NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 2
Issue 1 *Symposium - The Rights of Children*

Article 5

1984

Parents and Children - Rights, Responsibilities and Needs: An English Perspective

John Eekelaar

PARENTS AND CHILDREN—RIGHTS, RESPONSIBILITIES AND NEEDS: AN ENGLISH PERSPECTIVE

*JOHN EEKELAAR**

At a time when it is being increasingly claimed that animals have, or should be seen as having, rights, it would be difficult to refuse to attribute rights to children. Almost everyone today would admit that children have "rights." But when we try to discover what these rights are and, more significantly, what the implications of recognising these rights hold for the adult world, consensus fails and commitment to children's rights falters. In this paper I will argue that, far from being firmly established, the concept of children's rights is under serious threat. We need to confront more openly what kind of claim we are making when we assert that children have rights. We need to appreciate that the ascription of rights to children, just as assuredly as their ascription to any other group, whether human (such as slaves) or animal, carries with it the logical corollary of limiting and supervising the freedom of other members of the community.

What kind of rights do children have? In essence, the answer we give to this question reveals our assumptions about what we consider to be the good life. It is, in short, a political question. I do not intend to dwell on the kinds of aspirations that people have held, and still hold, for their communities and their children. They are far too diffuse. Instead I will put forward a principle which in a rough and imperfect manner represents the seminal idea behind many, or most, of the claims presently made in our society about what children should be entitled to. The principle is that, *given the social and economic structure of our present society, all* children should have an *equal* opportunity to maximise the resources available to them during their childhood (including their own inherent abilities) so as to minimise the extent to which they enter adult life affected by

* Fellow of Pembroke College, and Lecturer in Jurisprudence, Oxford University.

avoidable prejudices incurred during childhood. The Committee on Child Health Services (1976) expressed this principle when it observed that "the 1970's may come to be seen as the decade in which the industrialised world tried to provide for all children the same range and quality of services as they had already created for some children."[1] This is a broad principle, significantly qualified by the reference to the current socio-economic conditions. It is by no means completely, or even nearly, translated into achievement. But it does explain, I think, the root of concern for the quality of the lives of children, whether handicapped or not, whether within their own families or outside, whether subjected to family breakdown or not. In short, we are concerned lest some children are "disadvantaged."

This principle, like others that people may hold about children's claims, rests on the political level. Much of its implementation, therefore, must be at that level. The cost to the community appears in expenditures in such areas as children's medical services and education. These claims cannot be said, in Britain at least, to have been translated into legal rights. What, then, is the mechanism for translating such claims into legal form? Normally, it is done by conferring legally enforceable claims on the children's parents. A mother's entitlement to child benefits, or other social provisions geared to the family, for example, rests on the conceptualisation of the parent as agent of the child. The child does not have the competence to make the claim. The parent is expected to do so on his behalf and to use the provision for his benefit. We have here the basis for a very important idea. The parent is given a legal right against the state to an entitlement premised on the child's needs. The parent, therefore, is expected to use the right for the child's benefit. The parent is socially, if not legally, a trustee for the child.

But parents are expected to do more than make use of family-based entitlements, provided by the state, for the benefit of their children. The social organisation of our society entrusts to parents the primary task of caring for their children during childhood. How can this be reconciled with the basic principle of children's rights mentioned earlier? To permit unrestricted parental autonomy would be to abandon the principle to the

1. COMMITTEE ON CHILD HEALTH SERVICES, FIT FOR THE FUTURE 24 (1976).

whims of parents. I think there is little doubt how, socially, we resolve the conflict. Parents are expected to do their best for their children; to love them, to promote their interests, to treat them equally. Failure to do this invites social criticism. The problem is how this social expectation is to be given legal form. If it is not, children will have no rights whatsoever.

At this point we confront the major challenge to children's rights. For there is only one way in which their basic rights can be secured, and this is by making their parents accountable for the exercise of their parental role. Legally, the position can be explained by analogy with the trust. The parents have the legal right to care for their children which is exercisable against outsiders in the same way as trustees have the legal right to deal with trust property. But, like trustees, they must exercise these rights in the interests of the beneficiaries. Their rights against third parties are in effect duties towards the beneficiaries. But socially the result is that parents are not truly autonomous at all. At most, they exercise their parental rights on a kind of implied license from the community. Their judgement may be questioned. In the last resort, their trust may be terminated.[2]

It is the contention of this paper that, unless we are prepared to accept the full implications of this position, we are not realistically committed to giving children rights. It is here where these rights are most vulnerable to attack, for clearly their expression opposes strongly held political beliefs. One of these beliefs is the value of family autonomy. The other, its counterpart, is of the political undesirability, both from an ideological and an economic standpoint, of interventionist government. This line of attack can perhaps loosely be described as the neo-conservative objection.[3] Opposition also comes from another quarter. Community judgement about how parents care for their children can be represented as the imposition, through agency imperialism, of middle class standards on other social groups distinguished by their class or ethnic character,[4] or, in its feminist version, on a

2. Beck, Glavis, Glover, Jenkins & Nardi, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669 (1978).

3. Dickens, *The Modern Function and Limits of Parental Rights*, 97 L.Q. REV. 462, 465 (1981).

4. A. MORRIS, H. GILLER, E. SZWED & H. GEACH, JUSTICE FOR CHILDREN (1980); L. TAYLOR, R. LACEY & L. BRACKEN, IN WHOSE BEST INTERESTS? (1980).

woman's freedom. This might loosely be described as the left-radical objection, although, significantly in this age of growing political polarisation, similar arguments are to be found in the radical right. The forces yield a powerful combination. We might legitimately wonder whether children's rights can survive.

Let us examine the two positions more closely. Perhaps the strongest expression of the former is to be found in *Before the Best Interests of the Child,* by Goldstein, Freud and Solnit, published in the United States in 1979 and in Britain in 1980.[5] In this work, the authors propose the policy of minimum state intervention in family life. Interference in parental care of children is to be confined to the most extreme cases of physical harm. Damage to a child's emotional well-being would never justify such intervention.[6] This, of course, is a legitimate viewpoint to take. But instead of presenting this as a diminution of children's rights, justified as the proper price to pay for the furtherance of a political ideology, it is presented as a fuller enhancement of children's rights. This is done by constructing the concept of "family integrity," which is a combination of "the three liberty interests of direct concern to children, parental autonomy, the right to autonomous parents and privacy."[7] Thus, it is the child's right that the parents develop uninterrupted psychological ties with him, free from state intrusion.

It is this identification of children's rights with parental autonomy which makes this doctrine so dangerous to children's rights. On close examination, it will be seen that this is not a theory about children's rights at all. To make a case for the existence of rights is to argue for a principle. But this proposition is not one of principle. It is partly a theory about how society should be organised and partly an expression of opinion about matters that are contingent to possible rights, not about the rights themselves. To count as a theory of children's rights, it would have to be expressive of some claims that can plausibly be attributable to children's interests. Consider, for example, the claim to a safe upbringing or to equality with other children. A "right" to be brought up by one's biological parents falls outside

5. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979).

6. *Id.* at 75.

7. *Id.* at 9.

any such reasonable claim because such an upbringing, unless heavily qualified, is consistent with a complete negation of any claims a child might reasonably have. Thus, the preference for parental upbringing is better seen as an ideal of social organisation, capable of operating consistently with children's claims and even enhancing them, but not necessarily synonymous with them.

The point can be made more strongly with regard to the proposition that it is a child's right that the parent-child relationship should be *uninterrupted.* Such continuity cannot in itself reasonably constitute a child's right, for, as the authors concede, it may in some cases do the child great harm.[8] It is therefore merely a contingent judgement that such an uninterrupted relationship is normally the best instrument for advancing the child's true rights. What these rights may be is not clearly articulated, but they are probably related to the authors' view that without uninterrupted parental care, children are unable to cope emotionally with adult life.[9] Whether we agree with this contingent judgement thus becomes not a question of principle but of evidential evaluation both in general and in any particular case. This in turn depends on our degree of acceptance of various aspects of psychoanalytic theory and also of a political view hostile to enhanced state intervention. The authors claim that the "legal system" lacks resources adequately to respond appropriately to a child's needs.[10] But whether we make such resources available or not is a political matter. The exclusion of emotional harm as a ground for intervention is based on the claim that the ground is "too imprecise" to give parents fair warning of intervention or to adequately control the actions of state officials. These are obviously issues separate from any claim the children might have. The exclusion is further justified on the ground that knowledge of the causes of such harm and its proper treatment is insufficient to justify such intervention.[11] This is a remarkable argument for these authors to advance, for the very cornerstone of their case for uninterrupted parental upbringing and minimal state intervention is alleged to be its cen-

8. *Id.* at 12-13.
9. *Id.* at 9.
10. *Id.* at 12.
11. *Id.* at 75.

trality to the proper *emotional* development of the child.[12] If the whole concept is as imprecise and uncertain as this, it seems a very weak basis for a theory of intervention or non-intervention. On the other hand, if proper emotional development is so important, it is hard to see why it alone, if denied a child, should be excluded as a ground for intervention.

We should now consider the second source of threat to children's rights mentioned earlier. The argument here is perhaps more overtly political, for the charge of agency imperialism clearly identifies a conflict between social groups: which group is to win the hearts and minds of the community's children? Like much political invective, this attack depends for its potency on generalisations from particular cases so as to conjure up folk demons. A recurring figure in this demonology is the "predatory social worker" or "authoritarian" health visitor. The following example is taken from Ferdinand Mount's recent book, *The Subversive Family,* written from a rightist perspective and of special significance owing to the influence the writer apparently holds over the present British Prime Minister, Margaret Thatcher. He is describing the British health visitor: "This kindly, middle-aged body has at her ultimate disposal a Stalinist array of powers . . . the Visitor—grim, symbolic title—remains an Intruder."[13]

If such incipient, or actual, totalitarianism really is the political price we must pay for children's rights, perhaps we should abandon them. But it is not. It is easy to refute Mount. The statement is just false. The health visitor has in fact *no* powers, Stalinist or otherwise, at her disposal. She has no rights of entry into any home. At most, she may refer a case to social services, a matter involving complex negotiation between the services. And indeed, the whole left-radical case is vulnerable by simple appeal to the facts. Its weakness might be detected by the fact that, for every alleged case of apparently over-zealous intervention, there can be found individual cases, usually attracting equal publicity, of apparently culpable failure to intervene. But individual cases or anecdotal evidence must be rejected as a means of discovering

12. *Id.* at 9-10.

13. F. MOUNT, THE SUBVERSIVE FAMILY 174 (1982). Mount is a senior policy adviser to the British government.

the way the child care services really operate. The "notorious case" tends to set up a mythology of its own, just as in social services the "memory" of a lost case frequently generates a widespread and enduring perception of the courts as being hostile to social services cases even when the reality is quite otherwise. The argument that the "authoritarian" social worker or health visitor is a myth is based on the findings of extensive research into the actual operation of the health and social services as regards the identification and response to child abuse and neglect.[14] As far as health visiting is concerned, the research shows that such extensive surveillance of children under five is possible in Britain precisely because there are no coercive powers. Voluntariness, persuasion and example are the key instruments.[15]

But quite beyond that, the research also shows that the agencies operate within a systematic set of beliefs which all function as inhibitors on state intervention. The most important of these is the "rule of optimism" whereunder, unless abuse or neglect is overt (which is rare), parental explanations for the causes of events or conditions of children are treated as true unless there are substantial grounds for discounting them. Parents are held naturally to love their children and, unless this can be shown to be absent, which workers are extremely reluctant to find, the presence of such love will override or excuse most allegations.[16] Similarly, workers hold to an ideal of parental responsibility. Attempts to act responsibly in one's children's interests, even if unsuccessful, or in accordance with different values, will be a potent parental excuse. As a broad indictment of agency behaviour, charges of class or cultural imperialism will not stand up. Nor will charges of bureaucratic imperialism. Before coercive intervention can be successfully achieved, a case is characteristically processed through a series of organisational elements. Usually personnel from the health services, social services, the legal department and, finally, the court, must be in agreement on the proposed action. Indeed, lack of proper liaison among the vari-

14. The research was carried out at the SSRC Centre for Socio-Legal Studies, Wolfson College, Oxford, and is published as R. DINGWALL, J. EEKELAAR & T. MURRAY, THE PROTECTION OF CHILDREN: STATE INTERVENTION AND FAMILY LIFE (1983).

15. *Id.*

16. *Id.*

ous agencies is frequently cited as a cause for failure to intervene. Looked at another way, the multi-agency system could be seen as a system of checks and balances, a further inhibition against over-zealous intervention.

It is not my purpose to suggest that present child welfare law, administration and practice is flawless, or that inappropriate intervention does not or cannot happen. It is good that individuals and organisations should draw attention to threats of overbearing bureaucracy and infractions of adult liberties. What I do maintain, however, is that the true recognition of children's rights demands a compromise with these other values. To imagine that the undiminished maintenance of adult liberties, or family autonomy free from community surveillance, is consistent with children's rights, let alone synonymous with them, is an illusion and, from the point of view of children, a dangerous one. I would further maintain that, by and large, the framework and administration of child welfare law in England embodies the necessary compromise between these adult values and the claims of children. The line drawn in this compromise is inevitably unstable. But the adult values are, as it were, built into the system. In my judgement the balance presently struck between these values and the responsibility of these agencies to protect children's rights is on the whole acceptable, although this is sometimes achieved despite the statutory framework rather than because of it. The same cannot be said about the apparent expansion of the High Court wardship jurisdiction into this area[17] for there the checks and balances of child welfare law are lacking. However, it is to be hoped that recent remarks in the Court of Appeal will have arrested this tendency.[18]

We turn now from child welfare law to the arena of divorce. Here, I believe, there is probably more consensus about what children's rights are, or should be. However, there is less willingness on the part of adults to carry this rhetoric into practice. This was vividly illustrated recently in the discussion in the columns of *The Times* following the Court of Appeal decision in *Richards v. Richards*.[19] In that case, the wife, after having

17. *See, e.g.*, Re CB (a minor) [1981] 1 All E.R. 16.
18. THE TIMES (London), Jan. 25, 1983, at 11, col. 1.
19. THE TIMES (London), Dec. 9, 1982.

served the husband with a divorce petition, left the house, a Council home, with the two children, a girl of 5 ½ and a boy of 3 ½. She was living temporarily with a woman friend, intending, it seems, to move in with another man. But that plan collapsed, she had to leave her present address and was offered only a caravan by the Council. She refused to return to the home while the husband remained there and sought his eviction. The court, faced with a man living alone in a family-sized Council house and a mother and two young children in, or about to go into, a caravan, acceded to her request, even though it accepted that the wife had no "reasonable ground" for refusing to return to her husband. "The needs of the children were paramount" said Cumming-Bruce L.J., "and the father [had] to accept . . . that his personal interests must be subordinated [to those of] the children."[20] That the interests of the children, who on any view are the innocent and most vulnerable participants, should be paramount in the resolution of divorce disputes is an oft-repeated sentiment. But here they clashed with the apparently justified claims of an adult, the father. In commenting on this case in an editorial, *The Times* paid the ritual lip-service to the children's interests: "In approaching these cases the courts have quite rightly taken the view that the interests of the children must have priority." But, having considered that in *Richards* these interests clashed with the apparently justified claims of an adult, the father, the editorial concluded:

> . . . there is the question whether the courts should not restrain their understandable inclination to further above all else the interests of the children (and thus of their mother) in situations of family breakdown. Should the children's needs be allowed to override all other considerations? . . . . The requirements of justice to the family as a whole may not always coincide with what appear to be the children's immediate needs.[21]

The House of Lords later overruled the reasoning of the Court of Appeal and held that, although relevant, the children's interests were not to be given priority.[22] The decision can be

20. Richards v. Richards [1983] 1 All E.R. 1017, 1023.
21. THE TIMES (London), Jan. 7, 1983.
22. Richards v. Richards [1983] 2 All E.R. 807.

seen as part of a wider challenge to the interests of children on divorce. A well-organised campaign to restrict the maintenance obligations of former husbands towards their former spouses resulted in the introduction on 1 December 1982 of a Private Member's Bill in the House of Commons,[23] and was expected to lead to Government-sponsored legislation during the 1983-84 Parliamentary session. I am not here concerned about the details of any such reform, but with the general tenor of the debate. This is well represented by a letter from a solicitor published in the journal *Family Law* in response to an article by Carol Smart[24] which raised mild questions concerning the thrust of the proposed reforms. The writer concluded as follows:

> In justice there are only two types of divorce law that one can have. One can have divorce based upon substantial misconduct with maintenance, or divorce virtually at will and no maintenance. One cannot in justice or equity have a situation where women are free to break up their marriages on trivial grounds and then claim financial relief.[25]

This sentiment captures much of the emotional force of the anti-maintenance movement. What is notable about it, for present purposes, is that the issue is presented solely as one between adults. It is true that persons making such an argument might add, parenthetically, that "of course" a man should support his children. But the relegation of child support in this way, and the shift of attention solely to so-called spousal maintenance, totally misses the true nature and function of post-divorce maintenance. The reality is that maintenance is very seldom claimed by wives on the breakdown of marriages where there have been no children. For example, the Scottish Law Commission found such claims in only 16% of such cases.[26] Research in progress at the SSRC Centre for Socio-Legal Studies in Oxford confirms this and in addition found no case in a nationally representative sample of people divorced since 1971,

---

23. Matrimonial Proceedings Bill, presented by Martin Stevens, Dec. 1, 1982 (Bill 28).

24. Smart, *Justice and Divorce: The Way Forward*, 12 FAMILY LAW 135 (1982).

25. Letter from Adrian J.G. Perelman in 13 FAMILY LAW 60 (1983).

26. SCOTTISH LAW COMMISSION, FAMILY LAW: REPORT ON ALIMENT AND FINANCIAL PROVISION 72-74 (1981).

where, ten years later, maintenance in any form was passing between the spouses to such marriages.[27] In other words, long-term post-divorce financial support is almost entirely confined to cases where the recipient former spouse was left with dependent children of the marriage. Although technically divisible into orders "for the wife" and "for the children," this maintenance is in effect child support. We return to our characterisation of the adult claimant to state benefits: the claim is effectively a claim made on behalf of the children. If we now regard such support as "family support," which we should, the debate takes on a different aspect. Under this approach, the concluding remarks of the letter quoted above would then have to read: "One cannot in justice or equity have a situation where women are free to break up their marriages on trivial grounds and then claim financial support for their children." If that is the position, what has happened to the children's rights?

Let us look more closely at the economic position after divorce. If we assume, as we should, that children usually stay with the mother,[28] the evidence is overwhelming that that family, which I will call the mother-child family, rapidly descends into poverty when not supplemented by another adult wage-earner. The research reported above found that 54% of the sample who were still single parents in 1981 relied on supplementary benefit as their main source of income, whereas none of them had done so at time of marriage and only 15% did at time of separation. In contrast, only 13% of those who had now reconstituted were presently on supplementary benefit.[29] In the United States, data from a longitudinal study of 5,000 families showed that people who remained married over the period 1967-73 achieved a 21.7% increase in real family income over that period, whereas women who divorced or separated in that time suffered a 29.3% reduction.[30] This type of data can be put in many different ways, but the results are always the same. Its

27. *See generally* Eekelaar & Maclean, *Financial Provision on Divorce: A Re-appraisal, in* STATE LAW AND THE FAMILY: CRITICAL PERSPECTIVES (M.D.A. Freeman ed. 1984).

28. In about 10% of cases, children will stay with the father after divorce. EEKELAAR & CLIVE, CUSTODY AFTER DIVORCE (1977).

29. *See generally* J. EEKELAAR & M. MACLEAN, MAINTENANCE AFTER DIVORCE (1985).

30. Hoffman, *Marital Instability and the Economic Status of Women*, 14 DEMOGRAPHY 67 (1977).

significance is enhanced when it is considered that, if the mother-child family is to retain its former living standard, it would require 80 to 90% of the former family's income to do so.[31] In other words, the needs of that family are far greater than that of the single former husband. Yet study after study has shown the paucity of maintenance payments both ordered and made. As one example, the SSRC research showed that for half the single-parent families, the amount of maintenance paid over represented a sum equal to from 11 to 30% of their total household income, and for a quarter of them over 30%. However, the payments-out exceeded 10% of the household income of only one-third of the payers.[32]

How is one to understand children's rights in all this? We must revert to the initial formulation that, given the social and economic structure of our present society, all children should have an equal opportunity to maximise the resources available to them during their childhood, including their own inherent abilities, so as to minimise the extent to which they enter adult life affected by avoidable prejudices incurred during childhood. Although the evidence is somewhat tentative, it seems plausible to suppose that the effects of economic adversity of living in a single-parent family, particularly if prolonged, can cause such prejudice. Such children are substantially less well off than those in the "average" family. Alleviation of their position by state benefits designed to bring them up to or approaching the level of the "average" family would be one solution, but not consistent with our society's economic structure. Might they have alternative resources available to them? The obvious one is the earnings of their former breadwinner. One can see the claim to child support as the expression of a child's right to treatment by the person delegated the trustee of his rights in such a way as to minimise the economic adversities of marriage breakdown.

This claim is, however, made more complex by the possible introduction of a new class of child claimants on the breadwinner. The SSRC research indicated that, while fathers who have not formed households containing new dependent children might have significant resources which could be transferred to

31. *See supra* note 29.
32. *See supra* note 27.

their former family without bringing them below the standard of living of the average family, this is not true for men who are now supporting other children. Such families are much more likely to live above the national average standard than single-parent families, but will on the whole be less well off than the average family. Fathers in this position could not transfer much more to their former family without bringing their present family below the average standard of living. But this situation requires us to confront the issue of equity between these families. One of the claims which any reasonable theory of children's rights should hold must surely be that no child should be subjected to unreasonable discrimination as against other children. Applied in this context, we can ask whether this claim means that the children of a man's former family should in principle have an equal claim to his resources with children of his new family. If the children were in the same family unit, it would normally be regarded as unfair if one child was persistently treated less well than others. However, the countervailing values of privacy and family autonomy preclude intervention in most such cases, though not all, for an extreme case of the "Cinderella syndrome" might well justify intervention. But on divorce the family is prised open. No competing claims of privacy or family autonomy oppose the claims of the children to equal treatment.

The only realistic way of comparing the position of the children is to compare the total household circumstances, especially income, of the two families. If this means including in the calculation any contributions made by the father's new wife, then this must be done. For it is precisely in the availability of two income earners that the children of the reconstituted family are advantaged over those in the former, single-parent family.

If we really believe that children have rights, these issues must be confronted. They may be uncomfortable ones for adults to face. But children's rights would not be worth calling rights if adults did not confront them.