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Judicial Interpretation of the Scottish Juvenile Justice System: Fostering or Frustrating the Welfare Model?

I. INTRODUCTION

In 1961 the Secretary of State for Scotland¹ appointed the Honorable Lord Kilbrandon² to chair a committee³ to evaluate the powers and procedures of the Scottish courts⁴ treating juvenile delinquents⁵ and juveniles in need of care or protection.⁶ At the time of the Committee's formation, juvenile crime in Scotland

1. The Secretary of State for Scotland, a government minister, maintains various administrative responsibilities for Scottish affairs. Among the Secretary's duties are the administration of health, education, housing, roads, and the courts. Traditionally, the Secretary of State is always a member of the House of Commons. F.M. MARTIN, S.J. FOX & K. MURRAY, *CHILDREN OUT OF COURT* 16 n.4 (1981) [hereinafter cited as *CHILDREN OUT OF COURT*].

2. Charles James Dalrymple Shaw, Baron of Kilbrandon. Lord Kilbrandon, a noted Scottish advocate, served as Dean of the Faculty of Advocates at Edinburg University (1957), as a sheriff of the Sheriff Court (1954-57), and as Chair of the Standing Consultative Council on Youth Service in Scotland (1960-68). Lord Kilbrandon was a member of the College of Justice, the Scottish Law Commission, the Court of Session, and the House of Lords. WHO'S WHO: AN ANNUAL BIOGRAPHICAL DICTIONARY 1246 (135th ed. 1983-84).

3. In addition to Lord Kilbrandon, the committee members included two judges of the Sheriff Court, three magistrates with experience in the juvenile courts, a juvenile court clerk, a professor of law, a child psychiatrist, a secondary school headmaster, an approved school manager, and a senior county chief constable. Kilbrandon, *Children in Trouble*, 6 BRIT. J. CRIMINOLOGY, DELINQ. AND DEVIANT SOC. BEHAVIOR 112, 113-14 (1966). For a definition of "approved school", see *infra* note 208.

4. Although Parliament is the sole legislative body for the United Kingdom, Scotland maintains its own court system, sharing with the English system only the House of Lords, the highest level of civil appellate review in the United Kingdom. *CHILDREN OUT OF COURT*, *supra* note 1, at 1. The High Court of Justiciary is the highest Scottish Criminal Court and has both original and appellate jurisdiction. *Id.* at 16 n.8. When hearing civil matters, judges of the High Court of Justiciary sit as the Court of Session. *Id.*

Below the High Court of Justiciary and the Court of Session are the Sheriff Courts, which deal with the majority of both civil and criminal cases in Scotland. *Id.* A sheriff, an experienced legal practitioner with a permanent Crown appointment, presides over the Sheriff Court. *Id.*

Prior to 1975, the Burgh Courts, or Police Courts, dealt with minor offenses and were presided over by lay magistrates who were generally senior officials of the local authorities. *Id.* at 16 nn.8-9. In 1975, when the Scottish local governments were reorganized into regional authorities, these courts were replaced by new District Courts. *Id.* The equivalent of the Burgh Courts in rural Scotland were the Justice of the Peace (J.P.) Courts. Fox, *Juvenile Justice Reform: Innovations in Scotland*, 12 AM. CRIM. L. REV. 61, 63 (1974).

5. The Kilbrandon Committee never specifically defined the term "delinquent," but used it generally to refer to children who have deficiencies in their upbringing. *CHILDREN OUT OF COURT*, *supra* note 1, at 4.

6. In general, children in need of care or protection are children who lack fit guardianship; who have been abused, neglected, or victimized; who are beyond control; or who are "exposed to moral danger." See Children and Young Persons (Scotland) Act, 1937, 1 Geo. 6, ch. 37, § 65. See also REPORT OF THE

had been increasing at an accelerated rate,⁷ and the then-existing juvenile court system was unable to handle the heavy caseload that resulted from this increase.⁸

The Kilbrandon Committee studied both the structure of several juvenile justice systems and possible remedies for juvenile delinquency.⁹ The Committee concluded that delinquency originated in the home during the child-rearing process,¹⁰ and that an effective remedy for delinquency was not punishment but rather social treatment.¹¹ It further concluded that social treatment should not be administered through the juvenile court system, since the court system is geared primarily to fact-finding and the administration of punishment.¹² The Committee recommended that while the fact-finding power should remain in the Scottish courts, Parliament should create a separate forum to administer treatment to both juvenile offenders and juveniles in need of care or protection.¹³ Finally, the Committee realized that cooperation of the child's family was essential to effective treatment,¹⁴ and accordingly, it expressed concern that the new system appear just from the public's perspective.¹⁵

The Kilbrandon Committee published its report in April 1964.¹⁶ Its recommendations for reform precipitated the publication of a White Paper¹⁷ and the subsequent passage of a parliamentary act¹⁸ creating the Children's Hearings System as a replacement for the ailing juvenile court system.¹⁹ The Secretary of State issued the Children's Hearings (Scotland) Rules,²⁰ which, together with the provisions of the Act, defined the powers, duties, responsibilities, and procedures of the system.²¹ The Children's Hearings System became effective in April 1971²² with the passage of the Sheriff Court Procedure Rules.²³

COMMITTEE ON CHILDREN AND YOUNG PERSONS (SCOTLAND), CMND. NO. 2306, ¶ 8 (1964) [hereinafter cited as KILBRANDON REPORT].

7. Grant, *The Children's Hearing System in Scotland: Its Strengths and Weaknesses*, 10 IRISH JURIST 24, 25 (1975).

8. Fox, *supra* note 4, at 64.

9. KILBRANDON REPORT, *supra* note 6, ¶¶ 2-3.

10. *Id.* ¶¶ 15, 87.

11. *See id.* ¶¶ 12-15.

12. *Id.* ¶¶ 52, 71.

13. *See id.* ¶ 72.

14. *Id.* ¶ 17.

15. Fox, *supra* note 4, at 67-68.

16. KILBRANDON REPORT, *supra* note 6.

17. SOCIAL WORK AND THE COMMUNITY, CMND. NO. 3065 (1966).

18. Social Work (Scotland) Act 1968, ch.49 [hereinafter cited as Act].

19. Bruce, *Historical Background* in THE SCOTTISH JUVENILE JUSTICE SYSTEM 3, 8-12 (F.M. Martin & K. Murray eds. 1982).

20. Children's Hearings (Scotland) Rules 1971, STAT. INST. 1971/492.

21. Bruce, *supra* note 19, at 12.

22. Murray, *Structure and Operations* in THE SCOTTISH JUVENILE JUSTICE SYSTEM 13, 13 (F.M. Martin & K. Murray eds. 1982); Grant, *supra* note 7, at 24.

23. Act of Sederunt (Social Work) (Sheriff Court Procedure Rules), STAT. INST. 1971/92 [hereinafter cited as Sheriff Court Procedure Rules].

The Children's Hearings System centers around the reporter,²⁴ who receives referrals and initiates contact with the family.²⁵ The reporter decides whether to bring the parents and child before a children's hearing, a three-person lay panel composed of members of the local community.²⁶ If the family comes before a hearing, the hearing members and the family discuss the facts of the child's situation,²⁷ and the hearing decides the appropriate treatment.²⁸ If the case involves disputed facts, the hearing will direct the reporter to take the case before the sheriff for a finding of fact before the hearing considers treatment.²⁹ As a forum for administering treatment, a children's hearing is not empowered to decide questions of fact.³⁰

Since the system began to operate, its effectiveness has been evaluated ideologically,³¹ empirically,³² and comparatively.³³ Judicial evaluation, however, was not immediately forthcoming because, under the new system, only a handful of juvenile cases reached the appellate court level each year.³⁴ Of the cases that have reached the Court of Session in the fourteen-year life of the system, most have concerned questions of procedure.³⁵ The Court of Session, in its attempt to standardize procedure throughout the hearings system, frequently considered questions in the context of the foundations of the Kilbrandon Committee's treatment model.³⁶ Despite such consideration, the Court of Session's opinions have sometimes fostered, yet sometimes frustrated, the treatment model of

24. Finlayson, *The Reporter* in CHILDREN'S HEARINGS 48, 48 (F.M. Martin & K. Murray eds. 1976).

25. *See id.* at 48-49.

26. *Id.* at 49. The term "hearing" has a dual meaning in the context of the Scottish system. It refers to a group of three lay persons who meet with the family, reporter, and social worker to discuss the case. It also refers to the actual meeting at which the case is discussed and evaluated. Murray, *supra* note 22, at 15 n.*.

In its report, the Kilbrandon Committee used the term "panel" to refer to the three lay persons, KILBRANDON REPORT, *supra* note 6, ¶ 74, but in the present hearings system "panel" refers to the pool of specially trained lay persons whose members conduct the hearings. *See infra* notes 154-69 and accompanying text.

27. Fox, *supra* note 4, at 87-88.

28. Act, *supra* note 18, §§ 43, 44. For a discussion of available treatment alternatives *see infra* notes 205-14 and accompanying text.

29. Act, *supra* note 18, § 42(2)(c).

30. *See id.*

31. *See generally* S. ASQUITH, CHILDREN AND JUSTICE: DECISION-MAKING IN CHILDREN'S HEARINGS AND JUVENILE COURTS (1983); May, *Rhetoric and Reality: The Consequences of Unacknowledged Ambiguity in the Children's Panel System*, 17 BRIT. J. CRIMINOLOGY 209 (1977); MORRIS, *Scottish Juvenile Justice: A Critique in CRIME, CRIMINOLOGY AND PUBLIC POLICY* 347 (R. Hood ed. 1974).

32. *See generally* S. ASQUITH, *supra* note 31; CHILDREN OUT OF COURT, *supra* note 1.

33. *See generally* S. ASQUITH, *supra* note 31; Rink, *Juvenile Status Offenders: A Comparative Analysis*, 8 HARV. J. L. & PUB. POL'Y. 151 (1982) (comparison of the handling of juvenile status offenders in Scotland and the Commonwealth of Massachusetts).

34. Forshaw, *Views From the Bridges*, 1982 SCOTS LAW TIMES [S.L.T.] (News) 193, 200.

35. *E.g.*, J.F. and Others v. McGregor, 1981 S.L.T. 334; McGregor v. D., 1977 S.L.T. 182; Kennedy v. B. and Another, 1973 S.L.T. 38; H. v. McGregor, 1973 S.L.T. 110.

36. *See, e.g.*, McGregor v. D., 1977 S.L.T. at 185-86; Kennedy v. B., 1973 S.L.T. 40; H. v. McGregor, 1973 S.L.T. 110.

juvenile justice. Because of the occasional adverse effects on the hearings system, Parliament has acted in at least one instance³⁷ to reduce the adverse consequences of the Court of Session's opinions while preserving the positive consequences which foster justice within the treatment model.

This Comment focuses on the effect of some of the major Scottish court opinions handed down over the fourteen years since the implementation of the Children's Hearings System. The Comment first discusses the need for reform under the former juvenile court system. The Kilbrandon Committee's suggestions for reform, as well as the procedural system actually implemented to accomplish this reform, will be examined. Next, the Comment examines the circumstances and opinions of some of the major court cases concerning procedural issues within the Children's Hearing System. The Comment then analyzes whether the holdings in these cases have fostered or frustrated the reform envisioned by the Kilbrandon Committee.

II. BACKGROUND: THE JUVENILE COURT SYSTEM PRIOR TO 1971

Prior to 1971, Scotland maintained a traditional court system to handle juvenile offenses.³⁸ The High Court of Justiciary³⁹ presided over serious crimes involving children, including murder, treason, rape, and incest; a network of lower courts⁴⁰ heard less serious juvenile cases.⁴¹ Despite provisions in the Children and Young Persons (Scotland) Act empowering the Secretary of State to establish specialized juvenile courts,⁴² the Secretary created such courts in only four areas of Scotland.⁴³

By 1962, the Sheriff Courts,⁴⁴ sitting as juvenile courts, heard approximately 32 percent of the juvenile cases in Scotland.⁴⁵ The Burgh Courts⁴⁶ heard up to 45 percent of the juvenile cases,⁴⁷ and the Justice of the Peace Courts⁴⁸ heard about 7 percent.⁴⁹ The Justice of the Peace juvenile courts⁵⁰ heard only 16 percent of juvenile cases brought into the court system.⁵¹

37. See Health and Social Services and Social Security Adjudications Act 1983, ch. 41, ¶ 8, sched. 2.

38. Grant, *supra* note 7, at 24; Rink, *supra* note 33, at 185.

39. See *supra* note 4.

40. See *supra* note 4.

41. Fox, *supra* note 4, at 63.

42. Children and Young Persons (Scotland) Act, 1937, 1 Edw. 8 & 1 Geo. 6, ch. 37, § 24. These juvenile courts were special Justice of the Peace courts with jurisdiction to handle juvenile cases. *Id.*

43. The four areas having juvenile courts were Ayrshire, Renfrewshire, Fife, and the city of Aberdeen. KILBRANDON REPORT, *supra* note 6, ¶ 43.

44. See *supra* note 4.

45. KILBRANDON REPORT, *supra* note 6, ¶ 45.

46. See *supra* note 4.

47. KILBRANDON REPORT, *supra* note 6, ¶ 45.

48. See *supra* note 4.

49. KILBRANDON REPORT, *supra* note 6, ¶ 45.

50. See *supra* note 42.

51. KILBRANDON REPORT, *supra* note 6, ¶ 45.

Juvenile crime was increasing at a rate unacceptable to the public,⁵² and the existing system was poorly equipped to handle the problem.⁵³ Because the Secretary of State had established very few specialized juvenile courts,⁵⁴ juvenile cases were being channeled into the Sheriff Courts rather than into other summary courts.⁵⁵ This trend threatened to clog the Sheriff Courts with caseloads that they were ill-equipped to handle.⁵⁶ A change in the system was necessary to accommodate this increasing volume of cases in the Sheriff Courts,⁵⁷ and the Kilbrandon Committee was appointed to investigate possible solutions.⁵⁸

III. KILBRANDON REPORT: THE ROOTS OF THE SCOTTISH JUVENILE JUSTICE SYSTEM

Soon after its formation in May 1961, the Kilbrandon Committee began its task of evaluating the Scottish juvenile justice system. It initially gathered both oral and written testimony on the subject from various Scottish social and legal organizations.⁵⁹ In addition, Committee members observed procedures in juvenile courts and residential institutions in both Scotland and England, and gathered information about Scandinavian welfare boards.⁶⁰ As a result of its findings, the Committee proposed not merely a modification of the existing juvenile court arrangements, but a fundamental change in the organization and administration of Scottish juvenile justice.⁶¹

According to the Committee, juvenile court systems, as extensions of the criminal law, are geared primarily to the principles of criminal procedure.⁶² A criminal court's primary functions are to determine the guilt or innocence of the accused and, when it finds the accused guilty, to administer the appropriate punishment.⁶³ The system attributes a high degree of personal responsibility to

52. See, e.g., 764 PARL. DEB. H.C. (5th ser.) 60 (1968) (remarks of Michael Noble, M.P.), cited in Grant, *supra* note 7, at 25 n.6.

53. See Grant, *supra* note 7, at 25.

54. *Id.*

55. Fox, *supra* note 4, at 64.

56. *Id.*

57. *Id.* One expert speculates that if more local authorities had requested the creation of special juvenile courts, the reform that led to the Children's Hearings System would not have been necessary. Grant, *supra* note 7, at 25.

58. See Grant, *supra* note 7, at 24-25.

59. KILBRANDON REPORT, *supra* note 6, ¶ 2.

60. *Id.* ¶ 3. One example of the Scandinavian system is the child welfare board in Sweden. It is empowered to administer treatment to juveniles in the form of probation, warnings to child offenders or guardians, placement in residential homes or boarding schools, or assistance and guidance in finding suitable employment. O. NYQUIST, JUVENILE JUSTICE: A COMPARATIVE STUDY WITH SPECIAL REFERENCE TO THE SWEDISH CHILD WELFARE BOARD AND THE CALIFORNIA JUVENILE COURT SYSTEMS 11 (1960).

61. Fox, *supra* note 4, at 65.

62. KILBRANDON REPORT, *supra* note 6, ¶ 50.

63. *Id.* ¶ 52.

the actor; it assumes a conscious choice between right and wrong, and the actor, by choosing to do the wrong, requires punishment.⁶⁴

A juvenile court, however, is required to consider the welfare of the individual before the court when it administers sentences.⁶⁵ Whereas the criminal adjudication process focuses on personal responsibility for a specific act, welfare considerations are not necessarily linked to personal responsibility and may involve a broad range of factors.⁶⁶ Sentencing in a juvenile court may be punitive in part, but, in consideration of the child's welfare, sentencing should also provide a measure of treatment to prevent a child's further antisocial behavior.⁶⁷

Although juvenile courts do provide mechanisms for both punishment and preventive treatment,⁶⁸ the Committee believed that the two principles conflicted in four ways. First, the crime-responsibility-punishment model utilized by the criminal courts resists preventive action against potential delinquents.⁶⁹ This model imposes criminal liability for a particular act, and it maintains a high standard of proof of guilt because it is concerned with punishment rather than preventive treatment.⁷⁰ The punishment administered by the system carries a stigma in the public eye as an evaluation of a criminal's worth, the worth tested by the high standard of proof.⁷¹ Therefore, any preventive action taken by a juvenile court to aid potential delinquents who have not been convicted of a crime risks labeling them with the stigma of a criminal offender.⁷²

Second, the Committee believed punishment to be a narrow concept that cannot apply beyond the person or persons guilty of committing the criminal act.⁷³ Treatment, however, may be administered not only to the individual offender, but to others whose potentially altered behavior might affect the behavior of the offender.⁷⁴

Third, because the punishment must fit the crime under the crime-responsibility-punishment principle, the Committee felt that ordering punishment might inhibit the court in ordering treatment for the offender.⁷⁵ Treatment under welfare principles, however, need not be directly related to the criminal act,⁷⁶ and may apply to situations beyond the reach of punishment.⁷⁷

64. *Id.* ¶ 51.

65. *Id.* ¶ 50.

66. *Id.* ¶ 55.

67. *Id.* ¶ 52.

68. For example, the Committee acknowledged a recent trend toward sentencing that focuses on educating and reforming the offender. *Id.* ¶ 52.

69. *Id.* ¶ 54(1).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* ¶ 54(2).

74. *Id.*

75. *Id.* ¶ 54(3).

76. As an example of the way in which a criminal court may be bound by the nature of a criminal

Fourth, the Committee recognized that punishment is administered one time, at the court sentencing.⁷⁸ Since the acts that have merited such punishment have been done and cannot be altered, the punishment itself is unalterable.⁷⁹ Treatment measures, on the other hand, offer a flexible approach which may be altered over the course of time in response to the changing circumstances and the changing needs of the individual.⁸⁰ The Committee concluded that it was "inconceivable that a court could ever guarantee to have chosen, at the moment of commencement of its sentence, the exact treatment — to be given perhaps over a period of several years — appropriate to the individual person before it."⁸¹

The Committee also noted that general principles of criminal law have been modified with respect to juveniles.⁸² Perhaps the most important modification is the recognition that, because children differ from adults in their moral and intellectual capacity to distinguish right from wrong, the criminal responsibility of youth should be mitigated.⁸³ Youth limits the degree to which children can be held personally responsible for criminal acts.⁸⁴ A second modification is the recognition that a court may consider all of the circumstances surrounding the juvenile offender, including future events, rather than administer punishment strictly on the basis of the offense.⁸⁵ A third modification demonstrates concern about the motives and causes of juvenile crime, and attempts to eliminate the source of the crime, rather than merely to punish the offender.⁸⁶ Characteristic of the concept of preventive treatment, these three considerations emphasize the need for an institution that can effectively implement preventive treatment to cope with the problem of juvenile crime.⁸⁷

In concluding its observations about juvenile courts, the Committee agreed that the shortcomings of the Scottish system existed because the juvenile courts sought "to combine the characteristics of a court of criminal law with those of a specialised agency for the treatment of juvenile offenders, proceeding on a

offense, and therefore unable to order effective treatment, the Committee described the case in which an offender is before the court for a relatively minor offense, yet the surrounding circumstances show that long-term social treatment would be in the offender's best interest. The court would be unable to impose a long sentence for a minor offense, and may even be required to impose a lighter-than-normal punishment because of the offender's situation. *Id.* ¶ 54(3).

77. *Id.*

78. *Id.* ¶ 54(4).

79. *Id.*

80. *See id.*

81. *Id.*

82. *Id.* ¶ 55.

83. *Id.* ¶ 55(1).

84. *Id.*

85. *Id.* ¶ 55(2).

86. *Id.* ¶ 55(3).

87. *See id.* ¶ 56.

88. *Id.* ¶ 71.

preventive and educational principle.”⁸⁸ The Committee proposed that Parliament abolish the juvenile court system and replace it with a specialized agency that would hold children’s hearings and administer treatment to juveniles.⁸⁹ The agency would not be empowered to make findings of fact, and would administer treatment only in cases where the facts surrounding the child’s situation had already been established.⁹⁰

As the Committee envisioned the procedure, the child and parents would attend an initial hearing which would inquire into the family’s understanding of the facts and allegations in the referral.⁹¹ If the family understood and acknowledged as true the facts in the referral, the hearing would then proceed to consider treatment measures.⁹² If either the parents or the child did not understand or accept the facts as stated, the hearing would refer the case to the sheriff court to determine the facts of the case.⁹³ Upon completion of the fact-finding process, the case would return to the hearing for treatment consideration.⁹⁴

Under this proposed system, the fact-finding forum would remain separate and distinct from the treatment forum.⁹⁵ The hearing could proceed with treatment only if the facts were not disputed, or had been determined by a court of law.⁹⁶ The courts, if necessary, would be involved in the proceedings only to determine the facts or legal issues in question; decisions involving treatment would be left to the hearing.⁹⁷ The Committee recommended that the hearing itself be composed of lay members who had been instructed as to the purpose and procedure of the system.⁹⁸

The proposed system would accommodate both juveniles who had committed offenses and children in need of care or protection, because treatment of both groups depends upon the application of preventive measures, which the hearing is equipped to impose.⁹⁹ The Kilbrandon Committee believed that the problems of both children in need of care and protection and delinquent children could most often be attributed to “shortcomings in the normal ‘bringing-up’ process — in the home, in the family environment, and in the schools.”¹⁰⁰ Since these problems originate from the same source and share common treatment methods,¹⁰¹ the Committee saw the inclusion of the two groups of children within the

89. *Id.* ¶ 73.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* ¶¶ 74, 75.

99. *Id.* ¶¶ 15, 72-79.

100. *Id.* ¶ 87; see also Kilbrandon, *supra* note 3, at 115-16.

101. KILBRANDON REPORT, *supra* note 6, ¶ 15; Kilbrandon, *supra* note 3, at 115-16.

same procedural system as a realistic acceptance of the common source of their problems and as a realistic approach to treating both groups of children.¹⁰²

A final concern of the Kilbrandon Committee was that the proposed system appear to do justice in the eyes of the parents and children whom it purported to serve.¹⁰³ The Committee recognized that the cooperation of both children and their parents was essential to providing effective preventive treatment.¹⁰⁴ Observance of the strict proportionality approach to sentencing¹⁰⁵ may at times lead to unduly severe punishment for juvenile misbehavior.¹⁰⁶ Abidance by this approach also may hold a child responsible for misbehavior learned from the antisocial attitudes of the parents, as well as preclude consideration of the child's best interest.¹⁰⁷ In order to maintain the support and cooperation of those whom it seeks to serve, the hearing system strives to minimize the confusion and misconceptions surrounding the decision-making process so that the decisions appear just from the participants' perspective.¹⁰⁸ Once the participants have

102. KILBRANDON REPORT, *supra* note 6, ¶ 87.

One of the harshest and most frequent criticisms of the Kilbrandon Report arises from its rather simplistic assumption that the roots of juvenile problems lie almost solely with the family and the child rearing process. May, *supra* note 31, at 222-24; Morris, *supra* note 31, at 360-64. Despite its goal of creating a system to eliminate the source of delinquency, the Committee documents neither research on the origin of delinquency nor any attempt to synthesize some of the many criminological theories of juvenile justice. May, *supra* note 31, at 222. Instead, the Committee assumes that the family is at the source of the problem and structures a system that reaches to this perceived source through family participation in the hearing and the treatment measures. *Id.* at 223-24. If, in fact, the family does not cause delinquency, as some theories of criminology suggest, treatment administered by the hearing may be irrelevant, or even counter-productive. *Id.* at 224. For further discussion, see May, *Delinquency Control and the Treatment Model: Some Implications of Recent Legislation*, 2 BRIT. J. CRIMINOLOGY 359 (1971).

The Committee has also received criticism for assuming too readily that juvenile offenders and children in need of care or protection were merely different manifestations of the same underlying problems. Morris, *supra* note 31, at 363. Although both types of problems share some common sources, at least one study has shown that juvenile delinquency is primarily linked to social disorganization, such as overcrowded living conditions and high infant mortality rates, while child mistreatment is frequently linked to family disorganization, such as separated nuclear families and trauma between parents and children. Philip & McCulloch, *Uses of Social Indicators in Psychiatric Epidemiology*, 20 BRIT. J. PREV. SOC. MED. 122 (1966), noted in Morris, *supra* note 31, at 364. In formulating a social institution to penetrate both types of problems, the Kilbrandon Committee's decision to obscure these differences rather than to highlight them seems contrary to its goal of developing an effective remedy for the problems. Given the resources of the hearings system, however, the practical consequences may be immaterial. Morris, *supra* note 31, at 364.

103. Fox, *supra* note 4, at 67-68.

104. KILBRANDON REPORT, *supra* note 6, ¶ 17; Fox, *supra* note 4, at 67.

105. The strict proportionality approach contemplates that the severity of the punishment be determined by the severity of the offense. See KILBRANDON REPORT, *supra* note 6, ¶ 54(3).

106. Fox, *supra* note 4, at 67; see KILBRANDON REPORT, *supra* note 6, ¶ 56.

107. Fox, *supra* note 4, at 67; see KILBRANDON REPORT, *supra* note 6, ¶ 56.

108. Fox, *supra* note 4, at 68.

The Committee realized, however, that eradication of all negative feelings toward the system is not possible because some clients of the system will inevitably see any type of public interference as a punishment. KILBRANDON REPORT, *supra* note 6, ¶ 57. At best, the Committee hoped to "reduc[e] considerably such conflicts in the eyes of the parents, if less frequently in the eyes of the child." *Id.*

gained confidence and trust in the system, they will be more willing to accept the social treatment offered on behalf of the child's welfare.¹⁰⁹

Thus, the Kilbrandon Committee concluded that social treatment, and not punishment, was an effective tool for coping with juvenile delinquency. Because a criminal court is primarily a fact-finding forum that administers punishment based on the facts of the offense, the Committee considered the court system to be an inappropriate institution for administering treatment. Instead, the Committee recommended the separation of the fact-finding forum from the treatment forum, and placed the power to administer treatment to both juvenile offenders and juveniles in need of care or protection within a lay system of children's hearings.

IV. OPERATION OF THE CHILDREN'S HEARINGS SYSTEM

The Kilbrandon Committee submitted its findings and recommendations in 1964.¹¹⁰ In 1966 a White Paper, *Social Work and the Community*, proposed essentially the same system of children's hearings as were originally set forth in the Kilbrandon Report.¹¹¹ In 1968, Parliament passed the Social Work (Scotland) Act.¹¹² Part III of the the Act established the Children's Hearings System.¹¹³ The Secretary of State implemented the Children's Hearings (Scotland) Rules,¹¹⁴ and when the Sheriff Court Procedure Rules¹¹⁵ became effective, the system became operational in 1971.¹¹⁶ Although the Act and rules provided the legal frame-

109. See FOX, *The Handling of Juvenile Delinquents in Scotland: Evaluation of the System by an American Observer*, 18 INT'L. J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 267, 269 (1974).

110. KILBRANDON REPORT, *supra* note 6, ¶ 1.

111. See SOCIAL WORK AND THE COMMUNITY, *supra* note 17, ¶¶ 56-75. The Kilbrandon Report and the White Paper differed slightly in their proposal for social services reorganization. See Morris, *supra* note 31, at 354. Compare KILBRANDON REPORT, *supra* note 6, ¶¶ 232-251 (proposal for formation of a social education department) with SOCIAL WORK AND THE COMMUNITY, *supra* note 17, at ¶¶ 8-11, 18-55 (organization of a new social work department). The White Paper also suggested that panel members be drawn from a wide circle of classes and occupations, so as to bring to the panel views and experiences which were representative of those of the community. May, *supra* note 31, at 213; see SOCIAL WORK AND THE COMMUNITY, *supra* note 17, ¶ 76-81.

Despite the attempt to maintain a diversity among panel members, the result of the selection process has been the appointment of a rather homogeneous group with respect to social and educational backgrounds, and cultural and moral values. See May, *supra* note 31, at 212. For further discussion concerning the problems associated with panel recruitment and selection see May & Smith, *The Appointment of the Aberdeen City Children's Panel: A Comment on the Social Work (Scotland) Act 1968*, 1 BRIT. J. SOC. WORK 7 (1971); Mapstone, *The Selection of the Children's Panel for the County of Fife: A Case Study*, 2 BRIT. J. SOC. WORK 445-69 (1972); A. ROWE, INITIAL SELECTION FOR CHILDREN'S PANELS IN SCOTLAND (1972).

112. See *supra* note 18.

113. Murray, *supra* note 22, at 13.

114. See *supra* note 20.

115. See *supra* note 23.

116. Bruce, *supra* note 19, at 12.

work¹¹⁷ under which the system was to operate, they did not offer guidance as to how the ideals discussed by the Committee were to be achieved in practice.¹¹⁸

The operation of the Children's Hearings System involves the cooperative effort of several agencies and individuals, among them the reporter, the Children's Panel Advisory Committee, the children's panel, and the social work department.¹¹⁹ The system is also heavily dependent on the cooperation of the police in the initial detection and referral of children in need of treatment.¹²⁰

A. *The Reporter*

The central figure in the hearings system is the reporter,¹²¹ who functions as the administrator of the hearings system, its advisor on legal matters, and a decision-maker with considerable discretion as to which cases are brought before a hearing.¹²² The reporter is appointed by the regional authority and usually has several assistants.¹²³ Reporters and assistants have varied backgrounds, but most have some qualifications either in law or in social work.¹²⁴ The reporter is responsible for the intake of cases, as well as for performing other broad administrative duties.¹²⁵ In exercising the discretionary powers of the office, the reporter has license to adjust the system of juvenile justice to suit the needs of the local community.¹²⁶

Under the Act,¹²⁷ a reporter may receive information relating to a child in need of care from any source; most frequently, the police provide such information with respect to children who have committed offenses.¹²⁸ After receiving a referral, the reporter must decide whether the circumstances of the referral fit one of the preconditions laid down by section 32 of the Act¹²⁹ for which interven-

117. An important caveat to the legal framework of the Children's Hearings System is that the Lord Advocate, the Crown's senior law officer for Scotland, retains the right to direct the prosecution of children in the adult criminal courts. In practice, children are prosecuted only for serious crimes against the person. As of 1982, about 1,000 children a year are prosecuted in the criminal courts of Scotland. Murray, *supra* note 22, at 17.

118. Bruce, *supra* note 19, at 12.

119. Murray, *supra* note 22, at 13.

120. *Id.* For a discussion of the role of the police in the Children's Hearings System, see Bett, *The Police in CHILDREN'S HEARINGS*, 43-47 (F.M. Martin & K. Murray eds. 1976).

121. Finlayson, *supra* note 24, at 48; Fox, *supra* note 4, at 75.

122. Fox, *supra* note 4, at 75; Murray, *supra* note 22, at 13.

123. Murray, *supra* note 22, at 13. Each of twelve regional authorities employs a reporter, and almost all reporters have several assistants, bringing the total number of reporters and assistants in Scotland to about 97 as of 1982. *Id.*

124. Fox, *supra* note 4, at 77-78; Murray, *supra* note 22, at 13.

125. Fox, *supra* note 4, at 75-76.

126. Finlayson, *supra* note 24, at 48.

127. Act, *supra* note 18, § 37(1).

128. Finlayson, *supra* note 24, at 48.

129. Section 32 of the Act provides:

(1) A child may be in need of compulsory measures of care within the meaning of this Part of

tion in the child's life is justified.¹³⁰ The reporter must also decide whether, given the circumstances, the child appears to be in need of compulsory measures of care.¹³¹ To assess the circumstances, the reporter may gather information from the police, the social work department, the child's school, or any other person or agency having information on the child's need for care.¹³²

After fully assessing the child's situation, the reporter has three options.¹³³ The reporter may choose to take no further action and subsequently inform the child, the parents, and the persons submitting the referral of that decision.¹³⁴ If some other action appears necessary for the child's benefit, the reporter may request that the family accept voluntary guidance and assistance from the social work department.¹³⁵ Finally, if the family refuses voluntary services, or if more stringent treatment seems necessary, the reporter may bring the child to a children's hearing.¹³⁶ Reporters exercise this third option only when they believe that children need compulsory measures of care and when the investigations of the children's circumstances reveal sufficient evidence to support at least one ground of referral.¹³⁷

this Act if any of the conditions mentioned in the next following subsection is satisfied with respect to him.

- (2) The conditions referred to in subsection (1) of this section are that —
 - (a) he is beyond the control of his parents; or
 - (b) through lack of parental care he is falling into bad associations or is exposed to moral danger; or
 - (c) the lack of care as aforesaid is likely to cause him unnecessary suffering or seriously to impair his health or development; or
 - (d) any of the offenses mentioned in Schedule I to the Criminal Procedure (Scotland) Act, 1975 has been committed in respect of him or in respect of a child who is a member of the same household; or
 - (dd) the child is, or is likely to become, a member of the same household as a person who has committed any of the offenses mentioned in Schedule I to the Criminal Procedure (Scotland) Act, 1975; or
 - (e) the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes the crime of incest has been committed by a member of that household; or
 - (f) he has failed to attend school regularly without reasonable excuse; or
 - (g) he has committed an offence; or
 - (h) he is a child whose case has been referred to a children's hearing in pursuance of Part V of the Act.

Act, *supra* note 18, § 32, as amended Children's Act 1975, ch. 72, sched. III.

Schedule I of the Criminal Procedure (Scotland) Act 1975, ch. 21, mainly concerns sexual offenses and offenses constituting cruelty and abuse of children. Part V of the Act concerns children moving to Scotland from another part of the United Kingdom who have been referred to a reporter by an authority from the area in which the child previously resided.

130. Murray, *supra* note 22, at 14.

131. *Id.* For a definition of compulsory measure of care see *supra* note 129.

132. Murray, *supra* note 22, at 14.

133. *Id.*; Kelly, *Children's Hearings: The Handling of Juvenile Delinquents in Scotland*, 18 INT'L J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 260, 261 (1974).

134. Act, *supra* note 18, § 39(1).

135. Act, *supra* note 18, § 39(2); Kelly, *supra* note 133, at 261; Murray, *supra* note 22, at 14.

136. Act, *supra* note 18, § 39(3); Kelly, *supra* note 133, at 261; Murray, *supra* note 22, at 14.

137. Kelly, *supra* note 133, at 261-62; Murray, *supra* note 22, at 14.

A reporter who has decided to refer a child to a children's hearing must make arrangements with the local authority,¹³⁸ the panel chair, and the social work department (which must provide a social background report for use at the hearing).¹³⁹ At least seven days before the hearing, the reporter must send the child and parents written notice of the time, date, and place of the hearing, along with a written statement of the grounds of referral.¹⁴⁰ At least three days prior to the hearing, the reporter must make available to the members of the hearing the relevant documents, including the grounds for the referral and the social background report.¹⁴¹ Hearing members must return all documents to the reporter at the conclusion of the hearing.¹⁴²

In addition to making the arrangements, the reporter must attend the hearing.¹⁴³ The reporter is responsible for recording the minutes of the proceedings at the hearing and for advising hearing members on legal or legally-related matters that may arise during the proceedings.¹⁴⁴

The reporter has the further responsibility to appear in court.¹⁴⁵ The hearing may direct the reporter to present evidence to the court in a case with disputed facts.¹⁴⁶ If the family decides to appeal from a final decision of the hearing, the reporter must supply the court with all relevant reports and documents.¹⁴⁷ The reporter acts as the respondent to the family's appeal.¹⁴⁸

Finally, the reporter performs a number of functions not specified by the Act but necessary to the efficient operation of the Children's Hearing System.¹⁴⁹ The most important of these functions is the maintenance of open communication between the reporter's office and the social work department, panel members, the police, schools, voluntary agencies, and other offices with which reporters work closely.¹⁵⁰ Open communication ensures that these offices continue to understand and aid the workings of the system.¹⁵¹

In sum, the reporter, the central figure of the Children's Hearings System, is responsible for the system's initial involvement in all cases. The reporter acts as a fact-gatherer, decision-maker, organizer, recorder, and legal advisor. In addition, the reporter is responsible for the continuous maintenance of the system through communication with associated agencies.

138. Act, *supra* note 18, § 34(3).

139. Act, *supra* note 18, § 39(4); Murray, *supra* note 22, at 14.

140. Children's Hearings (Scotland) Rules, *supra* note 20, rules 7, 8, 14, 15, 27.

141. *Id.* rule 6(1).

142. *Id.* rule 6(4); Murray, *supra* note 22, at 15.

143. Finlayson, *supra* note 24, at 49.

144. *Id.*

145. *Id.*

146. *Id.* at 50.

147. *Id.*

148. *Id.*

149. *Id.* at 55-56.

150. *Id.*

151. *Id.*

B. *The Children's Panel*

Each regional authority has at its disposal a children's panel which provides members for a children's hearing.¹⁵² Panel members are nominated by the Children's Panel Advisory Committee (CPAC), a regional committee formed to recruit and select panel members,¹⁵³ and are officially appointed by the Secretary of State.¹⁵⁴ In 1982, about 1700 adults concurrently served as panel members in Scotland; panel sizes ranged from eleven members on the Shetland regional panel to over 900 on the Strathclyde regional panel.¹⁵⁵ Panel membership is a voluntary public service.¹⁵⁶

As originally proposed by the Kilbrandon Committee, panel members are chosen because of their "personal qualities"¹⁵⁷ and not because of their professional credentials.¹⁵⁸ Desirable qualities include a genuine concern for the welfare of children and a moderate attitude toward treatment, free from tendencies toward extreme punitiveness or extreme permissiveness.¹⁵⁹ Because panel selectors look for the same desirable qualities in each panelist that they choose, the selection process suggested by the Committee produces a relatively homogeneous panel.¹⁶⁰

The White Paper that followed the Kilbrandon Report suggested that panels consist of members with diverse characteristics,¹⁶¹ who together form a body representative of the community.¹⁶² Panelists come from a variety of occupational, income, and age groups.¹⁶³ They generally have some experience in dealing with children although the responsible authority provides all formal training necessary for the position.¹⁶⁴ The formal training introduces panelists to the operation of the hearings system, explains the treatment methods and facilities available through the system, and outlines the duties and responsibilities of the panel member.¹⁶⁵ Panelists receive both introductory training before beginning their service term and in-service training throughout their five year terms.¹⁶⁶ The CPAC faces the difficult task of selecting persons with particular

152. Murray, *supra* note 22, at 15.

153. *Id.* For a further discussion of the composition of the CPAC, see *id.*

154. *Id.*

155. *Id.* at 15-16.

156. Murray, *The Children's Panel* in CHILDREN'S HEARINGS 57 (F.M. Martin & K. Murray eds. 1976) [hereinafter cited as *Children's Panel*].

157. KILBRANDON REPORT, *supra* note 6, ¶ 74.

158. *Id.*

159. *Children's Panel*, *supra* note 156, at 59; Murray, *supra* note 22, at 16.

160. May, *supra* note 31, at 213; see *supra* note 111.

161. SOCIAL WORK AND THE COMMUNITY, *supra* note 17, ¶ 76; see *supra* note 111.

162. See *supra* note 111; see May, *supra* note 31, at 213.

163. SOCIAL WORK AND THE COMMUNITY, *supra* note 17, ¶ 76.

164. *Id.* ¶ 80; see Murray, *supra* note 22, at 16.

165. See *Children's Panel*, *supra* note 156, at 64-65.

166. Murray, *supra* note 22, at 16. Most regional authorities appoint panelists to five year terms. A few authorities, however, give appointments for only two or three years. *Id.*

qualities to serve on the children's panels while balancing the panels with panelists from different occupations and age groups.¹⁶⁷

C. Social Work Department

Created by the Act, the social work department¹⁶⁸ works closely with the reporter and panel members within the Children's Hearings System.¹⁶⁹ A social worker is responsible for providing background reports on each child brought before a hearing.¹⁷⁰ In addition, a social worker is present at the hearing¹⁷¹ and may participate in the discussion that precedes the panel's decision.¹⁷² Finally, the social work department administers treatment, whether voluntarily accepted by the family or imposed by a hearing.¹⁷³

D. Proceeding Through the System

Any person reasonably believing that a particular child needs compulsory measures of care may refer the case to a reporter.¹⁷⁴ The Act lists eight conditions, any of which, if satisfied, may indicate that the child is in need of compulsory measures of care.¹⁷⁵ In general, a child who is beyond parental control, truant, suffering from parental neglect, or who has allegedly committed an offense, satisfies the conditions set forth in the Act.¹⁷⁶

After receiving an initial referral and conducting a preliminary investigation, the reporter then assesses the merits of the case to determine whether the child is in need of compulsory measures of care under the Act.¹⁷⁷ If insufficient evidence exists to support the referral, the reporter must dismiss the case.¹⁷⁸ If, however, the evidence in the case satisfies at least one of the preconditions set by the Act, the reporter will then consider the need for care.¹⁷⁹

167. See *supra* note 111.

168. Although the Scottish social work department was an integral part of the Kilbrandon Committee's reform recommendations and the Act, a thorough discussion of its reorganization and operation is beyond the scope of this Comment. For a discussion of the social work department, see Martin, *The Social Work Department* in CHILDREN'S HEARINGS 67-75 (F.M. Martin & K. Murray eds. 1982). See also Smith, *Little Kiddies and Criminal Acts: The Role of Social Work in the Children's Hearings*, 7 BRIT. J. SOC. WORK 4 (1977).

169. Murray, *supra* note 22, at 16.

170. See Act, *supra* note 18, § 39(4); Children's Hearings (Scotland) Rules, *supra* note 20, rule 6(1). For a discussion of the contents and use of the social background reports, see Hiddleston, *The Role of the Hearing: Using Reports* in THE SCOTTISH JUVENILE JUSTICE SYSTEM 32-47 (F.M. Martin & K. Murray eds. 1982).

171. Murray, *supra* note 22, at 21.

172. Grant, *supra* note 7, at 28.

173. Murray, *supra* note 22, at 16.

174. Act, *supra* note 18, § 37(1).

175. Act, *supra* note 18, § 32 (quoted *supra* note 129).

176. See KILBRANDON REPORT, *supra* note 6, ¶ 5.

177. Finlayson, *supra* note 24, at 49.

178. Kelly, *supra* note 133, at 261.

179. See *id.* at 261-62.

In considering the need for care, a reporter has wide discretion as to whether treatment should be administered, whether it should be voluntary or mandatory, and what form it should take.¹⁸⁰ Some referrals may require no more than a family conference with the reporter to remedy the situation.¹⁸¹ In other situations, the reporter may ask the family to accept voluntary treatment from the social work department, usually in the form of advice, guidance, or assistance.¹⁸² If the reporter chooses either of these alternatives, thereby alleviating the conditions suggesting a need for care, the child will not appear before a children's hearing.¹⁸³

Generally, the reporter looks beyond the immediate circumstances of the referral to determine the child's needs within the context of the child's social background.¹⁸⁴ If the reporter believes that the circumstances of the referral are serious enough to require that the child receive compulsory measures of care, the reporter must refer the child to a children's hearing.¹⁸⁵

A children's hearing is comprised of three members of the children's panel for the local authority.¹⁸⁶ The hearing must include at least one male and one female member; one of the three is designated to chair the panel.¹⁸⁷ The reporter and the social worker assigned to the case are also present.¹⁸⁸

Prior to the hearing date, the three hearing members receive and review information containing the child's social background report, the grounds for referral, and the reporter's statement of the reasons that the case is before the panel.¹⁸⁹ When the parents¹⁹⁰ and the child¹⁹¹ appear before the hearing, the chair must begin by explaining the grounds of referral as stated by the reporter.¹⁹² Both parents and child must then decide whether they accept in whole or

180. Finlayson, *supra* note 24, at 49.

181. Sinclair, *Entering the System in THE SCOTTISH JUVENILE JUSTICE SYSTEM* 24, 26 (F.M. Martin & K. Murray eds. 1982).

182. Finlayson, *supra* note 24, at 49; Kelly, *supra* note 133, at 261.

183. Finlayson, *supra* note 24, at 49.

184. Kelly, *supra* note 133, at 261-62; Sinclair, *supra* note 181, at 26-27.

185. Finlayson, *supra* note 24, at 49.

186. Act, *supra* note 18, § 34(1), (2).

187. *Id.* § 34(2).

188. Murray, *supra* note 22, at 15 n.*.

189. Children's Hearings (Scotland) Rules, *supra* note 20, rule 6.

The relevant reports and the course of the proceedings depend on the type of hearing convened. This Comment describes the procedure for a hearing on an initial referral. For a description of other types of hearings, see Murray, *supra* note 22, at 19-21.

190. Parents have both a right and a duty to attend all stages of the hearing, unless the hearing determines that the requirement of attendance is either unreasonable or unnecessary. Parents who fail to attend are subject to a fine. Act, *supra* note 18, § 41.

191. After receiving proper notice, a child is obligated to attend the hearing unless the hearing is satisfied that the child's attendance is unnecessary or would be detrimental to the child's interests. Act, *supra* note 18, § 40(1),(2).

192. Act, *supra* note 18, § 42(1).

in part the grounds of referral, as put forth by the reporter, as an accurate description of the situation.¹⁹³

If the child and the parents accept the grounds of referral as true, the hearing may then discuss the merits of the case.¹⁹⁴ The hearing considers all relevant reports, and, through discussion with the family, discovers the feelings and opinions of the parents and child.¹⁹⁵ Most frequently the hearing participants, including the parents and child, sit around a table in order to facilitate conversation.¹⁹⁶ Hearing members, through their words and demeanor, try to assure the child from the outset that the system is interested in helping the child and that the hearing is interested in listening to the family's views.¹⁹⁷ Once the family gains confidence in the system, discussion and cooperation more readily follow.¹⁹⁸

If the child or parents do not accept the grounds of referral and the hearing wishes to pursue further the merits of the case,¹⁹⁹ the chair directs the reporter to refer the case to the Sheriff Court²⁰⁰ for a finding of fact to establish the grounds of referral.²⁰¹ Once satisfied that the evidence supports a ground of referral, the sheriff remits the case to the hearing for discussion and consideration of proper treatment.²⁰² If a family accepts only a portion of the grounds of referral, the hearing may choose whether to proceed with respect to the grounds not in dispute or to refer the case to the sheriff for a fact-finding on the disputed grounds.²⁰³ With either procedure, the hearing may not discuss any portion of the case for which the grounds have not been established.²⁰⁴

After the facts have been established, and after the hearing members, reporter, social worker, parents, and child have thoroughly discussed the case, the three hearing members are responsible for recommending treatment.²⁰⁵ If the hearing decides that the child needs no further treatment, it may dismiss the case.²⁰⁶ If the hearing concludes that the child is in need of compulsory measures

193. *See id.*

194. *Id.* at § 42(2)(a).

195. Fox, *supra* note 4, at 87-88; Kelly, *supra* note 133, at 262-63.

196. Fox, *supra* note 4, at 80-81; CHILDREN OUT OF COURT, *supra* note 1, at 95.

197. *See* Fox, *supra* note 4, at 68-69, 82-83, 87-88.

198. *See* KILBRANDON REPORT, *supra* note 6, ¶ 109.

199. At this point, the hearing has the option of discharging the referral without further discussion. Act, *supra* note 18, § 42 (2)(c); *see infra* note 231.

200. *See supra* note 4.

201. Act, *supra* note 18, § 42(2)(c).

202. Act, *supra* note 18, § 42(6). The sheriff weighs the evidence to decide whether it supports the grounds of referral. If the child is accused of an offense, the sheriff uses the "beyond a reasonable doubt" standard in weighing the evidence. In a care or protection referral, the sheriff uses the "balance of probabilities" standard of proof for the referral. Finlayson, *supra* note 24, at 48-49.

203. Act, *supra* note 18, § 42(2)(b), (c).

204. Fox, *supra* note 4, at 72; Grant, *supra* note 7, at 28.

205. Act, *supra* note 18, § 43(1).

206. *Id.* § 43(2).

of care, it issues a supervision requirement.²⁰⁷ The supervision requirement either allows the child to remain at home under the mandatory supervision of the social work department, or requires the child to attend a residential institution, such as a List D school²⁰⁸ or a children's home.²⁰⁹ After implementing a supervision requirement, the hearing must monitor and periodically review the case.²¹⁰ No supervision requirement may be imposed longer than one year without review by the hearing.²¹¹

Upon review of the case, the hearing may extend or vary the requirement for another year, and the process may continue until the child's eighteenth birthday.²¹² A supervision requirement that has not been reviewed within one year automatically lapses.²¹³ Additionally, no child over eighteen years old may be subjected to supervision orders by a children's hearing.²¹⁴

In addition to the hearing's mandatory reviews, the family has a right after three months to request a review of the original order for adjustment of a supervision requirement.²¹⁵ After six months, the family may also request a review of a renewal of the identical terms of the original requirement.²¹⁶ This provision allows the hearing to adjust the supervision requirement to meet a child's changing circumstances, both when the child has shown improvement and when the treatment recommended has not been effective.²¹⁷ To review a requirement, the parents, child, reporter, and social worker again come before the hearing to discuss the current circumstances of the case.²¹⁸ The decision to alter the supervision requirement remains in the hands of the three hearing members.²¹⁹

In addition to their right to request review of supervision, the parents and child have the right to appeal any final decision.²²⁰ The reporter assumes the duty of providing the sheriff with all reports and statements concerning the case.²²¹ In the event of dissatisfaction with the sheriff's decision, the family has a

207. *Id.* § 44(1).

208. List D schools are specialized residential schools for young delinquents. Formally known as "approved schools," they derive their present name from the list on which they appear in the Scottish Education Department's index. CHILDREN OUT OF COURT, *supra* note 1, at 31 n.4.

209. Kelly, *supra* note 133, at 264. The social work department is responsible for the maintenance of the children's homes. Murray, *supra* note 22, at 16.

210. Act, *supra* note 18, § 48.

211. *Id.* § 48(3).

212. *Id.* §§ 47(2), 48(3).

213. *Id.* § 48(3).

214. *Id.* § 47(2).

215. *Id.* § 48(4).

216. *Id.*

217. See KILBRANDON REPORT, *supra* note 6, ¶ 91.

218. See Children's Hearings (Scotland) Rules, *supra* note 20, rule 17.

219. See *id.*, rule 17(4).

220. Act, *supra* note 18, § 49(1).

221. *Id.* § 49(2).

further right of appeal to the Court of Session.²²² This appeal is limited, however, to points of law and questions of procedure.²²³

In sum, the Children's Hearings System separates the fact-finding forum from the treatment forum; the duty to make all necessary fact-finding decisions rests with the courts, while treatment decisions are the responsibility of the reporter and the hearing. The family has the opportunity to discuss the situation with the reporter and hearing members, although the family has no actual voice in the hearing's decision making process. The family does have the right to appeal to the courts any final hearing decision that they consider unjust.

V. COURT DECISIONS

After the Children's Hearings System became effective on April 15, 1971, it was hampered by procedural difficulties caused by omissions and ambiguities in the statutes governing the system.²²⁴ Proponents of the system hoped that routine practice within the system itself would remedy most ambiguities and that those practices that were challenged in court would be clarified by judicial opinion.²²⁵ They recognized that the courts have the power to rule on interim issues of fact-finding and to review final orders of the panels.²²⁶ By establishing precedents through judicial review, the courts could establish a uniform practice throughout the hearings system.²²⁷

A. *H. v. McGregor*

One of the first opinions handed down from the judiciary on the subject of children's hearings concerned the appealability of panel decisions to the courts. In *H. v. McGregor*,²²⁸ a child who allegedly assaulted another child was referred to a hearing.²²⁹ When the child refused to accept the grounds of referral, the chair of the hearing directed the reporter to apply to the sheriff for a fact-finding.²³⁰ The parents objected to the chair's directive, contending that the panel should dismiss the referral.²³¹ The hearing, however, could not discuss the

222. See *supra* note 4.

223. Act, *supra* note 18, § 50.

224. Grant, *Bridging Gaps: Three Cases on Children's Hearings*, 1973 S.L.T. (News) 190 [hereinafter cited as *Bridging Gaps*].

225. *Id.*

226. Act, *supra* note 18, §§ 42(2)(c), 49.

227. See *Bridging Gaps*, *supra* note 224, at 190.

228. 1973 S.L.T. 110.

229. *Id.* at 113.

230. *Id.*

231. *Id.* at 114. A significant distinction exists between a discharge as an alternative to requesting a fact-finding from the sheriff and a discharge after a full evaluation of the case. The panel generally recommends the first type of discharge only if it decides that further treatment would be unnecessary, even if the grounds of referral were established. The panel recommends the second type of discharge

merits of the case until the grounds of referral were established.²³² The parents appealed the hearing's direction for a fact-finding, basing their right of appeal on section 49(1) of the Act.²³³ Both the sheriff and the Court of Session agreed that a decision to obtain a fact-finding from the courts is not a decision on the disposal of the referral, and section 49(1) of the Act refers only to decisions disposing of the referral.²³⁴ Section 42(2)(c) grants the hearing discretion to discharge the referral when the grounds are not accepted,²³⁵ but should the hearing decide not to exercise this discretion, it must refer the case to the sheriff before the case can proceed.²³⁶ A decision not to discharge the referral is, at best, a procedural decision, and the intention of the drafters of the Act was not to permit the delays accompanying appeals on points of procedure.²³⁷ Thus, the Court of Session concluded that the family has no right to appeal a hearing's directive to the reporter to establish disputed facts before the sheriff. The hearing has the right to request that the sheriff hear contested facts.

B. *Kennedy v. B. and Another*

Within the same year that the Court of Session decided *H. v. McGregor*, it decided a second case involving contested facts before the sheriff. In *Kennedy v. B. and Another*,²³⁸ the Court of Session considered whether a hearing retains jurisdiction when the circumstances of the case change significantly before the sheriff establishes the grounds of referral.²³⁹ In *Kennedy*, an eight year old child was referred to a children's panel as in need of compulsory measures of care under section 32(2)(c) of the Act.²⁴⁰ The grounds of referral was that lack of parental care would likely cause him unnecessary suffering or seriously impair his health or development.²⁴¹ According to the facts of the referral, the boy lived in Glasgow with his mother and seven siblings in a one-room house that lacked basic amenities and a sufficient supply of bedding.²⁴² When the local authorities

only if it decides, after completely and carefully evaluating all information available, that further treatment orders are not necessary. *Bridging Gaps*, *supra* note 224, at 192.

232. *H. v. McGregor*, 1973 S.L.T. at 112; see Act, *supra* note 18, § 42(2)(c).

233. *H. v. McGregor*, 1973 S.L.T. at 112. Section 49(1) provides:

A child, or his parents, or both, may, within a period of three weeks beginning with the date of any decision of the children's hearing, appeal to the sheriff in chambers against that decision and the child or his parents shall be heard by the sheriff as to the reasons for the appeal.

Act, *supra* note 18, § 49(1).

234. *H. v. McGregor*, 1973 S.L.T. at 114-15.

235. Act, *supra* note 18, § 42(2)(c); see *supra* note 231.

236. *H. v. McGregor*, 1973 S.L.T. at 114-15.

237. *Id.* at 116.

238. 1973 S.L.T. 38.

239. *Id.* at 39.

240. See *supra* note 129 (text of section 32 of the Act).

241. *Kennedy*, 1973 S.L.T. at 38.

242. *Id.* at 39.

eventually took the children into care, the children's skin and hair were verminous, and their clothing was so filthy that it had to be destroyed.²⁴³

The child was taken into care on August 9, 1971, and brought before a hearing on August 16, 1971, where he and his mother refused to accept the grounds of referral.²⁴⁴ The hearing directed the referral to the sheriff, who heard evidence on September 13, 1971, including a statement from the child's mother that circumstances had substantially improved since August 9 because the child was now living with his grandparents, and, therefore, the grounds as stated by the reporter no longer existed.²⁴⁵ The sheriff agreed that the grounds were not established and dismissed the application.²⁴⁶ The reporter appealed, focussing the appeal on whether the sheriff's decision should be based on the situation at the time of the original referral or the time that the case was brought into court.²⁴⁷

The Court of Session concluded that the sheriff should base the decision on the circumstances existing at the time that the sheriff hears the evidence.²⁴⁸ The Court looked to the present tense wording of the Act,²⁴⁹ which provides that the sheriff has the duty to decide whether the grounds of referral *are* established and whether the lack of care *is* likely to be detrimental to the child.²⁵⁰ Thus, the sheriff is obliged to consider pertinent facts or events occurring since the time of the original referral to the panel in determining whether the grounds of referral are still valid.²⁵¹

The holding in *Kennedy*, which also applies to children beyond the control of their parents,²⁵² compels the reporter to continue investigating the circumstances of the referral up to the date of proof for referrals under section 32(a), (b), or (c) of the Act.²⁵³ Although the holding may not impose upon the reporter a specific duty to investigate, as a practical matter a reporter who fails to continue the investigation may find the referral challenged by evidence of improved circumstances.²⁵⁴ If the reporter is unprepared to rebut such evidence, the sheriff will most likely adjourn the case and order the reporter to continue the investigation in light of the changed circumstances.²⁵⁵ If the reporter cannot discover new evidence to support the referral, the holding in *Kennedy* allows the sheriff to

243. *Id.*

244. *Id.* at 40.

245. *Id.* at 39-40.

246. *Id.* at 40.

247. *Id.*

248. *Id.* at 41.

249. Act, *supra* note 18, § 42(2)(c).

250. *Kennedy*, 1973 S.L.T. at 41.

251. *Id.* at 40-41.

252. *Id.*

253. See *supra* note 129 (text of section 32 of the Act). *Bridging Gaps*, *supra* note 224, at 191.

254. See *id.* at 191.

255. *Kennedy*, 1973 S.L.T. at 41.

dismiss the referral. Thus, not only may the hearing request that the sheriff review evidence of disputed facts, but the sheriff must also review evidence gathered after the hearing has requested the fact-finding.

C. *McGregor v. D.*

In 1977 the Court of Session decided another children's hearing case concerning a ruling on evidence before the Sheriff Court. In *McGregor v. D.*²⁵⁶ a child previously charged with breaking into a neighbor's home was referred to a children's hearing because he allegedly attempted to interfere with the administration of justice.²⁵⁷ The facts of the referral stated that the child returned to the neighbor's home and, knowing that the owner might testify at his trial, threatened her with physical injury if she were to appear in court.²⁵⁸ At the hearing, the child and his father refused to accept the grounds of referral, and the chair directed the reporter to apply to the sheriff for a fact-finding.²⁵⁹

The solicitor for the family²⁶⁰ challenged the relevancy of the grounds of referral, arguing before the sheriff that the facts as set forth, even if proved, did not constitute the offense mentioned in the referral.²⁶¹ The reporter conceded this argument but requested that the sheriff hear the evidence of the case and find that the child had committed an offense, albeit a different offense than the one named in the referral.²⁶² The reporter asked in the alternative for leave to amend the grounds of referral in order to substitute the name of the offense which the facts would support.²⁶³ The sheriff dismissed the application as irrelevant, denied leave to amend, and discharged the referral.²⁶⁴ The case presented three issues to the Court of Session on appeal: first, whether the sheriff has the power to dismiss the application as irrelevant; second, whether the sheriff was correct in dismissing the application as irrelevant; and third, whether a reporter should have leave to amend a referral.²⁶⁵

In considering the questions on appeal, the Court of Session emphasized that the nature of the proceedings under Part III of the Act are not criminal proceedings; rather, they are civil proceedings *sui generis*²⁶⁶ to which the ordinary

256. 1977 S.L.T. 182.

257. *Id.* at 182, 184.

258. *Id.*

259. *Id.* at 184.

260. The Act recognizes the family's need for legal representation in proceedings before the sheriff. Act, *supra* note 18, § 42(4). The Act further provides for legal aid to those families who qualify. *Id.* § 53.

261. *McGregor v. D.*, 1977 S.L.T. at 184.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Civil proceedings *sui generis* are proceedings of their own kind or class. BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).

codes of civil and criminal procedure do not apply.²⁶⁷ In fact, the Sheriff Court Procedure Rules²⁶⁸ expressly exclude the ordinary code of civil procedure from the sheriff court proceedings.²⁶⁹ Since the ordinary codes are inapplicable, the Court of Session looked to the Act itself, and to the subsequent statutory procedures pertaining specifically to the Children's Hearings System as the sole sources of procedural authority.²⁷⁰

The Sheriff Court Procedure Rules²⁷¹ list no specific provision allowing for dismissal of applications before hearing the evidence.²⁷² To the contrary, the rules explicitly state that "the sheriff shall . . . hear the evidence tendered by or on behalf of the reporter."²⁷³ Moreover, section 42 of the Act²⁷⁴ refers to a finding upon evidence presented to the court and requires a ruling on questions of fact before a decision can be reached as to whether the child has committed an offense.²⁷⁵ Basing its reasoning on the wording of the Sheriff Court Procedure Rules and on section 42 of the Act, the Court of Session held that a sheriff has the obligation to hear the reporter's evidence.²⁷⁶ Therefore, the sheriff in *McGregor v. D.* was not entitled to dismiss the referral before the evidence was presented.²⁷⁷

Thus, not only is the hearing entitled to request a fact-finding, but the sheriff must hear the evidence that the reporter presents, even if the reporter has failed to name an offense relevant to the evidence. Under this rule, if a child is referred to a hearing on irrelevant grounds,²⁷⁸ and the family, usually legally unadvised and unfamiliar with the concept of relevancy, accepts those grounds, the hearing may proceed to a disposal.²⁷⁹ If the child or parent denies the grounds and sends the case to the sheriff for fact-finding, the sheriff is obligated to hear the evidence, despite the irrelevant grounds.²⁸⁰

Although a second opinion, written by Lord Emslie, acknowledged that these proceedings were a waste of time in situations that constitute no recognized

267. *McGregor v. D.*, 1977 S.L.T. at 185. *See also* *McGregor v. T.*, 1975 S.L.T. 76; *Kennedy v. O.*, 1975 S.L.T. 235 (Court of Session declared proceedings under Part III of the Act to be civil proceedings *sui generis*).

268. Sheriff Court Procedure Rules, *supra* note 23, sched. 2, pt. I.

269. *McGregor v. D.*, 1977 S.L.T. at 185.

270. *Id.*

271. *See supra* note 23.

272. *McGregor v. D.*, 1977 S.L.T. at 186.

273. Sheriff Court Procedure Rules, *supra* note 22, rule 8(1).

274. Act, *supra* note 18, § 42(2)(c), (5), (6).

275. *McGregor v. D.*, 1977 S.L.T. at 185-86, 187-88.

276. *Id.* at 186, 187.

277. *Id.*

278. A referral on irrelevant grounds will probably result from a reporter's unintentionally poor drafting of the referral document. Grant, *More Bridge-Building*, 1978 S.L.T. (News) 301, 302 [hereinafter cited as *More Bridge-Building*].

279. *Id.*

280. *Id.*

offense at law,²⁸¹ cases brought on irrelevant grounds of referral will not always be dismissed after hearings on the evidence.²⁸² Rule 10 of the Sheriff Court Procedural Rules²⁸³ allows the sheriff to find that the child has committed any offense supported by the evidence; the offense need not have been specified in the grounds of referral.²⁸⁴ Therefore, after the reporter has presented evidence and the sheriff has established the facts of the referral, the sheriff may then proceed to determine whether the facts support any offense at all, regardless of the offense that the reporter previously named in the referral and communicated to the family.²⁸⁵ If the facts do not disclose an offense, then the sheriff may reasonably discharge the referral.²⁸⁶ If the sheriff errs in the decision to discharge, the parties may appeal the decision under section 50 of the Act.²⁸⁷

In regard to the third issue of the case, the reporter took the appeal with the hope that the Court of Session would give a definitive ruling on the competence of amendment or addition of grounds.²⁸⁸ The Act, the Children's Hearing (Scotland) Rules, and the Sheriff Court Procedure Rules are all silent on the subject.²⁸⁹ The opinions of both judges, relying heavily upon the lack of express power in the procedural acts, concluded that the reporter may not amend the grounds of referral before the sheriff.²⁹⁰ Furthermore, a material amendment before the sheriff could radically alter the grounds of referral on which the hearing authorized the reporter to proceed.²⁹¹ Neither opinion made clear

281. *McGregor v. D.*, 1977 S.L.T. at 186.

282. See *More Bridge-Building*, *supra* note 278, at 302.

283. Rule 10 of the Sheriff Court Procedure Rules provides: "Where the grounds of referral are alleged to constitute an offence or offences or any attempt thereof the sheriff may find on the facts that any offence established by the facts has been committed." Sheriff Court Procedure Rules, *supra* note 22, rule 10.

284. *More Bridge-Building*, *supra* note 278, at 302.

285. *Id.* Although the holding of *McGregor v. D.* was phrased in broad terms, the facts pertained to an offense committed by the child. In *McGregor v. A.*, 1982 S.L.T. 45, 47, the Court of Session held that rule 10 of the Sheriff Court Procedure Rules and the holding in *McGregor v. D.* were equally applicable to offenses committed by another *against* the child.

286. *McGregor v. D.*, 1977 S.L.T. at 186.

287. *Id.*

288. *More Bridge-Building*, *supra* note 278, at 303.

289. *Id.*

290. *Id.*

Amendment is a familiar creature of the rules of procedure for criminal and civil business and it finds no place, either expressly or by implication, in the procedure designed to regulate the operation of [application of fact-finding to the sheriff].

McGregor v. D., 1977 S.L.T. at 186 (opinion of Lord President).

. . . [T]here are no provisions in the statutory code for the application or use of any of the familiar steps of civil process in the sheriff court. There are no answers to the statement to the ground of referral and therefore no adjustment of pleadings. There is consequently no closed record which can suffer "amendment" nor are there any operative conclusions which could be amended.

Id. at 187 (opinion of Lord Cameron).

291. *Id.* at 189.

whether amendment of the referral was permissible at any time prior to appearance before the sheriff.²⁹²

In sum, the decision in *McGregor v. D.* held that a sheriff may not dismiss a referral as irrelevant, and that a reporter has no power to amend a referral before the sheriff. The decision instead recognized the power set forth in Rule 10 of the Sheriff Court Procedure Rules that allows a sheriff to find that any offense supporting the facts of the case upholds the referral.

D. J.F. and Others v. McGregor

The Court of Session extended the rulings in *Kennedy* and *McGregor v. D.*, which required the sheriff to hear the evidence presented by the reporter, to the case of *J.F. and Others v. McGregor*.²⁹³ Four children were referred to a hearing under section 32(2)(d) of the Act because another sibling had been assaulted in the family household.²⁹⁴ The children were too young to accept the grounds of referral, but at a hearing before the sheriff, the parents took the advice of a solicitor and accepted the grounds in order to minimize the expense of trial.²⁹⁵ The sheriff held the grounds to be established based solely on the parents' acceptance and remitted the case to a children's hearing to proceed with treatment.²⁹⁶ Appeal from the order was taken to the Court of Session.²⁹⁷

The Court of Session noted that neither the Act nor the subsequent procedural rules provided guidelines for accepting grounds of referral before the sheriff, but it emphasized that the procedure explicitly required the sheriff to hear evidence before deciding that the grounds had been established.²⁹⁸ Section 42(7) of the Act²⁹⁹ requires the sheriff to find the grounds of referral when a child is incapable of understanding the explanation of the referral.³⁰⁰ The sheriff

292. See *More Bridge-Building*, *supra* note 278, at 303.

293. 1981 S.L.T. 334.

294. *J.F. and Others*, 1981 S.L.T. at 334.

295. *Id.* at 335.

296. *Id.*

297. *Id.* at 334.

298. *Id.* at 335.

299. Section 42(7) of the Act, as in effect when this case was decided, provides:

Where a children's hearing are satisfied that the child for any reason is not capable of understanding the explanation of the grounds of referral required by subsection (1) of this section, or in the course of, or at the conclusion of that explanation, it appears not to be understood by the child, the hearing shall, unless they decide to discharge the referral, direct the reporter to make application to the sheriff for a finding as to whether any of the grounds for the referral have been established, and the provisions of this section relating to an application to the sheriff under subsection (2)(c) thereof shall apply as they apply to an application under that subsection.

Act, *supra* note 18, § 42(7). Cf. note 374 *infra* and accompanying text (text of Section 42(7) with 1983 amendments and a discussion of reasons for the amendment).

300. *J.F. and Others*, 1981 S.L.T. at 335.

is to proceed with the findings as specified under section 42(6)³⁰¹ by examining the evidence before the court.³⁰² The Court of Session interpreted the word "evidence" in section 42(6) to mean evidence in its ordinary legal use, and referred to Rule 8(1) of the Sheriff Court Procedure Rules, which mandates the sheriff to hear evidence before ruling on disputed grounds of referral.³⁰³ By definition under Rule 2(3) of the Sheriff Court Procedure Rules,³⁰⁴ the facts in *J.F. and Others* were in dispute because the children were not capable of consenting to them.³⁰⁵

The Court concluded that the the procedure for accepting the grounds of referral at hearings of section 42 applications should not be altered simply because of the absence of guidelines or provisions dealing with the acceptance.³⁰⁶ Thus, the Court remanded the case to the sheriff for a finding of fact.³⁰⁷ The decision in *J.F. and Others v. McGregor*, considered in conjunction with the holding in *McGregor v. D.*, effectively prohibits a sheriff from determining the grounds of a referral under section 42(2)(c) and section 42(7) of the Act without first hearing the evidence.³⁰⁸

The four cases discussed above illustrate the Court of Session's attempt to establish a uniform procedure for fact-finding before the sheriff. In *H. v. McGregor*, the Court recognized the hearing's right to request a fact-finding when the case involves disputed facts. Next, in *Kennedy v. B. and Another*, the Court held that the sheriff must make the finding of fact in light of the child's present circumstances. In *McGregor v. D.*, the Court stated that although a reporter may not amend the grounds of referral before the sheriff, the sheriff is permitted to find that an offense not mentioned in the referral has been established by the facts of the case. Finally, in *J.F. and Others v. McGregor*, the Court required the sheriff to hear all of the evidence in cases where a child is incapable of understanding the explanation of the referral.

301. Section 42(6) of the Act, as in effect when this case was decided, provides:

Where the sheriff is satisfied on the evidence before him that any of the grounds in respect of which the application has been made has been established he shall remit the case to the reporter to make arrangements for a children's hearing for consideration and determination of the case, and where a ground for the referral of the case is the condition referred to in section 32(2)(g) of this Act, the sheriff in hearing the application shall apply to the evidence relating to that ground the standard of proof required in criminal procedure.

Act, *supra* note 18, § 42(6). *Cf.* note 373 *infra* and accompanying text (text of Section 42(6) with 1983 amendments and a discussion of reasons for the amendments).

302. *J.F. and Others*, 1981 S.L.T. at 335.

303. *Id.*

304. Rule 2(3) of the Sheriff Court Procedure Rules provides:

In these Rules any reference, however expressed, to disputed grounds of referral shall be construed as a reference to grounds of referral which form the subject of an application under subsection (2)(c) or subsection (7) of section 42 of the Act.

Sheriff Court Procedure Rules, *supra* note 23, rule 2(3).

305. *J.F. and Others*, 1981 S.L.T. 334.

306. *See id.* at 335.

307. *Id.* at 335-36.

308. Forshaw, *supra* note 34, at 194.

VI. ANALYSIS

A. *Effects of the Court Decisions*

In instituting uniform procedures in the Children's Hearings System, the Court of Session frequently looked to the wording of the Act and the principles of the Kilbrandon Report to support its decisions. The results of those decisions, however, were not always in harmony with the original intent of the Kilbrandon Committee. Some of the Court of Session's opinions fostered the principles of preventive treatment supported by the Committee; other rulings of the Court merely frustrated the principles upon which the Committee founded the hearings system.

While *H. v. McGregor* held that the family has no right to appeal a hearing's request for a fact-finding because the request is not a final dispositional order, the decision nevertheless recognizes the rights of both child and parents to appeal from a final order of the hearing.³⁰⁹ As provided in the Court's opinion, the right of appeal remains even if the hearing decides to dismiss the referral.³¹⁰ In practice, few appeals will be made from discharges because a party would act illogically to deny the grounds of referral in front of the hearing and then insist that the sheriff review the facts once the hearing had granted a discharge.³¹¹

In a few situations, however, the right of appeal from a discharge may provide an important protection for either abused children or parents unable to control a child.³¹² For example, if the hearing's ultimate decision in a care and protection referral is to discharge the case, the child may wish to appeal to the sheriff for protection, perhaps from physically abusive parents.³¹³ Likewise, parents unable to control a child may believe that a discharge is contrary to the child's best interests, and will appeal to the sheriff for mandatory social services.³¹⁴ If the sheriff allows the appeal and finds that the hearing's decision was not justified in all circumstances, the sheriff must remit the case to the hearing for reconsideration.³¹⁵

Thus, an appeal from a discharge allows the appealing party to take an additional step to prevent further injury to the child or future delinquency in cases where either the child or the parents feel that the hearing's disposal was imprudent.³¹⁶ The recognition of the right to appeal a discharge by the sheriff courts provides an additional procedural safeguard to insure that the decision of the hearing is in the child's best interest.³¹⁷ This decision is consistent with the

309. *H. v. McGregor*, 1973 S.L.T. at 114-16.

310. *See id.* at 114, 116.

311. *Bridging Gaps*, *supra* note 224, at 92.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* (citing Act, *supra* note 18, § 49(5)(b)).

316. *See Bridging Gaps*, *supra* note 224, at 92.

317. *See id.*

prevention principles espoused by the Kilbrandon Report.³¹⁸ By recognizing this additional procedural safeguard, the Court of Session has encouraged the prevention of a child's harm or delinquency through a functional hearings system.

The decision in *Kennedy v. B. and Another*,³¹⁹ like the *H. v. McGregor* decision, protects children in need of care or protection and children beyond the control of their parents. The holding requires a sheriff considering the grounds of referral to hear any evidence collected subsequent to the initial referral that is presented to the court.³²⁰ The reporter must continue to monitor the child's situation to determine the facts of the case while the case is before the sheriff.³²¹

Reporters particularly need to monitor cases that fall under section 32(2)(b) and (c) of the Act because these cases involve harm or potential harm to a child.³²² Both provisions of the Act are concerned with the child's future welfare, and evidence of changing circumstances may strongly affect the sheriff's assessment of the child's situation and risk of future harm.³²³ Similarly, a child beyond the control of parents under section 32(2)(a) at the time of referral, but back within their control by the time the case is before the sheriff, may show by evidence of current circumstances that the conditions that precipitated the referral no longer exist and, therefore, that the child's welfare is no longer in jeopardy.³²⁴ By compelling the reporter to gather the most recent facts, the holding in *Kennedy* ensures that the sheriff's decision takes into account the child's present circumstances and considers the child's welfare in light of those circumstances.

While *Kennedy* ensures that referrals are disposed of in the child's best interests by ensuring that the sheriff considers the most recent circumstances relevant to the grounds of referral,³²⁵ the case also compels a second, and perhaps less desirable, conclusion.³²⁶ The *Kennedy* decision in effect gives the sheriff an opportunity to decide the final disposition of a case.³²⁷ If a case before the sheriff contains facts that would support a referral, but the family brings to the sheriff's attention evidence of changed circumstances, the sheriff has the opportunity to decide whether, in light of the new facts revealed, the child needs social care or assistance.³²⁸ Although the *Kennedy* decision may seem reasonable in terms of its statutory interpretation,³²⁹ it nonetheless undercuts the Kilbrandon Committee's

318. See KILBRANDON REPORT, *supra* note 6, ¶ 54.

319. 1973 S.L.T. 38.

320. *Kennedy*, 1973 S.L.T. at 40-41.

321. *Bridging Gaps*, *supra* note 224, at 191; see also *Kennedy*, 1973 S.L.T. at 40-41.

322. *Bridging Gaps*, *supra* note 224, at 190.

323. *Id.*

324. *Bridging Gaps*, *supra* note 224, at 191.

325. See *Kennedy*, 1973 S.L.T. at 40-41.

326. *Bridging Gaps*, *supra* note 224, at 191.

327. *Id.*

328. *Id.*

329. *Id.*; see Act, *supra* note 18, § 42(5).

primary goal of separating the fact-finding forum from the treatment forum.³³⁰ By allowing the sheriff to consider new evidence in determining whether to dismiss a case, the Court of Session has opened the door to deciding questions of a child's welfare and treatment in the forum reserved for fact-finding.³³¹ In the hypothetical extreme, a sheriff may dismiss a case brought before the court on disputed grounds based on a finding that the family's circumstances had improved.³³² If the improvement were only temporary, however, the referral could be brought again in front of a children's hearing.³³³ The family could then dispute the facts again and ask that the case be presented to the sheriff.³³⁴ If the family once again showed that its circumstances had improved, even if temporarily, the sheriff again would have the discretion to dismiss the referral free of all treatment measures.³³⁵ In this way, the family could successfully, and perhaps continuously, avoid compulsory treatment.³³⁶ Thus, the *Kennedy* decision may allow for disposal of a case without consideration of future care and treatment of the child.³³⁷ Also, it may allow for a parent to present to the court a superficial remedy, which may neither bind a party to its terms nor truly rectify the situation, in order to escape the hearing's jurisdiction.³³⁸

In *McGregor v. D.*,³³⁹ the Court of Session reiterated its decision in *Kennedy* to recognize a sheriff's power to dismiss a referral.³⁴⁰ Concerning the other issues raised in the case, the Court employed two different canons of interpretation in justifying its holdings.³⁴¹

In examining the reporter's duty to specify the nature of the offense in the grounds of referral,³⁴² the Court dismissed such a duty as irrelevant to the objective of the Act.³⁴³ In the proceedings below, the sheriff reasoned that the provisions of Rule 15(4) of the Children's Hearing (Scotland) Rules³⁴⁴ imply that the sheriff has a power to dismiss referrals that do not specify the nature of the

330. See *Bridging Gaps*, *supra* note 224, at 191; KILBRANDON REPORT, *supra* note 6, ¶¶ 70, 73.

331. *Bridging Gaps*, *supra* note 224, at 191.

332. *Id.*

333. *Id.*

334. *Id.*

335. See *id.*

336. See *id.*

337. See *id.*

338. See *id.*

339. 1977 S.L.T. 182.

340. *Id.* at 185-86.

341. *More Bridge-Building*, *supra* note 278, at 302.

342. See Children's Hearings (Scotland) Rules, *supra* note 20, rule 14.

343. See *McGregor v. D.*, 1977 S.L.T. at 186, quoted in *More Bridge-Building*, *supra* note 278, at 302.

344. Rule 15(4) provides:

In the case of a condition mentioned in section 32(2)(g) of the Act, the statement of the facts constituting the offence shall have the same degree of specification as in a charge contained in a complaint under the Summary Jurisdiction (Scotland) Act 1954(a) and the statement shall also specify the nature of the offence in question.

Children's Hearings (Scotland) Rules, *supra* note 20, rule 15(4).

offense in questions; otherwise, the provision would be unenforceable and therefore meaningless.³⁴⁵ The Court of Session preferred a functional approach to the legislation; it reasoned that because reporters often lack legal training, a reporter should not be expected to know the correct labels for offenses.³⁴⁶ Since proceedings under Part III of the Act are civil proceedings *sui generis*, a reporter is not bound to high standards of specificity and accuracy in specifying criminal offenses.³⁴⁷ Rule 15(4) is subordinate and ancillary to section 42 of the Act,³⁴⁸ the rule would have little value if it functioned contrary to the best interests of the child and therefore against the overall objective of the statute.³⁴⁹

In subordinating the importance of Rule 15 (4) to the overall objective of providing for the child's best interest, the Court of Session may have overlooked two important aspects of the rule.³⁵⁰ First, the drafters of the Children's Hearing (Scotland) Rules may have foreseen that reporters would not always be legally qualified and that families would not always have access to legal advice.³⁵¹ Under these circumstances the drafters may have intended that a reporter be held to a high standard of specification in the grounds of referral and may have constructed Rule 15(4) to convey that intent.³⁵²

Second, the Court of Session apparently ignored the fact that the community has no right to interfere with a child's life unless one of the conditions under section 32(2) of the Act occurs.³⁵³ The disposal of a children's hearing is somewhat akin to an action taken in criminal court insofar as the disposal may include the deprivation of liberty and may last for an extended period of time, until the child's eighteenth birthday.³⁵⁴ Since the family may not wish the child to be subject to compulsory treatment, the referral should be drafted to best protect the child according to high standards of judicial scrutiny.³⁵⁵ To deny children these protections is to deny them rights which adults possess, which could make compulsory treatment seem "more punitive and arbitrary than a criminal sanction."³⁵⁶

Given the Kilbrandon Committee's concern that the hearings system should appear to administer justice,³⁵⁷ the Court of Session failed to consider that the de-emphasis of the offense itself may contradict the child's own sense of jus-

345. *McGregor v. D.*, 1977 S.L.T. at 185.

346. *Id.* at 186.

347. *Id.* at 185.

348. *More Bridge-Building*, *supra* note 278, at 302.

349. *McGregor v. D.*, 1977 S.L.T. at 186.

350. *More Bridge-Building*, *supra* note 278, at 302.

351. *Id.*

352. *Id.*

353. *More Bridge-Building*, *supra* note 278, at 302.

354. *Id.*

355. *Id.*

356. *More Bridge-Building*, *supra* note 278, at 302.

357. *Fox*, *supra* note 4, at 68; *cf.* KILBRANDON REPORT, *supra* note 6, ¶ 57.

tice.³⁵⁸ In the vast majority of cases, the commission of the offense is both the formal and obvious grounds of referral, and the offense must remain at the center of the case for the system to make sense to the family.³⁵⁹ A child and parents confronted with discussion and questions concerning conditions in the home, the child's schooling, and the child-rearing process in general may become confused and resentful if they see no link between the hearing's inquiries and the offense that precipitated the referral.³⁶⁰ A family that sees no foundation for the treatment orders issued by the hearing is likely to regard such a system with bewilderment and suspicion rather than with trust.³⁶¹

In contrast to the functional approach taken by the Court of Session to downplay specific references to the offense itself, the Court in *McGregor v. D.* also took a literal approach. The Court used this literal approach in interpreting the duties of the sheriff to hear all of the evidence presented by the reporter and the power bestowed on the sheriff by Rule 10 of the Sheriff Court Procedure Rules to find that any offense supported by the evidence has been committed.³⁶² This procedure could completely deprive a family of any notice of the offense until the sheriff pronounced the finding.³⁶³ This lack of notice may easily engender the sense of confusion and unfair treatment that the Kilbrandon Committee wanted to avoid.³⁶⁴

The holding in *McGregor v. D.* places at risk the public's trust in the Children's Hearings System's ability to administer justice. If a reporter carelessly drafts the referral statement, the family may have no actual notice of the offense until the sheriff pronounces the finding. The holding in this case prohibits the family from learning the true grounds of referral, and thereby prevents them from addressing the actual merits of the case. As a result, the parents and child may become unwilling, uncooperative participants in the treatment ultimately recommended by the hearing. According to the Kilbrandon Committee, lack of the family's cooperation would likely result in ineffective treatment.

The requirement that the sheriff must hear all evidence presented by the reporter, as stated in *McGregor v. D.*, may also work to protect the child from false fact-finding.³⁶⁵ *J.F. and Others v. McGregor* established another requirement, providing that a finding of fact occur when the child is silent, either because he or she has refused to answer or is too young to answer.³⁶⁶ This requirement guarantees that a case cannot reach disposal unless the child accepts the facts, or

358. May, *supra* note 31, at 219.

359. *Id.*

360. *Id.*

361. *Id.*

362. See *More Bridge-Building*, *supra* note 278, at 301-302.

363. *Id.*

364. *Id.* at 302-303.

365. Forshaw, *supra* note 34, at 194.

366. 1982 S.L.T. at 335.

a separate authority, the sheriff, ensures on behalf of the child that the facts are true.³⁶⁷ In this way, the child is protected from parental assent when the parents' interests may differ from the child's interests.³⁶⁸

Perhaps the only disadvantage of these protections afforded to children is that they may not extend far enough.³⁶⁹ The sheriff court acts as curator on behalf of the child only when the child is silent, but even in the most complex cases, the court may be excluded if the child accepts the grounds of referral.³⁷⁰ The sheriff may not interfere with the child's decision, even if this decision is the result of the child's limited experience or intelligence, inadequate legal advice, or other factors which the child never articulates to either parents or hearing members.³⁷¹

B. *The 1983 Amendments*

One unfortunate result of the Court of Session's insistence that the sheriff hear all of the evidence in disputed referrals was the expenditure of judicial time on proceedings where the grounds of referral truly were no longer in dispute.³⁷² After the decision in *J.F. and Others v. McGregor*, sheriffs began to hear evidence not only in care or protection cases where the child was too young to understand the grounds of referral, but also in cases of teenage offenders who, after consulting a solicitor, chose not to dispute the facts of the offense before the sheriff as they had before the hearing.³⁷³ Parliament, concerned with time spent on unnecessary court procedures, expressed its disapproval of the Court of Session's holding by amending sections 42(6) and (7) of the Act.³⁷⁴ The amend-

367. *Id.*; see also 1981 S.L.T. at 334.

368. See Forshaw, *supra* note 34, at 194, 195.

369. See *id.* at 194.

370. *Id.*

371. *Id.*

372. Kearney, *Dispensing with Proof in "Social Work Referrals,"* 1983 S.L.T. (News) 269.

373. *Id.* at 270.

374. *Id.* The amendments to the Act consist of the addition of subsection (6A) and modification of subsection (7) of section 42 to read as follows:

(6A) Notwithstanding the provisions of subsection (2)(c) of this section, where, in the course of the proceedings before the sheriff, the child and his parent accept any of the grounds in respect of which the application has been made, the sheriff may dispense with the hearing of evidence relating to that ground unless he is satisfied that in all circumstances such evidence should be heard, and deem that ground to have been established for the purposes of this section.

(7) Where a children's hearing are satisfied that the child for any reason is not capable of understanding the explanation of the grounds of referral required by subsection (1) of this section, or in the course of, or at the conclusion of that explanation, it appears not to be understood by the child, the hearing shall, unless they decide to discharge the referral, direct the reporter to make application to the sheriff for a finding as to whether any of the grounds for the referral have been established, and the provisions of this section relating to an application to the sheriff under subsection (2)(c) thereof shall apply as they apply to an application under that subsection except that where any of the grounds for the referral are accepted by the child's parent, whether or not accepted by the child, then, notwithstanding subsection (6A) of this section, the sheriff may dispense with the hearing of evidence relating to that ground if he is satisfied that in all the circumstances it would be reasonable to do so.

Health and Social Services and Social Security Adjudications Act 1983, ch. 41, sched. 2, ¶ 8.

ments give the sheriff broad discretion to determine whether the court needs to hear the evidence in order to establish the grounds of referral.³⁷⁵

Subsection 6(A) will most often become significant in a case where the child is alleged to have committed an offense. The child or the parents may dispute the grounds of referral at the hearing, but, after seeking the advice of a solicitor or reconsidering the circumstances on their own, both parents and the child may decide not to dispute the grounds in the Sheriff Court.³⁷⁶ The sheriff then has the discretion either to declare the grounds of referral established or to require the reporter to present evidence supporting the referral.³⁷⁷ The amendment, however, gives no guidelines to the sheriff as to the elements to be weighed in deciding whether to hear evidence; it merely states that the sheriff should be satisfied that all circumstances require the evidence to be heard.³⁷⁸ The elements will most likely be the extent to which the sheriff perceives that the child and parents understand the full definition of the offense charged, as well as the circumstances surrounding the offense.³⁷⁹ The sheriff may also wish to discuss with the family outside pressures or considerations (other than the circumstances listed in the referral) that may have led to the decision not to dispute the facts.³⁸⁰

In cases involving care or protection rather than juvenile offenses, a sheriff considering whether to hear evidence under the new subsection (6A) may have a more difficult time determining the criteria to investigate.³⁸¹ This difficulty arises from the extent of the types of care or protection referrals, the frequent inability of families to understand the implications of such referrals without legal advice, and the added consideration established by *Kennedy v. B. and Another*³⁸² that evidence regarding a change of circumstances since the hearing is relevant to the grounds of referral.³⁸³ If the sheriff, after speaking with the family, is not convinced that the circumstances support the referral or that the family fully understands the act of accepting the stated grounds, the sheriff may request to hear the evidence.³⁸⁴

Not only would hearing the proof serve to dispel doubts in the sheriff's mind concerning the merits of the case, but, in certain cases, hearing of proof may demonstrate to the involved parties that a neutral court has tested and evaluated the merits of the case to determine whether further proceedings are necessary.³⁸⁵

375. Kearney, *supra* note 372, at 270.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* at 270-71.

380. *Id.* at 271.

381. *Id.*

382. 1973 S.L.T. 38.

383. Kearney, *supra* note 372, at 271.

384. *Id.*

385. *Id.*

It may also show that proceedings in the hearings system are in fact dependent on the merits of the referral, despite the family's acquiescence to the merits of the referral because of convenience or misunderstood legal advice.³⁸⁶ This second consideration is consistent with the Kilbrandon Committee's goal of enlightening the family about the operation of the system and its own situation in order to facilitate cooperation between the family and the system.³⁸⁷

As amended, section 42(7)³⁸⁸ encompasses primarily care or protection cases.³⁸⁹ Like the cases that fall within subsection 6(A), the sheriff will likely consider the parents' understanding of the nature of the referral and their motivation behind their decision not to dispute the referral before deciding whether to hear evidence on the case.³⁹⁰ The amendment to subsection (7) does not eliminate the protection afforded by the court to the child from assenting parents who may not share the child's interests; rather, it places the power of protection within the discretion of the sheriff to determine when protection is necessary for the child's best interests.³⁹¹

In sum, Parliament passed the amendments to the Act primarily to avoid expenditure of judicial time on cases where the facts are no longer disputed. The amendments grant the sheriff discretion to decide whether to hear the evidence or whether merely to declare the grounds established. Through the exercise of this discretion the sheriff is able to protect both children and parents from situations where their assent is not truly voluntary, or where they do not clearly understand the consequences of their actions. In such cases, the hearing of proof may show the family that the impartial court has tested the merits of the case and reached a decision. A family believing that the sheriff had ruled fairly on the merits of the case is likely to cooperate with subsequent treatment orders. With such cooperation, the treatment has a better chance of working effectively against the child's problem.

VII. CONCLUSION

This Comment has focused on the effect of some of the Court of Session's opinions on procedure in the Children's Hearings System. It has discussed the deficiencies in the former Scottish juvenile court system, the reforms proposed by the Kilbrandon Committee, and the procedural system implemented to accomplish those reforms. The Comment also examined some of the Court of Session's opinions on procedural issues and the way in which those opinions have

386. *Id.*

387. KILBRANDON REPORT, *supra* note 6, ¶¶ 35, 109.

388. *See supra* note 374 (text of amendment); Kearney, *supra* note 372, at 272.

389. *Id.* at 273.

390. *Id.*

391. *Id.* at 272.

both helped and hindered the implementation of the treatment model of juvenile justice.

The Court of Session's opinion in *H. v. McGregor* fosters the goal of the treatment model by recognizing that both the child and the parents have the right to appeal from a final order of the hearing discharging the case. In recognizing this additional procedural safeguard, the Court has encouraged the prevention of a child's future harm or delinquency by allowing an appeal where either party feels that the hearing's decision was imprudent. The prevention of delinquency is the goal of the treatment model.

Likewise, the decision in *Kennedy v. B. and Another* has fostered the treatment model by assuring that the sheriff considers the most recent information relevant to the child's circumstances when ruling on the facts presented. The decision, however, comes dangerously close to undercutting the structure of the hearings system. The Committee recommended the separation of the fact-finding and treatment forums because it felt that the two processes were incompatible. By allowing the sheriff to consider new evidence in deciding whether to dismiss the case, the *Kennedy* decision permits a question of the child's welfare to be decided in the fact-finding forum. This procedural anomaly contradicts the original intent of the Committee, and, at least hypothetically, allows a family to circumvent the treatment forum.

The opinion in *McGregor v. D.* contained elements that both foster and frustrate the treatment model's ideals. The opinion held that a reporter's failure to specify in the referral the exact offense committed is not a valid reason for the sheriff to dismiss a referral. Instead, the Court recognized that the sheriff may find that any offense supported by the facts of the case had been committed. The holding serves to de-emphasize the named offense and allows the sheriff to proceed according to the facts of the case. The de-emphasis of the offense, however, may only confuse the family and create mistrust in the system. This possible effect on the family frustrates the Kilbrandon Committee's goal of creating a system which can win the trust and cooperation of those whom it purports to serve.

Finally, in *J.F. and Others v. McGregor*, the Court attempted to ensure that a child's interests are protected despite the child's own lack of understanding about the case. Protection of the child's best interest is crucial to the treatment model, but in its attempt to extend this protection, the Court made its holding too broad. This overly broad holding resulted in many unnecessary appeals to the sheriff and precipitated a parliamentary amendment.

The amendments to section 42 of the Social Work (Scotland) Act demonstrated Parliament's concern for the smooth functioning of the Children's Hearings System and its willingness to act against unfavorable procedural rulings by the Court of Session. Although the 1983 amendments are the only actions in this regard, Parliament seems not to have conceded to the Court of Session the final

word on procedural interpretation. At least some of the procedural gaps in the original Act need to be remedied through the legislative rather than the judicial process. Parliament is not likely to amend the Act routinely in response to the Court's decisions, but the recent amendments indicate that Parliament shares the responsibility with the Scottish courts to preserve the principles of the treatment model and the foundation of the Children's Hearings System.

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