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Ready to Take the High Road? The Case for Importing Scotland's Juvenile Justice System

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READY TO TAKE THE HIGH ROAD? THE CASE FOR IMPORTING SCOTLAND'S JUVENILE JUSTICE SYSTEM

William S. Geimer*

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I. THE PROMISE OF SCOTLAND

The children of this country could benefit greatly from a version of the children's hearing system employed in Scotland. There are serious obstacles to such an experiment, not the least of which is the question of whether adults here are philosophically and politically equipped to administer it. Nevertheless, the strengths of the Scottish system so closely address the weaknesses of our own that the possibility of adapting it to our use is worth exploring.

This article includes an explanation of the failure of the two principal ap-

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proaches that have dominated the operation of United States juvenile courts to date—one “protective” and one “adversarial.” These sections are inserted for two important reasons beyond mere historical relevance. First, because there are legitimate civil liberties concerns about the Scottish system, it is vital to understand for comparative purposes the illusory nature of civil liberties for children in our current system. Second, because certain protectionist assumptions about the treatment of children have influenced both the American approaches *and* the Scottish system, it is important to identify those assumptions. Against this background of our experience, the strengths and weaknesses of the children’s hearing system in Scotland will be examined. Finally, a proposal is advanced for a pilot hearing system in this country.

During June 1984, I was privileged to observe the Scottish system and to interview representatives of its major components. For that experience, I am indebted to many.¹ My first-hand look revealed to an even greater degree that which is probably true of any system—that the people who operate the system are as important as its mechanisms. The people administering the Scottish system demonstrated an almost innate understanding of welfare principles. With few exceptions, “best interests of the child” is a meaningful guidepost in Scotland, not an amorphous pretext for punitive intervention. Broad grants of authority, couched in language clearly open to abuse, are used in a nonabusive way. Whether enough people with equivalent understanding can be found in this country, thereby lessening the need for a great deal of due process machinery, is a question which gives one great pause.

The three major advantages of the Scottish system are initially itemized and discussed below.

(1) *Separation of Adjudication and Disposition:* In cases referred to the hearing system, the question of whether the child engaged in conduct that legally invokes the intervention of the state is decided either by the child’s admission or in adult court by the regular criminal law process. In court, of course, the same due process protections afforded adults are available to the child. If “guilt” is admitted or established, however, what happens to the child is determined by volunteer citizens panels exercising actual rather than

1. In addition to the many whose comments are cited herein by reference to interviews with them, I am particularly grateful to Professor Sanford J. Fox, Boston College School of Law, and Helen Millar, University of Glasgow. Professor Fox is a leading authority in juvenile law, through whose good offices I was able to obtain access to the system in Scotland. Mrs. Millar is Director of Training for children’s panel members in Strathclyde, the largest region in Scotland. She assembled the key people with whom I needed to speak and took me to the places I needed to observe.

advisory authority.² These panels are physically and philosophically separated from the adult criminal process.

(2) *Systematic Review and Flexibility*: One of the major flaws in our system is the absence of systematic review of dispositions. Once the next case is called in juvenile court, the judge who has decided the fate of a child is likely never to hear of him or her again unless the conditions of the disposition are later alleged to have been broken or until the child comes back on a new charge. In Scotland, citizens panels are required to review every disposition at twelve-month intervals. There are often used provisions for those in the system, including the children, to secure more frequent reviews.³ In addition to the latitude accorded to those who have been supervising the child, the process gives citizens panels the duty and opportunity to make adjustments, thereby giving at least some meaning to the goal of "individualized justice."

(3) *Development of a Sense of Community*: Granting authority and responsibility to citizens in the disposition of juvenile cases offers at least a chance for the development of a sense of community. That is a great advance over our juvenile justice that is presently handled solely by professionals. Not even the families involved, much less their neighbors, become very involved in the process. The Scottish experience shows, however, that expectations must be tempered by recognition of major problems in recruiting and training panel members. It is no small obstacle to develop significant representation on panels from the social and economic class of those upon whom the panels' decisions usually fall. Additionally, training those who volunteer for panels to be sensitive to the situations faced by the families of those who appear before them is not an easy task.⁴

There are notable shortcomings in the Scottish system, and new problems would be encountered here simply due to organizational and structural differences in our respective governments and courts. Yet the positive aspects of the Scottish system would commend it to our examination even if our own house were in some semblance of order. Sadly, it is not. The two sections following illustrate the current unhealthy state of American juvenile justice. It is the degree of our failure that makes consideration of yet another change

2. For discussion of the intake and processing of cases referred to children's hearing panels, see *infra* text accompanying notes 54-68.

3. The Social Work (Scotland) Acts, 1968, ch. 49 §§ 2-4. In the Strathclyde and Lothian Regions, the policy is that review hearing panels shall, whenever possible, include one or more members who heard the case originally. Interview with Winnie Sherry, Regional Chair, Strathclyde Children's Hearing Panel, in Glasgow, Scotland (June 12, 1984).

4. For discussion of the recruitment and training of children's panel members, see *infra* text accompanying notes 88-96.

advisable even though there has been no scarcity of reform or abolition proposals in the short unhappy life of the separate juvenile court system to date.⁵

II. FAILURE OF THE "PROTECTIVE" SYSTEM

The juvenile court we are to compare with the Scottish system emerged from a nineteenth century child saving movement. The movement built upon an earlier notion that children did not have participatory rights in society, only the right to be protected.⁶ It succeeded in formalizing a separate focus on children in part because industrialization, urbanization, and immigration had weakened the normal mechanisms for social control—family, church, community. These middle class child savers, under the auspices of religious and civic organizations, set up institutions to control and reduce youthful crime, poverty, idleness, and other conduct that they deemed to be undesirable.⁷

The means employed to protect and control young people had identifiable characteristics that suggest underlying assumptions about juveniles under the law. In spite of the widespread belief that major changes occurred in the 1960's and 1970's, these factors continue to influence our system.

Surviving protectionist characteristics and assumptions include:

5. The existence of a separate juvenile court system in this country is commonly marked from the Illinois Juvenile Court Act of 1899. There were significant precursive developments beginning at least with the New York House of Refuge in 1825 and several statutory innovations in Massachusetts during the 1860's. For a detailed history of the evolution of a separate juvenile system and the forces that shaped it, see Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). Since they came into existence, however, the separate juvenile courts have not been permitted to evolve. They have been subjected to frequent tinkering as well as to numerous and conflicting calls for reform and abolition. See, e.g., Guggenheim, *A Call To Abolish the Juvenile Justice System*, II Children's Rights Report No. 9 (June 1978) (a catalog of failures supporting the conclusion that the system is essentially a device to circumvent basic rights); E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975) (courts not tough enough on young offenders); Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, 25 JUV. JUST. 2 (1974).

6. See E. BOULDING, *CHILDREN'S RIGHTS AND THE WHEEL OF LIFE* 1-11 (1979). It is clear that allocation by age of the right to participate rather than only to be protected often is arbitrary, and does not correspond with the actual capabilities and limitations of young people. *Id.* at 13-18.

Protectionism itself is of relatively recent origin. Prior to the seventeenth century, children occupied a place in a unitary social, legal, and economic system. Life was short and difficult for all and no special distinctions or limitations existed for children. L. EMPEY, *AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION* 7-8, 26-46 (1978).

7. See H. SANDHU & C. HEASLEY, *IMPROVING JUVENILE JUSTICE* 20-28 (1981). In-depth historical analyses of the child saving movement may be found in A. PLATT, *THE CHILD SAVERS* (1969) and Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

1. *Benevolent Rhetoric.* That which is done *to* young people, if acknowledged at all, must be described as if it were done *for* them.

2. *Belief in Behavior Prediction.* Certain characteristics and conduct, relatively nonthreatening at present, are accurate indicators of the probability of serious future misconduct if intervention does not occur.

3. *Crime, Poverty, and Immorality Are the Same.* The continued viability of such an assumption permits the benefits/burdens of intervention to fall disproportionately on members of lower economic and social classes whether or not this result is adopted explicitly as a matter of policy.⁸

4. *Intervention Based on Condition, Not Conduct.* Unlike adults, singled out by the criminal justice system for what they *do*, young people are selected for intervention because of who they *are*.⁹

5. *Punitive Reality.* Those who deviate appreciably from the behavioral norms of those in power should suffer. Whether they suffer for their own good, or for the gratification of those in power, or for some ostensibly utilitarian purpose, is marginally relevant but not of major importance.

However it came to be that the separate juvenile court system, begun in Illinois in 1899, made children the test subjects for this bizarre set of propositions, the results were not good from the outset.

The system *as designed* contained the potential for significant abuses. No record of proceedings was required, and no opportunity existed to correct error through appellate review.¹⁰ The broad definitions of "delinquency" permitted criminalization of noncriminal behavior. This gave adults the

8. See L. EMPEY, *supra* note 6, at 76-85; A. PLATT, *supra* note 7, at 36-45; see also B. FLICKER, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 38-39 (2d ed. 1982); Fox, *supra* note 7, at 1193. Religion as well as poverty was used to identify the target class of children. Catholic immigrants, for example, were subjected to religious training conducted by middle class Protestant reformers. Fox, *supra* note 7, at 1191-95; Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 116-17 (1909).

9. See A. PLATT, *supra* note 7, at 137-45; Mack, *supra* note 8, at 104-07; Mennel, *Origin of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME AND DELINQ. 68, 71-77 (1972). Previously, even though young people appeared in adult criminal courts to answer allegations based on conduct, those courts formally and informally acknowledged youth as a mitigating factor. See, e.g., Mennel, *supra*, at 70 (juries' reluctance to sentence children); *Angelo v. Illinois*, 96 Ill. 209 (1880) (greater burden on prosecution to overcome presumption of innocence); F. MCARTHY & J. CARR, JUVENILE LAW AND ITS PROCESSES 11-72 (1980) (apprenticeship as alternative to other penal measures).

10. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 16; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 799 (1966).

power to control children's behavior by such excessive means as institutionalization for nonviolent, noncriminal "offenses" such as truancy.¹¹ Moreover, the period of incarceration was indeterminate, limited only by the child's attainment of majority. The system, therefore, invited arbitrary decisions and disproportionate punishments.

The punitive reality of the protective system was its most disturbing characteristic. By the time of the famous decision in *In re Gault*, horror stories abounded.¹² The underlying assumptions, overblown rhetoric, and punitive nature of the protective system were ripe for repudiation. Unfortunately, that repudiation did not occur in 1967 and has not yet occurred.

III. FAILURE OF THE QUASI-ADVERSARY SYSTEM

A. *Gault—Less than Landmark*

In 1967, the United States Supreme Court formally acknowledged many of the failures of the protective system in practice. *In re Gault*¹³ is widely viewed as a landmark decision. That view is suspect. Packaged in a cloud of overblown rhetoric,¹⁴ a number of limited due process guarantees for

11. Handler, *supra* note 10, at 14-15; H. SANDHU & C. HEASLEY, *supra* note 7, at 30-33.

12. Lawyers, money for legal assistance, and appellate rights were in particularly short supply for juveniles before 1967. Reported cases may properly be viewed as the tip of the proverbial iceberg. See, e.g., *Taylor v. Means*, 77 S.E. 373 (Ga. 1913) (ten-year-old child sent to industrial farm for a commitment of up to 11 years for the theft of a five-cent soft drink); *People v. Silverstein*, 121 Cal. App. 2d 140, 262 P.2d 656 (Cal. Ct. App. 1953) (juvenile serves 15 months in reformatory for burglary, then tried in adult court and sentenced to prison for same crime). In another case, a child was institutionalized solely on the testimony of his probation officer that he had thrown rocks at zoo animals and smoked cigarettes. Ellrod & Melaney, *Juvenile Justice: Treatment or Travesty?*, 11 U. PITT. L. REV. 277, 281-82 (1950). See also Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

13. 387 U.S. 1 (1967).

14. Gerald Gault had been committed to an industrial school upon a finding by the juvenile court, over his denial, that he had participated in a lewd phone call. *In re Gault*, 99 Ariz. 181, 407 P.2d 760 (1965). The United States Supreme Court called for a candid appraisal of the claimed benefits of the separate juvenile process, *In re Gault*, 387 U.S. 1, 21 (1967), and described the shortcomings it found in terms so forceful as to indicate that nothing but importation of adult constitutional guarantees could right the wrongs: "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28. "So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide." *Id.* at 29-30. *Gault's* promising rhetoric persisted in later cases. See, e.g., *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358, 361-66 (1970); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). See also *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."). *Bellotti* is one of the rare post-*Gault* decisions with substance as well as rhetoric. It struck down parental veto power over a minor's decision to have an abortion. *Id.* at 647-48.

juveniles can be found.¹⁵ Of at least equal significance, however, was the failure of the Court to abandon the basic assumptions of the child savers.¹⁶ Thus *Gault*'s promise of fairer treatment for young people was at most a half-empty one.¹⁷

Since *Gault*, some further due process gestures have been made and the Court has made further piecemeal assignments of some adult rights. The

15. They include:

a. The right to timely and adequate notice of the charges. *In re Gault*, 387 U.S. 1, 31-34 (1967).

b. The right to confrontation and cross-examination. *Id.* at 56-57. The recipient of the allegedly lewd call was not present at *Gault*'s hearing and the case against Gerald was made through the hearsay testimony of the arresting officer. *Id.* at 43. In mandating that notice and opportunity to be heard be made meaningful by confrontation, the Court, as it recognized, was doing no more where liberty was at stake than it had long ago done when only property was at risk. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

c. The privilege against self-incrimination. *In re Gault*, 387 U.S. at 50-51. The only issue presented and decided on self-incrimination dealt with compelling testimony at trial. The more significant question of pretrial custodial interrogation, decided for adults the previous year in *Miranda v. Arizona*, 384 U.S. 436 (1966), was left open. Nevertheless, perhaps because of the rhetoric of *Gault*, courts in ensuing years usually assumed *Miranda* and other pretrial guarantees to be applicable in juvenile cases. *Miranda* applicability was implicitly recognized in a 1979 case. That decision, however, went against the child, and is illustrative of the double standard applied by the Supreme Court even to recognized guarantees. A guarantee is found technically applicable, then the very matters which distinguish juveniles from adults are seized upon to deny the juveniles' claims in specific cases. *See Fare v. Michael C.*, 442 U.S. 707 (1979).

d. The right to counsel. *In re Gault*, 387 U.S. at 34-42. This was the most significant of the guarantees because of its potential for further expansion of due process rights for juveniles. Subsequent developments, however, have muted the impact of attorneys on delinquency hearings, *see infra* notes 20-31 and accompanying text, discouraged vigorous advocacy, *see, e.g., State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401, 413 (W. Va. 1980) (counsel cited for contempt because of persistent efforts to secure less restrictive disposition for juvenile clients), and rendered the right to counsel an equally half-empty part of the promise of *Gault*. *See generally, Skoler, The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558, 574-81 (1968); F. BAILEY & H. ROTHBLATT, *HANDLING JUVENILE DELINQUENCY CASES* (1982). The demonstrated limitations on effectiveness of counsel are part of the reason I am willing to accept the Scottish practice of doing without them at the disposition stage.

This short list of guarantees was further limited: "[w]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process." *In re Gault*, 387 U.S. at 13.

16. The *Gault* court did not depart from the view that delinquency consists of conditions to be treated rather than conduct to be proven and punished, it merely bemoaned the disparity between the system's benevolent purpose and its punitive reality. The guarantees extended were prescribed only after the court was satisfied that they would not unduly affect the flexibility and informality of the separate system. *In re Gault*, 387 U.S. 1, 21-27 (1967).

17. Or half full, depending on the extent to which one shares the abundant optimism that has been a hallmark of the juvenile court experiment. *See, e.g., Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

embrace of protectionism, however, has continued.¹⁸ The Court has apparently failed to discern the flaw in the quasi-adversary system it created in 1967. It has yet to see that the engrafting of "some of the elements of the adversary system"¹⁹ to the protectionist model is like installing power steering and cruise control on a tricycle. It does nothing for the vehicle but it gives the sales personnel something to talk about.

B. Turning from the Plow: McKeiver v. Pennsylvania, Schall v. Martin and New Jersey v. T.L.O.

Scarcely four years after *Gault*, the Supreme Court turned its hand from the plow before it had really begun to address the evils of the adjudicatory stage of the protectionist model. In *McKeiver v. Pennsylvania*, the sixth amendment right to trial by jury was found not to be a part of the juvenile's fourteenth amendment due process protections.²⁰ The importance of this decision to a system that was at the time already in an ambivalent state is difficult to overstate. That Professor Fox, a giant in the field of juvenile justice, should term it an "unsignificant exception" to the transition to an adult criminal model is amazing.²¹

The stated rationale of *McKeiver* is almost as surprising. The first of a series of questionable propositions was the assertion that juries historically had not been considered essential to fair and accurate fact finding.²² This is an assertion made all the more interesting when one considers that two years earlier the Court had made the jury trial guarantee binding on state criminal

18. The reasonable doubt standard of proof was declared applicable to juveniles. *In re Winship*, 397 U.S. 358, 364 (1970). The protection against double jeopardy was extended to prevent the transfer of juveniles to adult court on charges which had formed the basis of a prior adjudication of delinquency. *Breed v. Jones*, 421 U.S. 519 (1975). In each of these cases, however, a determination was made that the protections and model would not be threatened. *Winship*, 397 U.S. at 366; *Breed*, 421 U.S. at 540. There was also express endorsement of the goal that "to the extent fundamental fairness permits," adjudicatory hearings should be "informal and nonadversary." *Breed*, 421 U.S. at 540.

19. *In re Gault*, 387 U.S. at 27.

20. 403 U.S. 528 (1971). The *Gault*, *Winship*, and *Breed* decisions facilitated this result because the Court used a "fundamental fairness" model for determining the content of the fourteenth amendment due process clause, as opposed to the "incorporation" doctrine championed by Justice Black. In adult cases, while "fundamental fairness" has remained a residual doctrine, the notion that the fourteenth amendment incorporates all of the basic guarantees of the Bill of Rights has gradually prevailed, after spirited debate between Justices Harlan and Black. *Cf. In re Winship*, 397 U.S. 358, 377-86 (1970) (Black, J., dissenting); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel incorporated); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial incorporated); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation incorporated).

21. F. MARTIN, S. FOX & K. MURRAY, CHILDREN OUT OF COURT 289 (1981) [hereinafter cited as CHILDREN OUT OF COURT].

22. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

trials, characterizing it as a "fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."²³

Second, the *McKeiver* Court concluded that jury trials would not remedy the shortcomings of the juvenile justice system.²⁴ This is another curious conclusion for a court which had described the right as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."²⁵

The specifics of the cases before the Court in *McKeiver* also suggest the vulnerability of juveniles when a judge who is oriented toward "helping" them is the fact finder. Joseph McKeiver was convicted based on his participation, along with twenty or thirty other youths, in pursuing three other teenagers and taking twenty-five cents from them, although the testimony of two of the victims against him was described by the Pennsylvania Supreme Court as weak and inconsistent.²⁶ Forty-five North Carolina cases, consolidated with McKeiver's, involved black youths and adults convicted of impeding traffic during a civil rights march.²⁷

The third argument asserted to justify the result in *McKeiver* is at once the weakest and the most revealing. The Court considered that the extension of the right to jury trial would be the ultimate admission of the failure of the protectionist model and it hesitated to hamper continued "experimentation" by the states.²⁸ The Court's decision was significant because it was the first indication that in the ensuing years it would not pursue the adult due process course. Far from being an "unsignificant exception,"²⁹ *McKeiver* would prove to be a more important case than *Gault*.

The import of denying a fundamental Bill of Rights guarantee lies in more than a symbolic recommitment to child saving philosophy. Given the holes in *Gault*, the practical implications of *McKeiver* are far reaching. A major shortcoming of *Gault* was the lack of an effective remedy against the untrained judge. Such judges hearing the "same story" time and time again,

23. *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968). Earlier, the Court had described the jury as "the tribunal which the Constitution regards as the most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36 (1965).

24. *McKeiver v. Pennsylvania*, 403 U.S. at 547.

25. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

26. *McKeiver v. Pennsylvania*, 403 U.S. at 536.

27. *Id.* at 536-37.

28. *Id.* at 547. Not surprisingly, few states guarantee juries in juvenile proceedings, although some do and others use juries in an advisory capacity. S. DAVIS, RIGHTS OF JUVENILES § 5.3 (2d ed. 1985).

29. See *supra* note 21.

are privy to pretrial knowledge of the case from a social worker, court professional, or by personal involvement in the pretrial detention process, and are often further influenced by knowledge of previous adjudications involving the same child.³⁰ Denying juries under these circumstances seriously undermines the effectiveness of the attorney injected into the process by the *Gault* decision.³¹

McKeiver also took the community out of a process in which it belongs. It is the premise of this article that the community should be given authority at the dispositional stage, as it is in Scotland. But the presence of community representatives for adjudication would also be beneficial in curbing the propensity of a protective system to intervene unnecessarily in the lives of young people. As in the adult system, fewer minor charges might be prosecuted if a contested trial before a jury were in the offing.

After *McKeiver*, there were indications that the Court's view of juveniles as second class due process citizens would prevail.³² Two recent decisions of the Court have now made that clear. In *New Jersey v. T.L.O.*,³³ the Court found a high school student to have no privacy right in her own purse if the principal had "reasonable grounds for suspecting" that she had violated any school rule.³⁴ The Court found the search of the student's purse to be reasonable under a special juvenile fourth amendment standard, even though the parties to the litigation assumed that the search was unreasonable and merely had wanted the Court to tell them whether the exclusionary rule was applicable in the juvenile court prosecution of T.L.O. which followed the search.³⁵ The Court did answer, after a fashion. In effect the Supreme Court held that if all such school searches are reasonable, there is no need for an exclusionary rule. Where this or other constitutional guarantees

30. See P. PRESCOTT, *THE CHILD SAVERS* 12-46 (1981).

31. Under such circumstances, the application of the reasonable doubt standard to juvenile adjudications mandated by *Winship* is well nigh useless. Will a judge who wants to help the juvenile admit to being convinced of guilt by a preponderance of evidence, but not convinced beyond a reasonable doubt? Counsel in *Winship* strained to put these words in the mouth of the trial judge. *In re Winship*, 397 U.S. 358, 360 n.2 (1970). Had the judge seen what was coming, I have little doubt there would have been no *In re Winship*. Ironically, *Winship* has been quite useful to adult criminal defendants. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

32. See, e.g., *David Levell W. v. California*, 449 U.S. 1043 (1980) (Marshall, J., dissenting from denial of certiorari) (the uncontroverted facts revealed the confession to be the product of an unlawful arrest and therefore inadmissible in adult trials. See *Dunaway v. New York*, 442 U.S. 200 (1979)).

33. 105 S. Ct. 733 (1985).

34. *Id.* at 743-44. T.L.O. had her purse searched for evidence that she had violated a school rule against smoking in the lavatory. The court assumed that her possession of cigarettes would have some relevance to that question. *Id.* at 745-46.

35. *Id.* at 759-60 (Stevens, J., dissenting in part).

might be at issue, it is difficult to imagine a lay citizen panel having any less regard for the rights of children.

The second decision further illustrates what should by now be plain—constitutional protections for juveniles who are experiencing or are threatened with deprivation of liberty are available in little more than name only. *Schall v. Martin*³⁶ upheld a New York preventive detention scheme under which juveniles may be incarcerated, without a finding of probable cause, upon a demonstration that “there is a serious risk that [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime.”³⁷

The Court's lack of concern for the demonstrated unreliability of predicting future behavior,³⁸ and its similar indifference to the statute's lack of specificity regarding anticipatory offenses justifying detention,³⁹ are deplorable. The greater significance of the decision, however, lies in its rhetoric—an uncritical, patronizing embrace of the worst of child saving lore at the expense of due process:

[T]he Constitution does not mandate elimination of all differences in the treatment of juveniles. The State has “a *parens patriae* interest in preserving and promoting the welfare of the child,” which makes a juvenile proceeding fundamentally different from an adult criminal trial.⁴⁰

. . . [J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may in appropriate circumstances be subordinated to the state's “*parens patriae* interest in preserving and promoting the welfare of the child.”

. . . Society has a legitimate interest in protecting a juvenile

36. 104 S. Ct. 2403 (1984).

37. *Id.* at 2405, 2419. Detention without a judicial determination of probable cause is not yet permitted in adult cases. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

38. *Schall v. Martin*, 104 S. Ct. 2403, 2417-18 (1984). However divorced from reality the Court's embrace of behavior prediction may be, it is the least surprising aspect of *Schall*. The Court is permitting *executions* based on predictions about future dangerousness in the face of compelling evidence that such predictions are wrong two out of three times. See *Barefoot v. Estelle*, 463 U.S. 880, 893-906 (1983); see also *id.* at 920-21 (Blackmun, J., dissenting). See also Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 763-65 (1985).

39. *Schall v. Martin*, 104 S. Ct. at 2419, 2426 (Marshall, J., dissenting).

40. *Id.* at 2409 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.⁴¹

The Court also quoted with approval sweeping conclusions about the increased likelihood of criminal activity by released juveniles as compared to that of released adults. Quoting a New York case dealing with the same statute, it found that:

To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment and the absence of second-offender sentencing, there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult There is the element of gamesmanship and the excitement of "getting away" with something and the powerful inducement of peer pressures.⁴²

There is, of course, not a shred of evidence cited to support these generalizations beyond the paternalistic ramblings of the Court of Appeals of New York. Other authorities cited by the Court are equally devoid of evidence, including two of its own opinions.⁴³ Nevertheless, in the future we shall no doubt see *Schall* cited as authoritative on the propensities of the young.

In order to give fair consideration to yet another juvenile justice reform proposal of any type, much less to the children's hearings system in Scotland, it must be understood that the constitutional safeguards for juveniles facing loss of liberty in this country are illusory. Little of benefit to youthful offenders would be lost by changing the system. In fact, to the extent that the quasi-adversary system is perceived as the equivalent of adult due process, it aids the proponents of our current "get tough with juveniles" policy.⁴⁴

It readily will be seen that the Scottish system is also grounded in essentially protectionist assumptions and it is, to a degree, lacking in formal civil liberties safeguards. But as *Schall* demonstrates, United States juvenile jus-

41. *Id.* at 2410-11 (citations omitted).

42. *Id.* at 2411 n.15 (quoting *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 520-21, 350 N.E.2d 906, 909-10 (1976)).

43. *Schall v. Martin*, 104 S. Ct. at 2411 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) and *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

44. *See infra* notes 139-40 and accompanying text.

tice is not only protectionist, its underpinnings involve the very worst of child saving philosophy. In contrast, I hope to demonstrate in the remainder of this article that the system in Scotland is grounded in a much more enlightened protectionism.

IV. THE CHILDREN'S HEARING SYSTEM IN SCOTLAND

A. Purpose, Process, and Players

Compared with this country, the purpose of Scotland's hearings system is clearer and less encumbered with political baggage. Its bifurcated process solves at a stroke many of the due process problems heretofore described. Further, it involves the community in dispositions in a manner both humane and efficient. Even more than most systems, its effectiveness depends upon the skill, judgment and commitment of its principal players. There follows a description of these components of the Scottish system, with particular emphasis on matters relevant to an American adaptation.

1. Purpose

Unlike many juvenile codes in the United States, which commit the child's interest to a no-win balancing contest with public protection,⁴⁵ the purpose of the Scottish system is *preeminently* to serve the best interests of the *child*.⁴⁶ That purpose has been discernible from the outset. In 1961, the Secretary of State for Scotland appointed a committee to examine Scottish juvenile justice. From its work eventually came the Social Work (Scotland) Act of 1968, authorizing the hearings system described here to begin in

45. In every state, commission by juveniles of an act which would constitute a criminal offense if committed by an adult is conclusive evidence of the "condition" of delinquency. There is some variation in the age limits for those designated to be processed in the juvenile system, but this identification of adult crime and juvenile delinquency is a constant. Unlike most adult criminal codes, however, which are devoid of language about what the code is trying to accomplish, juvenile codes usually have purpose language. This legislative guidance to those administering the system formerly focused on the child, and decreed that he should be treated with the least restrictive alternatives available consistent with his welfare. See, e.g., GA. CODE ANN. § 15-11(1)-(3) (1971); MASS. GEN. LAWS ANN. ch. 19, § 53 (West 1906). Recent revisions, however, have left the child welfare language intact and simply added a command that the public be protected. See, e.g., FLA. STAT. ANN. § 39.001(2)(a)-(c) (West Supp. 1985); CAL. WELF. & INST. CODE § 202 (West 1984); Comment, *Effects of Recent Legislation on the California Juvenile Justice System*, 17 U.S.F.L. REV. 705 (1983). One state has clearly abandoned child welfare purpose language in favor of public safety and punishment. WASH. REV. CODE ANN. § 13.40.010(2) (West Supp. 1985). The relation of these developments to consideration of a hearings system in the United States is discussed in CHILDREN OUT OF COURT, *supra* note 21, at 286-96.

46. CHILDREN OUT OF COURT, *supra* note 21, at 19-24; Lockyer, *Justice and Welfare*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 176-90 (F. Martin & K. Murray eds. 1982).

1971.⁴⁷ That system has survived periods of adverse public reaction with its child-centered purpose pretty much intact.

Making the well-worn phrase "best interests of the child" useful as a guide is no small undertaking. As Professor Martin recognizes, the task of a panel member under such a statement of purpose is not to lose sight of a child's individuality.⁴⁸ While doing the everyday work, there is a natural pressure on panel members to generalize about theories of delinquency and to be concerned about the overall impact of the panel system. But after reviewing a number of delinquency theories that have influenced juvenile law experiments, Martin appears satisfied that the original Kilbrandon Committee recommendations remain consistent with current knowledge and that they recognize the futility of searching for a single theory to guide the system:

The Kilbrandon recommendations are rooted in a kind of liberal common sense. . . . In general, delinquency arises because for whatever reason parents have been unable or unwilling to ensure that their children develop a firm sense of social responsibility. The consequent need is for the "application of training measures appropriate to the child's needs."⁴⁹

Although the "liberal common sense" approach accepts only parts of some theories of delinquency as a guide to the child's best interest, it does reflect considerable acceptance of what is called labeling theory. The Scottish system operates on the assumption that delinquency is something most young people will grow out of and that a formal, accusatory, interventionist philosophy is harmful and counterproductive.⁵⁰ Consequently, a juvenile justice system should attempt to protect growth, rather than accuse and label.

The distinction between this "protecting growth" rationale and American protectionism may not be clear at first glance, particularly since so many sins

47. It is difficult to estimate the appropriate amount of background information to be included here. Relatively few are familiar with the system in Scotland, but those who are know its origins quite well. Full descriptions may be found in CHILDREN OUT OF COURT, *supra* note 21, at 1-18; Bruce, *Historical Background*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 3-12 (F. Martin & K. Murray eds. 1982). It should be noted that what the system is attempting to accomplish is communicated to the field level. The purpose of the hearings system as it developed from 1961 has been set out in nonlegal language and included in a basic document used by panel members. See SOCIAL WORK SERVICE GROUP, SCOTTISH EDUC. DEP'T, CHILDREN'S HEARINGS, NOTES ON PART III OF THE SOCIAL WORK (SCOTLAND) ACT 1968 at 8, 9 (rev. impression 1976) [hereinafter cited as CHILDREN'S HEARINGS].

48. Martin, *Theories of Delinquency*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 138 (F. Martin & K. Murray eds. 1982).

49. *Id.* at 150-51.

50. *Id.* at 147-50. See also E. LEMERT, SOCIAL PATHOLOGY 76 (1951), cited in L. EMPEY, *supra* note 6, at 345.

have been committed in the name of the best interests of the child. But the distinction is real. Perhaps the enlightened protectionism of Scotland may also be illustrated by noting what its "best interests" standard is *not*:

(1) It is not a pro-intervention standard. There is no promotion of a medical model to identify and treat "predelinquency" before it gets worse.⁵¹

(2) It is not a standard which is principally concerned with recidivism or overall crime rates, crime waves, or "balancing" the child's best interests against the interest in protecting the public. Best interests means best interests, as it can be determined in individual cases.⁵²

(3) The stated purpose is not an elaborate veil to mask a punitive reality.⁵³

The purpose of the Scottish system is to act realistically and unpretentiously in the best interest of the children who come through it to the end that their growth might be protected. That is a good starting point.

2. Process

This section outlines the operation of the children's hearing system. There is an imbalance in attention devoted here to the various stages of the process. Its intake and referral procedure is discussed more fully in the next section dealing with the unique role of the Reporter. Because of its great importance to any evaluation of the system in due process terms, this section deals at length with the most intrusive disposition available to panels—commitment to a "List D" school. Descriptions of some hearings and of the List D School disposition are drawn in part from my 1984 observations of these components. Reaction to the process described here should also take into account that, in practice, the system operates in cases of "garden variety crime" and status offenses.⁵⁴

51. CHILDREN OUT OF COURT, *supra* note 21, at 301-02. *But cf.* LEGALITY AND COMMUNITY, THE POLITICS OF JUVENILE JUSTICE IN SCOTLAND 58-62 (P. Brown & T. Bloomfield eds. 1979) [hereinafter cited as LEGALITY AND COMMUNITY].

52. Martin, Fox, and Murray are correct that there is no unambiguous statement of the objective of the hearings system. CHILDREN OUT OF COURT, *supra* note 21, at 309. Yet their detailed study of the system in operation and my own fragmentary observation reveals little concern for these larger public factors.

53. Almost half of the cases referred to the Reporter are not sent on for hearing. CHILDREN OUT OF COURT, *supra* note 21, at 68; *see infra* notes 81-84 and accompanying text. Only about one-third of initial referrals lead to compulsory supervision requirements and involuntary residential commitment has been steadily declining. CHILDREN OUT OF COURT, *supra* note 21, at 20, 42.

54. Martin, Fox, and Murray saw in 1978, a system in which roughly three-fourths of referrals were on offense grounds, with truancy making up the greater part of the remainder. The overwhelming number of offense cases actually dealt with by panels were property crimes. CHILDREN OUT OF COURT, *supra* note 21, at 36-37.

The business of children's panels is defined and limited in several respects:

(1) All referrals eventually resulting in a hearing before a children's panel come initially to a civil servant called a Reporter. The Reporter is vested with wide discretion to determine what steps are to be next taken and whether a case will go to a panel.⁵⁵ Referrals to the Reporter may come from any interested person. In practice, the great majority of referrals are from the police, with some also coming from the education department, Procurator Fiscal (prosecutor) and social work department.⁵⁶

(2) Panels are limited to consideration of cases of children under sixteen or between sixteen and eighteen who are subject to a supervision requirement from a previous hearing.⁵⁷

(3) Conduct and situations committed to panels include criminal behavior, (save a few serious offenses),⁵⁸ status offenses (specifically including truancy),⁵⁹ neglect, and abuse. Children and parents are notified of the date and place of a hearing and of the grounds of referral (charges) seven clear days in advance. Attendance of parents and children is mandatory.⁶⁰

(4) The grounds of referral must be admitted or have been previously established in court. That is, the child and his parents, summoned to the hearing, must admit that conduct encompassed by the hearing system's mandate has indeed occurred, or that conduct must have been established in court. Children's panels have no authority to adjudicate guilt or innocence.⁶¹

The acceptance of the grounds of referral can be a sticky point in the process. If the grounds are not accepted, the panel has no authority to continue and the case must be dismissed or referred to the court for determination of the truth of the allegations.⁶² Since attorneys do not appear, families and panel members alike must wrestle on their own with distinctions between "mere presence" and accomplice liability; "mere preparation" and attempt. Unsurprisingly, the system has been criticized for overreaching.⁶³

55. CHILDREN OUT OF COURT, *supra* note 21, at 64.

56. *Id.* at 65; Murray, *Structure and Operation*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 23 (F. Martin & K. Murray eds. 1982); see Rinik, *Juvenile Status Offenders: A Comparative Analysis*, 5 HARV. J. OF L. & PUB. POL'Y 188 (1982).

57. CHILDREN OUT OF COURT, *supra* note 21, at 8; Murray, *supra* note 56, at 17; CHILDREN'S HEARINGS, *supra* note 47, at 11.

58. See CHILDREN OUT OF COURT, *supra* note 21, at 65, 66-67.

59. *Id.* at 66.

60. See *id.* at 10-11; Murray, *supra* note 56, at 21; Rinik, *supra* note 56, at 191-92.

61. Murray, *supra* note 56, at 17; see CHILDREN OUT OF COURT, *supra* note 21, at 12; CHILDREN'S HEARINGS, *supra* note 47, at 10, 32; Rinik, *supra* note 56, at 192.

62. CHILDREN OUT OF COURT, *supra* note 21, at 12; Murray, *supra* note 56, at 17; CHILDREN'S HEARINGS, *supra* note 47, at 10, 32; Rinik, *supra* note 56, at 192.

63. Erickson, *The Client's Perspective*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 97 (F. Martin & K. Murray eds. 1982). In the very first hearing I observed in Edinburgh, the

Once the grounds are admitted or established, the panel is required to discuss with the child an appropriate disposition, come to a decision and announce it.⁶⁴ In most instances the discussion also includes a social worker who is present and has submitted a background report on the child.⁶⁵ Often a school official or a family friend will attend and participate in the discussion.⁶⁶

Panels are required to explain the right to appeal their decision to court, and are further required to review periodically the progress of any child for whom a mandatory supervision order has been issued.⁶⁷ Hearings are required to be held in informal surroundings physically distant from the halls of justice.⁶⁸

A panel deciding that a child is in need of compulsory measures of care issues a supervision order. The practical spectrum of such orders includes:

(1) *Nonresidential Home supervision or "social work supervision"*: The assistance of social workers is simply mandated. This is an important choice. Although social workers are trained as generalists not juvenile specialists, the departments have been closely tied to the hearings system from its inception. The Social Work (Scotland) Act 1968 created local social work departments which were called upon to improve social welfare both through the provision of social services and the development of outreach organizations composed of neighborhood residents. The recruitment of children's panel members from representative segments of the community was a part of the Act, designed to complement the overall social services scheme.⁶⁹

Social work supervision is said to have value in giving a family another chance to work out problems, with the social worker available for support and with the sanction of a further appearance before a panel as an impetus.⁷⁰

panel chair ignored the child's denial of the grounds of referral—an allegation of truancy. See *infra* notes 124-25 and accompanying text.

64. 1971 STAT. INST. No. 492 (S.60), Children and Young Persons, Local Government, Scotland: The Children's Hearings (Scotland) Rules 1971, rule 17 [hereinafter cited as The Children's Hearings (Scotland) Rules 1971].

65. CHILDREN'S HEARINGS, *supra* note 47, at 20-21.

66. This was common at the hearings I observed in Edinburgh. My presence, as a "person engaged in research relating to children" was entirely at the discretion of the particular panel chair. The Children's Hearings (Scotland) Rules 1971, *supra* note 64, at rule 12.

67. The child or his parent, as well as the local government may bring about review of supervision orders. Such orders cease to have effect if no review is made at the end of a year. CHILDREN'S HEARINGS, *supra* note 47, at 30-31.

68. CHILDREN OUT OF COURT, *supra* note 21, at 93-94.

69. Murray, *supra* note 56, at 16-17.

70. Ford, *Consequences*, THE SCOTTISH JUVENILE JUSTICE SYSTEM 83 (F. Martin & K. Murray eds. 1982). The tension between social work as a legal requirement and as a social work practice does sometimes produce anxiety among social workers who see themselves as "social policemen." *Id.*

In one of the review hearings that I observed in Edinburgh, an increased level of service seemed to have been very successful. Both the child and her parents objected to termination of the supervision order unless the social worker's visits could somehow be continued.

(2) *Nonresidential Intermediate treatment*: This is really an adjunct to social work supervision. A home-based child is directed to participate in an available community-based counseling, neighborhood activity group, or treatment center day care project.⁷¹

(3) *Residential*: "Panel members must remember that placing a child away from home is not just a 'last resort' . . . but a 'treatment of choice.' As David Denholm says—'residential care should be positive discrimination in favour of the most disadvantaged children in our society.'"⁷²

Whether positive discrimination or punishment, removal from home and deprivation of liberty on the order of a lay panel is the disposition at greatest variance from American practice. Even though it is the least used disposition in the hearings system,⁷³ it demands that the hearings process be examined as a legal system and not just a social work device.

Directly within the authority of panels are three residential requirements—foster care, children's homes, and List D schools. Foster care placement is similar to that in the United States. Children's homes are community-based residential facilities, normally staffed by residential care personnel, not teachers or social workers. Children attend local schools.⁷⁴ It is the List D school, named for its classification by the Scottish Education Department, that provides the most intrusive disposition.⁷⁵

71. *Id.* at 84-86. For outlines of programs available at two recently opened Intermediate Treatment Centres, see Mackintosh, *Developments in I.T.*, THE HEARING: BULL. OF THE PANEL TRAINING RESOURCE CENTRE, Feb. 1983, at 15.

72. Strathclyde Region Children's Panel, Panel Member Handbook, pt. III(b) (n.d.) [hereinafter cited as Strathclyde Handbook]. The ideal, of course, is not always the reality. In a detailed study of the objective sought to be achieved by panels in 27 List D commitments, Professors Martin and Murray found that 12 were "last resort" decisions contrary to the formal philosophy of the system. Others were positive choices but the panels misconceived the services reasonably to be expected from a List D school. Martin & Murray, *The End of the Road: Residential Disposals in the Scottish Children's Hearings System*, 6 J. ADOLESCENCE 211 (1983).

73. CHILDREN OUT OF COURT, *supra* note 21, at 170; see also Lothian Regional Council, Annual Report: The Children's Hearing System in the Lothian Region 5 (1982-1983); Ford, *supra* note 70, at 87.

74. Strathclyde Handbook, *supra* note 72, at pt. III(b).

75. Families have the right to appeal the panel's disposition to the Sheriff's Court, the lower level trial court in Scotland. The Social Work (Scotland) Act 1968, ch. 49 § 29(1); see also The Children's Hearing (Scotland) Rules 1971, *supra* note 64, at rule 17(4)(c). A child may have a representative at the hearing, but the panel chair is empowered to exclude representatives who are "persisting in behaviour which disrupts the proceedings at the hearing or

My civil liberties concerns were eased considerably as a result of a look at one List D School. Such a limited impressionistic experience obviously provides no justification for discarding those concerns entirely. Nevertheless, I am a veteran of many tours of institutions, some of them quite progressive, and I am not easily taken in. On the whole, I have found institutions to be preoccupied with their own security and administrative convenience. The voluminous rules and sometimes bizarre practices employed in pursuit of these objectives are supposedly justified as being beneficial to youngsters who need "order, limits, and a structured environment."

The Kerlaw List D school in Ayershire was not the kind of inward looking place that I had expected. It is in many respects a microcosm of the Scottish understanding of welfare principles. It reflects, as does the Scottish system, such an understated and natural set of assumptions about children and how they should be treated that I am sure Deputy Head Master Chris Johnson had difficulty understanding the reason for many of my questions and my surprise at some of his responses. Information in the following account comes from my observations and data supplied by Johnson and confirmed by Helen Millar.⁷⁶

At the time of my visit there were twenty List D schools in Scotland, eighteen run by churches or private groups and two by local authorities. Kerlaw is one of the latter. The cost of boarding a child is about three hundred pounds per week, one-half which is charged back to the local authority which issued the commitment. A few of the schools, including Kerlaw, have "secure accommodation" units—maximum security wings. At Kerlaw there were seventy-two residents in the open school and nine in the secure unit.

There are no walls, bars, or whistles at the facility. Only the secure unit is locked. Local police, however, are notified when residents flee and their return is sought. For the secure unit, the initial commitment is for twelve weeks. It is reviewed and the commitment may be extended for nine months, with further review every three months. The first three months review is done internally. Thereafter reviews are conducted by the panels that may rescind, continue, or modify the commitment for the rest of the term. A child may be transferred from the open school to the secure unit, but it is required that the Reporter be notified immediately and that the panel convene on the case within seven days. For the open school, residential orders are normally for twelve months. The social worker must review the commitment every six months.

which is otherwise likely to be detrimental to the interests of the child." The Children's Hearings (Scotland) Rules 1971, *supra* note 64, at rule 11(3). In practice, attorneys do not appear at hearings.

76. See *supra* note 1.

Johnson listed the official priorities of the institution as (1) to change behavior to make it more acceptable to the outside; (2) to educate; and (3) to provide good physical care. He remarked wryly that they were best at number three.

For all residents, the behavior modification objective is pursued with the assistance of a simple home computer containing seven categories of problems. Assessment of individuals in these areas forms part of the three-month review. In the secure unit, people are given personal and group objectives, e.g., to learn to stand further away from others. They are scored on three personal and three group objectives and a review is conducted at dinner every twenty-four hours. The number of "progress points" resulting from this system is determinative of a resident's status for purpose of allocation of privileges, but is *not* considered in connection with release date decisions.

To this point in the visit, I had seen only a little to separate Kerlaw from the better facilities in this country. I pressed Johnson about two matters that often reveal the true character of a facility. I asked to see the handbook of rules and regulations and I asked about the existence and administration of a stripped cell or solitary confinement facility. I was amazed to find that, for this school at least, there is no rule book! Johnson conceded that the initial set of group objectives addressed are management assistance matters, e.g., sitting down, not hitting, not talking all at once, but these matters are addressed ad hoc if and as they arise.

No rule book, of course, means no written notice and precious little due process in defining what constitutes unacceptable behavior, how it shall be determined to have occurred, and what the reaction of the institution will be. Those who operate the institution exercise almost complete discretion in these areas. There is great potential for abuse in such a system. On the other hand, one who cannot fall back on rules, particularly those promulgated by him in compliance with directives passed down by higher authority, loses a crutch. There is no substitute then for thinking about the individuals with whom one is dealing and about their particular situation. Perhaps this is part of the reason for the pervasive understanding of welfare principles in Scotland. In the Scottish system, when dealing with children, there is very little behind which one can hide.

The intelligent administration of such a broad grant of discretion was further illustrated by the isolation cell. There indeed was a cell and it looked just like the ones in many of our institutions—bare, sterile, frightening. There are no written rules for notice, hearing, burden of proof, or length of punishment in the isolation cell. Yet in the seven months of its existence, the

cell had been used for exactly ten minutes. That was in the case of a boy who had destroyed eight hundred pounds worth of furnishings in the place from which he had come and promptly set about to do the same to his room at Kerlaw. Johnson said that guidelines were coming out for the isolation cell which would limit its use to two hours. He not only expressed no opposition to this limit, but offered the opinion that if the room were needed for more than twenty minutes, someone other than the child had the main problem. Further discussion revealed that Johnson had other plans for the room altogether and the school could do without it.

But what of the other List D schools? There were no substantive or procedural legal constraints on their being or becoming prisons. Too much depends on people like Johnson. Is importing due process the only solution? More research about the actual operation of all List D schools would certainly be required for a full evaluation.⁷⁷

Another possibility occurred to me after I learned of the quite attractive educational opportunities offered at the school: reducing the *quantity* of coercion as a due process tradeoff. I asked Johnson to imagine that the initial order could compel residence at the school for only two weeks. Could he make the children see the advantages of the school in that time and not have to rely on the coercive authority of the state thereafter? After reflection, he estimated that, for more than eighty percent of the residents, such a plan would work and that the school could accept it.

For that minimal intrusion on liberty, children would be exposed to the following educational setting—a setting which compares favorably with that of the inner-city Glasgow schools from which most of them come.

In the secure unit, the teacher to student ratio is one to three. In the open school it is about one to ten. The curriculum includes math, English, history, art, woodwork, and metalwork. Not-yet-offered but hoped-for subjects include languages, chemistry, and physics. The class timetable is organized as closely as possible to that of a normal school system. Attendance is good. Johnson observed that students do not duck out of even nonvocational courses. There is an interest in history and English, aided by the circumstance that students are not stigmatized—most are in class with other underachievers.

Public perception of the List D school is important to the hearings system. Many Scots, like many in the United States, combine a call for strict measures with reluctance to pay for them. Johnson reports that commitments are

77. The authors of *CHILDREN OUT OF COURT*, *supra* note 21, note with regret the paucity of research on List D schools and other dispositions, considering the relative simplicity of obtaining data. *Id.* at 30.

kept down because of the direct nature of expense apportionment. (Imagine the effect if our county governments were directly billed for half the cost of every institutionalization.)⁷⁸ Local authorities look for ways to frustrate panel commitment orders.

According to Johnson, the punitive segment of the public provides less opposition to the hearings system than might be expected, in part because their information about List D schools is out of date. Twelve years ago, there *were* rule books, everyone was marched around in uniforms, and corporal punishment was used. All that is gone, but many individuals are not aware of the changes.

Finally, Johnson outlined another important component of the schools regime—community contact. The kids go home on weekends, and even some in the secure section are permitted to leave (with chaperones). Kerlaw is forty-five miles from Glasgow, an ideal distance according to Johnson. Regular home visits are feasible, but running off to Glasgow is generally not.

At least this one school in the Scottish system does not abuse its discretion. The system is not inherently punitive, but without safeguards it has the potential to be so. We would tend to view the needed safeguards as procedural due process devices at the dispositional stage. But it is also a safeguard to ensure that the people administering the system are honestly committed to the well-being of children and have the ability to administer broad grants of discretion in a nonpunitive way. That is what the Scots attempt to do and it is for that reason that we should examine the system's players.

3. *Players*

a. *Reporter*

One of the players most essential to the Scottish system has no American counterpart.⁷⁹ The Reporter for each region serves as intake official, deci-

78. It should be noted that Scotland achieved a minor organizational miracle in 1973, a development which has had a significant impact on the growth of the hearing system. Governments of cities, counties, and burghs were consolidated into nine regions. Local Government (Scotland) Act 1973. Professor Martin, on being asked how the abolition of local governments could ever be accomplished, said that from the outset one of the critical factors was to guarantee everyone in the old governments a job in the new ones.

Prior to consolidation, local governments had been empowered to convene separate juvenile courts since 1932, but had rarely done so. CHILDREN OUT OF COURT, *supra* note 21, at 1-2. After consolidation the giant regions of Strathclyde (2.5 million) and Lothian (.76 million) as well as other sizeable regions undoubtedly were better able to organize and administer panel recruitment and training programs than were the former cities and burghs. *Id.* at 15.

79. Each of the regional authorities employs a Reporter, with all but the smallest employing deputies also. There are almost 100 reporters, deputies, and assistants in Scotland, 50 of them in Strathclyde. Murray, *supra* note 56, at 13; Strathclyde Handbook, *supra* note 72, at pt. I. Oversight of Reporters, however, is vested in the office of the Secretary of State for

sion maker, investigator and public relations official. The fidelity of Reporters to the goals of the system is pivotal, for they are vested with wide and unreviewable discretion to determine which children will be subject to hearings.⁸⁰

A child may be referred to the Reporter by anyone who believes the child to be in need of compulsory measures of care. With only this vague guidance, the Reporter determines after investigation which cases shall be referred to the lay panels. Almost half the cases are not sent on but are dismissed by the Reporter.⁸¹ This statistic seems to indicate a protective system operating *without* an intervention bias. The strength of that indication, of course, depends upon the explanation for it.

In 1984, I discussed this and other aspects of the position of Reporter with Fred J. Kennedy, Regional Reporter for Strathclyde, his deputy Peter Ritchie, and Alan Findlayson, Reporter for the Lothian Region.⁸² Ritchie contends, and the others concur, that cases not sent on to hearings represent instances of no further action being taken for positive reasons rather than passive dismissals. He explained that the Reporter conducts an initial investigation,⁸³ after which dismissal may result for three reasons: (1) insufficient evidence; (2) other voluntary measures are in force (e.g., parents, relatives,

Scotland, in whose department the civil service machinery is found. Scotland has been a part of the United Kingdom since the Act of Union in 1707, hence the Secretary of State for Scotland is a British appointment. Scotland maintains, however, a separate and independent legal system. Murray, *supra* note 56, at 13; CHILDREN OUT OF COURT, *supra* note 21, at 1.

80. Sinclair, *Entering the System*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 24-25 (F. Martin and K. Murray eds. 1982). Although appointed by regional authorities, Reporters are not accountable to any central authority for their referral decisions and may not be dismissed without consent of the Secretary of State. *Id.* The Social Work (Scotland) Act 1968, ch. 49 § 39, prescribes options for Reporters to whom cases are referred, but contains no provisions for review of those decisions.

81. Sinclair, *supra* note 80, at 26; CHILDREN OUT OF COURT, *supra* note 21, at 68.

82. Kennedy and Findlayson are attorneys. Ritchie is a former probation officer. The Secretary of State has not exercised his prerogative to prescribe qualifications for Reporters. A majority have legal or social work training, but about one quarter have no particularly relevant qualifications. Sinclair, *supra* note 80, at 24. Curiously, the authors of CHILDREN OUT OF COURT do not recommend a requirement in Scotland that the Reporter be an attorney, but would impose such a requirement upon an American hearing system. CHILDREN OUT OF COURT, *supra* note 21, at 278, 304. I do not find the evidence calling for such a change persuasive. The benefit to be expected in greater panel adherence to procedural rules could well be outweighed by changes in the way attorney-reporters might perform other essential functions of the position, including the exercise of intake/referral discretion.

83. Reporters are directed to make such investigation as they think necessary when they receive information that a child may be in need of compulsory measures of care. Social Work (Scotland) Act 1968, ch. 49 § 38(1). In Strathclyde, that investigation is rarely an on-the-street operation and does not involve contacting the child or family. Ritchie believes the best method is to obtain initial reports from a number of agencies and independently assess their conclusions. He usually receives reports from social work, child guidance, health services,

youth clubs, or community agencies have addressed the problem after referral); or (3) care is just not necessary or the offense is minor.⁸⁴

This explanation for the dismissal rate is not widely known. Ritchie said one reason was simply poor public relations work by Reporters. He added that Reporters are purposely closemouthed in order to protect their independence and that of the hearings system. A low profile avoids newspaper debates, second guessing, and criticism from punitive elements in the public.⁸⁵ He noted, however, that it is important to do grass roots work to increase public understanding and support—to go to civic clubs and explain welfare principles at a local level.⁸⁶

Finally, the Reporter as administrator not only acts as the system's liaison with police, prosecutors and all community agencies, but also arranges and attends every hearing.⁸⁷ In this function there is an obvious potential for manipulation of panels and for the exercise of a disproportionate influence over their decisions. Although I saw no such influence, it is clear when the system is viewed in the whole that selection of the right people to fill the powerful post of Reporter is critical.

b. Panels

After discretion has been exercised, resulting in the referral of the child to the Reporter and thence to a hearing, the child next comes in contact with three members of a lay panel. The panel determines whether the child is in need of compulsory measures of care, and if so what measures. Panels con-

police, and education officials. Interview with Peter Ritchie, Strathclyde Region Deputy Reporter, in Glasgow, Scotland (June 13, 1984).

84. The third reason in particular contains a potential for class bias in the exercise of referral discretion. In explaining this criterion, Ritchie described a child who might be in trouble for the first time "who seems to be from a reasonable background." At my request he elaborated on that phrase and confirmed the influence of social and economic class on the decision to refer a child to hearing rather than dismiss. The explanation was couched in positive, possibly valid terms—wealthier kids have more voluntary measures of care available to them as a rule. But I was reminded of a conversation the preceding day in which Professor Martin had claimed that he could examine four key demographic factors and predict with 90% accuracy whether a child would be referred on for hearing. Interview with Peter Ritchie, *supra* note 83; Interview with Professor F.M. Martin, in Glasgow, Scotland (June 12, 1984).

85. Ritchie's approach to public relations parallels that of Chris Johnson of the Kerlaw List D School. See *supra* note 78 and accompanying text.

86. Kennedy elaborated on the importance of independence to making welfare principles work in the face of a punitive element in the public. He said that most Reporters in Scotland feel as free to make decisions as do judges. All three Reporters were emphatic that any American adaptation should create a new position of Reporter with the same prerogatives and protection they enjoy. In their view, we should not try to find the closest existing official in our scheme and simply give that person the duties of Reporter. Interview with Fred J. Kennedy, Strathclyde Region Reporter, in Glasgow, Scotland (June 13, 1984).

87. CHILDREN'S HEARINGS, *supra* note 47, at 18-21.

sist of lay people nominated by the Secretary of State for Scotland from a list of applicants submitted by the Children's Panel Advisory Committee described below.⁸⁸ Initial appointments are usually for five years and may be renewed.⁸⁹ A regional chairman is also appointed by the Secretary of State and has the statutory duty to select members and chairmen for particular hearings.⁹⁰ A hearing consists of three panel members, with male and female representation required. The hearing chair has broad discretion to determine how the hearing shall be conducted and who shall be permitted to attend.⁹¹ Panel members are initially required to undergo a formal training program and to attend periodic training sessions thereafter.⁹²

Every individual with whom I spoke stated that the recruitment of panel members included an effort to filter out volunteers who were overly punitive or lenient. A larger and related aspect of this question is the desirability of recruiting panels representative of the children referred to hearings.⁹³

c. Citizen's Panel Advisory Committees

The Secretary of State for Scotland and each regional government jointly appoint a committee called the Citizen's Panel Advisory Committee (CPAC). Its principal function is to recruit and select panel members to conduct hearings. The committee also advises the Secretary of State on other matters, including public relations, training, and fitness of panel members.⁹⁴

The process of selecting panel members was described as "opaque" by

88. CHILDREN OUT OF COURT, *supra* note 21, at 11; Murray, *supra* note 56, at 15; CHILDREN'S HEARINGS, *supra* note 47, at 12.

89. Murray, *supra* note 56, at 16.

90. Strathclyde Handbook, *supra* note 72, pt. I(b). Strathclyde has some 830 of the 2000 or so panel members serving in Scotland. *Id.* The region is consequently divided in areas, whose panels elect their own chairs and determine the rotation of panel memberships for hearings scheduled in their areas. The panel members I interviewed at length were these area chairs for Strathclyde. See *infra* notes 118-20 and accompanying text. I am grateful to them and to Winnie Sherry, Strathclyde Region Children's Panel Chair, for securing their cooperation.

91. Children's Hearings (Scotland) Rules 1971, *supra* note 64, at pt. III, §§ 9, 12; see CHILDREN OUT OF COURT, *supra* note 21, at 11; see also Murray, *supra* note 56, at 21.

92. See Murray, *supra* note 56, at 16; see also CHILDREN'S HEARINGS, *supra* note 47, at 13.

93. Martin, Fox, and Murray attempted to determine what attitudes towards delinquency, punishment, and treatment were characteristic of panel members. CHILDREN OUT OF COURT, *supra* note 21, at 29. They undertook to canvass panel members and social workers on their views about delinquency and its management. *Id.* at 236-54. They construct no generalizations about panel members but it is interesting to note that they are convinced that social class differences between panel members and those whose fate they decide is unimportant. *Id.* at 237, 247. I do not agree. See *infra* notes 115-16 and accompanying text.

94. CHILDREN OUT OF COURT, *supra* note 21, at 11-12; Murray, *supra* note 56, at 15.

those I interviewed in 1984.⁹⁵ Maeve McDonald, Chair of the Strathclyde CPAC, helped explain it. A panel of CPAC members interviews applicants, first running them through a mock background report on a child. Next, applicants are interviewed individually. The sub-CPAC's then make their recommendations in detail. Selections made by the CPAC's are perfunctorily approved by the Secretary of State.

In 1984, there was an average of two volunteers for every panel position filled, but some areas were unable to fill vacancies at all. The goal in Strathclyde, according to Ms. McDonald, is a four to one ratio of applicants to panel members.⁹⁶

d. Social Workers

Social workers are involved at several critical points in the administration of the Scottish scheme. The Social Work Department is a key agency consulted by Reporters in the exercise of their referral discretion.⁹⁷ Social workers prepare background reports for panels and usually attend hearings.⁹⁸ They are also actively involved in carrying out supervision orders issued by panels.⁹⁹

e. Children and Their Families

To their great credit, Professors Martin, Fox, and Murray made a major effort to measure the reaction of parents and children to the system.¹⁰⁰ Anecdotal but illuminating comments from children have also been collected and reported to those who operate the system.¹⁰¹ But this is still essentially an I-Thou system. One group of people is trying to do something *for* another group. The input of the recipients is desirable but not essential. Their appearance near the foot of this list of players roughly matches their degree of influence in the system.

95. Interviews with Professors F.M. Martin, Kathleen Murray, and Helen Millar, in Glasgow, Scotland (June 12, 1984).

96. Interview with Maeve T. McDonald, Chair, Strathclyde Children's Panel Advisory Committee (CPAC), in Glasgow, Scotland (June 14, 1984).

97. See *supra* note 82 and accompanying text.

98. See *supra* note 65 and accompanying text.

99. *Id.* Social Work Department officials also attend meetings of CPACs and are involved in panel training. For discussion of the potentially disproportionate influence of the department on hearings, see *infra* notes 119-20 and accompanying text.

100. CHILDREN OUT OF COURT, *supra* note 21, at 112-50, 192-235.

101. For example, the editors of a training publication received the following comments from students at Geilsland School, Beith:

f. Other Players

It may readily be seen that police, school officials, politicians, and administrators of other community agencies all possess a degree of real and potential influence on the operation of the hearings system. The most influential players, however, may be the members of the nonprofessional public. They not only staff the hearing panels, they also determine the limits within which the system will be permitted to operate.

Crucial to the evaluation of the feasibility of an experiment in the United States is whether the Scottish public differs significantly from the American public. Much is sometimes made of the homogeneity in population existing in Scotland compared to the diversity in this country.¹⁰² It should be noted, however, that the Scots are stern Presbyterian folk, whose attitudes about crime and delinquency mirror those of many in this country. They are not

I've only been to one Panel Hearing. There were two women and one man. The man was Chairman and he brought up all the negative, bad things and none of the good things. The two women were quite nice and fair, too.

It wasn't like a Court—more like a review meeting.

The members of the Panel are people who like to help. I've heard that there have even been dustmen on Panels.

The Panel explains why they are sending you away, but a Court just does it.

The Panel ask you a lot of questions, but the court talks as though you weren't there, so the Panel gives you a better deal.

I've been to a Panel 5 times and to Court 4 times. The Panel's all right. They try to help you. They gave me a chance 3 times. I was nervous the last Panel I went to. My Mum said she would attend, but I knew she wouldn't and I was worried about that. I can talk to the Panel members better than I can to my own social worker. When my Mum did attend, she spoke up for me. The Panel gave her a good chance to speak. The Panel gives everybody a chance to speak and put forward their view. However, in Court the Sheriff listens to your lawyer, who might do all the speaking and you never get a chance. I like the Panel better. I've seen the same people at three of my Panels and this is better because they know me and how I will react to their questions.

.....

Doesn't bother me going into a Hearing. They didn't discuss anything with me. They just made decisions about me. They spoke to my parents, but not much. 'We think he should be sent away for 3 weeks, Mr. X.' My father agreed. It's better going to a Court, because your case takes so much longer to come up and they're bound to know all about you in that time. A Panel Hearing comes up much more quickly and how can they have got all the information together, which will make it fair for you.

Parents did not get a chance to say much.

THE HEARING: BULL. OF THE PANEL TRAINING RESOURCE CENTER, Feb. 1983, at 33-34.

102. See Krantz, *The Scottish, Cleveland, Ohio, and Boston, Massachusetts Systems for Dealing with Troubled Children 5* (1979) (unpublished paper), quoted in Rinik, *Juvenile Status Offenders: A Comparative Analysis*, 5 HARV. J. LAW & PUB. POLICY 151, 199, 212 (1982). The 18 members of my 1985 Juvenile Law Seminar also immediately identified this cultural difference as a major obstacle.

so different, as arguably are the Scandinavians, for example,¹⁰³ as to make it unrealistic to consider borrowing a social system from them.

B. Problem Areas

Some of the problems with the Scottish system may also be expected to trouble an adoption of that system in the United States. I would include problems associated with recruitment and training of representative panels, undue influence of professionals on an ostensibly lay-operated system, and the appropriate level of legal formalism for such a system. An American hearings system also might expect to encounter difficulty in defining an appropriate jurisdiction, in competently administering the broad discretion required by such a system, and in overcoming public skepticism and resistance. In this section, observations are made about the current Scottish experience relative to these matters.

1. Recruiting and Training Representative Panels

There is some division and ambivalence in Scotland about the desirability of significant working class representation on panels. Some very distinguished people, including all three authors of *Children Out of Court*, are at best lukewarm in their support for the idea. Professor Martin is not optimistic about efforts to match classes in any systematic way. He observes that the hearings system is in the nature of most voluntary movements—one group wants to *help* another. Professor Martin points out that working class members would probably be more punitive, and he expresses the belief in any event that class matching is not a substitute for care, sympathy, and empathy.¹⁰⁴ Professor Murray believes it would be very difficult for working class people to be trained and integrated into the system in a useful way.¹⁰⁵ Both conclude that the best that can be said about the class matching idea is that it is democratic. Professor Fox also seems to consider the issue to be

103. See Nyquist, *The Swedish Approach to Juvenile Corrections*, in *THE CHANGING FACES OF JUVENILE JUSTICE* 135 (V. L. Stewart ed. 1978), quoted in S. FOX, *CASES AND MATERIALS ON MODERN JUVENILE JUSTICE* 30-38 (1981).

104. Interview with Professor F.M. Martin, in Glasgow, Scotland (June 12, 1984). Helen Millar, Panel Training Director for Strathclyde, was also present and from her experience she echoed the view that working class panel members who have coped with adversity are often unsympathetic to those who have not done so. This labeling of working class adults sets up a conflict between the recruitment of representative panels and the effort to secure members with desirable characteristics. The conflict is discussed in Brown, *The Selection and Recruitment of Panel Members in Lothian Region*, *THE HEARING: BULL. OF THE PANEL TRAINING RESOURCE CENTER*, Feb. 1981, at 25. The author, who was responsible for recruitment in the region, described as universal the sentiment that desirable personal characteristics are the more important consideration. *Id.* at 14.

105. Interview with Professor Kathleen Murray, in Glasgow, Scotland (June 12, 1984).

relatively unimportant.¹⁰⁶

Not surprisingly, Scottish socialists are quite critical of the shortage of working class panel members.¹⁰⁷ Their concern is supported by studies indicating that working class children receive a disproportionate share of the more restrictive dispositions ordered by panels.¹⁰⁸

In any event, it is clear that from its inception the system was meant to have working class representation on panels *and* that it was to be composed of individuals with particular personal characteristics.¹⁰⁹ Among panel members in Strathclyde, I found grudging agreement in principle that working class representation should be increased, though many reservations were expressed.

The Scottish ambivalence is illustrated by the history of efforts to recruit more representative panels. Prior to 1984, recruitment had been undertaken primarily through advertisements in national newspapers, through articles by local area chairmen in local newspapers, and by phone-in show appearances on local radio. CPAC's had asked for suggestions to increase working class membership. The social work departments suggested going into inner city neighborhoods to places where people congregate and looking for the natural leaders. This tactic was rejected by the leadership of the panels out of an expressed fear that it would do more harm than good should one of these folks be recruited and then not be selected.¹¹⁰ Instead, the principal tool of the new recruitment campaign underway in Strathclyde is the free loan of a specially produced video cassette entitled "Help Put Back the

106. CHILDREN OUT OF COURT, *supra* note 21, at 23-24.

107. LEGALITY AND COMMUNITY, *supra* note 51, at 4. This work is the most severely critical of the hearing system. Its value is difficult to assess because its data is old and many possibly valid points of criticism appear in clouds of "capitalist running dog" rhetoric. The continuing underrepresentation of working class adults was also documented by David P. Brown, *supra* note 104, a more disinterested observer.

108. *Id.* Although working class children may indeed be more often in need of compulsory measures of care because more affluent families have a wider range of voluntary options, it is unlikely that this completely explains the disparity in treatment. In any event, the current situation should moderate concerns that working class panel members would be more punitive.

109. A 1966 government White Paper following the Kilbrandon Report called for drawing panel members from a wide variety of age groups, neighborhoods and occupations including those whose "occupations or circumstances had hitherto prevented them from taking a formal part in helping and advising young people." Social Work and the Community, *quoted in* CHILDREN OUT OF COURT, *supra* note 21, at 6. An influential circular from the Social Work Department at the time of initial panel recruitment echoed that theme and went on to spell out desirable characteristics of panel members, including absence of bias and prejudice, capacity to communicate with parents and children, and a capacity to understand their feelings and reactions. Social Work Group Services Circular No. SW7 (1969), *cited in* CHILDREN OUT OF COURT, *supra* note 21, at 13 and Brown, *supra* note 104, at 12-13.

110. Interview with Winnie Sherry, Strathclyde Region Children's Panel Chair, in Glasgow, Scotland (June 13, 1984).

Pieces" which explains the system and features appearances by many of the panel members with whom I spoke. They describe their experience and urge viewers to volunteer.¹¹¹

Privately, the experienced panel members were less than enthusiastic about the recruitment effort. Some were defensive in part because of a belief that they already have the personal characteristics and training to deal properly with disadvantaged youth. They are also quick to note that many of their number are but one generation removed from the social and economic environment of the families with whom they deal.¹¹²

The Strathclyde panel members noted several other obstacles to working class participation. For instance, members are reimbursed for travel expenses and for lost wages necessitated by hearings. One who is unemployed, however, might be interrupted in job search efforts by panel duties, but of course has no wages to lose.¹¹³ Another frequent observation was that university-based panel training discouraged working class participation.¹¹⁴ Ina Clanahan, who appears on the recruitment video, was candid enough to say that the participation of working class members on her panels had not been entirely satisfactory. She thinks that these members are put off by having to deal with written reports and by the trappings of the hearing procedure—that there is too much formality for them even in an informal system.

Given the obstacles, is it worth the effort to recruit representative panels? Can anything more than a window dressing effect be achieved? Should we

111. Help Put Back the Pieces, Videocassette, produced for Strathclyde Regional Council by Transworld Television, Clydebank (1984). Mrs. Sherry was kind enough to send me a copy of the cassette. I must accept her confident assertion that the VCR revolution has reached working class Glasgow neighborhoods with enough force to make the experiment fruitful. The new campaign was also to feature displays in supermarkets and an informational bus to travel the neighborhoods.

112. For example, Tim Hamilton, panel member from Glasgow Central East, an electrician, is now electrical inspector. His father was a blacksmith. Tom Quinn, panel member from Glasgow North West, an electrician, is now a maintenance supervisor. His father was a house painter. Ina Clanahan, Inverclyde, is a panelist whose parents progressed from very basic shipyard employment to good positions with IBM.

113. Deputy Regional Chair Christine Barron was particularly concerned about this disincentive, observing that most unemployed people with whom she has dealt believe they are on the verge of finding work and that this complication further adds to the difficulty of recruiting them. Interview with Christine Barron, Deputy Chair, Strathclyde Region Children's Hearing Panel, in Glasgow, Scotland (June 13, 1984).

114. Interviews with panel members James Hamilton and Pam McGaughrin, in Glasgow, Scotland (June 13, 1984). Both members were critical of the initial training but had positive things to say about the subsequent localized in-service training. The latter had components which McGaughrin thought to be particularly valuable to the task of understanding the problems of working class families. She mentioned as most helpful: speeches by children, visits to deprived areas, and regular meetings with the social workers, police, and school officials who serve these areas.

be concerned about the dispositional objections raised by the socialists and by the indicators that class differences affect the intake process? Can empathy and training obviate the need for class matching efforts? These questions should concern American observers. In addition to economic and social class diversity, we would have racial and ethnic factors to consider in the makeup of our panels. Further, the gulf between the rich and the poor in this country may be wider than it is in Scotland.

My tentative conclusion is that an American hearing system should affirmatively pursue representative recruitment. I recognize that this entails going further with representative selection requirements than we have heretofore gone in either the adult or juvenile court system.¹¹⁵ But there are potentially significant advantages. If mistakes are to be made, it is better that members of the same group make them on one another. The mistakes may be accepted with less rancor if they are less the product of an I-Thou system. Mistakes are less likely to be repeated if panel members are more accessible to working class families. No amount of training or care in selecting those with desirable characteristics can provide that accessibility. Finally, only panels with a pronounced mixture of social and economic classes offer hope for the development of a wider sense of community. After all, the system does not work *exclusively* with underprivileged youngsters. It may be expected that the sense of community will be promoted if members of various classes are both dispensers and receivers of juvenile justice.¹¹⁶

2. *Influence of Professionals*

In a system whose salient selling point is that lay members of the community are the legal decision makers, the influence of professionals is an important matter. Two professional groups, social workers and educators, are integral parts of the Scottish system. In particular, the importance of social work background reports to Reporters and panels is difficult to overestimate.¹¹⁷ Social workers attend and participate in most hearings and educa-

115. Even in capital cases, we require only that representative segments of the community not be systematically *excluded*. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Juveniles, of course, do not even have access to juries. See *supra* notes 20-31 and accompanying text. Our judges have never been drawn from the ranks or relatives of criminal defendants.

116. The Scottish experience has shown that representative recruitment is no easy task. The benefits to be derived from such recruitment remain matters of speculation. There is an obvious need for research. It should be conducted, however, by a group carrying less ideological baggage than the Scottish socialists. See LEGALITY AND COMMUNITY, *supra* note 51.

117. In addition to preliminary reports that play a part in the referral decision of the Reporter, see *supra* note 83 and accompanying text, a social background report is required on children referred to hearing. The Reporter is to make the report available to panel members as soon as possible, but not later than three clear days before the hearing. The Children's Hearings (Scotland) Rules 1971, *supra* note 64, at rule 6. In addition to its impact in the Depart-

tors are also often involved in the process. In any such arrangement, there is the danger that busy community members who volunteer to sit on panels may be mere ratifiers of decisions made by the professionals.

A related problem arises from such an arrangement when the institutional behavior of the social worker or educator is itself partly responsible for the problems faced by a family. Neither of these professional groups can be expected to recognize those instances readily or to engage in much constructive self-criticism. Only an independent panel might do that. Truancy, for example, in itself suggests the possibility that the shortcomings involved are not only those of the truant. Does the hearing system have, or can it develop, the capacity to sort out shared responsibility in individual cases? Can it build a record of constructive criticism that might eventually modify the behavior of the institution, while maintaining the essential degree of cooperation and cordiality?

In June 1984, I discussed these issues with five experienced panel members who chair area panels in the large Strathclyde region.¹¹⁸ In contrast to the uneasiness I observed when discussing panel recruitment, I found the members to be sensitive to the question of undue professional influence and eager to discuss it.

The five area chairs agreed that there was a particular danger of over-reliance upon social work reports but said they were alert to it, that they addressed it to some extent as part of the in-service training of panel members, and that they saw no substantial evidence of undue reliance in their

ment-Reporter-Panel process, the report can play a significant role in the final step, Panel-Family. The panel chairman is required to disclose the *substance* of the report to the child and his parent at the hearing, *if* it appears material and *if* disclosure would not be detrimental to the interests of the child. The Children's Hearings (Scotland) Rules 1971, *supra* note 64, at rule 17(3). Here is another broad grant of discretion apparently not being abused. Contents of reports are routinely disclosed and the "best interests" reservation of authority is used only in those instances such as reports of incest or sexual abuse of siblings of which the child summoned to hearing is unaware. Nevertheless, the system provides no meaningful way to *enforce* disclosure or to provide for an opportunity to explain or rebut potentially pivotal sentencing data. Once again, the players are more important than the process.

The reports are subject to unwitting abuse by panel members in another way that could more seriously undermine the system. Reports often contain allegations of misconduct other than those forming the "grounds of referral." Lay panel members (as well as many courts) have difficulty with such "uncharged misconduct." At a hearing that I observed, when the grounds of referral were denied, the chair moved quite easily to claim jurisdiction based on undisclosed allegations of misconduct contained in the social background report. *See infra* notes 124-25 and accompanying text.

118. Those interviewed and their years of experience on children's panels: Tim J. Hamilton, Glasgow Central East, nine; Pam McGaughrin, Strathkelvin/Cumbernauld area, ten; Ina Clanahan, Inverclyde area, four; Tom Quinn, Glasgow North West, eleven; Marion Aitken, Glasgow South West, ten.

areas. The last observation must be weighed in light of research indicating that, where a recommended disposition is contained in the social work report, the panel reaches the same decision approximately eighty percent of the time.¹¹⁹

On the related matter of criticizing institutions, the members called my attention to a document called the Hearing Comments Register, which is available at hearings. It affords members the opportunity to record their expanded views of the problem in a particular case. Most members favored use of the register as a device for building up commentary on institutional performance. All, however, resisted any other means of formal or systematically reported criticism.

This cautious approach is understandable. It does not suggest any reluctance to accept the concept of shared responsibility for many of the situations that bring young people to hearings. On the contrary, illustrations of the practical application of this view were apparent in a "freewriting" exercise performed by the members at my request. They agreed to write whatever came to mind, continuously for three minutes, on propositions that I supplied. Two of the propositions were:

Here is a description of the circumstances of a case which would lead me to conclude that a child referred for truancy was justified in staying away from school. Here is a description of the way I would conduct the hearing and the disposition I would probably recommend if I concluded that a child referred for truancy was justified in staying away from school.

Although the exercises clearly called for hypothetical situations, four of the five wrote about actual hearings in which they had participated. In two cases, medical problems in the family were determined to justify the truancy. In one there was a determination that school was doing little for the child and the panel's disposition was to assist in transfer from school to an apprenticeship program. In the other, it was determined that the problem was rooted in neglect and inadequate instruction by school personnel. None of these determinations could have been made had the panel members been

119. Hiddleston, *The Role of the Hearing: Using Reports*, in *THE SCOTTISH JUVENILE JUSTICE SYSTEM* 33 (F. Martin & K. Murray eds. 1982) (citing generally *CHILDREN OUT OF COURT*, *supra* note 21). Although it is tempting to conclude from this statistic that panels are unduly influenced, there are caveats. The excellent work done in *CHILDREN OUT OF COURT* is the only substantial research conducted on the point. Every person I interviewed, whether asked or not, observed that much had changed since the study to increase the competence and independence of panels. It should also be remembered that not all reports contain recommendations and that a relatively high level of agreement should be expected between social workers and panel members who are conscientiously seeking the best interests of the child.

unwilling to go beyond the simplistic notion that a child has a duty to attend school.

That professionals influence lay panel decisions is quite clear. Whether they do so to a degree that calls into question the benefit of having community decision makers is not clear. Experienced Strathclyde panel members had little difficulty seeing themselves as the primary decision makers. While we may rightfully be more concerned about the newer or less dedicated members, it is encouraging that panel training programs do address the proper use of reports and the panel's relations with professionals.¹²⁰

Although it appears that there is a capacity in experienced panel members to be constructively critical of school and social work personnel, the idea seemed new to them and they approached it with some caution. I hope this approach will be pursued. Systematic recording of institutional criticism is desirable for several reasons: (1) panels are in a unique position to identify instances when institutional behavior may compound a family's problem; (2) accretion of panel observations might have a positive effect on the agencies; and (3) the very exercise of observing and recording these comments could be expected to increase the independence of panel members and to reinforce their image of panels as the primary decision makers in the system.

Awareness of the influence of professionals should also be a part of the American hearing system. Our judges usually have little difficulty seeing themselves as decision makers. Yet in my juvenile court practice I too often saw the court defer completely to the wishes of social workers, court counselors, probation officers, and the like.

120. New panel members in Strathclyde are given specific guidance on the use of reports, emphasizing the members' role as ultimate decision makers. Some of the specific suggestions are:

What recommendations are given and why? Would you on the basis of the reports agree with the recommendations?

Note what else you want to know before taking a decision.

Think carefully about the areas of the life of child and family you may wish to explore and what statements in the reports you might wish to verify (for example—statements such as 'known thief' from a school report or 'father drinks heavily' from the social work report).

Strathclyde Handbook, *supra* note 72, at pt. III(a).

Another factor diminishing the impact of professionals on panel decisions may be the overall poor quality of their reports. See Ogilvie, *Study of Children's Panel/Social Work Department Operation*, THE HEARING: BULL. OF THE PANEL TRAINING RESOURCE CENTRE, Feb. 1981, at 15-18 (no agreement yet on what a good report is supposed to look like); MOORE, *Social Background Report is for Children's Hearings*, THE HEARING: BULL. OF THE PANEL TRAINING RESOURCE CENTRE, June 1981, at 13-18 (little progress in improving reports beyond bare improvements in literacy).

3. *Legal Formalities*

Problems associated with the absence of legally trained persons at hearings are well recognized and are often discussed by both participants and observers of juvenile justice in Scotland.¹²¹

Although panels are criticized somewhat for failing to make disclosures and explanations that inform the family about the process, the principal hitch is the acceptance of grounds of referral—that is, with the “arraignment” phase of the hearing. Faced across the table with a family summoned to a hearing, having read various reports, the panel naturally wants to help. It cannot do so unless there is an admission of conduct bringing the child within the panel’s mandate. Neither the child nor the panel members may understand the elements of the grounds of referral or whether conduct satisfying them has in fact occurred.¹²² The family has been given advance notice of the grounds of referral and some opportunity, however limited, to seek legal advice on whether to admit or deny.¹²³ A more complicated related danger is that lay people, not attuned to the importance of notice and opportunity to defend, will make decisions based on charges that could have, but did not constitute the grounds of referral. Both these and other shortcomings marked one of the hearings I observed in Edinburgh. Yet the hearing also demonstrated many of the strengths of the system. A description of it may be instructive on the matter of the costs and benefits of informality in the system.

David was referred to hearing on grounds that he had been absent from school without reasonable excuse for sixty-six days during a 133-day period.¹²⁴ The panel chair ignored his negative response to the question of his acceptance of the grounds of referral. David went on to explain that he had been unofficially attending another school where his friends were enrolled.

At that point, the chair, obviously referring to a report, compounded his error. He told David that truancy was not the only matter of concern, that he had been in trouble at three schools, that the charges included fighting and carrying a knife. By now the hearing had violated the rules governing

121. See Grant, *The Role of The Hearing: Procedural Aspects*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 65 (F. Martin & K. Murray eds. 1982); CHILDREN OUT OF COURT, *supra* note 21, at 101-11; LEGALITY AND COMMUNITY, *supra* note 51, at 28-43.

122. The system’s socialist critics observed twelve instances of what they considered to be a cavalier disregard for whether the child participated in an offense or was merely present at its commission. LEGALITY AND COMMUNITY, *supra* note 51, at 19.

123. *Id.* at 33.

124. The following account is of a hearing observed June 15, 1984, in Edinburgh, Scotland. The hearing lasted 37 minutes. The child was accompanied by his mother and a family friend, a social worker, and school official were also present. The child’s name has been changed for this account.

its conduct in several respects: (1) failure to properly establish its jurisdiction; (2) failure to advise the child of his right to have the grounds of referral established in court; (3) probably consideration of uncharged misconduct as grounds for referral; and (4) failure to disclose the substance of the prehearing report.¹²⁵ The school official attending threw in a rumor that David had marijuana at school. His mother said he could be a bit of a bully at home, but it was nothing that she could not handle.

The foregoing account suggests something of a civil liberties disaster. But about twenty minutes into the hearing a panel member finally asked a question designed to permit David to talk freely. He did, and he described a plan he had worked out with his family to investigate the possibility of living with his uncle, who trains paratroopers in Wales. There ensued a free discussion of the school he would attend, a plan to visit Wales on holiday to see if he liked it and how the transfer might be worked out. His mother said that the uncle wanted the boy to come and that getting him out of Westerhailes, his blighted Edinburgh neighborhood, might change his outlook. This dialogue was conducted in a relaxed and informal manner with all parties, including David, participating. That a nonpunitive solution would be popular in a case like this is not surprising. What is more revealing is that the panel declined even to hold its coercive power in reserve.

The Reporter advised that the panel could issue a supervision order that day in order to preserve its authority if things did not work out in Wales. Such an order was also transferable to Wales. The other choice was to adjourn the hearing without action, effectively dismissing the case, a step which would require starting the process over again completely if the plan went awry. The panel chose nonintervention and arranged for the assistance of the Social Work Department in both Edinburgh and Wales on a voluntary basis. Ironically the chair then, in meticulous compliance with the rules, explained the panel's decision to adjourn without action and the child's right to appeal that decision to court.

Ultimately, David's panel did what the architects of the hearing system would have hoped. There is no reason that the panel could not have done the same thing and followed the rules. Prehearing legal advice is usually proposed as the way to address the problem of understanding and acceptance of grounds of referral. Greater emphasis on the rules in panel training might help to remedy the other shortcomings.¹²⁶ I would also suggest that

125. The Social Work (Scotland) Act 1968, ch. 49 §§ 42(1)-(7), 43; The Children's Hearings (Scotland) Rules 1971, *supra* note 64, at rule 17(3).

126. Rules training is part of local in-service training rather than mandatory initial training in Strathclyde. The panel member's handbook contains a step-by-step guide for conduct of

reports be furnished to families in advance of the hearing.¹²⁷ At the end of the day, however, there will always be a procedural due process price to be paid for conducting hearings without lawyers or judges. Are the benefits worth the price, not in the abstract but as compared to what probably would have happened in our juvenile court? It is significant that the outcome in this case was that which is often sought by those wishing to sever status offenses from juvenile court jurisdiction—provision of social services. Yet the panel had the authority to do much more, to intervene coercively and in a punitive manner. There is little in the structure of the hearing system to prevent another panel from following the more punitive course.

4. Jurisdiction

Conceding for the moment that cases of abuse and neglect are appropriate for juvenile courts,¹²⁸ what jurisdictional divisions are proper when it is the child who has engaged in the troubling conduct? What should be the day-to-day business of a hearing system? In practice, the answer to this question in Scotland is "garden variety" crime and status offenses committed by persons under the age of sixteen.¹²⁹ That division of authority between the hearing system and the adult court is a good one, making more acceptable the civil liberties tradeoffs necessary to the operation of the hearing system.

hearings, but there is no mention of civil liberties considerations or the importance of following the rules. Strathclyde Handbook, *supra* note 72, at pt. II(a).

127. Regional policy in Strathclyde is that social workers disclose to families what they are saying in reports or let families read the reports. *Id.* at pt. III(a).

128. The Scottish hearings system has jurisdiction over abused and neglected children, although treatment of that part of its work is beyond the scope of this article. Social Work (Scotland) Act 1968, § 32(2)(c)(d)(e). The volume of such cases is not insubstantial. In Lothian Region, for example, during each year of the nine-year period 1975-1983 there were approximately four thousand referrals to the Reporter. About three thousand of these were on offense grounds. Of the remaining thousand, roughly three hundred were abuse or neglect cases, only slightly fewer than truancy (§ 32(2)(f)), and more than the total of status offenses "falling into bad associations or exposed to moral danger" (§ 32(2)(b)) and "beyond the control of their parents" (§ 32(2)(a)). Over the period, there was a slight decline in offense referrals, a like increase in truancy cases and no significant change in the number of abuse and neglect referrals. Lothian Regional Council, Annual Report: The Children's Hearing System in the Lothian Region, app. B (1982-1983).

129. Hearings jurisdiction is also retained over persons between 16 and 18 who are subject to earlier supervision orders. An exception is some cases of offenses committed by those over 16. In 1982, the Lord Advocate (Attorney General) pushed for court dispositions in these cases unless there was reason for reference to hearing. Murray, *supra* note 56, at 17. It is technically within the discretion of the Lord Advocate to direct court disposition of all offense cases. Reporters, however, would not stand for that. In Strathclyde, even the over-sixteen initiative has been checked, with the burden in practice being on the Procurator Fiscal (local prosecutor) to justify court referral. Interview with Fred J. Kennedy, *supra* note 86. Still, the crimes with which panel members usually deal are no more serious than thefts or house-breakings. CHILDREN OUT OF COURT, *supra* note 21, table 6.2, at 98.

Satisfactory choice of jurisdiction will be even more critical if a hearing experiment is undertaken in this country. Although it has been argued that the real value in a separate juvenile court system can be found in its special ability to treat serious offenders,¹³⁰ the trend in the United States has been to try increasingly younger offenders, for an increasingly wider range of offenses, as adults.¹³¹ At the other end of the jurisdictional spectrum, the punitive treatment of those "convicted" of vaguely worded status offenses in this country has brought into serious question the propriety of permitting such jurisdiction at all.¹³²

The exercise of relatively unguided and unchecked discretion is a feature of the Scottish system. That is in part because of the inclusion of status offense jurisdiction on the one hand and the direct commitment of discretion to prosecutors where offenses are involved on the other.¹³³ Our status offense jurisdiction is similarly defined and our prosecutors and judges have an even greater amount of discretion to secure waiver of juvenile court jurisdiction in serious cases.¹³⁴

5. Discretion

The broad discretion necessarily afforded the players in a hearing system is a legitimate cause for concern. The delicate business of transferring power from policy makers to decision makers involves the potential, be it positive or negative, for great impact on children. Although much has been written on the subject, too little is known about how discretion is exercised, much less controlled.¹³⁵

130. See, e.g., *The Serious Juvenile Offender: Some Promising Approaches*, NEW DESIGNS FOR YOUTH DEVELOPMENT 3-8 (Sept./Oct. 1982); see generally V. AGEE, *TREATMENT OF THE VIOLENT INCORRIGIBLE ADOLESCENT* (1979).

131. See, e.g., Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the 'Rehabilitative Ideal,'* 65 MINN. L. REV. 167, 168-97 (1980). A recent change in Florida vests discretion in the prosecutor to bypass the juvenile system merely by filing an information in adult court. FLA. STAT. ANN. § 39.04(2)(e)(4) (West 1981).

132. See C. SILBERMAN, *CRIMINAL VIOLENCE*, CRIMINAL JUSTICE 335-39 (1978); *Do You Want To Get Beat Up at Home or in Prison?* in *THE CHILDREN'S RIGHTS MOVEMENT* 43-48 (B. Gross & R. Gross eds. 1977).

133. See Feld, *supra* note 131, at 167-68.

134. See *id.* at 174-84; Carter, *The Florida Juvenile Justice Act: From Juvenile to Adult with the Stroke of a Pen*, 11 FLA. ST. U.L. REV. 921 (1984).

135. Relatively simple observations of the discretion exercised by police and prosecutors, e.g., K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (commentary about how discretion is exercised and how the control of it has become more sophisticated). See, e.g., LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Work, Richman & Williams, *Toward a Fairer System of Justice: The Impact of Technology on Prosecutorial Discretion*, 12 CRIM. L. BULL. 289 (1976). The inquiry into prosecutorial discretion has been aided by those from disciplines other than law. British soci-

The identification of an appropriate policy by juvenile law policy makers, in our case courts and legislatures, is no small task. There are three principal means of influencing the system in an effort to insure that the day-to-day discretion granted to decision makers is exercised consistently with that policy. The first is the placement of substantive limits on the exercise of discretion. The most workable substantive limitation is jurisdiction. Conduct and situations that are not amenable to a response that is consistent with the policy, or that result in responses that could not command public support, may simply be removed from the ambit of the decision makers. As suggested in the previous section, the business of an American hearing system should be carefully defined and limited to compensate in part for the major transfer of discretionary power to lay decision makers as well as to placate the predictable reservations of the public.

A second means of influencing the exercise of discretion is to "guide" it. The policy maker mandates that the decision maker consider selected factors, or decrees that any deviation from a normally expected result be documented and explained.¹³⁶ Guiding discretion is a popular, largely meaningless game in the administration of the death penalty in this country,¹³⁷ and it has been raised almost to the level of a baroque art form in the

ologist Keith Hawkins, in relating his experience as a member of the parole board for England and Wales and his study of United States parole boards, reminds us that to understand discretion we must not look only to primary decisions made at salient points in a process. A secondary, less visible decision about a prisoner's security classification, for example, may present him opportunities or obstacles which will have great effect on the later decision of the parole board to release or not. Hawkins further notes the importance of secondary decisions about the amount and kind of information to be provided the decision maker and even decisions about how that information is packaged. K. Hawkins, *Decision Making in the Criminal and Regulatory Context* 5-9 (Mar. 27, 1985) (lecture delivered at Washington and Lee University). These observations are particularly appropriate to understanding the Scottish hearings process, which has a number of salient decision points (police-reporter-panel-implementors) between which a number of important secondary decisions occur (e.g., whether to schedule a hearing quickly or to delay; what is to be put in the social background report; who will choose to attend the hearing).

136. The first device is illustrated by requirements that capital sentencing juries consider certain factors selected by the state legislature. *See, e.g.*, GA. CODE ANN. § 27-2534.1 (1981) (list of "aggravating" and "mitigating" factors to guide sentencing discretion). The second is exemplified by Washington's presumptive juvenile sentencing grid, deviation from which must be explained by the judge. WASH. REV. CODE ANN. §§ 13.40.030, 13.40.160 (Supp. 1985).

137. *See Geimer, supra* note 38, at 746-52, 766-75. The effort to guide the discretion of sentencers in determining who among murderers shall die has not been successful, but death penalty jurisprudence also provides an example of substantive limitations on discretion. Before 1977, sentencers also had to choose among rapists. Most of those chosen for death were black. H. BEDAU, *THE DEATH PENALTY IN AMERICA* 32 (3d ed. 1982). In *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court removed these choices from the "jurisdiction" of sentencers.

field of administrative law.¹³⁸ Either of these areas of the law would provide much information for any who might wish to fashion guidance for the discretion exercised by reporters or panel members. Such an examination will lead, however, to the conclusion that discretion cannot be effectively guided. At best the decision maker may be occasionally deterred from doing that which the policy maker would not want done. In most instances, discretion guiding efforts merely prove the truth of a maxim well understood by many front-line decision makers: "Do what you think is best. Then, if someone wants a piece of paper, give him a piece of paper."

The final means of influencing discretion is to select the right decision makers and protect them. Its desirability is obvious from the limitations of the first two alternatives. Herein lies the relevance and worth of Scotland's efforts to grapple with working class panel recruitment and the influence of professionals, its CPAC screening and interview machinery, and its insistence on the independence of Reporters. If Chris Johnson of Kerlaw List D School is to decide whether or not your child goes into solitary confinement, there is little need for the policy maker to determine whether that option should even exist, or to prescribe fact finding mechanisms and discretion guides for his use in individual cases.

The problem in Scotland, and to a greater extent in the United States, is the identification of an appropriate policy for the juvenile courts, and the recruitment of the right people to administer that policy.

6. *Public Support*

Here, as in Scotland, public opinion seems to indicate a desire for a more punitive system than the one being operated by the policy makers and legal decision makers.¹³⁹ This variation is understandable and explainable.¹⁴⁰

138. See, e.g., Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983).

139. The gap may be even wider here since 1981 because of changes in federal policy. The head of the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) spoke of its new direction: "the primary goals of OJJDP will be to protect society from crime, apprehend and punish criminals, and seek ways to turn young people away from crime as a way of life . . . it is imperative to note we are not a social service agency." Address by Alfred Regnery, Administrator, OJJDP, Tenth National Conference on Juvenile Law (Feb. 23, 1983).

An administration task force took this view: "It must be faced that some juvenile offenders are more sophisticated about crime, the way in which the system operates, and how they can avoid being held culpable than are many adults." NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, SERIOUS JUVENILE CRIME: A REDIRECTED FEDERAL EFFORT (March 1984). If this official rhetoric accurately reflects public opinion, an American hearing experiment would have to proceed carefully indeed. It is interesting to note, however, that a 1980 national opinion survey funded by OJJDP found that 73% of the respondents held the view that the primary role of juvenile

But it leaves an innovation like a children's hearing system with two practical choices—operate within the tolerances of the variation or educate and persuade the public to relocate the zone of acceptability. Since an American hearing system would necessarily be a limited, pilot project, it would probably be confined to operating within strict limits while undertaking such public relations work as resources would permit. A comparative disadvantage is that Scotland made the major decision for change sixteen years ago on a national level and has by and large resisted retrenchment. There, the burden to show shortcomings in the juvenile process is now on the opponents of the hearing system. In the United States we are neither organizationally nor philosophically in a position to make such a change as a nation. A carefully selected experiment, which proves successful is the best for which we can hope. But unlike tentative steps taken to date, useful as they are, it must be a bold experiment. Power must be formally transferred to a lay body in a bloc and not left at the discretion of courts or parties in individual cases. The final section suggests how such an experiment might be conducted.

V. A PILOT CHILDREN'S HEARINGS SYSTEM IN THE UNITED STATES

Most observers of the Scottish system have concluded either that it is not transferable or that major modifications would be required for application in the United States.¹⁴¹ I disagree. A pilot program should be undertaken with a minimum of tinkering. It should be carefully located and structured,

court system should be the treatment and rehabilitation of offenders, not punishment. See Rosenblat, *Why the Justice System Fails*, TIME, March 23, 1981, at 22-28.

140. Part of the explanation is fear based on ignorance. There is increasing evidence for those with the time and inclination to look that violent crime by juveniles is not increasing in the 1980's and that juvenile crimes are, by many indicators, less threatening and injurious than those committed by adults, though both crimes may be described by the same section of a criminal code. See McDermott, *Facts about Violent Juvenile Crime* (1982); McDermott & Hindelang, *Analysis of National Crime Victimization Survey Data To Study Serious Delinquent Behavior—Monograph One*, JUVENILE CRIMINAL BEHAVIOR IN THE UNITED STATES: ITS TRENDS AND PATTERNS (Jan. 1981).

141. Professor Fox sees value for us in the hearing system. He would not give panels in this country the power of commitment, however, and would require that the reporter be an attorney. CHILDREN OUT OF COURT, *supra* note 21, at 286-308. I view neither of these changes as desirable and consider them major modifications of the Scottish system.

Ireland certainly has a community of interest with Scotland but, after careful study of the hearing system, declined to adopt it. TASK FORCE ON CHILD CARE SERVICES, FINAL REPORT TO THE MINISTER FOR HEALTH § 17.9 (1980).

There is a children's hearing project in Cambridge, Massachusetts, in which panels mediate status offense cases with consent of court and parties. It is apparently successful in this limited venture. Interim Report of The Children's Hearing Project (1982). The Project Director, Sandra Wixted, does not desire any mandatory powers for the panels. Telephone conversation with Sandra Wixted, Project Director (June 26, 1985). *Id.* Another observer of the Cambridge experiment in its early stages would favor compulsory arbitration powers but sees the civil

but it should be a full-blown try. The proposal outlined here emphasizes what I consider to be the essential characteristics of such a program. It is not a comprehensive blueprint, but a statement of major conditions essential to the success of an American program. In all aspects not specifically addressed in this section, I recommend that the system operate just as it does in Scotland.

A. The Right Alignment of Purpose and Jurisdiction

The watered-down purpose language resulting from recent juvenile code revisions here¹⁴² illustrates a problem even more serious than lack of general guidance for courts. The purpose sections are obviously engrafted with little thought of how they fit the jurisdictional grants of the courts. Any hearings system experiment must at the outset clarify the relationship between its goals and allocation of its business. Answering the first question takes us a long way toward answering the second.

I agree with Professor Fox that the state and the child should not always be viewed as adversaries, that they often share the legitimate interest that the child outgrow his delinquent behavior. The overall purpose of a hearing system should be "protecting growth" in young people.¹⁴³ The hearing system pilot program should not be instituted for the purpose of crime control, general deterrence, or public safety. Its success should not be measured by comparative crime or recidivism rates. Rather, it should be evaluated by its impact as one of many factors influencing the lives of those it touches in protecting their growth.

The jurisdictional grant, then, should place before panels only conduct indicating some amenability to being dealt with in a manner that will further the clear purpose of the system. Should that include serious crimes and status offenses?¹⁴⁴

liberties tradeoffs in the Scottish system as too costly to justify its complete adoption. Rinik, *supra* note 56, at 210-13.

Reluctance to grant compulsory powers to lay panels is grounded in a very legitimate concern for the danger of punishment without due process. But such punishment continues in the present system while child welfare advocates and civil libertarians finesse the question of coercion. It is an issue that should be faced directly. I agree with the view of Andrew Lockyer that compulsory measures of care are not punishment but they are compulsory and are often more intrusive than punishment. They should be avoided if nonintrusion is the primary goal. Lockyer, *supra* note 46, at 176, 182. Nonintervention, however, is not the goal of either system discussed here.

142. See *supra* note 45 and accompanying text.

143. CHILDREN OUT OF COURT, *supra* note 21, at 296-99. See also *supra* notes 89-90 and accompanying text.

144. Dealing only with these two poles of jurisdiction implicitly assumes that commission by a child of any violation of the adult criminal code is a sufficient indicator that he may be in

Protecting growth and preventing serious crime may not be compatible. Perhaps regrettably, in cases of murder and rape the state and the child really are adversaries and the public is not likely to stand for the situation to be handled in any other way. But what is serious crime? Professor Fox, who would also exclude serious crime from hearings jurisdiction, says the answer must be arrived at subjectively, and so it must.¹⁴⁵ But keeping the purpose of the juvenile system in mind suggests a different way of assessing the relative gravity of offenses than might be employed in an adult system. One way *not* to measure it, for example, would be solely by the amount of harm or risk of harm inflicted. Rather, the decision should be offender oriented—a realistic attempt to be true to the commitment to deal with conduct we have some hope of influencing under the protection of growth rationale, and to consign that with which we cannot deal to the adult courts. I would expect this approach to keep within the jurisdiction of a hearing system of offenses, such as narcotics sales, which might be excluded as serious crime under other criteria.

Fidelity to the purpose of protecting growth also points toward some jurisdiction over status offenses, whatever the merits of the argument that our system as presently operating should not encompass them.¹⁴⁶ An experiment in truly enlightened protectionism, administered by members of the community and involving the family as a whole should have cases arising from noncriminal behavior as part of its remit. It is not necessary, however, to permit the program to operate in cases where the child engages in “beha-

need of compulsory measures of care. This is a classic child saving assumption which is almost certainly false. Nevertheless, it is administratively convenient and so engrained in both the United States and Scottish systems that I yield to it.

145. CHILDREN OUT OF COURT, *supra* note 21, at 304. Suggestions for a definition range from simply excluding the seven major offenses listed in the FBI Uniform Crime Reports (homicide, forcible rape, robbery, aggravated assault, burglary, larceny and auto thefts), P. STRASBURG, VIOLENT DELINQUENTS—A REPORT TO THE FORD FOUNDATION 9 (1978), to a more complex method based on victim or general societal perception of seriousness, to various “value-informed” criteria. Zimring, The Serious Juvenile Offender: Notes on an Unknown Quantity (National Symposium on the Serious Juvenile Offender, Minneapolis, Minn., Sept. 19-20, 1977). None of the methods permit easy separation of aggravated assault from school-yard fights or robbery from extorting lunch money. Perhaps that problem commends the kind of give and take on jurisdiction and exercise of prosecutorial discretion that has characterized the relationship between reporters and the Scottish Lord Advocate. *See supra* note 129.

146. *See supra* notes 168-72 and accompanying text. It is interesting to note that OJJDP as national policy maker, before its current preoccupation with serious offenses had some success in ameliorating the punitive treatment of status offenders. Involvement of such offenders with the juvenile courts dropped sharply during the period 1974-1979 and their removal from secure institutions was characterized as one of the more successful policy thrusts of the 1970's. Krisberg & Schwartz, *Rethinking Juvenile Justice*, 29 CRIME AND DELINQ. 333, 355-57 (1983).

viour or associations injurious to his welfare or the welfare of others,"¹⁴⁷ or "is found in a disreputable place . . . or associates with vagrant, vicious, criminal, or immoral notorious persons."¹⁴⁸ An advantage of a pilot program is the opportunity to experiment with more definable offenses. I suggest truancy and habitual disobedience to reasonable parental requirements.

B. *A Real Transfer of Power*

There are voluntary diversion programs with some attributes of the Scottish system. The Children's Hearing Project in Cambridge, Massachusetts was directly inspired by Scotland.¹⁴⁹ Scots, studying the effect of increased working class membership on panel decisions, would also be interested in the Youth Court experiments of several New York communities in which petty juvenile offenders are judged by their peers.¹⁵⁰ These programs all have merit simply by diverting people from our abominably formal juvenile court system. Some make an affirmative contribution to the growing trend toward mediation of family problems. But precisely because of their voluntary nature they will never be viewed seriously as potential replacements for all or any major part of the juvenile courts. Rightly or wrongly, without *power* these programs are considered interesting frills. There must be a real transfer of power. A state must permit one of its subdivisions to transfer the authority to make dispositions in some juvenile cases from the courts to lay panels. It must safeguard the experiment by protecting the principal players. The creation of a position of Reporter should accompany the grant of authority to a locality. The Reporter should be a nonpolitical appointee of the Governor, selected from nominees submitted by the locality, removable by the Governor only for cause, and appointed for a term which overlaps normal election years. Likewise, panel members, though not selected by the Governor, should serve fixed terms and be removable for cause only by the Governor. A condition of the grant of authority should be submission of an acceptable plan for recruitment and training of panel members as well as procedural rules for the conduct of hearings.

Such a pilot program is politically possible. State legislatures quite frequently enact local legislation. My personal experience with North Caro-

147. ARIZ. REV. STAT. ANN. § 8-201.13 (1984).

148. OHIO REV. CODE ANN. § 2151.022(E) (Page 1976).

149. See Wixted, *The Children's Hearings Project Massachusetts Advocacy Center*, THE HEARING: BULL. OF THE PANEL TRAINING RESOURCE CENTER, Oct. 1981, at 12.

150. See Swackhammer & Roberts, *Youth Court: One Way of Dealing with Delinquents*, FBI LAW ENFORCEMENT BULL. (March 1980); *Youth Court Pondered Here*, Lockport, N.Y. Union-Sun & Journal, Oct. 17, 1984, at 20, col. 3; *Youth Court Viewed as Way of Nipping Crime at the Onset*, The Buffalo News, May 28, 1984, at B5, col. 5.

lina's adoption of a Public Defender system for juveniles and indigent criminal defendants provides an example.¹⁵¹ Judges and attorneys were initially quite skeptical about the idea and there was little chance for a state-wide program. But in 1970, pilot programs were established in two judicial districts. In little more than two years, the objections of the bench and the bar disappeared and Public Defender offices have now spread across the state.

C. *The Right Location and the Right People*

The right location is any political subdivision with a relatively homogeneous population and a degree of public support sufficient to permit the system to operate without substantial modification for a period of years and to be intelligently evaluated. One helpful aspect of our political system is that any city or county with the interest or initiative to seek the necessary legislative action will probably meet these requirements.

In the all important search for the right people, we can learn much from Scotland. There, an attempt is made to recruit panel members without axes to grind and to screen out people who are overly punitive or overly lenient. In addition, the Scots are, however tentatively and belatedly, recognizing the value of working class representation on panels. To complement the selection process, there is an extensive orientation and an in-service training requirement for panels.

It may be accurate to generalize that we are a rights-conscious people, accustomed to checks and balances and adversarial machinery, while unaccustomed to the wise use of discretion. That generalization does not describe us all. It only counsels caution in the initial selection process for the pilot program.

D. *The Right Process*

Within the jurisdictional grant of the pilot program, the hearing process should mirror that of Scotland with few exceptions. It is particularly important that intake and the hearing referral decision be the function of the Reporter, and that provisions for automatic and requested panel review of dispositions be employed.

151. I was one of the five original public defender attorneys employed by North Carolina in a program initiated on January 1, 1970. My colleagues and I also were among the very first attorneys in the state to appear in delinquency proceedings, though *Gault* had been decided two and one-half years earlier. The reception that we encountered from judges and juvenile court professionals was not always a warm one.

I would suggest the following modifications, some of which are also suggested by Professor Fox:

(1) Require families appearing at hearings to present evidence that an attorney has been consulted concerning the prudence of accepting the grounds of referral and that the family including the child, and the attorney, agree that acceptance of the grounds is provident.¹⁵²

(2) Require that a copy of any reports to be consulted by the panel be furnished to the family three clear days in advance of the hearing.¹⁵³

(3) Provide for the systematic recording and transmission of constructive criticism of schools and other agencies. Panel members should be encouraged to address, as they arise, aspects of a case that might be rooted in something more than just the attitude and conduct of child and family.

(4) Exceed the Scottish effort to recruit representative panels and concentrate training efforts on (a) understanding the economic and social condition of families likely to appear at hearings and (b) following the procedural rules provided for the conduct of hearings.

VI. CONCLUSION: RIGHTS AND COMMUNITY

Our preoccupation with rights is one of our strengths. At the same time it can be a weakness. It can foster the implicit assumption that one should expect nothing other than what has been established as a right after full combat on the legal battlefield. The notion then tends to disappear that people should not always employ all the power they possess; that there are times when they should do for a person that which the law does not require them to do. In short, a rights orientation often inhibits development of a sense of community.

This rights orientation means that any transfer of wide discretionary power over the lives of children to lay panels is a risky proposition. If our current juvenile justice model was inflicting less harm on children, perhaps the experiment would not be worth the risks. But it is hard to imagine children doing worse under almost any alternative to our present "worst of both worlds" system.

There is another factor that tips the scales in favor of a full try at Scotland's approach. The greatest benefit may flow to the adults who participate

152. CHILDREN OUT OF COURT, *supra* note 21, at 304.

153. This is administratively feasible. Interview with Peter Ritchie, *supra* note 83. The Scots are edging toward disclosure as a policy matter. If there are to be exceptions to the disclosure requirement, however, it is probably better they be spelled out as specifically as possible rather than be left to the discretion of the panel chair as in Scotland. *See supra* note 117.

in a hearing system. We need to develop a nucleus of nonprofessional adults who have the matter of justice for juveniles high on their personal agendas, and who have through direct experience developed a personal understanding of the "best interests of the child." Lay panel members and reporters can provide that nucleus. Their lives are affected by the system as much as are those of the families. It is also pleasant to contemplate juvenile justice becoming a topic of intelligent discussion in living rooms, restaurants, and workplaces. From this perspective, the hearings system would not be just something we tried to do *for* juveniles. Rather it would be like the old Geritol commercial—something we do for ourselves.

