

RIGHTS, INTERESTS AND REASONING IN

JUVENILE JUSTICE

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FOR MY PARENTS

TO JONATHAN AND BENJAMIN

WITH MICHAEL

I declare that this thesis is my own work
written entirely by myself

Ruth M. Adler
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ABSTRACT

The central theme of the thesis is legal intervention in the lives of children. The underlying question is whether such intervention should be regarded as a violation of children's rights, as claimed by child-libertarians, or whether it is more appropriate to view it as a furthering of interests, in the manner of the advocates of protectionism. A coherence of theory and practice is regarded throughout as a necessary condition of achieving justice for children. Rights and analyses of rights are examined briefly as a preliminary step towards articulating a framework for a theory of children's rights. It is argued that such a theory must necessarily invoke children's interests. The concept of interests is examined in some depth and it is shown how any substantive theory of the interests of children must accommodate both "want-regarding" and "ideal-regarding" considerations. Such a view is held to gain considerable support from an analysis of actual reasoning about interests. The discussion now turns to an examination of the Scottish Children's Hearings System as illustrative both of the conceptual points already elucidated, and of the complexities involved in decision-making in a system in which interests are considered to be the paramount concern. In conclusion, the thesis examines the relevance of principles of justice in a setting which has now been characterised as necessarily open to dispute. Some practical implications are presented by way of a final 'testing' of the theoretical conclusions.

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INTRODUCTION

It is a sad reflection on the circumstances of many children in contemporary societies that it is so often necessary to invoke their rights and to compel action in their interests. Children are born into families or at least into a setting which one likes to imagine is characterised by:

"... the continual rendering of services, kindnesses, attention and concerns beyond what is obligatory between persons whose lives are intimately and enduringly connected ... Good parents, children and families submerge the performance of their obligations to one another in ways of life whose continuity, familiarity and at times power to irritate are in no way obligatory". (1)

The passage continues with a statement which highlights the focal theme of this thesis:

"... we do not see the relationship between children and those who rear them as more than partially and regrettably adversarial". (2)

This thesis concentrates precisely on those areas which are or at least may become "adversarial", in an attempt to provide a framework and guidelines for their resolution. The focus will be on the child. However, this should in no way be regarded as a denial of parental rights and interests but rather as recognition of the fact that in cases of severe conflict, children are nearly

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1. Onora O'Neill and Wm. Ruddick (eds.) Having Children (Oxford University Press, New York, 1979), Introduction, p.7.
 2. ibid.,

always in a weaker bargaining position than their parents and other adults with competing interests, and that in addition, recent attempts to remedy this often seem misguided.

The cause of juvenile justice is currently being championed from two apparently conflicting directions, which have unfortunately come to be known as the "welfare" view and the "justice" view. It will become clear below (p. 7) that the terms "welfarism" and "legalism" are regarded as much more appropriate shorthand descriptions of the two ideologies. However since the debate in the literature is nearly always presented as a dispute between "welfare" and "justice", these labels will be used for the moment. Exponents of "welfare" see children as peculiarly vulnerable and in need of special protection. This standpoint is clearly reflected in the statute book. Laws regarding the criminal responsibility of children, introduced at a time when children were subjected to all the same penalties as adults, are the outcome of this view; so too is labour legislation introduced when children were forced to work long hours in appalling conditions in mines, factories and on the land. The establishment of compulsory education, ultimately making it impossible for children to enter the workforce, provides a further example. The Children's Hearing System in Scotland is a product of the same underlying philosophy of childhood.

The exponents of "justice" have a radically different outlook. The child liberationists in the United States and (rather less consistently) the "Justice for Children" movement in the United Kingdom, are protesting at the injustices perpetrated against children through measures taken 'for their own good' and demanding

recognition of the fact that in many areas, differences between adults and children are quite irrelevant to the ascription of rights. The liberationists claim that the arguments for extending equal rights to children are similar to those for extending them to women, blacks and any other oppressed groups. One writer states:

"The only people in our society who are incarcerated against their will are criminals, the mentally ill and children in school".

(3)

It is the disturbing belief that both views can be plausibly defended and equally plausibly attacked, that forms the starting point of this thesis. As a member of a Scottish children's panel, I am occasionally alarmed at the attempts made to persuade children that their removal from home, for example, is in their best interests. Some children do indeed need protection from their protectors. As an observer in a juvenile court in California, I was equally disturbed to see five lawyers haggling over the case of a thirteen year old offender in the process of upholding his constitutional rights. It seemed dubious to say the least, whether these rights were worth having, particularly when it was pointed out to me that no young offender could come into a court and apologise for his behaviour, for to do so would be to lose the constitutional protection against self-incrimination.

Perhaps attempts to squeeze the facts of childhood into a unified theory are misguided in that the complexities of reality are being denied for the sake of consistent theory. It could be that the developmental nature of childhood makes it an inappropriate subject for

3. Richard Farson, Birthrights (Penguin, USA, 1978), p.96.

a single coherent theory. There may be a need for a system of juvenile justice to be sufficiently flexible to accommodate conflicting theories to achieve justice for children, instead of denying the conflicts of childhood to achieve a coherent philosophy. It may also be that the Scottish system has the potential to achieve the necessary flexibility.

In a recent article on the Scottish system, it was asserted that:

"It is not a weakness of the system that it contains different approaches but rather the very purpose for which it exists". (4)

This is perhaps not what was originally intended, but it is becoming increasingly apparent that some of the so-called "inconsistencies" and "conflicts" of the system are inevitable. The real need is to articulate them clearly and to explain the underlying issues which make them inevitable.

Rights and Interests

It must be said from the start that implicit in the two views or models of "welfare" and "justice" are theories of both rights and interests. Firstly there are analytical questions concerning the nature of rights and what it means for an individual to have a right. Secondly there are questions of moral and political substance concerning the actual rights to be ascribed to different individuals

4. Phyllida Parsloe, 'The Boundaries Between Legal and Social Work Concerning the Hearing System' in D. Houston (ed.) Social Work in the Children's Hearing System, Glasgow/Edinburgh Joint Committee for Further and Advanced Training 1975, p.27.

and their ranking in any cases of conflict. Disagreements can arise at either or even both levels. Both the "welfare model" and the "justice model" can agree that a denial of that to which an individual has a right, constitutes an injustice, as would the implementation of a mistaken order of priorities. However, the "welfare" view is tied to a particular analytic theory of rights in a way in which the "justice model" is not. A system which assumes the legitimacy of acting towards children 'for their own good' cannot (barring unlikely coincidences) accommodate a theory of rights entirely divorced from an account of interests, for any course of action acknowledged to be in a child's interest within a welfare system, might then involve a violation of the child's rights. If it transpired that this was in fact the case, it would indeed be necessary to choose between "justice" and "welfare". The "justice model" is not faced with this problem for it can accommodate theories of rights and interests which are quite independent of one another, and argues strongly that in any potential or actual conflict, rights should take priority. It therefore seems crucial to provide an account of both rights and interests as a first step towards assessing the competing models of juvenile justice.

Two ideal types of justice characterised by David Miller are regarded as useful in providing a framework for the whole thesis. The next part of the introduction will present a brief account of Miller's views. In addition, it seems that much of the current debate relies heavily on medical analogies which are thought here to have only limited application. It therefore seems appropriate to provide a discussion of these analogies before proceeding further. It is hoped that the relevance of both Miller's ideal types and the excursus on

the medical analogies will become clearer as the thesis develops. The introduction will conclude with an explanatory note on the methodology adopted here and a brief overview of the subsequent chapters.

Legal Justice and Social Justice

The distinction made by Miller is that between "legal justice" and "social justice". The concern of the former is said to be:

"... the punishment of wrongdoing and the compensation of injury through the creation (and enforcement) of a public set of rules (the law)..." (5)

By contrast, social justice is concerned with:

"... the distribution of benefits and burdens throughout a society, as it results from the major social institutions ..." (6)

It is suggested that the criteria of justice are not necessarily the same in the two areas, although they share certain common elements, such as a preoccupation with the nature of the rights possessed by the individual and the fact that the law clearly falls within the scope of each. Hence:

"... the separation of the two ideas is made for purpose of analysis, rather than from a conviction that legal and social justice have nothing to do with one another ..." (7)

5. David Miller, Social Justice (Clarendon, Oxford, 1976), p.22.

6. ibid.,

7. ibid., p.23.

The significance of the distinction in the present context, lies in the fact that the dispute between "justice" and "welfare" or legalism and welfarism in the area of juvenile justice seems to be, at its most fundamental level, an argument about these two types of justice.

The so-called "justice model" rests its case on an account of what Miller would term "legal justice", while underlying the "welfare model" is the assumption that, at least with respect to children, it is primarily the concerns of social justice which should determine outcomes and policies.

It is further pointed out by Miller that in making actual decisions within different systems of justice, weight is given to at least three competing principles which exemplify three interpretations of the formal principle of justice: "to each his due". These principles (each with its well-known exponents) are as follows:

- (1) to each according to his rights
- (2) to each according to his deserts
- (3) to each according to his needs.

It is held that (1) and (2) and (1) and (3) are only contingently in conflict, while (2) and (3) are necessarily in conflict, barring unlikely accidents. Thus one might:

"... strive for a social order in which each man has a right to that (and only that) which he deserves, or to that (and only that) which he needs (but) no society can distribute its goods both according to desert and according to need. (It can of course distribute part of its goods according to desert and part according to need) ..."

(8)

8. David Miller, op.cit., p.28.

A system of social justice might give primacy to either the principle of desert or the principle of need, but in practice (as Miller illustrates) often attempts to accommodate both principles and therefore necessarily experiences conflict and displays inconsistencies. It will become clear that the appeal of the "justice model" of juvenile justice, lies in the fact that it makes a clear distinction between those juveniles whose cases are to be adjudicated on the basis of desert (offenders) and those whose cases are to be adjudicated on the basis of need (the abused, neglected or deprived). The weakness of this position lies in the fact that it chooses to ignore that many young offenders have already been dealt with on the basis of desert prior to their appearance in court or at a hearing (see p. 223) and more importantly that many clearly meet all the criteria of those children deemed to be "in need". Unless advocates of this position are prepared to argue that offending per se should be the grounds of forfeiture of all claims to be treated on the basis of need, not a suggestion that has appeared in the literature cited here, they will still be faced with the inevitable conflict between principles of desert and principles of need. The "justice model" more than the "welfare model" would thus seem to be guilty of denying the complexities of reality for the sake of consistent theory. Such a Procrustean approach is viewed as unacceptable in a thesis which regards as central the need for theory and practice to be informed by one another and to exhibit coherence in any actual system of justice.

Welfare and Treatment : The Use and Abuse of Medical Analogies

"Treatment" is a term often used to characterise the disposals and resources available in welfare systems, hence medical analogies abound in the literature on juvenile justice. The Kilbrandon Report on Children and Young Persons, in particular, makes extensive use of medical terminology. The Report employs words like "symptom" and "diagnosis" as well as arguing for a "treatment model" and making comparisons between medical practice and its own policy recommendations.

"The doctor prescribes a course of treatment and observes the patient's response to it ... On the basis of his observations he continues the treatment or prescribes a different course, more drastic or less, as the situation appears to him to require ..."

(9)

Again at a later point in the Report it is claimed that:

"... in a great many delinquents a degree of maladjustment, of malfunction personal to the individual, has always been observable".

(10)

These and similar assertions have led critics of the welfare model to make the following kind of accusation:

"In essence, 'misconduct' is seen as a medical problem, a social illness, which can be made the subject of 'diagnosis', 'treatment' and 'cure'".

(11)

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9. Report of the Committee on Children and Young Persons, Scotland (Kilbrandon Committee 1964) Cmnd. 3065, HMSO, referred to hereafter as the Kilbrandon Report, paragraph 54 (4).
10. Kilbrandon Report, paragraph 77.
11. Allison Morris et al., Justice for Children (Macmillan, London 1980), p.34.

In other words, certain children are viewed as sharing "pathological conditions" which make them fundamentally different from other children. If this really were an accurate account of the underlying assumptions of the welfare model, the way would indeed be open for a concerted attack. It could be pointed out that little is in fact known about the immediate causes of crime and delinquency and that such a view of children in trouble would mean that social realities can be ignored. Thus Allison Morris writes:

"By treating 'misconduct' as a problem of individual adjustment rather than, for example, a problem arising out of the social (economic and political) position and condition of adolescents, subsequent action is both determined and delimited. Not only does the choice of cause affect the choice of treatment, it also affects the adequacy of that treatment".

(12)

However valid such observations may be, further reading of the Kilbrandon Report and other expositions of the welfare model, make it clear that they are made with reference to a straw man. There is no sustained claim in the literature that children in trouble are all, in some sense, ill. As David Watson writes:

"Most of our clients are personally quite well, though their relationships leave a lot to be desired".

(13)

In writing of the children who appear in courts for whatever reason, Kilbrandon states:

12. ibid., pp.35-36.

13. David Watson, 'Welfare Before Liberty : Justice for Juveniles?' in R. Brown and T. Bloomfield (eds.) Legality and Community (Aberdeen People's Press, Aberdeen 1979), p.29.

"The distinguishing factor is their common need for special measures of education and training, the normal upbringing processes for whatever reason having failed or fallen short".

(14)

The confusion has arisen because the term "treatment" can be applied in at least two ways. It is used widely as in: 'She treats children with respect' and in a more restricted way as in: 'She treats children for asthma'. Extending these two uses to the realm of juvenile justice, it can be seen that the first (wide) application of the term is quite compatible with punishment, whilst the second (restricted use) is directly opposed to it. The Kilbrandon Report states:

"... punishment might be good treatment for the particular person concerned in his particular circumstances: but punishment would be imposed for its value to the purpose of treatment, not for its own sake as some sort of reward for ill-doing".

(15)

The myth that punishment is viewed as irrelevant with respect to juvenile offenders has ironically been created by advocates of welfarism as well as its critics and is the direct outcome of accepting the restricted use of "treatment" as its central application. This myth has, regrettably, become a cause for misplaced pride within the system and gives rise to misunderstanding and confusion. In addition, it is this misleading picture that has led to the kind of

14. Kilbrandon Report, paragraph 252 (1).

15. ibid., paragraph 53.

of critique cited above, for "treatment" in the restricted sense is of very limited relevance in the field of juvenile justice. How does this argument affect the debate on the validity of the distinction between compulsory treatment and punishment?

Compulsory treatment in the restricted 'medical' sense is clearly distinguishable from punishment. However, in the wider non-medical application it might be punishment but need not be so. In neither case does the fact that it is perceived as such by the recipient make it so, but the fact that it is or would be perceived as such might justify a modification of the compulsory measures involved. The child sent to bed with a temperature (a legitimate use of medical analogy) might be offered comfort in the form of tasty dishes, a new book or whatever, whereas where a child is sent to bed as a punishment, the unpleasantness involved is essential to the action rather than an unfortunate side-effect. This remains true regardless of whether or not the children involved grasp the distinction. However, a recent claim ⁽¹⁶⁾ that children in England regularly prefer detention orders (a punitive disposal) to care orders to the extent that some children have even been known to commit additional offences specifically to achieve this end, must raise considerable doubts about the content and efficacy of care. There is a danger here of misapplying a medical analogy by asserting that, just as in the medical sphere, even if children regard hospitalisation as equivalent to incarceration, this may be unfortunate, but does not detract from any justification one

16. D.H. Thorpe, D. Smith, C.J. Green and J.H. Paley, Out of Care : The Community Support of Juvenile Offenders (Allen and Unwin, London 1980), pp.125-6.

might give for the existence of hospitals, so too in the case of social intervention, the child's perceptions are irrelevant. In other words, regardless of children's perceptions of them, Children's Homes, residential schools and so on, can carry on with the job they were intended to do. This is not the case. If 'care' holds such terrors for children, it seems highly unlikely that it can achieve its aims. There is a need to make explicit the aims and objectives of any care order in terms of the interests it is aimed to further, so that assessment of its success or failure can be made accordingly. To give a very simplistic example: if a young child is taken into care because her parents refuse to send her to school and if at the end of some specified period (six months perhaps) she has made no educational progress and is far unhappier than at the time of her first appearance in court, the disposal was almost certainly the wrong one. In the terms of the analysis provided in Chapter 3, the intrinsic interest which was the focus of concern (education) will not have been secured and another interest (in security) will have been damaged. There is of course room for discussion as to how long one might persist in this course of action, how long a child needs to 'settle' in a new environment, but if such a situation were to continue for a substantial time, say more than a year, then it would seem to be indistinguishable from punishment and unjust punishment at that. There is a need to explain to children what is happening to them and why, so that they and others can assess the rationality and effectiveness of any chosen disposal. As David Watson writes:

"If the child sees the disposal as a means to his ends he is less likely to find that means unpleasant, or at least the unpleasantness of the means will be offset by the pleasantness of the end".

(17)

This account seems to point to a need for separate institutions for those on sentence and those in care (as recommended in the concluding chapter). It is clear that a non-offender sent to a List D school (formerly an Approved School) for education and unhappy about the disposal, will feel unfairly treated if an offender 'gets out' after six months or a year and s/he has to remain there until his/her sixteenth birthday. Such feelings will almost certainly serve to lessen any value the experience might otherwise have. Compulsory intervention to promote welfare, and punishment, are indeed distinct, irrespective of the perceptions of their recipients, but if they are to achieve their aims within the context of a system of juvenile justice, it would seem important that the distinction be grasped as far as possible by those on the receiving end. Medical analogies are almost dysfunctional here, for much unpleasant treatment (an injection or operation for example) can be entirely successful regardless of any of the patient's feelings, perceptions and opinions of the diagnosis and the most appropriate cure. This is not the case with social intervention in the lives of children. However, there remains one further area where one might usefully apply medical analogies and where they have not been employed.

17. David Watson, 'The Underlying Principles : A Philosophical Comment' in F.M. Martin and Kathleen Murrey (eds.) Children's Hearings (Edinburgh, Scottish Academic Press, 1976) p.203.

Several critics ⁽¹⁸⁾ of the Scottish system have accurately observed that hearings tend to move from disposals involving either no intervention (a discharge) or minimal intervention (an adjournment) at a first hearing, to ever-increasing degrees of intervention (home supervision followed by residential supervision), at subsequent appearances. This has then been submitted as evidence for the existence of a tariff, said to be characteristic of punitive institutions and alien to welfare systems. Increased intervention is here equated with increasing severity of sanction. In this area it would indeed seem helpful to elucidate the nature of the chain of events by making a comparison with treatment in medical contexts. A diagnosis of tonsillitis, for example, is not immediately followed by surgical treatment. An attempt will be made to cure the condition with antibiotics and only when this is thought to have failed, will the tonsils be removed. In other words, where the less drastic remedy is sufficient to achieve a cure, the more drastic will not be employed. This is presumably, at least in part, because of the attendant risks and possible complications associated with the more radical procedure. In exactly the same way, where a twelve year old, for example, fails to attend school, a hearing should examine all the possible alternatives and opt for the least restrictive first, that is for the disposal which might achieve the desired end, whilst causing minimal disruption to other areas of the child's life. A subsequent recognition of failure followed by increased intervention is no more indicative of punishment

18. See for example Allison Morris et al., op.cit., pp.46-47. Allison Morris and Mary McIsaac, Juvenile Justice? (Heinemann, London, 1978), pp.131-133.

than resorting to surgery where medication has failed. However, just as the risks of surgery sometimes prove to have been too high (those mythical operations that are said to have been successful although the patient died!) so too the price of securing certain interests for certain children may prove unacceptable. The reasons for this will become clear as the thesis progresses. It seemed important by way of a preliminary exercise, to indicate the way in which medical analogies may serve both to clarify and to obscure issues in the field of juvenile justice. It is hoped that any application of such analogies in this thesis will serve to illuminate rather than to obfuscate.

Methodology and Outline of the Argument

The methodology adopted throughout this thesis can perhaps best be understood as a variation of what has been termed "the method of wide reflective equilibrium". This method is presented by John Rawls (19) as an appropriate procedure in the field of moral theory. At the most basic level it can be explained as consisting of the mutual adjustment of individual moral beliefs and intuitions with both moral and non-moral principles until a "harmonious fit" is achieved. An article by Norman Daniels has analysed and described this method in some detail as:

19. John Rawls, A Theory of Justice (Oxford, 1972), pp.46-53.

"... an attempt to produce coherence in an ordered triple of sets of beliefs held by a particular person, namely,
 (a) a set of considered moral judgements,
 (b) a set of moral principles and
 (c) a set of relevant background theories". (20)

The procedure involves taking individual moral judgements as the starting point and then moving on to an examination of alternative sets of moral principles and the degree to which they "fit" the initial judgements. These judgements, together with the principles may themselves be modified in the process. In the final stage, the principles are "tested" against some set of relevant background theories and mutual adjustment continues between the three sets until an equilibrium is reached. It is very important to realise from the outset that nothing remains necessarily fixed in such a process, no single factor is considered immune from revision. However as Daniels rightly observes, there is considerable reluctance to give up certain judgements and such judgements take on the status of "provisional fixed points". Thus:

"Since all considered judgements are revisable, the judgement: 'It is wrong to inflict pain gratuitously on another person', is too. But we can also explain why it is so hard to imagine not accepting it, so hard that some treat it as a necessary moral truth. To imagine revising such a provisional fixed point we must imagine a vastly altered wide reflective equilibrium that nevertheless is much more acceptable than our own. For example, we might have to imagine persons quite unlike the persons we know". (21)

20. Norman Daniels 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', Journal of Philosophy LXXVI 5 (1979), p.258.

21. ibid., p.267.

Presumably principles too and even background theories, may take on a similar status of "provisional fixed points". Moreover the method of wide reflective equilibrium does not seem to preclude taking any one of the three sets (considered moral judgements, moral principles and background theories) as a starting point in the balancing process and subjecting them to "exhaustive review", as well as testing them against one another. This is precisely the procedure adopted here with one crucial addition, namely the introduction of a relevant body of practice into the whole process. Practice is viewed here as a fourth "set" which must necessarily be accommodated in achieving a "harmonious fit". This need arises from the central concern of the thesis with decision-making and action in a specific context, a concern which differentiates it sharply from the focal theme of "A Theory of Justice" and hence applies the method of reflective equilibrium to a quite different enterprise. Underlying this enterprise is the assumption shared by what Ronald Dworkin has termed the "constructive model" for elucidating the coherence characteristic of reflective equilibrium, namely:

"... that men and women have a responsibility to fit the particular judgement on which they act into a coherent programme of action, or, at least, that officials who exercise power over other men have that sort of responsibility".

(22)

It is held here that the method of reflective equilibrium will prove helpful in formulating such a "programme of action" even if it were to be ultimately rejected as a model for justification in ethics or

22. Ronald Dworkin, Taking Rights Seriously (Harvard, Cambridge, 1978), p.160.

for making progress in moral argument. Indeed Dworkin states specifically that the so-called "constructivist model" remains neutral with respect to moral ontology. It is said to be consistent with but not to presuppose the existence of an objective morality. Whilst this claim remains highly debatable, it is nevertheless held here that the coherence intrinsic to reflective equilibrium is required for "independent reasons of political morality", in particular the:

"... assumption that it is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, to provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases".

(23)

At least one critic ⁽²⁴⁾ has rejected the method of reflective equilibrium as a key to moral progress and moral knowledge, whilst leaving quite open the separate question of whether or not it may serve as a useful procedure for formulating a programme of action. It should be clear that inasmuch as the main concern of this thesis is to provide a framework for making just decisions about children who come face to face with the law, it is to be regarded primarily as a "complex proposal" concerning the most appropriate way of achieving this aim, rather than as a moral theory or an empirical account. The success or failure of the method of reflective equilibrium in the following chapters, therefore lies in the extent to which the thesis achieves its

23. Dworkin, op.cit., pp.162-163.

24. Joseph Raz, 'The Claims of Reflective Equilibrium', Inquiry 25 (1983) pp.307-330.

main aim, namely the acceptance of a "complex proposal". In a quite different context, Eugene Kamenka has outlined the relevant criteria for assessing such a proposal:

"It is to be judged by its internal coherence and logical consistency, by the truth of its associated empirical claims and its relation to relevant empirical material, that it may or may not take up and in the last resort, by its relation and that of its consequences and implications to our own moral beliefs".

(25)

Several individual chapters in the following pages aim to achieve an equilibrium in a given related area, but the chapters are not to be judged in isolation from one another but rather as contributing to a proposed coherence of theory and practice in the field of juvenile justice. Chapter 1 provides a summary account of different theories of rights, concentrating in particular on those areas which seem of relevance to questions concerning the nature and existence of children's rights. General issues are raised and the more detailed argument takes as its starting point the "provisional fixed points" that 'rights talk' is meaningful and that where there are rights, children as well as adults are to be regarded as right-holders, hence any theory of rights which excludes children from the class of right-holders is to be rejected accordingly. After further elucidation of the concept of rights and what it is to have a right, the choice theory is presented as a theory which not only fails to "fit" a firmly held conviction that if there are rights, then children as well as adults are to be viewed as right-holders, but in addition

25. Eugene Kamenka, 'The Anatomy of an Idea' in E. Kamenka and Alice Erh-Soon Tay (eds.) Human Rights (Arnold, London, 1978) p.12.

cannot be 'squared' with what are often regarded as the most fundamental human rights. Moreover the "interest theory" can be shown to "fit" both of these firmly held moral beliefs and is adopted accordingly. However to conclude that both children and adults have rights, is to leave open the question of whether or not the same rights should be ascribed to each group. Chapter 2 is concerned with this question and again uses the method of reflective equilibrium to reach a conclusion. Three alternative theories of children's rights (each in itself compatible with the interest theory which can therefore be excluded from the balancing process at this point), are tested against a series of empirical problems whose resolution appears to be intuitively obvious. The examples are set out together with their practical solutions and the theories are "tested" against these solutions. "Protectionism" in a modified form is shown to produce the most "harmonious fit". At this point, the validity of the conclusion rests entirely on the assumption that the examples themselves are uncontroversial. However the case for "modified protectionism" is subsequently strengthened by elucidating what seem to be relevant differences between children and adults in the ascription of rights and by showing how such a theory seems to "fit" best with decisions made about children in various legal contexts. Such decisions and indeed the suggested solutions to the practical problems at the beginning of the chapter all rest on a prior notion of what constitutes a child's interests. Since rights have already been said to be intimately connected with the concept of interest, and given that the guiding principle in many legal settings where decisions are taken with respect to children is to "act in the best interests of the child", it would

seem essential to elucidate the concept of interest before proceeding any further with prescriptions regarding juvenile justice. Chapter 3 provides such an elucidation. A purely "want-regarding" account is rejected as failing to explain the interests of the very young and others without articulated wants, and as providing only a partial account of the interests of other individuals. The identification of the interests of children is shown to be problematic in a way that discovering the interests of adults is not. The principle of making decisions "in the best interests of the child" must be modified accordingly. Chapter 4 is primarily a descriptive account and is used to show that in marked contrast to the principle, practice has already been modified in at least one setting (the Scottish Children's Hearing System) to accommodate a reality that is far more complex than the principle would seem to indicate. Indeed in some instances the principle is shown to have been abandoned entirely or at least modified to such a degree that it is no longer an independent criterion of just decision-making. A detailed account is provided of actual decision-making in the interests of children in a specific legal context, in order to indicate both the degree to which practice is sometimes forced to abandon the principle and rather more importantly the limitations intrinsic in the principle as a guide to decision-making. These limitations are explored further in Chapter 5 which attempts to show how the evaluative reasoning which characterises discussions about interests can proceed to a conclusion in a coherent way. Chapter 6 explores the nature, relevance and application of principles of justice in a setting that has now been characterised as necessarily open to dispute. The need for empirical findings to be taken into account if there is to be

a coherence between theory and practice is explored in some detail. The last chapter presents a number of practical implications in order to provide a final "testing" of the principles which have now been formulated as providing the most appropriate framework for a system of juvenile justice. They are not to be viewed merely as a list of policy recommendations arising from the thesis, but as proposals whose adoption would 'square' with the principles advocated and which thus exhibit the possibility of the coherence of theory and practice which is regarded throughout as a necessary condition of achieving justice for children.

CHAPTER 1

Rights and Analyses of Rights

"... any genuine right must involve some normative direction of the behaviour of persons other than the (right) holder".

(R. Martin and J.W. Nickel, 'Recent Work on the Concept of Rights', American Philosophical Quarterly 17, 3, (1980) p.167)

"... a right is ... a legally (or ... quasi-legally) protected or furthered interest".

(T.D. Campbell, The Left and Rights (RKP, London 1983) p.27)

"To be sincere, reliable, fair, kind, tolerant, unintrusive, modest in my relations with my fellows is not due them because they have made brilliant or even passing moral grades, but simply because they happen to be fellow members of the moral community ..."

(G. Vlastos, 'Justice and Equality' R.B. Brandt (ed.) Social Justice (Prentice-Hall, New Jersey, 1962) p.47)

Rights, in marked contrast to requests, pleas, kindnesses, favours and charitable deeds, carry with them the notion of what is due to the right-holder; they are thus intimately connected on the one hand with notions of respect and dignity (as exemplified by the quotation from Vlastos above), and on the other hand with the concept of justice. One view of the relationship between rights and justice has been summarised in the following way:

"... charity turns into justice when the needs of the beneficiaries are widely recognized in a society as moral claims. No one has a right to charity, but once the benefit which the needy lack is regarded as something due to all, as something to which all have a right, it passes out of the domain of charity into that of justice".

(1)

1. D.D. Raphael, Justice and Liberty (Athlone, London 1980) p.88.

On this account, the Welfare State, for example, is not a charity organisation but an institution which can be seen to satisfy certain requirements of justice in society.

The observations above should be viewed as signposts to the direction of the discussion of rights to be presented here. Together with the quotations heading the chapter, they presuppose some answers to certain key questions concerning rights. In particular: Are there any rights? What are rights? What does it mean to have a right? Who has rights? These questions are clearly interrelated and in some instances answers to one will settle them all. It is undoubtedly the case that 'rights' talk' is not a misuse of language and that although many accounts of rights are stipulative or persuasive (or both), attempts at elucidation can bring about an increased understanding of important human concerns. The account given here is not intended to be exhaustive, but serves rather as a stepping stone towards theories of children's rights and children's interests which appear to be consistent with the view of juvenile justice advocated in later chapters and should be judged accordingly.

In a recent survey article,⁽²⁾ the authors point out that there are three different aspects on which the various characterisations of rights can and do focus. These three aspects are reflected in the quotations heading the chapter. First there is what Martin and Nickel have termed the "normative element", which describes rights in terms of their constitutive "normative categories" such as second-party duties, claims, liberties, immunities and so on. Second there are

2. R. Martin and J.W. Nickel, 'Recent Work on the Concept of Rights', American Philosophical Quarterly 17, 3 (1980), pp.165-178.

descriptions and assumptions concerning the function of rights, that is, what can be done with them. They have been viewed variously as protective of particular interests, as conferring control over a particular state of affairs and as creating an area of inviolability for the right-holder. Thirdly characterisations of rights may involve justificatory theories in terms of individual interests and needs or (as shown in the quotation from Vlastos, heading the chapter), of human dignity. These aspects are interdependent. They cannot be completely isolated from one another. Indeed the authors view the "multi-level" approach as a fruitful line of inquiry. However, for purposes of elucidation and analysis of the competing theories, it would seem helpful to maintain the categorisation of the three aspects of 'rights' talk' as a means of assessing the relative strengths and weaknesses of the different accounts.

Legal Rights and Moral Rights

It has been pointed out by Jeremy Waldron, that although the "pioneering work" in this area focuses primarily on legal rights, it would be a mistake to conclude (as did Bentham) that talk of rights in extra-legal contexts is meaningless. It is indisputable, as Waldron observes, that where a statute explicitly grants a right, its existence is unequivocal. However even within a legal framework, rights are often matters of dispute to be contested in terms of:

"the logical relations we recognize between the concepts of right, duty, offence and rule". (3)

3. J. Waldron, Forthcoming volume on Rights in Oxford Readings in Philosophy, Introduction, p.5.

It is accurately asserted that:

"... the same issues arise when we move from positive law to the critical standards of morality". (4)

The difference is that in the case of morals, unlike that of law, the standards themselves are nearly always contested in a way that legal rules are not.

"Unless it is proposed that we should give up critical moral evaluation altogether, it is difficult to see the case for confining talk of rights ... to the context of positive law". (5)

A related point has been put most forcefully as follows:

"Far from feeling obliged to attempt to settle questions about rights by plunging into full-scale controversy about ethical theories, we might with equal plausibility adopt the reverse procedure. Since the rights of individuals appear to be important elements in many moral situations, one criterion according to which the adequacy of an ethical theory is to be judged, is its ability to take account of this important moral concept". (6)

It is precisely by adopting this kind of procedure that some authors, most notably Neil MacCormick, reject one account of rights in favour of another. The starting point of his argument is as follows:

4. J. Waldron, op.cit., p.5.

5. ibid., p.6.

6. Colin Wrings, Children's Rights (RKP, London, 1981) p.35.

"... at least from birth, every child has a right to be nurtured, cared for, and, if possible, loved, until such time as he or she is capable of caring for himself or herself. When I say that, I intend to speak in the first instance of a moral right. I should regard it as a plain case of moral blindness if anyone failed to recognize that every child has that right".

(7)

If this is indeed the case, then any theory of rights which excludes children from the class of right-holders either explicitly or implicitly, can be rejected accordingly. The discussion will return to this theme later. The quotation is used here simply to point out (as indicated in the Introduction) that certain theories can be rejected because they neglect to provide a satisfactory account of rights and that rejection on such grounds (where the basis for the rejection is clearly articulated), seems to be a move with at least the same procedural validity as a denial of the existence of rights, because their acceptance is inconsistent with a given theory. The following discussion will be concerned with both moral and legal rights and should be judged in that light.

A Classification of Rights

It is widely acknowledged (not least by the authors already cited here) that a good starting point for any discussion of rights is the detailed classification provided by W.N. Hohfeld.* He regarded rights:

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7. Neil MacCormick, 'Children's Rights : a Test Case for Theories of Right', Archiv für Recht-und Sozialphilosophie LXII (1976) p.305.

Footnote: * The original classification is set out in Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (Yale, 1919). Both Martin and Nickel and Campbell and Waldron (cited above) provide useful summaries and discussions of the original.

"... as devices for the parcelling out of legal advantage and disadvantage to individuals, in four distinct patterns". (8)

He identified four types of rights, each of which may exist on its own or in combination with the others and each with its own second-party correlatives. The four kinds are as follows: "legal claim rights" with the "legal duties" of some second party as their correlative; "legal privileges" often termed "liberties", to perform X are matched by the lack of a claim on the part of others that X not be done, a so-called "no right"; "legal powers" to do X, enabling the right-holder to alter existing legal arrangements in some way, have "legal liabilities" as their correlative and finally there are "legal immunities" correlated with a lack of power or "disability" on the part of others to perform the action in question. Using Hohfeldian terminology one can 'unpack' notions such as "the right to trade" in the following manner:

"What people mean by 'I have a right to trade' is that in carrying on my business, I do no man any legal wrong. As against every other person, each of my trading activities is privileged; as regards each such activity every person has a no-right that I shall not do it. From that nothing follows about my rights regarding other people's actions. ... From my privilege to trade, it does not follow that I have a right that X shall not commit a certain act even if that act makes it more difficult for me to trade ..." (9)

8. R. Martin and J.W. Nickel, op.cit., Footnote 5.

9. J.W. Harris, Legal Philosophies (Butterworths, London, 1980) p.78.

Moral rights can be classified and analysed in a similar manner. The four legal categories all have equivalents in the realm of morality. It is possible to speak of a "claim right" to freedom; of the "privilege" or more usually the "liberty" to dress as one pleases; of the "power" to change moral relations by making a promise and of the "immunity" from being bound by obligations entered into by others (without authorisation) on my behalf, all without recourse to the legal sphere. The distinguishing mark of such discourse is not its legal or moral character but rather that it takes place within the framework of a system of rules and/or norms. Rights exist, if they exist at all, within normative orders:

"a right which does not guide anyone's behaviour is no right at all". (10)

However one is still left with the question of what it is that these different concepts, that is, claim rights, privileges or liberties, powers and immunities have in common. By virtue of what are they all called "rights"? Is there a single common factor or is it simply that this is an example of a concept embracing what Wittgenstein termed "family resemblances",⁽¹¹⁾ with no single factor common to all the various applications? For present purposes, attempts to provide a unitary theory can be broadly placed in two groups. First there are those accounts which focus on a single "normative element" said to be contained in all rights, of which Joel Feinberg's elucidation of

10. R. Martin and J.W. Nickel, op.cit., p.167.

11. L. Wittgenstein, Philosophical Investigations (translated by G.E.M. Anscombe, Blackwell, Oxford, 1963) I, 67.

"valid claims" is regarded here as the most promising. Second theories concerning the alleged functional unity of rights, in particular Herbert Hart's view of rights as conferring sovereignty on the right-holder within a limited domain, Neil MacCormick's view of rights as securing goods or interests within a normative order, Dworkin's account of rights as trumps over collective goals and Haksar's view that:

"... talk of rights is linked with demands, or claims, or complaints, that can validly be made by the person who has the right, or by those who speak on his behalf".

(12)

The latter approach is intimately connected with Feinberg's theory of rights as "valid claims". The following discussion will first examine Feinberg's arguments and then proceed to offer a brief critical account of the "will" or "choice theory" of rights as contrasted with the "interest theory". It will be argued that Feinberg's view that:

"... to have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles",

(13)

together with the interest theory as expounded by MacCormick, offer the most promising prospect of a theory of rights which has equal application in the field of juvenile justice and in the normative regulation of adult life.

12. V. Haksar, 'The Nature of Rights', Archiv für Recht-und Sozialphilosophie LXIV (1978), p.183.

13. J. Feinberg, 'The Nature and Value of Rights' in Rights Justice and the Bounds of Liberty (Princeton, 1980), p.155.

Rights and Claims

The starting point of Feinberg's account as presented in one of many articles is a "thought experiment".⁽¹⁴⁾ The reader is asked to imagine a world in which no one at all, or at most only a very small minority, has rights. The people can be kind, gentle, compassionate, and generous, and even act out of a sense of duty, with respect to actions that are required by law for example. People treat each other well and there might even be a system of rewards for services. Moreover one can introduce what Feinberg terms a "sovereign right-monopoly" in order to achieve a system of ownership, contracts, marriages and so on. Any obligations incurred will now be to the sovereign and not to promisees, creditors and so on. The only wronged party where breaches of the rules occur, is the sovereign. There is an analogy here with the view of marriage (adopted by some religious thinkers) as involving three parties, for the vows are seen as being made between each partner and God. Marital duties are thus owed to God alone, only God holds the relevant rights. In the hypothetical "sovereign right-monopoly", rights would similarly vest in the sovereign, there would be no other right-holders. The key question is what would be missing from such a world. How would it differ from the world as we know it? Feinberg answers as follows: the inhabitants of such a world have no idea that anything is due to them. The hallmark of rights, which also explains their centrality in much moral and legal thought, is that:

14. ibid., pp.143-4.

"Rights are not mere gifts or favours, motivated by love or pity, for which gratitude is the sole fitting response. A right is something a man can stand on, something that can be demanded and insisted upon without embarrassment or shame. When that to which one has a right is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one's own or one's due that one receives. A world with claim rights is one in which all persons, as actual or potential claimants are dignified objects of respect, both in their own eyes and in the view of others. No amount of love and compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values".

(15)

These "values" can be summed up in the Kantian concept "respect for persons as ends in themselves" and as already pointed out, are reflected in the quotation from Vlastos, heading this chapter. They form the basis of a justificatory theory of rights. The discussion will for the present confine itself to Feinberg's "normative account".

The "thought experiment" is used to illustrate that the activity of claiming is central to the concept of rights. It is "claim-rights" rather than liberties, powers and immunities that must be seen as the paradigm case of rights. Feinberg provides a detailed analysis of the activity of claiming, pointing out the difference between "making claim to" which he terms the "performative" sense and "claiming that", referred to as the "propositional sense" and contrasting both with what it is to "have a claim" and the relationship of this to rights. It is suggested that:

15. J. Feinberg, Social Philosophy (Prentice-Hall, New Jersey, 1973), pp.58-59.

"... having a claim consists in being in a position to claim ... to make a claim to or claim that ..." (16)

Moreover there are both valid and invalid claims and only the former are to be regarded as rights. On this view claims may vary in degree but not so rights. The other crucial difference between claims and rights is that, according to Feinberg, mere entitlements or "claims" to something in the absence of a corresponding claim against some specified individual or individuals are not to count as rights except in an attenuated or "manifesto sense".

"... claims, based on need alone, are 'permanent possibilities of rights', the natural seed from which rights grow". (17)

The same point is reflected in the quotation from Raphael above (p. 24) and explains why it is possible, but nevertheless inaccurate, to speak of a universal right to education or work for example. Such assertions are prescriptive and point to the claims which ought to be recognised in the future in the pursuit of social justice. However it has been suggested that equating such entitlements with rights:

"seems subject to Bentham's critical dictum that hunger is not bread". (18)

16. J. Feinberg, 'The Nature and Value of Rights', op.cit., p.151.

17. J. Feinberg, 'The Nature and Value of Rights', op.cit., p.153.

18. R. Martin and J.W. Nickel, op.cit., p.170.

Where rights are regarded as possessions of the right-holder, generating at least in the present, no more than duties of non-interference on the part of the rest of society, it becomes impossible to explain their centrality and importance in moral and legal thought. It is almost as though once we have all assented, for example, to the injured man's right to medical treatment and have not actually prevented him from getting help but simply proceeded on our way, we have not wronged him. If this were indeed the case, and it is strongly asserted here that this is not the case, the nature of rights would at most assume the characteristics of liberties and as such could not form the basis of prescriptions concerning the behaviour of others towards right-holders, in anything more than a negative way. But in many instances, rights function in a far more positive way and are indeed the grounds of directives to both individuals and governments regarding what is required of them within the framework of prevailing moral and legal norms. It is this feature that is so well captured by Feinberg's conclusion that:

"To have a right is to have a claim against someone, whose recognition as valid is called for by some set of governing rules or moral principles". (19)

It might be suggested that this analysis is of no relevance in elucidating the nature of liberties, powers and immunities and hence refers to only a sub-class of what are usually termed rights. Such a criticism is not well-founded in that the activity of claiming seems to have relevance within these categories too, although it plays a

19. J. Feinberg, 'The Nature and Value of Rights', op.cit., p.155.

slightly different role. The actual exercise of a liberty does not involve a claim against others, but the infringement of a liberty, or power or immunity by another party does indeed give rise to such a claim for some form of remedy, compensation or redress. In the absence of any such claims, there are no guarantees at all regarding the relevant rights and hence it is not at all clear what having such rights might mean. This idea is reflected in MacCormick's assertion:

"That there is a realm of secured normative liberty is what is essential to there being rights to act or refrain from acting". (20)

Further on in the same article the argument continues as follows:

"What is being stressed is that primary rights require remedial rights and remedial rights are characteristically ones which do have corresponding duties - the duty to afford the remedial action. That a claim for a justified remedy is itself a justified claim gets on for being a tautology". (21)

It would seem that the activity of claiming is central to the concept of rights, although claims stand in a different relation to the various kinds of rights. Such an account of the relationship between claims and rights seems to underlie a recent warning advanced against equating claims and rights on the grounds that such an equation gives rise to confusion. Tom Campbell argues:

20. D.N. MacCormick, 'Rights, Claims and Remedies', Law and Philosophy 1, 2 (1982), p.334.

21. ibid., p.355.

"Rights can serve to justify certain claims or demands, hence their close association, particularly where rights are being violated. It is easy, therefore, to think of rights as species of claims. But this too confuses the claim with its possible justification. A right is not a justified claim, but it may justify a claim".

(22)

This criticism seems to rest on the recognition of the fact that one may have a claim to something, because one has a right to it. In other words, the right may be prior to the claim. However this point could be conceded by Feinberg without weakening his central observation that to have a right is to have a particular kind of claim. Indeed, as Campbell points out, Feinberg himself observes the dangers of circularity in defining rights and claims in terms of one another and rather uses the analysis of the activity of claiming as a means of elucidating the notion of what it is to have a right. With regard to defining the two concepts in terms of each other, Feinberg states:

"... if we are after a 'formal definition' of the usual philosophical sort, the game is over before it has begun and we can say that the concept of a right is a 'simple, undefinable, unanalyzable primitive'. Here as elsewhere in philosophy this will have the effect of making the commonplace seem unnecessarily mysterious. We would be better advised not to attempt a formal definition of either 'right' or 'claim' but rather to use the idea of a claim in INFORMAL ELUCIDATION * of the idea of a right".

(23)

This seems to meet the criticism put forward by Campbell and elsewhere by Alan White, ⁽²⁴⁾ and is the position adopted here.

22. T. Campbell, The Left and Rights (RKP, London 1983) p.22

23. J. Feinberg, Social Philosophy, op.cit., p.64.

24. A.R. White, 'Rights and Claims', Law and Philosophy 1, 2 (1982) pp.315-336.

Footnote: * My capitals.

However, the underlying unity of rights is perhaps best understood not by reference to a common "normative element", but rather by examining the role they play within the normative orders in which they exist. Two theories will be contrasted here: the "choice theory" and the "interest theory".

The Choice Theory

The choice theory of rights has been elucidated in a number of articles by H.L.A. Hart. The articles all focus on the degree of control conferred on the right-holder and see such control as a necessary condition of having a right. Thus he writes:

"... to have a right entails having a moral justification for limiting the freedom of another person and for determining how he should act ...", (25)

and again in a later article:

"... what is sufficient and necessary is that he (the right-holder) should have at least some measure of the control ... over the correlative obligation ..." (26)

One of the main criticisms levelled against such an account, is that it automatically excludes those incapable of exercising such control, from the class of right-holders. Hart acknowledges this

25. H.L.A. Hart, 'Are There Any Natural Rights?' Philosophical Review 64 (1955) p.183.

26. H.L.A. Hart, 'Bentham on Legal Rights' in A.W.B. Simpson (ed.) Oxford Essays in Jurisprudence, Second Series (Clarendon, Oxford, 1973), p.196.

point and his response to it has been modified over the years.

In the first article cited above, he states that it is misleading:

"... to extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment ..."

(27)

The same one assumes, is the case with the sick and the temporarily or permanently handicapped: they have no rights although others have duties towards them. It was presumably unease with such a conclusion that led Hart to qualify this position as follows:

"Where infants or other persons not sui juris have rights, such powers and the correlative obligations are exercised on their behalf by appointed representatives and their exercise may be subject to approval by a court. But since (a) what such representatives can and cannot do by way of exercise of such power is determined by what those whom they represent could have done if sui juris and (b) when the latter become sui juris they can exercise these powers ... the powers are regarded as belonging throughout to them ..."

(28)

This account is more satisfactory in relation to children than the alternative cited above. However, it still fails to recognise that there is an important distinction to be made between adults who may be temporarily incapacitated from exercising their rights and children who because of their limited capacities, have never exercised any rights, but who will, one hopes, grow into adults capable of doing so. Exercise of rights on behalf of the former

27. H.L.A. Hart, 'Are There Any Natural Rights?' op.cit., p.181.

28. H.L.A. Hart, 'Bentham on Legal Rights' op.cit., pp.192-3, Footnote 86.

should be by reference to what is known about the way in which they would choose if fit to do so, exercise of rights on behalf of children is impossible on this criterion, for they have yet to make the relevant choices. It would seem that the only factors to be considered are the necessary conditions of becoming adults capable of exercising such choice - such factors cannot be viewed as grounds of rights on the choice theory. This is one of the main arguments for proposing an alternative theory of rights. However, before discussing the alternative account, there is a second criticism of the choice theory which would seem to highlight its inadequacies even further, for it is made with respect to what are often considered the most fundamental rights of both adults and children. This will be explained below.

If "choice" or the exercise of a measure of autonomy are viewed as necessary conditions of the existence of a right, then in any situations forbidding such a choice, there can be no rights. The point has been well illustrated as follows:

"... the law relating to assault prohibits any person from offering or inflicting physical interference or harm on another. A had a duty not to interfere with B. So far as concerns the 'will theory', B has a 'right not to be harmed' only if and insofar as he, B, can in some way regulate A's duty not to interfere with him. That seems all very well; in relation to minor interference, or manly sports or bona-fide surgical operations, B can waive A's duties. So for the 'will theory', B has a right not to be trivially assaulted, or assaulted in the course of manly sports, or assaulted by a surgeon conducting an operation. Yet in relation to serious assaults, or 'unmanly' pastimes or operations by unqualified persons, no valid consent can be given which releases the assaulting party from the duty of non-interference.

It is rather bewildering to suppose that none of us has a right not to be thus grievously assaulted, simply because ... the law denies us the power to consent to these grave interferences with our physical security".

(29)

There are many more examples where such a strange conclusion would follow. It is compulsory to vote in Australia. Children in most jurisdictions are required to attend school. In socialist states, as pointed out by Campbell, there is an enforceable duty to work, indeed most so-called "socialist rights" are "non-waivable".⁽³⁰⁾ According to Hart's analysis it would follow that Australians have a duty, but no right to vote; that children similarly have a duty but no right to receive education, that the people in the relevant countries do not have a right to work and so on. Hart's response to these observations is to acknowledge that:

"... the notion of a legally respected individual choice, cannot be taken as exhausting the notion of a legal right ..."

(31)

Immunities or immunity rights are seen as falling outwith the scope of his analysis. Hart claims that he has not provided a theory of relevance to the whole field of rights, but rather:

"... a general theory in terms of the notion of a legally respected individual choice which is satisfactory only at one level - the level of the lawyer concerned with the working of the 'ordinary' law".

(32)

29. D.N. MacCormick, 'Rights in Legislation' in P.M.S. Hacker and J. Raz (eds.) Law, Morality and Society (Clarendon, Oxford, 1977) p.197.

30. Tom Campbell, op.cit., p.190.

31. H.L.A. Hart, 'Bentham on Legal Rights', op.cit., p.197.

32. ibid., p.201.

It is believed here that a theory which could be "satisfactory" at this and further levels and which in particular could provide a more adequate account of the rights of children, would on these grounds alone, be a sounder theory. It is also believed that the interest theory provides just such an account.

The Interest Theory

A very general summary of the interest theory has been provided in the following terms:

"... to ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C, and that T is, a good of such importance that it would be wrong to deny it to or withhold it from any member of C. That as for moral rights: as for legal rights I should say this: when a right to T is conferred by law on all members of C, the law is envisaged as advancing the interests of each and every member of C on the supposition that T is a good for every member of C, and the law has the effect of making it legally wrongful to withhold T from any member of C".

(33)

Such an account not only embraces all the Hohfeldian categories but in addition, the choice theory as presented above, for within the framework of the interest theory, freedom of choice can be recognised as a good or an interest, but it is a good among others and as such may come into conflict with them and in certain cases be overridden. Here lies the resolution of the apparent paradox posed by the choice theory, namely that a non-waivable right is not a right at all. Under the interest theory, compulsory work can be accurately described as a right:

33. D.N. MacCormick, 'Children's Rights : A Test Case for Theories of Right', op.cit., p.311.

"... insofar as it enables the individual to develop himself ..."

(34)

As with the duty to work, so too with compulsory education, which can be defended in terms of the child's right to self-fulfilment. Since the areas of legal compulsion are far greater with respect to the child than the adult, the law may be seen as reflecting the view that freedom of choice is a less desirable good with respect to children than with respect to adults. The grounds for this view will be discussed further in the next chapter. It is sufficient to point out here that freedom of choice is no good at all to those incapable of exercising such choice. It is one of the advantages of the interest theory that it clearly elucidates how and why such individuals may nevertheless be said to have rights. The main problems for such an account are first the identification of the relevant interests and second the inevitability of conflict between such secured interests. The nature of interests is the theme of Chapter 3 but it may be helpful to say a little here about interests and their relationship to rights within the framework of the interest theory.

At the most general level rights can be regarded as high priority interests or needs (the two are regarded as interchangeable for the present), which are of such importance that they are protected by moral and legal rules. The actual interests protected in this way may vary from one society to another and within a society with respect to different classes of right-holders, in particular, in the context of

34. Tom Campbell, op.cit., p.188.

this thesis, with respect to children and adults. The point has already been alluded to briefly. Few would deny that all humans have an interest in health and an interest in freedom of choice. However inasmuch as the law allows adults far wider discretion with respect to harming their health than it accords children, a child's right to health is implicitly regarded as more important than the child's right to freedom of choice. Whether or not such a distinction with respect to children and adults is justified, will be discussed in the next chapter. The important point to note here is that there is scope for disagreement at two different levels: first in identifying the interests embraced by actual or potential rights and second in ranking them in the event of a conflict. It is held here that much of the confusion within the field of juvenile justice stems from the fact that in taking actual decisions about children, these two processes (identification and ordering) are carried out almost unconsciously and are only rarely made explicit, so that the real grounds of disagreement are seldom revealed. These points are explored further in Chapter 5. In conclusion it will perhaps be helpful to summarise the theory of rights adopted throughout the following chapters.

The unity of rights reflected in the interest theory has been analysed by MacCormick, ⁽³⁵⁾ in terms of five common features, the first three of which are equally applicable to the choice theory, which has been rejected here partly on the grounds that it excludes certain individuals, particularly children, from the class of right-holders, and partly because it cannot, without contradiction, explain the

35. D.N. MacCormick, 'Rights, Claims and Remedies', op.cit.,

existence of non-waivable rights. The five common elements in the order presented by MacCormick are as follows: first, rights exist, if they exist at all, within normative orders. Second, "rights vest in individuals" (including collectivities such as trade unions, schools etc.). Third, the rules relevant to the ascription of rights apply to individuals "severally" but are nevertheless universal or general in character. Fourth, rights are seen as relating to

"individual goods, in the sense of 'things' which are normally considered good for normal individuals".

(36)

Such an assessment depends partly on individual wants and partly on more objective evaluations of the needs of individuals. * Finally, only the interests or 'goods' secured under the rules or principles of the relevant normative order can be termed rights. Other acknowledged goods fall outwith the class of rights. It is therefore important to understand the ways in which the relevant interests are secured. Four ways are identified in MacCormick's account: first of all there must be clear statements of what it is wrong to do and hence by implication of what one may freely do without censure or disapprobation. Second in some contexts, the securing of the relevant interests involves the exercise of a "normative power". In such cases, the normative order acts to ensure that such exercise is respected. Third, rights are

36. ibid., p.338.

Footnote: *MacCormick's account seems marginally deficient here in that he regards interests as solely "want-regarding". It will be argued in Chapter 3 that in the case of the very young this is impossible and that even in the case of adults able to articulate their wants fully, interests cannot and should not be defined solely by reference to such wants.

secured by imposing duties on others to act or refrain from acting in specified ways. Fourth, if rights are to be effective at all in guiding actions, there must be restrictions on the ability to make unilateral changes with respect to "the norms under which rights are constituted".

It has been noted repeatedly that one of the attractions of such an account is that both adults and children can be seen to be equally well qualified candidates for the class of right-holders. However, even under such a theory it remains an open question whether or not the two groups can be said to hold the same rights. There are at least three possible approaches to the resolution of this issue and they form the subject matter of the next chapter. It is one of the strengths of the interest theory of rights that it is consistent with the adoption of any one of the three alternatives.

CHAPTER 2

Towards a Theory of Children's Rights

"... that the right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself ..."

(C. Fried, Right and Wrong (Harvard, Cambridge, 1978) p.152)

"We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury".

(J.S. Mill, On Liberty in Everyman Edition (Dent, London, 1964), p.73)

"The incapacity of the child in infancy should only mean that extra steps must be taken to guarantee the protection of his rights".

(R. Farson, Birthrights (Penguin, U.S.A. 1978), p.73)

The quotations heading this chapter reflect three different perspectives on the status of childhood, giving rise to three corresponding theories of children's rights. These theories will be termed "parentalist", "protectionist" and "child-libertarian" respectively. It should be noted that of the three authors cited above, only Farson is concerned specifically with questions about children and children's rights. However the views of each are taken as representative of a different school of thought relating to children. In addition Fried, Mill and Farson have similar views of the adult individual as a rational, self-determining, autonomous agent, to whom respect is due "as end in himself."⁽¹⁾ The quotations are seen as

1. See I. Kant, Groundwork of the Metaphysic of Morals, in H.J. Paton, The Moral Law (Hutchinson, London, 1964) especially pp.100-102.

providing the framework for a theoretical discussion of children's rights, in particular (as explained in the Introduction) for addressing the questions of whether children and adults have the same rights or distinct sets of rights or whether there is an area of overlap, and of how such rights are to be identified and articulated. These questions form the subject matter of the first part of the chapter. The second part will attempt to increase understanding of these themes by approaching the issue of children's rights from a quite different direction, namely the law relating to children. This section will focus primarily on descriptive questions: What rights does the law (primarily in Scotland) accord to children? How do the civil and criminal law compare in this area? Do the different branches of the law vary in their views of childhood in the manner of the quotations at the beginning of the chapter? In other words, do they enshrine different approaches towards children? In order to limit the discussion in advance, three areas of law will be singled out: compulsory education; the criminal law as it applies to young offenders dealt with by the courts; and thirdly custody and access in matrimonial disputes. The aim is not to provide an overview of the law relating to children, but rather to indicate how the theoretical arguments might be applied to provide for greater consistency and coherency in the law. It is hoped that after approaching the subject from these two perspectives an "equilibrium" can be reached and hence a contribution made towards articulating a theory of children's rights that will serve both to resolve some current disputes and to suggest a basis for more effective provision for juvenile justice in the future.

The Theoretical Arguments

Parentalism, protectionism and child-libertarianism are seen here as the starting point for a discussion of the theoretical and conceptual issues relating to the rights of children. It has already been stated (p. 47) that all three share a common conception of what it means to be a person. It would seem from this that they must also share a minimal conception of those rights which have been termed "passive negative rights". (2) These include the right not to be tortured, enslaved, degraded or exploited and do not rely in any way on merit. They are regarded as unforfeitable and "non-conflictible", that is they cannot conflict with each other and take precedence when conflicting with other kinds of right. They have their origin in a conception of what it means to be human and are in a sense "groundless". Evidence for the existence of such rights lies in the well-worn example that when someone is seen drowning, onlookers do not stop to inquire into the individual's moral, intellectual and social standing before attempting a rescue, and if they did, most people would agree that the individual in question had been wronged. It seems self-evident that if all human beings have these rights, children have them too. It is at this point that the parting of the ways occurs for the parentalists, protectionists and child-libertarians.

The parentalists acknowledge that children have rights to care, protection and education in their own interests, but provided there is no violation of the human rights described above, it is parents who

2. J. Feinberg, Social Philosophy (Prentice-Hall, New Jersey, 1973) p.88.

can and should identify the relevant interests. Child-libertarians on the other hand argue that children have no special rights arising from their perceived helplessness and dependency. On the contrary, children have or should have exactly the same rights as adults. No distinction should be made between the two groups. Both views are problematic. The first assumes that a child's interests are knowable and in addition largely ignores the fact that from a very early age the child has a distinct character and viewpoint of his own which cannot be simply ignored whenever it conflicts with parental desires and opinions. The second view rejects as irrelevant the fact that a child's capacities are not yet fully developed and fails to recognise that the right to develop these capacities may conflict irreconcilably with the rights it advocates, such as the right to choose whether or not to receive formal education. The confusions in both views raise several theoretical and empirical issues. The following discussion will attempt to examine some of the problems arguing that a modified protectionism offers the possibility of reconciling the positive aspects of each position.

It has been noted (p.49) that Fried, Mill and Farson have similar views of the individual as a rational, self-determining, autonomous agent. It is hard to see how a child could ever become such a person on the first view. Where a child is regarded more or less as an extension of its parents (as in the quotation heading this chapter) how is the transition from dependent to independent individual ever to be achieved? This is a conceptual as well as a practical problem. At the practical level it is very unclear how anyone who had had a "life plan" drawn up on his/her behalf and had never made decisions

concerning him/herself could ever learn to do so. Conceptually it remains perplexing that one should argue from the facts of biological reproduction and unquestioned helplessness to an existence as an extension of one's natural parents and a right of total control (within the limits set by the human rights outlined above). It suggests a picture of the child as some kind of robot - it can act on its own but only when programmed to do so. It would be unfair in the extreme to attribute such a view to Fried but the central question which he, and indeed Mill avoid is: 'What rights (freedoms for Mill), if any, belong to a developing individual?' Fried and Mill do not discuss this problem, while Farson seems to regard it as almost irrelevant; the child (for Farson) has the same rights as an adult and because of his/her limitations may need to have them protected in the same way as an adult who has fallen ill or is in some other way temporarily incapacitated. In other words Farson does not regard children's limited abilities as in any way relevant in determining their rights.

It is interesting to note that the relevance or otherwise of the developmental nature of childhood is a key factor in the controversy between the advocates of the "welfare model" (who support a treatment ideology), and the champions of the right to punishment or "justice model" in the sphere of juvenile justice. The welfare view regards the 'immaturity' of juveniles as the key factor in determining how to deal with them, the opposition claims that this is of no relevance at all and that measures taken should be based on the principle of 'equality before the law' which should be applicable to all offenders irrespective of age. Thus, as indicated in the Introduction (p. 5), the



former regard children's rights as definable in terms of specific objective needs and interests, while the latter claim that basing decisions on such dubious criteria is a violation of generally acknowledged moral rights which are being systematically denied to children. How, if at all, can the conflict be resolved? An attempt will be made to approach the problem with reference to a number of examples concerning behaviour that is central to growing up and which can be either morally neutral or a key part of an individual's value-system, the case of eating habits. It is hoped that the cases will prove useful since they exemplify a number of different types of conflict between adults and children in an area that assumes significance from birth. The only indisputable fact is that children need food to grow into adults, how much and what kind of nourishment is well beyond the scope of this discussion. Several cases will be outlined and comments will be made on what seems intuitively obvious in them, in the belief that they will shed some light on the question of children's rights. In each case an attempt will also be made to assess what 'parentalists' like Fried or 'protectionists' like Mill and 'child-libertarians' like Farson might say.

CASE 1

A two year old who decides to stop eating altogether and starts to lose weight.

Comment:

The child cannot be allowed to persist even if prevention means hospitalisation. This presents no problems at all for parentalists and protectionists and libertarians would undoubtedly not favour self-destruction but would somehow need to explain that though 'free' the child is not free to do that. It is debatable whether an adult should be allowed to act in this way.

CASE 2

A six year old diabetic who declares that her pocket money is hers to spend as she wishes and she intends to spend it all on sweets.

Comment:

There seems no doubt that any measure short of violation of 'passive negative rights' would be legitimate to stop this child from carrying out her intention. As in Case 1, this presents no problem for parentalists or protectionists, but is highly problematic for libertarians who think that children of all ages should have the same earning and spending power as adults.

CASE 3

A two year old (my son!) who wants a diet of breakfast cereal, milk, bread, fresh fruit and an occasional egg yolk.

Comment:

Assuming that the child is growing (as he did) and that there are no gross deficiencies in the diet (as there are not) he should be allowed to choose to eat in this unorthodox way. There are no pragmatic grounds against this. It doesn't, for example, create difficulties for the cook. In practice, all efforts at persuasion to enjoy other equally delicious foods will be (and indeed were) counterproductive. Finally, although the child may not have adopted a reasoned position, what he wants is clearly not unreasonable. Parentalists and protectionists might well recommend taking measures to achieve a more balanced diet, libertarians would allow the child total freedom of choice.

CASE 4

A two year old who announces that meat is horrible and she is a vegetarian although (a) it is clear she does not know the difference between meat and vegetables and (b) she has in fact never tasted meat.

Comment:

It seems clear that there are no grounds at all for accommodating this child's declared preferences and it would not be unreasonable to feed her meat and tell her that one had done so after she obviously enjoyed it. Parentalists and protectionists would clearly adopt this view. Libertarians again would have difficulty in justifying behaviour that failed to respect the child's position.

CASE 5

A four year old who wants to be vegetarian because she thinks that it is cruel to kill animals.

Comment:

Where this child is a member of a meat-eating family it seems that once the family has put the argument against vegetarianism it would be wrong to force her to eat meat. She may well come to change her views in the future but once again (as in Case 3) the position is not unreasonable and is certainly reasoned to a degree. One might question it where the same child was seen pulling wings out of flies! Parentalists and protectionists might adopt this attitude. Libertarians might well consider it an infringement of liberty to even attempt to dissuade the child.

CASE 6

A child (of any age) born into a strictly vegetarian family announces she wants to eat meat.

Comment:

There can be no doubt that if the rest of the family consider meat eating to be wrong, they are under no obligation to accede to her wishes. However, a question still remains about the times she eats away from home - this is certainly something subject to only very limited control (in school perhaps) and it is highly controversial. Parentalists and protectionists would clearly recommend strict control and libertarians complete freedom of choice. It could be argued

(not by libertarians) that the age of the child should prompt different responses. What if the family regard meat eating as dangerous to the child's spiritual well-being as sugar is to the physical well-being of the diabetic? This example raises the whole issue of parental rights.

CASE 7

A 13 year old in a non-orthodox but practising Jewish family wants to adhere rigidly to the dietary laws that the family has rejected.

Comment:

This example is not intended as an opening for prolonged theological disputation but merely to point out that it can be forcefully argued that the parents should agree to the request despite the considerable inconvenience involved, because the child is in fact adopting their value-system and adhering to it more rigidly than they are. Parents cannot reasonably send their children to Hebrew school where one is taught (among other things) the dietary laws and then refuse to allow the child to comply with them. Parentalists and protectionists might well think that the child's view should be ignored, libertarians would want to respect it, but only because it is the child's view, not because it is the direct outcome of parental teaching.

The seven cases outlined above seem to indicate quite clearly that neither the parentalist nor the protectionist (who like the parentalist sees children in need of special care and protection and articulates specific rights in terms of needs and interests but independently of parental rights) nor the child-libertarian (who makes no distinction between adults and children with respect to rights) can give fully a satisfactory account of children's rights. The protectionist fails to take into consideration firstly, that from a very early age a child may have a very distinct viewpoint of its own which ought to be taken into consideration unless it is obviously

detrimental to its development (as in the case of the hunger-striker (Case 1) and Case 2 of the diabetic) and secondly that except in such extreme cases, very little is known about what in fact constitutes a child's needs and interests. This could hardly be more clearly illustrated than in the case of food. The more orthodox child care books declare: 'children need a balanced diet' and proceed to recommend daily doses of vitamins, protein and so on. Repeated experiments (cited by Dr Spock for example) ⁽³⁾ show clearly that children left to choose their meals from a wide selection of "wholesome foods" will in fact 'balance their diet' over a period of time. They may eat bananas for a week and then proceed to eggs and apples, but when left alone with a choice, most children take what they need. One suspects that the same may be the case in areas other than food! The child-libertarians would extend the analogy to all spheres but it is here that they appear to ignore at least two important points. First the undeveloped capacities of a child do seem relevant in the ascription of rights to children, although perhaps not to the degree claimed by the protectionists. Secondly, children are not born into some kind of vacuum but into families with their own values and viewpoints, which is not merely a contingent factor. As Fried says:

"The child's most intimate values and determinants ... must come from somewhere. The child cannot choose them - rather, they choose the child". (4)

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3. Benjamin Spock, Baby and Child Care (New English Library, London, 1969), pp.253-255.
4. C. Fried, Right and Wrong (Harvard, Cambridge, 1978), p.154.

In other words, values cannot be placed on a table like different varieties of food. Even if one were to remove children at birth and allow them to grow up communally in an identical environment, it is impossible to conceive of what it would mean to allow them to grow up with complete freedom of choice. How is a child to choose between Christianity, Judaism and Atheism if it has not experienced any of them? What would it mean to allow it to experience all three? The most that 'free choice' can mean in this area, is a freedom to reject what has been experienced and to attempt to live other religions or none at all, it cannot mean a choice from an initially neutral position. This argument can be extended to the whole sphere of education. Farson feels that this too should be entirely optional. While quite prepared to concede that much of what goes on in the name of 'compulsory education' is antithetical to any kind of learning, it seems a mistake to argue from here to advocacy of an entirely voluntary system. To allow a child not to learn to read for example, seems to deny it implicitly many of the other rights Farson supports, namely: the right to information, the right to vote, the right to economic power - these rights seem to have very limited application in a modern technological society if it does not ensure that its members can read. Can these reflections be documented in a more rigorous way to form a coherent theory of children's rights?

In the discussion of rights in the previous chapter, it was suggested (p. 30) that at their most general level rights can be viewed as generating different obligations. It has been argued that the relationship between rights and obligations can be defined in at least two different ways:

- (1) "'A' has a right to 'X' implies everyone has an obligation not to interfere with A's obtaining or exercising X"
- or
- (2) "'A' has a right to 'X' implies someone has an obligation to help A obtain or exercise X". (5)

It is proposed by Cohen that under (2) the individual(s) obligated and the extent of the obligation must be specified for each right.

Cohen suggests that:

- "... while non-interference (1) and performance (2) may provide some sort of continuum of obligations, there are many cases in which the obligations attending the right go well beyond stepping aside". (6)

To return briefly to the case of food - to say that a baby has a right to food is clearly absurd where (1) is considered the central definition of a right (as with the Choice Theory^{*} summarised in Chapter 1), it has quite different implications where (2) is adopted as the relevant account of a right. Moreover both (1) and (2) can be applied to those 'goods' which adherents of the Choice Theory would themselves acknowledge as rights. Thus Cohen points out that the right to defence at a trial for example has been interpreted in the past as what he calls a right of "non-interference", a right to prepare a defence unimpeded, and more recently as a right of "performance" that is the provision of a defence for those unable to secure one. Cohen suggests that it might be advantageous to grant

5. Howard Cohen, 'Children and Privacy' in R. Bronaugh (ed.) Philosophical Law (Greenwood, Westport, 1978), pp.195-6.

6. ibid., p.196.

Footnote: * Choice Theory could however accommodate (2) above with respect to most adults.

children rights as rights of performance wherever there is a (justified) reluctance to grant them the same rights as adults.

Thus to cite his own example:

"... to say that a child has a right to privacy is to say that someone has an obligation to help the child exercise it ... It ought to be someone who does not have a conflict of interest with the child and who is committed to using the occasion of the exercise of a right to develop the child's capacities for self-determination". (7)

The key criterion for Cohen in ascribing rights to children is whether or not such an ascription will increase (or at least not retard) their ability to exercise the rights they will have as adults.

"In short, children ought to learn to exercise those rights in becoming adults that they will later exercise as adults - so long as doing this improves rather than retards the capacities in question". (8)

Hence children have firstly "passive negative rights" (not argued by Cohen, but he too would undoubtedly agree that torture for example is not a permissible way of "developing capacities" even where it is claimed to do so) and secondly they hold all the rights that adults have as "non-interference rights" as "performance rights". This appears an attractive solution, the only problem is that it is one to which the protectionists and the child-libertarians would both happily agree. There no longer seems to be a dilemma. Is this a

7. Howard Cohen, op.cit., p.202.

8. ibid., p.198.

legitimate move?

The protectionists would point out (accurately) that Cohen is saying that rights should be granted to children whenever this does not impede their development into self-determining adults. If giving rights to children actually enhances their development then their exercise should be positively encouraged. The child-libertarians would stress that Cohen acknowledges that development is advanced by experience, for them the relevant experience seems to be precisely granting equal rights to children and adults. The force of the two arguments now appears to rest on empirical premisses. The protectionists are prepared to give rights provided they are conducive to development. The child-libertarians see all rights as conducive to development. It remains only to examine children raised in the context of the two approaches and to assess which are the more autonomous, mature, responsible adults. Or does it? A central argument put forward by the child-libertarians against the protectionists is that growing up is not a problem but a dilemma. Problems are amenable to solution, not so dilemmas. Farson cites one Abraham Kaplan:

"Rearing a child is like having a romance, it is not a set of problems to be solved, but a relationship to be experienced". (9)

A relationship moreover where all involved have something to learn and something to teach. In contrast the protectionists view 'growing up' as a problem whose solution if not known, is at least

9. R. Farson, Birthrights (Penguin, USA, 1978) p.29.

knowable. Children have specific needs and interests and once these have been established they must form the basis of adults' behaviour towards them.

Farson states:

"It is time to admit that no one knows how to grow people".

(10)

If it is time to admit also that no one ever could know "how to grow people", that part of what it means to be a person, is precisely that there could never be a set formula or recipe for successful maturation (the term is used advisedly, for 'growing older' unlike 'maturation' remains inevitable), the protectionists can be accused of committing a category mistake, not only do children's needs and interests beyond the most basic food and care remain unknown, the search for further knowledge in this sphere is misguided. In support of this claim, the child-libertarians can point out that some of the world's most revered people have had the most appalling childhood experiences and that often those from caring, loving environments grow into dissatisfied and irresponsible adults. To give a more specific example from the Scottish hearing system: it was recently revealed by the deputy principal of one of the roughest schools in Edinburgh, that in a recent year (1980) well under 150 children had been referred to the Reporter as possibly in need of compulsory measures of care and that under 50 were in fact deemed to be so. *

10. Farson, op.cit., p.29.

Footnote: * These figures were given in confidence. It is therefore inappropriate to cite the name of the school.

There are almost 1,000 children in the school; it is located in an area of multiple deprivation, with high unemployment, a high rate of crime, alcoholism, violence and marital break-up. This should not be taken as a recommendation for studied neglect, but rather as evidence for the view that many (the child-libertarians might say most) children seem to develop into fairly responsible people despite the adults most immediately involved with their well-being and not because of them. However, if this is indeed so, the child-libertarians' case is at most 'not proven'. These observations seem to attest to nothing more than the resilience of many children. They do not explain why the undisputed differences between adults and children are morally irrelevant. Furthermore, part of the force of the child-libertarian claim lies in a quite different assertion, namely that:

"Only in being given responsibility can children become mature adults and not simply grow older". (11)

But this is a claim of the very same kind that has previously been rejected on the grounds that child-rearing is not among the category of knowable techniques or arts. If it could indeed be shown that children mature by being given responsibility, the protectionists would advocate the ascription of the relevant rights as readily as the child-libertarians. Where the disagreement is seen to rest on empirical grounds it can be resolved. However it should now be apparent that the conflict is essentially one about the status of

11. R. Farson, op.cit., p.173.

childhood. The protectionists rest their case on the undisputed dependency of the very young and view this as the most important factor in dealing with children for most of their formative years. The child-libertarians, while in no way denying the initial dependency of infants regard this state as an argument for providing extra safeguards to achieve equal rights. Protectionists would argue that at least some rights, to liberty for example, are ascribed only to self-determining autonomous individuals and are therefore inappropriate to the status of childhood, but that the young have special rights to care and protection which are not accorded to independent adults. Reflections on day to day dealings with children such as those presented in the examples on eating habits, seem to lend considerable support to the protectionist argument, but the central dilemma still remains: if different rights are accorded to the dependent and the independent and if childhood is seen as a journey from dependency to independence, how can one decide which rights are to be ascribed to children? The child-libertarian view avoids this question altogether, but it should be clear that by doing so, it also avoids the reality of childhood. Perhaps the starting point for a more constructive approach should be a detailed examination of what are, or at least might be considered, the relevant differences between adults and children in the ascription of rights. 'Dependency' is not only too vague a term, it is often used to support differential treatment in a manner that begs the whole question at issue. A recent book by Laurence Houlgate ⁽¹²⁾ has highlighted some important aspects

12. Laurence Houlgate, The Child and the State (John Hopkins, Baltimore, 1980).

of this particular approach to according a different status to children and adults. Houlgate's central concern is with the legal rights and claims of children but much of his argument is equally applicable to the moral sphere.

Houlgate examines five arguments for the ascription of different rights to children and adults, in some detail. First the argument from "actual moral agency"; second the argument from "potential moral agency"; third the argument from "social contract"; fourth the argument from "beneficence" and fifth the argument from "utility". The first two view the child's lack of autonomy as the grounds for denying certain rights to children, the other three consider the lack of capacity for rational choice as the key factor. The second capacity certainly seems a necessary condition of autonomy, but since it may exist where the latter is absent, the discussion will follow Houlgate in examining the two separately.

The argument from moral agency relies on the views expounded, among others, by Kant and Locke. Locke in particular argues that certain unique characteristics of moral agents are of peculiar relevance to the ascription of rights. These include the ability to reason and the abilities to be "self-determining" and "self-legislating". Locke is quite certain that children do not possess these abilities and therefore do not have the corresponding rights to liberty and property. These views are clearly set down in "Of Paternal Power".

"The freedom, then, of man, and liberty of acting according to his own will, is grounded on his having reason which is able to instruct him in that law he is to govern himself by and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrained liberty before he has reason to guide him is not the allowing him the privilege of his nature to be free, but to thrust him out amongst brutes, and abandon him to a state as wretched and as much beneath that of a man, as theirs". (13)

It is clear that Locke felt it was inappropriate to talk of a child's moral right to liberty primarily because he did not regard the child as a moral agent. Houlgate points out that this claim is not at all self-evident:

"... there is ample evidence to prove that even very young children possess the capacity to formulate plans and to execute them independently ...". (14)

Moreover studies of moral development show that children round 13 years of age can apply moral rules. Thus even if the very young are not moral agents, children well below the age of majority should be (and often are) regarded as such. Secondly, the connection between autonomy and moral rights remains unclear. There may be some rights which require autonomy as a precondition, but Feinberg's "passive negative rights" (see p. 49) for example, fall outside this scope. Autonomy is not considered a condition of the right not to be tortured or enslaved. It is not a morally relevant factor in distinguishing

13. John Locke, The Second Treatise of Civil Government (Blackwell, Oxford, 1946) pp.31-32.

14. L. Houlgate, op.cit., p.53.

adults and children here, how can it be so in other areas? When (if at all) does it become relevant? In addition it might be noted that few adults are fully autonomous, that is, acting in accordance with self-accepted principles, but this on its own is never regarded as sufficient grounds for denying them moral rights, so why should it be so in the case of children? Is the argument from "potential moral agency" more useful in articulating a morally relevant difference between adults and children?

Houlgate suggests that one might wish to argue that since children:

"... uniquely possess the potential for developing into beings with autonomous will ..."

(15)

one might wish to ascribe to them:

"... the right to be provided the conditions that will allow them to become beings who are self-determining and self-legislating".

(16)

Does potentiality provide the necessary criterion for ascribing different moral rights to adults and children? There are several weaknesses to be considered here. Firstly (as Houlgate observed) mere potential is not usually considered sufficient grounds for the provision of conditions to fulfil that potential. What of the potential sadist? Is the argument confined to potential moral agency? Houlgate feels uneasy since this might become an argument against all forms of abortion and contraception. The point is hardly conclusive. Perhaps

15. L. Houlgate, op.cit., p.56.

16. ibid.,

"potential moral agency" is not a sufficient condition for the right to development, but it is certainly a necessary condition of any such right and may well provide the relevant difference that needs to be established in defining specific rights for children. The case must ultimately rest on some kind of description of what it means to be a moral agent and to reach maturity. This will necessarily rest on perfectionist considerations which will indicate the kind of potential that bestows a right to its fulfilment, as well as on empirical observations on development. Arguments appealing to children's lack of moral development remain inconclusive and in need of further examination. First, however, a brief look at the relevance of the "capacity for rational choice". Children's assumed lack of this capacity is the basis for denying them rights accorded to adults in the arguments from beneficence, utility and social contract. It will be shown that this capacity on its own cannot serve as a basis for a separate theory of juvenile rights but this conclusion in no way eliminates the need for such a theory.

Two questions are rightly regarded as central by Houlgate. First it is necessary to indicate what it means to say that a person or class of people has or lacks the capacity for rational choice. Second one must examine the evidence for asserting that children lack this capacity. Houlgate points out the need to distinguish between "correct" and "reasonable" choices. The reasonable choice is not necessarily the correct one and the correct one may in certain circumstances even appear unreasonable. Houlgate adds further that although adults and children are often in possession of the same evidence, children seem to

"attach incorrect evaluative weights to the relevant facts".

(17)

Consider the child who wants to wear summer clothes in the snow!

An assessment of the claim that children lack the capacity for rational choice must involve decisions on the choices that reasonable people would make in different situations, but this in turn is dependent on a whole evaluative framework providing (once again) a view of ideal development and the goals it is reasonable and desirable for people to attain. In the absence of any such theory, Houlgate declares that at least some things must command almost universal assent as "reasonable to pursue" and suggests that "survival" ⁽¹⁸⁾ is one such thing.

Ignoring the contentious aspect of this assertion, one can ask (with Houlgate) whether children lack the capacity to make choices that do not seriously endanger their lives. One must distinguish here between any disinclination and any actual inability that children may have, only the latter implies that children don't understand the risks and hence cannot choose to avoid them, that is, only the latter involves the claim that children lack the cognitive capacity to understand. It also often includes the assertion that children lack the information needed for rational choice and the view that children's inability to defer gratification prevents rational choice. It has been argued that there is "no evidence" to support any of these claims except in the case of the very young. Houlgate reminds the reader

17. L. Houlgate, op.cit., p.67.

18. ibid., p.68.

that work based on Piaget suggests that children reach the highest stage of human cognitive development around 12 years of age. (19) Since the information available to children is often a function of the extent to which adults have decided to withhold it, this point becomes circular. Finally even the very young can defer gratification when playing games, for example. The final point is undoubtedly Houlgate's weakest. Children may indeed be able to defer gratification, but without any further psychological experiments this must be qualified with the statement: 'if they see the point in doing so'. The fact is they frequently do not see the point. Perhaps more importantly, children have a different concept of time. To suggest even to an 11 or 12 year old that one can afford a third rate X (tennis racket, electronic game or whatever) now, or a first class model in six months' time, is to present him with a far more serious dilemma than an adult in similar circumstances. Six months seems an eternity to a child. It is moreover decisions with long-term consequences that are so often involved in areas where there is a reluctance to grant children freedom of choice: the choice of school, of medical practitioner, of home for example. A child may want to go to a given school because his/her best friend is going there. S/he can only anticipate the short-term misery of separation rather than any long-term benefits perceived by parents. Perhaps s/he even understands his/her parents' reason for refusal, e.g. the friend is going to a private school and they believe in state education, but s/he gives these reasons a different weight. It does not require much

19. L. Houlgate, op.cit.,

imagination to give rational arguments on both sides, but the issue cannot be settled on objectively rational criteria divorced from an evaluative framework, a conception of what is important in life, of the kind of values the parents hope their children will adopt. It is these things that a child even with the "capacity for rational choice" so often lacks. Of course there may come a time when one has to acknowledge sadly that one has failed to impart them and further intervention is unjustifiable, but to deny the legitimacy of the attempt is to misunderstand the nature of childhood.

The conclusions above are almost entirely negative. It will perhaps be helpful here to indicate once more the direction in which a more constructive approach to juvenile justice must move. It has been suggested that the isolation of specific capacities as morally relevant in denying certain rights to children, (and possibly ascribing other rights to them) is unhelpful, except in the case of the very young. Many children do indeed have the capacities of many adults. The key difference would appear to lie not in any capacity, but rather in the different perspectives of children and adults, perspectives of what is important, of what is worthwhile, of time. There is no suggestion here that the adults are always right, but they do have experience in their favour. A theory of juvenile rights must ultimately accommodate the concept of development and some kind of description of maturity as that towards which development is directed. It is surely these concepts which embrace the differences between adults and children that constitute the grounds for ascribing varying rights to them. To illustrate the practical implications of this kind of approach, the concluding paragraphs of the discussion will examine an actual American

case summarised in a recent book concerned with children's issues, (20) which will also serve as an introduction to an examination of some aspects of the law.

In the matter of Seiferth (1955) *

Martin Seiferth had a cleft palate and hare lip, his father refused consent for surgery to rectify the condition because he believed in "mental healing" by "letting the forces of the universe work on the body". When the boy was 12 years old, the local Deputy Commissioner of Health instituted proceedings to have Martin declared a neglected child in order to transfer his custody to the County to ensure that he would receive the necessary medical treatment. The Children's Court Judge refused the request but the Appellate Division granted the petition. The original decision was upheld in the state Supreme Court by a margin of one.

Relevant facts

1. Surgical treatment for this condition is nearly always given at a very early age (around 3 years) and the older the patient, the less favourable the prognosis.
2. A surgeon testified to the effect that it was important to have the operation young, but it could be done at any time. There was no medical emergency. However, in twenty years of medical practice he had never encountered a case which had been neglected for so long.

20. Onora O'Neill and Wm. Ruddick (eds.) Having Children (Oxford University Press, New York, 1979), pp.138-144.

Footnote: *The relevant citation is: In re Martin Seiferth jr. 309 N.Y.30 (1955). However, due to difficulties in obtaining a complete copy of the original, references given here are all to Having Children cited above (reference 20).

3. In order for the surgery to be fully effective, patients have to undergo extensive post-operative speech therapy.
4. Martin had been convinced by his father of the power of "natural forces" and was totally opposed to surgery.
5. The father testified:

"If the child decides on an operation, I shall not be opposed ... in a few years the child should decide for himself ..."

(20a)

The Children's Court Judge Wylegala concluded:

"After duly deliberating upon the psychological effect of surgery upon this mature, intelligent boy, schooled as he has been for all of his young years in the existence of forces of nature and his fear of surgery upon the human body, I have come to the conclusion that no order should be made at this time compelling the child to submit to surgery. His condition is not emergent and there is no serious threat to his health or life. He has time until he becomes 21 years of age to apply for financial assistance ... to have the corrections made. This has also been explained to him after he made known his decision to me".

(20b)

The "decision" Martin made was taken after having had the medical procedures explained to him at length, and having met other children and medical staff involved in similar treatment. The majority opinion of the Supreme Court ultimately upheld Wylegala's view, stressing that without Martin's co-operation the treatment was unlikely to be effective and such co-operation was thought to depend on Martin's undergoing surgery voluntarily. The dissenting opinion insisted that the case had to be viewed as one of neglect and that in

20a. Onora O'Neill and Wm. Ruddick, op.cit., p.141.

20b. ibid., p.142.

the circumstances however desirable it might be to secure the child's consent, it was in no way necessary:

"Neither by statute nor decision is the child's consent necessary or material, and we should not permit his refusal to agree, his failure to cooperate, to ruin his life and any chance for a normal happy existence; normalcy and happiness, difficult of attainment under the most propitious conditions, will unquestionably be impossible if the disfigurement is not corrected ... this is a proceeding brought to determine whether the parents are neglecting the child by refusing and failing to provide him with necessary surgical, medical and dental service. Whether the child condones the neglect, whether he is willing to let his parents do as they choose, surely cannot be operative on the question as to whether or not they are guilty of neglect ..."

(20c)

This case raises most of the controversial areas of the preceding discussion on children's rights. The child-libertarian and the protectionist can both agree with the final ruling, but concurrence is a far more complex matter for the protectionist. The child-libertarian would oppose surgery solely because the child did not want it. Had the child been in favour, this would have been sufficient grounds for reversing the decision. A consistent child-libertarian would adopt this procedure regardless of the child's age (although presumably below a certain minimum a representative would have to be appointed to present the child's probable views) and regardless of the reasonableness of the child's views. Thus if a 12 year old boy whose parents had consented to surgery, did not want it on grounds of beliefs held independently of his parents, the child-libertarian would regard carrying out an operation as a serious violation of the boy's rights.

20c. Onora O'Neill and Wm. Ruddick, op.cit., 143.

This view has the merit of consistency but it seems to run counter to some very basic intuitions on appropriate behaviour towards children.

The actual decision in the case of Seiferth was in fact taken on protectionist grounds. Judge Wylegala certainly took Martin's views into account, but his decision was based on the harm likely to accrue where surgery was undertaken against his will, and on the fact that the decision did not present an immediate threat and could be reversed should Martin so wish. The Judge felt that the full benefit of surgery could only be achieved with the boy's consent. It is fairly clear that in the absence of a need for post-operative co-operation, Wylegala might well have reached the opposite conclusion. The boy's views were thus only one problem among several, rather than the overriding factor they constitute for the child-libertarian.

The dissenting opinion is also given in protectionist terms but from a far more doctrinaire perspective. The underlying assumptions here are: firstly that it is clear which action constitutes the child's best interest, secondly that the child's opinion on the subject is irrelevant, thirdly that the matter at hand is a clear case of parental neglect and whatever rights parents may legitimately have over their children they do not have the right to abuse them in this way. Unfortunately none of these assertions is as uncontroversial as it appears. It may well be clear that it is not in a child's interests to have a cleft palate, but given that a particular child has developed an overwhelming fear of surgery and adopted a belief system that supports this fear, the issue becomes much cloudier. Similarly while agreeing that the child's opinion may be irrelevant in some situations,

for example where life is endangered, it is clear that this is not such a case and that it is in fact his opinions which constitute the major difficulty for successful intervention. Unless one is prepared to take a strict deontological position advocating that treatment is the right course of action irrespective of outcome, it is hard to see how the child's view can be regarded as irrelevant. Finally although one might wish to claim that parental views here are misguided, it does not seem to be a clear case of parental neglect. The parents hold strong principles and it is clear that they would wish to pass on these principles to their children. Unless one wants to take the extreme position that certain principles per se must disqualify adherents from parenthood, one cannot regard teaching such principles as constitutive of neglect. Perhaps this is the correct view, but its consequences are far-reaching indeed, and would lead to an intervention in adult life that many would find unacceptable. However the dissenting opinion seems to capture one aspect that both the child-libertarians and the majority view avoid, namely that some positions are intrinsically more reasonable and more acceptable than others - Fuld, J. who dissented, was prepared to articulate some conception (however minimal) of what constitutes the good life.

"... normalcy and happiness, difficult of attainment under the most propitious conditions, will unquestionably be impossible if the disfigurement is not corrected".

(20d)

The view seems to be that with surgery the boy at least has a chance of normalcy and happiness, without it, he has none. The view may be

20d. Onora O'Neill and Wm. Ruddick, op.cit., p.143.

controversial, but the issues are clear. A child cannot be allowed to ruin his life chances. The child-libertarian position gives the child the right to do just that. The protectionist, unlike the child-libertarian cannot always come up with clear answers given ignorance on how best to attain a full life, but where something is clearly not constitutive of such a life - alcohol and drug abuse for example - intervention is regarded as justifiable. In the Matter of Seiferth can also be seen as just such a case. However the particular difficulty of this case lies in the nature of the medical evidence. If it is indeed true (and it would seem that at least one further opinion should be sought on the matter) that the success of this particular surgery depends on post-operative co-operation and that this would almost certainly not be forthcoming, then compulsory surgery would leave Martin physically no better off and psychologically worse off. Consent in this case is peculiarly tied up with a successful outcome. It seems to be a necessary constituent of effective treatment - it is for this reason (and not because acting without the boy's consent is a violation of his autonomy) that consent must be sought. Having said this it should be stressed that in supporting the ultimate decision, one should firstly admonish the parents, secondly put the greatest possible pressure on the boy to change his mind and finally inquire into why proceedings were not instituted much earlier when the child's consent would not have been able to effect the outcome in the same way. Perhaps the view presented here can be clarified further by looking briefly at a hypothetical case.

In the Seiferth case, treatment of Martin's actual condition required his co-operation. Presumably both his parents' and his own

views would have been identical even where this was not the case. However it will be argued that under such circumstances the dissenting opinion most accurately reflects the truth of the matter. Consider the situation if Martin had had two undescended testicles. * The medical facts of this condition are that the operation is most likely to be successful if performed under the age of about 6 years and that if left until post-puberty the boy will certainly be sterile and possibly impotent. The treatment involves minor surgery, 14 days in bed and nothing further. Whilst reluctant (for reasons given above) to call any refusal of surgery on the parents' part neglect, it would indeed seem to be the case here that the child's consent or refusal is immaterial and that the parents should be overruled, for it is clear where his interest lies, whether or not he recognises it. Failure to perform the operation constitutes a considerable diminution of life chances. Even if as an adult such a boy were to choose not to have children and/or to remain celibate, to narrow the range of his choices and impose such a state at an early age seems indefensible - precisely the kind of thing he cannot be allowed to do. It is for this reason that his views are in a sense 'immaterial'. But it is also because the 'reasonable' view seems almost self-evident that if a child demanded such an operation in opposition to his parents, he should be given full support, not because he has demanded it, that is, not in support of some liberty right, but because what he has demanded is

Footnote: * This is a condition that occurs not infrequently.

clearly more constitutive of a full life than the alternative. *

The Legal Perspective

This section will be less comprehensive than the preceding one. The aim is to examine the legal rights held by children in three specific areas: compulsory education, the criminal law as it applies to young offenders dealt with by the courts, and the issues of custody and access in matrimonial disputes and to examine these areas of the law in the light of the previous theoretical discussion. It will be seen that the legal rights of children can sometimes be defended from a protectionist and sometimes from a child-libertarian viewpoint, but neither necessarily guarantees action in the child's best interest. Once again the conclusions will be almost entirely negative, but it is hoped that by revealing the sometimes conflicting attitudes of the different areas of the law to children, a step can ultimately be made towards indicating the direction in which future legislative measures for children should move.

Footnote: * In a recent book on the problem of consent to medical treatment for children (W. Gaylin and Ruth Macklin (eds.) Who Speaks for the Child? The Problems of Proxy Consent (Plenum Press, New York, 1982)), one of the contributors suggests that the weight given to the views of both parents and children should depend in part on an assessment of the gains and risks involved. Thus where the gains are high and the risks low as in the case of a blood transfusion to save life perhaps, there can be no right to refuse. Where both gains and risks are high, as with a life-endangering operation to facilitate walking for example, the state should not intervene on behalf of the child and so on. The interesting point to note is that once again, there is an implicit acceptance of modified protectionism. Yet again the views of the child are to be taken into account or rejected, not because they are his/her views but because of their reasonableness or otherwise according to accepted standards.

Compulsory Education

"The child is entitled to receive education which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him ... to develop his abilities ... and his sense of moral and social responsibility".
(Principle 7 U.N. Declaration of the Rights of the Child)

The area of compulsory education seems a particularly appropriate field to investigate in a discussion of children's rights. It applies only to children and justification is therefore given in terms of certain differences between children and adults. The principle cited above has been given legal force in most countries. Recent legislation for Scotland brings together all the relevant prior enactments in the Education (Scotland) Act 1980 which will be referred to throughout this discussion. The law regards the right to education as a "performance right" (see above p.58). The statutes clearly reflect the view that the right to education imposes (among others) an obligation to ensure that it is in fact obtained, at least until the age of 16 years. Inevitably such legislation has become a key target of the child-libertarians. Farson echoes the earlier views of John Holt in "Escape from Childhood" in asserting:

"The only people in our society who are incarcerated against their will are criminals, the mentally ill and children in school". (21)

"The real lesson in compulsory education is that one cannot be trusted to govern oneself". (22)

21. R. Farson, op.cit., p.96.

22. ibid., p.98.

It was indicated in the first section that this view will be rejected here in favour of a modified protectionism, but the child-libertarian argument should certainly be taken into account in assessing some aspects of current practice.

The 1980 Act clearly places the obligation for children's education jointly on the education authorities and on parents. Section 1 lays down the duty of the authority "to secure provision of education" whilst Section 30 refers to "the duty of parents to provide education". Section 28 states in addition that "pupils are to be educated in accordance with the wishes of their parents". Section 31 establishes the age of compulsory education as between five years and sixteen years and except in the exceptional cases where an exemption has been granted (Section 34), a child's failure to attend school "without reasonable excuse" is an offence on the part of the parents (Section 35). Any legal proceedings in such cases are taken against the parents and penalties range from a maximum fine of £50 for a first conviction to that of the same fine plus a month's imprisonment for the third and further convictions (Section 43). Section 44 makes provision for any cases of proven truancy to be referred to the Reporter of the children's panel, regardless of whether or not the parents have been convicted. This Section is of particular interest here, for although the Act clearly places responsibility for school attendance entirely with parents, referral to the panel not only acknowledges that a particular child may be "in need of compulsory measures of care" but is also an implicit recognition (perhaps not intended by the legislation) that failure to attend school may be a problem originating almost entirely with the child and not with the parents.

Referrals to the hearing system for truancy range from cases of young children with a parent who keeps them home for company, to genuine school phobics, to children whose parents take them to the school gates in desperation each morning only to find that they never reach the classroom, to fifteen year olds who have decided (perhaps with good reason) that school has nothing to offer them. The hearing system (in contrast to the courts) has at least in theory, the flexibility to differentiate between these types of cases and would almost certainly recognise that at least in the last two instances, responsibility rests very much with the pupils and not with the parents. Regardless of the legal terminology, it does seem more realistic to say that here it is the children who have not only the right but also the obligation to attend school. This apparently paradoxical situation can be elucidated with reference to the interest theory of rights advocated in Chapter 1 and to a specific conception of "interests" which recognises the existence of objective interests irrespective of subjective perceptions (the theme of Chapter 3). It has already been pointed out to those that view compulsion as irreconcilable with the maintenance of legally recognised rights, that there are other examples of right-holders simultaneously incurring obligations, even where they have not chosen to do so (see p.41). It was asserted that it would be absurd to suggest that the element of compulsion here makes it inappropriate to speak of "rights", to say for example that where a right is felt or perceived to be burdensome by the right-holder, it is no longer a right. Rather the rights and duties involved in such circumstances have "different bases". Tom Campbell writes as follows about the compulsion to work in some socialist states:

"We can say that work is an obligation insofar as it involves contributing to the satisfaction of human need and a right insofar as it enables the individual to develop himself, the latter having more to do with the type of work done and the former with what the work produces".

(23)

As with compulsory work, so too with compulsory education neither is intrinsically indicative of a violation of rights.

The observation in the preceding paragraph will later be shown to be central to any analysis of the theoretical assumptions underlying the Children's Hearing System in Scotland. Legalistic criticisms of the system (by Morris and McIsaac for example) focus on the element of compulsion and the indeterminacy of disposals as overwhelming evidence for the system's infringement of children's rights. It is believed here that compulsion and indeterminacy are not inherently antithetical to a due regard for the rights of those involved. If there are grounds for accusing the Children's Hearing System for denying rights to children, they do not lie here. In the sphere of education, it is thus not compulsion which should give rise to alarm, but, as will be explained below, there is cause for concern elsewhere.

The Education (Scotland) Act explicitly views children as entirely dependent and nowhere recognises that they may have their own viewpoint. This is clearly not the case within all individual schools, which may range from those with a compulsory curriculum to those with individual time-tabling, but the focus of this discussion is the legal status of children with regard to their education. This is nowhere

23. T. Campbell, The Left and Rights (RKP, 1983), p.188.

more clearly illustrated than in Sections 8 and 9 of the Act which uphold the tradition of religious education in state schools:

"with liberty to parents ... to elect that their children should not take part in such observance or receive such instruction" (Section 8 (1)) (24)

There is no provision at all for taking into account the views of the children themselves. This applies not only to pupils who might be tempted to exploit the "conscience clause" to gain a free lesson, but also to any Muslim or Jew for example, who might genuinely wish to participate in New Testament instruction, but whose parents are opposed to it. Children have no legal rights at all in this area, nor indeed in any other decision on the subjects they are to be taught or on the institution which they are to attend. It is in these areas that it might be salutary to give the child-libertarian view serious consideration.

Predictably the legal position changes dramatically after the age of 16. Compulsory attendance can still be required for some young people but the legal duty to attend now falls on the individual in question. Section 45 refers to compulsory attendance at junior colleges and states clearly that:

"... it shall be the duty of every young person upon whom such a notice is served to attend ..." (25)

The penalties for non-compliance (a maximum fine of £1 with a possible month's imprisonment at the third conviction) are to be imposed on the

24. Education (Scotland) Act 1980

25. ibid., Section 45.

truant and not on parents. The Act also gives over-sixteens the right to education where the obligation to attend no longer exists. Section 49 is concerned with "... the provision to assist pupils to take advantage of educational facilities". Such provision includes the power to provide maintenance where necessary for those over school leaving age. A decision in the Sheriff Court of Lanark in 1970 moreover, upheld a child's right to education after the age of 16 by insisting that a father was obliged to continue support of his daughter where he had the means to do so. In this case it was held:

"... that as the child was reasonably and appropriately engaged in full-time education, the father was found liable to pay therefor in so far as his personal circumstances permitted".

(26)

It would appear that the right to education is recognised in law even where there is no longer a legal requirement to participate.

This brief account makes it clear that beyond the actual provision of educational facilities, particularly for those between 5 and 16 years of age, the law has little to say on how the right of education is to be interpreted. Litigation in the field is confined almost entirely to attendance orders, either where a pupil is truanting or where parents are disputing a school placement made for their child and trying to secure a place elsewhere. Recent decisions in the courts attest to the fact that the Education Act is open to a wide range of interpretations with respect to parental choice. In a

26. Mizel v. Mizel, 1970 S.L.T. (Sheriff Court) 50.

case in Lothian in August 1979, the court upheld a father's decision not to comply with an order to send his child to a given primary school in the following terms:

"... the said Act * placed the responsibility upon the parent to provide efficient education, and that in undertaking the responsibility the parent had displayed a preference which was not fanciful but had a basis of substance ..."

(* Education (Scotland) Act 1962)

(27)

However, in Sinclair v Lothian Regional Council,⁽²⁸⁾ it was held that the education authority is only bound to consider but not to follow the wishes of parents and that since this had occurred, the local authority's discretion should not be interfered with. It is clear that for most people 'parental choice' has as limited a bearing on the educational establishments their children in fact attend, as does the choice of the children themselves. Within the public sector choice is in practice very limited, but as stated above the limitations are the outcome of policy decisions within a legislative framework and not of the statutes themselves, which have little to say on many of the substantive issues affecting children's rights in the field of education. This observation extends to the use of corporal punishment. It was recently pointed out:

"With the exception of the provisions relating to approved schools, there is no statutory basis for the proposition that a teacher is permitted to beat his pupils".

(29)

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27. Brown v Lothian Regional Council, 1980 S.L.T. (Sheriff Court)14.
28. Sinclair v Lothian Regional Council, 1981 S.L.T. (Sheriff Court) 13.
29. Peter Wallington, 'Corporal Punishment in Schools' Juridical Review 17 (1972) p.125.

The approved schools' "provisions" themselves seem to be limited to the 1961 regulations which require all cases of corporal punishment to be entered in the punishment book. Here too statutory provision gives wide discretionary powers to those in authority. It is the educational authorities that have effective control over the de facto rights of children in school. As will be shown below, this is in marked contrast to young offenders from a similar age group, who find themselves facing action in the courts.

Children in Court

The Scottish system of juvenile justice was reorganised in 1971, following the report of the Kilbrandon Committee in 1964 and the Social Work (Scotland) Act 1968. As a result of the new legislation a large majority of children in trouble and deemed to be "in need of compulsory measures of care", were removed from the jurisdiction of the courts. However a minority of young offenders over the age of criminal responsibility (8 years) is still directed to the Sheriff Court and dealt with under the terms of the Children and Young Persons Act (Scotland) 1937 and the Criminal Procedure (Scotland) Act 1975. The Lord Advocate retains the power to prosecute all children above the age of 8 years in the criminal courts. In practice only certain types of cases involving children are automatically referred both to the Procurator Fiscal and to the Reporter to the Children's Panel. Broadly speaking the key considerations and categories of offence are: the gravity of the offence (cases of murder, rape and armed robbery for example have to go for trial under criminal procedure), some offences under the Road Traffic Act by those over 14 years which on conviction

can lead to a disqualification from driving, offences which on conviction permit forfeiture of an article (these are usually firearms offences) and any offences committed by a child acting along with an adult, as well as all offences by children over the age of 16, who are not already on supervision under the terms of the Social Work (Scotland) Act. It is worth noting that the Sheriff is at liberty to ask for advice from the Children's Panel regarding the disposal of almost all such cases, but remains free to ignore any advice given. The interesting point here is that children appearing before the court have a distinct set of legal rights that are not granted to those within the remit of the hearing system. They have the rights of adults on trial including (except in rare cases of extreme violence) the right to a determinate sentence on conviction. In addition there is separate provision under Section 23 of the 1975 Act for the remand and committal of those under 21. In brief this section of the legislation is designed to keep young offenders apart from adult detainees, either in separate institutions or in self-contained units of adult institutions. With the exception of the provision of separate facilities and the imposition of restrictions on reporting, the law here seems to be much more in accord with child-libertarian principles. At least in this area children and adults do appear to have the same legal rights. What are the consequences for the child?

A case study published in 1978 ⁽³⁰⁾ compared a number of boys committed to such care by the courts and by the children's hearing system and produced results that can only be regarded as deeply disturbing by

30. Monica Rushforth, Committal to Residential Care (Scottish Office Central Research Unit, HMSO, 1978) especially pp.24, 26, 67.

anyone who professes a concern for the rights of children. The study centred on those sent to List D schools and found among other things that for those included in the sample:

- (i) there were no significant differences in the home background or in the offence histories of the two sets of boys;
- (ii) a higher proportion of "court boys" was held in custody both prior to the hearing and during the continuation of their case and where no List D place was immediately available after disposal, they waited longer than "panel boys" for a vacancy and moreover had to remain in custody more frequently while doing so;
- (iii) "there was some indication that boys who have been processed by the courts may stay rather longer in the schools and may be somewhat more likely to be transferred to a Borstal, or receive a subsequent Borstal sentence";
- (iv) "Though asserting that the two sets of boys were no different, it was clear that half the staff interviewed felt that some, at least, of the court boys were subjected to subtle measures of control over and above those imposed on panel boys".

The findings of the study raise many questions well beyond the scope of this discussion. The most important point to notice here is that granting legal rights in itself guarantees very little. The overwhelming fact is that in the present system, the "court boys" from the sample whose legal rights are more like those of adults and are thus more clearly defined, suffered longer terms of confinement before and after trial and more stigmatisation, than those who are referred to the panel for similar offences. It could be argued that this is the result of inherent inconsistencies in a system that allows control and treatment principles to operate side by side. Irrespective of whether this is indeed the case, the point remains that in the present context, granting certain adult legal rights to certain children,

seems to make them considerably worse off than similar children denied such rights. The issues are far more complex than either the child-libertarians or the protectionists are prepared to concede. Perhaps this can be illustrated even more forcefully by a brief look at one of the 'protectionist' provisions in the Criminal Law.

It was stated above that Section 23 of the 1975 Act demands separate remand facilities for young offenders. In practice the results of this requirement are also often very detrimental to the individuals in question. In Edinburgh for example, the remand facilities frequently used are a self-contained unit of Saughton prison. As a result of the legislation, young offenders are debarred from using nearly all the prison's very impressive recreational and educational facilities, as well as the open workshops. Consequently this category of detainees spends a far greater proportion of the day locked up in cells than do all the other inmates. Once again the legal rights divorced from an institutional context do little to guarantee action in the child's best interest. One could argue that isolation from adult prisoners is in the child's best interest regardless of any consequences, but this is not only dubious, it has almost certainly never been discussed. It would seem that in the fields of law just as in the realm of theory, there is an urgent need for articulating more fully what is constitutive of "a child's best interests". The area of the law which more than any other seems to take this standpoint, is that relating to questions of parental custody and access in matrimonial disputes.

Custody and Access in Matrimonial Disputes

In cases of separation, nullity and divorce, decisions frequently have to be made by the courts concerning the custody of any children involved and access to them by the parent to whom custody has been denied. David Walker writes:

"The paramount consideration is the welfare of the child or children and the court will consider the child's wishes, and a child in minority is entitled to be heard on the matter".

(31)

In recent years questions of guilt and issues of custody have been separated in matrimonial disputes. The 'welfare of the child' has been redefined to allow considerable weight to be placed on the child's own preferences, although these are not the only views taken into account. A recent decision illustrates clearly that the "child's best interest" can remain unknown and that in the absence of any other relevant criterion for resolving the dispute, the child's view can become the deciding factor. In Fowler v Fowler there was general agreement that both parents were in a position to provide their 10 year old daughter a home, although in the past neither had put the child's interests first. The mother's former cohabitee had been found guilty of violence towards the girl and the father had repeatedly given her into the care of others. Lord Stott stated:

31. David M. Walker, Principles of Scottish Private Law, Volume 1, (Clarendon, Oxford, 1982) p.282.

"I am fully conscious of the fact that while in questions of custody the interest of the child is of paramount consideration, it cannot by any means be assumed that a child's interests necessarily coincide with her wishes. All the witnesses however agreed that Denise was a highly intelligent girl with a mind of her own and that was fully confirmed by my own impressions of her. I was quite satisfied that she had not been pressurised or brainwashed by either parent and since her views were reasonable and there was no compelling reason to disregard them I have I confess allowed Denise in effect to decide the issue for herself".

(32)

There are several points of interest here. Firstly the decision focuses on all the theoretical arguments outlined in the first part of this chapter. Secondly the case is very useful as a starting point for a comparison between the different kinds of legal rights accorded to children.

In the theoretical discussion it was suggested that neither the child-libertarians nor the protectionists could provide a comprehensive theory of children's rights. It is worth noting that the decision in Fowler v Fowler can be fully defended on both child-libertarian and protectionist principles. It is also worth stressing that the decision was made within the frame of reference indicated above as the appropriate one in making decisions about the lives of children, namely a prior statement of what constitutes the child's interest and a prior notion of what might be considered "reasonable". The child's right to be heard in such cases is clearly unconditional, the right to determine the issue is more complex and in a very great measure dependent on the actual views expressed, whether they do

indeed accord with or at least are not in direct conflict with what is acknowledged as reasonable and in the child's best interest. In all such cases there is general agreement that except in instances of extreme abuse, it is better for children to spend time with both parents. Requests to prevent access are viewed with caution. In the case of Cosh v Cosh in June 1979, a mother attempted to deny access to the natural father after her second marriage. She claimed that the children no longer wished to see him. The children expressed no such view in chambers and it became clear that the mother was putting them under considerable pressure. The judge concluded:

"I do not consider that this is a case in which it would be in the best interests of the children not to have contact with their father and indeed I see no good reason why this contact should be severed ... the responsibility for making access arrangements now rests to a substantial extent upon the pursuer (the mother)..."

(33)

Here it was clear that the views of the children (aged 12, 10 and 4 years) were confused and ambiguous and the prior notion of their interest determined the case. Once again the principles underlying the decision are taken within an evaluative framework. The legal rights of the child in this area are protectionist in that they rest on a view of the child as a dependent, but they are also sufficiently flexible to accommodate the concept of development. They do allow the child to be self-determining within prescribed limits - the case of Fowler v Fowler is clear testimony to this fact. How does this compare with the legal rights discussed in the first two areas?

33. Cosh v Cosh, 1979 S.L.T. (Notes) 73.

It was shown that in the sphere of education, the only legal right of the child is to be given education - any other de facto rights have a solely discretionary basis. It is not clear how any changes in the law would materially affect children's education - any choices have to be made on the basis of the available facilities and these are often severely limited. Moreover choice of school, unlike choice of parent can never be made on the basis of the child's firsthand experience. Parents may have well-formed views based on experience, on what is constitutive of the child's interests in this area. The law at present can do little to accommodate even these. In the area of education there is the additional problem of the current professional orthodoxy which is often the main determinant of how and what children are taught. Thus single sex schools are quite out of fashion in Lothian Region at present, as are traditional methods of teaching foreign languages. It is not clear that any changes in the law could or even should affect this. However there is certainly scope for minimal legal reform in the area of religious education. If such education is to remain compulsory, then the conscience clause should be extended to children at least to the degree that it includes the right to be heard, which is so clearly upheld in matrimonial disputes.

Compulsory education and custody and access are areas of the law relating primarily to children. The legal rights of young offenders are also partly based on a view of children as a special category but in addition bear many similarities to the legal rights of adults. It was shown above that those accorded such rights are often in a considerably worse position than those to whom they are denied. This

might be because the rhetoric of the two systems, the court and the panel, has to some extent spread to the institutions in which the offenders find themselves. The court in theory views those found guilty, primarily as lawbreakers, the panel sees them in need of help. The language of the one is punitive of the other supportive. Ignoring for the present the degree to which rhetoric in fact matches reality, it should now be apparent that any legal rights enshrined in the two systems must be quite different. Where an offence is the sole reason for intervening in a child's life, it is essential as in the case of an adult, to establish that the offence was indeed committed and notions of just punishment demand a determinate sentence that is proportionate to the crime. However in a system that regards a need for care as the criterion for intervention, these rights are as irrelevant as they are to questions of compulsory education and custody and access. The criteria for a just disposal in the first case are well-defined and fairly uncontroversial, in the latter they remain hazy at best. The concern of a court in criminal cases is the pursuit of justice according to law, that is of Miller's "legal justice", in cases where welfare is the issue as in matrimonial disputes, it is the pursuit of some of the ideals of "social justice", of the best possible outcome for a given individual in given circumstances within the range of options permitted in law. There is no place for "proportionality" and "determinacy" here any more than in the present hearing system. The objectives of such a system may indeed be misguided particularly where extended to offenders, but it is absurd to criticise it for denying children those rights which are alien to its very existence. These issues will be explored further in Chapter 6

Criticism should be levelled at the hearing system for a different but related reason, namely that in reality not only some of the dispositions but some of the statutory grounds of referral to the system have no place within a welfare ideology but belong rather to the realm of law enforcement, that is to the very area in which considerations of due process are of paramount concern. It will be argued below (in Chapters 6 and 7) that in order to be immune from the legalistic criticisms currently being levelled against it, the children's panel must either openly accept a dual role that includes both care and law enforcement and guarantees the rights of children accordingly, or it must refer all cases requiring punitive measures back to the courts and concern itself only with those children who are genuinely "in need of compulsory measures of care". However, before elaborating such proposals further, it would seem essential to attempt an analysis of the concept at the heart of all considerations of care, namely the concept of interest.

CHAPTER 3

Interests Within and Outwith the Law

When a children's hearing have considered the grounds for the referral of a case accepted or established ... the report obtained ...and such other relevant information as may be available to them, they shall proceed in accordance with the subsequent provisions ... to consider on what course they should decide IN THE BEST INTERESTS OF THE CHILD * (Social Work (Scotland) Act 1968, 49, III 43(1))

... that while in questions of custody the interest of the child is of paramount consideration, it CANNOT BY ANY MEANS BE ASSUMED THAT A CHILD'S INTERESTS NECESSARILY COINCIDE WITH HER WISHES * (Lord Stott in Fowler v Fowler, 1981 S.L.T. (Notes) 9)

... OUR KNOWLEDGE ABOUT HUMAN BEHAVIOUR PROVIDES NO BASIS FOR THE PREDICTIONS CALLED FOR BY THE BEST INTEREST STANDARD.* No consensus exists about a theory of human behaviour, and no theory is widely considered capable of generating reliable predictions about the psychological and behavioural consequences of alternative dispositions. (R.H. Mnookin, 'Foster Care In Whose Best Interest?' in Onora O'Neill and Wm. Ruddick, op.cit., p.189)

* My capitals

The quotations heading this chapter give some indication of the centrality of the concept of interest in the area of juvenile justice, while at the same time acknowledging that the nature of children's interests often remains unknown. The "interest of the child" has become such a well-worn formula in care proceedings, and more recently within some jurisdictions, in juvenile criminal proceedings, that the suggestion that it is of little worth as a guideline for action without considerable elaboration and qualification, will certainly be considered by many as outrageous. However, it will

be argued here that rigid adherence to this principle without acknowledging its potential shortcomings as a guide to action, is the most important single factor lending weight to the child-libertarian argument. As in the discussion of children's rights, there are both conceptual and empirical issues. There is a need for an analysis of the concept of interest as well as detailed examples of its application. The discussion of the empirical aspects of the formula will show that even where agreement has been reached on a formal principle, dilemmas on substantive questions reflected in the third quotation above, are almost inevitable.

In attempting to elucidate the concept of interest, it is once again possible to begin with a discussion of the conceptual issues or to start from a descriptive account of some of the interests recognised in law and then to proceed to clarify the principles and ultimately perhaps to improve their application in practice. Roscoe Pound has written extensively on interests relating to the law. His account is primarily descriptive and his theoretical framework will be rejected as offering only a partial account of interests (comparable to the partial account of rights provided by the Choice Theory), however his presentation is seen here as a useful starting point for a critical inquiry into the nature of interests and their centrality in certain areas of the law.

Pound's Account of Interests in the Law

Pound offers an extensive and detailed account of interests. The main focus of the discussion concerns interests as they relate to law, however Pound's initial definition of interests is of a far wider scope:

"... an interest may be defined as a demand or desire or expectation which human beings, either individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behaviour through the force of a politically organized society must take account". (1)

Pound goes on to assert that the law does not create these interests but rather

"finds them pressing for recognition and security". (2)

The starting point of the argument can thus be seen to be an entirely factual definition of interests as the objects of individual wants and desires. It has already been indicated that such an account is entirely inadequate with respect to the very young and only partially satisfactory with respect to other individuals (see Footnote p.45). However, the immediate concern here will be to examine Pound's account within his own theoretical framework. After giving a brief summary of the main points in the doctrine and putting the argument in context, the discussion below will concentrate on those issues relating specifically to the area of children's interests and more generally to that of parents and the family as a whole.

Pound outlines three specific concerns of the legal system with regard to interests. First it classifies and recognises a certain

-
1. Roscoe Pound, Jurisprudence Vol.III (West, St Paul 1959) p.16.
 2. ibid., p.21.

number of interests. Secondly the legal system fixes the limits within which it attempts to secure interests. Thirdly the legal system works out ways of securing interests. Pound acknowledges that selecting interests to be recognised in law must involve principles of valuation. It would appear that these principles should involve utilitarian considerations of a maximisation of want-satisfaction rather than any evaluation of the intrinsic worth of the various interests themselves. In writing of individual interests Pound asserts:

"All the demands that press upon the legal order for recognition are to be recognized and secured so far as possible with the least sacrifice of the scheme of interests (i.e. claims, demands, desires etc.) as a whole".

(3)

But at this point the aim is to describe the different categories of interests. The discussion will follow the order of Pound's own presentation.

The three main categories of interest according to Pound are: individual, public and social. It is crucial to an understanding of the analysis to realise that these categories are not mutually exclusive and that some claims might fall under all three headings. The different types are defined as follows:

3. R. Pound, op.cit., p.31.

"Individual interests are claims or demands or desires involved in and looked at from the standpoint of the individual life immediately as such - asserted in title of the individual life. Public interests are the claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life ... It is convenient to treat them as the claims of a politically organized society thought of as a legal entity. Social interests are claims or demands or desires ... thought of in terms of social life and generalised as claims of the social group".

(4)

From this initial classification, Pound moves to a detailed examination of the interests falling within each category, inquiring into the extent of the interest, explaining the development of its legal recognition and examining how far the interests in question are in fact secured by law. For example, within the category of "individual interests" are included firstly "interests of personality", secondly "domestic interests" and thirdly what are termed "interests of substance". Under each of these sub-headings Pound gives a further detailed classification of interests falling within the group. The second group (domestic interests) would seem to be the most relevant for present purposes and will therefore be presented in some detail, both to illustrate Pound's method and to try and develop a satisfactory theory of children's interests as they relate to the law.

In offering an account of interests in domestic relations, Pound highlights several important distinctions too frequently ignored in discussions of parental interests and the interests of the child.

4. R. Pound, op.cit., p.23.

It is vital to distinguish individual interests in domestic relations and the social interest in the family and in marriage as social institutions. In addition it must not be forgotten that in this sphere, there are individual interests vis-à-vis the rest of the world and between members of a family. In the past, the law has been mainly concerned with the former, but this pattern would seem to be changing. It is also worth noting that:

"... the relations themselves are both personal and economic". (5)

Within the area of domestic relations, there are four types of individual interest which come within the realm of the law: the interests of parents, those of children, the interests of husbands and those of wives. Parents are seen to have certain interests against the world at large. These include:

"... the custody and control of them (their children) ... and the authority to dictate their training, prescribe their education and form their religious opinions". (6)

It is clearly recognised that these interests are limited in law by the competing interests of the child and by the social interests:

"... in the maintenance of the family as a social institution and ... a social interest in the protection of dependent persons, in securing to all persons a moral and social life, and in the rearing and training of sound and well bred citizens for the future ...". (7)

5. R. Pound, op.cit., p.69.

6. ibid., p.75.

7. ibid., p.76.

The interests of children against parents are said to be those of support during infancy, education and training within parental means and (as with parents against children) to maintenance under certain circumstances. Pound asserts that:

"The first two ... are not secured directly by the law, and derive their effective support almost entirely from morals ..."

(8)

The interests Pound ascribes to children would seem to be unexceptionable. However, it is not at all clear how such interests can be derived from either "the demands" or "desires" or "expectations" of the group concerned. These interests are precisely those claimed on behalf of children by certain adults, either individually or in a political or social group and, as will be shown below, such claims rest on presuppositions concerning the rights of children and the ideals of "a moral and social life" and "sound and well bred citizens". The assertion that children's interests can be articulated in the absence of such an evaluative framework, that is in the absence of "ideal-regarding" * considerations, seems to have been put into serious doubt implicitly by Pound himself, in his own so-called "factual" account of these interests. Such a defect is regarded here as the inevitable outcome of any attempt to present the interests of children as pure facts. It is noteworthy that Pound evades the problem of implicit value-judgements in determining the contents of

8. R. Pound, op.cit., pp.82-83.

Footnote: * This term is elucidated further below, p.108.

the list of social interests for he takes as his starting point the interests actually recognised in law. The law is said to uphold interests in six main areas:

1. the general security;
2. the security of social institutions;
3. the general morals;
4. the conservation of social resources;
5. general progress;
6. the individual life.

"Interests in the security of domestic institutions" appears under the second heading - "the security of social institutions". The law seeks to uphold the family in many ways. A wife cannot, for example, be an accessory for protecting a criminal husband and husbands and wives are not required to give evidence against one another. Pound suggests that the failure of the law to recognise the claims of illegitimate children is a reflection of the fear of weakening the institution of marriage. (9) Pound asserts further that the movement to give independence to married women is often regarded as damaging to the interest in the security of social institutions. To sum up:

"... the social interest in the security of social institutions (is) the claim or want or demand involved in life in civilized societies that its fundamental institutions be secure from those forms of action and courses of conduct which threaten their existence ..."

(10)

There are two further interests in this area apart from that of the interest in the security of domestic institutions, namely those in

9. R. Pound, op.cit., p.297

10. ibid., p.296.

the security of religious institutions and those in the securing of political and economic institutions. The question of whether or not the particular institutions themselves are worth preserving is of no relevance at all to Pound's analysis. Here the facts stand in isolation. Ironically their relevance and weight in any actual decision can only be determined on the basis of value. There are some further references to the interests of the family in general and of children in particular, but it is the sixth category of social interests, "the social interest in the individual moral and social life or in the individual human life" that will be of central concern here. Pound views interests in this area as possibly the most important of all social interests. He states that three forms of these interests are recognised in law: first the interest in individual self-assertion, second that in individual opportunity and third the interest in individual conditions of life. This category of interests as a whole is defined in the following way:

"... the claim or want or demand involved in social life in civilized society that each individual be able to live a human life therein according to the standards of the society. It is the claim or want or demand that if all individual wants may not be satisfied, they be satisfied at least so far as is reasonably possible and to the extent of a human minimum".

(11)

The law has recognised interests in all three groups under this heading. The social interest in individual self-assertion is recognised in laws forbidding the arbitrary subjection of an

11. R. Pound, op.cit., p.316.

individual to the will of others. The interests in opportunity are recognised in different spheres: political, physical, cultural and so on. An outstanding example is provided by the laws regarding the compulsory education of children which can also be viewed as an expression of the social interests in the conservation of social resources and in the general progress. The interests in the individual conditions of life are recognised in statutes regulating conditions and hours of work as well as in minimum wage laws, housing laws, child labour legislation and so on. Pound concludes his classification of social interests with the following assertion:

"Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands ..."

(12)

The questions to which Pound now turns are those of evaluating and 'weighing' the various interests as well as securing them - that is precisely those questions which are crucial, where decisions are to be made according to the criterion of "the best interests". Perhaps the most significant observation made by Pound in his discussion of the valuation of interests is to stress the importance of comparing interests "on the same plane" and of putting interests "in their most generalized form" in order to compare them. If, for example, one formulates one claim as an individual interest and a competing one as a social interest, the issue may be decided in advance simply because of the categories within which the problem has been posed:

12. R. Pound, op.cit., p.316.

"Thus individual interests of personality may be asserted in title of ... the social interest in the general securing or under the social interest in the individual life, or sometimes from different standpoints or in different aspects, under both of them."

(13)

Pound's arguments here are highly relevant in discussing the interests of children. According to his view, situations of conflict cannot be fairly resolved until the relevant interests are considered under the same heading, that is either as individual interests or as public interests or as social interests. He also proposes that wherever possible interests should be described under the title of "social interests". It would seem then that questions of removing a young offender from home for example, should be viewed as a possible conflict between the social interest in the general security and the social interest in the individual life, rather than a case of societal interests versus those of the individual, where, as Pound correctly points out, the scales have been tilted in advance. However, having shown the starting point of any fair assessment of interests with great clarity and depth of understanding, Pound now leaves matters hanging uncomfortably in the air with a dogmatic statement that the quest for assessing the intrinsic worth of interests is "futile".

"Probably the jurist can do no more than recognize the problem and perceive that it is put to him as a practical one of securing the whole scheme of social interests as far as he may; of maintaining a balance or a harmony or adjustment among them, compatible with recognition of all of them".

(14)

13. R. Pound, op.cit., p.329.

14. ibid., pp.330-1.

It should be clear that even from within the framework of Pound's account of interests, a framework that will be rejected here as a means of identifying the interests of children, this remains highly unsatisfactory. It gives no indication at all of how to proceed in situations of a conflict of interests, that is, in precisely those situations which might be viewed as paradigmatic for legal intervention in the lives of children. It may well be that such decisions are ultimately arbitrary and that even Pound's policy of "interest-maximisation" is unrealisable, for such a policy involves assigning relative values to the conflicting interests once they have been identified. Not even here can decisions be made on the basis of the facts, for such decisions involve an assessment of the weight and relevance of the different facts, that is of their value. Any adjudication on grounds of interests cannot proceed in a value-free way. Whether or not such adjudication remains a desirable goal is a separate question. However the preliminary steps to answering this question and indeed to attempting to make decisions in the interests of children, must surely be first a more satisfactory account of interests and second an elucidation of the kind of activity necessarily involved in such an enterprise. The former is the task undertaken in the second part of this chapter.

The discussion will draw heavily on the arguments of Brian Barry and David Miller who are considered here as representing two opposing points of view. Neither author has a great deal to say about children and the relevant section of Miller's work concentrates on needs rather than interests. However, in their discussions of interests and needs, Barry may be said to put forward a subjectivist thesis comparable to Pound's, while Miller adheres to an objectivist position. A satisfactory

theory of interests is seen here as lying somewhere between the two. Barry's analysis in Political Argument will be taken as the starting point. An attempt will be made to summarise and criticise his arguments on interests with particular reference to children. This will be followed by a comparison with Miller's discussion of needs in Social Justice. It is thereby hoped to provide a framework for a coherent normative theory of children's interests which will draw on and develop different aspects of each account. The arguments of Stanley Benn in particular seem to indicate the direction in which such a theory should move.

Barry's Analysis of the Concept of Interest

The evaluation of the analysis of the concept of interest in Barry's Political Argument requires a prior understanding of the distinction between "want-regarding" and "ideal-regarding" principles. Barry defines principles in such a way that these two categories are "jointly exhaustive of the possibilities". Thus:

"Want-regarding principles ... take as given the wants which people happen to have and concentrate attention entirely on the extent to which a certain policy will alter the overall amount of want satisfaction or on the way in which the policy will affect the distribution among people of opportunities for satisfying wants".

(15)

"Ideal-regarding" principles are defined as "the contradictory of the want-regarding theory". (16) It is on the basis of ideal-

15. B. Barry, Political Argument (RKP, London, 1970) p.38.

16. ibid., p.39.

regarding consideration that some wants are thought to be more worthy of satisfaction than others, while some are discounted altogether as legitimate goals. Hence, ideal-regarding principles involve reference to some objective state of affairs irrespective of individual preferences and may be seen as an attempt to articulate what people ought to want. Mill's assertion: "... better to be Socrates dissatisfied than a fool satisfied" (17) is a reflection of a position that is at least partially ideal-regarding whilst Bentham's dictum "pushpin is as good as poetry" (18) reflects entirely want-regarding assumptions concerning the nature of individual interests. The key question for present purposes is whether interest as in the phrase 'in her interest' is to be interpreted as a want-regarding or an ideal-regarding concept. Barry clearly argues primarily in favour of the former, but his conclusions remain highly controversial. In the next paragraph Barry's arguments will be discussed in some detail.

Barry begins by giving a working definition of interest such that

"an action or policy is in a man's interests if it increases his opportunities to get what he wants".

(19)

He then proceeds to outline a number of significant differences between: 'x is in A's interests' and 'A wants x'. Five differences

17. J.S. Mill, Utilitarianism, Everyman Edition (Dent, London, 1969) p.9.

18. J. Bentham, Works (Tait, Edinburgh, 1843) Vol.2, pp.253-4.

19. B. Barry, op.cit., p.176.

are listed but some are much more important for present purposes than others. The statement 'x is in A's interests' is considered to have a more restricted application than 'A wants x'. Moreover, Barry correctly points out that it is possible to be mistaken about one's interests in a way in which it is not possible to be wrong about one's wants. In addition there is clearly no logical equivalence between the two statements in the sense that it can be established whether or not something is in an individual's interest without the person's approval and even without the individual's knowledge of its existence. Furthermore there are times when an individual seeks to determine whether something is in his/her interest in order to decide whether or not to support it. Here 'x is in A's interests' is equivalent to 'A wants the results of x' where x is an action or policy. Barry sets limits on what these results can be, but these appear to be at a tangent to the main thrust of the argument until the following assertion:

"To say ... that an action or policy is in somebody's interest is not actually to say that it satisfies his immediate wants at all; it is rather to say that it puts him in a better position to satisfy his wants ... it is clear that some want-satisfaction does not consist of interest-enhancement".

(20)

Barry views 'interest' as of more restricted application than wants and regards:

"Evaluations in terms of 'interest' [as] far more practicable than evaluations in terms of want-satisfaction".

(21)

20. B. Barry, op.cit., p.153.

21. ibid., p.184.

The argument seems quite acceptable until this point, but leaves several questions unanswered. Barry acknowledges that an individual may be ignorant of his or her own interests and that it is not only possible for someone to seek clarification on whether or not a course of action is in his/her interest but this can even be established by others in total ignorance of the person concerned. The crucial question is: What are the criteria for making such a determination? Should the individual's wants be the only factor taken into consideration or one among several, or are wants of no consequence here? One can guess at Barry's answers, but these issues are not explicitly discussed by him, almost certainly because they are peripheral to the main theme of the book. Before exploring these points further, it will be helpful to examine the concluding paragraphs in Barry's analysis of interest. It is recognised that there are situations where the limitation of opportunities for satisfying wants can be in an individual's interest - withholding some asset from an addictive gambler provides a clear example. Barry claims that such cases can be redescribed as limiting current want-satisfaction for the sake of future want-satisfaction, that is, as frustrating short-term desires to fulfil long-term desires. In support of this position Barry cites arguments representing the opposite viewpoint and claims to demolish them. It will be held here that he fails to answer his opponents and that the arguments of Stanley Benn in particular are far more forceful than Barry allows. Benn states that there are occasions when one can judge what is in someone's interest without any reference to wants at all, and that children provide the clearest example of such a situation:

"When we act in the interests of a child, we may not be much concerned with what he wants but rather with educating him to be a person of a certain sort ... It might be in the child's interests to deny him satisfaction of some of his desires to save him from becoming the sort of person who habitually desires the wrong sort of thing".

(22)

Barry insists that such accounts are mistaken and widen the concept of interest to an unacceptable degree. He asserts:

"Parents ... do not in general 'act in their children's interests'; they 'bring them up' or 'raise them'.

(23)

Barry continues by saying that a legitimate use of the "interest of the child" arises where local authorities check on foster parents to ensure that the child is not being exploited. This he views as determining:

"... the degree to which the child is left free time to do what he wants, rather than acting as an unpaid servant".

(24)

Hence no ideal-regarding considerations about "moulding the child's character" are involved. The entire argument here appears very superficial and highly unsatisfactory. It seems appropriate to dispose of the minor issue first. The examples provided in no way illustrate Barry's point. Where the authorities supervise foster placements, they are at least in theory concerned not only with whether or not a child is being exploited, but with whether or not

22. S.I. Benn, 'Interests in Politics', Proceedings of the Aristotelian Society LX (1960) p.131.

23. B. Barry, op.cit., p.135.

24. ibid., p.136.

it is adequately cared for; treated kindly, fed, clothed, sent to school and so on - these are the factors that constitute the child's interests in such cases and they are in great measure ideal-regarding. Moreover, Barry's criterion of non-exploitation as being "left free time to do what he wants" is extremely weak and seems to have been provided purely to suit his argument. However, the use of an inadequate account as a way of avoiding substantive issues is far more pronounced in the criticisms levelled against Benn. To dispose of the question of what constitutes action in a child's interest by asserting that parents usually "bring up" or "raise children" rather than "act in their children's interests" appears to be an implicit recognition that Benn's example highlights a fundamental weakness in Barry's position and that he is not prepared to meet the challenge. It seems undeniable that at least in the case of children, evaluative elements must enter into a full definition of interests. Benn refers to children who have desires which might be considered destructive of their interests. But what of children whose patterns of wants may be subject to frequent change or even quite unestablished; are such children to be said to have no interests at all? Before enlarging on this theme and on Benn's points, it might be helpful to approach the whole subject from another direction, by extending Miller's analysis of the concept of need to that of the concept of interest.

Needs, Interests and Harm

It will be considered rather a strange move to criticise an analysis of interests by comparing it with an account of needs. As a preliminary defence, it seems adequate to point out that the two are closely related

and that at least one current elucidation of interest such that

"harm (in the relevant legal sense) is the
invasion of interest" (25)

almost exactly parallels Miller's definition of need in the
statement:

"A needs x = A will suffer harm if he lacks x." (26)

These points are discussed further below.

Miller asserts that "wanting" is a psychological state ascribed on the basis of an individual's avowals and behaviour. "Needing" on the other hand is said to be an "objectively" ascribed condition. Miller distinguishes "instrumental", "functional" and "intrinsic" needs, denying Barry's view that all need statements are of the form 'A needs x in order to do Y'. (27)

The examples given of the different categories of need are very clear. "Instrumental needs" are expressed in statements such as: "He needs a key" or "She needs a driving lesson". Here it makes sense to ask: "What for?" "Functional needs" are reflected in statements such as: "Surgeons need manual dexterity" or "University lecturers need books". To ask "Why?" here is not to ask what ends are served by possession of these things, but rather to ask for an explanation of what being a surgeon or a university lecturer involves. The need is

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25. J. Feinberg, 'The Interest in Liberty on the Scales' in J. Feinberg (ed.) Rights, Justice and the Bounds of Liberty, Princeton, New Jersey, 1980) p.31.
26. D. Miller, Social Justice (Clarendon, Oxford, 1976), p.130.
27. ibid., p.12.

for something whose possession is essential to and in some cases almost constitutive of the occupation. Intrinsic needs can be understood in the following examples: "People need food" or "She needs someone to understand her". Here the need is not constitutive simply of an occupation but of what it means to be a person or at least a particular person. In Miller's words,

"What appears as a 'means' is really part of the
'end'". (28)

The first and third categories of need might be as usefully applied to interests. It is of no importance here to determine whether or not the second could be similarly extended. The question is undoubtedly more problematic than in the other two cases particularly with reference to children. Instrumental interests would be those explicitly connected with a particular goal. Thus a child who wants to become a professional swimmer has an interest in receiving coaching, hence providing some form of appropriate tuition would be in this child's interests. A person's "intrinsic interests" would be in the possession of those things which are a precondition of having any other interests at all. Feinberg uses the expression "welfare interests" (29) to refer to those interests necessary as a means to any goals. In view of the argument put forward later in the chapter it might be more helpful to term them "basic interests". There are considerable difficulties in drawing up a list of basic interests beyond the bare

28. D. Miller, op.cit., p.128.

29. J. Feinberg, op.cit., p.32.

necessities of physical existence. Feinberg, for example, includes "emotional stability" in his list of "welfare interests". Whilst this may indeed be a necessary condition of having any kind of worthwhile existence, its inclusion in a list of basic interests presents practical problems of a quite different kind to 'goods', such as health and physical integrity. Moreover it is precisely the kind of interest that may come into conflict with other interests, particularly with regard to children. A child (or indeed any human being) has an uncontested basic interest in his/her health and physical integrity, hence where a child is being physically abused through malnutrition or physical violence, it is clearly in his/her interest to have the situation altered either by close supervision or by removal to a different environment. But even here there are borderline cases involving a balancing of interests. Consider the following example from a children's hearing - the account is of an actual case - where a decision had to be taken "in the interests of the child".

Bill was 13 years old. He had no father, his mother went out in the morning before he did, without leaving any food. In addition she went to bed in the evening ignorant of his whereabouts. The school Billy attended was very alarmed at his undernourished, ill-clad state. There was a place for him in a children's home but he begged not to be "put away", stating "I haven't done anything, I want to stay with my Mum".

In this situation, what course of action is in the interest of the child? The only clear answer is a change in the mother's attitude which would lead her to care more adequately for her son. However although this is something which a social worker might aim to achieve, it is not a disposal available to a children's hearing. A clear

outcome might also have been indicated had Billy himself wanted to go to a Home. Again this is something that might happen in the future, in which case one would have little hesitation in asserting that such a decision was 'in his interest'. However, just as the child's own perception and wants were intimately bound up with the ultimate decision in the Seiferth case (see p.71 above) so too Billy's picture of his situation made it difficult to determine where his best interests lay. Had there been evidence of physical cruelty as well as neglect, he would certainly have been removed from home. After a lengthy discussion Billy was in fact put on supervision, but it was made clear to his mother that social work intervention was aimed at providing more effective care and that she would be required to play her part rather than opt out even further. The example should serve to show that even decisions governed by basic interests are not entirely uncontroversial, however they are clearly less context-bound and individualistic than those based on instrumental interests. To return to Barry's categorisation: basic interests would seem to be ideal-regarding rather than want-regarding but wants cannot be entirely eliminated from the picture. Even basic interests are partially want-regarding but clearly to a far lesser degree than instrumental interests. However, this is by no means self-evident, for a close examination of instrumental interests will reveal that ideal-regarding considerations cannot be left out of the picture. This will now be explained further.

It was explained above (p.114) that Miller attempts to define need with reference to the concept of harm. He suggests that:

"A needs x = A will suffer harm if he lacks x." (30)

Feinberg on the other hand has offered an elucidation of harm and interests in terms of one another, such that:

"Harm ... is the invasion of an interest". (31)

It does not seem necessary to enter into a debate on the difference between needs and interests here except to point out that an account of interests in terms of needs is viewed here as a partial account.* The overriding factor for present purposes would appear to be that when one talks of the needs and interests of an adult or of a child, there is indeed an implicit reference to the harm that would result by failing to act on them. If this is the case, the current argument can proceed with an elucidation of harm rather than further debate on the concepts of interest and need. Miller believes that with certain reservations:

"... to determine what counts as harm for any given person, it is necessary first to identify the aims and activities which are central to that person's way of life". (32)

30. D. Miller, op.cit., p.130.

31. J. Feinberg, op.cit., p.31.

32. ibid., p.133.

Footnote: * The relationship between needs and interests has been analysed in some detail in a book by Wm. E. Connolly, The Terms of Political Discourse (Heath and Co., Boston, 1974) Chapter 4. It is suggested that assessments of needs and interests are usually made within a system of accepted standards and conditions but once these are questioned, one can legitimately ask whether certain policies, pursuits and preferences are in the "real interests" of any given individual. Thus workers qua workers have certain needs, but it remains a separate question whether being a worker is in a person's interest.

These "aims and activities" are collectively termed "plans of life". They may be chosen by the individual or laid down in advance for him/her and refer to such things as social roles and ideals, specific goals and tasks, occupations, ambitions and so on. A person may or may not be able to articulate his/her "plan of life", but in any case there will be activities that are "essential" and those which are "non-essential" to it. Harm can now be defined as:

"... whatever interferes directly or indirectly with the activities essential to (a) plan of life ..."

(33)

Until this point the account is entirely empirical, but Miller proceeds by recognising that a "plan of life" must be acceptable or "intelligible" if it is to be regarded as a starting point for recognising the individual's needs and interests.

"Thus if confronted with a pyromaniac we are likely to say not that he needs a plentiful supply of matches, access to barns etc. but that he needs psychiatric help".

(34)

In other words the life plan of the pyromaniac is unacceptable and there seems to be an acknowledgement here that such a person's needs and interests are unidentifiable apart from and prior to a change in such a plan. It should now be obvious why it was postulated at the beginning of this paragraph that ideal-regarding considerations cannot be eliminated from the picture even with regard to so-called

33. David Miller, op.cit., p.134.

34. ibid., p.135.

"instrumental interests", for until the goals, with reference to which such interests have been identified, have been evaluated, it is not clear that the interests themselves exist. The example of the pyromaniac provides a clear illustration of the point. A further example from a children's hearing will furnish a second illustration and direct the discussion back towards the issue of children:

Charles was 15 years old and had been charged with several thefts. He had escaped from the locked wing of a List D school and admitted to a string of offences including seducing homosexuals and then blackmailing them. It was clear that he was set for a life of crime.

The relevance of this example here (it will reappear later in the thesis), is to show that in the absence of an acceptable "plan of life", it does indeed seem difficult to identify an individual's needs and interests beyond the basic requirement of survival. Charles might well have thought it in his interest to secure an apprenticeship with the Mafia. The hearing members, clearly not of this opinion, were at a total loss as to how to proceed. The directive to "act in the child's best interests" seemed inapplicable here. There are further problems in identifying the interests (and needs) of certain other groups, which Miller fails even to mention. Charles was almost an adult, and it makes some sense to talk of his having a "plan of life", but there are many individuals of whom it makes absolutely no sense to say that 'they have a plan of life' even where their lives exhibit a plan. Children must surely form the largest single such group and the next paragraph will attempt to extend the analysis of harm and hence of interests and needs, presented above to their case. In doing so the discussion will return to Benn's views (outlined above) on the nature of children's interests.

The Interests of Children

It will be remembered that Miller has defined harm and need in the following terms:

"Harm, for any given individual, is whatever interferes directly or indirectly with the activities essential to his plan of life; and correspondingly his needs must be understood to comprise whatever is necessary to allow these activities to be carried out". (35)

Hence, for Miller, the recognition of a person's needs involves a prior identification of his life plan. It seems that this analysis can be extended to children by stipulating that their interests (like those of adults) consist of those things necessary to having a life plan, that is, basic interests or "welfare interests" which are little more than the prerequisites of any kind of decent life and in addition those goods necessary for forming a plan of life. These interests are quite different from those identified with a particular life plan and are thus quite different from adult interests. These interests are in fact intrinsic to being a child. Benn acknowledges the distinctive nature of at least some children's interests in the statement:

"... that anything which is a condition necessary to the development of an individual into a person capable of making responsible decision in his own interest, is both in his and in the public interest ...". (36)

It should now become apparent why the attempt to identify certain interests in the case of children is a gamble in a way in which

35. David Miller, op.cit., p.134.

36. S.I. Benn, op.cit., p.139.

assessing an adult's interests is not. Parents may, for example, provide for a child on the assumption that he/she will ultimately go to University. If at the age of 17 the child decides to become a professional footballer, decisions taken by the parents may well turn out to have been antithetical to his/her interests. The source of the conflict in such cases is that the parents have attempted to choose a "plan of life" for the child rather than simply enabling the child to come to a decision on his/her own behalf. They have in fact identified the child's interests as those of a particular kind of life, rather than recognising them as lying in keeping open as many options as possible within a range of acceptable alternatives. ('Acceptable' is used here only to exclude cases such as the pyromaniac, the sadist, the professional criminal and so on. In an ideal world, children would never choose such forms of life and where they do in reality, their interests are only rarely identified with such pursuits by the adults around them.) Once again Benn seems to have highlighted the main issue:

"When we act in the interests of a child, we may not be so much concerned with what he wants but rather with educating him to be a person of a certain sort. This is to set up a norm. Falling short of it would be a 'stunting' or a 'frustrating' of the personality. The conditions necessary for attaining the norm are 'needs' rather than 'wants' and it is in the child's interests that these needs should be satisfied".

(37)

Feinberg takes strong issue with this ideal-regarding theory of interest. He claims that unless children can be educated to have wants of a certain

37. J. Feinberg, op.cit., p.49.

kind, it is mistaken to talk of their having certain types of interests. With reference to "moral education" Feinberg writes:

"... far from showing that a good character is in a person's interest even if it does not promote want-satisfaction, Benn's example shows instead that a good character can be something that is directly in a person's interest only when the person has a want-based interest in it".

(38)

There seems to be a fundamental confusion here. While it is indeed true that it is impossible to get a child or indeed any human being to act in his/her interest if he/she is determined not to do so, the lack of desire is in no way to be taken as evidence for the absence of a corresponding interest. Identification of an individual's interest is a quite distinct process from getting someone to act on these interests. Feinberg is prepared to recognise the distinction in the area of health and other "welfare interests":

"... we have some welfare interests in conditions that are good for us even if we should not want them (for example, health), whereas in respect to our more ultimate goals, we have a stake in them because we desire their achievement, not the other way round. In these instances, if our wants were to change, our interests would too".

(39)

The implication here is that welfare interests apart, interests can only be identified with reference to specific goals or ends and the term is wrongly applied in such expressions as: 'children have an interest in learning a foreign language' or less tortuously: 'it is

38. J. Feinberg, op.cit., p.49.

39. ibid., p.40.

in a child's interest to learn a foreign language'. The wider implication would seem to be that apart from basic or welfare interests, those without ends or goals have no further interests at all. This position is quite unacceptable and seems to be precisely the view that Benn is trying to counter. In particular it makes complete nonsense of any attempt to "act in a child's best interests". If children have no interests beyond the preconditions of having any interests at all, that is, survival and perhaps a reasonable standard of health, then the aim of acting in their interest is quite misguided. Such a view of interests parallels the choice theory of rights (see pp.38-42 above) which denies that children have rights on the grounds that they are unable to choose whether or not to exercise them. In both cases it seems that the conclusions furnish immediate evidence regarding the inadequacies of the premisses on which they are based. It may be contingently true that no particular formula can guarantee that a child will mature in such a way that he/she is able to formulate ends or form 'life plans', but it seems clear that certain types of behaviour such as withholding a child from any form of education will make it quite impossible for such a child to take responsible decisions concerning the future. Such actions can be said to be contrary to a child's interests and interests here has a far wider meaning than that reserved for welfare or basic interests. It again seems reasonable to postulate a third category of interest, termed "intrinsic". Inasmuch as Benn acknowledges that children have interests quite apart from basic interests and unrelated to their wants and aims, he seems to provide a much more compelling account of the nature of children's interests than either Barry or Miller.

Some preliminary answers can now be given to the theoretical questions posed earlier. It would seem that there are certain basic interests which have also been termed welfare interests. Feinberg sees these interests reflected in the assertion:

"... one cannot live on bread alone, but without bread one cannot live at all". (40)

Leaving aside Marie Antoinette's likely response to this statement, it serves as a reminder that there are certain conditions necessary to the achievement of any human goal. Feinberg produces a fairly lengthy list:

"In this category are the interests in one's own physical health and vigor, the integrity of normal functioning of one's body, the absence of distracting pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse, at least minimal wealth, income and financial security, a tolerable social and physical environment and a certain amount of freedom from interference and coercion". (41)

These interests are objective in the sense that they do not seem to relate to any personal ideals but are rather a precondition to the achievement of any ideals. What is regarded as "normal", "minimal" and "tolerable" will clearly vary from one society to another. A diet that appears indicative of neglect in Scotland, for example, may well seem highly desirable in the more destitute areas of the world. However the fact remains and has been sufficiently laboured that there

40. J. Feinberg, op.cit., p.33.

41. ibid., p.37.

exists a set of commonly recognised interests which applies equally to all human beings. In addition there appear to be further interests that are related to particular ends of "plans of life". These interests would seem to be quite different for those who can actually be said to have a plan of life and those who are as yet unable to formulate aims constitutive of such a plan. In the case of the former (most adults) want-regarding considerations clearly come into any choice of aims but it would seem that once a choice has been made, what is in the individual's interest is often no longer a matter of subjective preferences. If a woman wishes to become a doctor, it is clearly in her interest not to neglect her studies. If a single man wishes to have a family, it is not in his interest to seek membership of social clubs open only to men and so on. However the interests of those who do not have aspirations are not as easily identified. Although it seems clear that they have interests, these are not constitutive of any life plan, but rather, in the case of children, of acquiring the capacity to formulate such a plan. These interests, unlike basic interests are specific to children alone. As with the case of basic interests, there will be some variation between societies. Within the context of the Western world, it certainly seems uncontroversial to say that a child would be substantially harmed by being denied a minimum level of literacy and in almost any society today it could be argued that it is very much in a child's interests to learn to read, for even where there is a low level of literacy, the ability to read and write opens up a range of possibilities denied to the illiterate. It therefore seems to follow that a child can be said to have an intrinsic interest in learning to read. Other items to be included in such a list must remain

controversial. Possible candidates include interests in: limited liberty, privacy, education, going to school, choosing friends and so on. To digress briefly, it seems worth remarking that the law sometimes appears to place a greater emphasis on the interest in education than on that in going to school, since certain parents are still permitted to teach their children at home. It could be forcibly argued that the interest in going to school is far greater than that in receiving a formal education. The example provides a clear indication of the controversial nature of such a list and disputes of this kind cannot be settled by appealing to empirical data. If a child emerges at twelve years of age with distinction in three Advanced Level subjects and no social skills, both sides can claim their case to be proven! Enough has been said to indicate that the intrinsic interests of children are more complex and open to debate than those termed "basic interests". Even where there is agreement on the list of intrinsic interests, such interests may be given different weights by different people. Parents who recognise a child's interest in choosing friends, for example, may on occasion be forced into a position of saying 'but not friends like that!'. 'Basic interests' seem quite different in this respect, since although it is (regrettably) sometimes necessary to choose between them, such a conflict is unimaginable in an ideal world, whereas conflicts between and disagreements about intrinsic interests are unlikely ever to be completely eradicated. It should now be fairly apparent why the instruction to "act in the child's best interests" offers no determinate guidelines to those making decisions about children's lives. This part of the discussion will conclude by indicating briefly the complexities involved in taking such decisions.

It was suggested earlier, (p.113 above) that Barry's view that parents "bring up" or "raise" children rather than "act in their interests" was a very inadequate response to any proposed theory of children's interests. However this view does seem to capture a point worth making, namely that just as children's rights are only invoked when things have somehow gone wrong for a child, so too parents do not regulate their day-to-day behaviour towards their children by appealing to what is in their interests. Talk of interests arises on being faced with some kind of conflict. Perhaps things are going badly or maybe a change is being contemplated of school, or home, for example. This is even more apparent where children's interests fall within the remit of the law. A little reflection will show that where official or legal decisions are to be made "in the best interests of the child" a conflict situation has already arisen. The appearance of children in a juvenile court, or at a children's hearing, or before a judge in a custody case, is in itself evidence that their interests have been inadequately safeguarded or at the very least may be at risk. The decision which has to be made could far more accurately be described as determining the second-best interests of the child, or less paradoxically choosing "the least detrimental alternative".⁽⁴²⁾ Such a reformulation could lead to a completely different attitude both on the part of those taking the decisions and of their critics. The reality of the decisions made on behalf of children both in courts and at children's hearings nearly always involves a clash of interests which would and should never be in conflict in an ideal world. It may mean choosing between basic interests or between basic interests and intrinsic interests (the 'happy truant' provides a clear example of the

42. J. Goldstein, A. Freud, A.J. Solnit, Beyond the Best Interests of the Child (Macmillan, New York, 1973) Chapter 4.

second kind of choice) and in no such case is there an objective method for arriving at the right answer. Indeed it might be forcefully argued that there is no right answer, for as the foregoing argument has attempted to show, an assessment of both interests and needs involves criteria of value, yet where the law intervenes in the lives of children, such values can be said to 'masquerade as facts' and hence serve to conceal the irreducibly subjective element necessarily involved in any eventual outcome. It will be argued below (Chapter 6) that neither the introduction of such a subjective element, nor the 'individualised' disposals which are inevitable whenever decisions are made on the criterion of interests, are inconsistent with principles of justice. As a first step towards defending these claims, the next chapter will look in detail at the reasoning that takes place within one specific context where decisions are taken "in the interests of the child", namely the Scottish Children's Hearing System. The argument will then proceed (in Chapter 5) by referring briefly to other areas of the law in which such reasoning takes place, but which nevertheless seem to have escaped the type of criticism levelled against the juvenile justice system and will attempt to analyse how such reasoning proceeds to a conclusion.

CHAPTER 4

Reasons and Reasoning in the Children's Hearing System

The remit of the Scottish Children's Hearing System is to make decisions in the interest of the child. Such decisions are necessarily made within a setting which imposes both legal and extra-legal constraints on the decision-makers. Hence what can be deemed to be in a child's interests, is severely limited in advance prior to any investigations or rulings the panel members may make. A hearing cannot, for example, move a child from one educational establishment to another, nor does it play any part in choosing foster parents and so on. Similar constraints operate in courts acting in the interests of the child. Thus in custody cases, the judge has to decide in favour of one of two parents. The possibility that a child's interest might lie in residing outwith the family is only raised in the most extreme circumstances of cruelty and neglect.

These observations should in no way be taken as criticisms. It would be absurd to assume that such decisions could be taken in a vacuum, divorced from numerous other considerations, not least the rights of parents and the available alternatives. However, theoretical discussions of children's interests often seem oblivious to the complexities involved in making actual decisions on interests. Whether in a hearing or in a court, reasoning on interests is necessarily limited by the context in which it occurs. The precise nature of the limitations may vary from one setting to another, but it will be assumed here that a detailed examination of one such setting will serve as a paradigm for all of them.

The Formal Structure of the System

A hearing usually involves at the very least three panel members (at least one man and one woman), the Reporter to the children's panel, a social worker, the child and at least one parent. Depending on the nature of the case, various other people may be present too: teachers, Children's Home staff, members of intermediate treatment groups and so on. Occasionally a hearing may proceed in the absence of a child. This usually happens when the children are very young or in particularly distressing neglect and abuse cases. Hearings also sometimes proceed without any parent present, for although parents are required to attend there are no prohibitions against making decisions in their absence. In practice this does happen where a parent refuses to attend, but there is a general reluctance to proceed in such cases and the parents may be charged. A hearing cannot proceed without three panel members, a Reporter and a social worker. The whole procedure is conducted in front of all the participants and the decision is reached in public. Hearing members only ever retire to another room in very exceptional circumstances. In six years as a panel member, I have only once had a discussion in private during a hearing, in a situation where a highly experienced panel member chairing the hearing felt that the risk of sending the children home was so great that she could not consent to such a decision. The mother was crying hysterically and it was therefore decided to withdraw briefly. Such occasions are very rare indeed. In normal circumstances the proceedings are entirely open. Once the grounds of referral have been established, the hearings proceed in a relatively informal manner in which it is to be hoped that all those present are involved. It should be noted that it is required that:

"The chairman shall inform the child and his parent of the substance of any reports, documents and information ... if it appears to him that this is material to the manner in which the case of the child should be disposed of and that its disclosure would not be detrimental to the interests of the child".

(1)

At the end of a hearing, except in cases of adjournment, the member in the chair is required to inform the child and parents of the decision taken, of the reasons for the decision and of the rights of the family to request the stated reasons in writing and to appeal against the decision to the Sheriff within twenty one days. Once these formalities are over and usually after the family has left, the person chairing proceeds, either alone or together with the other two members, to write down the reasons for the decision. The reasons are meant to be an accurate account of the grounds for the decision and hence a reflection of the reasoning underlying the decision. The written reasons are kept on file irrespective of whether or not the family requests a copy of them and regardless of whether or not an appeal is lodged. The following discussion will rely in part on such written documentation.

Perhaps the most instructive way to proceed is to consider first a few examples of what are deemed 'good reasons'. It is important to note that such reasons may often be considered no reasons at all by critics of the system, but the present chapter aims to look at the hearing system from the 'internal point of view'. There is no doubt that for those within the system, 'good reasons' are clearly

1. Children's Hearings (Scotland) Rules [Statutory Instruments, 1971, No.492 (S.60)] 17,3.

distinguishable from bad ones. Indeed whole training sessions are devoted to instructing those about to chair for the first time, on the giving of reasons. Briefly, 'good reasons' are those which accurately reflect the grounds of the decision, indicating, wherever possible, why it is thought to be in the child's interest and which 'will stand up in court'. The latter is often stated as a separate requirement in recognition of the view stated in an early appeal:

"... a Sheriff should not interfere with the determination simply because he felt another form of treatment would be preferable ... I consider the Sheriff should not allow an appeal unless there was some flaw in the procedure adopted by the hearing or he is satisfied that the hearing had not given proper consideration to some factor in the case".

(2)

It must be remembered that there are limited disposals available to a hearing and that there may be situations in which none of the available options seems to offer the key to a solution. The possible alternatives include: first, discharging the case; second, placement on supervision to a social worker whilst remaining at home; and third, a residential supervision order removing the child from home and either placing him/her with a family or in a children's home or in a List D school. All supervision orders may be reviewed at any time, subject to certain rules and regulations, and must be reviewed within a year or they automatically lapse. A hearing may also adjourn to obtain further information or to see whether a child can 'get back to school' or 'stay out of trouble' pending an actual decision. The

2. D. v Sinclair, 1973 S.L.T. (Sheriff Court) 47/8.

remit of the panel is to act "in the best interests of the child". The underlying philosophy of the system can perhaps be most accurately portrayed by the dictum:

'Help for tomorrow not punishment for yesterday'.

This is the rhetoric of the system and it seems self-evident that in the light of this rhetoric, the decisions taken will be justifiable (if at all) primarily on forward-looking grounds. This stands in marked contrast to legal intervention in the lives of adults, where consequentialist considerations at most form only one element in the reasoning resulting in a decision. According to the rhetoric of the Scottish system of juvenile justice, the anticipated consequences of the different available disposals are the overriding criterion in all decisions made on behalf of children. The reality is very different, for very often the actual decision is the only one available in the circumstances, or it may (despite the contrasting rhetoric) be taken on grounds involving societal needs or legal requirements. These observations will be substantiated by presenting the examples below in separate groups which are intended to reflect the reality of the kinds of decision taken. The cases have been selected accordingly and in addition they are all considered to exemplify 'good reasons' and thus to be illustrative of the reasoning that takes place in children's hearings. They will thereby also serve as an indication of the limitations of the instruction to act "in the best interests of the child". The discussion will concentrate on reasons and reasoning, but the view of interests presented in the preceding chapter should be kept in mind throughout. The examples will be presented on three groups.

The first group contains decisions and reasons of the kind that best conform to the rhetoric and ideology of the hearing system, that is where an attempt has been made to identify the interests of the child concerned and to go some way towards furthering those interests. The second group includes cases where the hearing makes a genuine choice between alternative options but where it is quite clear that the decision is at most only partially governed by the criterion of best interests. Only two cases are cited here, one where the decision was made in the light of legal requirements, the second where societal needs were paramount. All cases in this category fall under one of the two types documented, hence there is no need for further examples. The third group represents those cases where the so-called 'decision' is merely a rubber stamp, for there are no choices to be made. Here only one example is provided as representative of this type of case. It will be argued below that principled criticisms can be made of any system of juvenile justice based on the criterion of interests, with regard to the kinds of decisions falling within the second and third categories, but that the first group remains immune from such criticisms, particularly those concerning the supposed violation of the rights of children. It is because any system of juvenile justice is inevitably confronted with all three types of decision that conflicts must arise between the rhetoric and reality of a system founded on one single independent criterion of justice. It should be noted that there are identifiable, and to some degree overlapping, types of reasoning associated with the decisions in each category. As stated above, in any cases coming before a hearing where an actual decision is taken, that decision is either to discharge the referral or to issue a supervision order either at home or

at a specified residence. The patterns of reasoning underlying such decisions can be broadly categorised as follows:

A. Discharge

- (i) There doesn't seem to be a real problem, for example, the offence was an isolated incident.
- (ii) There is a problem but it can be dealt with without formal supervision because:
 - (a) the family can manage
 - (b) there is already a social worker involved with the family
 - (c) voluntary help is available and being used, for example, a youth club etc.
- (iii) There seems to be a real problem but formal supervision is seen as irrelevant, for example, the family refuse to co-operate with any kind of intervention, fail to keep appointments with psychologists etc. but removing the child from home is inappropriate.

B. Supervision

Whether at home or involving a residential placement there seem to be at least three patterns of reasoning underlying such orders. Only the first and second conform in any way to the declared aims and objectives of the hearing system.

- (i) There are some clearly identified problems associated with the child or the child and the family; course of action X might be helpful in working towards a solution, hence the hearing decides in favour of X.
- (ii) There are clearly identifiable problems which will not necessarily be resolved by supervision, but which make supervision inevitable. The most extreme examples are provided by children whose parents refuse to give them a home. In at least some of these cases, the problem lies entirely with the parents.
- (iii) The child's behaviour (most often repeated offending) is quite unacceptable, there must be something wrong although there is little indication what it is and the hearing cannot 'do nothing', hence 'the need' for a supervision order.

It is worth noting that it is precisely in such cases that a 'tariff system' creeps into operation. Supervision at home is tried for the first two or three appearances, possibly followed by residential assessment and then a residential placement.

It is held here that any theory of juvenile justice must accommodate all such patterns of decision-making and that reasoning exemplified under B(i) and B(ii) above only rarely occurs with reference to adults. It is also believed that there are relevant differences between children and adults that make reasons of this kind justifiable in the case of the former and not in the case of the latter. However there are serious complications with regard to B(iii) and it is in this area that the arguments of advocates of the "justice model", the main critics of welfare systems, would seem to have some validity. Examples of actual decisions and the reasons given for them are set out below for illustrative purposes and reference will be made to them throughout the remainder of the discussion. The examples will be presented under three headings:

- I . Decisions on the Basis of Perceived Needs & Interests
- II Decisions on the Basis of Other Criteria
- III Rubber Stamps.

Some Decisions and Reasons from Children's Hearings

I Decisions on the Basis of Perceived Needs & Interests

A

Subject: Boy, 14 years old

Grounds of referral: Review

Initial grounds: Theft and truancy

Decision: Supervision (varied) to allow residence at home and attendance at List D school as a day pupil

Reasons: That Arthur is doing extremely well at the school and both he and his parents would like him to remain there until he finishes his schooling and that the school would be very pleased to have him as a day boy

Comment: The decision here was taken entirely in light of the perceived beneficial effects of supervision. The initial grounds are no longer relevant.

B

Subject: Boy, 9 years old
Grounds of referral: Failure to attend school

Decision: Discharge

Reasons: That Bill's school attendance has improved considerably over the last four weeks and that, since his older brother is on supervision, the Reporter would be informed immediately should the situation deteriorate again

Comment: The problem appeared to have resolved itself and there were built-in safeguards. The decision was in the boy's interest and the reasoning behind it is clear.

C

Subject: Girl, 14 years old
Grounds of referral: Failure to attend school

Decision: Home supervision

Reasons: Carol is very unhappy and seems quite unable to get back to school. On the other hand, a psychiatric report advises strongly against residential schooling. It is hoped that a social worker might help her to resolve her problems and might look for a short-term placement in a children's home to enable Carol to try to attend school from there

Comment: Needs here are quite unknown but it is obvious that some form of help is necessary. The decision was thought to be in the girl's interest and was the result of reasoning about those interests. The hearing discussed the possibility of residential schooling and rejected this option because of the psychiatrist's view that it would add to Carol's anxiety rather than have beneficial consequences. It was generally agreed that her increasing isolation from her peers was very damaging and that it was important for her to be with her own age group. The idea of a short spell in a children's home was mentioned since a girl in a similar situation to Carol had managed to get back to school after a brief stay away from home. The family all thought this might be a good idea, particularly if the placement was in visiting distance from their home.

D

Subject: Boy, 13 years old
Grounds of referral: Lack of parental care

Decision: Home supervision

Reasons: That David has not been in any kind of trouble and desperately wants to stay at home. It was thought that a social worker could ensure that the situation does not deteriorate further and might offer support to David's mother in caring for him

Comment: The problem here lay with the parent and not with the child - supervision is merely a way of 'keeping an eye' on him. The decision was undeniably taken 'in the interest of the child' and was the outcome of clear reasoning on the facts.

E

Subject: Boy, 12 years old

Grounds of referral: Review

Initial grounds: Multiple thefts

Decision: Continuation of supervision

Reasons: That Eric has managed to stay out of trouble and his school attendance is quite satisfactory but the situation at home remains unstable and his mother welcomes the support of a social worker. It was also felt that Eric would benefit from further social work support

Comment: The reasoning is clear ('instability at home' is a veiled reference to the mother's drink problem and the father's violence) and the decision was taken in the boy's interest. The boy and the father were opposed to the continuation. The disposal is quite unrelated to the original offences and hence might be viewed as unjust.

II Decisions on the Basis of Other Criteria

F

Subject: Boy, 15 years old

Grounds of referral: Review

Initial grounds: Truancy

Decision: Continuation of residential supervision

Reasons: That Frank has to attend school for a further six months, that he has been excluded from his local school which is not prepared to take him back and that other day schools are unlikely to accept him at this stage in his education

Comment: Both Frank and his parents wanted him to return to day school. Regardless of the hearing's perceptions of the situation, this option was unavailable. The 'decision' was wholly predetermined by the facts of the case, not least the law regarding school attendance. This type of reasoning occurs again and again, almost always in cases involving school attendance. It can indeed be forcefully argued that it is in a child's interest to attend school, but there may be a small minority for whom school is inappropriate or at least less important than other considerations. However, hearings never question whether or not a particular child is benefitting from school. The only questions addressed in truancy and exclusion cases are: 'How can we get the child back to school?' 'What school is prepared to accept the child?' and, sometimes perhaps, 'What school would be appropriate?' The crunch in such hearings is always 'The law requires you to attend school', it is the legal requirement that ultimately determines the outcome of such cases.

G

Subject: Boy, 15 years old

Grounds of referral: Multiple thefts

Decision: Continuation of supervision in secure unit

Reasons: That Gregory has repeatedly absconded from a number of residential placements and that he persists in committing serious offences and therefore needs to be contained in a locked unit

Comment: The decision was based entirely on societal needs, that is the need to be protected from a young man well on the road to being a hardened criminal.

III Rubber Stamps

H

Subject: Boy, 13 years old

Grounds of referral: Review and theft

Initial grounds: Theft

Decision: Continuation of supervision at a List D school

Reasons: That although Harry is doing well at day school and seems ready to return home, his father refuses to take him back and his mother's whereabouts are unknown

Comment: The decision had nothing to do with the boy's interests or needs, indeed it was unanimously held by the hearing members that he should return home. There simply was no alternative. As in the example under Category II, this case is typical of its kind. Parents quite often reject children once they are in care and refuse to allow them home again. The 'decision' is no more than a 'rubber stamp' on the existing arrangement.

It should be clear that in Categories I and II it makes sense to talk of the hearing reaching a decision, whilst for Category III the decision is almost irrelevant. It would be a mistake to conclude that such hearings serve no purpose at all. They not only fulfil a formal requirement (supervision orders lapse where not reviewed within a year) but often provide some comfort and a measure of reassurance to the child, as well as serving to explore whether there really are no other options. However, although such goals may be of considerable value, they are peripheral to the process of decision-making which is the focus of the present discussion. As stated above, decisions, in the sense of a choice between alternative options, are only taken at hearings in the first two categories. The discussion will concentrate on the decisions in the first category in this and the following chapter and turn to issues relating to the second category in Chapter 6.

The first category includes all decisions conforming to the rhetoric of the system. Here it makes sense to say that the decisions are taken according to the criterion of "interests". However this immediately raises questions of the identification of such interests, together with a realisation that in all but a small minority of cases there is an alarming scope for error. For some children, legal intervention may provide "a new beginning", for others it may be "the beginning of the end". It seems quite unacceptable to suggest that where the former is true the intervention is to be deemed 'just' whilst in latter cases it is to be considered 'unjust'. In the present context, it might prove helpful to reflect further on the identification of interests within the setting of a children's hearing.

In a recent study of the Scottish system (3) the authors provide a detailed account of the observations of 301 hearings, which include among other things, an analysis of the dialogue of those hearings. It is noted that the topics discussed can be broadly classified into ten categories, with an eleventh for residual items, and that on average five of these themes were discussed at any one hearing. The topics include the actual grounds of referral, behaviour and progress at school, leisure activities, behaviour at home, previous offences, family stress and so on. Each category is discussed and illustrated in some detail. The dialogue is seen as having both formal and informal concerns. The latter include factors like the expression of moral disapproval, influencing parental attitudes and so on and lie outside the scope of this discussion. The formal goals are "objectives with a clear statutory basis" of which the identification of interests is the most important. The conclusions reached by Martin, Fox and Murray (unquestionably in accord with my personal experience) provide little comfort to the sceptics:

"A good deal of the dialogue did not appear to reflect any systematic searching for the specific etiology of the child's behaviour nor did it reasonably indicate any consideration of the implications of various possible dispositions. Panel members ... did not appear to make use of a coherent framework of ideas concerning the causes of delinquency ...

To attain the formal objectives implies a model derived from an ideal of professional practice in the child care field - one in which assessment of the child's interests and choice of the most appropriate course of action are based on a framework of knowledge about the developmental process ...

3. F.M. Martin., S.J.Fox and Kathleen Murray, Children Out of Court, (Scottish Academic Press, Edinburgh, 1981).

The imperviousness of panel members to social work or any other professional language and ideology is manifest in our study of the dialogue of hearings. The richness of the discussion lies in the variety and intensity with which the common man responds to the lifestyles of others and tries, where possible, to locate points at which some pressure for change can be applied".

(4)

Apart from the fact that it seems highly debatable whether the "formal objectives" imply any "model" at all, these conclusions do not seem detrimental in any way to the whole endeavour, but simply illustrative of the complexities involved. If an analysis of the dialogue of hearings were to show that decisions are in fact quite arbitrary, this would indeed be an indictment of the system, but Martin, Fox and Murray make no such claims and are indeed concerned elsewhere with the possibility of predicting the outcomes of hearings from a number of different variables (Chapter 11). In addition, it should be noted that even given initial disagreement most hearings end in a unanimous decision (91% of hearings observed in Children Out of Court ended in such a decision), a very improbable occurrence, were the members' conclusions random or arbitrary. Is it possible to offer anything more than a banal explanation (the limited number of possible outcomes for example) by analysing the decision-making process in greater detail? It would seem helpful to approach this question from two different directions. First by looking in considerable depth at some cases presented to the children's panel and second by discussing and comparing this type of reasoning with that concerned with some other legally binding decisions, such as criteria of "reasonableness"

4. F.M. Martin, S.J. Fox and Kathleen Murray, op.cit., pp.138-9.

in courts of law. It is hoped thereby to widen the scope of the argument to include other areas of the law that seem to be faced with some problems of a markedly similar nature to those where interests are said to be the paramount concern, namely the ascription of weights to reasons and factors in a seemingly objective manner, where such reasons and factors do not have any objective weights.

The first approach (via actual cases) will be made by giving some full accounts of children's 'careers' through the system, from the first referral to the Reporter's office, to the point of the last hearing, which is often (but not necessarily) at school leaving age. Since all records are destroyed once a child reaches the age of sixteen and is no longer on supervision, it was decided initially to request access to all the papers after the next few such termination hearings in which I participated, before they were finally consigned to the incinerator. By chance, all the termination hearings for 16 year olds during the relevant time period were for children who had initially come into the system on offence grounds. Since it seemed important to include at least one neglect and abuse case in the accounts and the only termination hearing of such a case which I attended at the time, involved a ten year old, his 'career' is also included. In order to avoid any breach of confidentiality, the names of all the individuals and of the schools and children's homes involved have either been changed or omitted altogether, otherwise the details have been reported exactly as they appeared in the records.

Three 'Careers' Through the Hearing System

PAUL CAMERON is the fifth of five children and was first referred to the Reporter in 1976 at the age of nine years. He was required to attend eleven hearings between that date and May 1982, when the case was closed and all records destroyed. The account will be given hearing by hearing, including the reasons for each decision and any critical comments.

First hearing: May 1976.

Grounds of referral: Theft.

Decision: Discharge.

The social work report was no longer available, but the stated reasons give a clear indication of the basis of the decision.

Reasons:

"Paul has now settled down at school and there has been no further incidence of theft. He was made aware of what the consequences would be if his anti-social behaviour continues. The parents seem capable of exerting their parental authority and it was felt that for these reasons the matter could be discharged".

(A)

Second hearing: February 1977.

Grounds of referral: Theft.

Decision: Supervision at home.

The social work report was pessimistic, describing Paul's father as "very protective" and "authoritarian" towards the family, but quite ineffective and the mother as "understanding" but often frustrated. He felt Paul was modelling himself on a much older delinquent brother and "heading for big trouble", in conclusion:

"The Camerons seem to think of themselves as a stable, united and well-integrated family, but clearly this is not an accurate picture. The Camerons resent any interference from outside authorities and in the past have not shown any real motivation to accept help from this department ... Because of the family's unco-operativeness, I can only repeat ... that in this case, Paul would not be a suitable candidate for a supervision order."

Despite this recommendation, the hearing decided to place Paul on supervision.

Reasons:

"The decision was made in view of Paul's needs, rather than the offence itself. He has been involved in minor offences and kipping school following his older brother".

(B)

(N.B. These 'reasons' provide a classic example of "bad reasons" according to the system's own criteria. They merely echo the rhetoric of the children's panel: "needs not deeds" with no assessment at all of what those needs might be.)

Third hearing:

June 1977.

Grounds of referral:

Review.

Decision:

Adjournment for assessment.

The hearing was called because Paul's behaviour had deteriorated to such a degree that he was about to be excluded from school. He was truanting, forging excuse notes (again), disrupting classes and bullying other pupils, as well as stealing. He had also run away from home and stayed out overnight. Paul's mother was said to be co-operating, albeit reluctantly, with the supervision. Mr Cameron refused to have anything to do with it. Two possible courses of action were proposed for consideration by the hearing: a full psychological and educational assessment or three months' 'grace' to give Paul a chance to 'pull his socks up'. The decision was in favour of an adjournment for assessment.

Reasons:

"From reports available and following discussions with Paul, his headmaster, social worker and mother, the hearing felt that Paul's involvement in further incidents of theft and housebreaking, his non-attendance at school and his failure to keep appointments at the social worker's request, were giving cause for concern. The members felt that further advice was needed before a decision could be reached and requested an Assessment Team Report. The hearing felt that Paul's behaviour was being unduly influenced by older boys and his parents' instructions regarding this were being persistently ignored. Despite his being only ten years old, it was therefore decided that he should reside in the centre for the assessment".

(C)

(N.B. 'Reasons' are only given for an adjournment if the child is detained on a warrant, i.e. an explanation is required for removal from home.)

Fourth hearing:

July 1977.

Grounds of referral:

Continuation.

Decision:

Supervision at home.

The educational assessment showed Paul to be well below average in intellectual ability and lacking in concentration. The psychologist concluded that the child was a very anxious boy, and saw this high level of anxiety as the root of both his truancy and his delinquent activity. She felt the cause of the anxiety was a constant awareness of both his parents' chronic ill health. She also described Paul's mother as "extremely co-operative". She felt he had no psychiatric illness but rather "a mixed behaviour disorder". The team's overall recommendation was that Paul be:

"... returned home under supervision ... that the family (might) accept Dr X's offer of therapy for Paul to reduce the level of his anxiety. However ... it must be made clear to Paul that if he continues to truant, or to indulge in delinquent activities, then that will leave no alternative to committal to a List D school in the future."

The recommendation was accepted.

Reasons:

"After a period in the Assessment Centre, it was apparent that Paul had various anxieties which he was acting out. He agreed, together with his family, to seek help from the Royal Hospital for Sick Children. The hearing therefore decided to continue supervision with a warning that the next step would be List D school".

(C)

Fifth hearing:

June 1978.

Grounds of referral:

Annual review.

Decision:

Termination of supervision.

The social work report at this hearing stood in marked contrast to earlier reports. Both parents were unemployed because of ill health and the father was said to be drinking heavily. The family had failed to take up the offer of psychiatric help, but

"... Paul seemed to be improving very well and to have settled down considerably ... Paul's school attendance is very good, as has been his behaviour both in and out of school. His mother ... reckons he received such a fright at the Assessment Centre that he will not put himself in a position where he might have to go back there ... his spell there was the best thing that could have happened to him ...

He has always been very co-operative when I have seen him ...

Paul is due to start at (secondary) next term and I would suggest to the panel that he does so with a 'clean slate and his supervision order be terminated'."

The recommendation was accepted by the hearing.

Reasons:

"Paul's progress over the past year has been very good. School and Social Background reports both indicate how well he is doing. The hearing therefore decided to terminate the supervision requirement".

*

(c)

Sixth hearing:

October 1979.

Grounds of referral:

Theft by housebreaking.

Decision:

Adjournment for assessment.

In September 1979, Special Educational Services informed the Reporter that Paul was about to be excluded from school and that both he and his mother had failed to keep appointments to discuss the situation. It was felt by the Department that Paul would eventually have to be sent to a List D school. A further letter in October indicated that Paul was involved in gambling and glue sniffing. The hearing was actually called on grounds of theft. A new social worker became involved who reported that he had managed to talk to Paul's father, who seemed "reasonable", that the mother had not received any letters of appointment and that the glue sniffing was an isolated incident. However, prospects of Paul keeping his secondary school place seemed bleak. There was a recommendation of supervision and a home assessment to explore "the possibility of alternative educational provision". The hearing decided to adjourn for such an assessment to enable members to make a more informed decision.

Reasons:

Not required for an adjournment.

* The decision in the Fifth Hearing is an open acknowledgement of the stigma attached to being on supervision. The recommendation was that Paul should start with a 'clean slate' at secondary school. It should be noted that a strong case could have been made for continuing supervision at this point to facilitate a smooth transition to secondary school. In such cases, a great deal depends on the perceptions of the family and the child. Had they asked for supervision to continue for a further period, the decision would almost certainly have complied with their wish.

Seventh hearing: December 1979.
Grounds of referral: Continuation.
Decision: Supervision at home with a condition of attendance at the YPU.

The D.S.E.S. remained adamant in its recommendation of a List D placement. The psychiatrist at ... on the other hand felt that the family should be offered an opportunity to channel its obvious strengths towards keeping Paul at home. The hearing decided on a home supervision order with attendance at a Young Person's Unit as a formal requirement.

Reasons: "A full discussion took place and it became clear that one positive offer (?) was a Supervision Requirement with a condition of attendance at the ... by Paul, together with other members of the family. The school felt that this additional help would be of assistance ... in dealing with Paul ... it was clearly understood that a review would be called if required, when a residential placement would be the only other solution. Mrs Cameron assured the hearing of her and the family's co-operation in the decision".

Eighth hearing: December 1980.
Grounds of referral: Annual review, theft and assault.
Decision: Supervision at home.

In May 1980, Paul was referred to the Reporter on grounds of theft and assault. The social worker submitted a full report, indicating that up until that time, there had been a marked improvement in Paul's behaviour and suggested that it might be appropriate to take no further action unless Paul was involved in any additional offences. This recommendation was accepted. Paul's next hearing was therefore the annual review. To the annoyance of the social worker and the surprise of the hearing members, the additional grounds were put to Paul, but were soon dismissed as having been already covered. It was clear that Paul had benefitted from his sessions at the YPU but the situation at school remained unstable and his classroom behaviour, erratic. The school report suggested cause for "muted optimism". Supervision was continued without formal involvement by the YPU.

Reasons:

"A full discussion took place and we had the help of Mr V. from the school. Paul had taken steps to occupy his leisure time and he had made some small gains at school due in some measure to the support of the staff. Attendance had improved, though time-keeping was not satisfactory. Because Paul needed further support and encouragement, it was agreed to renew the supervision requirement though this time with no condition."

(D)

Ninth hearing:

March 1981.

Grounds of referral:

Review, theft, assault and trespass.

Decision:

Supervision at List D.

At the end of February, the Reporter was informed that Paul had been excluded from school. This exclusion was the culmination of a gradual deterioration in his behaviour. Things were going badly at home too, with Paul staying away for days on end. A place was available at a suitable List D school. The social worker wrote: "... it is with some regret that I make this suggestion. I feel that, had adequate alternative provision been available, it might have been possible to avoid Paul's removal from home ... in the circumstances, I can really see no alternative ..."

Paul was admitted to a List D school.

Reasons:

"The decision was made in view of the facts of Paul's lifestyle, i.e. staying out at night without parental consent or knowledge, involvement in minor trouble with the police, rows at school with the staff and a seeming lack of understanding by his father in particular."

(B)

Tenth hearing:

March 1982.

Grounds of referral:

Annual review.

Decision:

Continued residential supervision.

There were two referrals to the Reporter during the year, concerning minor incidents, which were dealt with internally by the school through a temporary loss of privileges for Paul, otherwise the reports were very favourable and optimistic, showing an all-round improvement in Paul's behaviour and attitude. It was decided that Paul should complete his schooling at List D.

Reasons:

"... that Paul has made very good progress at (List D) and is enjoying and benefitting from current work experience and that it is clearly in his interests as seen by his mother, himself, the social worker and the school to continue at (List D) until he is due to leave this summer".

(E)

Eleventh hearing:

May 1982.

Grounds of referral:

Review.

Decision:

Termination of supervision.

Reasons:

"... that although Paul has failed to find employment, he is determined to do so and intends to maintain contact with both the school and the social worker. He has clearly made good use of his time at (List D) and has taken full advantage of what the school has to offer.

KEVIN MACDONALD is the second of two children and was first referred to the Reporter in 1978 at the age of twelve years. He was required to attend ten hearings between then and June 1982.

First hearing: March 1978.
Grounds of referral: Theft (2).
Decision: Supervision at home.

Kevin had already received a police warning about stealing and had taken money from home. He had a serious problem of encopresis. He was described as "a young Woody Allan". Both parents were in employment but the mother was not well. "Both parents are concerned and very caring people who are at a loss to understand Kevin's behaviour". It was reported that the father's long hours and shift work meant that he spent little time with Kevin and most of their time together involved disciplining him. The soiling and stealing were seen to be possibly "indicative of deeper problems".

Both Mr and Mrs Macdonald and Kevin feel that intervention at this stage would be helpful. The family are receptive to social work involvement and the potential for constructive use of supervision is very much in evidence. The recommendation was accepted by the hearing.

Reasons: "The hearing members were concerned at Kevin's continual stealing from home and also his shoplifting activities. His parents were at a loss what to do and welcomed Kevin being put on supervision.

(A)

Second hearing: February 1979.
Grounds of referral: Annual review.
Decision: Termination of supervision.

The social work report was very positive. Kevin had moved to secondary school without any real difficulty, was involved in extra-curricular activities and was making good progress.

"Both Mr and Mrs Macdonald have shown that they are very interested and concerned about Kevin's progress. Mrs Macdonald changed her job in order that she could be in for the children in the mornings and when they came home from school."

The recommendation was for the termination of supervision. Help was also offered on an informal basis should it be required. The recommendation was accepted.

It should be noted that the school report referred to Kevin as "a nuisance", "attention-seeking" and "disruptive" in class. He was said "to act the clown".

Reasons:

"Kevin has not been involved in further offences and has responded well to his period on supervision. He has moved to secondary school ... and although the school report indicated that he was a bit of a nuisance in class, Kevin was aware of his faults and said he would try to improve his behaviour there. It was considered that he could seek help from the social worker on a voluntary basis".

(B)

Third hearing:

August 1980.

Grounds of referral:

Theft by housebreaking.

Decision:

None - the grounds were denied and hence referred to the Sheriff.

The social work report reiterated the parents' genuine concern for Kevin but felt that they had unrealistic expectations and placed too much stress on his achievement rather than on his happiness. Kevin was still very young for his years. He was in the remedial department at school, and at the receiving end of a lot of bullying. The school report referred to his inability to apply himself and his attention-seeking behaviour. Kevin denied taking part in the theft but admitted to receiving stolen money. There was a recommendation of supervision.

Fourth hearing: September 1980.
Grounds of referral: Remittance for disposal.
Decision: Adjournment for assessment.

A letter had been received from the school since the previous hearing, explaining that Kevin had been involved in two incidents of assault at school.

Fifth hearing: November 1980.
Grounds of referral: Continuation.
Decision: Residential supervision.

Following a six week assessment, several detailed reports were submitted to the hearing. A psychiatric report referred to theft inside and outside the home, to truanting from school and to Kevin's staying out all night. Mr Macdonald was seen as very punitive and his relationship with Kevin quite unsatisfactory. He refused to meet the psychiatrist. She saw Kevin as "physically and intellectually retarded" but felt that the co-operation necessary for therapeutic work with the whole family would not be forthcoming. The educational psychologist reported that Kevin was "underachieving" to some extent and that he should be able to manage the secondary course. The overall assessment was confused and suggested an eight week stay in a reception home from which Kevin could continue attending school and be observed further. The recommendation was accepted.

Reasons: "Kevin has had a domicilliary assessment but unfortunately the full extent of his problem is not yet apparent. It was therefore decided that we should also have information about the way Kevin operates away from home and so arrangements have been made for a short stay (8 weeks) at ... We are very concerned that his bad behaviour at school and his staying out all night have still been continuing".

(C)

Sixth hearing: January 1981.
Grounds of referral: Review.
Decision: Home supervision.

After observing Kevin for several weeks in the reception home, the assessment team concluded that his problems arose partly from his general appearance - he is very small, with poor eyesight - which did not contribute to his self esteem and partly from the dynamics of the family, which were felt "unlikely to be open to modification". There was a recommendation of supervision at home and attendance at an intermediate treatment group. However it was stressed that should Kevin persist in truanting and in delinquent activities, he would have to be placed in a senior List D school. The recommendation was accepted.

Reasons:

"The decision was made in view of the need for Kevin to face the situation as it exists. Mother and father want Kevin at home. Kevin to some extent does not trust them to meet him. (Children's Home) considers that the next step must be tried before the situation passes a point of no return and the parents lose interest. The problem of school must be settled."

(D)

(N.B. These reasons are very poorly formulated and almost incomprehensible without access to the background reports.)

Seventh hearing: August 1981.
Grounds of referral:
Decision: Place of safety order.

Kevin turned up at his IT group bruised and cut, allegedly by his father. After a lengthy discussion and interviews with the parents, it became clear that Kevin had behaved badly and his father had over-reacted, hitting him with scissors. It was also clear from Mr Macdonald's mood that the same thing might happen again. Moreover, Kevin adamantly refused to go home. Considerable confusion followed because his social worker had left and Kevin's claims that his mother drank seemed quite unsubstantiated. The order was granted.

Reasons:

"The situation at Kevin's home was breaking down with Mrs Macdonald saying Kevin was staying out without her consent. (IT group) had also noticed bruises on Kevin's arms caused by his father hitting him. The panel decided to continue the Place of Safety order ... until the next hearing."

(E)

Eighth hearing:

September 1981.

Grounds of referral:

Continuation.

Decision:

Residential supervision.

Kevin stated consistently that he wished to remain in care and Mr Macdonald refused to have him home. Members of the IT group felt that supervision had broken down and the social worker did indeed appear to be out of touch with recent events. There was a favourable report on Kevin's attendance and behaviour at the group twice weekly and at two residential camps. Kevin still maintained that his mother drank, his father said that he (Kevin) drove her to it and Kevin was then punished. The old social worker felt these accounts were exaggerated, the new one could not gain any co-operation at all from Mr Macdonald who was very angry at the implementation of the Place of Safety order. Kevin is keen to stay on at school. It was decided that Kevin should remain in the children's home and attend school from there.

Reasons:

"As Kevin did not want to return home and was doing well at school since his admission to (children's home), his father did not attend the hearing and also said through Mrs Macdonald that he did not want Kevin home. Mrs Macdonald although wanting Kevin home, felt that perhaps a period in (children's home) would be better at this time ..."

(E)

Ninth hearing: December 1981.
Grounds of referral: Review.
Decision: Residential supervision (continued).

Kevin had reached 16 and could not stay in the children's home in the long run. It was a reception unit which rigidly enforced a maximum stay of six months. Kevin's state had deteriorated badly. His mood had changed from initial "euphoria" at being in care, to "general apathy". He no longer wanted to go to school and had no wish to return home. The social worker felt there was no alternative to returning to his family but the hearing viewed this as unrealistic in the existing conditions. It was generally agreed that Kevin could not yet manage on his own. The decision was for Kevin to continue in care prior to an eventual return home.

Reasons: "Kevin should remain at (children's home) for the next two months. During this time a phased return home will be tried by all parties concerned. The panel members felt that Kevin could not return home immediately."

(C)

(N.B. This is a reformulation of the decision and not of the reasons for it.)

Tenth hearing: June 1982.
Grounds of referral: Review.
Decision: Termination of supervision.

Kevin had been home for a trial period some time after the last hearing, but things broke down after a few weeks. He returned to the reception unit and from there went on a number of weekend visits to a home for older boys, which had a vacancy. He then went there on "a holiday basis". He also got a placement on a YOP scheme. The social worker reported that Mr Macdonald had not changed his attitude to Kevin at all, while Mrs Macdonald maintained contact but seemed relieved that he was out of the house. The new home was prepared to admit Kevin on a permanent basis until he became more independent. The IT group continued to offer support. In the circumstances there no longer seemed to be a role for formal supervision.

Reasons:

"... that Kevin has settled down in (the home) and is currently working well on a YOP scheme, that he has regular contact with his mother and the offer of continued support from (IT group). In the circumstances there seemed no further need for formal social work involvement."

(F)

TOM SINCLAIR is an only child whose mother died in 1974, he was first referred to the Reporter in 1978 at the age of six years. He was referred to ten hearings between then and March 1982. This case stands in marked contrast to the other two in that Tom was never required to attend a hearing because of his own behaviour, but rather because he was badly neglected. In addition, although all formal supervision is terminated, he is only ten years old, so that the records are still on file.

First hearing: January 1978.
Grounds of referral: Lack of parental care.
Decision: Issue of a warrant and application to Sheriff.

The RSPCC, Tom's GP and the social worker submitted detailed reports all indicating severe neglect. Tom's father had left him to be cared for by his mother (Tom's grandmother) and moved to England, returning six months later to fetch Tom. They lived together with a Mrs X for fourteen months and the three came back to Edinburgh fourteen months later when Tom was voluntarily placed in the children's Shelter, and shortly afterwards returned to his grandmother until his father could find accommodation. In the meantime his father was drinking heavily. The grandmother was admitted to a psychiatric unit three weeks after Tom's arrival from the Shelter and Tom was sent to stay with an uncle and aunt. At the hearing the grounds of referral were denied but a warrant was issued to prevent Tom's father from moving him yet again prior to further enquiry.

Reasons: "In view of Mr Sinclair's threat to remove Tom from where he is staying at the moment with an uncle and aunt and taking into consideration the serious nature of the grounds of referral, it was thought to be in the boy's interest to take out a Place of Safety order to ensure that he remains with his uncle and aunt until the ... court proceedings have taken place."

(A)

Second hearing: February 1978.
Grounds of referral: Continuation.
Decision: Renewal of warrant.

This hearing was held on a technicality, since Place of Safety orders lapse after 21 days and the court proceedings had not taken place.

Reasons: "Until such times as the grounds of referral were established and a full hearing could take place, the hearing felt that it was in Tom's best interest to remain subject to a warrant".

(B)

Third hearing: February 1978.
Grounds of referral: Remittance for disposal
Decision: Supervision with condition of residence.

Tom had settled fairly well with his relations. His father had not visited him since the last hearing. Tom's grandmother had been released from hospital but it seemed unrealistic to think that she would be able to care for Tom again. There was a recommendation that Tom should continue to reside in his present home and attend school from there.

Reasons: "Mr Sinclair agreed that he could not provide a home for Tom at the moment. Over the past few years Mr Sinclair has moved from place to place frequently. He has yet to show that he can settle down and provide a stable environment for his son. Tom is presently happily settled with an aunt, and attending school regularly. The hearing felt this arrangement should continue while Mr Sinclair took the opportunity to set up a home.

(C)

Fourth hearing: June 1978.
Grounds of referral: Review.

Decision:

Continuation of supervision.

Tom's father was in full-time work but still moving around with no permanent address and drinking heavily. He had been taking Tom out on Saturday afternoons but appeared to have been leaving Tom and going off on his own or with his co-habitee. Tom was doing well at home and at school. In particular he was becoming less isolated. He showed some ambivalence about the time he spent with his father. The social worker felt that overnight visits (requested by Mr Sinclair) were not a good idea. "The coincidental remarks of a six year old child are not the basis for legal restrictions on parental access, but they do suggest a need for caution in arranging and monitoring that access". Tom's stories had indicated that his father was drinking heavily on their outings and had on at least one occasion visited what sounded like a brothel. The view of the social worker was fully endorsed.

Reasons:

"Owing to the fact that Mr Sinclair has not got a house and his co-habitee has two children in care, the hearing felt that having Tom for weekends was not a suitable plan at present. Mr Sinclair was not at all happy with this decision".

(D)

Fifth hearing:

December 1978.

Grounds of referral:

Review.

Decision:

Supervision with a new residence.

Tom's uncle and aunt felt that they could not continue looking after him as well as their own children, particularly as Mr Sinclair created enormous tension by his sporadic visits and inconsistent behaviour. He had not seen his son for eight weeks. It seemed quite inappropriate for Tom to reside with him, particularly as he still had no fixed address and Tom's feelings towards him had become increasingly negative. New foster parents had been found and Tom had been for an evening and a weekend. It was agreed that this new placement seemed to be the best alternative.

Reasons: "The hearing members were guided entirely by the recommendation of the social work department who stated that the fostering at the (uncle and aunt) had broken down and that a place had been found with the ... family."

(E)

(N.B. Mr Sinclair failed to attend the hearing.)

Sixth hearing: June 1979.

Grounds of referral: Review.

Decision: Continued supervision.

The review hearing was not attended by Tom's father. The social work report indicated that steps were being taken to assume parental rights on Tom's behalf so that he could be adopted. Tom had adjusted well to the new foster placement but was still "shy and withdrawn". Tom's father was taking legal advice but his whereabouts were unknown. It was decided that Tom should continue to stay in the present foster placement.

Reasons: "Mr Sinclair has made no effort to visit Tom during the past six months. No information is available about his present circumstances as no contact has been made with the social work department. Taking the boy's history into account, the hearing had no alternative but to ensure that Tom remained in foster care."

(E)

Seventh hearing: May 1980.

Grounds of referral: Review.

Decision: Supervision in children's Home.

Mr Sinclair had visited Tom and created serious problems by keeping him away overnight - the police had been called in. The agreement with the foster parents had been for one year and this had now elapsed. They did not wish to continue fostering Tom, mainly because of the tension created by Mr Sinclair. He had appealed against the assumption of parental rights and the appeal was to be heard in three weeks' time. In the circumstances a placement in a children's home was seen as the only available alternative.

Reasons:

"The hearing members were concerned that the foster placement for Tom had broken down which had necessitated an immediate move to ... children's home pending the outcome of the appeal against the assumption of parental rights by Tom's father. It was regretted that the father could not be cited so that the recent developments could be discussed with him, but it was the view of the hearing that it would be in Tom's best interests to remain for some time in the stable environment of (children's home) with continuity of schooling before yet another move was contemplated ..."

(A)

Eighth hearing:

November 1980.

Grounds of referral:

Review.

Decision:

Continuation of supervision.

The Sheriff upheld Mr Sinclair's appeal against the assumption of parental rights by the region. In the circumstances long-term planning for Tom had undergone a complete reversal and all energies were being directed towards securing his eventual return to his father. Tom had made good progress in the children's home. A senior social worker was making regular visits to Mr Sinclair and his co-habitee and Mr Sinclair was visiting Tom every Saturday. The school report was optimistic. Mr Sinclair still had no permanent home, so it was inevitable that Tom should remain in the children's home.

Reasons:

"Tom has settled very well at (the children's home) and is doing well at school. His father is more optimistic about being allocated a house and the plan at present is that the social worker will give him support and continue the process of more frequent visits by Tom to his father's present accommodation so that they get to know each other better and the co-habitee. The hearing members were satisfied to continue the supervision with residence at (children's home).

(A)

Ninth hearing: March 1981.
Grounds of referral: Review.
Decision: Supervision residing with his father.

Mr Sinclair and his co-habitee had been given a house (outside Edinburgh) with the help of the social work department. Tom had been to stay overnight several times. The children's home was supporting the parents and offering help. Tom displayed anxiety about leaving the children's home but wanted to go and live with his father. It was decided that the time had come to attempt a return to the family home.

Reasons: "It was considered that since Mr Sinclair now had a house and a job and preparations had been made by the social work department with him and his co-habitee to receive Tom into the household, Tom should return home but should remain on supervision so that a social worker could help and keep a close watch on this transition."

(F)

Tenth hearing: March 1982.
Grounds of referral: Annual review.
Decision: Termination of supervision.

The reports documented Tom's year at home in great detail. After an initial "honeymoon period" Tom went through two very bad patches including severe temper tantrums and very clinging behaviour for weeks on end. Mr Sinclair immediately asked for advice both from the social worker and the children's home staff who all provided help. The co-habitee had become very fond of Tom and no problems arose when her two sons moved in temporarily after an eviction. The household also weathered a severe crisis when Mr Sinclair became ill and was forced to give up work. Tom was clearly well settled and formal supervision was no longer necessary.

Reasons: "It was decided to end the supervision requirement because it seemed that Mr Sinclair and Mrs X had successfully established a home of which Tom was a part and that there was no need for further social work involvement."

(F)

Comments

It is worth noting that when foster placements break down (twice in this case) remedial action usually has to take place before a hearing can be arranged, so that in such cases the 'decision' is often little more than an endorsement of action taken by the social work department. In this case the hearing could have decided to return Tom to the care of his father at any time, but it hardly seemed a real option. It should also be stressed that the eventual outcome in no way negates the attempt to assume parental rights. This rather drastic action may well have been the factor that finally brought Mr Sinclair to his senses - he began visiting his son regularly and reliably only after being informed of the plan to have Tom adopted in the future.

Discussion

Six features emerge from these cases with varying degrees of clarity. First, the tentative nature of all of the decisions is indicative of the lack of certainty as to the best course of action. Second, in offence and truancy cases, there is a constant balancing of the non-punitive and the punitive. Help is offered, advice given, but 'the consequences' of non-co-operation are constantly emphasised - the List D stick. Third, there is a persistent underlying assumption that removal from home should be a measure of the last resort. The view that taking a child away from parents can only rarely (if ever) be in the interests of the child, is rooted in empirical observations and independent principles. The latter can be seen in the belief that parents have a right to raise their own children, except where this is forfeited by cruelty, negligence or disability. This is clearly reflected in the

fourth common element, namely the strong emphasis on parental competence in arriving at any decision. Where parents are deemed to be "responsible", "concerned", "in control" and so on, the outcome of hearings is quite different from situations where parents are seen as "inadequate" or "in need of support". Fifth, and rather less interestingly, although equally important, one is struck by the limited disposals available to the panel. Even when Paul was finally sent to a List D school, the social worker regarded this as indicative of "the lack of alternative provision" rather than an ideal placement. Sixth, and closely related to the fifth factor, is the obvious autonomy of the education department. Where a child is excluded from school for example, the panel has no powers to reinstate the child or to implement an alternative placement, except at a List D school, which is outwith the jurisdiction of the education department. The fifth and sixth points do not require further elaboration here, the first four features will be discussed and developed further.

The first point observed in the careers was the tentative nature of the decision. This is not only the outcome of the present state of knowledge, but more importantly seems inevitable in any form of consequentialist argument. However much understanding of the developmental process from childhood to adulthood increases, there can never be a control against which to test the success or failure of any given decision - that a specific child grows into a law-abiding, contented adult, does not indicate the wisdom of any compulsory measures of care, any more than a child growing into a hardened criminal is proof that the wrong decisions were taken. The most that can be said in the former case, is that no harm was done and in the latter that it does not

appear to have helped. But even here, it might make a difference to a child to know that there were people genuinely concerned for his/her welfare. These observations are very similar to those made on assessing child-rearing techniques in an earlier chapter (p.61). However, there is an additional factor here. The impossibility of ever proving conclusively that a certain course of action was "in the best interests of the child", lies not only in the lack of any independent control, but also in the fact that an appearance at a hearing or in a juvenile court is just one small event among a very wide range of occurrences and situations affecting a child. It is not at all unusual for fairly persistent boy offenders to reform in a very short space of time after making a new friend (usually a girl) who strongly disapproves of his behaviour. Similarly, a teacher may take a particular interest in a child, with far-reaching consequences. Family events too have an overwhelming effect - births, deaths, marriages, divorces, are at least as likely to make a lasting impact as any compulsory measures of care. One of the strengths of the system is that at its best, it has the flexibility to take these other changing factors into account and vary decisions accordingly. The key problem in the present context is seen to lie in the inevitable difficulties of relying very heavily on consequentialist reasoning. If the future is unknown and largely unknowable, how can a system of justice be based so heavily on reasoning about possible future outcomes? The argument will return to this question later. The second point, concerning the mixture of non-punitive and punitive reasoning exemplified by hearings is yet another way of viewing the conflict between the rhetoric and the reality of the

system. Critics argue that treatment is simply another form of control and that in the eyes of children the distinction between compulsory measures of care and punishment is of no significance at all. The type of reasoning shown above is produced as overwhelming evidence for their case. This seems an oversimplification of a very complex process, familiar to anyone who has day-to-day dealings with children. The 'carrot and stick' approach is so all-pervading, it seems almost absurd to question its legitimacy, what is new is its incorporation into a formal system of justice. Children at home and in school are daily offered 'carrots' in the form of praise and encouragement, as well as material rewards, and 'sticks' in the form of displeasure, threats and actual punishments. Moreover, there are criteria of justice governing the informal system too. Thus it has always seemed a flagrant injustice to me, when children are offered huge gifts in the event of a good exam result - do badly in the exam and you suffer a second misery, the withholding of the present. Similarly within the context of a children's hearing there are criteria (usually unarticulated) governing the just application of non-punitive and punitive forms of reasoning. Consider the case of a fourteen year old girl who found herself in the assessment centre after getting drunk when both her parents had run away with their respective lovers, being told 'You asked for it ...'. Within the evaluative framework of the system itself, the punitive approach could only be regarded as intrinsically unjust if all talk of punishment is seen as antithetical to the interests of the child. No such suggestion has ever been made. It is the rhetoric that is at fault here, not the system as it actually operates. However the critics have a point which must ultimately be answered, in that in reality punitive disposals are

sometimes used as a way of furthering the interests of the child and at other times as an end in themselves (see example G in Category II). The second have no place at all within a welfare system and the former need to be governed by formal criteria of justice as much as the latter. "Interests" should never be regarded as a carte-blanche to act without restraint, nor indeed are they so in practice. Some of the constraints on any hearing are illustrated in the third and fourth points above. But before moving on to these, it might be helpful to summarise the argument so far.

Reasoning about interests in children's hearing (as in courts of law) involves consequentialist considerations of a special kind and in addition a balancing of non-punitive and punitive arguments to a degree that seems quite alien to other kinds of legal reasoning. The detailed examples illustrate clearly that this reasoning does not occur in a vacuum but rather with reference to specific aims apart from the generalised aims of the system. In Paul Cameron's third hearing, for example, the aims were clearly to get him to change his behaviour both in and out of school, "interests" were thus identified with whatever course of action was most likely to get him to stop stealing and bullying. In the circumstances three months' 'grace' seemed unlikely to result in improved behaviour and the psychiatric assessment certainly revealed a new dimension of which all those concerned had been quite unaware. Similarly at Kevin's first hearing the aim was to put a stop to his persistent thieving - "interests" were seen to lie in whatever might achieve this aim. With Tom too, interests were identified by reasoning with reference to a well-defined aim, namely finding a stable home for him. The first two elements viewed as characteristic of the reasoning in hearings can thus be

validated or rejected by examining the aims of the system and of the individual hearing. Where these are seen as just, this type of reasoning cannot be entirely inconsistent with the relevant criteria of justice. If the aims are unjust, so too are the means of achieving them. However, the end does not justify any means. The narrow range of available disposals makes it clear that the aims have to be achieved (if they are to be achieved at all) by using a very small number of options. These options are not only limited by statute but by the kinds of considerations mentioned under the third and fourth points above. It is clear that in reasoning about the interests of the child, the hearing members attach considerable weight to factors other than immediate aims and formally acceptable means of achieving them. The scope of the argument can be widened here, for what is viewed as "acceptable" by a hearing in identifying interests and what is regarded as "reasonable" by a court of law where "reasonableness" is the focus of a decision, both appear to rest on objective assessments, but further analysis reveals the importance of the context in which these judgements are made and of underlying shared values which often remain unarticulated. It is hoped that a discussion of these and similar types of judgement will prove instructive. The next chapter will thus extend the focus of the argument in the hope of shedding light on a kind of reasoning which occurs not only in the realm of juvenile justice but in the whole field of legal reasoning.

CHAPTER 5

Evaluative Reasoning and the Weighing of Interests

The process of reaching a conclusion as to the interests of a child in a children's hearing involves a constant balancing and assessment of all the available information in an attempt to arrive at the best possible disposal. It was suggested in the previous chapter that certain aspects of this process seem very similar to whole areas of law unrelated to juvenile justice. The decisions as to whether or not 'reasonable care' was taken, as to what constitutes a 'fair rent', as to whether or not an individual exhibited 'unreasonable behaviour' all seem to necessitate an answer to the question posed by J. Wisdom:

"When all the facts are known how can there still be
a question of fact?" (1)

One may have access to all the available facts concerning a child like Tom Sinclair and yet still not be able to determine what should be done in his interests. One may appear to know all the events leading up to an accident and remain undecided as to whether it was a case of culpable negligence. A judge may be privy to all the details of certain marital disagreements and still uncertain as to whether or not one party behaved unreasonably. In all the above situations the final judgement involves weighing the factors, but in order to weigh one must first have weights and what makes this type of reasoning perplexing is that the

1. J. Wisdom, 'Gods' (Proceedings of the Aristotelian Society XLV 1944-5) p.193.

weights have not been assigned in advance, but are rather arrived at in the course of the argument and hence seem to have an irreducibly subjective element. And yet both in courts and in children's hearings there is a strong degree of consensus. Wisdom writes of this form of reasoning:

"It has its own sort of logic and its own sort of end - the solution of the question at issue is a decision, a ruling ... But it is not an arbitrary decision, though the rational connexions are neither quite like those in vertical deductions nor like those in inductions ..."

(2)

The question to be examined is thus given that:

"... we ascribe greater or lesser weight to some reasons or factors than others ... how can we do so in any kind of objectively reasonable way?"

(3)

Chaim Perelman has posed the problem in the following terms:

"The reasons on which our decisions are based consist more often than not of opinions which we consider the most probable, probability in this case being in any case rarely susceptible of quantitative determination. These opinions are worked out by means of reasonings which depend neither on self-evidence, nor on an analytic logic, but on presumptions whose investigation depends on a theory of argumentation. Not all opinions and all argumentations merit equal consideration. This does not prevent the existence of a rational argumentation, an argumentation which, like Kant's categorical imperative claims to be valid for the community of reasonable minds".

(4)

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2. J. Wisdom, op.cit., pp.194-5.
 3. D.N. MacCormick, forthcoming article, 'On Reasonableness' in Ch. Perelman (ed) Les Notions à Contenu Variable en Droit (Brussels) Section III.
 4. Ch. Perelman, The Idea of Justice and the Problem of Argument (Routledge, New York, 1963) p.97.

How does such "rational argumentation" proceed and how does it move to an acceptable conclusion?

It will be argued here that decisions of the kind under discussion can only be taken within a system of values and a commonly accepted body of knowledge, and that even inside such a system decisions are and can only be reached within a fairly narrow sphere, which is partly determined by the context in which they are made. The discussion will first turn to the need for a system of recognized values.

Recognized values

The term "recognized values" is used advisedly. It will be argued that for the kind of reasoning under discussion to reach an acceptable conclusion, there is a need for agreement on which values are to count, that is for a system of "recognized values", rather than for a system of shared values. This qualification is essential, since it explains how, for example, a practising Catholic can preside over a Scottish divorce court. Such a judge's personal values would rule out all divorce, but a court (like a children's hearing) does not operate within the framework of individual values, but rather those of the society and the system over which it has jurisdiction. If the judge felt sufficiently strongly, it presumably might be permissible to opt out of divorce cases, but it would not be in order to deny a divorce to all couples appearing in the court on the grounds that divorce is wrong. "Recognized values" are thus those values which are or should be

operational in the decision-making process at hand. *

It is important to realise immediately that to argue for a set of common recognized values as a necessary condition of reaching agreement on the significance and implications of a number of acknowledged facts, is quite independent of the much wider question of whether or not there exist criteria for choosing between different value systems. The Catholic may be right. The present discussion should in no way be taken to imply that any set of values is as good as any other. The point which is being made and has already been made in the preceding chapter, can perhaps be illustrated rather forcefully by imagining the reaction to a woman's complaint that her husband only stayed one night a week with her and spent the other six with other women, in a monogamous and in a polygamous society. In the former such behaviour would not only be deemed 'unreasonable' but would constitute overwhelming grounds for divorce. In the latter, the woman might well be told to count herself

* Familiarity with Ronald Dworkin's Taking Rights Seriously (Harvard, Cambridge 1978) might give rise to speculation as to whether or not "recognized values" are simply another name for what Dworkin terms "principles". There is clearly a marked similarity between the two concepts but they are nevertheless distinct. Principles are viewed by Dworkin as particular kinds of reasons for making certain decisions. They do not apply in an "all or nothing way" but are brought to bear in "hard cases". Moreover they (like recognized values) have weight and their weights are assigned during the reasoning process which culminates in a decision. Principles like recognized values are to be found in an institutional context. However principles are an integral part of Dworkin's rights' thesis and they come into play primarily in determining where the rights of individuals lie in "hard cases". Recognized values are rather a feature of evaluative reasoning in a specific context. In particular, with respect to this thesis, they serve to identify interests in a system of juvenile justice. These interests may or may not enjoy the status of rights within the system. At the most general level, recognized values can be said to have wider application than Dworkin's principles but there is clearly a considerable area of overlap between them.

lucky! The 'unreasonableness' of the man's behaviour in the former society is as self-evident as its 'reasonableness' in the latter. Where social institutions are commonly accepted, conformity to them is not seen as a matter of personal choice, subject to individual preference, but rather as an objective fact about the world. In such a situation certain kinds of behaviour will automatically be regarded as 'objectively reasonable'. Where the institutions rest on rockier foundations the criteria of 'reasonableness' are no longer 'self evident'. One hundred years ago women demanding the same kind of education as men were considered 'unreasonable'. Today it is those trying to deny women equal education who are deemed 'unreasonable'. 'Reasonable' is thus itself a relative term or perhaps more accurately what has been described as:

"a value-function which covers a range of variable factors and values at different levels varying according to the particular topic or focus of concern in different types of case and fields of law". (5)

Similar observations can be made on the assessment of the interests of children.

It was stated above "an assessment of both interests and needs involves criteria of value" (p. 129). The current orthodoxy on one aspect of children's interests was recently voiced by a speaker at a meeting of the Scottish Child Law Group:

"I believe it is an unchallengeable fact that man has found no better way of rearing children than in families - however one defines 'better' or whatever the objectives of child rearing". (6)

5. D.N. MacCormick, op.cit., Section IV.

6. L.J. McEwan, 'A Social Work Perspective' in Scottish Child Law Group, Parents' Rights, Children's Welfare and State Intervention (January 1980) p.3.

This is the often unarticulated assumption underlying the identification of interests in children's hearings. The implication is that if for some reason a child can no longer stay with its natural parents, a substitute family must be found. The important point here is to realise that this assumption has at best a very partial basis in any scientifically established fact. The scores of broken marriages and unhappy children appearing at the panel and elsewhere are hardly strong testimony to the strengths of the nuclear family, yet the belief persists and interests are identified accordingly. This is clearly reflected in the third and fourth points above (pp.171-172). A less extreme example can be seen in attitudes to education. In attempting to identify the interests of a twelve year old truant, the question asked is usually "How can we get her back to school?" There is only very rarely a suggestion that it might be appropriate for a given child not to attend school and this particular belief is enshrined in the law. It is a belief that is being challenged in some quarters. Michael Duane writes that in:

"The school of the future ... the children will be free to choose whether or not to come to school and what they shall do while they are there". (7)

It is clear that were these views to become generally accepted or recognised, interests would no longer almost automatically be identified with school attendance. One final example to stress the point. In the current climate of high unemployment and almost no job

7. Michael Duane 'Freedom and the State System of Education' in a collection Children's Rights (Elek, London, 1971) p.240.

prospects for non-certificate school leavers, it would not seem entirely inappropriate to advise some young offenders to perfect their thieving techniques. The advice is never given because it contravenes all kinds of assumptions about what constitutes a decent way of life and interests are quite properly identified in the light of these assumptions. Recognized values can thus be seen to be a key factor in the reasoning described at the beginning of the chapter. Is it possible to give a more systematic account of the way in which they operate?

The actual operation of recognized values will vary from one context to another. But it is clear that in any context there are many values relevant to the various decisions taken and in most cases there is a hierarchy of values which is rarely made explicit. To explore this further the discussion will concentrate once more on the area of juvenile justice. The argument will focus for a time on examples of theft by a child and it will become apparent that recognized values lie at the very heart of the dialogue which occurs at children's hearings and indeed of the sentencing process in juvenile courts too.

The first premiss underlying all such referrals or charges is that: stealing is wrong. It is highly unlikely that anyone within the hearing or court system or even among readers of this text, would question this assertion (hence it might be termed a "provisional fixed point" as explained on p.17 above) but it in fact depends for its validity on the assumption of the legitimacy of private property and it must be acknowledged that such legitimacy is itself not beyond dispute, but involves a particular view of human beings and the ways in which they do and ought to live together. Where such views are rejected, the contention

that stealing is wrong may not only become a matter for debate but almost meaningless. Agreement on the wrongful nature of stealing is however, no more than a starting point when faced with actual cases.

Consider the following examples:

- (1) Stealing an apple off a tree hanging on to the street.
- (2) Stealing sweets from a shop.
- (3) Stealing a suitcase full of clothes from a department store.
- (4) Stealing a radio from someone's home by breaking in.
- (5) Stealing a car and driving it away.

Suppose these thefts were all committed on various occasions by a twelve year old boy who was neither starving nor homeless, that is (in the terminology of Chapter 3) whose basic interests were being met and who moreover was quite aware of what he was doing. What attitudes would be taken towards these offences? In the absence of any further information, such as whether or not an adult was involved, and holding all factors constant for the five cases, it can be predicted with some certainty that panel members, juvenile judges and once again the reader of this account, would regard these events as increasingly serious with (4) and (5) as the most disturbing. The basis for this prediction is the existence of well-established values which would almost certainly be brought to bear on such cases. The first and second would be regarded as pranks or giving way to temptation and although not actually condoned would be dismissed as trivial either with or without a homily on the evils of taking what is not one's own. The third would cause greater concern for two reasons. First and probably less importantly, because of the much greater value of the stolen property and secondly and far more seriously because of the

premeditated nature of the action. Even if the sweet stealing were premeditated in the sense that the boy entered the shop in order to take the sweets, to go into a large store with an empty suitcase aiming to fill it, does suggest a far greater degree of deliberate intent to do wrong and hence a step further on the road to criminality, than the second example. Breaking into a private home (always postulating the absence of further information) certainly appears to involve not only deliberate intent, but a lack of concern for the feelings of others which is not manifest in the same way by stealing from a public place. The people living in the house will at very least suffer a shock quite apart from the loss of any property. The invasion of privacy is regarded by most as a wrong quite irrespective of whether or not anything is stolen. This latter element is absent in the last example but there is a new factor here which will make it highly probable that, at least in the case of a twelve year old offender, this would be regarded as the most serious. A twelve year old at the wheel is a serious threat to life and limb. In addition, given the absence of insurance in nearly all such cases, there is often no possibility of any kind of compensation for the potential victims. Summarising from the examples, they can be said to incorporate the following beliefs and assumptions:

- (a) the legitimacy of private ownership which leads to:
- (b) the claim that stealing is wrong;
- (c) the belief that premeditation is more serious in cases of theft (elsewhere too?) than giving way to temptation on the spot;
- (d) the belief that the invasion of privacy is an independent wrong; *
- (e) the belief that endangering life is far more serious than either stealing or invading privacy.

* The concept of privacy like that of private ownership rests on a certain view of people and society.

It should be evident that the above beliefs are not arbitrary but can all be argued for and that at some point a lack of agreement would have to be regarded as a lack of common perspective and hence an inability to reach any kind of consensus. Consider the claim that theft (of any kind) is far more serious than endangering life, that is that the sanctity of private property always outweighs the sanctity of life. Regardless of the status of such a belief, that is irrespective of whether or not it could be said to be mistaken, it is quite clear that it could not be accommodated in a communal decision-making process that involves, at least partially, an assessment of the gravity of certain types of behaviour. This is not a denial of the possibility that recognized values might be such that the sanctity of property always outweighed the sanctity of life. The dialogue and reasoning can only begin on the basis of recognized values, and in their absence necessarily breaks down.

The examples all focussed deliberately on one aspect of theft referrals or charges, namely the offence itself, postulating that other factors should be held constant and ignored. In any actual case of this kind involving children, the offence is only one element. A hierarchy of recognized values will come into play with almost every element taken into consideration. Other factors to be considered (already mentioned above) will include at the very least, the offender's home circumstances and his performance and behaviour at school. The most basic and rarely challenged assumptions concerning home life are that parents have a right to raise their children unless they have somehow forfeited it through neglect and abuse and that except in such cases children should live with their families. The Sheriff's ruling (quoted on p. 193 below) in

Tom Sinclair's 'career' outline is overwhelming testimony to these views. Prevailing attitudes towards schooling have already been described (p. 182). The underlying assumptions are that children need education and that except in unusual circumstances, this is best achieved in a school setting. Despite repeated offending, Paul Cameron was not sent to a List D school until he was excluded from day school. Once again, however well-established, every assumption is no more than a "provisional fixed point" and is therefore open to challenge and can be questioned and disputed and some positions will always appear inherently more reasonable than others. A recent article ⁽⁸⁾ has suggested that parents might be licensed before being allowed to raise children. Michael Duane's views cited above (p. 182) are a total rejection of the beliefs currently underpinning attitudes to children who fail to attend school. Should either of these proposals assume the role of prevailing orthodoxy and become enshrined in the law, the decisions regarding children in both hearings and courts would be quite different. In the event of even a minority of panel members bringing such opinions to bear on the issues coming before them, agreement would become almost impossible. It is only in rare instances that such a clash of principle occurs during hearings and presumably in juvenile courts too; were it to become a common occurrence, the reasoning that is taken to be characteristic of such settings simply could not take place. In practice the basic assumptions are so rarely questioned, that they assume the status of objective facts rather than recognized values. Before looking at what occurs when all the aspects of the case are viewed

8. Hugh Lafollette 'Licensing Parents', Philosophy and Public Affairs 9, 2 (1980) pp.182-197.

as a whole and finally weighed, it might be advisable to give some thought to the other two elements claimed to be central to the reasoning process under analysis: first, a commonly accepted body of knowledge and, second, the narrow sphere within which decisions are made.

The role of facts

There would seem to be a body of uncontested facts which is essentially different from any values, even the least disputed, although it has been apparent throughout this discussion that the distinction between fact and value is often very hazy. The statement regarding the role of the family cited on p. 181 seems to me to be a statement of value and yet was presented as "an unchallengeable fact". Similarly, the discovery of 'facts' in many research projects is a direct consequence of the evaluative framework of the research, of the questions asked, and often of the impossibility of any independent control. However even with these strong qualifications, there does seem to be a body of undisputed facts which is relevant in the balancing process being analysed here. Examples of the kind of facts referred to are the effects of non-compliance with public health regulations in restaurants, the likely results of smoking in the presence of flammable products, medical knowledge on the symptoms and effects of diverse diseases, a child's basic nutritional needs and so on. Thus where food is served from a filthy kitchen, those responsible can be said to have been negligent, as can the factory owner who permits smoking on the production-line for flammable goods. Similarly a diagnosed kleptomaniac may be given special consideration, and children deprived of a basic diet can be said to have

at least some of their interests ignored. Of course here too there are often borderline cases. However it is clear that these facts have a bearing on certain cases that is quite different from that of the values described above. The case of Martin Seiferth (pp.71-78) provides an outstanding example of how available knowledge can affect the outcome of a case. Where such cases are to be decided on protectionist criteria, what is for the good of the child can only be determined (if at all) by referring to what is known about the condition to be rectified. The hypothetical case of undescended testicles (p. 77 above) provided another clear example. The damage caused by postponing surgery until puberty, has only been discovered fairly recently. Before this fact came to light, there would have been no grounds at all for proposing compulsory treatment. These examples highlight a further complication, namely that not only values but inevitably knowledge too is subject to change and increased knowledge may well result in new criteria of reasonableness, of negligence and of what is to count as an interest. Thus until it became known that dirt breeds infection, it was not unreasonable or negligent for a surgeon to proceed to the operating table without first washing hands. Recent legislation on the compulsory wearing of seat belts is also the direct outcome of studying the consequences of failing to take such precautions. Presumably failure to comply with the new regulations will in future count as negligence. The role that an "accepted body of knowledge" necessarily plays in the reasoning process appears to be less problematic than that of recognized values, but the relationship between such values and the kind of facts just described, is very complex.

In areas of controversy, the two sides may hold opposing views on

grounds of principle or on factual criteria or some fusion of the two. Corporal punishment provides a good example. It is possible to put the case for and against the practice in terms of certain values and on the basis of empirical observation. One can argue for physical punishment on retributive principles - violence should be met with violence - and in terms of its supposed beneficial effects. Similarly, the case against, rests on arguments concerning the dignity of the individual and respect for persons, which are said to be violated by any form of beating, as well as on the supposed ill effects of the practice - it breeds violence, fails to act as a deterrent and so on. In each case principles and values can be seen to play a prior role which exactly parallels the role they play in the reasoning and balancing process under discussion. A convinced retributivist will not be swayed by the evidence any more than the person who regards corporal punishment as a violation of individual rights. Each might summon arguments in support of their cause, for example, "corporal punishment is barbaric and has been shown to cause lasting damage", but in neither case does any evidence constitute the grounds for the belief, rather the belief (where it exists) determines what is made of the facts. The arguments for and against the reintroduction of capital punishment exhibit similar characteristics. It is argued here that this is the very same process which occurs in the so-called "weighting" of factors that takes place in courts and in children's hearings and indeed in extra-legal contexts too. In the long-run a marshalling of evidence may lead to a modification of principle, but this is a slow process, discussion of which is beyond the scope of the present study. The point being stressed is that in the day-to-day decisions being analysed here, "recognized values" play a central role that is often

not made explicit in the legal process, and is hidden by the rhetoric of the system. They structure the reasoning that takes place in a particular way, often determining what is 'made' of particular facts and facts, in the sense of a body of knowledge, often determine what is to be deemed 'reasonable' and what is to count as an interest. What of the third element mentioned above?

The limited sphere of actual decisions

The third factor - undoubtedly the least interesting - claimed to be characteristic of the reasoning being analysed here, is the narrow sphere within which decisions are taken. This may perhaps seem too obvious to mention but the account would be incomplete without drawing attention to this point. It can be dealt with fairly briefly. In cases of purported negligence, judges are asked to make a ruling on specific actions and the degree of care taken in performing those actions, not for example on whether a particular agent is a negligent person. Children's hearings too have a very confined remit. They can order supervision to a social worker but never choose the actual worker to whom the child is to be entrusted, nor dictate the precise content of supervision. They may decide on a placement at a List D school, but only rarely have more than a marginal say as to which List D school, particularly as such schools are under no obligation to take in pupils they do not wish to accept. If all such issues were left open to judges or hearing members to decide, there would be a far wider measure of disagreement between panel members and in some instances, arbitrary outcomes, or perhaps no decisions at all. Decisions in such instances would depend to a very high degree on individual decision-makers and would probably be predictable (if at all)

on the basis of knowledge of individual values and characteristics. Here decisions would become individualised to a degree that would seem to be unacceptable in a system of justice. The next chapter will return to this theme. Enough has been said here to take a closer look at how all three elements come together in the reasoning process.

The three elements in concert

It would seem helpful to take one of the 'careers' of the previous chapter to show how all the various elements affect outcomes. Tom Sinclair's case seems to be illustrative of much that is being elucidated here. It is hardly a matter of controversy that abandoning a six year old child first to a sick and unstable grandparent, subsequently to a new cohabitee and then to a children's shelter whilst constantly under the influence of drink, is constitutive of neglect. Whatever the lack of conclusive evidence on child-rearing techniques, current knowledge is more than adequate to attest to the damaging effects of such behaviour. By the time of the third hearing Tom appeared to be happy and settled at school, but it is important to note the last sentence of the reasons:

"The hearing felt this arrangement should continue while Mr Sinclair took the opportunity to set up a home".

Here is the first appearance of the implicit assumption or, in the terminology of this thesis, "recognized values", governing the whole of this case, namely that except in exceptional circumstances children should reside with their parents. By the time of the fourth hearing, the father had given ample cause to doubt his adequacy as a parent even further and in addition Tom was not enthusiastic about seeing him, nevertheless

although overnight visits were not permitted, there was no suggestion at all that visits should cease altogether. It was apparent in the fifth hearing that Tom's uncle and aunt's failure to offer him a home any longer was due entirely to the father's unreasonable behaviour. By the sixth hearing the father had failed to contact his son for six months and the boy was not at all happy. The social work department clearly felt that the parent had now forfeited all parental rights and were taking steps that would ultimately lead to Tom's adoption by alternative parents. Once again Mr Sinclair's subsequent behaviour resulted in a breakdown of the foster placement and Tom was placed in a Children's Home pending the father's appeal to the court. Because of the court decision, all efforts were now channelled towards reuniting father and son. The Sheriff's reasoning is most instructive:

"It is provided by Parliament that, when a resolution is passed by a Local Authority, assuming parental rights, but the parent dissents, the resolution shall lapse unless the Local Authority satisfies the Court not only that it is in the interests of the child that the resolution should not lapse, but that there were specific grounds justifying the resolution and also that the grounds continue up to the time of the hearing". (9)

It should perhaps be pointed out before discussing this issue further, that the panel's decision-making role in this 'career' was fairly minimal. Until the ninth hearing (when Tom finally went to live with his father) the hearing only served to confirm an arrangement that had been arrived at quite independently by the social workers involved. Once again no attempt is being made here to offer criticism. The

9. Unreported case Sheriff Court, Haddington 1981.

course of events may or may not have been the best in the circumstances and the outcome certainly seems a happy one. The only aim at this stage is to look at the reasoning and how the three elements described above all helped to determine the results. Perhaps most illuminating of all is the way in which certain recognized values, in this case the concept of parental rights, act in the manner of what Joseph Raz has termed "exclusionary reasons".

In Practical Reason and Norms, Raz points out that a logical theory of practical conflicts demands a recognition of different forms of argument. He goes on to state:

"... that we should distinguish between first order and second order reasons for action and that conflicts between first order reasons are resolved by the relative strength of the conflicting reasons, but that this is not true of conflicts between first order and second order reasons". (10)

"Second order reasons" are defined rather tortuously as:

"any reason to act for a reason or to refrain from acting for a reason. An exclusionary reason is a second order reason to refrain from acting for some reason". (11)

In the context of Raz's argument, a promise provides a good example of a factor that can act as an "exclusionary reason". Except in special circumstances, the fact that a promise was made to perform a certain act, rules out the possibility of balancing the other (first order) reasons for and against the very same act. It is

10. J. Raz, Practical Reason and Norms (Hutchinson, London 1975), p.36.

11. ibid., p.39.

suggested that in the type of reasoning being examined here, certain principles and values sometimes act as "exclusionary reasons" in exactly the same manner. Parental rights provide an outstanding example.

It was stated above that a commitment to the ideal of the nuclear family played a crucial role in identifying children's interests. It will be argued that in addition an implicit view of parental rights often acts as a guillotine in any exploration of a given child's interests. In other words it is not open to a court or to a children's hearing to place a child with a substitute family for example, or less drastically in a different school, on the grounds that the child will almost certainly be happier there. Parents have a recognised right to make all kinds of decisions concerning the lives of their children, unless they have forfeited this right in some specified way, and in many cases this right acts as an "exclusionary reason" in the course of deciding how to further a child's interests. It has already been pointed out that in the absence of any abuse or neglect, the judge determining custody after legal separation or divorce, tries to ascertain which parent would best provide a suitable home for the children involved not whether they might not be happier living with quite different parents. The reasoning involved is clearly illustrated by Sheriff X (cited above) in refusing to uphold the assumption of parental rights in the case of Tom Sinclair. He makes it clear that regardless of where a child's interests may be seen to lie, parental rights can only be withheld if there are other reasons apart from perceived interests for doing so. In such cases parental rights "trump" interests in the same way as Raz's "exclusionary reasons" trump first order reasons. They are not just another factor to be put on the scales but

rather determine what it is that can go on the scales in the first place. They limit alternatives to a very considerable degree and in a way that is hidden by the rhetoric of the system, that is, that the interests of the child are the paramount concern. The three 'careers' presented in the last chapter show this very clearly, Tom Sinclair's most clearly of all. However what counts as an exclusionary reason is once again dependent on the institutional framework within which such reasons operate and on the principles which they reflect. Parental rights would not count as an exclusionary reason or possibly any reason at all in a society where children are reared communally. Similarly under certain circumstances it is impossible to give consent to the performance of some actions, for example, assault. Hence such prior consent could never become a reason for doing or abstaining from doing anything. Thus once again there are underlying criteria of value which should be made explicit in order to reach a full understanding of how actual decisions are made.

The analysis so far has relied on fairly simple cases in order to illustrate the complex relationship between recognized values, an existing body of knowledge and the relatively narrow scope of the decisions taken. The most complex cases are those in which, in addition to these three elements, there is a conflict of recognized values. It is in these cases that decisions become overtly controversial and are sometimes on the basis of the majority opinion rather than unanimous agreement. The case of Carol (p. 140) provides a useful example. Here, a fourteen year old girl had not attended school for a year, was clearly unhappy but very anxious to remain with her parents who apparently provided a good home for her. The psychiatric report was of the firm

opinion that residential schooling would only heighten her anxiety. The competing sets of values are thus those concerning home and schooling. There were not the slightest indications of abuse or neglect, nor had Carol ever been involved in any offences, hence (according to the underlying recognized values) she ought to reside with her parents. On the other hand, according to recognized values, fourteen year olds need to go to school and are indeed required to do so by law. In such a case, removal from home would appear to be the only certain way of achieving this end. There seem to be three possible approaches to this dilemma. One might wish to argue that there is no dilemma and that the decision should be governed by one set of recognized values. It could be said that failure to ensure that a child receives schooling, even if it means accompanying her to school and possibly staying around during school hours or undergoing psychiatric treatment, is in itself constitutive of neglect, hence, whilst every precaution should be taken not to increase the girl's anxiety, steps must be taken which will ensure that she will receive some kind of education immediately. Alternatively those opposed to compulsory education could presumably argue that the law in this area is totally misconceived and the decision should be taken in the light of the values attaching to residing with one's family.* Either way, the dilemma disappears and reasoning can proceed on the basis of one set of recognized values. In practice some hearing members, undaunted by the psychiatric assessment, would adopt the first attitude. The second is not open to hearing members.

* A hearing member qua hearing member could not argue in the second way since it is in direct contravention of the law, it also conflicts with current recognized values, but followers of Michael Duane (p. 182) would clearly approach the dilemma in this manner and it is presented here for purposes of completeness.

A second approach when faced with a conflict of values which needs to be overcome or resolved before a decision can be taken, is to stipulate that whenever such a conflict occurs, one set of values should always take priority. Thus in the case of Carol, it could be argued that there is indeed a conflict of values but homelife is far more important and although every effort should be made to get her back to school, such efforts must take place from and in co-operation with her home. Alternatively one might argue that however valuable family life might be, schooling is of even greater importance, so that she should immediately be sent to school and every attempt should be made to pick up the pieces of her home life afterwards. In practice and almost certainly without realising it, panel members do indeed come to hearings with precisely such priorities and decisions are taken accordingly. Once again discussion of whether or not this is desirable, will be postponed.

The third approach, like the second, openly acknowledges the existence of the conflict, but unlike the second, regards the two sets of values as irreconcilable, within the particular context (they clearly are not irreconcilable for the majority of children) and opts for some kind of compromise. This is clearly what occurred in Carol's case. She was neither forcibly removed from home nor was she allowed to forget about school. Cynics will probably respond by commenting that the decision was tantamount to allowing the situation to continue, that is to taking no action at all. But it might just be that the only fair and realistic

decision was the one in fact taken. *

The issues raised here can be explained more schematically as follows: the recognized values providing the framework within which decisions are made in the hearing system, encompass both the basic interests and the intrinsic interests outlined in Chapter 3. In addition and cutting across these two types of interests, the law itself sometimes actually defines what is to be regarded as an interest. This can be seen most clearly in the area of school attendance: regardless of any views on the irrelevance of the curriculum and the desirability of some sort of work experience from a very early age for example, the law declares that, very exceptional circumstances apart, a child ought to attend school and interests are to be defined accordingly. Legal values similarly play an additional, though not independent role, in offence referrals: thieving is not in a child's interest, at least partly, because it is against the law. The law here provides exclusionary reasons for the system. It can now be seen that recognized

* There is a useful analogy to be made here with indifference curve analysis as expounded by economists in the areas of demand theory and welfare economics. Suppose an individual is equally fond of apples and oranges for example, then s/he will be equally satisfied with or indifferent with respect to having five of one and three of the other or four of each and so on, but would obviously be better off, that is where the two are plotted against one another, on a higher curve, with twelve of one or six of each. In other words overall welfare or satisfaction is the same anywhere along a given curve and decreases or increases on lower or higher curves. In exactly the same way it might well be that any action taken with respect to children like Carol may well be no more than a move along a given curve, giving her a little more schooling perhaps at the cost of greater anxiety and less domestic security. In other words such decisions might in no way change her overall welfare, but only its constituent parts, hence giving rise to the delusion that something has been done. The third approach implicitly encompasses the belief that action should only be taken if there is some prospect of improving the overall situation, that is, of moving onto a higher curve.

values operate at the level of basic interests and intrinsic interests and can either accord or conflict with legally defined interests. Basic interests can be broadly defined in terms of a child's need for love, for shelter and for food and clothing. Intrinsic interests are inherently more controversial but include at the very least recognition of the need for some kind of education, for play, for friendship and for privacy. It should be noted that all these interests are non-substitutable to a significant degree and are likewise non-comparable - a child cannot survive undamaged where one, two or even three of these needs are met to the exclusion of all others. Consider the absurdity of the assertion that a child doesn't need food because s/he is loved (or vice versa), or similarly that s/he doesn't need friends because s/he is achieving well in all school subjects (or vice versa). Can these interests be ranked in any way and if so, should they be? It can be asserted that at the simplest level, basic interests do (and should) take priority. Few hearings would (or should) concern themselves in the first instance with the educational requirements of a child abandoned on the steps of the social work department. Can the basic interests themselves be ordered? Once again, at the simplest level, they can be and indeed are prima facie. Love clearly takes precedence, not because it is necessarily viewed as the most important dimension of a child's development but because it is clearly the only basic need whose fulfilment cannot be guaranteed in any way at all. Foster parents and Children's Homes can all provide more than adequate food and shelter as well as a high degree of concern, but whether or not those caring for a child will come to love it, is not merely unpredictable but would not even seem to be a matter for speculation. It is for this reason that

where a child is clearly in a loving environment - and there are of course borderline cases here too - all efforts will be and should be channelled towards meeting other needs within the context of the present home surroundings. Some hard cases are precisely those where it is felt that the circumstances are such that no amount of effort can adequately secure the other interests, hence even in undisputed cases of love for a child, it may be necessary to decide on a removal from home. The crucial factors in such a decision will be the extent to which other interests, basic as well as intrinsic, are being neglected and in addition the age of the child in question. Examples will make the process clearer. Where parents have a severe drink problem such that they are unable to give consistent care (regardless of their feelings for their child) then the younger the child, the more likely its removal from home. A thirteen year old might well survive regular parental weekend drinking bouts quite successfully, a six month old baby would almost certainly be severely damaged. However, in the case of the thirteen year old, the recognized values inherent in intrinsic interests and the degree to which they were neglected might give rise to a decision to remove the child from home. If, for example, s/he was quite unable to attend school, or regularly went on shoplifting expeditions (or both) whenever the parents were drunk, s/he would undoubtedly receive sympathetic understanding from the hearing but would at the very least be placed on supervision and in the event of continued truancy and theft, would almost certainly be removed from home. These are precisely the sorts of considerations that lie behind decisions such as that concerning David (Category I, D, p. 141). He was obviously neglected, but nevertheless attending school and staying out of trouble. Moreover, he

wanted to stay at home. The child's wants provide the last piece in the jigsaw showing the reasoning of hearings actually at work. Where two courses of action both seem reasonable options, the child's wants may determine the outcome in exactly the same way as in the custody case cited in Chapter 2 (p.91). Thus had David wished to leave home, an order would almost certainly have been made accordingly, not because of his wishes alone, but because in the circumstances they would have seemed entirely reasonable. Had he been previously excluded from school and/or involved in repeated offending, his wishes would not have determined the outcome of the proceedings. The elements present in the reasoning process are thus: a body of knowledge and a hierarchy of recognized values which all have a bearing on the recognition and weighting of basic, intrinsic and legally recognized interests. Priority is given in the first place to basic interests but damage to such interests may sometimes not provide a conclusive argument for drastic remedial action where such action itself might harm other interests, whether basic or intrinsic or legal, that appear to be undamaged and where the child in question articulates a strong preference for one of a number of reasonable options. The decision-making process can now be seen to be very complex and the key to its complexity lies in understanding that although this process is rational and operates according to an implicit ranking of priorities, none of these priorities is infeasible. It should be clear from the preceding discussion that there are various reasons for this. At the simplest level, a preliminary judgement may be rejected on receiving additional information. Secondly the application of accepted general principles to individual cases sometimes reveals that the principles are too crude and cannot be applied

in the decision-making process without further refinement. Hence interests often remain a matter of dispute even in settings where there is total agreement as to whose and even which interests should be the paramount concern. In the terminology of the beginning of this chapter, the "ascription of weights" is often highly problematic and in need of revision. In rather less abstract terms, some children, for example, manage to survive quite cheerfully in circumstances in which others fail to function at all and their respective interests must be identified accordingly. Finally the case of an individual child may sometimes reveal that the principles of the system are themselves in need of modification. In other words, a considered judgement about a given child may simply not 'square' with the established principles, priorities and values of the system. In such a situation there is a need to return to the balancing process involved in reaching a reflective equilibrium, as described in the Introduction (pp. 16-17) for such a case reveals an unacceptable inconsistency of theory and practice and a need for some kind of modification to achieve a new equilibrium. The decisions of children's hearings should thus be viewed as tentative conclusions rather than final resolutions. The grounds given for identifying the interests of a child as lying in one course of action rather than another and indeed those given for decisions on the reasonableness or otherwise of certain behaviour, are all "cumulatively persuasive rather than logically conclusive". It would be a grave error to conclude from this that one decision is as good as another. There are criteria for distinguishing good decisions concerning reasonableness, from bad ones, for distinguishing just disposals at a children's hearing from unjust ones. The next chapter will attempt to explore the relevant principles of justice.

CHAPTER 6

Justice for Children?

Conceptions of justice within decision-making systems are inextricably bound with types of justification, that is with the general and specific reasons supporting individual judgements or decisions in actual cases. What counts as a good reason is determined to a very great extent by the principles underlying the system and by its declared aims. The general nature of the rival principles in the area of juvenile justice was outlined in the introduction with reference to Miller's distinction between "legal justice" and "social justice". In any hypothetical system purporting to focus purely on deeds, different outcomes with respect to the same offences would involve an injustice, whereas in an equally hypothetical system concerned exclusively with needs, different decisions following identical offence referrals would in no way be indicative of injustice, but rather precisely what the system was aiming to achieve. Accusations of injustice therefore fall into two broad categories: first, those which view the whole system as unjust because they reject its underlying principles and declared aims and second, those which point to injustices within the system, that is to practices and disposals which appear to violate the principles and aims according to which the system operates. Criticisms of the first kind can be either on grounds of principle, for example, viewing all forms of compulsion as a violation of individual rights, as do Farson and Holt cited in Chapter 2; or on more pragmatic grounds, perhaps stating that however laudable the ideals, they cannot be incorporated into a formal system of justice.

The second type of objection (sometimes in conjunction with the first), is raised by Morris and McIsaac and by their colleagues in the Justice for Children organisation. It should be clear from the discussion in the previous chapters, that views of the first type, in particular child-libertarianism, are rejected here in favour of a modified protectionism. But such a protectionist perspective may not be immune from what have been termed "pragmatic" objections. These will now be discussed more fully, since they have a direct bearing on the question of what is to count as an unjust decision within the framework of any welfare system and of the hearing system in particular. At their most general, such objections are all levelled against the theory of justice for children which has been implicitly adopted throughout this thesis. It might therefore be helpful to begin by summarising this view and then trying to meet each objection in turn.

Modified Protectionism in Outline

Liberal theories of the state such as those of Rawls, Dworkin and Nozick, support competing theories of justice and the just society but they all share the view that one can arrive at a theory of justice without a prior commitment to what may constitute a good life. It has been argued repeatedly in the previous chapters that regardless of the validity of this claim with respect to adults, it is false insofar as it relates to children. Children's rights, children's interests and needs and hence what constitutes just behaviour towards children, can only be elucidated, if they can be elucidated at all, by reference to "perfectionist" considerations, to notions of what it is good for a child to have, to be and to become. Apart from an account of the most minimal

basic interests in the securing of love, food and shelter, these standards are all contestable and contested. As stated in a recent book on juvenile justice:

"... except for the basic physical requirements for healthy development, children's needs are socially defined, socially sustained and socially adjusted to conform with prevailing values and expectations ..." (1)

It is therefore quite impossible to draw up an uncontroversial list of goods required by any ideal of justice towards children. It nevertheless seems a wrong move to argue from here to the invalidity and hence the injustice of the whole enterprise, that is to conclude from the observed impossibility of drawing up a complete, universally recognised list of goods that one should draw up no list at all.

Morris and McIsaac claim:

"Where there is an absence of objective criteria by which the nature and extent of a 'problem' can be determined, decision makers can do little more than refer to their own values ..." (2)

Decision-makers can and do refer to far more than their own values, but the values to which they refer are open to debate. This in itself is no reason to reject them but seems rather to call for a maximum degree of openness, sensitivity, awareness and flexibility in arriving at decisions by appealing to such values. In the

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1. Michael King, 'Welfare and Justice' in M. King (ed.) Childhood, Welfare and Justice (Batsford, London, 1981) p.110.
 2. Allison Morris and Mary McIsaac, Juvenile Justice? (Heinemann, London, 1978), p.52.

terminology of the previous chapter, justice would seem to demand an explicit acknowledgement of the recognized values operational for the system at any given time, rather than a rejection of the system itself. However this will only go a small way towards meeting the critics of the "welfare model" whose cries of injustice are aimed at two further levels of the system. Even if agreement can be reached on what interests and needs ought to be secured, the questions of whether and how they can be secured and what the interests of any particular child may be, remain quite distinct. One can argue in the manner of some authors * that many (if not all) current forms of intervention seem to exacerbate rather than alleviate problems, without denying the possibility of identifying individual interests and meeting needs in the future. Similarly one can point out the inadequacy of some current modes of assessment of interests and needs, without thereby criticising the other institutional arrangements in existence for children. In practice, the two types of criticism often go hand in hand and although this may be no more than a contingent fact, the two will remain closely linked. If, in the present state of knowledge, it turned out that little or nothing can be done to secure the interests of children, then there may indeed be little point in channelling a great deal of effort towards identifying individual interests. If on the other hand, it were to be the case that despite recognition of general overall interests, individual interests cannot be identified with any degree of certainty, then it is absurd to set up institutions which aim to do more than secure interests at the most general level. The truth of the matter (as so often!) would seem to lie somewhere between these extremes.

* See for example: L. Taylor, R. Lacey and B. Bracken, In Whose Best Interests? (Cobden Trust, MIND, 1979).

The following paragraphs will look at accusations of injustice both at the level of meeting interests and needs and then, yet again, at the level of identifying individual interests.

The Supposed Injustice in Meeting Needs

There would seem to be overwhelming evidence that many of the institutions currently supposed to be catering for the welfare of children are serving to create far more problems than they solve. The research of many writers * indicates that much of the residential provision for children serves as a breeding ground for violence and crime despite the good intentions and genuine concern of many of those staffing them. This is not the place to examine such findings further, but rather to remark that it seems extraordinary to argue from here to a rejection of welfarism and a plea for legalism in the manner of Morris and Giller, and Taylor, Lacey and Bracken. If the effects of residential placements whether in open facilities or secure units are indeed as damaging as is suggested, placing children there under determinate, proportional sentences, seems to have very little to commend it except in a context relying on the twin concepts of retribution and deterrence, that is in a setting in which welfare criteria are inapplicable and regard is given to quite different principles of justice resting on notions of desert of some kind. If children who might otherwise have led honest lives, are indeed set on the road to criminality by being sent away from home, then a substantive injustice is being perpetrated at the very least to the children concerned and such action can never be taken in the

* See for example the works of Norman Tutt, Spencer Millham and David Thorpe cited in the bibliography.

interests of the individual child; whether or not it might be in the interests of society remains highly questionable. But it is absurd to argue from here, in the manner of Morris and Giller, to the view that it is therefore unjust to take any action (apart from voluntary measures) in the interests of the child and that all forms of compulsory intervention on the criteria of needs and interests are inherently unjust. The most that can be said is that some forms of intervention are clearly antithetical to children's interests and should therefore either be rejected outright or imposed only on quite different grounds. How best to meet acknowledged needs and interests and which needs and interests can be secured through institutional arrangements can only be touched on briefly here. However, there is a considerable literature on the subject and some references are included in the bibliography. For the moment, it need only be pointed out that to recognise on the one hand the injustice done to some children through intervention aimed at promoting their interests, and on the other hand the impossibility of securing some interests through legislative provision, does not invalidate the whole attempt to make such provision for some forms of action in the interests of children. This would only be the case in the unlikely eventuality of every form of compulsory intervention being shown to have damaging consequences: social work supervision, intermediate treatment, placements in youth groups, specialist educational provision and so on. The likelihood of finding such evidence seems, to say the least, remote. And only if such evidence could be found, would the sweeping indictment of Morris and McIsaac be well founded;

"There is no place for concepts such as 'fairness' and 'justice' in a system based on welfare ideology".

(3)

In the meantime this kind of polemic is vague and unsubstantiated and does little to further an understanding of the issues involved. What of injustices with respect to identifying individual needs?

The Potential Injustice in Identifying Interests

The previous chapter focused in some depth on the reasoning process which culminates in disposals based on the identification of individual interests. It has been suggested that if it transpired that such identification was, in practice, nearly always mistaken, compulsory intervention on the basis of such findings would be unjust. This type of criticism gains strength from two quite different sources: first from the failure to see the crucial role the child must play in the identification process and second from attempts to deny that the scope for error is very large indeed. These will be examined in turn.

Children are not passive containers into which one can pour acknowledged objective goods, but, as argued in Chapter 2, are from a very early age, individual beings with their own feelings, preferences, opinions, aims and desires. However unreasonable these may appear to be, they cannot be ignored without far-reaching and often harmful consequences. The Seiferth case presented in Chapter 2 provides a forceful illustration of how individual circumstances may contribute towards making a presumably almost universally acknowledged desirable end (removal of a cleft palate), an

3. A. Morris and M. McIsaac, op.cit., p.154.

inappropriate outcome. Given Martin's own strongly held views, there can be little doubt that enforced treatment would have been only partially successful and at the price of considerable psychological harm. Many less dramatic examples can be found in the context of school problems. On investigating school attendance figures, it is not at all unusual to find that non-attendance coincides with the days on which a certain subject is taught. Some lessons, for whatever reason, create such a high level of anxiety in some children that it seems quite reasonable to argue that although a wide-ranging compulsory curriculum (as opposed to free choice) is a desirable policy for most children, there may be circumstances in which such a policy is antithetical to a child's interests and should not be pursued. A particular case will serve to illustrate the point: a large, very unhappy teenage girl who was referred to a hearing for failure to attend school. Despite encouragement from panel members and a social worker, she simply refused to go on the days on which she had physical education. She was finally sent to a residential school where physical education was voluntary and returned to a hearing a year later much happier and much more confident. Insofar as anyone could tell, her aversion for school really was linked only to her dislike of P.E. In extreme circumstances such as this, it seems absurd to say that the child's perceptions, preferences and fears are irrelevant and that her interests are to be assessed quite independently of such subjective factors. The degree to which institutional arrangements can and should be sufficiently flexible to accommodate such individual idiosyncracies, is beyond the scope of this discussion. The example is used only to underline the point, that even from a protectionist perspective, ignoring the child's own viewpoint may

be a serious obstacle to securing an outcome "in the best interests of the child". It is for this reason that a juvenile justice system built around the concepts of interests and needs and hence around perfectionist criteria, cannot deny the child's right to be heard without contravening the very principles on which it is founded. Any assessment of interests and needs, with the possible exception of those too young to have any views at all, is thus necessarily individualistic. Disposals based on such assessments must likewise be individualistic. What of the scope for error?

The Scope for Error

The aim of acting in the interests of the child has been clearly endorsed in the preceding chapters despite certain qualifications and reservations regarding the identification of interests and appropriate methods of securing them. Once such forward-looking considerations have been accepted as the paramount issue in a given setting in determining outcomes, the scope for error is enormous, whilst the scope for injustice is more limited. To return to the various examples in Chapter 4, all the decisions in Category I are just in the sense that they conform with the declared aims and principles of the system and with its procedural requirements. The same can be said of the case histories. But whether or not the decisions taken were the right decisions in the sense of actually securing rather than being thought to secure the interest of the child, remains an open question. The impossibility of making any conclusive assessments on the rightness or wrongness of a chosen course of action is an inherent part of a system based on forward-looking considerations. A medical analogy may clarify the nature of the problems

involved. A woman suffering from severe depression might be told by a psychiatrist that there are four possible courses of action: short-term relief of some of the symptoms perhaps through sleeping pills or relaxation techniques; long-term more extensive drug treatment, psychotherapy or just to 'grin and bear it'. If after discussing the advantages and disadvantages of each, examining the woman's medical history and taking into account her own views on the matter, the psychiatrist opts for drug therapy and the patient turns out to have a severe allergic reaction to the medication, the decision taken will almost certainly have been the wrong one, although even here there is room for doubt. However it is very clear that there has been no professional negligence and no breach of medical ethics. The decision involved a leap into the unknown and therefore inevitably, an element of risk. In exactly the same way, decisions taken about children's interests involve a balancing of at least partially unknown risks and can, with benefit of hindsight, prove mistaken. The Maria Colwells of this world provide a stark testimony to the alarming scope for error. Even those cases with a happy outcome do not necessarily indicate that the right decisions have been taken. Tom Sinclair has been happily reunited with his father but at the moment of writing he is only 10 or 11 years old and things could go badly wrong again. Moreover, he thrived with his foster family until his father arrived on the scene and disrupted the home. If the Sheriff had upheld the request to assume parental rights, Tom would almost certainly have remained where he was without further disruption. Paul Cameron's story had a relatively happy ending but he should clearly have been sent to a residential school at a much younger age. The combination of the hearing's reluctance to

remove children from home and the social worker's view that such measures were inappropriate in his case, militated against this. However at his last hearing Paul stated (and the school confirmed) how much he had enjoyed the experience and requested a continuation of the placement until he was due to leave school. He had made academic progress for the first time in years and was clearly very happy. Can any conclusions be drawn from these observations? This question takes the discussion right back to the issues of whether or not and in what circumstances, it is in fact possible to identify and meet the needs of children falling within the remit of the system.

It seems impossible to do any more here than indicate guidelines for assessing the effectiveness of any form of compulsory intervention in the lives of children and to note that this seemingly empirical problem, raises central non-empirical questions concerning the nature of the relevant criteria of assessment: the child's happiness, ability to make friends or to communicate, progress at school, the parents' perceptions, an end to offending, or a combination of any and all of these and more factors? Which are to count and how can they be measured? Comments can only be made here at a most superficial level, pointing out that in cases such as that of Tom Sinclair, it can be asserted with some certainty that a lack of intervention at the initial stages would have had serious consequences. In other cases, like that of Paul Cameron, intervention has beneficial consequences but comes much too late. In situations like that of Kevin Macdonald, it seems to serve a minimal 'watch dog' role and in yet others it may simply have no effect or substitute one set of problems for another or, worst of all, compound existing problems leaving a child considerably worse off than

before. It has already been asserted that if all cases were to be of the last type, that is, intervention only served to exacerbate problems, then a concern for the interests of children would indeed demand a policy of radical non-intervention or intervention only on the basis of quite different criteria such as the protection and appeasement of the public, for in such an eventuality, positive action in the interests of the child would necessarily involve an injustice. Even the most extreme critics of the Scottish system have refrained from proceeding this far in their attack. There are of course no controls possible in examples of 'happy' outcomes to establish what would have happened without intervention. However, on the basis of personal experience it does not seem an exaggerated claim to say that some children are indeed helped by the system while others are no worse off on leaving than they were on entering it. What proportions are regarded as appropriate in the two categories to justify the whole system, is a matter for extensive discussion of which factors should be considered as relevant, that is what should be put into the scales, and of how weights are to be assigned to these different factors, followed by empirical investigation and an analysis of the results. Sadly it is impossible to do any more here than point to the urgent need for answers to these questions.

The preceding paragraphs attempted to provide a qualified defence of welfarism with respect to children coming into direct contact with the law, that is of a system of juvenile justice having regard to interests and needs, rather than offences and deeds, viewing these as the most relevant criteria in making decisions about children within a legal framework. It seems clear that the case for welfarism could be

strengthened further by showing that its chief rival, the so-called "justice model", rests on shaky foundations. The quotation marks are used advisedly for, as already indicated, the two models rest on competing theories of justice, rather than, as is suggested by the terminology, representing justice versus some alternative to justice. Since these two theories are considered to be jointly exhaustive of the possibilities, indicating the weaknesses of the one may serve to strengthen the case for the other. It must be remembered throughout that the models are ideal-types and that in reality neither exist in a pure form, rather as Norman Tutt recently stated:

"... inevitably the operational system emerges as a compromise which attempts to be fair and differentiate for individual circumstances. Therefore even the most ardent proponents of a justice model (Morris and Giller) allow for pleas of mitigation to explain individual circumstances, likewise the leading welfare systems (Social Work (Scotland) Act 1968) allow for pleas of not guilty to be determined in a court of law. However, in order that the debate continue in an attempt to refine the juvenile justice system, it is important to examine the criticisms that exist for both models and to evaluate these criticisms".

(4)

This whole thesis is an attempt at such refinement and it therefore seems important to look further at objections to the "justice model" before proceeding to a discussion of possible injustices within the welfare framework which is broadly adopted here.

The "Justice Model" Reconsidered

The recommendations of the Justice for Children organisation have been summed up in the following terms:

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4. Norman Tutt, 'Justice or Welfare?' Social Work Today 14, 7 (1982) p.7.

"... intervention on the proof of commission of the offence and proportionality of sanction to offence".

(5)

The account proceeds to recommend further principles, in particular, that sentences be determinate and the least restrictive of any available alternatives. Moreover children should be given a waivable right to counsel and there should be minimal intervention prior to any legal proceedings. Finally decision-making should be visible and accountable. It should be noted that at least three of these principles are entirely compatible with the welfare model and indeed with the recommendations to be made in the concluding chapter of this thesis, while the remaining principles rest on theories of responsibility and autonomy that are here considered at least partially inappropriate with respect to children, quite regardless of any applicability they may have with respect to adults. These points will be examined in turn.

Pleas for the least restrictive disposal, for the right to representation and for visible and accountable decision-making can all be made from within a welfare ideology. Given the serious doubts raised about residential placements, for example, it is entirely consistent with welfarism to urge that removal from home should be a measure of the last resort. Similarly given the complexities involved in identifying interests and the difficulties a child may have in putting forward its own views in the face of perhaps half a dozen well-meaning adults, it might be considered very much in a child's interests to be represented at any hearing in which decisions are being made affecting his/her life.

5. A. Morris, H. Giller, E. Szwed and H. Leach, Justice for Children (Macmillan, London, 1980), p.67.

Once again several supporters of welfarism have put forward the case for independent child representatives. Finally the principles of visibility and accountability have certainly been recognised in the Scottish system in the Children's Hearings (Scotland) Rules, where it is laid down that:

"The chairman shall inform the child and his parent of the substance of any reports, documents and information mentioned in paragraph (2) (a) if it appears to him that this is material to the manner in which the case of the child should be disposed of and that its disclosure would not be detrimental to the interests of the child".

(6)

There is also a right of appeal following any decision. The interpretations put on these various provisions are by no means immune from criticism but they are included here only to show that they can be incorporated within the "welfare model" as consistently as within the "justice model". What of the remaining principles?

The concepts embraced in the principles of proportionate, determinate sanctions following proof of the commission of an offence are indeed alien to the "welfare model". Underlying such principles are notions of desert, and freewill and responsibility, as well as an implicit denial that intervention may be justified on grounds other than proof of the commission of an offence. This denial is frequently accompanied by a plea for a removal of legal sanctions from all forms of behaviour that do not constitute offences when committed by adults, for example: running away, use of alcohol and cigarettes, consensual sexual behaviour and so on. Underlying such a plea are the very same

6. Children's Hearings (Scotland) Rules (Statutory Instruments 1971 No.492 (S.60)), 17, 3.

notions of freewill and responsibility with the associated assumption of the individuals in control of their own behaviour and able to make all decisions concerning their own lives. Regardless of the legitimacy of these principles with respect to adults, they seem quite inapplicable with respect to most (not necessarily all) children. As Tutt points out, the law at present certainly does not uphold this view of children. The age of criminal responsibility is 10 years in England and Wales, 8 years in Scotland (which certainly has the nearest to a pure welfare model in practice within the United Kingdom), 10 years in Ireland and 15 years in Scandinavia and several other European countries. Morris and Giller et al recommend that the age of criminal responsibility be retained at 10 years of age. They carefully avoid discussion of what is to happen in cases of offending by those under the minimum age. Should it be ignored or regarded as a symptom of need? The former seems quite unacceptable and if the latter, then why cannot this approach be extended to older children? The authors themselves admit:

"... although the current age of criminal responsibility (10) was arbitrarily chosen, it represents the age at which it is generally felt that legal accountability can be imposed ..." (7)

This is hardly a convincing argument. Moreover the second half of the book (mainly by Szwed and Geach) deals with children in need of care and recommends the setting-up of a Family Court to this end. The authors would seem to be weakening their own position here. Once it is (quite rightly) recognized that some children may be in need of care,

7. A. Morris, H. Giller et al., op.cit., p.66.

it seems absurd to deny that at least a number of these may come to the attention of the authorities through offending. How can it be argued that dispositions should be made on the criterion of need for the first category and not for the second? Pursuing these principles to their logical conclusion would mean that a ten year old child found abandoned by both parents would be referred to a Family Court, whilst the same child arrested for breaking school windows would have to be referred both to the Juvenile Court and on discovering its home circumstances to the Family Court. Moreover since home circumstances are to be viewed as irrelevant in the court setting for:

"Certain criteria should be statutorily excluded:
for example, the social and family characteristics
of the child"

(8)

it is not even clear how one might plead mitigating circumstances on grounds of abandonment in the offence proceedings. Of course it might be argued that such cases would be rare in practice, but recent studies like that of Rushforth cited above (p.87), indicate exactly the reverse, namely that the backgrounds of offenders and non-offenders in given residential institutions are indistinguishable, hence either both groups or neither group must be in need of care. It therefore seems arbitrary to treat them as distinct. This is precisely the kind of argument underlying the Kilbrandon Report and the White Paper Children in Trouble.* There may be a residual category of 'pure'

8. A. Morris, H. Giller et al., op.cit., p.63.

Footnote: *Children in Trouble Cmnd.3601, HMSO (1968) was one of a series of White Papers brought out by the Labour Party on children and the criminal law.

offenders and it may indeed be appropriate to deal with these on a different basis, but the "justice model" cannot (and does not) rest its case on a small minority, but rather on the whole category of juvenile offenders. Underlying this model is the child-libertarian view of children's rights, but unlike the child-libertarians, the advocates of this model are quite unprepared to extend this theory of rights into all areas of concern for children. The resulting confusions and contradictions are well-exemplified in the Black Report on Northern Ireland. ⁽⁹⁾ The report recommends that offences by juveniles should be regarded as sufficient justification for instituting a distinct set of legal proceedings. However it also regards children as less competent than adults to make decisions affecting their own lives. It states (paragraph 4.53) that it might be advisable for the law to be made more flexible to allow those between 13 and 16 years to be employed to a greater degree than at present, out of school hours and during school holidays, but there are no suggestions for changing the age of compulsory school attendance. It recommends the retention of the age of criminal responsibility at 10 years with certain qualifications until 14 years of age (paragraph 5.17 (b)). However children should neither leave school, nor vote, nor marry until well after this age. Moreover there are to be separate courts for children with powers of committal to separate institutions and stringent reporting restrictions throughout for all proceedings. The underlying philosophy of the report and indeed of most advocates of the "justice model" is clearly not that of the child-libertarians. Moreover in

9. Report of the Children and Young Persons Review Group, (HMSO, Belfast, 1979) referred to hereafter as the Black Report.

addressing the problems of children in need of care, they all openly acknowledge the appropriateness of a modified protectionism, that is of according to children a special view as children and not as mini-adults. In other words, it is generally recognised and regarded as just that children (like adults) come face to face with the law for things they have done, but unlike adults, also become the subject of legal proceedings for things done to them. Where does the disagreement lie or is there perhaps no disagreement after all?

The stumbling blocks in reconciling the apparently opposing views would seem to centre round two factors: firstly, arguments concerning the relevance of punishment and secondly, empirical observations on the perceptions of children. Regarding the former, the Black Report for example states of young offenders:

"... they have by their actions come into conflict with society and society claims the right to exercise reasonable restraint over those who offend against it ..."

(10)

Even Kilbrandon acknowledges that punishment may be an appropriate response in some circumstances:

"... punishment might be good treatment for the particular person concerned in his particular circumstances ..."

(11)

Once punishment is viewed as the appropriate response, then the principles of proportionate determinate sanctions, following proof of

10. Black Report, paragraph 5.35.

11. Kilbrandon Report, paragraph 53.

the commission of an offence are indeed highly relevant, for notions of just punishment (analysed by Hart, * for example) are constituted by these elements. Advocates of welfarism could thus readily concur in their relevance. But what such arguments frequently ignore is that many children appearing before courts and at children's hearings have already been punished. In the debate on the Children and Young Persons Bill reported in Hansard in 1969, Gordon Oakes, M.P. spoke as follows:

"If an offending child is disciplined by its parents, does that not count for something? If an offending child is disciplined by its teachers at school, does that not count for something? If a probation officer spends hours with that child, is that to be dismissed because no court has been involved? If police rely on advice and caution as they often do ... is that to be set aside because there have been no court proceedings? I cannot accept that if an offending child does not appear before the court, he gets off scotfree".

(12)

It seems extraordinary that nowhere in the literature I have encountered on the opposing models of juvenile justice is any mention made of the fact that children can be and frequently are, punished in their own homes and at school without any recourse to the law, be it to due process or appeal procedures. In my experience on children's hearings, children have on many occasions been severely punished by their parents for relatively minor offences. They have had their pocket money stopped, been kept indoors for considerable time periods, been banned from television for days on end and been belted. Many of these

12. Hansard : Commons 1968-9, Vol.779, p.1234.

Footnote: *H.L.A. Hart, Punishment and Responsibility (Clarendon, Oxford, 1968). The first chapter is particularly relevant here.

penalties are far more severe than any court would, could or even should impose. It surely is not asking too much of officials to explain in the relevant circumstances that no further action will be necessary, because the only action deemed appropriate (namely punishment) has already been taken. Whether such an explanation is given by a policeman or in a juvenile court or at a children's hearing does not seem to be very significant. The relevance of punishment in other situations will be discussed further below. What of the second bar to a consensus on juvenile justice, namely the perceptions of the young person?

The supporters of the "justice model" seem to rest their arguments in this area on the following kind of case: a young offender deemed to be in need of care finds himself in front of the authorities and is sent away from home against his will for an indefinite period. He may well be told that this is not punishment but rather action in his "best interests". Nevertheless, it is a curtailment of his liberty and quite contrary to his own wishes, so to him it is quite indistinguishable from punishment and given the indeterminate nature of the disposal, unfair punishment at that. If on arriving at the residential establishment he encounters other young offenders who have in fact been sentenced to spend a specific time there because of offences committed, this will only serve to compound the initial impression that he is being punished and moreover, punished unjustly. Consider also that to most children (and possibly adults too) courts are places where people accused of breaking the law stand trial and that in England and Wales it is the court that makes decisions concerning both child offenders and children said to be in need of care. Given all these facts it is hardly surprising that many

children fail to grasp the philosophical niceties between so-called needs-based treatment and offence-based punishment. On the evidence of the following statement by Lord Donaldson, it is not at all clear whether or not members of the House of Lords all understand the distinction either:

"One has to admit that treatment may include painful methods such as a ruler on the knuckles or a cane ..." (13)

However having observed all these anomalies and accurately reflected that they offend very basic conceptions of justice, many critics make the further, quite unacceptable move, to the conclusion that all forms of compulsion are punishment, if only because they are perceived as such by those deprived of liberty. This move is made by Morris and Giller. It will suffice here to point out that there certainly are situations where one can give meaning to the notion of "compulsory treatment". In the medical sphere, a distinction might be made between conditions which a patient may choose to neglect or to have treated for example rheumatism and bronchitis and those where no such choice is accorded, such as typhoid or smallpox. Whatever the patient's views on the matter, it seems strange to suggest that the latter is a punitive measure. Perhaps more appropriately in the present context one might once again consider three children put to bed: one because s/he could no longer keep his/her eyes open, one because s/he was running a temperature and the third as a punishment. As stated in the Introduction (p.12) it is only in the third instance, that any unpleasantness involved is

13. Hansard : Lords, 1969, Vol.302, p.116.

intrinsic to the aims of the action. Where do these observations lead?

It is recognised here that particularly among older children, punishment may be an appropriate response to some offending. The arguments in favour may rest on principles of retribution, deterrence or reform or some combination of the three. It is similarly acknowledged that some children coming to the attention of the authorities as a result of their offences are in need of some kind of measures of care, because, for example, they are being neglected or abused by their parents or perhaps are not receiving any form of education. In speaking for the Children and Young Persons Bill, Elystan Morgan implicitly recognised these two responses to young offenders:

"The Bill seeks to strike a balance between the need to control unacceptable behaviour on the one hand, and the duty, on the other, to offer help to those who need it, while, at the same time, preserving judicial safeguards which are necessary for the freedom of the individual".

(14)

What emerges from all the confusion is that fairness would seem to demand that once punishment in any form and for whatever reason is being meted out by an institution constituted for this purpose under law, it must be strictly divorced from any and all other compulsory measures imposed in the interests of children. It seems apparent that the mixture of care and control which characterises much of the behaviour towards children in the environments of home and school cannot be achieved fairly in a legal context whose sole function is

14. Hansard : Commons, op.cit., p.1292.

precisely to provide such care and control, although there is no question that at least in some cases the imposition of measures of control is the outcome of the same genuine concern for the children that is reflected in measures of care. It cannot be sufficiently stressed that the view stated here is quite different from that expressed in the Black Report, which regards the commission of an offence as sufficient justification for instituting a distinct set of legal proceedings. What is being proposed is that in situations where, for whatever reasons, punishment is considered the most appropriate response, referrals should be made to an agency, be it a juvenile court, tribunal or whatever, that remains quite distinct from any group concerned with measures of care. It would also follow from this approach that in situations where a custodial sentence is the chosen disposal, children cannot justly be held in exactly the same institutions as those deemed to be in need of care. Most radically of all, with reference to the Scottish system in particular and other systems in general, there is a need to abolish all offence referrals to agencies of whatever kind, constituted to carry out care proceedings. It is hardly surprising if a young person attending a hearing because s/he is thought to be in need of compulsory measures of care, thinks s/he is 'on trial', when the proceedings begin with a detailed account of an offence, followed by questions concerning its accuracy. It is in this area that proponents of the "justice model" stand on very firm ground. Accommodating their views in this area within a system based primarily on considerations of welfare, would constitute a very real step towards achieving justice for children.

To recapitulate, the "justice model" focuses on the offence as

the criterion for legal intervention, any just disposals must therefore rest on notions of desert and hence on the principles of culpability, proportionality and determinacy. The "welfare model" views the offence as a possible indicator of need, but the offence qua offence cannot be the ground for legitimate intervention on welfare principles. It is the retention of offence referrals within the hearing system together with what appears to be a tariff of available disposals, that gives strength to the criticisms made by the Justice for Children movement. The tariff system has already been mentioned briefly in the Introduction (p.15) It is suggested here that the abolition of offence referrals and modification of the alleged tariff, would not only silence the critics but would also strengthen the system by making it truer to its own principles.

Injustice Within the System

It has already been pointed out that even where the principles underlying a particular system of justice are accepted without qualification, the scope for injustice within the system will nevertheless remain. Many practices and disposals may (and do) violate the principles and aims according to which particular systems operate. The Scottish Children's Hearing system is certainly not immune from such criticism. There would seem to be two main areas of concern. First (rather less interestingly) it is very clear that there is considerable procedural laxity in the conduct of many hearings. Second, actual decisions may not be taken on the basis of the child's interests and needs but rather according to quite different criteria: societal interests, legal requirements or on the basis of desert. Such

decisions are unjust within the framework of a welfare ideology. These issues will be discussed in turn.

Several writers, particularly Martin, Fox and Murray, (15) have documented the way in which a large number of hearings fail to enforce the regulations laid down by statute as the formal requirements of any properly conducted hearing. These include not only such features as identifying the child and ascertaining its age, but more importantly, explaining the grounds of referral to the child and making sure that they have been understood and accepted by the child and the parents. In addition the family has a right to know the substance of any report and the reasons for any decisions as well as the right to appeal against all such decisions. These and all the other procedural requirements set down in Part III of the Social Work (Scotland) Act 1968 and the Children's Hearings (Scotland) Rules 1971, afford no discretion in the relevant areas, although many of them are clearly viewed as discretionary guidelines in the actual conduct of hearings. Martin, Fox and Murray summarised the findings of 301 observed hearings. The highest possible score for adhering to the statutory procedural requirements was 8. Of the total number observed, only 87 scored 6 or more. It is not suggested here that failure to ascertain a child's age, for example, necessarily leads to an injustice. But there is often an unspoken assumption that if one is there to help a child, then formalities do not really matter and when this extends to persuading a child to accept the grounds of referral in the manner vividly documented by Paul Brown, the possibility of injustice is rather less remote:

15. F.M. Martin, S.J. Fox and Kathleen Murray Children Out of Court (Scottish Academic Press, 1981) Chapter 7.

"Brian is 12 ... He is accused of 'acting with' other boys on seven counts, including theft of £14 from a phone box, packets of crisps from a school and other similar incidents. He ... is asked if he accepts that he did them. He replies: 'No, I was there but I only watched'. The reporter ... explains that he can be accused of 'acting with' someone even if he didn't do anything ... from the boy's point of view one might as well accuse a passenger of breaking the speed limit ..." (16)

In this narrative, four offences were eventually accepted, whilst the other three were struck off the list. The subsequent discussion centred on quite different topics, in particular behaviour at school. Pressure is also often put on children to accept the grounds of referral by informing them that if the grounds are denied, the case will have to be sent to the Sheriff for proof. However, admitting the impropriety of such practices seems to do no more than on the one hand, strengthen the case for abolishing offence referrals and on the other, for ensuring that the statutory requirements are properly upheld. Possible ways of achieving this end will be discussed in the concluding chapter. What of practices and disposals that do not appear to be based on the criteria of interests and needs and sometimes even seem to be in direct conflict with them?

The discussion can now turn back to the actual cases presented in Chapter 4. The decisions in Category I are unproblematic and just within the context of a needs-based and interests-oriented system. It is those decisions falling in the second and third categories that

16. P.D. Brown and T. Bloomfield (eds.) Legality and Community (Aberdeen People's Press, Aberdeen, 1979) p.2.

are problematic. Category II in particular would seem to be quite inconsistent with the declared aims of the system. Decision F (a residential order for a 15 year old truant excluded from his day school) was made solely because of the law regarding school attendance. Decision G (placement in a secure unit for a 15 year old offender found guilty of multiple thefts) was clearly made in the light of societal needs. It is not suggested that these decisions were necessarily wrong (it will become apparent that I view the first as wrong and the second as probably right), but that they have no place within the framework of a system based on individual interests and needs. Both examples can be taken as typical of their kind and will be discussed in turn.

The issue of school attendance was discussed in some depth in Chapter 5. It was held there that basic and intrinsic interests may either accord or conflict with legally defined interests. The area of truancy becomes more problematic the older the child. Thus while one might wish to argue that any twelve year old has an intrinsic interest in attending school, that is that there is no conflict here between intrinsic and legally defined interests, this becomes increasingly difficult as the child approaches school-leaving age. It is an uncomfortable fact that the truant may well have assessed his/her interests in this area correctly. Many schools have little to offer the non-certificate 15 year old. In addition there is some evidence * that truants fare no worse than non-truants in the

* Footnote: See in particular: J. Gray, A.F. McPherson and D. Raffe, Reconstructions of Secondary Education, RKP, London, 1983, Chapter 11.

search for jobs and as already shown, a great deal of evidence that residential placements frequently have harmful consequences. In the long-run, changes in school provision and/or the law in this area may eradicate the conflict. But while the conflict persists it would seem that, at least in cases where school is unable or (as in Frank's case) unwilling to offer anything to a child, the hearing system is being co-opted into becoming a law enforcement agency. Such co-option detracts from its real aims and objectives and gives weight to those critics who claim that the welfare ideology simply offers alternative methods of control and is no more concerned with the interests of the individual than the system it replaces:

"To speak of punishment versus treatment is basically misleading because the change that has taken place involves simply a gradual movement from one kind of control in the direction of another". (17)

As Paul Brown points out, in many hearings concerned with truancy:

"... there was a strong tendency to see school as something that must be gone through, hated perhaps but put up with at all costs ...". (18)

He concludes:

"... the attitude of the panel was a norm-enforcing one: encourage school attendance because it is required rather than questioning that requirement". (19)

17. P.D. Brown and T. Bloomfield, op.cit., p.56.

18. ibid., p.31.

19. ibid.,

The argument here should not be taken as a denial that many schools have much to offer children but rather to argue that where the only reason for enforcing school attendance is that it is a legal requirement, hearings should refrain from so doing. If a hearing concludes that a child, for whatever reason, has nothing to gain from going to school, then it should do no more than inform the child that it is breaking the law and possibly the education department that it is failing in its duty to make adequate provision for certain children. Whether or not other agencies take up the case is an entirely separate matter. This will undoubtedly give rise to accusations of "irresponsibility" and exclamations of "How can you do nothing?" The uncomfortable fact is that at least in some situations, given the nature of certain institutions, there is nothing to be done or at least nothing that can be done at the level of individual interests. To equate interests in such instances with the requirements of the law is to reduce the concept of interest to a level at which it no longer serves as an independent criterion of intervention. In such cases, and in such cases alone, Paul Brown's critique has considerable force:

"... the needs of the child have ... been limited to changing his mind, rather than the social situation ..." (20)

Action in such cases may have harmful effects on the very individual it is aimed to help and is no more than a conscience-salving exercise for the decision-makers. Some persistent offenders present similar problems for welfare systems in general and the hearing system in particular.

Some children appear before hearings again and again on offence grounds. Of these, many will have problems amenable to social work intervention and the resolution of such problems may be worthwhile even where the offending continues. However, as has been made clear in the first part of this chapter, the offence qua offence is not regarded as a valid criterion of intervention on welfare grounds. It is not a legitimate aim of a hearing simply to put a stop to a child's offending, particularly when the only known methods of guaranteeing such an end (placement in a secure unit) have been shown to have seriously damaging effects on individual development. Once again, there may be instances where such disposals are the only appropriate ones, but such cases must be referred to the courts or any other agency which, though not necessarily indifferent to individual interests and needs, has a prior commitment to law enforcement. Hearings have no role to play in this area and in sometimes taking over such a role they weaken the case for their own independent contribution and become indistinguishable from punitive institutions. The reasoning behind such residential disposals by hearings has been well revealed:

"We do not know in what way residing in X may benefit your child. We cannot even be sure that it may not be harmful ... But it is obvious that something requires to be done. We feel that we cannot do nothing, the public expects us to act, and this is the only remedy that has not yet been tried".

(21)

To admit to impotence and even failure in some cases is not an indictment of the whole system. If in particular instances there is

21. P.D. Brown and T. Bloomfield, op.cit., p.40.

no clear assessment of where an individual child's interests might lie, and if it is not possible to make such an assessment, then referrals should either be sent to the appropriate agency or discharged altogether. Any other course of action will remain an injustice within the framework of a welfare system.

CHAPTER 7

From Theory to Action : Practical Implications

The preceding chapters have attempted to provide a theoretical justification of modified protectionism and its underlying principles as offering the most appropriate framework for action towards children who are subject to legal intervention. Arguments have been illustrated throughout by reference to actual systems of juvenile justice, in particular to the Scottish Children's Hearing System, which is seen as an attempt to put many of the principles examined here into practice. The thesis has been presented on the basic assumption that much theory is enriched when informed by actual empirical examples. Legal theory, divorced from any reference to actual legal systems, would seem to offer little prospect of an increased understanding of the nature of law and the role it plays in our lives. In addition, as explained in the Introduction (p.19) a coherence of theory and practice is viewed here as a necessary condition of achieving justice for children. In this concluding chapter, the procedure adopted so far will be reversed. Instead of elucidating and refining concepts and principles by reference to practice, the discussion will examine the practical implications of the theoretical conclusions. These practical implications are presented not merely as policy recommendations (although they are that too) but rather as a final 'testing' of the theoretical conclusions, showing how their adoption would 'square' with the principles advocated and hence would serve to reach an equilibrium in the manner explained in the concluding section of the Introduction. There are two possible lines of approach. One can

either start from scratch and provide an account of an ideal system of juvenile justice, a 'blue-print for action', or the starting point could be an actual system in operation. The second approach is adopted here for three reasons. First, despite all its shortcomings, the Scottish system certainly seems to provide one possible framework for the application of the principles advocated here. Second, the Scottish system is illustrative of the fact that new policies often give rise to quite unintended and unforeseen consequences and situations. It would therefore seem more fruitful to offer remedies for current shortcomings rather than a utopian scheme which would inevitably generate a new set of problems. Finally (purely pragmatically) it is much more likely that some of the proposals will be implemented if they involve reforms within an existing framework, rather than a total rejection of present institutions. However, each individual recommendation also has implications of a wider nature for any system of juvenile justice and these will be explored as well; first, a brief explanatory paragraph on the Scottish system.

The Scottish system of juvenile justice is often taken as comprising only children's hearings. This is misleading, for as already indicated in Chapter 2, a minority of young offenders still appears in court on a discretionary basis, whilst others are required to do so. This is in accordance with the recommendations of the Kilbrandon Report which proposed both that juveniles accused of "the gravest crimes" such as murder and rape should be subject to criminal procedure ⁽¹⁾ at the discretion of the Lord Advocate and that all disputed questions of fact

1. Kilbrandon Report, paragraphs 24 and 26.

"should be decided by a court of law".⁽²⁾ Both recommendations were adopted in principle in the Social Work (Scotland) Act 1968. The Lord Advocate has the power to determine which children shall be prosecuted for any offences and it is laid down by him in a Crown Office circular⁽³⁾ that certain cases will automatically be referred to the courts and not to children's hearings, in particular the offences of murder, rape and treason, and with the discretion of the Procurators Fiscal, where children are involved in a crime with an adult, where there may be a need to confiscate weapons (a hearing does not have the power to make such an order) and in certain motor vehicle offences. There are still considerable regional variations in the proportion of child offenders appearing before courts in Scotland. In addition, in any cases of a denial of the grounds of referral to a hearing, the case may be sent to the Sheriff for proof. The Scottish system of juvenile justice is thus broadly constituted by the hearing system with its remit to act on behalf of any children deemed to be in need of compulsory measures of care and by the courts which retain jurisdiction over some juvenile offenders, as well as in cases of disputed custody in matrimonial proceedings and in appeal cases concerning the assumption of parental rights by the local authority. In addition the courts and not the panel have jurisdiction with respect to adoption and guardianship proceedings, financial provision for children and in some areas relating to the education of children. There has been a great

2. Kilbrandon Report, op.cit., paragraph 97.

3. Crown Office Circular 1971.

deal of discussion recently regarding a proposal by the Hughes Committee ⁽⁴⁾ that issues of custody should be referred to hearings for disposal. However, this proposal has been rejected for the moment from both within and outwith the hearing system ⁽⁵⁾ and nowhere has it been suggested that hearings and courts should cease to work side by side in making determinations with respect to legal intervention in the lives of children. The courts as well as the hearings play an integral role in the current system of juvenile justice in Scotland. It is with this in mind that the practical implications and recommendations presented here should be considered. Eight points will be presented for consideration.

I : No offence referrals to hearings

It has been repeatedly argued that there should be an abolition of all offence referrals to children's hearings. At present most child offenders are referred to the reporter in the first instance and only after initial investigations indicate a possible need for compulsory measures of care are they referred to a hearing. Thus:

"Where it appears to the reporter that the child is in need of compulsory measures of care, he shall arrange a children's hearing ..."

(6)

The evidence for the need for such measures is rarely, if ever, the offence itself but rather a whole range of other factors related to

4. Royal Commission on Legal Services in Scotland (Hughes Committee, 1980) Cmnd.7846, Chapter 10.

5. See for example the report 'Aspects of Care and Custody' in The Hearing, 8 (1983).

6. Social Work (Scotland) Act 1968, III, 39 (3).

home, school, leisure activities, general behaviour and so on. Reporters do on occasion use hearings to administer a warning, assuming that the referral will be discharged (a teenage boy who operated slot-machines requiring 50p coins with 10p coins 'treated' with tinfoil comes to mind!) but this is not the function of hearings and could be (and often is) carried out at least as effectively by a police caution. In the vast majority of cases reaching a hearing, the offence is, or at least should be, no more than a peripheral factor which brought the child to the attention of the authorities. It is at most only a partial reason for calling a hearing and sometimes not even that. Offence referrals often serve to cloud the real issues and can on occasion be a bar to achieving the very ends the hearing is called to secure. This has damaging effects on the credibility of the system as well as on the child and even those offering help. An extreme example will illustrate all the problems inherent in such cases, but the aim here is primarily to show how presenting an offence as the grounds of referral can distort the whole proceedings and result in an unsatisfactory outcome.

The Case

A girl of 14 was referred to a hearing on grounds of theft. Investigation revealed that there had long been concern about the girl's welfare because of her relationship with her stepfather. The social background report indicated that there was considerable evidence pointing to cruelty. The girl was thought to have been locked up for days and beaten. In addition it appeared that she remained unaware of the identity of her natural father.

The Hearing

At the hearing the grounds of referral were put and the girl denied stealing the jacket in question. She did admit to being in the company of a friend who had stolen the jacket and to knowing that it was stolen. Discussion followed about 'being there', 'being an accomplice' and so on and it was eventually ruled that she had indeed accepted the grounds of referral. The stepfather was extremely aggressive and demanded that she be taught a lesson. The hearing continued with general statements about the possibility of her needing help and support to sort out her problems and she was eventually put on supervision. Not one panel member (myself included) referred in any way to that part of the background report that was the real reason for the order. Everyone present was anxious to avoid an open confrontation with the man who was the root of the trouble.

Discussion

This is a very extreme example of a recurring pattern. Ignoring for present purposes that the conduct of the hearing was in direct violation of The Children's Hearings (Scotland) Rules and also freely admitting that the reporter who brought the case and the hearing members who conducted it all acted in good faith, it must be said that hearings such as this are not only a charade but do little to serve the interests of the children involved. The course of events would be quite different if the actual reason for the hearing rather than the 'presenting problem' formed the grounds of referral. Arguments against such a policy hinge round the problem of providing proof in court in cases of denial. An offence is often easier to prove than cruelty for which the only witnesses are usually members of the family. A most distinguished reporter made the following off-the-record admission to a group of panel members, regarding cases of suspected cruelty:

"I always look at their school attendance and hope to get them that way".

The motives are admirable, the resulting confusion often destructive. Adoption of the recommendation under discussion would have had the following consequences for this case: the grounds of referral would have been "lack of parental care ... likely to cause unnecessary suffering". (This is a statutory ground under Part III Section 32(2) (b) and (c) of the Social Work (Scotland) Act 1968). The grounds would almost certainly have been denied and gone to the Sheriff for proof. Assuming first that the grounds were upheld, there would have been a stormy hearing but no possibility of covering up the material issues that underlay the decision taken. The following points would have been gained. First the child and her parents would have known from the outset why the hearing was called. Second it would not have been left to the discretion of hearing members to bring up "sensitive issues", they would have constituted the whole basis of the discussion, having been sent to the family in advance. Third it would have assisted the social worker assigned to the case in offering the relevant form of supervision. As things in fact happened, the first task of the social worker was to attempt to explain to the family that despite the grounds of referral and everything said during the hearing, the supervision requirement was made to try and modify parental behaviour and not that of the child - a fairly tall order in the circumstances. In the terminology of the theoretical part of this thesis, the child's legal right to adequate care was being violated. Proceedings were instituted to identify her interests and to make provision to secure

them more adequately. It has been stressed repeatedly that the identification of such interests must necessarily take account of the child's views of the matter. In the case described here, this was impossible given the parameters of the discussion at the hearing. Had the girl realised that hearing members knew of her predicament, she might even have requested a period away from home. As it was, the hearing might well have failed to act in her best interests by failing to identify them. The discussion centred round the recognised values regarding law-breaking and only minimally round those concerning family life and violence towards children, however the latter more than any other, formed the basis of the decision. The hearing was procedurally unjust in failing to abide by the statutory regulations of the system, substantively unjust in that it is not at all clear that the outcome was in the child's interest and almost certainly unjust in the eyes of the child as it involved drastic intervention following a trivial offence. Putting the alternative grounds of referral could have achieved justice at all three levels. Before turning to further recommendations there is a need to discuss two additional points. First the alternative strategy proposed for the case outlined above will inevitably provoke the question of what would happen were the Sheriff to rule that the grounds could not be established and to discharge the referral. Second the significance of this recommendation for other systems of juvenile justice must be explored. These questions will be examined in turn.

It has already been explained that the justification for bringing a child to a hearing on one set of grounds and making the decision in respect of quite different criteria, lies in part in the difficulties of

proving the actual grounds for the disposal in a manner that will satisfy a court of law. It is argued that, where the grounds cannot be proved, the child will be excluded from help and remain at risk. There are two immediate kinds of response. First it is not at all clear that children are helped in the kind of situations described above, except minimally by enabling a social worker to keep an eye on the child. However, since contact is rarely more than once a week and often only once a fortnight, this task could be carried out far more effectively in other ways. The school might be alerted to the concerns surrounding the child. The RSSPCC has great expertise in these areas and even the local police are better equipped to monitor such situations than a social worker. If the child were in real danger, these agencies could present the evidence to the reporter and another hearing would be arranged. A supervision order on dubious grounds is little more than a conscience-saving exercise for the hearing system. Once again it stems from an unspoken belief that one must do something. The fact is that the risks of letting some children 'slip through the net' seem minimal in comparison with the abuses which occur by spreading the net in a way that precludes giving genuine support to those in need of care. It seems far preferable to offer genuine support to a lesser number than a pretence of help to a greater. The second kind of response to those who speak of the risks of excluding children from help by bringing cases on grounds of cruelty is to point out that there is always a possibility that the hearsay evidence provided by background reports and forming the basis of some decision, is in fact false. It should therefore be presented in such a way that it is open to challenge by those whom it condemns, in the particular instance cited, the

stepfather. Any alternative course is in direct violation of the well established legal presumption of innocence.* What of the implications for other systems of juvenile justice?

The extension of this recommendation to alternative systems, can only be put in the most general terms. It is at its most basic level a demand for a distinction between the 'presenting problem' which brings a child to the attention of the authorities and the actual problems that provide the rationale for legal intervention. There will of course be many instances where these two are identical, for example, where apparent abuse and neglect are the factors leading to an initial investigation, these factors (if proven) will be the justifying grounds for any decision taken. Similarly where (for whatever reason) punishment is considered the appropriate response, the offence committed will be the central element in deciding on a disposal. Confusion, and hence in many cases injustice, occurs where the grounds for bringing a case to a tribunal or court or welfare board and the grounds for any disposal in the form of compulsory measures, be they for care, education or punishment are quite different. In such situations the reasoning

* Two of the earliest commentators on the Scottish system expressed serious concern about the lack of regard with respect to "the canons of natural justice" on the part of some professionals. When cases go to appeal, both social enquiry and school reports are seen by the Sheriff:

"Sheriffs and lawyers have often been horrified by the lack of evidence provided by professionals to substantiate their opinions. One Sheriff reported to us that he had read reports which were 'venomous' and 'slanderous'".

(N. Bruce and J. Spencer, Face to Face with Families, (Macdonald, Loanhead (1976), p.117)).

The fifth recommendation returns to this theme.

moves from a publicly-stated premiss to a conclusion based on quite different (usually hidden) premisses. As such it not only fails to make sense to the people involved, but inhibits the exercise of any right of appeal. In the context of the UK it is also in violation of the statutory right to reasoned decisions under the Tribunals and Inquiries Act 1958. The first recommendation is thus that with respect to the Scottish system, offence referrals to children's hearings should be abolished, whilst with respect to any system, the reason or reasons for instituting the proceedings should be the factor or factors underlying any compulsory measures imposed. Any alternative course of action will almost certainly constitute a violation of the child's rights and will (barring unlikely accidents) necessarily involve a failure to identify the child's interests.

II : Separate proceedings for 'pure' offence referrals

The discussion will centre primarily round the Scottish system since it seems difficult to make recommendations divorced from a specific context. It has been asserted throughout the discussion that there may well be some juvenile offenders for whom the offence itself is the most appropriate or even sole ground for legal intervention. Such cases fall into two broad categories. First those where punishment is seen as the best measure for the child on educative or reformist grounds and second where the public interest requires a punitive disposal as in some instances of arson, for example. The Kilbrandon Report recognised that there might be situations:

"... in which major issues of public interest must necessarily arise ..."

(7)

Here the principles of prevention and deterrence are the main justificatory ground for action. It can be argued that under the first category, punishment may be quite consistent with and even constitutive of the child's welfare and therefore not in conflict with the principles of the hearing system. But it has already been stressed that although there are no theoretical objections to including punishment among the disposals available to a hearing, it does not seem to work in practice. The principles of just punishment are broadly speaking: the principles of the commission of an offence, of proportionality of sanctions and of determinate sentences. These principles are well established in courts and quite alien to children's hearings. In addition, even though it might be possible to incorporate them within the panel system, there would still be a need to remit those cases where punishment was considered to be required in the public interest, irrespective of the child's interest, to another legally constituted tribunal or court, for children's hearings have no remit to deal with such cases. It would be far simpler and less confusing to the subjects of intervention to propose that in any situation where punishment is deemed to be appropriate, the cases be remitted to the courts for adjudication and disposal or discharge. The courts already have a statutory right to remit cases to hearings for advice and/or disposal (Social Work (Scotland) Act III 57(1)), and it would only require a minor amendment to give hearings a similar power to send

7. Kilbrandon Report, paragraph 125.

cases to the court. All the cases listed under Category II in Chapter 4 might have been best dealt with in this manner. It is hard to state this recommendation in more general terms of wider applicability, but perhaps it is worth stating that the Scottish experience suggests that despite the theoretical possibility of a single tribunal or court making decisions both on the basis of needs and of deeds, in practice, it would seem that such a dual role is open to abuse and can be a source of legitimate confusion to those subject to the different disposals. It therefore seems that wherever possible, the roles should be institutionally separated. Wherever an offence is both the ground and basis of legal intervention rather than an indicator of a possible need for intervention, there should be separate proceedings.

III : Separate measures of care and of punishment

The third recommendation is an obvious extension of the second. Measures of punishment and other compulsory measures solely to promote welfare, should wherever possible be quite distinct. It was pointed out in an earlier analogy that children may be sent to bed either when tired or when ill or for punishment and that in the first two instances one might 'sugar the pill' (a legitimate use of medical analogy) by telling a story or having a game for example. However, it is difficult to imagine what form the 'sugar' might take in an institutional context. Granting certain privileges to one group of children to go on outings or extra home-leave would be a constant source of friction and tension between the two groups, by creating 'second class citizens'. In addition where the only wish children have is to 'go home', those under

sentence may still be regarded as the privileged group, so that any 'sugar' will only serve to cause bitterness. In the Scottish context, this means that children should not be sent to List D schools both by hearings on residential supervision orders subject to annual review, and by courts under sentence. This recommendation gains support not only from the theoretical arguments presented here but also from the findings cited in Chapter 3 showing that the backgrounds and histories of "court boys" and "panel boys" in one study, were almost indistinguishable making different disposals for the two groups quite arbitrary:

"... the background of the two sets of boys was very similar, both in terms of family situation and delinquent career".

(3)

In such circumstances, it makes very little sense to use the same institution as both a punitive and a non-punitive disposal. In more general terms, if there is a need, for whatever reason, to impose sentences of any kind on juvenile offenders, then the institutional setting in which such sentences are carried out, or more colloquially in which 'time is spent' must be different from that to which children are committed for indefinite periods on quite different grounds.

This is not a plea for an increase in juvenile penal institutions, there are (at least in the UK) already an alarming number of secure units for young people. The recommendation only points to the need to differentiate sharply between penal sanctions and measures of care. This leaves quite open the question of when and even whether penal sanctions are ever appropriate.

3. As cited in Chapter 3, p.

IV : Written reasons for all decisions

This recommendation relates to the problems that inevitably arise within a system that depends heavily on the discretion of its appointees. It is often asserted that discretionary justice may lapse into arbitrariness where it remains free from any form of check or control. One way of securing controls and checks is to exclude secrecy. It would therefore seem essential that there should be no discretion at all with respect to the giving of reasons for any decision. K.C. Davis asserts:

"Openness is the natural enemy of arbitrariness ..." (9)

At least one way of guaranteeing "openness" is a statutory requirement to state reasons in writing wherever possible. This proposal is in accordance with a recommendation of the Franks Committee that:

"Decisions should be reasoned, as full as possible and made available to the parties in writing ..." (10)

Within the Scottish context, this will involve at least two innovations. First a statutory requirement on reporters to give reasons for their decisions and second a new procedural requirement for hearings to provide written reasons for the family, for any decisions taken. At present some reporters' departments do in fact provide written reasons, whilst hearings are required to give a copy of the written reasons to families on request. The first should no

9. K.C. Davis, Discretionary Justice : A Preliminary Inquiry (Illinois, Chicago, 1976) p.98.

10. Report of the Committee on Administrative Tribunals and Enquiries (Franks Committee 1957) Cmnd.218, HMSO 42.

longer be a discretionary matter, whilst the second should be made obligatory by statute. The implications for other systems are clear: there should be no discretion at all with respect to the giving of reasons. In a context where disposals are necessarily 'individualised', the giving of reasons is an essential condition of just decision-making.

V : Availability of all reports to families

This is a further extension of the points raised under IV above.

It has already been noted that the Hearing Rules state:

"The chairman shall inform the child and his parent of the substance of any reports, documents and information ... if it appears to him that this is material to the manner in which the case of the child should be disposed of and that its disclosure would not be detrimental to the interests of the child".

(11)

In practice this leaves far too much discretion to hearing members. The families concerned should automatically be given a copy of the social background report and the school reports which provide the grounds for the majority of the decisions. There may be a need to establish an area of discretion with respect to children, especially younger ones, regarding this recommendation but parents should see the reports as of right. This will lead to the exclusion of much hearsay evidence which is regarded here as entirely beneficial. Unsubstantiated rumours and guesses should not form the basis of any legal decision. The extension of this proposal to other systems is

11. Children's Hearings (Scotland) Rules (Statutory Instruments 1971, No. 492 (S.60)), 17, 3.

quite plain: families should have automatic access to all the material that forms the grounds of any decisions made.* Once again this is viewed as constitutive of the "openness" that is a crucial safeguard against arbitrary decision-making.

VI : Statements of aims, objectives and content of supervision

It is only in very rare cases that a hearing will make an explicit statement concerning the precise nature of any supervision imposed. The Social Work (Scotland) Act confers powers to impose special conditions as follows: a supervision requirement may require the child:

"to submit to supervision in accordance with such conditions as they (the hearing members) may impose ..."

(12)

But in practice the form any supervision requirement takes is usually regarded as the domain of the professionals in the system. This

12. Social Work (Scotland) Act 1968, III, 44(1)(a).

Footnote: *It is interesting to speculate whether the great reluctance on the part of both social workers and teachers to let families read the reports submitted to hearings, stems from a further misapplication of a medical analogy (in addition to those indicated in the Introduction). Doctors' records are generally regarded as notes for the profession, either as aide-memoires for the writer or to provide information for colleagues who may meet the patients at a future date. They might contain speculation at the significance of certain symptoms, as well as documentation of any prescribed course of treatment. If doctors were required to show patients such records, as they might be in some settings, their content would presumably change quite dramatically. In a setting where the aim is to reach a decision with the family, rather than to do something to a patient, withholding information can only have damaging effects.

appears to be another area where discretion should be subject to checks and controls if it is not to give way to arbitrariness. This is important both from the child's and the family's point of view and from that of the supervisor. The point has been well stated by T.D. Campbell:

"Where there are no recognised standards of social work care for children in trouble then the rights of children whose cases are disposed of by a children's hearing can get no practical foothold. Thus we need to know what is the minimum that can be expected of a social work department where a child is under supervision ... partly in order to make rational decisions about whether or not to put a child under compulsory care ... partly in order to protect social workers from criticisms ... (and) to give meaning to the idea of children's rights. For only where the child ... can refer to such recognised standards to formulate a claim that the duties of a social work department have not been carried out, can we say that the child has effective rights within the system ..."

(13)

A general statement outlining the aim and objectives of a specific supervision order is a necessary condition of assessing the effectiveness of that order and hence in deciding whether or not to continue it. Wherever children are subjected to legal intervention 'for their own good', it is necessary to make explicit which 'good' or which interest or interests are to be furthered, so that the success or failure of any prescribed course of action can be evaluated by both supervisors and supervisees. This recommendation is in line with recent suggestions that social work

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13. T.D. Campbell, 'Discretion and Rights Within the Children's Hearing System' in D. Houston (ed) Social Work in the Children's Hearing System (Glasgow/Edinburgh Joint Committee for Further and Advanced Training 1975) pp.25-26.

intervention should be target-oriented if it is to achieve change.

It has been pointed out that social work and social services departments:

"... try to take on everything with the inevitable result that they take on nothing effectively ... in order to achieve change they must work towards a clearly defined target and very rigorously maintain a narrow, specific focus on their work".

(14)

This observation holds for whoever takes on a compulsory, supervisory role: social workers, teachers, foster parents, youth workers or residential staff. It is therefore relevant to any juvenile jurisdiction. The grounds and purposes of statutory intervention must be clearly defined, so that they can be challenged and where necessary discontinued or changed.

VII : Representatives for children

This recommendation is made with great uncertainty as to how it might best be put into effect. However, there is no hesitation at all in recommending that representatives should be made available for children coming before any court, tribunal or hearing. Parents and children have the right to bring a representative under paragraph 11 of the Hearing Rules, but this right is rarely exercised and in the terminology of Chapter 2 it is a right of non-interference, rather than a right of performance. The recommendation for representation is much stronger and in the Scottish context involves at very least

14. D.H. Thorpe, D. Smith, C.J. Green and J.H. Paley, Out of Care : The Community Support of Juvenile Offenders (Allen and Unwin, London, 1980) p.39.

the implementation of Section 66 of the Children Act 1975 which makes provision for the appointment of a person to represent the child's interests:

"... because there is or may be a conflict, on any matter relevant to the proceedings between the interests of the child and those of his parent ..." (15)

This section of the Act has never been implemented although there have recently been extensive discussions about its implementation. The question which immediately arises is that of identifying suitable individuals to act as child representatives. The legal and social work professions have a claim, so too do teachers and possibly even retired panel members. These problems are not peculiar to Scotland but will occur in a similar form in any juvenile jurisdiction. The disadvantages of competing claims will be discussed briefly. The arguments against employing lawyers focus on two main areas. Firstly it is often pointed out that lawyers simply do not have the relevant training to work in a setting which attempts to achieve co-operation between the various parties. Lawyers do not usually operate in a context which has no winners and losers. Where welfare agencies are mistaken in their appraisals and actions, a lawyer may well help to combat them but as was recently pointed out:

"Where there really is some deep psychological or behavioural problem, it has to be recognised that the intervention of a lawyer might make things worse. Situations can slide into a position where lawyers and client come perilously close to collusion in obscuring the vision of the welfare agencies. There may be no option to this and the benefits may well outweigh the disadvantages but it is nevertheless a consideration that must be borne in mind". (16)

15. Children Act 1975, 66 (i).

16. R. Smith, 'Children and their Lawyers in the Juvenile Court' in M. King (ed), Childhood, Welfare and Justice (Batsford, London, 1981) p.42.

The second area which gives rise to reservations as to the appropriateness of legal representatives, arises from observations of what actually happens when lawyers are present. Stewart Asquith writes:

"In all the cases where a child was represented legally, the child himself made no actual contribution to the discussion, the greater part of which, in all but one of the cases, was accounted for by the participation of the lawyer ..."

(17)

This is exactly the converse of what hearings and indeed any system of individualised justice should strive to achieve. It may well be that any adult representative would have a similarly inhibiting effect on children, in which case the argument for representation as a means of more adequately securing the interests of children, would be severely weakened. However, the following observation would still be valid:

"It is almost as if everyone involved in the system which may ultimately interfere with liberty is trained for their role, except for the parents and children".

(18)

There are situations where children clearly do need representatives. These include cases where parents refuse to attend hearings, where parental rights have been assumed by the local authority and in some cases of neglect and abuse. It is also often hard for families to challenge hearing members effectively, for although the panel is

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17. Stewart Asquith, Children and Justice (Edinburgh 1983), pp.199-200.
18. Joan Cooper, Children's Hearings : More or Less? Unpublished conference paper (1983) p.5.

composed of lay members, in the context of a hearing, members are often presented and present themselves as 'experts'. Social workers are also possible candidates for representatives. They do indeed have the relevant training but it is hard to imagine how they might be regarded as an independent voice on behalf of the children. Social workers are already required to attend hearings and often see themselves as acting for the child. However in cases where they seem to be acting in the interests of the Social Work Department for example, or where a child feels unfairly treated by a supervisor, it is not clear how a second social worker might resolve the tensions. The appearance of collusion would be overwhelming. Teachers might provide the answer in some cases, but once again in the many instances where problems are school-based, the appearance of collusion might be entirely counterproductive. A proposal to appoint former panel members has some attractions, but the reversal of roles might be very difficult to achieve in practice. It might even be possible to train some young adults who had come through the system and regarded the experience as valuable: the Paul Camerons of the world. An immediate objection is that such "successes" are relatively few and the number who might be willing and able to take on such a task, even fewer. The solution might be to have a panel of people (quite distinct from the existing panels) prepared to act in this capacity and trained for it, who would be available on request and would operate quite independently of the hearings, perhaps in a Children's Advice Centre. Children about to participate in legal proceedings should be advised beforehand that they could discuss issues in total confidence and that anything they said would only be reported on their instructions.

The majority of cases might well not require such measures, but situations where children perhaps want to leave home might well come to light more easily than at present under such a procedure. Complaints against individual social workers could perhaps also be voiced more effectively. In any juvenile jurisdiction, the availability of child representatives can be seen as an important counterbalance to the weight that children and families sometimes find pitted against them.

VIII : Uniform application of all procedural regulations

The final recommendation comes in the form of a 'package' or 'cluster' of proposals all related to a single aim: the strict enforcement of procedural justice within any system of juvenile justice. The exact form in which this might be implemented will depend heavily on the statutory framework and setting within which decisions are taken. The discussion will once again relate to the Scottish system, but the wider implications are clear. The findings of Martin, Fox and Murray with respect to procedural laxity at hearings have already been cited (p. 229). It was suggested that severe disregard of the procedural requirements could result in substantive injustice in some cases. Remedies for many of the deficiencies observed in the study of 301 hearings have already been proposed in the previous recommendations. By eliminating certain areas of discretion, implementation of the fourth and fifth recommendations would bring about an immediate improvement in at least two respects. The right to receive written reasons was indicated in only 44% of the observed hearings and the reasons were stated explicitly in only 58%. The

social background report was referred to in 35% of the cases, the school report in 60%. Since under the recommendations listed all families would receive copies of all reports as well as the written reasons, such omissions could no longer occur. But there would still be considerable scope for infringing the rules, in particular those relating to the establishment of the grounds of referral at the start of a hearing. Moreover since a mere 6% of over 900 panel members questioned in the "Out of Court" study thought that the observance of procedural requirements was an important aspect of the hearing, there is clearly a need for some kind of reform. John Grant writes:

"Panel members think of the procedural rules as something alien to the system of juvenile justice they are operating, as an undue formality, as an impediment to their work ... For the future they ought to be made aware, in the clearest terms, that procedural rules are an integral part of the children's hearing system ... The basic responsibility for ensuring compliance with the law in the hearing is placed squarely on the chairman ... The belief that all panel members are able to chair a hearing flies in the face of reality".

(19)

It is proposed that certain panel members should be selected to become permanent chairmen. This is one possible solution and there may be others, but they all point to the need for specific training prior to taking the chair. This is already provided very conscientiously in some areas. But at the other extreme, there are

19. John Grant 'The Role of the Haring: Procedural Aspects' in F.M. Martin and Kathleen Murray (eds) The Scottish Juvenile Justice System (Scottish Academic Press, 1982) pp.65-66.

stories (perhaps apocryphal) concerning areas where the last panel member to enter the room automatically chairs the session. Such practices may serve as a source of amusement for those with fertile imaginations but have little else to recommend them. This brings the discussion to another aspect of what can be broadly termed "procedural fairness". It seems inevitable that in a system of individualised justice, there will be considerable regional variations with respect to disposals that appear to relate to essentially similar cases. Even in an ideal system, resources cannot be equally accessible to all those who may need to use them. Residential schools, for example, will not always be within a distance that permits weekend visits home and this may be a factor in determining whether or not to place a particular child there. Substantive justice in this area does not necessarily seem to require the elimination of regional differences. Procedural justice on the other hand, seems to be quite inconsistent with regional variations. At present, there is little uniformity of practice with respect to who chairs hearings or how they are conducted. Discretion in this area can only serve to detract from, rather than contribute to, the course of justice. Any policies implemented to overcome the failures highlighted by the research findings should be implemented nationally and not regionally. This leaves open the exact form that such policies might take. Here it need only be stressed that even in a welfare-based system there is a need for strict adherence to the rules which form the framework within which discretionary decisions are made. It is primarily because of the absence of such a rigorous framework in certain contexts, that the critics cited throughout this thesis have insisted on the inevitability

of a conflict between welfare and justice, particularly with respect to legal intervention in the lives of children. The aim of the thesis has been to argue that the conflict is rather between two competing theories of justice and that at least with respect to children, it is the ideals of welfare within a legally constituted system, that offer the most coherent set of principles and policies for achieving justice.

CONCLUSION

The practical implications have been presented primarily as a final 'testing' of the conclusions of the foregoing chapters, with those conclusions assuming the status of "provisional fixed points".

There could be all kinds of objections on the part of policy-makers to the eight recommendations discussed above. There are financial considerations, particularly with reference to the provision of representatives. The first recommendation (for the abolition of offence referrals to hearings) could be politically unacceptable and so on. But from the point of view of the normative theory presented here, they are regarded as unexceptional. The theoretical arguments have shown throughout that legal intervention in the lives of children is and ought to be on the basis of both interests or needs and desert or deeds. The most crucial difference between the competing theories of juvenile justice lies in their radically different approaches to the problem of accommodating the two sets of criteria. The rhetoric of the "justice" view states that legal intervention on the basis of needs should at all times be quite distinct from that on the basis of deeds, even though the same children may sometimes be subject to both types

of intervention. By contrast, the rhetoric of the "welfare" view subsumes deeds under needs and calls wherever possible for one type of proceeding for all juveniles who may be subject to legal intervention. The first view is regarded as incoherent. In recognising the legitimacy of legal action on the basis of interests and needs, it implicitly acknowledges that there are relevant differences between children and adults, which can justify such intervention on behalf of the former and not of the latter. However, in articulating principles for intervention on the basis of deeds, these differences suddenly appear to be largely irrelevant. The principles of proportionate, determinate sentencing are to apply to children almost exactly as they apply to adults. The fact that children can be (and are) punished in extra-legal contexts is totally ignored. The interests freely recognised in the case of the abused and neglected are no longer to be the paramount consideration. An offence can render such interests at least partially forfeitable. Such an extreme position is defensible, if it is defensible at all, only with respect to the small minority of young offenders whose actions pose a genuine threat to the public interest. In all other cases the "welfare" view seems to offer more coherent and consistent guidelines for action in respect of children. But reality is far more complex than the rhetoric would seem to indicate.

The "welfare" view allows "deeds" to slip in by the back door and hence exposes itself to valid criticisms. Once it is recognised that in certain situations needs or interests may include action on the basis of deeds, the relevance of determinate, proportionate disposals cannot be denied without a serious contravention of the principles of

formal justice. Moreover since the very same factors which are regarded as indicative of a need for increased intervention on the criterion of interests, are often those presented as evidence in mitigation and hence a need for less intervention, where disposals are to be on the basis of deeds, it is essential to state openly from the outset which set of criteria are regarded as relevant in any decision-making process. It is in failing to make the reasoning process explicit and in allowing it to move, for example, from premises concerning alleged offences, to disposals related to quite different criteria, that injustices occur. Implementation of the recommendations is seen as the means of avoiding such pitfalls. However, these problems are far less significant in the pursuit of justice for juveniles, than the complexities encountered in actual reasoning about interests; complexities which remain unrecognised in much of the literature. A recent analysis of interests states:

"Every assessment of real interests is mediated through the way of life of those making the assessment, and as a result such judgements promise to remain controversial to some degree ..."

(20)

Reasoning about interests is necessarily open to dispute, for as shown in Chapter 3, the concept of interest is partially want-regarding and partially ideal-regarding. However, the contestable nature of any disposals on the basis of interests, does not render them arbitrary as the critics claim, it rather underlines the

20. Wm. E. Connolly, The Terms of Political Discourse (Heath and Co., Boston, 1974) p.73.

indispensable requirement of complete openness, of making explicit the recognised values as well as the factual basis of any decisions taken. Once again, implementation of the recommendations would be a way of meeting this requirement. Here, and not in any return to legalism, lies the possibility of achieving justice for children.

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