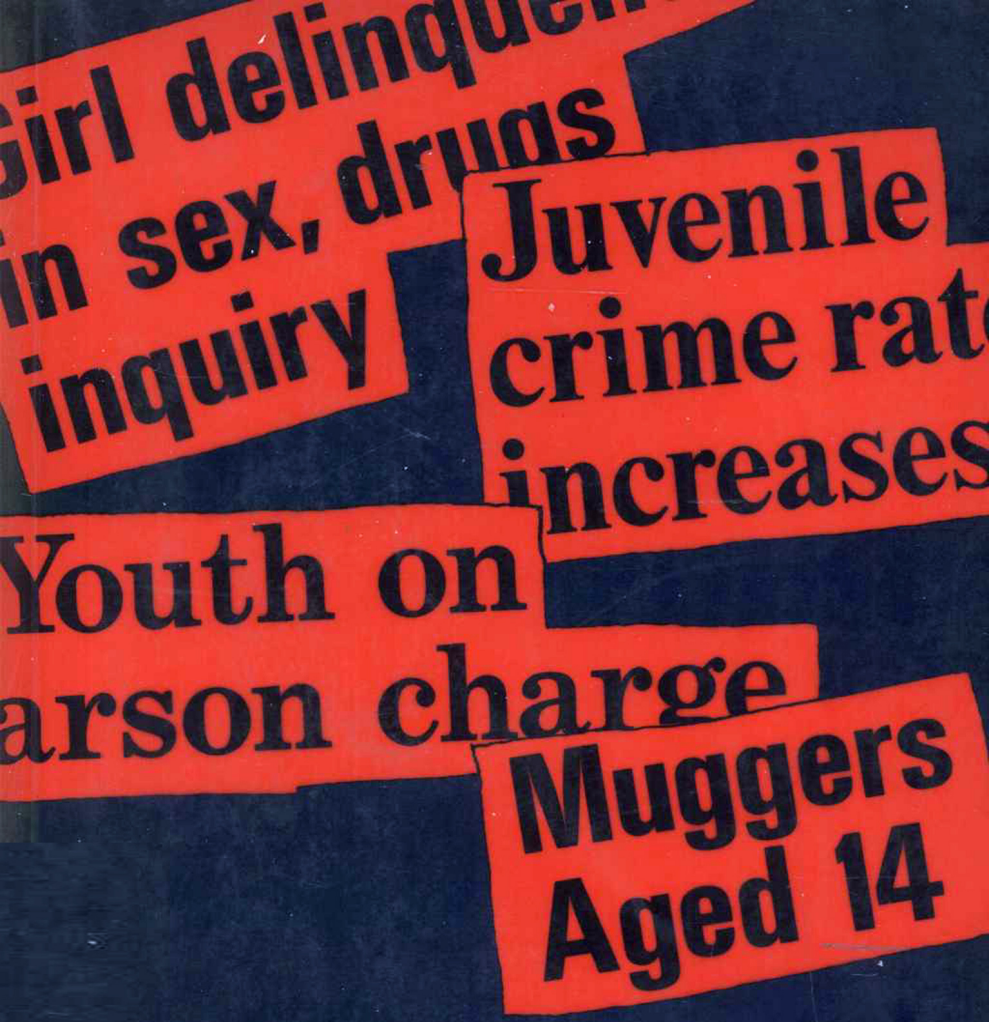

Providing Criminal Justice for Children

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Introduction

Allison Morris and Henri Giller

Justice for Children was explicitly a polemic on the current system for dealing with both troubled and troublesome children. It presented arguments in favour of a juvenile *justice* system but was rightly criticized for offering little by way of practical guidelines. Its brevity also resulted in certain of these arguments not being fully developed. This led to some confusion about the proposals. For example, one reviewer commented 'the answer to bad social work practice is not to abolish social work.'[1] But this was not our intention. Others expressed concern about promoting procedural justice at the expense of substantive justice (see Harris 1982 for an extended review). Again this was not our intention. The aim of this book is to develop both more coherently and more critically the principles presented in *Justice for Children* with respect to delinquent children[2] and to outline in greater detail what such a system would look like.

We deliberately asked experts in their respective fields to write the essays for this volume rather than those who agreed with all the arguments in *Justice for Children* and it is clear that some do not agree. Each explores the relevant issues and presents the evidence available from different perspectives. There is, however, agreement on one issue: the current system of dealing with juvenile offenders is unjust. Though each essay stands independently, they combine into a coherent whole: the provision of justice for children.

Stewart Asquith is concerned with the relationship between justice and retribution, the distinction between formal and material justice and the need for a justification for punishment which addresses the peculiar situation of children. He cautions that it is not enough to promote procedural justice as such proposals might, in fact, be unjust. Social, economic and environmental circumstances *do* play a part in the production of crime and care must be taken that a system which satisfies the demands of formal justice does not compound basic social and structural injustices. The pursuit of justice for children is essentially a *political* affair, he argues, requiring

[1]Sarah Preston, the *Financial Times*, 7 June 1980.
[2]A companion volume discusses abused and neglected chilldren.

examination of the roles allocated to children in social and legal relationships.

Nigel Walker draws attention to the fact that though much has been written over the years about official measures for dealing with juvenile offenders, little has been devoted to the exact nature of the justification for such measures. Theories of punishment are almost always discussed in the context of penalties for adults. In this pioneering essay, Walker reviews the three major justifications for punishment: retribution, reductivism and denunciation - and compares the state's response to two categories commonly viewed as exceptions to rules about criminal responsibility: childhood and madness.

Walker suggests that the main justification for punishment in *Justice for Children* was denunciation. Though he raises a number of complex problems in making denunciation the prime justification (for example, whether or not this would involve the abolition of the irrebuttable presumption of the innocence of the under-age child), Walker concludes that, if there is a time and place for such a justification of punishment, 'it is probably in the present-day juvenile court'.

Paul Friday explores a variety of delinquency prevention strategies and stresses the need to encompass not only the individual factors associated with delinquency but the institutional and structural factors as well. For an effective social policy, he suggests that crime must be considered in its broad social, economic and political context and, from this, that there is really only one major conclusion to be reached: crime prevention requires radical social-structural change. The criminal acts of the young are not a repudiation of the basic values of society; they are *reaffirmations* of them and it is these which require change.

Rosemary Sarri reviews the development of diversion, with particular emphasis on the United States. She considers the different ways in which it has been defined, the range of programmes that have been presented and what is known about their relative effectiveness. From this it emerges, as is often the case, that what stems from good intentions can produce unexpected and negative results. For example, children who would otherwise have been dealt with informally and would, therefore, not have appeared before a juvenile court may now be dealt with within a diversion programme. Professor Sarri concludes by suggesting remedies for making diversion a more effective policy.

David Thorpe's essay is a critique of current social work practice. He draws attention first to the increase in the use of institutions for delinquent children since 1971 and explores some of the reasons advanced for this. He places particular emphasis on the removal of

children, often first or minor offenders, from their families by social workers on welfare grounds (see also Cawson 1978; Giller and Morris 1981). Secondly he suggests that similar reasoning has influenced the practice of intermediate treatment. Rather than a measure available for children *prior to removal from home* as was intended (*Children in Trouble*, HMSO 1968), research suggests that intermediate treatment has increasingly become a measure available for children *prior to delinquency* (and the most recent Government White Paper (1980) reinforces this trend). Yet, as Thorpe shows, it is notoriously difficult to predict delinquency with much accuracy.

The welfare/justice dilemma is a core dilemma for social work with juvenile offenders and the practice of care orders and intermediate treatment, according to Thorpe, appears to offend both. What seems necessary, he argues, is the development of specific criteria which delineate the client group (to include offenders and to exclude potential offenders) and which determine both the length and objectives of intervention. Institutions should be measures of last not first resort.

Ray Jones also critically examines social work practice but concentrates on statutory supervision. His main objective, however, is how supervision might be made 'more credible and acceptable'. He identifies seven principles which should guide social work practice:

> We need to react to delinquency;
> we should not over-react to delinquency;
> we should not promote further delinquency;
> we need to be concerned with deprivation as well as delinquency;
> whatever we do should make sense to the recipients of juvenile justice;
> whatever we do should make sense to, and be acceptable by, the community;
> and whatever we do should have a chance of being effective.

In his discussion of the implications of these principles for policy and practice, Jones outlines the shape of supervision within a framework of punishment rather than one of social welfare. This does not mean the rejection of help for children and Jones suggests practical programmes which can both meet the principles outlined above and provide the kind of help sought by the delinquent.

Henri Giller discusses the applicability of a justice approach for the provision and practice of residential services. He rejects indeterminate care orders and argues instead for a residential order of determinate length for children for whom there is no other appropriate response and that such children should be placed in *neighbourhood* residential centres. Since the formal requirements of the order would be met by the child's residence in the centre, the child would in the main use ordinary community services (for health, education,

welfare, etc.). This again, however, need not mean the rejection of helping strategies within the residential institution; the important distinction would be that this would take place *on the client's terms*.

Allison Morris raises fundamental questions about the role of a lawyer in the juvenile court and, on the basis of research both in this country and in the United States, suggests that more legal representation (through, for example, duty solicitor schemes) does not necessarily mean better representation. Her argument is that a lawyer can only act effectively where there is agreement not only about his role, but about the *juvenile court's* role. She outlines what this would mean within a justice framework.

In their essay, Giller and Covington identify discretionary decision-making as *a* problem throughout the juvenile justice system, but argue that structuring that discretion would not, of itself, produce *the* answer to the problem. They demonstrate this by presenting three case studies of the exercise of discretion – the police, the independent sift and the court – and show that recent attempts to structure discretion have led to the inflation of penalties and the mere shifting of discretion. Instead, Giller and Covington advocate discussions about the appropriate role of the criminal justice system and about ways in which one might achieve social justice.

One final introductory note: this attempt to promote justice for children is no idiosyncratic venture. Similar themes have emerged in other countries, for example, in America (ABA/IJA Standards Project 1977), in Canada (Canada, Solicitor General 1975) and in Northern Ireland (Black Committee Report 1979). In this country, the Parliamentary All-Party Penal Affairs Group in its blueprint *Young Offenders – a strategy for the future* (1981) endorsed some of the principles outlined in *Justice for Children*.

However, co-option by the Right is a real danger. For example, it is claimed by some (Brown 1981) that the Conservative Government's White Paper *Young Offenders* (1980) has elements of a justice approach. We discuss this further in the conclusion. The point we wish to stress here is that the rejection of justice proposals by liberals in order to avoid such co-option is potentially more dangerous. This does no more than play into the hands of the Right and further aids the confusion between 'justice' and 'law and order'. We hope that this emerges clearly from the essays in this volume. Tactics of 'law and order' perpetuate social injustice; providing justice for children is a step towards social justice.

Editors' note: Some of the contributions to this volume were written in the summer of 1981.

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1

Justice, retribution and children

Stewart Asquith

> It is not enough . . . for a system of law to comply with the formal attributes of justice even though tempered with a spirit of equity. For in addition, law needs to possess a just content, and this can only mean that its actual rules must themselves by their provisions aim at and endeavour to conform to some criteria of rightness which repose on values exterior to justice itself in the sense that no merely formal idea of justice can dictate to us the basis upon which we are to prefer one set of values to another. (Lloyd 1964, 133)

Some time ago whilst participating as a member of the now legendary Brains Trust, Professor Joad, a philosopher, achieved some notoriety by beginning many of his replies to questions with the phrase 'It all depends on what you mean by . . .'. Since justice is what Gallie (1964) calls a 'contestable concept' it is subject to a variety of often conflicting interpretations which have to be analysed. And, depending on what meaning is given to the concept, proposals purporting to provide justice may in fact be unjust. This will depend on the crucial distinction drawn between formal and material justice referred to above by Lloyd and in this essay I will elaborate on the importance of this distinction and address three areas: the relationship between the concept of justice and retributivism; the appropriateness of retributivism in the context of the material conditions which characterize modern social life; and the difference between dealing with adults who commit offences and children who commit offences.

The provision of justice for children is necessarily a political enterprise which has to be informed by a comprehensive theory of social relationships in which the status of children and any rights they may possess are clearly identified.

Retributivism and justice

The current attack on what might be termed a welfare philosophy as the basis for systems of juvenile justice is composed of two main elements, both conceptually linked.

The first is that children's rights receive insufficient protection in systems based on welfarism for a number of reasons. *Theoretically*, the critics argue (Morris and McIsaac 1978; Morris *et al.* 1980) that welfarism is based on philosophically unsound principles insomuch as it is not possible to identify criteria which can either be employed to explain delinquent behaviour or to inform the measures to which children are subjected in their 'best interests'. In short, if we do not really know what we are doing with children we should not pretend to by employing the rhetoric of therapy when what is being exercised is a very subtle form of social control. Semantic and linguistic devices too readily conceal the ambiguity and confusion which is seen to be at the very root of welfarism. *Practically*, the justice movement deplores the absence of sufficient legal and judicial safeguards in a system of control based on welfare principles and in that respect their claims are reminiscent of the arguments made in relation to the infamous Gault and Kent cases which fostered a policy of constitutional revisionism in the United States in the 1960s (see, for example, Faust and Brantingham 1974). The 'return to justice' movement as currently conceived then includes arguments in favour of a court hearing, judicial review of decisions and legal representation. Only in this way, it is said, can children avail themselves of the safeguards commonly available to adults caught up in the criminal justice system. It is no surprise to find that the Scottish system of juvenile justice in which hearings take the form of administrative tribunals comes in for particular comment and criticism along these lines. Indeed, there has more recently been empirical evidence to the effect that even the minimal statutory requirements which should govern children's hearings in Scotland are in practice often being ignored (Martin *et al.* 1981).

The second argument is that measures imposed on children should be offence-(rather than child-) oriented and that children can, therefore, be legitimately punished for what they have done. Advocacy of children's rights and of punishment is, within the terms of a justice approach, conceptually linked: only in a system in which children are punished for what they have done can their rights best be protected. Within a welfare philosophy children can be subjected to measures which are indeterminate and which may appear inconsistent with the measures inflicted on children who have committed *prima facie* similar offences. Accordingly, the main proponents of the justice movement include amongst their main principles the proposal that measures should be determinate, proportional (to the offence) and consistent (with other offences). Needless to say these in themselves provide for a decision-making process that is, in theory at least, more structured and restrictive than that manifested in a welfare system in which wide discretionary

powers are available to decision-making personnel. A retributively oriented philosophy underpinning a legally and judicially constituted form of decision-making is seen as the most appropriate and most just basis for a system of juvenile justice.

What is particularly interesting about such arguments is the extent to which they are currently being voiced in a number of countries. Very similar arguments are contained in proposals made by the ABA/IJA Standards Project (1977) in the USA, the Black Committee (1979) for Northern Ireland, Morris *et al.* (1980) for England and Wales and Joutsen (1981) in the republic of Ireland. There are a number of differences in the recommendations made by these different bodies and individuals but what they have in common is the commitment to punishment (as opposed to welfarism) as *the* means of dealing with children who offend and to judicial proceedings (as opposed to what are seen to be wide discretionary powers available within administrative forms of decision making).

In the attempt to clarify when and in what circumstances an individual may be justly punished one of the most important debates in moral and political philosophy is encountered: the extent to which moral autonomy can be reconciled with legitimate political authority. Indeed the question of authority to punish is inextricably linked with definitions of punishment. Flew (1954), and later Watson (1976), offer a number of conditions that must be satisfied before the word punishment can be applied. They suggest that punishment must be an *intended* unpleasantness to the subject; punishment must be for an *offence*; punishment must be of an *offender* and punishment must be imposed by virtue of some special authority. There is a problem with this and one which may, I believe, be reflected in philosophies advocating a return to justice.

Though these conditions *may* be entailed in the definition of punishment they are not themselves *sufficient* to form a means of determining under what circumstances and to what degree punishment may be inflicted. In the justification of punishment, definitional statements of necessity have to be supplemented by moral arguments. It is the lack of an essentially *moral* justification for a system of punishment that may render the notion of 'justice' open to criticism. The suggestion that 'welfarism' is basically unjust, supposing that to be the case, must be supplemented by arguments which justify punishment as being *the* form of institutional control. It is not enough to assert that a system of punishment, subject to judicial control, constitutes a more 'just' system in which the rights of children are protected. The success of these arguments depends on the conception of justice employed.

There are two elements to the concept of justice – formal and what is often referred to as material or substantial. Formal justice is

traditionally associated with judicial proceedings and means little more than treating like cases alike and in this way relates very closely to the principles of equal treatment of similar cases and to the demand for consistency advocated by Morris *et al.* (1980). For the retributivists, an offender is punished because he has done something to deserve his punishment, but punishment somehow has to fit the offence and ought not to be decided upon simply with atonement in mind. A limit then has to be imposed on the severity of the sanction and the infliction of retributive sanctions can further be limited by relating the punishment to the offence. The obvious difficulty here is in deciding on the criteria to be employed in relating offences and sanctions; the retributivist principle of proportionality offers little help in general though it may contribute to the maintenance of balance in the sanctions employed for different types of offences. Moreover, in terms of limiting retributivism, the importance of the moral culpability of the offender is further signified by Walker (1969, 31) in the principle that 'society has no right to apply an unpleasant measure to someone against his will unless he has done something prohibited'. Thus, only those who behave responsibly can be justly punished and here retributivism and formal justice parallel each other: the justice of the sanction has to be determined in relation to the culpability of the offender and with reference to the treatment meted out to those who commit similar offences. That is, like cases have to be treated alike. It is precisely because of this that Mundle (1954) argued that retributivism is a logical not a moral doctrine since it allows us to determine *who* can be punished and how much.

Similarly, formal justice means something like the application of the law impartially and fairly with all individuals treated equally before the law. What formal justice and retributivism share is the notion of the individual as a juridic person, equal before the law and punishable by virtue of his capacity as a morally autonomous being. However, this tells us little about what is meant by cases being alike and it is in this context that the material content of justice is to be articulated. Though formal justice may mean that rules have to be applied equally to cases alike in nature, the very content of the rules and the categories employed to define 'likeness' of cases have to be established and these raise questions of material, not formal, justice. Formal justice may allow us to determine the application of punishment in *particular* cases but it is only through the concept of material justice that the institution of punishment may be morally justified. This is the distinction drawn by Rawls (1955) between the justification of a rule or practice on the one hand and the justification of a particular action on the other. To my mind, both concern the moral justification of punishment but one refers to the morality of the

institution or the practice as a whole whereas the other refers to the moral appropriateness in a particular instance of the application of punishment within that practice. A number of points have to be made here.

First, the concept of justice employed by many of the proponents of a justice approach reflects concern with the procedural injustices which may arise within systems of delinquency control espousing a commitment to welfare. As such, proposals for change, even in the advocacy of retributive sanctions, are primarily directed at promoting greater procedural justice *within* systems of control and there is often little discussion of how these are, or ought to be, related to the material conditions of social life.

Second, in the pursuit of greater protection for children within systems of control, further consideration has to be given to the distinction between dealing with children and dealing with adults and, consequently, between children's rights and adults' rights. The perception of the offender in retributive thinking is rational and responsible and this poses particular problems for any social institution dealing with those whose status as morally autonomous agents needs careful consideration. The extent to which children can be considered criminally or morally responsible or both is a crucial question. The mental capacity of the individual has always been singled out as a prime factor to be taken into account in determining the character of retributive sanctions. Walker (1969, 23), for example, argues that 'the amount and therefore the severity of the penalty should be governed by the offender's intentions and not by the actual result'. In this respect, the issues involved in dealing with juveniles parallel very closely the debates about the punishment of the mentally ill since both involve questions of moral agency and moral competency.[1]

Retributivism and injustice

The criterion of 'likeness' employed by the proponents of 'justice for children' seems determined by the offence committed and the moral culpability of the offender. Indeed, both are required since no one who was not morally culpable could be justifiably punished. Further, for those following Kantian orthodoxy, only retributivism recognizes, in punishment, human dignity, self-realization and moral autonomy. In theory, the status of the person who can justly be punished is closely connected with the right of the state to punish and with a particular conception of social relationships. According

[1]This point is explored by Walker in his essay in this book.

to Murphy (1973) the state has a right to pursue retributive objectives only if certain conditions are satisfied. First, all men have to be considered as rational and autonomous beings; only then can they justifiably be punished. Secondly, all men have to be seen as participating equally and fully in a social system in which they experience mutually beneficial relationships and enjoy similar social, political and economic opportunities. Only in this way can the state derive the right to punish since all men can participate in deciding who can be punished and for what reason. In a sense, argues Murphy, the decision to punish an individual is one in which the offender, as a participating member of the social system, has himself participated.

It could be argued that such a social system is a purely abstract form and can be criticized on much the same grounds as theories of society employing metaphysical notions such as Social Contract or General Will. However, it indicates two things. One is that retributivist theories of punishment cannot simply be presented on the grounds of increased procedural justice alone but require an elaborate social and political theory by means of which any justification offered can be given material content. The use of force in the pursuit of retributivist objectives and the threat it poses to individual liberty and autonomy has to be promoted within a theory of society and social relationships in which men participate as equal individuals. As Murphy (1973) puts it, retributivism depends on a political philosophy of reciprocity. Only in this way can it be seen as containing any semblance of material justice.

The other is that, put quite simply, where men do not share equally in social and economic opportunities, retributivism is *materially* inadequate. In Murphy's words:

> The theories of moral, social, political and legal philosophy presuppose certain empirical propositions about man and society. If these propositions are false, then the theory (even if coherent or formally correct) is materially defective and practically inapplicable. (1973, 73)

Though Murphy is addressing the relationship between Marxism and retribution, I am not suggesting that a Marxist stance has to be taken. My argument is simpler. Retributivist philosophies do contain a degree of internal coherence or logic. Their relevance for modern societies, however, which are characterized by gross social inequality, must be seriously considered. The danger is that in constructing a social institution, such as a criminal justice system, which satisfies the demands of formal justice one may compound basic social and structural injustices.

This means that, in accepting a retributivist philosophy and the notion of a responsible offender, the advocates of a justice approach must articulate what part social, economic and environmental

circumstances play in the production of crime. In practice, they tend to suggest that these circumstances are relevant but that they are not resolvable within a criminal justice system. The difficulty this presents is that, as Murphy (1973) explicitly points out, there may well be a theoretical gap between the assumptions and principles employed in philosophies of crime causation and those embodied in philosophies of crime control.

The second problem in adopting a retributive stance towards dealing with children rests on the difficulty of establishing to what extent, under what circumstances and at what age children can be held responsible. The question is whether or not there is or can be any retributivist justification for dealing with children differently from adults.

Children and retribution

The central problem for retributivist justifications of punishment for children is that they rest on notions which are complicated because of the status of childhood. If one relies on equal treatment of offenders in accordance with such principles as consistency and proportionality with what the offender has done, there appears to be little reason, *prima facie*, for differentiating between child and adult offenders. Indeed, a major thrust of current developments in social policy for delinquents is to erode any distinction which may exist in juvenile and criminal justice systems. In Canada, for example, recent proposals include the fingerprinting of children, open courts and judicial inquiry; in Finland, recent arguments for a court-based system include the demand for a reduction in the age of criminal responsibility (this is in itself a logical consequence of the acceptance of retributive sanctions for child offenders since punishment of children who are not criminally responsible would not only be not morally justifiable but also presumably illegal); and in Northern Ireland, proposals for a punishment system with fixed penalties for particular offences are accompanied by the suggestion that there should be two types of court – a welfare court and a criminal court, a recommendation very similar to that made by Morris *et al.* (1980). All these proposals derive, it would appear, from the commitment to offer children protections in a juvenile justice system which are afforded to adults in the criminal justice system.

It could be argued that children's rights do indeed demand greater procedural and administrative protection in *both* a punishment and a welfare system. One of the great sources of debate about the Scottish system of Childrens' Hearings, for example, is how best to offer such protection in an administrative tribunal. However,