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How the LAW *Thinks About* CHILDREN

Michael King & Christine Piper

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MICHAEL KING

Reader in Law
Brunel, the University of West London

CHRISTINE PIPER

Lecturer in the Department of Law
Brunel, the University of West London

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Aldershot · Brookfield USA · Hong Kong · Singapore · Sydney

Published by

Gower Publishing Company Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Gower Publishing Company
Old Post Road
Brookfield
Vermont 05036
USA

ISBN 1 85628 088 8

Printed in Great Britain by
Billing & Sons Ltd, Worcester

Acknowledgements

We should like to thank Alex Stein and Stewart Asquith who read and commented helpfully on draft chapters of this book stages during its period of gestation. We are especially grateful to David Nelken, Brad Sherman and, of course, Gunther Teubner whose advice and encouragement were invaluable at a time when we were wrestling with the complexities of autopoietic theory. Mark Mower, the technician, who helped us produce the printed version deserves a medal for his patience in the face of our inaccuracies and indecisiveness. Finally, a word of thanks to those members of the Tavistock Clinic whose interest and concern over the way that the legal system in England and Wales deals with child welfare issues proved to be the starting point for some of the ideas which we have developed in this book.

Michael King and Christine Piper, Uxbridge, August 1990.

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1 Introduction: the limits of welfare–justice

The phrase 'thinks about children' in the title of a book tends to suggest a psychological approach to understanding children – parents or perhaps teachers interpreting their behaviour and responding to their needs. Yet to include 'law' in the title is confusing. The law is not an individual; it cannot think, at least not in the usual sense of the term. Is this title then no more than a rather silly conundrum - a way perhaps of catching the browser's eye to disguise yet another legal textbook on child law or another research study about the decision-making of the courts in children's cases. No and yes. No, it is not a conundrum - the law, as we shall explain, *does think,* and yes, this is a book at least partly about the courts.

However, our purpose in writing this book is not merely to add to the growing list of publications about the failures of courts and social work agencies to protect children against abuse by adults. Nor is it to offer any simple proposals for changes in the law itself which would result in more children being saved from death, serious injury or sexual exploitation at the hands of those who are supposed to be ensuring their welfare. Our goal is, rather, to examine recent perspectives on the law as a social institution capable of 'thinking', that is of generating knowledge about children, what they are, who should look after them and, above all, what is good or bad for them. In the course of 'thinking' law must encounter other social institutions which also 'think about children', often in different ways to those in which law thinks. We want to see first of all whether this unfamiliar approach can throw light on current concerns over children's issues in the courts

and, secondly, what happens when 'law's thoughts' conflict with those of other social organizations.

A Child welfare in law

The problems faced by the law when deciding issues concerning children have received more than their fair share of attention in the press and media over recent years. The scandals of child battering, and later child sexual abuse, the scourge of juvenile delinquency, the heartache of children separated from a parent through divorce or state intervention have pointed the laser beam of public concern in two directions, highlighting first,the courts and their decisions and secondly, the 'caring professions': the doctors, social workers, psychiatrists, psychologists and psychotherapists who are increasingly involved in identifying the abuse and suffering of children and in protecting them from harm. This focus on children (and adolescents) and the dangers that lie in wait for them has become a major cause of concern in all Western industrialized countries.

Despite political rhetoric about family and parental responsibility, it is clear that the autonomy of families, the power to educate and bring up their children as they please without pressure or interference from agents of the state, has long since passed. One only has to open the newspaper and read of proposals to outlaw the smacking of children[1] to realize just how far matters have progressed towards the acceptance of external influence in the parent–child relationship. The question today is not 'Should the state intervene?', but as a French writer recently put it:

> Which social classes, which sub-cultures, which professions or institutions, or which combination of these are going effectively to insert their social, moral and psychological values into the process of determining the child's best interests? (Stender, 1979)

We have now arrived at the point when many thousands of people throughout America, Australasia and Western Europe, after undergoing specialist training which often lasts several years, spend all or much of their professional lives assessing children at risk and making recommendations and decisions about their future. It is clear, therefore, that the debate which raged in the 1950s/60s over the rights and wrongs of state intervention in the family has been won by the child protection lobby.

There are many factors, beyond the scope of this book, that have contributed to the present firm and deep commitment of state institutions to such protection. Some sociologists would point to the depoliticization and technicalization of social problems,[2] whereby major issues are 'taken over' by professional groups who thereafter claim a proprietary interest in these problems and their solutions. Others would identify such factors as cultural and moral pluralism,[3] the fragility

of the traditional family,[4] the diversity of parenting arrangements and changes in gender roles,[5] to list but a few.

Whatever the causes, it is clear that the debate has moved on from the subject of family versus state power to that of how to make the exercise of state power effective in its protection of children yet, at the same time, sensitive and responsive to the needs of children and their parents. In addition to claiming proprietary interests in those social problems concerning children, state institutions have, in other words, tended to 'internalize' the family versus state debate. It has been transformed into a balancing act where the rights of parents and children are weighed, by the state institutions themselves, against what are believed to be society's interests in protecting children and reinforcing normative values.

As long as social problems remain at the level of general public concern and debate over principles, there can be much common ground between different countries and different legal jurisdictions facing similar social phenomena. The problems of drugs, the physical and sexual abuse of children, marital breakdown and youth disaffection and unemployment have in these times of rapid communication passed like virulent epidemics from one country to another and from one continent to another.

However, even if the ultimate objectives of child protection and delinquency prevention have been identical in all jurisdictions, the form that the internalization of the family versus state issue has taken has varied in accordance with historical and cultural differences. Such differences have been magnified by the fact that in most countries it is the legal system, traditionally the principle state institutions for balancing conflicting interests, which has taken over responsibility for providing a firm, but sensitive response where child protection is concerned. In the law, much that is common between different jurisdictions is lost beneath a mass of rules and procedures which occupy the minds of professional participants and convince them that their problems are specific to the country, city or even the particular court in which they practice.

These legal concerns, in all their complexity, tend increasingly to submerge policy objectives beneath a mass of statutes, procedures, rules and cases to be learnt and absorbed by students and practitioners alike. Not only do they obscure the normative processes at work within the law, but they also make comparisons between policies and practices in different jurisdictions ever more difficult. The result is a paradox. While the problems posed by children and young people are almost identical in all Western industrialized countries and the general responses of these countries are broadly similar, the laws, legal procedures and practices putting these responses into effect and governing their administration are very different. Moreover, these differences are increasing as the legal response becomes ever more sophisticated and complex.

As if this were not enough, anyone wishing to indulge in generalizations about children and the law is faced with the great divide between common law and civil law, between the accusatorial system of Anglo-American law practised in English-speaking countries and the inquisitorial system operating on the continent of Europe. Once child welfare issues become professionalized and technicalized within the different legal systems general social issues, which are common to almost all industrialized nations, are then transformed into concepts which necessarily contain them within narrow cultural and geographical boundaries.

B The welfare-justice clash

There is one theoretical paradigm however which appears to have been universally accepted by lawyers and legal commentators as being common to cases where children's issues come before the courts. This paradigm sees policies and decisions in such cases subject to two opposing ideologies, welfare and justice.[6] They are most starkly opposed in the area of criminal justice where *welfare* is represented by the desire of the law to diagnose the underlying problems of children who commit crimes and to treat these problems in some therapeutic way and justice – the traditional concerns of the law for procedural fairness, protecting the innocent against arbitrary decisions, and the punishment of wrong-doers according to the seriousness of their offence. One researcher of the American lower courts sees the problem as follows:

> ... *the modern ethic of responsive justice* with solutions tailored to fit individual problems creates a paradox for the system... . Within such a *framework of individualized justice*, emphasis is placed upon information and perspectives which are inconsistent with formal legal rationality and *adversarial due process* ... psychological 'evidence', therapeutic diagnosis and social history of the family are relevant to a just and equitable consideration of the case. (Sibley, 1981, p. 23, emphasis added)

This dichotomy has particular repercussions for criminal trials of young offenders, where the formal legal rationality tends to be rigid and inflexible. According to another American writer:

> The modern theory of juvenile justice argues for individualized justice tailored to treat a wide range of factors as relevant to respond to the 'whole person'. It de-emphasizes the strictly 'legal' proceedings, and purposefully expands its inquiry beyond and away from the provoking incident in order to determine the root of the child's trouble and consider appropriate alternative responses ... the central problem of the court is rooted in neither the poor quality of the personnel nor the tendency to avoid responsibility; *it is entrenched in the official's aspirations to do good, in the impulse for*

flexibility and substantive justice which give rise to competing conceptions of justice. (Feely, 1979, p. 284-6, emphasis added)

Consequently the debate over juvenile justice has been couched in terms of a clash between these two distinct philosophies. In other areas of the law, though the analysis has taken a somewhat different form, the issues are still presented in terms of this clash between different ideologies.[7] In child protection cases, for instance, the intervention of social workers is seen as presenting a serious problem for the law. The courts' desire to ensure that the decisions of these child-care experts to remove a child from its family or to cut off contact between a child and its natural family are necessary and justified is seen to undermine support for social workers in their efforts to protect children and promote their interests. So the law, which in liberal western countries has traditionally protected the rights of citizens from interference by the state, is seen as being set against the very different ideology of therapeutic intervention for the benefit of a child at risk, regardless of the parents' objections or their refusal to cooperate.

The form the ideological battle has taken in child protection cases nevertheless varies from jurisdiction to jurisdiction. In England and Wales, for example, campaigns for *rights* for parents and children have repeatedly clashed with the child-protection lobby.[8] Dominant issues in this battle have been the provision of lawyers to 'defend' parents and their children against social work intervention, and the right of appeal to the courts in cases where parental access to the child is denied. In England and Wales The Children Act 1989, heralded as the most important piece of legislation governing parent-state-child relations for twenty years, attempts to balance the rights of families and the duty of the state to intervene and protect children in the different areas where conflict arises between these two interests. In keeping with current legal beliefs, it places much emphasis on parental rights and the use of the courts for the determination of disputes between parents and those engaged to protect children while at the same time restating the principle that parents are the best people under normal circumstances to determine what is in the interests of their children.

A third area where law and welfare have been seen as opposing forces is that of disputes over children in matrimonial cases. Here the ideological clash takes the form of a conflict between the traditional role of the courts as arbiter between two opposing parties [9]and the desire to minimize the harm caused to the children by the separation and divorce of their parents. Lawyers, according to this view, are people whose training and ideological orientation leads them to do all in their power to achieve the best outcome for their clients. As a result the interests of children often disappear from view or, worse still, the children are used as ammunition in the legal battle. The welfare approach, on the other hand, makes the child's interests the dominant concern. Parents should therefore be discouraged from using the courts to resolve differences between them and encouraged through mediation and conciliation to come to some sensible,

mutually acceptable arrangements which promote the welfare of the children.[10] In addition courts should have an important role to play in protecting the children of divorced couples and promoting their welfare. This is already a factor in many post-industrial countries. An extreme example is Ontario, Canada, where in every divorce case involving children, parents are required to provide information to the Official Guardian. The Official Guardian then decides whether a detailed investigation is necessary.[11] In England and Wales a divorce cannot be declared absolute until the judge has reviewed the arrangements proposed by the parents for the future welfare of the children. [12]

The problems that arise from these attempts by law to respond to current demands for just but sensitive decision-making have tended to be portrayed again in terms of clashes of ideology. According to this view, if the courts' decisions do little in practice to protect children and promote their welfare, the cause is to be found in the imbalance between the two different ideological objectives of welfare and justice which the law pursues. All will be put right if the right balance can be found. Justice and welfare have therefore become concepts with a dual function. They are used to explain the complexity and confusion of court decision-making in the main areas concerning children: juvenile justice, child protection and matrimonial disputes, but they also serve as rallying points in those campaigns which seek to promote one or the other as the preferred way of dealing with children's issues in the courts.

C Policies for reform

Solutions to this ideological battle have been presented in two main ways. The response of some commentators, including two of those we quoted earlier, is that the courts are less than ideal institutions for dispensing welfare or 'individualized justice'.

> The freedom to pick and choose among these conceptions undercuts the morality of all of them and, ironically the impulse to provide justice seems to foster a sense of injustice. (Feely, 1979, p. 284-6)

> These factors [associated with individualized justice] are uncomfortably out of place when they are tailored to the requirements of legal evidence, proof of guilt and considerations of legal responsibility. (Sibley, 1981, p.23)

According to Morris and Giller (1987) in their authoritative book on the juvenile courts, those who posit the justice model see the juvenile justice system to be 'an ineffective mechanism for defining welfare needs and for delivering welfare services'. Instead these advocates of justice wish to restrict and simplify the basis of the operation of the juvenile justice system to the juvenile's offence. (p. 251) In other words, such deficiencies are seen as remediable through reforms which alter the objectives of legal proceedings and change procedures in order,

for example, that the child's interests prevail over all other considerations or that adequate protection is offered to the interests of parents. The conflict between justice and welfare would therefore be resolved by the elimination of either justice or welfare through the imposition of legal rules and procedures which allowed the operation of only one ideology. There would in effect be institutional separation of these two philosophies.

The other main solution is presented in terms of providing institutions that are able to combine the two philosophies more effectively than can the existing courts. In the juvenile justice area the mechanism for achieving this suggested by Adler is the separate processing of those cases where 'offence is both the ground and basis of legal intervention rather than an indicator of possible need for intervention' (1985, p.137) . Harris (1985), on the other hand, argues for the integration of justice and welfare by ensuring that the amount of welfare applicable in each case is proportionate to the offence charged. In the area of matrimonial disputes Family Courts have been widely promoted as the means of providing delineated justice and welfare services.

Many of those who advocate the first solution take the more radical view that the promotion of children's welfare is not and never can be realisable as an objective for courts of law.[13] Yet, their protests have for the most part been drowned by more pragmatic voices who support the solution of compromise and cooperation between the two ideological camps of justice and welfare. The history of the 'Return to Justice' movement, which for a time influenced policies in the United States in the mid-70s and in the United Kingdom in the early 80s, is illustrative of the ultimate success of supporters of cooperation. The Return to Justice advocates were able to score gains - the introduction of determinate sentences on both sides of the Atlantic, the abolition of some status offences and the proliferation of lawyers appearing in children's cases for example. However they had to contend with a powerful lobby of vested interests in the form of probation officers, welfare officers, social workers and other child-care professionals who were, and for many years had been, engaged in promoting welfare within the confines of the courthouse. These welfare professionals argued strongly for the influence of a humanizing ideology in a legal world where the strict application of rules, precedents and tariffs takes little account of the needs of children. The legislation for England and Wales is fairly typical of recent trends in all post-industrial Western countries in increasing the scope of this humanizing role by requiring that the courts request welfare professionals to supply them with the 'facts' necessary to consider all the circumstances and all possible alternatives, before passing a custodial sentence upon a young offender.[14]

Therefore, instead of the separation of welfare and justice, what has occurred in practice over the past decade has been a swinging of the policy pendulum back and forth between what has been portrayed as these two opposing ideologies and

a wealth of pragmatic compromises designed to hold the middle ground between the two ideological camps. At this stage in our analysis we shall do no more than give a few samples of such compromise schemes in the three areas that we have mentioned. However a number of these examples will be described and analysed in greater detail later in this book.

Within juvenile justice there has been a general policy on both sides of the Atlantic to keep young people out of the courts and out of custody. This has been achieved through the invention of cautioning councils, and other similar bodies where social workers sit down with policemen to decide whether young people who have broken the law should be prosecuted and brought before the courts or dealt with in some other way, such as a police caution or invited to join a project designed to keep them out of trouble. For those who are prosecuted and convicted there are schemes in England and Wales which offer alternatives to custodial sentences. These schemes are usually staffed by social workers, but depend for their clientele on the approval of the courts as a tough and effective alternative to incarceration, emphasising the seriousness of the offence rather than individual problems of the offender.

In matrimonial disputes over children, there has been a proliferation of schemes in almost all English-speaking countries designed to help parents reach agreement without resorting to a full legal hearing of their dispute. Many of these schemes involve conciliation or mediation appointments (or some similar title) on the court premises with the parties' legal representatives present under the eye of the judge or registrar.[15]

In the area of child protection there have also been moves towards reducing the workload of the courts by filtering out those cases which are not seen as needing the heavy hand of judicial intervention. Terry Carney, the Chair of the Victorian Child Welfare Practice and Legislation Review, denies that he and his fellow Review members are arguing for 'an orderly withdrawal on the part of the law'. Instead, their central thesis is rather that:

> overreliance on adjudicative styles of legal intervention should be redressed by way of the substitution of facilitative laws. This new bond between welfare and justice is embodied in the proposals ... .(Carney, 1989, p.37)

In the State of Victoria the proposed bond between welfare and justice also involves the introduction of a Family Court, a 'semi-inquisitorial and more expert body' (Carney, 1989, p.35). Its expertise is to be augmented by 'court liaison officers' whose task it is 'to advise on the provision of necessary services and reports'. Although England and Wales still awaits the introduction of Family Courts, the practical bond between welfare and justice within the courtroom has in recent years been cemented by the arrival in care proceedings of the *guardian ad litem* to advise courts on how best to protect children's interests.

Much discussion has occurred, but the result in terms of greater clarity of analysis and actual institutional change is tantalizingly small. Even from this brief account of recent attempts to 'improve' the legal system it is clear that, despite the changes that have been introduced, 'the vast edifice of the courts', as Davis (1988b, p.12) has called it, remains virtually untouched. The same is true of the legal profession. Despite the development in several countries, including Britain, the United States and Holland, of training programmes which aim to provide such lawyers with the knowledge and skills to enable them to become specialist child lawyers combining the legal with the social, within the context of those courts dealing with children's issues most lawyers continue to ply their traditional trades of advocate and negotiator.

D Fundamental flaws

The problems presented by decision-making in children's cases and the ways of solving these problems have been constructed in terms of ideal and idealized objectives: 'justice' being the rallying cry for lawyers and 'welfare' for the caring professions. Law and social work have not realized these ideals. Changes have in practice made very little difference to the manner in which courts, lawyers and court welfare professionals conduct their business. Why?

Some commentators have argued that any failures of compromise solutions to effect substantial change are the result of such remediable factors as inadequate resources[16] or the lack of cooperation and communication between the professionals associated with the two ideologies.[17] According to this view, given the right conditions, these professionals are quite capable of achieving the cooperative ideal. It is only when they are forced to work together under conditions that generate stress and conflict that things go badly wrong. The response is therefore pressure for more and better compromise solutions to provide a more favourable environment for the two ideologies and the professions that embody them. As we have noted, the Family Court in New Zealand, Australia and some American jurisdictions,[18] has been heralded as a monument to the successful marriage between welfare and justice.

Similarly, the solution of merging professional ideologies in the person of one functionary who incorporates the best of both welfare and justice has been taken further. For example the French *juges des enfants* are drawn from the ranks of the judiciary but are encouraged to temper the insensitive and impersonal nature of legal rationality with the caring compassion of welfare. Within the realm of welfare a similar spirit of cooperation and integration has been responsible for the introduction of law-like concepts and personnel from the legal process.[19] These supposedly offer protection for the rights of the citizen, be they parents or children, against the arbitrary power of experts to identify harm and remove children from families. Welfare personnel are to consult with representatives of the law both in the selection of those who are to go before the courts and in

the decisions as to what should happen to them. In Holland the Child Protection Councils, incorporating social workers and lawyers, work together in teams on cases of child abuse. In France Social Services Departments (the DASS) have their legally-qualified *inspecteurs*.

Other, more critical, writers attribute the failures of the law and of social work to realize the ideals expressed in the welfare and justice models to confusions and contradictions within the conceptual framework which sustains these models. For example, Harris and Webb, drawing upon the theoretical writings of Foucault and Donzelot, write:

> Historically welfare has emerged to fill a vacuum which is itself the product of a series of conflicts,confusions, compromises; it is a strategy of power, a means of investigating families, of controlling non-delinquent children, an acceptable means of expanding the power of the state. (1987, p.168)

They also maintain that the logic of justice is flawed, first, in its claim that treating 'like cases alike' is clear and unproblematic and secondly in the vagueness and ambiguity of the very idea of justice. 'Of itself', they argue, 'justice means very little' (1987, p.168). For those who offer radical, post-structural critiques of the existing social order and its historical antecedents, however, the debate between welfare and justice is no more or less than a device designed to legitimate a reductionist, dualistic ordering of experience. They point to inherent contradictions and illogicalities in the very concepts of welfare and justice and to the confusion of ideologies and objectives that abound wherever attempts at cooperation or merging occur. They prefer analyses which identify power relations based on class, gender or race, or systems for exercising control over families (Donzelot, 1980).

Yet there are serious difficulties with an analysis which sees the issues purely in terms of power for it misses the fundamental point that the ideals of welfare and justice are seen very differently by law and social science. What has been overlooked is that the current debate is not only *about* law but also formed *by* law. The very terms used in the debate, 'justice' and 'welfare', have meanings accorded to them which have been constructed by the operation of the law.

Within the law, justice is constructed narrowly in terms first of procedural justice[20] and secondly as justice to individuals based on the idea of a just 'return' for the amount of individual responsibility and rights deemed relevant. Justice in the wider sense of the term is found only in the sentencing of offenders where the outcome can be influenced by the concept of justice to a society wronged by the individual offender. This is, however, simply a symbolic justification for what is done to an individual [21] according to a principle of 'just desserts' for a legally constructed amount of personal culpability. By contrast, outside the law justice is not always constructed in such individualistic terms. The concept of social justice, which suggests the influencing of a more equitable balance of both legal

rights and social welfare in society generally is very different from the narrowly defined idea of legal justice.

This is no novel idea. The most widely quoted expression of this 'gap' is probably the argument that the rule of law, and therefore legal justice, is simply an ideology to mask the existence and consolidation of social *in*justice.[22] As Stewart Asquith remarks:

> Policies which ignore the social and economic realities in which children find themselves, while promoting greater equality and justice within formal systems of control, may not only ignore, but may compound the structural and material inequalities which have been historically associated with criminal behaviour. (Asquith, 1983, p.17)

What has been neglected is the similar gulf between the concepts of *welfare* constructed within and outside the law. Just as legal justice is not the same as social justice, the welfare offered by social workers operating within and around the law is not the same as social welfare.[23] This concept of welfare is one which claimed to be able to deliver social justice to the point that welfare became a shorthand term for a particular type of social policy aimed at greater and more equal social provision in terms of education, housing, health care and economic rewards.[24] '"Welfare state" has been used as a way of defining "welfare" itself.'[25] Used in opposition to justice, however, 'welfare' appears to mean something much narrower. The focus of attention becomes, not social policy, but the individual and relationships between individuals.[26]

How such a narrow concept of welfare has been constructed within the legal discourse is a question which will be addressed in more detail in chapter 3. The point we wish to make here is that there are limits to 'welfare in law' because there are limits to law's effective action set by the intrinsic nature of law and by law's own concept of its role.[27] Law's *raison d'être* is as a body which conceptualizes the world into rights and duties on which it can adjudicate and which swings into action when an individual, personal or corporate, wishes to activate a right or impose a duty. [28] The law's actions are largely reactive. They are determined by the nature of rights and duties embodied in law which, in civil law jurisdictions and increasingly in common law jurisdictions, is made by external agencies, notably the legislature. Therefore if the law does not provide a parent with the right to *satisfactory* accommodation for rearing children then the law cannot provide it. The law may, instead, find itself responding to the rights and duties of local authorities in respect of alternative accommodation for such children away from parents in unsatisfactory accommodation.[29] Similarly the law cannot find employment for a parent or improve the education provided by schools,[30] it can only respond when what might be a relevant right or duty is brought to its attention[31] and recognized as requiring judicial action.