

Restorative Justice, Diversion and Social Control : Potential Problems¹

Diarmuid Griffin, Lecturer in Law, National University of Ireland, Galway.

Introduction

This paper will highlight some potential dangers of pursuing the use of restorative justice (RJ) for juvenile offenders in Ireland. It will look at penal reforms of the past; in particular it will look at the work of Stanley Cohen and his examination of the development of “community corrections.” Social control theorists, like Cohen, often view changes in penal structures differently to reformists and examine the underlying impact of expanding the social control apparatus beyond the prison system. In this presentation I intend to use the template used by Stanley Cohen in the 70’s to analyse the development of restorative justice in the juvenile justice system. The dangers highlighted by Cohen will then be applied to restorative practices in order to provide a framework for the critique of this approach. While it is acknowledged that the development of such programmes are essential in developing an appropriate response to juvenile offending it is also important to critically discuss these projects to highlight the problems and potential dangers emerging out of their adoption. The focus of the paper will remain primarily on restorative programmes although many of the criticisms discussed can also be levied at diversionary programmes.

Restorative justice, diversion and the Irish juvenile justice system

Marshall’s generally accepted definition describes RJ as a “process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications.”² The focus is on repairing the harm done to individuals in the criminal process and restoring “whatever dimensions ... [that] matter to the victims, offenders and the community, *i.e.* those affected by the crime.”³ In practice, the process generally involves the bringing together of the victim, offender and if possible, individuals from the community, to negotiate a settlement aimed at dealing effectively with the offending behaviour. The provision of reparation by the offender to the victim of the crime is seen as crucial in addressing the offender’s behaviour and addressing the needs of the victim. RJ is a relatively new concept to Irish criminal justice. To date, restorative initiatives have been mainly limited to the juvenile justice system and have yet to be expanded beyond the programmes implemented to divert young offenders from the formal criminal process.⁴ The restorative models that have been implemented in the juvenile justice system have been incorporated into an already existing programme that attempts to divert young offenders away from criminal activity.

The current restorative model developed from a programme established by the Garda Síochána. The Juvenile Liaison Scheme was first initiated by the Garda Síochána on a limited basis in 1963 and was put on a national footing in the 1980s. A Juvenile Liaison Officer (JLO) is responsible for the “informal monitoring of and contact with young people at risk” through supporting youth work and engaging in

¹ This paper was presented at the National Conference on Young People and Crime: Research, Policy and Practice at the Centre for Social and Educational Research, the Dublin Institute of Technology, Ireland on the 13th September 2005.

² Marshall, *Restorative Justice: An Overview* (A Report by the Home Office Research and Development and Statistics Directorate, 1999) at p.1.

³ Braithwaite, “Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory”, review essay prepared for University of Toronto law course, “Restorative Justice: Theory and Practice in Criminal Law and Business Regulation” (1997) 1–100 at 5.

⁴ Other restorative schemes have been initiated on an *ad hoc* basis but have not been extensively utilised. The Department of Justice, Equality and Law Reform funds two restorative justice projects through the Probation and Welfare Service: (1) the victim-offender service in Tallaght and (2) the Nenagh reparation project.

preventative activities.⁵ The aim is to prevent children from becoming involved with the criminal justice system. JLOs may administer a formal or informal caution to an individual under the age of 18 who has become involved in crime where the individual admits the offence, where the young person has not been cautioned before, and where the parents agree to co-operate.⁶ This replaced the need, to some extent, for the juvenile to be processed formally through the criminal system, thereby limiting the harmful effects often associated with the court system.

The Children Act 2001 placed the Juvenile Liaison Scheme on a statutory basis, renaming it the Garda Diversion Programme. The programme incorporates a RJ approach to crime control. Specifically, Pt 4 of the Act established two forms of RJ initiatives, namely restorative formal cautions and family group conferences (FGCs). Both initiatives involve the bringing together of those connected with the offending behaviour, in particular the victim and offender, to negotiate an outcome. Mediation between the offender and the victim during the process is desirable as is the provision of reparation by the offender to the victim. Under Pt 8 of the Act, the Children Court may direct the Probation and Welfare Service to convene a family conference where the court believes it to be desirable.⁷ This is, in brief, the restorative programmes that operate in the Irish juvenile justice system.

Stanley Cohen's Vision of Social Control and the Development of "Community Corrections"

Stanley Cohen examined the implications of the new ideology of 'community treatment' or 'community control' for crime and delinquency that emerged as an alternative to imprisonment and other forms of rehabilitation in the 1970s. He focused on the development of the "community corrections" that were part of the penal welfare movement and the apparent changes that were occurring in the formal social control apparatus. Cohen drew parallels with the reform movement that resulted in entrenching the prison central to the crime control system with the reform movement that instigated the development of "community corrections."

Foucault argued in *Discipline and Punish* that underlying the humanitarian reform from the public execution to the prison, the prison represented an investment in a more efficient and effective "economy of power", that is, the control of those not only within the walls of the prison but the community outside as well.⁸ Foucault notes that "so successful has the prison been that, after a century and a half of "failures" the prison still exists producing the same results, and there is the greatest reluctance to dispense with it."⁹ Foucault argues that if the rationale for imprisonment is correctionalism then it is a failure as it produces the conditions for recidivism. "For the prison, in its reality and visible effects, was denounced at once as the great failure of penal justice."¹⁰ Instead, he argues, "[m]ass imprisonment offered a new strategic possibility- isolating a criminal class from the working class, incarcerating the one so that it would not

⁵ Dáil Éireann, First Report of the Select Committee on Crime, "*Juvenile Crime: Its Causes and Its Remedies*" (Stationary Office, Dublin, 1992), p.40.

⁶ Children Act 2001, s.23(1)(a), (b) and (c).

⁷ See also Pt 2 and 3 of the Children Act 2001, where a Health Board-governed conference may be convened where the Children Court deems it appropriate. This conference is not specifically restorative.

⁸ Foucault argued that the prison existed for two reasons: (1) prison is 'deeply rooted' *i.e.* embedded in the wider disciplinary practices which he deems to be characteristic of modern society, (2) it carries out certain precise functions namely, the creation of the delinquent, which he argued, is useful in a strategy of political domination because it works to separate crime from politics, to divide the working classes against themselves, to enhance the fear of the prison, and to guarantee the authority and powers of the police. Foucault, M., *Discipline and Punish: The Birth of the Prison*, (Harmondsworth, Penguin, 1991)

⁹ *Ibid.* at p.277

¹⁰ *Ibid.* at p.264. He further states that '[d]etention causes recidivism: those leaving prison have more chance than before of going back to it... The prison cannot fail but to produce delinquents. It does so by the very type of existence that it imposes on its inmates... The prison makes possible, even encourages, the organisation [sic] of a milieu of delinquents, loyal to one another, hierarchized, ready to aid and abet any future criminal act...' at p.265-67

corrupt the industriousness of the other.”¹¹ Thus, Foucault identified the shift from the public execution to the prison as a movement aimed at a more efficient method of controlling populations both inside and outside the prison rather than a more humane method of punishment.

Further, he argues that the disciplinary regime evident in the prison was replicated within other socialising institutions such as the school, the mental asylum, the factory and the hospital. The punitive discipline that is characteristic of the prison system is dispersed out beyond the walls of the prison and is an integral component of ‘non-custodial’ punishments:

“Foucault dissolves the difference between imprisonment and freedom, between punitive and non-punitive institutions and relationships, and shows us a mesh of disciplinary relationships, such that the citizens of modern industrial society are inhabitants of the *punitive city*, within the *carceral archipelago*.”¹²

Cohen notes that similar to the prison, “community corrections” are not evaluated in terms of success: “Social control is an enterprise, which largely justifies itself. ‘Success’ is not the object of the exercise.”¹³ The secret success of the prison was to insert the disciplinary power more subtly within the framework of society. Cohen identifies the “community corrections” reformation with the prison reformation and argues that it may be evidence of the dispersal of discipline beyond the walls of the prison into the community, thus creating new networks of social control and widening the ambit of the social control apparatus. ‘Community corrections’ can be interpreted as the expansion of the network of control beyond the confines of the prison system and embedding the apparatus of social control more subtly and deeply into society. In light of Foucault’s interpretation of penal reform, Cohen examines the ‘community corrections’ movement with scepticism. He notes that the justification for the implementation of these reforms is based on two sets of “pragmatic” assumptions:

Set 1:

“(a) prisons and juvenile institutions are... simply ineffective: they neither successfully deter nor rehabilitate,... (they actually make things worse by strengthening criminal commitment)

(b) community alternatives are much less costly and

(c) they are more humane than any institution can be: prisons are cruel, brutalising and beyond reform.

Their time has come.

Therefore: community alternatives ‘must obviously be better’.”¹⁴

Set 2:

“(a) theories of stigma and labelling have demonstrated that the further the deviant is processed into the system, the harder it is to return him to normal life- ‘therefore’ measures designed to minimise penetration into the formal system and keep the deviant in the community as long as possible is desirable;

¹¹ Ignatieff, M., ‘State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment’, in Tonry, M., and Morris, N., (eds.), *Crime and Justice*, Vol. 3 (Chicago, University of Chicago Press, 1981) at p. 90

¹² Barbara, H., *Understanding justice: an introduction to ideas, perspectives, and controversies in modern penal theory*, (Buckingham, Open University Press, 1996) Chapter seven, ‘The disciplined society: Foucault and the analysis of penalty’ at p.126. ‘In his work *Madness and Civilisation*, Foucault argued that seemingly more humane mental institutions had replaced the apparently more coercive prisons in modern societies as the central instrument of state control. This movement was packaged and sold by the state as a more humane, enlightened, reasonable response to deviance, but Foucault argued it was actually a way to expand the scope of state control... [T]he state attempts to maintain its legitimacy by packaging its control efforts so that they appear to be reasonable, humane and necessary. But always hidden within this “velvet glove” is an iron fist whose ultimate goal is to control troublesome populations.’ Vold, G., Bernard, T., and Snipes, J., (5th ed.) *Theoretical Criminology*, (New York, Oxford University Press, 2002) at p.223-224

¹³ Cohen, S., ‘Community control- a new utopia’, (15 March 1979), *New Society* at p.609

¹⁴ *Ibid.*

(b) the causes of most forms of deviance are in society (family, community, school, economic system)- 'therefore' prevention and cure must lie in the community and not in artificially created agencies constructed on a model of individual intervention;

(c) liberal measures such as reformatories, the juvenile court and the whole rehabilitative model are politically suspect, whatever the benevolent motives behind them. The state should be committed to doing less harm rather than more good- 'therefore' policies such as decriminalisation, diversion and de-carceration should be supported."¹⁵

Primarily, Cohen argues that the policies of diversion, decriminalisation and decarceration should be subjected to the same suspicion regardless of the appearance of benevolence. It is important to identify the potential of 'community corrections' to expand the network of social control and not merely interpret these programmes as a mechanism of benevolent reform. It is instructive to analyse the development of restorative diversion programmes in Ireland utilising the framework Cohen established to critique "community corrections." In this paper, the metaphors of "widening the net", "thinning the mesh", "blurring the boundaries" and "masking and disguising" will be used to highlight the potential dangers that may arise from implementing RJ diversionary programmes.

'Widening the Net' and 'Thinning the Mesh'

A fundamental concept of the development of community sanctions, alternatives to imprisonment, and diversion is that the state should focus on doing less harm rather than more good. Cohen notes that "[i]t is ironical, then, that the major results of the new network of social control have been to increase, rather than decrease, the amount of offenders who get into the system in the first place."¹⁶ He argues that "...something like 'diversion' becomes not movement out of the system but movement into a programme in another part of the system."¹⁷

The problem regarding alternative sanctions is twofold: the net is widened through subjecting a wider population to control and the mesh is thinned through diverting individuals into the system rather than screening those individuals out. "[A]lternatives' become not alternatives at all but new programmes [sic] which supplement the existing system or else expand it by attracting new populations."¹⁸ This is especially so if alternative programmes are used for shallow-end offenders *i.e.* those individuals who would not ordinarily be sent through the formal process, instead of deep-end offenders *i.e.* those who would ordinarily be sent through the formal process and would benefit from intervention. Commenting on the impact of psychiatry on the criminal justice system in the early twentieth century, Rothman states that "...rationales and practices that initially promised to be less onerous nevertheless served to encourage the extension of state authority. The impact of the ideology was to expand intervention, not to restrict it."¹⁹ Proof of the effectiveness of alternatives should be reflected in a decrease in the use of traditional criminal sanctions and institutions. However, Cohen notes the evidence suggests that "...in general, as the number of community based facilities increases, the total number of youths incarcerated increases."²⁰

Focusing on the area of juvenile justice, Cohen acknowledges that diversion has been an integral part of the juvenile justice system. However, the development of diversion, and what it currently reflects, is divergent from the original intention. Cohen notes the irony that diversion from the juvenile court has been developed when the juvenile court was itself the result of a reform movement primarily aimed at diversion. Police discretion was introduced on an informal basis to protect the juvenile from the "damaging" effects of

¹⁵ *Ibid.*

¹⁶ *Ibid.* at p.610

¹⁷ *Ibid.*

¹⁸ Cohen, S., 'The Punitive City: Notes on the Dispersal of Social Control', (1979) *Contemporary Crises*, Vol.3 p.339 at p.347

¹⁹ Rothman, D., Behavioural Modification in Total Institutions: A Historical Overview, *Hastings Centre Report* in Cohen, S., 'The Punitive City: Notes on the Dispersal of Social Control', (1979) *Contemporary Crises*, Vol.3 p. 339 at p.347

²⁰ Cohen, S., 'The Punitive City: Notes on the Dispersal of Social Control', (1979) *Contemporary Crises*, Vol.3 p.339 at p.348

the criminal justice system. However, these discretionary practices of the police became increasingly formalised. Therefore, three methods of diversion are in place for the juvenile offender: the juvenile court diverts from the adult court, formal diversion programmes run by the police divert from the juvenile court, and the informal diversion programmes divert from formal diversion programmes.

“Whereas the police used to have two options- screen right out... or process formally- they now have the third option of diversion into a programme. Diversion can then be used as an alternative to screening (doing nothing) and not an alternative to processing.”²¹

Traditional diversion removed the juvenile entirely from the criminal process, new diversion diverts from the traditional system into a different system. Therefore, there is more intervention for a wider population of juveniles:

“[T]he new movement- in this case of crime and delinquency at least- has led to a more voracious processing of deviant populations, albeit in new settings and by professionals with different names. The machine might in some respects be getting softer, but it is not getting smaller...”²²

Applying Cohen’s “widening the net” and “thinning the mesh” critique to RJ and diversion in Ireland, similarities can be drawn with the operation of diversion. The Children Court was initially adopted as a welfare-focused alternative to the “damaging” adult criminal system.²³ An informal diversion programme was established by the Gardaí under the Juvenile Liaison Scheme in 1963. This Scheme was then put on a formal statutory basis under the Children Act 2001, which also incorporated formal restorative cautions and FGCs.²⁴ Thus, juvenile offenders may be dealt with on an informal and formal basis by the Gardaí, and also by the formal Children Court.

The classification of offence and offender for which RJ is invoked as a mechanism in the justice process, is pivotal to restraining the potential for the process to draw in new populations of juveniles that were previously screened out of the criminal process. Due to a lack of empirical data, it cannot be validly asserted that cautions and restorative programmes are used for shallow-end offenders. However, as Diversionary Programmes are governed entirely by the Gardaí and the Probation and Welfare Service²⁵ and there is no specific policy of using the process for deep-end offenders, there is significant potential for “widening the net.” Thus, it is entirely probable that formalising diversion and developing a new restorative approach will not in fact divert individuals that are to be formally processed in the Children Court. Those individuals destined for the Children Court will remain on course. Instead, restorative initiatives may simply result in the expansion of the system by involving individuals that would previously have been screened out to become involved in the criminal justice system through incorporating first time offenders, those that commit minor offences or those that there is a lack of evidence to pursue formal punishment. As Cayley notes, RJ may simply be “used only to clean up the easy cases at the margins of the system [while] having little effect on the treatment of the main body of cases.”²⁶ The danger of such an expansion for juvenile offenders serves as a particularly relevant warning of restraint regarding the discretion evident in RJ programmes and the need to use RJ as a real alternative for real offenders.

“Blurring the Boundaries”

“Blurring refers to the increasing invisibility of the boundaries of the social control apparatus.”²⁷ Previously, the prison or institution was removed from mainstream society and what occurred inside the walls of the prison could not be viewed by outsiders. There were clear lines between the prison and

²¹ Cohen, S., ‘Community control- a new utopia’, 15 March 1979, *New Society*, p.609 at p.611

²² Cohen, S., ‘The Punitive City: Notes on the Dispersal of Social Control’, (1979) *Contemporary Crises*, Vol.3 p.339 at p.350

²³ The Children Act, 1908 provided for the setting up of a special court for offenders aged between seven to seventeen.

²⁴ Family Group Conferences.

²⁵ Part 8 of the Children Act, 2001 governing the Probation and Welfare Service led conferencing has recently been implemented.

²⁶ Cayley, D., *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives*, (Cleveland, OH, Pilgrim Press, 1998) at p.359

²⁷ Cohen, S., ‘Community Control- a new utopia’, (15 March 1979), *New Society*, p.609 at p.610

society, the imprisoned and the free, the guilty and the innocent. With the emergence of the community sanction and alternatives to imprisonment this clear distinction has been blurred. Cohen notes that the blurring of boundaries occurring in the crime control apparatus is not merely a loose end. In fact, “[t]he ideology of the new movement quite deliberately and explicitly demands that boundaries should not be made too clear.”²⁸ He notes that “alternatives” and “diversion” blur boundaries by not only increasing the pervasiveness and invisibility of social control but also through de-emphasising the concept of delinquency: “The ideology of community treatment allows for a facile evasion of the delinquent/non-delinquent distinction.”²⁹ It also evades the public/private, criminal/civil distinction. This renders it difficult to determine who is and is not involved in the system and what conduct is serious enough to warrant intervention. Furthermore, the control of deviant behaviour is no longer the remit of a separate isolated system but involves the community, including family, school and neighbourhood in the discipline and normalisation of an individual.

Cohen’s concept of the blurred boundaries of ‘community corrections’ is particularly appropriate in an examination of the restorative process. In Ireland, the Children Court combines a welfare and justice focused alternative to the adult criminal justice system. Diversion from this system was developed under the Juvenile Liaison Scheme from 1963 onwards. Currently, there are three methods of diversion; an informal caution, a formal caution and a FGC. Conferencing can be organised on three occasions in the juvenile criminal process by three different state agencies. The Children Court may refer a child to a Health Board governed conference at any stage of the process where the welfare of the child requires.³⁰ A juvenile may be recommended for entry to a FGC under the scheme run by An Garda Síochána.³¹ The Children Court may refer a juvenile to a family conference governed by the Probation and Welfare Service.³² Aside from the financial issue of the duplication of a service by three different agencies providing similar functions, it is clear that the proliferation of agencies dealing with offenders through conferences results in a significant extension of the criminal justice mechanism. This blurs the lines between the criminal justice and welfare system and the delinquent/non-delinquent distinction. In particular, a Health Board convened conference does not deal with criminal justice issues and is strictly welfare focused yet it is attached to the criminal process. While the juvenile justice system combines a welfare/justice approach and thus encourages blurred lines, the hazy distinctions between welfare focused and justice focused diversion programmes raises concern.

The guilt/innocence distinction is also blurred as the restorative process skews the importance of procedural safeguards in an attempt to secure “flexibility” and facilitate mediation and negotiation. The lack of legal safeguards prior to and post admission to the programme raises a concern as to the lack of visibility and accountability of such processes:

“Instead of adjudication focused on prior conduct there is an assessment of whether the accused can benefit from the services offered by the program, a decision which often entails intentional avoidance of due process and the whole issue of guilt and innocence.”³³

²⁸ *Ibid.* ‘New diversion agencies become attached to the court, without supposedly being part of the legal system. Very open prisons become indistinguishable from secure “community correctional centres.” Intermediate treatment is supposed to be somewhere between sending a child away from home and leaving him in his normal home environment.’ at p.610

²⁹ Cohen, S., ‘The Punitive City: Notes on the Dispersal of Social Control’, (1979) *Contemporary Crises* Vol. 3 p.339 at p.346

³⁰ Part 2 of the Children Act, 2001 allows for the Children Court to adjourn proceedings and direct the Health Board to convene a Family Welfare Conference where appropriate so as to make a care or supervision order under the Child Care Act 1991. This is expected to come into operation by the end of 2004. Kilkelly, U., ‘Overview of Status and Provisions’, Children Act, 2001 Seminar, Faculty of Law, UCC, 19th June 2004.

³¹ Children Act, 2001, Part 4

³² *ibid.* Part 8

³³ Scull, A., *Decarceration*, (Engelwood Cliffs, Prentice Hall, 1977) Chapter 3 The Decarceration of the Bad: Criminal Delinquents p.51-64

Further, the agency-led, victim-oriented nature of the programmes undoubtedly affects the impartiality of the operation. There is also a significant danger that this deliberate blurring of boundaries may diminish the importance of imposing a proportionate response to both the offence and offender.³⁴

Also of note is the distinction between the public/private divide associated with issues of crime control and the blurring of this distinction in the restorative process. In essence, the traditional view of the criminal justice system is that crime control is the responsibility of the state. However, in accordance with the general trend of making the public responsible for certain aspects of crime control,³⁵ RJ involves family, school and community in the discipline and surveillance of the juvenile. Concurrently, the juvenile is subject to the surveillance of the Juvenile Liaison Scheme. RJ therefore blurs the boundary between state and community intervention and their respective roles in crime control resulting in the enhancing of the surveillance of the juvenile within the community. Cohen notes that “[t]he uncertainties and blurrings... perhaps beckon to a future where it will be impossible to determine who is enmeshed [sic] in the social control machine.”³⁶

“Masking’ and “Disguising”

Cohen notes “[t]he softness of the machine might... be more apparent than real.”³⁷ The new strategies of diversion and correction are based on a social work framework rather than a legalistic rational. Terminology such as “community” and in this specific case “restoration”, sound benign and attractive while still hiding the true nature of the “alternative.” “Alternatives” are only such if they are real and substantive. While most offenders might agree that a community-based alternative is preferable to a custodial sentence, this is only the case if a custodial sentence would be the outcome of formal processing having refused to enter an “alternative” programme. Further, the assumption that these programmes are more humane and less stigmatising than a formal criminal sanction should not be assumed:

“In a system with low visibility and low accountability, there is less room for such niceties as due process and legal rights. ‘[N]ew diversion’... occurs by deliberately avoiding due process: the client proceeds through the system on the assumption or admission of guilt. Indeed the deliberate conceptual blurring between ‘diversion’ and ‘prevention’ explicitly calls for an increase in this sort of non-legal discretion.”³⁸

The issues regarding RJ’s lack of compliance with fundamental due process procedures is beyond the scope of this paper. However, it is clear that the focus on the welfare of the child is used as a justification for relegating the importance of legal safeguards that are integral to the formal criminal process. The important question is whether the offender experiences the “diversion” as being actually more humane and less stigmatising than the traditional criminal process? This will only be the case if those offenders that are destined for the court system are diverted into the restorative system. If it is used for low-end offenders that would not be involved in the process if diversion programmes were not in place, then the term “mask of benevolence” is appropriately applied.

The danger of disguising RJ and diversion in a mask of informality and non-legal discretion while at the same time attaching itself to the court is highlighted by the proposed amendment to S.48 of the Children Act 2001 by virtue of S.31 of the Criminal Justice Bill 2004. If this section is implemented it will allow the

³⁴ For a discussion on these issues see Griffin, D., Restorative Justice: A Real Alternative?, (2005) *Irish Criminal Law Journal* Vol. 15 No. 4 p.2-10.

³⁵ e.g. The privatisation of crime control through companies dealing in security and surveillance, the development of obligations in the community to respond to criminal activity (Company Law Enforcement Act, 2001, Criminal Justice Act, 1994) and the general responsabilisation of the public through the development of programmes such as Neighbourhood Watch etc. See Garland, D., *The Culture of Control*, (Oxford, Oxford University Press, 2001) at p.124-127.

³⁶ Cohen, S., ‘Community control- a new utopia’, (15 March 1979), *New Society*, p.609 at p.610

³⁷ Cohen, S., ‘The Punitive City: Notes on the Dispersal of Social Control’, (1979) *Contemporary Crises* Vol. 3 p.339 at p.350

³⁸ Cohen, S., ‘The Punitive City: Notes on the Dispersal of Social Control’, (1979) *Contemporary Crises* Vol. 3 p.339 at p.351

prosecution to inform the court at sentencing in respect of an offence committed by a child after the child's admission to the Programme of "(a) any acceptance by the child of responsibility for criminal behaviour in respect of which the child has been admitted to the Programme, (b) that behaviour, [and] (c) the child's involvement in the Programme."³⁹ The potential for the behaviour of the juvenile in the programme to be subsequently admitted at sentencing stage undermines the ideology behind RJ proponent's arguments for informality and the removal of legal safeguards. In effect, it signifies that while RJ may be an alternative to the Children Court it still operates under the umbrella of the criminal process and is subject to its procedures. It communicates a clear message to juvenile offenders participating in the restorative process: if your behaviour does not conform to the standard expected within the process, it may be used against you if you re-offend. Although RJ and diversion may operate within a social or welfare based framework rather than a legalistic one, it should not be assumed these programmes are necessarily benevolent in practice. If implemented the restorative process will not be a reflection of willing participants attempting conciliation and negotiation. The threat of harsher sanction in a subsequent legal process undoubtedly undermines the voluntariness of the process for the accused and further limits his bargaining power within that process.

Conclusion

Returning to the two sets of assumptions that Cohen identified with the benevolent reforms of "community corrections" and applying them to RJ, we should be wary of over-relying on benign sound bites such as mediation, negotiation, and restoration. Prisons and juvenile institutions *are* ineffective; they do not successfully rehabilitate or deter. However, community alternatives like RJ are not necessarily less costly⁴⁰ and their humanity is dependant on whether the individual involved experiences the process as more humane. This should not be assumed.

Theories of stigma and labelling have demonstrated that the further the individual is processed into the criminal system the more difficult it is for such an individual to return to a normal life. Despite restorative proponents arguments to the contrary, RJ may in fact contribute to this labelling process by bringing in new populations that would not ordinarily come in contact with a criminal process. Thus, RJ should be examined as to its own potential to stigmatise and label. While, it is accepted that the causes of crime may lie in the community and "therefore" prevention may also lie in the community, RJ is not necessarily the most appropriate way of addressing these concerns. It is questionable what real changes RJ can actually deploy to "cure" crime and rectify the social problems of those that come into contact with the criminal process. And while the state should be committed to doing less harm rather than more good why should it be assumed that RJ represents less harm and more good rather than more harm and less good.

Cohen's vision of social control is an appropriate warning of the dangers of developing benevolent alternatives to the criminal justice system. RJ reflects a flexible and fluid process distinct from the formal system yet it is a criminal process in itself. There is a strong potential for this process to widen the intervention of the state under the mask of benevolence. As Cohen notes "[t]he humanitarian rationale for the move from imprisonment may be unfounded..."⁴¹ It may result in a more extensive form of intervention for criminals and delinquents. The benevolence of RJ should not be assumed merely on the basis of its welfarist and communitarian appeal and benign terms such as mediation, negotiation and empowerment.

It is not the case that alternatives to the formal criminal process such as RJ are doomed from inception. Even Cohen accepts that there are genuine community alternatives that are effective in diverting individuals from the criminal process and are more humane and less intrusive. He notes that "...all these terrible sounding 'agents of social control' instead of being disguised paratroopers of the state, might be able to deploy vastly improved opportunities and resources to offer help and service to groups which

³⁹ Criminal Justice Act, 1994, S.31

⁴⁰ The financial tag of a FGC should be compared only with a police cautioning for a similar offence and not with official prosecution unless prosecution would be the result if the individual was not involved in the diversion process.

⁴¹ Cohen, S., 'Community Control- a new utopia', (15 March 1979), *New Society*, p.609

desperately need them.”⁴² As O’Malley states that “[s]ocial control can be viewed in a more positive light than some social theorists would admit.”⁴³ The objectives of RJ such as restoration and reintegration are worthy and valid goals to aspire to and many of the concerns raised in this paper may be deemed minor or insignificant in light of the benefits of the pursuing the restorative ideal. However, despite the undoubted benefits of RJ it is also important to highlight the potential difficulties that may arise through the pursuit of restorative goals.

⁴² Cohen, S., ‘The Punitive City: Notes on the Dispersal of Social Control’, (1979) *Contemporary Crises* Vol. 3 p. 339 at p.360

⁴³ O’Malley, T., *Sentencing Law and Practice*, (Dublin, Round Hall, Sweet and Maxwell, 2000) at p.5