit, and Nils Christie seek to democratize the social control of punishment, but conceive of this in different ways. All want to make the criminal justice process less mediated by professionals following system imperatives, all are critical of traditional forms of punishment, and all advocate means of censuring offenders that are transparent and ultimately accepted by the offender as justified. But there are some subtle differences in how they see the censuring process. As we move in our discussion from Zehr to Braithwaite and Pettit, and then to Christie, we turn from a process that is primarily interpersonal to one that is quite political. From the

8. See John Braithwaite, “Survey Article: Repentance Rituals and Restorative Justice,” *The Journal of Political Philosophy* 8 (2000): 11.

9. Nils Christie, *Limits to Pain* (Oslo: Universitetsforlaget, 1981).

10. John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990).

11. C. L. Ten offers a standard definition: punishment is “administered by the legal authority,” “involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued,” and “the imposition is made to express disapproval or condemnation of the offender’s conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct.” *Crime, Guilt, and Punishment* (Oxford: Oxford University Press, 1987), 2.

12. Kathleen Daly, “Does Punishment Have a Place in Restorative Justice,” unpublished paper presented to the Australia and New Zealand Society of Criminology annual conference (1999); <http://www.gu.edu.au/school/ccj/kdaly.html>.

8 RESTORATIVE JUSTICE AND CIVIC ACCOUNTABILITY

perspective of democratic theory, a more political mode of censuring offenders has potential civic value, though it also has attendant risks.

Howard Zehr: Interpersonal Accountability

Howard Zehr, an early pioneer of restorative justice in the United States, stresses in his writing the psychological losses resulting from the punitive and professionalized nature of mainstream criminal justice. While punishment, for Zehr, is not immoral, punitiveness and the forms punishment typically take get in the way of a more authentic experience of justice. He agrees in principle with a number of philosophers of criminal justice who hold that the moral force of punishment stems from both the need to elevate the victim out of a degraded position—degraded because the victim has suffered sub-human treatment, treatment as less than the worth of the offender—and the need to release the natural, but harmful, feelings of resentment at being in such a position.¹³ Yet Zehr sees punishment as a second or third best solution to the problems produced by crimes. Punishment “seeks to right the balance by lowering the offender to the level to which the victim has been reduced,” while a non-punitive measure like restitution “seeks to raise the victim to his or her previous level” and “acknowledges the role of the offender and possibilities for repentance.”¹⁴ Punishment does not give victims a real experience of justice and it does not give offenders a chance at real accountability.

More communication between victim and offender is needed, according to Zehr, for a real experience of justice and for real accountability. Crime is traumatic for victims because it undermines their sense of personal autonomy and belief in social order. For Zehr, the punishment of offenders is inadequate as a way for victims to overcome trauma. To regain a sense of power over their world and to reaffirm a sense of social order he thinks victims need answers and information about the crime. Why did the offender choose me as a victim? Was there something about me in particular, or was it merely a random or circumstantial choice? Victims also need to express their emotions in a way that affirms their validity and directs them constructively. As Zehr argues,

[V]ictims need opportunities to express and validate their emotions: their anger, their fear, their pain. Even though such feelings may be hard for us to hear and may not square with what we would wish them to feel, these feelings are a natural, human response to the violation of crime....The suffering and pain are part of the offense and need to be expressed and to be heard. Victims need oppor-

13. Jeffrie G. Murphy, “Forgiveness, Mercy, and the Retributive Emotions,” *Criminal Justice Ethics* 7 (1988): 3-15; Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988).

14. Zehr, *Changing Lenses*, 93.

tunities and arenas to express their feelings and their suffering, but also to tell their stories. They need to have their “truth” heard and validated by others.¹⁵

The punishment and offender orientation of mainstream criminal justice proceedings makes it difficult for such communication to take place.

Zehr also argues that for a real experience of justice, communication between victim and offender cannot be dominated by the state or by criminal justice professionals. State officials are not the best candidates for hearing and validating the victim’s truth and the offender’s remorse. Indeed, Zehr sees the predominance of officials and professionals in the criminal justice system as hindering the satisfaction of victims’ needs. At every turn, he writes, as the initial harm turns into a crime and runs through the procedural rules needed to adjudicate it, it becomes more and more abstracted, more and more alienated from the actual experience of victim and offender. The loss of autonomy experienced by victims during crime is paralleled in their “second victimization” by the state: “Instead of returning power to them by allowing them to participate in the justice process, the legal system compounds the injury by again denying power.”¹⁶ This abstract and alienating experience of justice for victims has a negative effect on them because it frustrates the sort of communicative action that would fulfill victims’ needs for information and emotional expression.

Professionalization and abstract proceduralism also hinder the reintegration of offenders into law-abiding society, according to Zehr. As with victims, offenders are largely bystanders once the criminal justice system has taken hold. Critical decisions about accountability and responsibility for their actions are made by others: how they will explain, defend, excuse, or admit their actions is determined by defense counsel, and the consequences for their actions are determined by prosecutor, judge, and jury. Because the process is adversarial and non-participatory, it does little to challenge any stereotypes or rationalizations offenders have built up about their victims and about society in response to their crimes, encouraging them to focus on their own legal situations and how to minimize penalties. “At minimum, because the criminal process is so complex and so offender-oriented, they are caught up entirely in their own legal situations. Consequently, offenders rarely are encouraged or allowed to see the real human costs of what they have done.”¹⁷

Reintegration requires, above all else, the opportunity for offenders to recognize the harm they have caused. This matches up well with victims’ need to communicate with offenders, to ask offenders questions about their intentions, motivations, and choices as well as to express their suffering and anger. By participating in such a dialogue, offenders start to take responsibility for what they did and erode whatever stereotypes and rationalizations they have constructed. Through such a com-

15. Zehr, *Changing Lenses*, 27.

16. Zehr, *Changing Lenses*, 31.

17. Zehr, *Changing Lenses*, 41.

municative process offenders can admit their wrongful degradation of their victims so that repentance and forgiveness can take place. This active role in dialogue, it is hoped, can contribute to offenders' sense of self-esteem, and the mending of inter-personal relations can help establish their place in society.

Victim-offender mediation programs are Zehr's concrete examples of restorative justice in practice. These have three primary actors: victim, offender, and mediator. Mediators are ideally community volunteers trained to give some structure to the dialogue between victim and offender but without dominating the proceedings with their own perspectives.¹⁸ The goal is to set up a "face to face encounter between victim and offender" that will focus on "facts, feelings, and agreements."¹⁹ Zehr writes:

Both parties [victim and offender] are encouraged to tell their stories. Both get a chance to ask questions, to discover from the other just what happened. They also talk about the impact and implications of this experience. When they have done this, they decide together what will be done about it. Once they come to agreement, they sign a written contract. Often this takes the form of financial restitution, but that is not the only possibility.²⁰

This is to be a voluntary process on all sides, though there may be incentives for offenders to choose mediation over traditional court proceedings and it may take some encouragement for victims to be involved.

John Braithwaite and Philip Pettit: Widening the Circle of Accountability

John Braithwaite and Philip Pettit view punishment as an inferior response to crime because it threatens what they call "dominion." Dominion, put simply, is freedom conceived as a social and political value: "the condition of citizenship in a free society, a condition under which each is properly safeguarded by the law against the predations of others."²¹ Now it is true that crimes themselves can threaten dominion, and this in three ways: crime can compromise and interfere with the victim's freedom, it can condition victims and reduce the "extent of undominated choice" they enjoy, and crime can compromise the larger community's freedom by communicating the idea that citizens "are not protected against arbitrary interference of the sort represented by the crime."²² Nonetheless, state responses to such threats to freedom must not themselves become threats to dominion: "Domination is the main evil against which the state sets itself, after all" something that "argues in

18. Zehr, *Changing Lenses*, 161.

19. Zehr, *Changing Lenses*, 161.

20. Zehr, *Changing Lenses*, 161.

21. Braithwaite and Pettit, *Not Just Deserts*, 57.

22. Philip Pettit, "Republican Theory and Criminal Punishment," *Utilitas* 9 (1997): 68-70.

favour of fines and community service and against prison, since domination is all too likely, if not logically inevitable, under prison regimes."²³

Punitive responses to crime threaten freedom in a number of ways. Clearly, they threaten the freedom of convicted offenders who must serve prison time. Less obviously, but also quite significant, punishment threatens the current and future prospects for freedom of offenders and their dependents because it removes them from the mainstream labor market directly through prison time and indirectly through the stigmatization of the conviction. But apart from adversely affecting the freedom of offenders and their dependents, punitive responses to crime present high opportunity costs for society with other ways to use public resources. Worse, a state committed to punishment threatens even innocent citizens, who fear being caught up in prosecution. For these reasons, Braithwaite and Pettit think that the default response to harmful acts ought to be mercy and non-intervention, with punishment and intervention requiring serious justification.²⁴

Like Zehr, Braithwaite and Pettit think that the right response to harmful acts is a de-centralized and de-professionalized process that engages the victim and offender in dialogue. They see such a process as being better at addressing the three threats to dominion posed by many crimes—the initial assertion of domination over the victim, the future effects of the crime that condition the victim's choices, and the effects on the larger community.

The first step is for offenders to recognize the wrongfulness of their acts. The best way to do this, for Braithwaite and Pettit, is not by attaching coercive sanctions to certain acts, but by communicating social norms through education and dialogue. Proper socialization into norms like fairness and non-violence is the main reason most people do not commit criminal offenses.²⁵ Now, presumably, prior socialization has failed to some extent in the case of offenders. So the trick is to remind them of the social norms they have violated, to engage in a dialogue of reprobation and "moral reasoning."²⁶ In such a dialogue, ideally involving the victim and supporters of both victim and offender, the offender admits it was wrong to threaten the victim's dominion and recognizes the victim's right to live without such threats.²⁷

The second step is for offenders to repair the damage done. Offenders can offer recompense in the form of restitution to victim or victim's family, or, if that is impossible, in the form of community service. In either case the goal is to lift both victims and offenders out of a state of mutual loss.

Third, offenders owe the community reassurance that they won't re-offend. This will be more or less difficult depending on the severity of the offense. To gain such

23. Pettit, "Republican Theory," 71-72.

24. Braithwaite and Pettit, *Not Just Deserts*, 79.

25. Braithwaite and Pettit, *Not Just Deserts*, 82.

26. Braithwaite and Pettit, *Not Just Deserts*, 89.

27. Pettit, "Republican Theory," 75.

reassurance from offenders, as well as to achieve recognition and recompense from them, the community has a role to play both in communicating reprobative sentiments and in offering avenues for reintegrating into the norm-abiding life of society. Braithwaite and Pettit's favored restorative justice forum is the family-group conference. As with Zehr's victim-offender mediation, family group conferences deal only with cases where "defendants 'decline to deny' their guilt."²⁸ Unlike mediation, though, conferences involve quite a few actors:

[C]onferences are meetings of citizens (generally seated in a circle) to discuss a criminal offense and agree on a plan of action for the problems caused by the offense. A facilitator invites the offenders to nominate as participants the people most important in their lives, the people for whom they have most respect and affection. Victim(s) also attend and are invited to nominate participants with a special relationship of care to support them. The selection principle for participants reverses that which applies in trials: The citizens invited to participate in trials are those who can inflict maximum damage on the other side; citizens invited to participate in conferences are those who can provide maximum support to their own side. . . . [T]he selection principle is designed to structure both shaming and reintegration of both offenders and victims into the conference. Participation of victims who confront offenders and their families with the hardship and insecurity they have suffered as a result of the crime structures shaming into the conference; participation of supporters of both offenders and victims is intended to structure reintegration into proceedings.²⁹

Like mediation, family group conferences are to be voluntary for victims, offenders, and their supporters.

Braithwaite and Pettit are clear that the dialogue that is fostered in conferences is to be organic to the parties themselves and not to be dominated by mainstream concepts of criminal justice. Conference communication directed by lay participants can be authentic in a way that traditional court discourse is not. Conferences allow the expression of emotions that can help produce shame, remorse, and, ideally, forgiveness.³⁰

Nils Christie: Civic Accountability

Nils Christie's rejection of punishment follows a simple moral logic: even though an action caused harm or pain, this is no reason to respond in kind. If we are against

28. John Braithwaite and Philip Pettit, "Republican Criminology and Victim Advocacy," *Law and Society Review* 28 (1994): 770.

29. Braithwaite and Pettit, "Republican Criminology," 770.

30. Braithwaite and Pettit, "Republican Criminology," 771.

harm and pain we are against it whether it is caused by the crime or caused by the response to the crime.³¹ Alternatives to punishment, such as apology or restitution, are preferable simply because they break out of the circle of pain infliction. Non-punitive alternatives are preferable, too, because of how limited pain infliction is at deterring future offenses, educating offenders, and compensating victims. We moderns are, in fact, squeamish about pain infliction, choosing to mete it out carefully and in doses of time rather than physical suffering. This squeamishness, Christie believes, is a signal that non-punitive solutions may correspond better, all things considered, with our considered moral beliefs than punishment.

Rigid notions of crime and punishment permeate mainstream criminal justice, yet there are other values that might hold sway:

Our criminal policies should reflect the totality of the basic values of the system. It is an affront to my values, and I think to many people's values, to construct a system where crimes are perceived as so important that they decide, in absolute priority to all other values, what ought to happen to the perpetrator of a particular crime.³²

The contrast of value pluralism held in the polity with the value monism reflected in the criminal justice system, provides Christie a good response to the conventionalist who sees non-punitive alternatives as being inadequate for dealing with the natural feelings of resentment harbored by victims of harmful acts.³³ Christie can reply that a more civilized approach channels these natural feelings of resentment into dialogue rather than through the more primitive response of pain infliction. "Much deviance is expressive, a clumsy attempt to say something. Let the crime then become a starting point for a real dialogue, and not for an equally clumsy answer in the form of a spoonful of pain."³⁴ Crime control policy, like all policy, should reflect our considered judgments and the balance of our values, not our unreflective preferences for revenge.

Far from being a natural response to harmful acts, formal crime control measures like imprisonment are the product of social distances that open up in modern urban life.³⁵ In traditional rural settings residents know one another through proximity and frequent social interactions. "Crime" there is not the default label for a

31. Christie, *Limits to Pain*, 10-11.

32. Christie, *Limits to Pain*, 45.

33. "Conventionalist" is my term for theories such as retributivism and expressivism, which maintain that the wrong done by an offender must be somehow reciprocated, if only symbolically, in order to even things out for the victim. Useful discussions of retributivism and expressivism are found in Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Belknap Press of Harvard University Press, 1981) and Joel Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), respectively.

34. Christie, *Limits to Pain*, 11.

35. Christie, *Limits to Pain*, 74.

breach of normal or expected behavior. Consider this narrative about a Norwegian rural sheriff, or *lensmann*:

A report came in on breaking and entering into a store of weapons for the home guard. The *lensmann* jumped into his car, drove far up into the mountains in the direction of the store, met a car high up there, stopped the car, found Ole drunk as usual, with a carload of guns to irritate his father. He brought Ole home and took the guns to a more safe depot. What a cliff-hanger story lost for the mass-media! Helicopters and anti-terrorist police might have been engaged in the crime-hunt of the century. Now it was only Ole. An old story of misery and family quarrels.³⁶

"Crime" and the crime control measure of "punishment" are symptoms of modernity. We don't know the stories of so-called offenders because we don't know much about anybody outside our small circles of family, friends and colleagues. We respond to the "crimes" of others with a call for punishment because "crimes," "offenders," "sentences," "punishments" are all abstractions for us. The more we know about and are connected with our neighbors, the less comfortable we are with such abstractions.³⁷

In addition to their value as non-punitive approaches to harmful acts, restorative justice procedures are valuable because they return the responsibility for conflict resolution to communities. In mainstream procedures, victims play no role other than witness in the proceedings, since their interest in responding to their harm is taken up and represented by a prosecutor.³⁸ They have no chance to speak with offenders and come to understand more about the reasons for their harmful acts.³⁹ Victims also receive little more than symbolic compensation.⁴⁰ As for offenders, by being so thoroughly represented, they have no way of resolving the harm they have caused. They have no chance to explain themselves, to discuss the context and possible reasons behind their actions, and to ask the victim directly for forgiveness.⁴¹ Though they might symbolically pay their debt to victim and society by being subjected to punishment, any non-symbolic debts to the victim remain unpaid.

The larger society is also a passive rather than active subject of criminal justice action. It is merely a client of professionals and state officials.

[T]he big loser is us—to the extent that society is us. This loss is first and foremost a loss in opportunities for norm-clarification. It is a loss of pedagogical pos-

36. Christie, *Limits to Pain*, 74.

37. Christie, *Limits to Pain*, 81.

38. Nils Christie, "Conflicts as Property," *The British Journal of Criminology* 17 (1977): 3.

39. Christie, "Conflicts as Property," 8.

40. Christie, *Limits to Pain*, 96.

41. Christie, "Conflicts as Property," 9.

sibilities. It is a loss of opportunities for a continuous discussion of what represents the law of the land.⁴²

“Norm clarification” means coming to know just why we do what we do in the criminal justice domain, it means reflecting on what consequences ought to follow what sorts of norm violation, it means taking responsibility for what the state officials and professional agents do who work on our behalf. “Pedagogical possibilities” implies that we all have a lot to learn about each other, about those who deviate from social expectations, and about our formal and informal mechanisms of social control.

Christie is arguing for a more democratic criminal justice process. Citizens are to have more influence over the awful power of criminal prosecution and sentencing to prevent values they reject from taking precedence. Just as in domains like health care or the environment, public policy in the criminal justice domain should serve public interests, as seen by reflective, engaged citizens. But it is to be more democratic in another sense too. Criminal justice ought to treat offenders as citizens, not as deviants or others or abstractions. Democracies have no place for social categories of that sort.

Christie’s model restorative justice forum is an explicitly lay oriented court that proceeds in four stages. In the first stage the court determines guilt, using traditional procedures. In the second stage, the court closely considers the victim’s situation to determine the compensation made by the offender and to assess victim needs, resulting from the offense, which could be addressed by local community and government services.⁴³ This second, victim and compensation oriented stage, will take some time. Once it does pass, it is time for the third stage and a decision on punishment. Punishment in Christie’s court is what the participants deem necessary over and above the compensatory acts of the offender.⁴⁴ In the fourth and final stage the court discusses and seeks remedies to offender needs brought to light during the proceedings.

Such a court maintains a balance of traditional, professionalized criminal justice and participatory justice. Christie is concerned with the rights of individuals and with the problem of imbalances of power between the actors involved in criminal cases. Equal standing under the law may require lawyers from time to time, and may require some state involvement—at least the threat of state involvement. Yet Christie is determined that the forum be a lay oriented court: “let us reduce specialization and particularly our dependence on the professionals within the crime control system to the utmost.”⁴⁵

42. Christie, “Conflicts as Property,” 8.

43. Christie, “Conflicts as Property,” 10.

44. Christie, “Conflicts as Property,” 10.

45. Christie, “Conflicts as Property,” 11.

Let variation blossom when it comes to the selection of personnel, rotation, training, etc. Let us remember some of the basic lessons from their predecessors: Let us make them vulnerable. Let us not give them power. Let them not become experts. Let them not become distant.⁴⁶

So it is clear that lay members of the court should be dominant, even if state officials must be involved at some levels.

Legitimacy not Abolition

All the major restorative justice approaches discussed above are critical of punishment, but they ground the criticism differently. For Zehr, what victims, offenders, and affected communities really want instead of punishment is the restoration of our sense of safety and well-being. For Braithwaite and Pettit it is the preservation of our “dominion” from both criminal offenses and the state techniques fashioned to punish them. And for Christie it is a constructive compensatory outcome that lifts both victim and offender out of their position of loss. It should not be surprising, however, that even thinkers with as many similarities as these would differ on what the goals and values of a reflective response to a criminal offense should be. Philosophical disputes abound on these questions and show no sign of abating. More importantly, there is a pluralism of public reasons stated for punishment in contemporary political debates.

Notwithstanding their claim that restorative justice offers alternatives to punishment, something very much like punishment is tolerated by all the approaches considered here. In the first place, all the accounts hold fast to the traditional blame-fixing methods of mainstream criminal justice. So offenders are still subjected to all the discomfort and shame of being charged by police, put on trial, and forced into mediation, conferencing, or other restorative procedures. And the outcomes of those procedures, whether they are in the form of a written apology or financial restitution or community service, will not be optional—even if agreed to by the offender. Sanctions with all the standard marks of punishment occur in all their models—coercion, censure, and deprivation all may befall an offender. Finally, none of the approaches explicitly rules out hard treatment sanctions like incarceration for repeat violent offenses.

The pluralism of goals and values found in restorative justice theory, combined with the fact that something like punishment is not only permissible but routine in all of the models, forces a reconception of practices like mediation, conferencing, and neighborhood justice. First, these are not straightforward embodiments of a new kind of “restorative” justice different from the retributive and rehabilitative

46. Christie, *Limits to Pain*, 97.

forms to which we have become accustomed. Rather, restorative justice practices might best be seen as forums for the expression *and* negotiation of the multiple values and goals of criminal justice. Second, rather than seeing restorative justice practices as replacing punishment, we might examine them as a mode of finding *legitimate* punishment. Each approach can be seen, in its own way, as an effort at making punishment less procedural, less a matter of course, more deliberate, more transparent, and more constructive for all the parties involved.

Braithwaite and Pettit, following R.A. Duff,⁴⁷ believe neither process nor remedy should be “mechanical or merely punitive procedures, without moral significance.”⁴⁸ They maintain that “whatever process someone charged with an offence receives, and whatever remedy is meted out to an offender, it should be designed to communicate in the fashion of a piece of moral reasoning the grounds for taking the offence seriously and condemning it.”⁴⁹ Extending their argument we can add that in a complex, changing, pluralistic culture, what punishment expresses shifts over time and must be continuously examined.

The idea that criminal justice proceedings might be exercises in legitimation may seem strange. Why should our responses to clear-cut *mala in se* like assault or theft require justification? It seems odd to say, as Christie does, that crime is a “starting point for a real dialogue.”⁵⁰ Yet that is what it is. Our response to crime is an expression of how we think about issues like harm, desert, and responsibility. Punishment can be a “real dialogue”—an open and participatory communicative process—or just a monologue. Worse yet, punishment can be what it seems to be in the United States: a monologue that is performed and understood by very few even though it is tacitly endorsed by all. How, when, why, and who we punish are all open questions that are continuously answered *on our behalf* by the officials and procedures we have empowered.

III. Populist Punitiveness, Disproportionality, and Partiality: Problems with Democratizing Punishment

Restorative justice forums are efforts at producing a more justifiable response to crime than mainstream punitive measures. But the less mediated and more democratic forums advocated raise two significant worries. As the process of punishment is devolved away from traditional criminal justice professionals the risk of mob mentality would seem to rise. To address this, we examine the case of “three

47. R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986).

48. John Braithwaite and Philip Pettit, “Republicanism and Restorative Justice: An Explanatory and Normative Connection,” in *Restorative Justice: Philosophy to Practice*, ed. Heather Strang and John Braithwaite (Burlington: Ashgate Publishing, 2000), 159.

49. Braithwaite and Pettit, “Republicanism and Restorative Justice,” 159.

50. Christie, *Limits to Pain*, 11.

strikes" sentencing guidelines that appear to fly in the face of restorative justice assumptions about what the public wants from criminal justice. Then we take up the challenge of whether more informal procedures can offer proportional sanctions and safeguard individual rights.

Ignorant and Punitive Publics: "Three-Strikes" Populism

It may seem perverse to look favorably on more public and participatory criminal justice at a time when leading criminologists assert that current criminal justice policies "are the harshest in American history and of any Western country,"⁵¹ and when most Americans still think that sentences are too lenient and favor "get tough" constraints on judicial and probation discretion like mandatory minimums and three-strikes sentencing.⁵²

Three-strikes sentencing policy is exactly what restorative justice advocates wish to avoid: a mechanical, non-dialogical, application of formal procedures that bind the hands of judges to sentence repeat felons to severe terms of incarceration. Yet policies like these swept a number of states in the 1990s, in many cases, such as California, the outcome of grass-roots popular efforts to channel public fears of habitual offenders into substantive criminal justice policy reform. Indeed, the California case is especially damning since the governor enacted a popular initiative with very little legislative modification. This has proven to be one of the most draconian versions of three-strikes policy in the country. The seemingly undeniable connection between populist pressure and draconian policy has led scholars to conclude that for rational and legitimate sentencing standards there have to be filters preventing popular influence. Sentencing commissions, removed from the cycle of "get tough" political promises used to assuage public fears of crime, appear to some to be the only solution to the vagaries of democracy.⁵³

But read in the terms of my argument, three-strikes represents public preferences that have not in any way been held accountable in the fashion favored by restorative justice. In the American political culture of the last three decades crime has been used as a campaign issue to wedge voters away from lenient liberals and towards "get tough" conservatives. Because of this history and for fear of losing even more voters to the Republican party, the last Democratic presidential campaign platform scarcely deviated on the topic of criminal justice from the Republican's tough-minded party platform; both favored the death penalty, for example.

51. Michael Tonry, "Crime and Punishment in America," in *The Handbook of Crime & Punishment*, ed. Michael Tonry (New York: Oxford University Press, 1998), 3.

52. Julian V. Roberts and Loretta J. Stalans, "Crime, Criminal Justice, and Public Opinion," in *The Handbook of Crime & Punishment*, ed. Michael Tonry (New York: Oxford University Press, 1998), 31-57.

53. Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford, 2001); Philip Pettit, "Is Criminal Justice Politically Feasible?" *Buffalo Criminal Law Review* 5 (2002): 427-450.

Common sense views of crime, criminals, and punishment are not given rational challenge by politicians, who in turn are rewarded (or, better put, not punished) at the polls for ratcheting up crime control policy.

In dialogue oriented restorative justice forums, citizens come in contact with real cases, real victims, and real offenders, rather than the abstractions popularized in campaigns and in media treatments. There is evidence that punitive attitudes do diminish with such direct experience.⁵⁴ And some public opinion researchers believe that American public opinion skews towards the punitive because of misinformation, lack of knowledge, and overly abstract survey questions. When polled about whether they support “get tough” legislation like three-strikes policies, people are rarely presented with the financial costs and therefore do not face the very real budget trade-offs such policies mandate.⁵⁵ When asked survey questions with robust characterizations of offenders and offenses, less punitive responses emerge.⁵⁶ Though there is no doubt that American public opinion is consistently punitive, it is also “mushy”—vulnerable to argument. Americans know that punishment is a lose-lose proposition and are open to alternatives, at least for some classes of offenders.⁵⁷

If most citizens are relatively ignorant about criminal justice policy and tend to vote on the basis of fears, then the answer cannot be less information, less experience, less accountability. Participation in restorative justice practices may very well correct unreasonable and unaccountable policy preferences created by campaign and media misinformation, popular stereotypes, and lack of knowledge.⁵⁸ Further, there is some evidence that three-strikes type policy is an expression of hostility towards both criminals and justice elites. Binding the hands of judges is a way of taking authority over criminal justice away from so-called experts⁵⁹ and devolving it back to more publicly

54. Braithwaite and Pettit, “Republican Criminology.” Zimring, Hawkins, and Kamin argue, in defense of sentencing commissions that are shielded from popular political pressure, that public attitudes flow from the role of citizen that, in comparison with the role of judge or prosecutor, demands only minimal information and indirect accountability. “Turn a complaining cab driver into a sentencing judge and his or her sensitivity to questions of desert and proportionality in individual cases might be just as strong as the judge sitting in the next courtroom.” *Punishment and Democracy*, 202. In my view this is an argument for lay participation, not sentencing commissions.

55. Roberts and Stalans write: “When asked directly whether they support such [anti-recidivist statutes such as three-strikes] legislation, three-quarters of Americans respond affirmatively. However, more refined research reveals important limits to the public support.” “Crime, Criminal Justice, and Public Opinion,” 48.

56. Francis T. Cullen, Bonnie S. Fisher, and Brandon K. Applegate, “Public Opinion about Punishment and Corrections,” in *Crime and Justice: A Review of Research* 27, ed. Michael Tonry (Chicago: University of Chicago Press, 2000), 46-7.

57. Cullen, Fisher, and Applegate, “Public Opinion about Punishment and Corrections,” 46-7.

58. By “unreasonable” I do not mean to imply that there are clear-cut standards of rationality that can solve all criminal justice policy dilemmas. But I do hold that information and analysis emerging through dialogue can show our current policy preferences to be mistaken: inaccurate, incoherent, or incomplete. “Unreasonable” choices result from gaps between our current policy preferences and our considered interests that can be bridged through deliberation.

59. Zimring, Hawkins, and Kamin, *Punishment and Democracy*, 14.

responsive bodies like legislatures. But in the terms of my argument, three-strikes policy should be seen not as the natural upshot of a more popular form of criminal justice, but as a seriously deficient and incomplete democratic experiment. Though Californians are now recognizing what they will have to pay as a consequence of their policy choice, their initial preferences were in no way challenged by direct contact with the complexities and concrete issues of the sentencing process.

Impartiality, Proportionality, and Safeguards for Individual Rights

A number of critics of restorative justice have worried that devolving sentencing authority will produce an uneven and unfair system of punishment.⁶⁰ Depending on whether the victim is punitive or forgiving, and depending on the general norms of the particular restorative justice program, an offender in one case can receive a very different set of burdens than another even if the offense is the same. Critics worry that informal procedures like mediation, conferencing, and community justice forums may offer fewer protections against biased, partial sentencing decisions and may have greater difficulty achieving standards of proportionality that fit the burden to the offense. Ashworth, for example, argues that devolution of responsibility to restorative justice forums is a mistake, since "it should remain the responsibility of the state towards its citizens to ensure that justice is administered by independent and impartial tribunals, and that there are proportionality limits which should not only constrain the measures agreed at restorative justice conferences etc. but also ensure some similarity in the treatment of equally situated offenders."⁶¹

Restorative justice advocates can respond, pragmatically, that mainstream criminal justice procedures are far from impartial and proportional and therefore these standards cannot properly be used to judge informal proceedings. They can point out that consent to a sentencing agreement is a critical feature of mediation and conferencing programs. And they can challenge impartiality and proportionality, as "constructs" of retributive justice that place undue emphasis on outcomes rather than the process of justice.⁶² These defensive responses should be resisted, in my view. In the first case, failures of impartiality and proportionality may very well occur in mainstream criminal justice, but they are still recognized as problems and are treated as breaches of justice when brought to light.⁶³ Second, "consent" is no

60. Andrew von Hirsch and A. J. Ashworth, "Not Not Just Deserts: A Response to Braithwaite and Pettit," *Oxford Journal of Legal Studies* 12 (1992): 83-98; Andrew von Hirsch, "Penal Theories," in *The Handbook of Crime & Punishment*, ed. Michael Tonry (New York: Oxford University Press), 659-682.

61. Andrew Ashworth, "Responsibilities, Rights and Restorative Justice," *British Journal of Criminology* 42 (2002): 591.

62. Allison Morris and Warren Young, "Reforming Criminal Justice: The Potential of Restorative Justice," in *Restorative Justice: Philosophy to Practice*, ed. Heather Strang and John Braithwaite (Burlington: Ashgate Publishing, 2000), 21-22.

63. Ashworth, "Responsibilities, Rights and Restorative Justice."

magic bullet for legitimating any and all procedures and outcomes. An appeal to the normative value of consent must always be accompanied by an adequate description of the circumstances of consent. And under the coercive context of criminal justice, what is consented to has to be examined very carefully indeed. Third, impartiality and proportionality have a distinguished pedigree in most moral theory, not just retributive theories of criminal justice.

A better tack for restorative justice advocates, I believe, is to accept rather than deconstruct the standards of impartiality and proportionality and to show how more deliberative, less mechanical, more communicative procedures like mediation, conferencing, and community justice forums can “play more fair” than mainstream forms. Restorative justice programs must be vigilant about consent and ensure that offenders know they can default back to traditional sentencing arrangements at any point in the process.

IV. Conclusion: Democracy, Distrust, and Punishment

The practice of punishment should be sobering for participatory democratic theorists. Even given widespread ignorance of sentencing practices, many Americans want to “supersize” them. Even given the degree of pluralism on so many political issues, legislators and prosecutors continue to offer simple punitive solutions. On its face, punishment appears to be an area where less civic participation produces more civilized, more rational outcomes. Even thinkers sympathetic to democracy call for filters such as elite commissions to take punishment standards out of the normal give and take of politics.⁶⁴

My argument for civic accountability does not depend on wishful thinking about public attitudes being transformed by restorative justice procedures. The claim is simply that restorative justice is a valuable theory and practice because it allows a more reflective process of punishment. We punish too much and too easily. We do not worry about the threat to our dominion posed by a punitive criminal justice system because we cannot see ourselves in the position of the accused. Some of the distrust of criminals should be turned in on itself, in my view. Democratic publics need to be held accountable for the deprivations they mete out to those convicted of criminal offenses and restorative justice practices are a way to expose more people to the workings of a traditionally closed domain.

The distrust I have in mind is reflected in founding era anti-federalist arguments about the importance of jury trials. Anti-federalists like Richard Henry Lee worried that without the opportunity to participate on juries, average citizens would be at a triple disadvantage compared to justice elites. They would have less authority, less of an opportunity to hold elites accountable, and, most importantly,

64. Pettit, “Is Criminal Justice Politically Feasible?”

less of an opportunity to gain knowledge of an institution that has profound effects on their lives.

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels [sic] and guardians of each other. . . .⁶⁵

Lee's goal here is primarily power sharing; he wants to keep lay people inside institutions of power as watchdogs on elites. But I want to draw out another connotation: in democracies citizens need to be sentinels and guardians over each other, whether we are nonvoters, voters, or officials, because of the power that is exercised and the judgments that are made about people's lives on our behalf. In the domain of criminal justice being a sentinel and guardian means holding both offenders accountable for their crimes and citizens accountable for their punishments.

65. Letter IV, in *The Anti-Federalist: Writings by the Opponents of the Constitution*, ed. Herbert J. Storing and Murray Dry (Chicago: University of Chicago Press, 1985), 58-9.