ACJRD Ltd. Submission to:

Brian Fitzpatrick, Director,

National Commission on Restorative Justice,

Pinebrook  House,

71/74 Harcourt Street,

Dublin 2

**Restorative Justice and Communitarianism:**
**Repairing Communities from Within**

**Introduction**

The relationship between the offender, the offended and the moderator in theories of criminal justice and state governance is a perpetually dynamic triad. The role of the state as the author of what acts are criminal and what acts constitute reparation for offending is a powerful one – even if it is only because of its "successful claim to the monopoly of the legitimate use of physical force" (Weber, 1919). However, state prescriptions for reparation do not of necessity equal reparation in the eyes of the community offended against. Rehabilitation and reparation are essentially subjective terms and the re-integration of an offender into his community is necessarily dependent on his community's acceptance of such rehabilitation.

This paper identifies Restorative Justice as being the key link between community and offender. It argues that community involvement, in the absence of control by force, is the critical determinant of re-integration because it legitimises the rehabilitation process locally. It will highlight the dangers of wide constructions of and responses to perceptions of community deviance. Finally, it will compare restorative justice with other community repair structures to show that restorative justice is an analogous model, rooted in communitarian philosophy as well as criminal justice principles.

**What is Restorative Justice?**

Unusually for a legal principle, there is no authoritative definition of restorative justice. Indeed a great deal of dissent among the commentators, as to the precise definition of "Restorative Justice". The explanation for this may lie in the fact that restorative justice is as much a political and sociological conception as it is a strictly legal tool. Some of the academic definitions of restorative justice in the literature include:

- "A convenient shorthand expression that is commonly applied to a variety of practices which seek to respond to crime in a more constructive way than is conventionally achieved through the use of punishment" (Dignan, 1999:48)

- "an 'Alice in Wonderland' concept, in which it is made to mean whatever particular groups or individuals intend it to mean, irrespective of its defining characteristics" (Dignan and Lowey, 2000:7)

- "Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify harms, needs and obligations, in order to heal and put things right" (Zehr, 2002:37)

- "Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration and prevents future harm" (Cormier, 2002:1)

However, the most widely quoted academic definition of restorative justice is

"a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" (Marshall, 1996:37; 1998:1)

Similar terms are used by the United Nations in defining the restorative process:

"any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party" (United Nations 2002)

On the other hand the UK Restorative Justice Consortium is objective-orientated in its definition of restorative justice, rather than process-orientated:

"Restorative justice seeks to balance the concerns of the victim and the community with the need to re-integrate the offender into society. It seeks to assist the recovery of the victim and enable all parties with a stake in the justice process to participate fruitfully in it" (1998)

According to the Irish Law Reform Commission restorative justice operates on three principles:

1. It is a problem solving approach to crime, involving the parties themselves and the community generally

2. It views crime as a breakdown in relationships which causes harm to the victim and the community

3. It seeks to repair this harm by attending to the needs of the victim and by trying to reintegrate the offender into the community, thus preventing re-offending.

Reviewing the divergent definitions of restorative justice and their varying emphases, it becomes nearly trite to say that all we know is that we do not know. The divergence is itself instructive because it reflects the varying perceptions as to the value and form of restorative justice by those on whose behalf it is used. However, despite the divergence, there are still key words and ideas replicated among the academic and institutional definitions of restorative justice. These can be grouped as:

1. Community and collectivity

2. Restoration, reparation and resolution

The argument of this paper is that restoration, reparation and resolution are terms and concepts that must be defined by community perception, not state prescription. Improving the quality of justice is dependent on two critical factors: desistance from crime and community re-integration. Restorative justice can achieve desistance inversely to the extent that incarceration achieves recidivism. However, community re-integration is dependent on the acceptance and participation of communities of the process of the reparation of the offender. Therefore neither the volume of cases

managed nor the extent of its application, defines the success of community restorative justice - either geographically or according to the type of criminal behaviour to which it is applied. Rather, community values which accept restorative justice as a satisfactory alternative, as opposed to the engagement of punitive coercion by the state in response to a criminal act, is the determinative influence in implementing and evaluating restorative justice as an effective criminal justice policy that will improve the quality of justice for all.

**Community and Communitarianism**

However, we cannot proceed without first defining what is meant by "Community" in this paper, both in conceptual and practical terms. In purely practical terms, community implies the inclusion of all of the key groups already identified - the offender, the victim and the moderator. "Community" also implies the explicit approval of the state and its agents, specifically the Gardaí and the judiciary. It also implies the tacit approval of the local residents where restorative justice is used. It is not simply a question of the consent of the parties to the process but rather it requires the endorsed approval of a wider group in the community.

Communitarianism is a social philosophy that maintains that societal formulations of the good are both needed and legitimate. Communitarianism is often contrasted with classical liberalism, which is a philosophical position that holds each individual should formulate the good. Communitarians examine the ways shared conceptions of the good (values) are formed, transmitted, enforced and justified. As such, they are committed to the construction of communities, the moral dialogues within them, historically transmitted values and mores, and the societal units that transmit and enforce values such the family, schools, and voluntary associations from social clubs to independent churches. (Oxford Handbook, 2001)

It is important to distinguish between communtarianism and popularism in designing restorative justice programmes. Restorative justice programmes that are grounded in a communitarianist ideology are more likely to endure as legitimate institutionalised

processes that are not subject periodic paradigm shifts and electoral politics. For restorative justice to become an election issue could fatally undermine its credence as a community repair programme and viable alternative to purely state imposed criminal sanctions.

**The Risk of Risk Prevention**

Other than politicisation, a second danger is that of the over-hyping crime and responses to crime, particularly youth crime. Over-hyping is dangerous to the extent that restorative justice may become a measure of actually identifying a higher degree of crime and deviance from social norms in the form of engaging those who would not normally be sentenced by the state. This is completely contrary to the objective of restorative justice to repair communities in difficulty and it is a real danger in the Irish context. Despite having the lowest per capita rate of crime in Europe, Ireland is rife with hyperactive perceptions of crime. Lockhart (2000) in his review of Restorative Justice operations in Northern Ireland notes,

> "The current government in the Republic of Ireland was elected on a strong law and order ticket. In spite of Ireland recording a low crime rate compared to other European Countries there has been a lot of media hype about crime. The government was elected to follow a 'zero-tolerance' policy which included the building of an extra 2000 prison places at vast public expense." (Lockhart, 2000: 12)

The continual re-working and expansion of juvenile justice schemes, streams of legislation and pronouncements seemingly dominating government concerns; the politicisation of crime for electoral gain; the excessive media fascination with all things "criminal" and the obsession with regulation, whether through family or school all attest to the disorder of young people as a central motif for political governance (Muncie, 2005:41). This is especially the case where crime rates are actually comparatively low relative to other E.U. and democratic Anglophone countries. The

effect is that any isolated criminal incident may demand entirely disproportionate attention by the media and therefore the relevant government bodies.

It is argued by Muncie (2005) that rather than attempts to isolate specific causes of crime there has emerged a "risk factor prevention paradigm" (2005:39) which focuses on the potential for harm, disorder and misbehaviour, rather than crime itself. These risk factors include hyperactivity, large families, poor parental supervision, low achievement and family disharmony (Farrington, 1996; Carroll and Meehan, 2007).

> "'Risk' is increasingly presented as a factual reality rather than as a complex construction mediated through interpretative judgments of what is considered to be the norm of acceptable behaviour. Boundaries between the deviant and non-deviant, between the public and the private have become blurred. Early intervention strategies designed to identify 'anti-social behaviour' and 'nip offending in the bud' have produced new criminal subjects and deviant 'others'. Invariably those considered most at risk are precisely those marginalised and socially excluded (street children, the disadvantages, the impoverished, migrant children, the destitute and so on) who critics of neo-liberalism would claim are the first 'victims' of a widening gap between rich and poor." (Muncie, 2005: 39)

Griffin (2005) makes the case that reparation projects should generally be regarded with the same suspicion as prison as a tool of social control. He cites Foucault in *Discipline and Punish (1991)* that prison is an effective "economy of power" insofar as it operates not just to control the people within the prison but the community outside as well. It is certainly not successful in preventing recidivism, and never has been. However, in separating a criminal class from the rest of society, both physically and metaphorically, the state uses a tool of social control over the whole of society – not just as a deterrent from crime but also as a concept of social construction in

relation to deviant behaviour. Deviance is identified; both by the state and by the deviant's peers. Griffin (2005) then cites Cohen (1979) who argues that, similar to prisons, community corrections are not evaluated in relation to their success, but rather:

> "Social control is an enterprise, which largely justifies itself. 'Success' is not the object of the exercise." (Cohen, 1979: 609)

The principles of community reformation may also be found in prison reformation and the discipline is dispersed beyond the walls of prison right into the community. According to Griffin (2005) "community corrections" can be interpreted as the apparatus of social control that are more subtly and deeply into society. Accordingly, policies of diversion, decriminalisation and decarceration should be considered with the same wariness, despite the appearance of benevolence.

It is clear then that proportionality must be a key component of any restorative justice programme in two ways. Firstly, the seriousness of the offence should be considered vis a vis the proportion of Garda and social welfare resources required to conduct a Restorative Justice Conference. Restorative justice is resource intensive – in his analysis of the restorative events which occurred in Ireland in 2002, O'Dwyer found that the evaluated cases took an average of 11.8 hours between preparation and the running of a restorative event, with a range of one to 51 hours and further resources required at the follow up stages.

Secondly, proportionality must be considered in respect of possible over-intrusion of the offender's right to privacy relative to the seriousness of his offence, and the impact on the right to privacy of his family who has committed no offence. This is especially the case where family members are required to attend restorative conferences or events and/or where family members give undertakings in respect of their behaviour and the behaviour of the offender. Infringements on due process and

human rights may result from poor guidance in the form and application of restorative justice events.

The risks inherent in the use of restorative justice as an alternative to a court based response to crime include creating links between reparation projects and deviance that do not account for the degree of the offence and an over-intrusion into the personal privacy of the offender and the privacy of his family. The importance of the design of socially appropriate restorative justice models cannot be overemphasised.

**Community, Desistance and Recidivism**

One of the core strengths of restorative justice is its diversion of offenders from formal penalties such as incarceration. Within restorative justice there is less emphasis on formal crime control and more on informal offender and victim participation combined with harm minimisation (Muncie, 2005:42). Advocates of restorative justice find their guide in traditional forms of dispute resolution in the informal customary practices of the Maori, Aboriginal and Native Americans and the more structured Brehon Law principles. As Foucault (1996) showed, prison systems reinforce criminality - they do not break it. Prisons create the perfect community for crime creation – they operate on a primary "them and us" basis between inmates and guards and the fundamental identifier of the inmates is their previous criminal conviction. It is a self-replicating institution.

However, restorative justice offers a unique opportunity to break this self-replication by dealing with the crime in a manner acceptable to the community and diverting offenders from prison by successful completion of the restorative justice contract. If we consider the role of restorative justice in desistance theory, we can see that indicators that reflect engagement with "normal" societal structures (such as work, marriage, family) tend to lead to desistance rather than recidivism among offenders studied.

Desistance is the accepted term by criminologists for ceasing to commit criminal acts. Most offenders, after all, eventually stop offending. Yet there is relatively little theoretical conceptualization about crime cessation, the various reasons for desistance, and the mechanisms underlying the desistance process (Laub and Sampson, 2001). Although desistance is a major component of the criminal career model (Blumstein et al. 1986), it is the ''least studied process'' (Loeber and LeBlanc, 1990) compared with research on onset, persistence, and escalation in criminal offending. As Maruna noted,

> ''Desistance from crime is an unusual dependent variable for criminologists because it is not an event that happens, but rather it is the sustained *absence* of a certain type of event (in this case, crime)''
> (2001, p. 17).

Desistance is characterized by lacking – not just in terms of its empirical meaning but by also by a lack of a conceptual framework. It is also too easily explained by aging. It is well known that crime declines with age in the aggregate population (Gottfredson and Hirschi 1990). The decline of recidivism with age led Hoffman and Beck to argue for the existence of an age-related ''burnout'' phenomenon (1984, p. 621). These authors found that rates of recidivism decline with increasing age and that this relationship sustains, controlling other factors linked to recidivism such as prior criminal record.

However there are a variety of competing explanatory frameworks for desistance – increasing social stability, geography, education and skill training and spontaneous desistance. Trasler (1979) examined the idea of ''spontaneous desistance'' from crime. For Trasler, desistance stems from a response to changes in the contingencies of reinforcement. In other words, situational changes led to desistance. These adult reinforcers included a job, an adequate income, a home, a wife, children, and adult friends (Trasler 1979). In an effort to assess the effect of several transitional life events on desistance from crime, Rand examined data for 106 male offenders from the

follow-up study of the 1945 birth cohort in Philadelphia. Rand (1987) found no effect on desistance for fatherhood, serving in the military, vocational training, or going to college. Moreover, other transitional life events (e.g., cohabitation) were positively related to crime. Marriage, completing high school, and receiving vocational training in the military were related to reduced criminal involvement, but the results varied considerably by offender characteristics as well as crime-related characteristics (in Laub and Sampson, 2001)

The truth may lie in the middle – desistance may stem from an inter-dependent network of age, social engagement and spontaneous desistance. What we do know is that there are no links between time spent in prison and desistance, nor social exclusion and desistance. Restorative justice offers a unique, community-based route to the identifiers commonly associated *with* desistance and *against* recidivism.

**Designing a Restorative Justice Model for Ireland**

Restorative justice is not a forum for ascribing guilt or innocence. It applies where the offender has admitted the criminal act or has been found guilty by a court. The aim is largely to determine a course of action that will form the basis of the court's sentence. It does not replace the court as an instrument of judgment. The plan could include an apology, financial compensation and service to the victim or community; it could include taking part in a programme to address offending behaviour or related social problems (Lockhart, 2000: 7). It may even include elements of state punitive sanctions such as a probation order or custody as part of the agreement.

In his paper on the Garda Restorative Justice Programme, Kieran O'Dwyer asserts that the structure of the restorative process is important. O'Dwyer believes it necessary to

> "provide time and space for people to speak, absorb what is being said
> and respond. The process cannot be formula driven if it is to have
> maximum impact. Some JLO's initially relied on written notes at the

introductory stage but this is best avoided: it is more important to get the overall atmosphere right than avoid minor deviations from scripted dialogue".

However, while restorative justice forums in Ireland are loosely structured to respond to individual case circumstances and the facilitation of more natural, comfortable sharing of experiences, such looseness may operate as a critical weakness in the RJ process more generally. It leads to variances of what constitutes a "restorative event" dependent on the personality of the facilitator and local experience of "they way we were told/always did it". Such an approach may be useful for family conferences but where there is a punitive element, the alternative to which may be the incarceration of the individual or the imposition of some other libertarian penalty the requirement for institutional consistency in the restorative justice process is compelling. Heavily prescribed codes of conduct would facilitate consistency in the restorative process but might, as O'Dwyer suggests, undermine the subjective, community element of restorative justice as a response to local crime.

Questions regarding who designs the restorative justice model and how it is designed are as important as the design itself. If it is a model of community repair, its legitimacy and success depends on community participation in its design. As a model of criminal punitive sanction, the state must have a role in designing sanctions and processes which are consistent with international human rights standards and which are implicitly underwritten by the state as the ultimate purveyor of legitimate force.

Simply importing criminal justice models is not appropriate. The government elected on zero-tolerance policies (which were fashionable in the United States at the time) quickly abandoned this conservative approach in response to libertarian concerns. In designing a restorative justice programme for Ireland, guidance should of course be obtained from the experience of other modern, democratic jurisdictions. However, the cultural context caveat to systems that rely on community engagement and acceptance

is a measure of legitimacy and success. Irish communities must be consulted and involved on what should constitute sufficient reparation for offending behaviour, how that should vary depending on the seriousness of the offence and what the process of reparation should be.

**Conclusion**

This paper has examined socio-legal perceptions of restorative justice as a tool for repairing communities affected by offending, particularly juvenile offending. It identified key definition facets of restorative justice as including Community and Reparation. It has highlighted some of the dangers of broadly applying community correction programmes, for individuals, societal development and generic liberty. It has also addressed the importance of proportional responses that protect the privacy of the offender and state resources in managing restorative events and considered the role of restorative justice in the context of desistance theory. Throughout this paper the focus has been on restorative justice as a community event, dependent on community acceptance and endorsement for its legitimisation as an agent of sanction of criminal acts.

Restorative justice, as a form of sanction on an admitted or convicted offender, should be designed by the state as the controller of force and the protector of the human rights of its citizens in conjunction with community representations as to what will constitute an acceptable reparation to repair the damage to the community. The question posed by this paper is *what will Irish communities deem acceptable and sufficient reparation?* Restorative justice holds the potential to restore the "deliberative control of justice by citizens" and to restore "harmony based on a feeling that justice has been done" (Braithwaite, 2003:57). There is a wide gulf between "being compensated" and "being told you are compensated". Contributing to research, design and implementation are the first steps towards the enduring, legitimacy of restorative justice as a community repair system in a criminal justice code.

# ACJRD PROPOSALS - Applying theories explored in -
### *Restorative Justice and Communitarianism: Repairing Communities from Within[1]*

- ❑ Enshrine <u>RJ Principles</u>
    - RJ should be 'Doing With' not 'Doing To'
    - Universally applicable to <u>every</u> offence
    - Facilitate an evolving Criminal Justice System – diverting from a punitive system
- ❑ Address issues of <u>reconciliation</u> – ongoing payback to the community
- ❑ Provide <u>guidelines</u> for the 'Gatekeepers' – Judges/Gardai
    - How to choose appropriate offences for RJ approach
    - How to determine the tariffs
- ❑ <u>Have victim awareness campaigns</u> for offenders
    - Real people
    - Role play
    - Victim support
- ❑ Query <u>Consent</u> to offender/victim involvement in the Restorative Process
    - Is consent necessary?
    - What are the dimensions of consent?
- ❑ Create <u>a victim impact template</u> – a structure for the victim's voice
- ❑ Gain <u>Community Commitment</u>
    - Shift to Community ID not 'outsiders'
    - Local involvement leading to empowerment
    - Put management of the process in place
    - Community must have a 'perception of their authority'
    - Facilitate (where appropriate) discussion with victim, offender & community
    - Leave room for 'Common Sense' – application of 'consequences for actions' theories
    - Avoid labelling – offender identification with community not 'criminals'
- ❑ <u>Mediators</u> required
    - Not professionals e.g. lawyers – although due process is necessary…
        - Less bureaucratic systems
        - Would speed up the process
- ❑ Emphasis on <u>avoidance of re-offending</u> – a preventative focus – not just custodial focus; Link RJ with Desistence Theory
- ❑ <u>Recidivism</u>  - what is the quality of re-offending within RJ context?
- ❑ <u>Cost Benefit Analysis</u> – there should be monitored supervision – measuring outcomes
- ❑ <u>Research</u> required
    - Include randomised 'control' –a placebo in experiment i.e. avoids temptation to select cases which are 'guaranteed' to respond positively to an RJ approach creating rigorous research standards to aid policy makers.

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[1] Researched on behalf of the Council of ACJRD Ltd. by Jennifer Carroll, Solicitor, IRCHSS Doctoral Scholar, UCD,

**Bibliography**

Carroll and Meehan (2007) The Children Court: A National Study, Association for Criminal Justice Research and Development: Dublin

Criminal Justice Review Group (2000). Review of the Criminal Justice System in Northern Ireland. Norwich: Her Majesty's Stationery Office.

Dignan, J. and Lowey, K. (2000). Restorative Justice Options for Northern Ireland: A Comparative Review. Research Report Number 10, Norwich: Her Majesty's Stationery Office.

Farrington, David P., and Donald J. West. 1995. ''Effects of Marriage, Separation, and Children on Offending by Adult Males.'' In *Current Perspectives on Aging and the Life Cycle,* vol. 4, edited by Zena Blau and John Hagan. Greenwich, Conn.: JAI Press.

Griffin, D. (2005) "Restorative Justice, Diversion and Social Control: Potential Problems" 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 September 13th 2005

Laub, J and Samson, R (2001) "Understanding Desistance from Crime"

Lockhart, Bill (2000) "Restorative Justice: Diverging Developments?" presented at the Restorative Justice Consortium, London, 19th October 2000

Lassman, P. and Speirs, R. (1994) *Weber: Political Writings*, ed./trans., Cambridge: Cambridge University Press.

Maruna, Shadd. 1997. ''Going Straight: Desistance from Crime and Life Narratives of Reform.'' In *The Narrative Study of Lives,* vol. 5, edited by Amia Lieblich and Ruthellen Josselson. Thousand Oaks, Calif.: Sage.

Minister of Justice, Equality and Law Reform (1999). Children Bill, 1999. Dublin: The Stationery Office.

Muncie, J. (2005) "The globalisation of crime control – the case of youth and juvenile justice:neo-liberalism, policy convergence and international conventions", Theoretical Criminology 2005; 9:35

O'Dea, P. (2000). Family Conferences in the Children Bill, 1999. In: The Children Bill, 1999. Papers from a seminar organised by the Children's Legal Centre. Dublin: The Children's Legal Centre.

O'Dwyer, K "Garda Restorative Justice Programme: Highlights and Insights", presented at DIT, Dublin.

O'Sullivan, E. (2000). The Children Bill, 1999: Responsibility and Regulation. In: The Children Bill, 1999. Papers from a seminar organised by the Children's Legal Centre. Dublin: The Children's Legal Centre.

Raferty, G. (2000). The Children Bill, 1999: Opportunities and Challenges for Practice. In: The Children Bill, 1999. Papers from a seminar organised by the Children's Legal Centre. Dublin: The Children's Legal Centre.

The Oxford Companion to Politics of the World (2001) Oxford University Press: UK

Rand, Alicia. 1987. ''Transitional Life Events and Desistance from Delinquency and Crime.'' In *From Boy to Man, from Delinquency to Crime,* edited by Marvin E. Wolfgang, Terence P. Thornberry, and Robert M. Figlio. Chicago: University of Chicago Press.