

Restorative Justice as a Unifying Force for Child Justice Theory and Practice

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By Dr Ann Skelton

1 Introduction

This paper will explore two classical approaches to child justice,¹ and then describe the influence of restorative justice on child justice internationally. There will be a discussion of the benefits and risks associated with restorative justice, specifically applicable to children in the criminal justice system, with some conclusions about the extent to which restorative justice can “fit” with the current mainstream approach to child justice.

¹ In the US this is generally referred to as “juvenile justice”, in the UK, Canada, Australia and New Zealand “youth justice” is preferred. The term “child justice”, which is favoured in South Africa, is used in this paper as far as possible, but references to “juvenile courts” is retained because it has a distinct meaning that is not conveyed by substituting “child courts”.

2 Early Child Justice Reform

Sociologist Ellen Key,² writing just over a hundred years ago at the turn of the century, predicted that the twentieth century would be the “century of the child”. She was writing at the end of a century during which welfare-oriented individuals and organisations³ had founded reformatories and industrial schools to which children could be referred instead of to prison or as an alternative to deportation. By 1867, 64 reformatories had been established in England, Scotland and Wales of which 20 were for girls. During the same period 79 industrial schools had been created.⁴ New Zealand passed the Neglected and Criminal Children’s Act in 1867 which empowered provincial authorities to found industrial schools.⁵

Also during the nineteenth century, a probation system had been developed in Massachusetts, and by 1891 criminal courts in that state were required to appoint probation officers (employed by the courts) in cases involving

² Key *The Century of the Child* (1909) 7.

³ Feld (*Bad Kids: Race and the Transformation of the Juvenile Court* (1999a) 51) has described these early reforms as important because, although they were later criticised for over-reliance on institutionalisation, the reformers insisted on the separation of child and adult offenders within those institutions, and they also recognised the interconnectedness of delinquency and neglect. The reformers stressed the responsibility of the state towards its children.

⁴ Midgley *Children on Trial: A Study of Juvenile Justice* (1975)16.

⁵ *Op cit* 19.

children.⁶ The people behind these reforms were known as “child savers”, and as the century drew to a close, two of the “child savers” worked tirelessly to introduce the first juvenile court in the world. Interestingly, they were two women: Lucy Flower and Julia Lathrop.⁷ The central idea, which was embodied in the Illinois Juvenile Court Act of 1899, was that neglected, dependent and delinquent children should all be dealt with in a separate children’s court. “A sympathetic judge could now use his discretion to apply individualized treatments to rehabilitate children, instead of punish them.”⁸

The first ideas about a separate justice system for children were thus firmly rooted in a welfarist approach.⁹ The rise of the welfarist approach coincided

⁶ Tanenhaus “The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of the Immaculate Conception” in Rosenheim *et al* (eds) *A Century of Juvenile Justice* (2002) 47.

⁷ The first juvenile court was inspired by two women, and the driving force behind it in its early years were two other women, Jane Addams and Florence Kelley. One of the first probation officers at the court was also a woman: Ida Barnett Wells. Its first woman judge, Mary Bartelme, adjudicated girl’s cases from 1913, and was appointed as the presiding judge for the Chicago Juvenile Court in the 1920s. See further Dohrn “All Ellas: Girls Locked Up” 2004 *Feminist Studies* 302-324.

⁸ Tanenhaus (2002) 42.

⁹ Although the Chicago model (also known as the “Cook County” model) is credited with the most influence with regard to juvenile justice reform, it is clear that the welfarist thinking was already underway in many parts of the world. Midgley ((1975) 19) points out that “[t]he Norwegian Act of 1896 which established that country’s child welfare panels was drafted in 1892. Johnson argued that were it not for certain administrative delays, Canada would have created a juvenile court before Cook County. South Australia established children’s courts by ministerial order in 1889 and placed these on a legislative footing in 1895”.

with the rise of behavioural sciences such as social work and psychology.¹⁰ There was a transatlantic social movement in the 1880s and 1890s that was concerned about the effect of market processes and industrialisation on the social lives of urban populations.¹¹ These reformers were of the view that individual responsibility was not a complete explanation for widespread disorders in modern cities.¹² They questioned the free will on which the liberal state was being built. They de-emphasised individual choice and re-described crime and poverty as environmental problems, the root causes of which needed to be understood and resolved.¹³ Thus it is often said that the welfarist approach focussed on the child's needs rather than on the child's deeds.¹⁴ Welfarism promoted the idea that children should be separated from adults both in court and in institutions and that they should be dealt with according to different procedures from those used for adults. There was a heavy reliance on the involvement of social workers and probation officers.

A legal concept underpinning the welfarist approach was that of *parens patriae*. This was an English legal doctrine that allowed the monarch to protect vulnerable parties usually in issues of inheritance or guardianship.¹⁵ The doctrine was applied more broadly in the United States, allowing for the state to act as a "kind and just parent". The focus was on the welfare of the

¹⁰ Sloth-Nielsen *The Role of International Human Rights Law in the Development of South Africa* (2001 Unpublished LLD thesis, University of the Western Cape) 54.

¹¹ Tanenhaus (2004) 5.

¹² *Ibid.*

¹³ Garland *Punishment and Welfare: A History of Legal Strategies* (1985) 27-32.

¹⁴ Muncie *Youth and Crime* (1999) 254.

¹⁵ Sloth-Nielsen (2001) 56 n21.

child rather than on the rights of the child or of the parents. Rehabilitation and treatment were considered the goals of the system.¹⁶ The first annual report of the Juvenile Court of Cook County¹⁷ published in June 1900 proudly announced the following:

“The law, this Court, this idea of a separate court to administer justice like a kind and just parent ought to treat his children has gone beyond the experimental stage and attracted the attention of the entire world.”¹⁸

3 The Juvenile Courts Model Proliferates

The essential features of the juvenile court were not all included in the first law that created the court.¹⁹ Tanenhaus²⁰ explains how the system developed and evolved during the early twentieth century: “Juvenile courts, including Chicago’s model court, were not immaculate constructions; they were built over time.”²¹ By 1923 the idea of a juvenile court, and what distinguished it from an adult court, was well entrenched:

¹⁶ Shook and Sarri “Human Rights and Juvenile Justice in the United States in 2000” (2001) unpublished conference paper.

¹⁷ Cook County is the area in which the Chicago court operated.

¹⁸ Ayers *A Kind and Just Parent: The Children of the Juvenile Court* (1997) 24.

¹⁹ Illinois Juvenile Court Act 1899.

²⁰ (2002) 42: “Most of the features that later became the hallmarks of progressive juvenile justice – private hearings, confidential records, the complaint system, detention homes, and probation officers – were either omitted entirely from the initial law or were included without any provisions for public funding.”

²¹ *Op cit* 43.

“The nation’s experts now also agreed upon what practices – chancery proceedings,²² broad and exclusive jurisdiction until at least age eighteen, private hearings,²³ the complaint system,²⁴ detention, probation,²⁵ confidential records, clinical exams and individualized treatment – should become standard”.²⁶

The judge presiding in a juvenile court could dispense advice to children and families, order probation services to be rendered, institutionalise a child in a

²² Chancery proceedings were informal hearings, distinguishable from a criminal trial in that there was no jury and no legal representation.

²³ Tanenhaus ((2004) 49-54) explains that the issue of private hearings was controversial. The original supporters of the Illinois Juvenile Court Act 1899 had wanted the courts to be closed to the public in order to protect the privacy of the children and families. This was criticised on the basis that, in the absence of public scrutiny, children would be at risk of removal from their families. This concern carried the day, and the clause on privacy in the Bill was removed prior to enactment. The opportunity presented by the fact that the public and the media had access to the court in its early days was fruitfully used by those promoting the court to undertake public education about the special nature and purpose of the court. The debates continued, and by 1920 most states had included a “privacy” clause into their enabling legal framework.

²⁴ The complaints system was introduced in order to live up to the idea that the court should be used as a “last resort”. Initially, every petition filed with regard to any child had to be heard by the judge. The complaints system was established so that an informal complaint should first be filed and then investigated by the probation officer, and only if requiring the intervention of the court, would a petition then be filed.

²⁵ Schlossman (*Love and the American Delinquent: The Theory and Practice of “Progressive” Juvenile Justice 1825-1920* (1977) 61): “Prominent advocates of the juvenile court conceded that its fate rested on the quality of probationary care ... probation alone could transform the juvenile court into an education mission to impoverished children and adults”

²⁶ Tanenhaus (2002) 69-70.

specialist facility, or sentence the child to a penal institution.²⁷ The terminology of the juvenile courts did not speak of guilt, innocence, trials or sentences, but created a framework similar to civil matters by speaking of adjudications and dispositions.²⁸

The new juvenile justice courts model spread through the United States²⁹ and was also very influential in other parts of the world.³⁰ Sloth-Nielsen³¹ identifies three common themes in the global development of child justice systems. First was “the emergence of the notion of separation, that is, that juveniles warrant separate treatment in law, and further, that different legislation, institutions and principles should apply to children accused of offences”.³²

²⁷ Sloth-Nielsen (2001) 56; Clement *The Juvenile Justice System: Law and Process* (1997) 18.

²⁸ Shook and Sarri (2001) unpublished conference paper.

²⁹ Tanenhaus (2002) 45: “By 1925 ... every state except Maine and Wyoming at least had a juvenile court law, and juvenile courts were operating in all American cities with more than 100 000 people”.

³⁰ Dohrn, in the foreword to Tanenhaus *Juvenile Justice in the Making* ((2004) viii): “The invention of a distinctive court for children, a legal polity described by Professor Francis Allen as ‘the greatest legal institution ever invented in the United States’ spread like a prairie fire across the U.S. and throughout the world.” Sloth-Nielsen ((2001) 56-57): “The Illinois court was followed rapidly by other states in the USA setting up their own separate juvenile courts, and thereafter by statutes establishing juvenile justice systems in a number of other countries. In England and Canada, for instance the juvenile court dates from 1908.”

³¹ (2001) 57.

³² This separation was the culmination of the development that commenced with the founding of the separate institutions for children. See further Feld (1999a) 51-52.

The second common theme was the idea that there could be jurisdictionally distinct juvenile justice courts, which, in the procedure they followed, would be distinguishable from the conventional adult criminal trials. In England and in Australia, for example, magistrates were given summary jurisdiction to try children charged with offences, whereas adult criminal trials for the most part were conducted with juries.³³ The third common development identified by Sloth-Nielsen was the recognition of the role of social workers in the practice and policy of child justice.³⁴

3 1 Canada

Canada was one of the first countries to follow a welfarist approach. The tendency to treat child offenders in the same manner as adults was changed due to the efforts of the “child-saving” movement with the passing of the Youthful Offenders Act in 1894. It introduced a measure to allow the state to intervene when families were deemed to have failed to raise their children correctly. The essence of the legislation was that a child should not be punished but should be treated as a “misdirected and misguided child”.³⁵ In 1908 the Juvenile Delinquents Act was passed. This set out guidelines for juvenile courts and “encompassed a number of key philosophical elements that strongly reflected its treatment philosophy ... widely referred to as *parens*

³³ Sloth-Nielsen (2001) 58.

³⁴ *Op cit* 59: “This was a direct result of the philosophy of welfarism that had spawned the birth of the juvenile justice movement in the first place, and the importance of the social worker was statutorily enshrined in many jurisdictions”.

³⁵ Carrigan *Juvenile Delinquency in Canada: A History* (1998) 7.

patriae".³⁶ The system was clearly welfarist in its approach, with wide discretionary powers for officials and indeterminate sentencing powers for judges.

32 *Europe*

According to Doek,³⁷ the introduction of juvenile courts in Europe was clearly connected to developments in the United States.³⁸ Since then, different countries' systems have developed differently:³⁹

"The French system seems to have remained closest to an integrated, welfare-based concept of children in trouble, an approach that makes no clear distinction between delinquent juveniles and children in need of care and protection. That distinction is most clearly drawn in Germany and less so in Italy and Netherlands".

Bottoms⁴⁰ explains that although separate juvenile courts were established in 1908 in the United Kingdom, the model was not fully welfarist.⁴¹ He describes

³⁶ Winterdyk "Juvenile Justice and Young Offenders: An Overview of Canada" in Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (2002) 64

³⁷ "Modern Juvenile Justice in Europe" in Rosenheim *et al* (eds) *A Century of Juvenile Justice* (2002) 505-527.

³⁸ Doek (2002) 509-511: Juvenile Courts were first established in Germany in 1908 and in France in 1912, both influenced by the Chicago model.

³⁹ Doek (2002) 515.

⁴⁰ "The Divergent Development of Juvenile Justice Policy and Practice in England and Scotland" in Rosenheim *et al* (eds) *A Century of Juvenile Justice* (2002) 413-504.

the system as having been a “modified criminal court” model,⁴² until the 1960s when Scotland⁴³ and then England and Wales introduced welfare oriented models.⁴⁴ The model in England and Wales has undergone many changes since then,⁴⁵ whilst the Scottish children’s hearing system remains one of the few welfarist models of child justice still operating in the world today.⁴⁶

⁴¹ Gelsthorpe and Kemp (“Comparative Juvenile Justice: England and Wales” in Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (2002) 131) observe that from the outset the “welfarism” approach was tempered with a crime-control approach.

⁴² Crawford and Newburn (*Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (2003) 6-8) present a slightly different view. Referring to the period between the two world wars, the authors observe the following: “At this period the focus remained firmly upon the ‘welfare’ of young offenders and ‘treatment’ necessary to reclaim or reform them. The subsequent Children and Young Persons Act 1933 reaffirmed both the principle of a separate juvenile justice system and the assumption that the system should work in a way that promoted the welfare of young people.”

⁴³ Scotland’s famous “Children’s Hearing System” was introduced by the Social Work (Scotland) Act 1968 following the report of the Kilbrandon Committee. McAra “The Scottish Juvenile Justice System: Policy and Practice” in Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (2002) 441-475, 446): “The overall aim of the new juvenile justice system was to deal with the child’s needs, with the best interest of the child to be paramount in decision making.”

⁴⁴ Crawford and Newburn ((2003) 7): “The ‘high point’ of welfarism in juvenile justice was reached in the late 1960s.”

⁴⁵ Pitts (*The Politics of Juvenile Crime* (1988) 110) describes the many changes as “sequential”. He observes that the process was not typified by each generation of reformers learning from previous generations, but rather by waves of popularisation of new ideas, many inspired by political agendas.

⁴⁶ Asquith *Children and Justice: Decision Making in Children’s Hearings and Juvenile Courts* (1983) 12-21; Lockyer and Stone *Juvenile Justice in Scotland: Twenty Five Years of the Welfare Approach* (1998) 5-7. See however Cleland, (“Under Threat: Scotland’s Unique Welfare-Based Forum for Decisions About Children” (2005) unpublished conference paper) who raises concerns that the approach has been diluted by the introduction of the Antisocial Behaviour (Scotland) Act 2004.

Welfarism was also the basis of the early models of child justice in New Zealand and Australia. According to Sloth-Nielsen⁴⁷ the Australian system bore many hallmarks of welfarism, including judicial powers over those children deemed to be “uncontrollable”, the power of indeterminate sentencing, and a system characterised by a more informal atmosphere, focussed on the rehabilitative ideal. New Zealand formally established a separate juvenile court in 1925. “These courts were founded on the principle that young offenders were victims of their environment and in need of help rather than punishment.”⁴⁸

4 The Classical Debate: Welfare and Justice Models

Sloth-Nielsen⁴⁹ has observed as follows:

“For much of the 20th century, the literature in this field has understood juvenile justice to be representative of either ‘welfarism’ or ‘justice’ theories, and, until as recently as 1989, texts on juvenile justice tended to analyse various practices, policies and legislation on juvenile justice in terms of this world view. The ‘welfare-justice’ dichotomy provided a

⁴⁷ (2001) 63.

⁴⁸ Crockett “A History of Youth Justice in New Zealand” (2003) unpublished paper.

⁴⁹ Sloth-Nielsen (2001) 60.

theoretical model against which features, trends and changes in juvenile justice could be understood.”⁵⁰

This debate is described by Crawford and Newburn as “a double taxonomy most usually summarised as ‘punishment’ and ‘welfare’”.⁵¹

4.1 *The Welfarist Approach*

The welfarist approach has much in common with the rehabilitative approach. Both approaches grew from socialist roots, and focussed on the fact that people are shaped by their context. The model therefore looks for explanations of wrongdoing in the social circumstances that people are living in. The aim is to treat or cure the offender, rather than to punish. The approach ignores the victim and focuses solely on the child who comes to the system either through crime or because of care needs, the outcome is an individual treatment plan.⁵²

Like the rehabilitative model, the welfarist model is open to criticism, and interestingly, the arguments against it come from both the left and the right. From the right, the criticisms are fairly obvious: the system is perceived as

⁵⁰ Sloth-Nielsen ((2001) 60) points out further that both the welfare and justice models are ideal types that do not exist in a pure form. They are generally presented as antinomies with opposite and mutually exclusive aims.

⁵¹ (2003) 6.

⁵² Bazemore “Three Paradigms for Juvenile Justice” in Galaway and Hudson (eds) *Restorative Justice: International Perspectives* (1996) 39.

ineffective, it lacks sufficient disciplinary or punitive measures and it fails to treat the child as a rational responsible being who can make free choices. The just deserts advocates would say that there should be a greater focus on the child's deeds, not just on his or her needs, and that the punishment received should be the punishment he or she deserves. According to critics on the right, the "treatment mission" fails to denounce the offence or to provide meaningful consequences for it.⁵³ It therefore also fails to play a role in "enhancing public safety".⁵⁴

On the left, the criticism tends to focus on the fact that a welfarist approach is highly interventionist. Thus the system concerns itself with matters where the best recourse would be simply to take no action.⁵⁵ According to this view, the negative results of this over-pronounced tendency to intervene are the proliferation of professionals in the system, and the over-use of custodial measures.⁵⁶ Bottoms describes how the "new orthodoxy"⁵⁷ promoted by the youth justice movement in the United Kingdom championed the idea of

⁵³ Feld (1999b) 19.

⁵⁴ Bazemore (1996) 40.

⁵⁵ See generally Schur *Radical Nonintervention: Rethinking the Delinquency Problem* (1973).

⁵⁶ Pratt "Corporatism: The Third Model of Juvenile Justice" 1989 *Brit J Criminol* 236-254.

⁵⁷ The "new orthodoxy" in the UK was based on the following aims for the youth justice system: there should be fewer professionals, minimal intervention, fewer custodial options, more community involvement, welfare considerations should not be predominant in criminal proceedings, research and monitoring of the system is vital. See further Pitts *The Politics of Juvenile Crime* (1988) 90-93.

minimum intervention,⁵⁸ and challenged the Scottish Children's Hearing system on this issue. The Scottish system has managed to remain consistently committed to the welfarist model,⁵⁹ although the approach has faltered and disappeared in many other parts of the world.

A further set of criticisms of the welfarist approach relate to the growing awareness of human rights, and within that broader domain, children's rights.⁶⁰ It was the criticisms arising from a civil rights perspective that caused child justice experts all over the world to question the welfarist model. This "rethinking" began, as had the first juvenile court system, in the United States.

4.2 *The Impact of Civil Rights*

The 1960s was an important decade of civil rights activity in the United States, and it was towards the end of this decade that the United States Supreme Court handed down its landmark judgment in the case of *In re Gault* 387 US 1 (1967).⁶¹ In this case a fifteen year old boy named Gerald Gault was taken

⁵⁸ Bottoms (2002) 460: "[T]he juvenile justice movement began from the presupposition that the helping professions are sometimes a major source of hindrance to young offenders, because they pathologise them, intervene in their lives too readily and too extensively, and may therefore unwittingly encourage courts to use institutional disposals if and when welfare-based community treatments eventually fail."

⁵⁹ See, however, n 55 above in this chapter, where concerns raised by Cleland ((2005) unpublished conference paper) are noted.

⁶⁰ Sloth-Nielsen (2001) 98-116.

⁶¹ Bottoms ((2002) 462): "In the sphere of juvenile justice, the sixties saw in the United States a serious rebellion against the *parens patriae* approach of the socialized juvenile

into custody by police for allegedly⁶² making a telephone call containing lewd or indecent remarks. He was dealt with by the juvenile court. The procedure was so informal that no proper charge was formulated.⁶³ His parents were not given notice, he was not legally represented, there was no sworn testimony, no recorded transcript and no right to appeal. Gerald was referred to an industrial school until he turned 21 years of age. The Supreme Court overturned this decision⁶⁴ and recognized that a child, like any person, enjoyed certain due process rights under the Constitution, namely the right to be notified of the charges, the right to legal representation, the right against self-incrimination and the right to confront witnesses. The court observed as follows: "Under our Constitution, the condition of being a boy does not justify a kangaroo court".⁶⁵ What became evident from *In re Gault* and similar cases⁶⁶ was that "there are important limitations on the informality of the process in juvenile court, which was highly prized by the founders of the court."⁶⁷ Whist the Supreme Court decisions guaranteed a number of due

tribunals established early in the century, and witnesses also the entrenchment of rights and safeguards for child defendants."

⁶² The complainant telephoned her complaint to the juvenile court, but did not attend or give evidence at the juvenile court.

⁶³ Melli "Juvenile Justice Reform in Context" 1996 *Wis L Rev* 375 385.

⁶⁴ The court application was brought by way of a writ of habeous corpus challenging his illegal custody to circumvent the problem that there was no right of appeal from the juvenile court.

⁶⁵ 36.

⁶⁶ *In re Winship* 397 US 358 (1970), in which the Supreme Court noted (365-366): "We made it clear in that [Gault] decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." See also *Mc Keiver v Pennsylvania* 403 US 528 (1971).

⁶⁷ Rosenheim "The Modern American Juvenile Court" in Rosenheim *et al* (eds) *A Century of Juvenile Justice* 342.

process rights, they stopped short of equating juvenile proceedings with adult trials.⁶⁸ By the 1970s, the progress made in the 1960s had resulted in reductions in institutional placement, the development of community-based services, and procedural checks on the court.⁶⁹

The effects of *In re Gault* were felt more broadly than in the United States. Sloth-Nielsen⁷⁰ has observed that in the United Kingdom, Canada and Australia too, welfare approaches lost momentum, as a number of criticisms emerged to undercut the dominance of the welfare philosophy.

“The principal thrust of these arguments was that the children’s (or juvenile) court process was in fact highly punitive and stigmatizing, that it could be more injurious than curative and that there was a need to safeguard children against the ‘excesses’ of indeterminate sentences.”⁷¹

The pendulum began to swing back to a “justice” approach, which emphasized the need for visible and accountable decision-making accompanied by due process rights.

The divisions between the approaches are not clear-cut, with many systems still retaining aspects of both approaches. Such systems are described as

⁶⁸ *McKeiver v Pennsylvania* (n 76) found that a jury trial was not a constitutional requirement for a child.

⁶⁹ Shook and Sarri ((2001) unpublished conference paper.

⁷⁰ (2001) 65-66.

⁷¹ *Op cit* 66.

“hybrid” or “modified” models.⁷² For the purpose of the current classical debate, however, the welfarist and justice approaches represent the mainstream, with restorative justice a contender for a “third approach”.

4.3 *The Justice Approach*

The justice approach gained momentum due to its compatibility with the growing commitment to human rights and children’s rights, still a very strong influencing factor in child justice reform today.⁷³ The justice approach stressed the right of a child to legal representation in juvenile court, and the right to have visible and accountable decision-making, especially when deprivation of liberty is a possible outcome.

⁷² Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (2002). Another approach that has found favour in some countries, notably England and Wales, is the “corporatist” or “managerialist” model (see Pratt 1989 *Brit J Criminol* 236). This stressed the importance of diversion of offenders away from the criminal justice system, as a more effective and efficient way of managing child offenders. In the UK this led to the introduction of “intermediate treatment”, which reduced the number of children deprived of their liberty, achieved through a multi-agency delivered managerial approach. Unlike the welfarist, justice or restorative approach, corporatism is not values-based. Although the model favours diversion and aims to reduce detention, it does so because this fulfils the business principles of being economic, efficient and effective. Sloth-Nielsen (“The Business of Child Justice” in Burchell and Erasmus (eds) *Criminal Justice in a New Society* (2003) 175-193) has highlighted the fact that the corporatist approach has in fact been influential in the development of South Africa’s child justice system.

⁷³ Doek (2002) 523-524. Sloth-Nielsen ((2001) 110-116) has argued that a “children’s rights model” may be considered a “fourth model of juvenile justice”. The other three she identifies as welfarist, justice, and corporatist. Restorative justice she identifies only as a “trend”.

The justice approach is, however, linked to the retributive theory according to which a human being is a responsible moral agent to whom rewards are due when he or she makes the correct moral choice and punishment is due when he or she makes a wrong one.⁷⁴ As already been described in chapter 2 of this thesis, the failure of rehabilitation and the sense that “nothing works”⁷⁵ created an opportunity for retributivism, which had been unfashionable during and since the Victorian era, to return to prominence.⁷⁶ This found voice in the “just-deserts” approach. The notion of desert is closely aligned with retributive theory, punishment being justified in terms of the desert of the offender.⁷⁷ Proportionality is a key feature of sentencing based on just deserts theory, and in relation to the adult criminal justice system this means that sentences should be proportionate to and deserved by the gravity of the criminal conduct.⁷⁸ The just deserts movement was thus fiercely critical of aspects of the welfarist approach that allowed for indeterminate sentencing, and of net-widening, which allowed for status offences⁷⁹ to be caught up in the juvenile court system.

⁷⁴ The offender as a “responsible moral agent” is an idea rooted in traditional liberal democracy theory, propounded by Kant. See further Sorrel (1999) 10-27.

⁷⁵ Martinson 1974 *The Public Interest* 22-54.

⁷⁶ Braithwaite and Pettit (1990) 2.

⁷⁷ Zedner (1994 *Mod L Rev* 228) describes just deserts as a “renaissance of retributivism in sentencing”.

⁷⁸ Von Hirsch and Ashworth 1992 *Oxford J Legal Stud* 83.

⁷⁹ Status offences are acts committed by children, which are only considered offences due to the fact that they are children. Truancy and curfew violations are the most obvious examples.

One of the problems with the just deserts approach is that though it was intended to reduce arbitrary and excessive use of punishment, the way it was implemented resulted in an expansion of punishment. Bazemore⁸⁰ has pointed out that the just desert reforms sent several “questionable messages” to policy makers and the public:

“First, in giving new legitimacy to punishment for its own sake, retributive policies signalled to prosecutors and other decision makers that this was an appropriate and just response to delinquent behaviour. Second ... by equating sanctioning with punitive measures aimed solely at causing pain and discomfort to the offender, the legitimization of retributive punishment created an outcry for more severe punishments as it became apparent that existing levels were not achieving the desired effect.”⁸¹

A further problem was that this militated against the use of less harmful and less expensive forms of sanctioning that appeared weak and inadequate by comparison.⁸²

⁸⁰ (1996) 41.

⁸¹ See also Christie (1981).

⁸² Bazemore (1996) 41.

5 Punitive Trends in Child Justice

5.1 *Law and Order Approach Predominates in the United States*

Whilst many of the features of the justice approach represent sensible intentions to protect rights and address poor practices that had arisen in the welfarist model,⁸³ some jurisdictions over-corrected and a “law and order” agenda began to dominate, with the United States once again leading the way. This has been described by a number of writers as an “assault”⁸⁴ or “attack on the juvenile justice system”,⁸⁵ a “threat to juvenile justice”,⁸⁶ and as a “crackdown”⁸⁷ on child offenders.⁸⁸

⁸³ For example, the over-utilisation of custodial measures.

⁸⁴ Lemov “The Assault on Juvenile Justice” 1994 *Governing* 26-31; Sloth Nielsen (2001) 83; Zimring (2002) 155).

⁸⁵ Bazemore and Umbreit “Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime” 1995 *Crime and Delinquency* 296-316; Bazemore (1996) 37-68.

⁸⁶ Rosenheim (2002) 357.

⁸⁷ Stafford and Kyckelhahn (“Delinquency and Juvenile Justice in the United States” in Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (2002) 529-556).

⁸⁸ An extreme example of the rhetoric of this attack is typified by the often quoted tirade by Bennet *et al* (*Body Count: Moral Poverty ... And How to Win America's War Against Crime and Drugs* (1996) 27): “America is now home to thickening ranks of ‘super-predators’ – radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and created serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.”

One line of fire has been directed at the institution of the juvenile court itself. Zimring⁸⁹ argues that the juvenile court has been remarkably resilient. The irony of the 1990s is that:

“[T]he juvenile courts were under constant assault not because they had failed in their youth serving mission, but because they had succeeded in protecting their clientele from the new orthodoxy in crime control.”⁹⁰

Zimring is of the view that the enormous political pressure during the 1990s on the juvenile courts in the United States derived from the fact that the authorities wanted the expansion of imprisonment in the juvenile justice sphere to match that experienced in the adult criminal justice system:⁹¹ “The political forces that had produced extraordinary expansion in the rest of the penal system had been stymied”. However, transfer of children out of the juvenile court to adult court has effectively removed many children from protection.⁹²

Lemov⁹³ records that in 1994 there was not a murmur of dissent in either house of the Florida legislature as a 400 page Bill was passed into law containing a provision to allow prosecutors to try children as young as

⁸⁹ (2002) 154-155.

⁹⁰ *Op cit* 154.

⁹¹ *Ibid.*

⁹² Sloth-Nielsen (2001) 82: “Thus transferred, juveniles lose the protection of the juvenile court system and are liable to be tried, sentenced and incarcerated as adults”.

⁹³ 1994 *Governing* 26.

fourteen years old, and to scrap privacy rules for juvenile records.⁹⁴ In that year, and in the decade following it, tough legislation against teenage offenders has been winning approval in legislatures throughout the United States, and beyond.⁹⁵ In addition to children being transferred to adult court, judges and particularly prosecutors in the juvenile court have been given new roles and powers, and this has effectively re-oriented the mission of the juvenile court from a rehabilitative one to a punitive one.⁹⁶ Shook and Sarri⁹⁷ reflect, from an American perspective, on the irony that “as we celebrated 100 years of juvenile justice, our philosophy had returned to many of the practices in place prior to the invention of the juvenile court”.

The most concerning feature of the law and order agenda for children in the criminal justice system in the United States has been the tendency to include increasing numbers of children (at increasingly younger ages, as young as thirteen in some states) into the adult criminal justice system. This is often referred to as “waiver”, meaning waiver of the jurisdiction of the juvenile court. Many of the waiver provisions give increased power to prosecutors who have the discretion to make the transfer,⁹⁸ whilst other systems rely on judicial

⁹⁴ Between the years 1992 and 1995, 40 states in the US modified their confidentiality rules to open juvenile court records and make proceedings more public: Moon *et al* 2002 *Crime and Delinquency* 40.

⁹⁵ Lemov 1994 *Governing* 26.

⁹⁶ Zimring *American Youth Violence* (1998) 74.

⁹⁷ (2001) unpublished conference paper.

⁹⁸ Rosenheim ((2002) 356-357) comments that despite the fact that almost all states have passed waiver laws the majority of children are still dealt with by the juvenile courts. However, she cautions that “[t]here is strong political pressure to make the juvenile court

waiver. Many waiver systems are offence-driven. Although waiver was originally aimed at dealing with the most serious crimes, such as murder, the tendency has been to add to the list of offences which lead to children being transferred to the adult system or eligible for tough sentencing laws on less serious offences. Lemov⁹⁹ describes the phenomenon thus:

“No state begins with the explicit intention of dragging non-violent teenagers into the net of adult court and sentencing. Rather, a kind of bracket creep takes place. The first round of legislation carefully targets youths who commit violent crimes. In the next round, as public pressure builds, lesser categories of crime are added.”

It is evident that within a century the system in the United States has moved radically away from one in which a focus on the “needs” of the child eclipsed the “deeds” of the child. Now the deeds have become all important, because the system is offence-driven, with the offence category determining whether the child must be tried as a child or as an adult.¹⁰⁰ As observed by Feld,¹⁰¹

more punishment-centred than in early eras and to replace the power of judges and probation staff with greater prosecutor hegemony”.

⁹⁹ 1994 *Governing* 28. The author comments further that in Florida, which first began to lower the age at which children could be tried as adults, the biggest increase in children being transferred to adult status has been for non-violent drug offences. Something as trivial as possession of alcohol can be waived into adult court.

¹⁰⁰ Griffin, Torbet and Szymanski (*Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions* (1998) 17) report that in addition to the offence-based system, by 1997, 31 states had “once an adult, always an adult” exclusion provisions which require that once a child had been tried in adult court, all subsequent cases involving him would be tried by the adult court.

the new approach does not properly recognise differences in development, maturity, capacity, and culpability between children and adults.

A deeply worrying result of children being referred to adult court is that minimum sentencing laws initially aimed at adult offenders thus become applicable to children, rendering them vulnerable to extremely long sentences such as life imprisonment. In a recent case, a sentence of 30 years was passed down in the case of Christopher Pittman who was convicted of the murder of his grandparents in Charleston, South Carolina in 2005. He was twelve years old when the offence was committed.¹⁰²

There is one optimistic note in the United States sentencing arena with regard to young offenders. Until recently the United States was one of the few states in the world that retained the death penalty for children on its statute books, and that continued to execute offenders who were below the age of eighteen years at the commission of the offence. In 2005, the Supreme Court was presented with an opportunity¹⁰³ to rule on the constitutionality of the death

¹⁰¹ "Rehabilitation, Retribution and Restorative Justice: Alternative Conceptions of Juvenile Justice" in Bazemore and Walgrave (eds) *Restorative Justice for Juveniles: Repairing the Harm of Youth Crime* (1999b) 59.

¹⁰² Pitmann's lawyers raised the defence that he was taking an anti-depressant (Zoloft) at the time of the murder, but the jury dismissed this, and the child was convicted of two counts of murder on 2005-02-16. Imprisonment for a period of 30 years is the minimum sentence for murder in the state of South Carolina, and it applies to children as well as adults. Details of the case are available at <http://www.law.com/jsp>.

¹⁰³ It was not the first opportunity. In 1989 the Supreme Court upheld the constitutionality of the death penalty for juveniles in *Stanford v Kentucky* 492 US 361; 109 S Ct 2969; 106 L Ed 2d 306 (1989).

penalty for juveniles in the case of Christopher Simmons, who was on death row for a murder that he committed when he was seventeen years old. On 1 March 2005, the United States Supreme Court, by a vote of five to four, held that it was unconstitutional to execute offenders who were under the age of eighteen at the time of the commission of the crime.¹⁰⁴ Technically, the Court made its decision on the basis of the prohibition on “cruel and unusual punishment”, and the finding was made on the basis of three arguments.¹⁰⁵ Firstly, that deciding on whether a punishment is cruel and unusual it is necessary to consider public views, as reflected in “evolving standards of decency”, and that the emerging consensus in the United States of America was that the death penalty should not be applicable to juveniles. The second basis was that the sentence of death for a juvenile is disproportionately severe. The third argument was that virtually all other countries in the world have abolished capital punishment for persons under the age of eighteen years. In this regard the court also considered international sentiment against the death penalty for children.¹⁰⁶ This ruling will affect 72 young offenders in twelve states.¹⁰⁷ The penalty they now face, however, is one of life

¹⁰⁴ *Roper v Simmons* 125 S Ct 1183 (2005).

¹⁰⁵ Van Zyl Smit “The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States of America. What Next?” 2005 *Human Rights Law Review* 393.

¹⁰⁶ See, however, the acerbic dissenting judgement by Scalia J (with Rehnquist CJ and Thomas J concurring) who said that the law of the United States is fundamentally different from that of other countries, and therefore it was beyond his comprehension (as he put it) why the laws of other countries and international trends in the sentencing of children were considered at all.

¹⁰⁷ Information obtained from www.deathpenaltyinfo.org. The USA is one of the only two remaining countries in the world that have not ratified the UNCRC.

imprisonment without parole, which is also prohibited as a sentence for a child by the United Nations Convention on the Rights of the Child.¹⁰⁸

Children do not commit the most crimes, nor the most serious of crimes. The facts reveal quite the contrary.¹⁰⁹ Nevertheless, it is the highly publicised cases of violent crime that has driven the tough-on-crime responses in the United States. It is true that between 1987 and 1994 the United States child arrest rates for serious violence increased by an alarming 70%. 1994 was the peak year, the arrests of young people on serious crimes then decreased by 22% by 1997,¹¹⁰ and continues to fall. In 1997, attorney general Janet Reno announced that there had been a 30% reduction in serious crimes committed by children. This positive news, however was totally overshadowed because in the same week that the announcement was made, there were two murders committed by juveniles in the United States.¹¹¹ Statistics can also be misleading: The Canadian Centre for Justice Statistics has been reporting a downward trend in crimes committed by youths measured against the general crime rate since 1991. At the same time, however, there have been well-publicised, though inaccurate, reports that have pointed out worrying increases in youth crime. In 1996 the Toronto Police Department released

¹⁰⁸ Art 37 (a) "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

¹⁰⁹ Shook and Sarri 10: "The actual number of children involved in violent crime has never equalled 10% of all children arrested for delinquency in the United States."

¹¹⁰ Farrington and Loeber "Serious and Violent Juvenile Offenders" in Rosenheim *et al* (eds) *A Century of Juvenile Justice* (2002) 206-236.

¹¹¹ Schiraldi and Ziedenberg "How Distorted Coverage of Juvenile Crime Affects Public Policy" in Ayers *et al* (eds) *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* (2001) 114.

figures showing that an increasing percentage of children were committing more serious crimes. It turned out, however, that these shifts were a result of the change in the definition of youth crime because 1995 was the last year in which sixteen and seventeen year olds were counted as adults. The comparison was therefore meaningless and misleading.¹¹²

Advocates for child justice policy reform complain that there is an enormous disconnection between research and data about crimes committed by children and the setting of public policy in this area. A major reason for this is that media coverage of crime, particularly crime committed by children, obscures people's understanding of what is happening and what the solutions are. Schiraldi and Ziedenberg¹¹³ describe the problem thus:

“Coverage of juvenile crime is badly skewed toward hyper-violent, idiosyncratic acts, presented out of context with social forces that foster delinquency. This non-contextual, exaggerated coverage negatively affects both public opinion and policy making in the field of juvenile justice.”

Dohrn¹¹⁴ observes that there has been “a tidal wave of fear” associated with children during the last decade, and a major consequence of this is that adults have responded through legislative and policy decisions to criminalize vast sectors of youth behaviour.

¹¹² Cayley (1998) 63.

¹¹³ Schiraldi and Ziedenberg (2001) 114.

¹¹⁴ Dohrn “Look out Kid/ It’s Something You Did” in Ayers *et al* (eds) *Zero Tolerance: Resisting the Drive for Punishment in our Schools* 89-107.

5 2 *Influence of the Law and Order Approach in Selected Jurisdictions*

The American zero tolerance and “get tough” approaches have begun to permeate other child justice systems in the world, though fortunately to a lesser degree. The effects of this influence on selected jurisdictions are examined below.

5 2 1 *Australia and New Zealand*

Two Australian jurisdictions, Western Australia and the Northern Territory, have opted for mandatory minimum sentences, and these are applicable to young offenders as well as adults. Australia came in for some stern criticism from the United Nations Committee on the Rights of the Child¹¹⁵ for these provisions, particularly as in practice they have impacted heavily on indigenous youth.¹¹⁶ Nevertheless, Australia has also seen an enormous growth in the restorative justice approach, with family group conferencing legislated in every state.¹¹⁷ Daly¹¹⁸ observes:

¹¹⁵ Concluding Observations by the Committee on the Rights of the Child on Australia (1997).

¹¹⁶ Sandor “Mandatory Detention Laws Mean Mandatory Injustice” (2001) unpublished conference paper.

¹¹⁷ Daly “Conferencing in Australia and New Zealand: Variations, Research, Findings and Prospects in Morris and Maxwell (eds) Restorative Justice for Juveniles: Conferencing, Mediation and Circles (2001) 59.

¹¹⁸ Daly (2001) 61.

“Despite the fact that some elements of United States criminal justice policies have been incorporated into Australian jurisdictions (such as ‘three strikes’ in Western Australia and the Northern Territory or the idea of ‘zero tolerance policing’), Australia and New Zealand pride themselves in actively not following the lead of the United States, and perhaps even of England.”

5 2 2 Europe

With regard to England and Wales, Bottoms¹¹⁹ demonstrates that although Margaret Thatcher¹²⁰ was elected, in part, on a law and order political ticket the criminal policy field was by no means exclusively dominated by a law and order approach during the years that the conservative government was in power.¹²¹ In the field of youth justice, in fact, there were what he describes as “some surprising developments”. In its early years, the Thatcher government pursued a policy of “bifurcation” for young offenders. Bottoms explains:

¹¹⁹ Bottoms (2002) 442.

¹²⁰ Thatcher became prime minister in 1979, and the Conservative Party remained in power for the following 18 years.

¹²¹ Pitts ((1988) 41) would not agree with this view. He describes the Thatcher government’s approach to youth justice policy as “commonsense amateurism”. Successive previous governments approach to youth crime had given the impression of a “professional hand on the tiller. If we pursue this nautical analogy though, it has to be said that the crew of Thatcherian law and order lugger had apparently dropped all its oars in the water before the boat was out of the harbour”.

“A more restrictive or punitive approach was adopted for more serious or persistent young offenders, while at the same time diversionary policies were developed for those who could reasonably be diverted”.

The conservative government tried “short sharp shock” detention in custodial institutions for young offenders, but this was discontinued when it was shown to be unsuccessful.¹²² At the same time the diversionary approaches being experimented with were cautioning and “intermediate treatment”.¹²³ The murder of toddler James Bulger by two boys aged ten and eleven years respectively in 1993 led to “a period of public furore and massive media coverage on criminal justice issues, followed by an apparent hardening of public opinion in favour of more punitive approaches”.¹²⁴ The government’s response was to discourage cautioning for repeat child offenders, and introduced legislation allowing for “secure training orders” whereby repeat offenders aged twelve to fourteen years (inclusive) could be given sentences of up to two years, of which half could be served in a secure detention facility.

In 1998 the “New Labour” government introduced a package of youth justice changes¹²⁵ ushered in through the Crime and Disorder Act 1998.¹²⁶ This was

¹²² Thornton *et al* “Tougher Regimes in Detention Centres: Report of an Evaluation by the Young Offender Psychology Unit” (1984).

¹²³ Pitts (1988) 87-96.

¹²⁴ Bottoms (2002) 449. The author also records (450) that subsequent statistical analyses have shown that the courts’ use of custodial sentences increased from 1993 onward.

¹²⁵ The government policy paper that preceded the legislative changes was called “No More Excuses”. In the preface to the document, the Home Secretary stated the following: “An excuse culture has developed within the youth justice system. It excuses itself for its

followed in 1999 by the Youth Justice and Criminal Evidence Act, which provides for “referral orders” in all cases where the child pleads guilty to charges. These Acts are evidence of the influence of restorative justice, and will be discussed further later in this chapter.

The Scottish children’s hearing model is generally held in high regard and has, until recently, been remarkably impervious to outside influences. It continues to deal with both care cases and criminal cases within the same system, and focuses on “needs” rather than “deeds”. McAra,¹²⁷ writing in 2002, made the following observation: “Scottish society still seems concerned with securing a more effective and discriminatory machinery for dealing with children and young people who offend.” After years of the welfarist approach being clearly predominant, the advocates for the system have recently become more aware of the challenges that may need to be met from a human rights perspective.¹²⁸ However, whilst the Scottish system has been less

inefficiency, and too often excuses young offenders before it, implying that they cannot help their behaviour because of their social circumstances. Rarely are they confronted with their behaviour and helped to take more personal responsibility for their actions. The system allows them to go on wrecking their own lives as well as disrupting their families and communities.”

¹²⁶ In summary, the changes were as follows: (1)The cautioning system was replaced by new and more tightly restricted reprimands and final warnings; (2) actions to speed up the work of youth courts and reduce the number of adjournments; (3) new, interventionist orders for young offenders – an “action plan order”; (4) measures to tackle the causes of crime, such as parenting orders to attend counselling; and (5) multi-agency “Youth Offending Teams” to be established in each area, to deal not only with individual offenders but also to address the broader issues causing crime.

¹²⁷ McAra (2002) 471.

¹²⁸ Morris and Mclsaac (*Juvenile Justice: The Practice of Social Welfare* (1978) 71-21) and more recently, Lockyer and Stone (*Juvenile Justice in Scotland: Twenty Years of the*

affected by the law and order lobby than England and Wales have been, recent developments give cause for concern. Cleland,¹²⁹ writing in 2005, argues that the passing of the Antisocial Behaviour (Scotland) Act 2004 has the effect of giving primacy to the courts rather than to the hearings system in some instances. She submits that “the ‘youth justice’ agenda being pursued through the Scottish Parliament may make a fragmented and more punitive approach to certain groups of children in Scottish society more likely in the future”.

Doek¹³⁰ observes that there is some evidence of a more punitive trend in Europe during the 1990s, and that some laws were passed reflecting a “zero-tolerance” approach,¹³¹ and creating the possibility of longer detention.¹³² His general analysis, however, is that the courts have been reticent in using these options. He concludes that “concern about growing and more violent juvenile crime has resulted in the call for tougher and more punitive juvenile justice but not in its implementation”.¹³³

Welfare Approach (1998) 69-75) have pointed out aspects of the system that are at odds with children’s rights, namely the low age of criminal capacity (8), the indeterminacy of the supervision requirement, the neglect of due process rights and the highly discretionary nature of decision making.

¹²⁹ Unpublished conference paper.

¹³⁰ Doek (2002) 522-523.

¹³¹ For example, the city of Hamburg in Germany has adopted a zero-tolerance approach to policing.

¹³² In the Netherlands in 1995 the maximum length of detention was increased from 6 to 12 months for those below the age of 16 years and to 24 months for those who were 16 and 17 years old.

¹³³ 522. Doek ((2002) 522) gives examples of France and the Netherlands having increased the possibility of longer sentenced in legislation, but that the actual sentencing statistics

5 2 3 Canada

The Canadian system has not been impervious to public pressure for a tougher response to youth crime. Winterdyk¹³⁴ describes how a number of serious crimes committed by children in the early 1990s inflamed negative public sentiment, despite the fact that in the same period youth crime rates dropped. Government nevertheless has strived to find a balance. During the debates leading up to the adoption of the Youth Criminal Justice Act,¹³⁵ Winterdyk observed:¹³⁶

“While the public is calling for tougher sentencing and greater accountability, the government has used public platforms to both address public concerns and as well as show that a new act would need to continue to respect the needs of young persons while introducing certain measures to hold the more serious young offender accountable.”

This tension appears to have found its way through into the Youth Criminal Justice Act 2003, which will be discussed later in this chapter.¹³⁷

do not show increased detention. The only notable increase was in the number of juveniles placed for treatment in closed institutions.

¹³⁴ (2002) 68-69.

¹³⁵ Youth Criminal Justice Act, 2003.

¹³⁶ (2002) 69.

¹³⁷ Par 7 6 2 2.

The recent punitive trends in child justice do not appear to have had a marked effect on policies in African countries, with the exception of South Africa. Those African countries that have drafted new laws for children in the criminal justice system do not appear to be following the adult transfer route, and most have improved their pre-existing legal frameworks by limiting the use of imprisonment. Ghanaian, Kenyan and Ugandan legislation prohibit the imposition of imprisonment for children. Ghanaian Juvenile Justice Act (2003), section 46(6) and Ugandan Children's Statute (1996), section 95(6) both provide: "No juvenile or young offender shall be detained in an adult prison". The Kenyan Children's Act (2001), section 190(1) provides: "No child shall be ordered to imprisonment or to be placed in a detention camp." However, the exception to this general rule relates to capital offences for which a child may, upon conviction, be detained at a "place" and "for a period" to be determined by the President.¹³⁸ The Namibian Child Justice Bill has yet to be passed by parliament, but if it is passed in its current form, it will be a

¹³⁸ S 25(1) of the Penal Code (Chapter 63 Laws of Kenya). This Act, which provides for the general Kenyan penal law, was enacted in the 1960s before the concept of children's rights was much accepted. Its provisions in respect of children were not repealed by the new Act. The need to repeal its provisions or harmonise them with the new children's legislation has been expressed by a court a decision in 2004 and a number of child rights research reports. See further Sloth-Nielsen and Gallinetti (eds) *Child Justice in Africa: A Guide to Good Practice* (2004); Sloth-Nielsen "Born Free Children in Prison in Africa" (2005) unpublished paper.

fine example of a system based on children's rights and restorative justice principles.¹³⁹

The South African legislature, however, has shown some signs of following a United States inspired law-and-order approach with regard to young offenders, albeit to a limited degree. The legislature introduced minimum sentencing laws in 1997 which drew sixteen and seventeen year olds¹⁴⁰ into its ambit. The Supreme Court of Appeal¹⁴¹ ruled the wording of the Act to be at odds with the principles relating to the sentencing of children, viewed in the light of the Constitution.¹⁴² The legislature again amended the law in an attempt to have minimum sentences apply to sixteen and seventeen year olds, but the Constitutional Court has recently ruled that such sentences are unconstitutional, as they go against the injunction that for children imprisonment must be a measure of last resort and for the shortest appropriate period of time. The court also found that such sentences work against individuation of sentencing of children, lead to longer sentences and do not sufficiently take into consideration the prospects for rehabilitation of young offenders.¹⁴³

¹³⁹ Schultz and Hamutenya ("Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice" (2004) unpublished paper) acknowledge that Namibia's Child Justice Bill is based largely on the Child Justice Bill published by the SALRC. Ironically, if the delay on South Africa's passing of the Child Justice Bill continues, there is a possibility that Namibia may pass their Child Justice Bill first.

¹⁴⁰ Skelton "Juvenile Justice Reform: Children's Rights and Responsibilities Versus Crime Control" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 88-106.

¹⁴¹ *Brandt v S* [2005] 2 All SA 1 (SCA)

¹⁴² Par 10 2 2 2 below.

¹⁴³ *Centre for Child Law v Minister of Justice and Others* CCT 98/08 [2009] ZACC 18.

6 Restorative Justice and Children in the Criminal Justice System

6.1 *Child Justice as Incubator*

It is with children in the criminal justice system that many restorative justice approaches have been incubated. This is perhaps because most societies still believe that when dealing with children who have broken the law we should be more forgiving. Victims are more inclined to agree to meet with the offender if he or she is a child. It is also because much of children's misbehaviour is dealt with in a family context unless the criminal justice is invoked. Thus restorative justice, which has sometimes been equated with a "family" model,¹⁴⁴ seems well suited to the task of dealing with offences committed by children. There is a sense that children are human beings still in development, that if their errors are fully understood and corrected, the majority of them will grow into law-abiding adults. It is understood by most that exposure to more criminal elements through the criminal justice system and in prisons is likely to result in a more damaged person being returned to society.

More broadly, the field of juvenile justice has, for the past century, been a "laboratory" for the testing of new ideas. Entirely new systems have been invented, such as the juvenile court model in the United States and the

¹⁴⁴ Braithwaite (1989) 56; Wright 113.

Scottish children's hearing system. Thousands of projects on "alternatives" all over the world have focused on diverting children away from both the criminal justice system and from detention.¹⁴⁵ Police and prosecutors are more likely to express enthusiasm for the idea of children receiving this type of benefit, at least when the offences are not serious or violent. Their willingness to do so tends to bolster confidence in the victims of crime to be part of different or alternative processes.

6 2 *Restorative Justice: Programme and Legislative Reform*

6 2 1 *Restorative Justice as a Unifying Force in Child Justice*

It is strange but true, therefore, that in the same decade that saw a punitive "assault" on the juvenile court and on children in the criminal justice system, restorative justice became a powerful unifying paradigm for child justice, and has formed the basis of wide ranging programmatic and legislative reform. Victim-offender mediation projects involving children have flourished in many countries in the Western world since the 1970s.¹⁴⁶ In the second half of the

¹⁴⁵ Bazemore and Umbreit 1995 *Crime and Delinquency* 308; Kahan "What to Community Sanctions Mean" 1996 *U of Chicago L Rev* 591-653; Umbreit and Greenwood "National Survey of Victim-Offender Mediation Programmes in the US" 1999 *Mediation Quarterly* 235-251.

¹⁴⁶ Blagg "Reparation and Justice for Juveniles: The Corby Experience" 1985 *Brit J Criminol* 267-279; Wright (1991) 56-77; Umbreit and Greenwood "National Survey of Victim-Offender Mediation Programmes in the US" 1999 *Mediation Quarterly* 235-251; Umbreit, Coates and Vos 121-144; Weitekamp "Mediation in Europe: Paradoxes, Problems and Promises" in Morris and Maxwell *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 145-160.

1980s the modern theory of restorative justice was being developed and was articulated by Zehr in 1990. At about the same time, in an unrelated development, the Children, Young People and their Families Act 1989 was passed in New Zealand. The passing of this Act was a seminal turning point in the field of child justice for a number of reasons. Firstly, the family group conferencing model that it introduced was aimed at solving the problems that had been experienced with the previous system for young offenders in New Zealand.¹⁴⁷ The second important feature of the model was its communitarian expression, with less emphasis on all-knowing professionals, and more trust in the family and community as holding the solutions. This resonated with the idea of victims and offenders being brought back to the centre of the conflict, and being directly involved in finding solutions. A third important feature was the cultural sensitivity of the model, and the fact that the model had been developed through dialogue with Maoris. As described in chapter 5, this link with indigenous justice was to become an important feature of the growth and development of restorative justice during the 1990s, and it continues to be a source of knowledge. It may also explain why the model has spread to many parts of the world where there are indigenous people.¹⁴⁸ A compelling feature of restorative justice is that, unlike the welfarist and justice models of juvenile justice, it was not developed in the West and exported whole to the developing world. As indigenous people have engaged with the modern restorative justice theory they have enriched and developed

¹⁴⁷ That system had been largely welfarist in its orientation and had run into the problem of over-utilising institutionalisation, and Aboriginal youths were over-represented in the system.

¹⁴⁸ Restorative justice projects exist in Africa, the Pacific Islands and Asia.

it. Essentially they can claim, and they do claim, to know more about it than their colleagues in the West, as for them it is a rediscovery. Thus restorative justice holds the prospect of being a unifying force, presenting a new framework for juvenile justice that may be understood internationally.

Family group conferencing proved to be a very popular model, with Australia developing its own models in the early 1990s. Though Daly observes that “[n]o other countries in the world have moved as quickly and as completely in embracing the conference idea” than New Zealand and Australia, it is nevertheless true that family group conferencing inspired much experimental restorative work with child offenders in other parts of the world. South Africa was quick to follow on the lead of New Zealand and Australia in piloting family group conferences with child offenders. As early as 1994, a set of proposals for policy and legislative change for dealing with children in the criminal justice system were presented to the Minister of Justice by a non-governmental drafting consortium that had family group conferences as its centre-piece.¹⁴⁹

Bazemore and Umbreit,¹⁵⁰ writing in 1995, proposed that it was time to rethink the sanctioning function in relation to children committing crimes. In their view the history of welfarism in the juvenile court system had resulted in ambivalence with regard to sanctioning child offenders. The authors posited the idea that in the absence of a clear sanctioning framework, a punitive

¹⁴⁹ Juvenile Justice Drafting Consultancy *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* (1994); Skelton and Frank (2001) 103-144.

¹⁵⁰ 1995 *Crime and Delinquency* 296-316.

model had begun to gain dominance.¹⁵¹ Sanctions can include a range of options which, depending on intent, “may be directed toward rehabilitative, educative, regulation and/or compensatory ends – as well as retribution or deterrence”.¹⁵² In the absence of a framework that encourages non-punitive objectives, they argued, “juvenile justice policy makers have adopted a one-dimensional approach to sanctioning based on what some have referred to as *retributive justice*”.¹⁵³ This retributive approach to sanctioning had gained popularity because, in the minds of policy makers and the public, punitive sanctions serve to affirm community disapproval of proscribed behaviour, denounce crime, and provide consequences to the lawbreaker. The individual treatment mission of the welfarist juvenile court was difficult to defend because it failed to accomplish these goals.¹⁵⁴ The authors proposed a third way, restorative justice, which “offers a blueprint to policy makers and juvenile justice professionals for developing alternatives to the retributive model”.¹⁵⁵ It would do so, the authors proposed, but expanding less punitive, less costly, and less stigmatising sanctioning methods by involving the community and

¹⁵¹ The “just deserts” philosophy (Von Hirsch *Doing Justice* (1976)) was introduced as a logical sanctioning framework aimed at reducing disproportionate responses to crime. Critics of the philosophy (Christie (1982); Braithwaite and Pettit (1990)) claimed that in fact it was simply doling out more accurately measured doses of pain. The unfortunate practical results of this framework have been responses like mandatory sentencing, and the referring of children into the adult system.

¹⁵² *Op cit* 296.

¹⁵³ *Op cit* 297. Emphasis in the original.

¹⁵⁴ Walgrave and Bazemore (“Reflections on the Future of Restorative Justice for Juveniles” in Bazemore and Walgrave (eds) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (1999) 387) are of the view that although offender treatment is a worthy objective, it need not limit a larger focus on restoration. In a restorative framework this can be viewed as part of the work done to foster effective reintegration.

¹⁵⁵ *Op cit* 298.

victims in the sanctioning process. Priority would be given to reparation, direct offender accountability to victims, and conflict resolution.

Writing a decade later, Bazemore and Schiff¹⁵⁶ present the results of a national inventory¹⁵⁷ of restorative justice programmes with young offenders in the United States. From these statistics it is clear that “restorative conferencing for young offenders has become increasingly popular as a viable response to youthful offending”.¹⁵⁸ It would appear that the advice given by Bazemore and Umbreit to embrace restorative justice as a blueprint for dealing with children in the criminal justice system was heeded, at least at the level of programme development. As has already been catalogued earlier in this chapter,¹⁵⁹ most American states have passed tough-on-crime legislation ushering in punitive responses to offences committed by children. Bazemore and Schiff¹⁶⁰ make the following surprising revelation:

“Interestingly, and somewhat ironically, during roughly the same period, some 20 states also adopted restorative justice language into their juvenile court purposes clauses, while another 15 added restorative justice to state juvenile justice administrative codes or similar policy documents”.

¹⁵⁶ *Juvenile Justice Reform and Restorative Justice: Building Theory and Policy From Practice* (2005).

¹⁵⁷ The inventory identified 733 programmes in the US, most prevalent in a few key states. Almost every state is experimenting with restorative conferencing, and 94% of the States offer at least one programme.

¹⁵⁸ (2005) 107.

¹⁵⁹ Par 7 5 1.

¹⁶⁰ (2005) 6.

A possible motivation for policy makers to have done this is the desire to counter-balance the “punitive onslaught” by relying on fresh arguments,¹⁶¹ and proposing a “third way”.¹⁶² This seems to be born out by the fact that restorative justice language included in the Illinois statute was included in a statute that in fact introduced many punitive measures including provisions allowing transfer of children to the adult court.¹⁶³

Other countries have also experienced a pattern of increased use of restorative justice programmes, as well as legislative reform in this area. The experiences from a number of selected jurisdictions are described below.

6 2 2 Canada

The new Canadian Youth Criminal Justice Act 2003 reflects an uneasy compromise by incorporating features that aim to satisfy both restorative justice advocates as well as public opinion that supports tougher measures.¹⁶⁴

¹⁶¹ Feld (“Rehabilitation, Retribution and Restorative Justice: Alternative Conceptions of Juvenile Justice” in Bazemore and Walgrave (eds) *Restorative Justice for Juveniles: Repairing the Harm of Youth Crime* (1999) 35) suggests that restorative justice has been used to stave off attempts to abolish the juvenile courts. See also Melli 1996 *Wis L Rev* 397.

¹⁶² Bazemore “Three Paradigms for Juvenile Justice” Galaway and Hudson (eds) *Restorative Justice: International Perspectives* (1996) 37-68. Walgrave and Bazemore “Reflections on the Future of Restorative Justice for Juveniles” in Bazemore and Walgrave (eds) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (1999).

¹⁶³ Interview with Bernadine Dohrn in Chicago, Illinois on 2004-09-28.

¹⁶⁴ The political mood in 2001 can be summed up by this quotation from Ontario Attorney General Jim Flaherty (cited in Winterdyk (2002) 70): “Adult crime? Adult time.”

Charbonneau¹⁶⁵ states that although the Act encompasses some restorative justice ideas,¹⁶⁶ “its structure is undeniably penal in nature”.¹⁶⁷ Whilst the Act seems to support restorative justice in the context of extra-judicial measures, the Act is based on offence categories, and those young people committing a serious offence¹⁶⁸ will face an adult sentence. This is not only in conflict with the restorative justice principles of the Act, but also clashes with a long held understanding of youth as a mitigating factor in sentencing.

6 2 3 *England and Wales*

In England and Wales, conferencing initially developed in an *ad hoc* manner outside any statutory arrangements. According to Crawford and Newburn,¹⁶⁹ the Crime and Disorder Act 1998 established certain elements of a restorative justice approach as part of a mainstream response for juvenile offending, but family group conferencing is generally seen as an add-on to other more specific orders, such as reparation orders or final warnings. The model of restorative cautioning championed by the Thames Valley Police has had a greater impact,¹⁷⁰ and Crawford and Newburn¹⁷¹ are of the view that the

¹⁶⁵ “The Canadian Youth Criminal Justice Act 2003: A Step Forward For Advocates of Restorative Justice?” in Elliot and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005) 75-88.

¹⁶⁶ The Act calls for the increased participation of victims and there are principles of sentencing (s 38) that refer to “harm done” and “reparation”.

¹⁶⁷ Charbonneau (2005) 83.

¹⁶⁸ Murder, attempt to commit murder, manslaughter and aggravated sexual assault.

¹⁶⁹ (2003) 30.

¹⁷⁰ Pollard “If Your Only Tool is a Hammer, All Your Problems Will Look Like Nails” in Strang and Braithwaite *Restorative Justice and Civil Society* (2001) 165-179.

creation of “referral orders”¹⁷² by the Youth Justice and Criminal Evidence Act 1999 has been the most significant innovation from the perspective of restorative justice. Dignan’s¹⁷³ assessment is that the legislative changes “hardly amount to a ‘restorative justice revolution’, let alone the ‘paradigm shift’ that some restorative justice advocates have called for”.¹⁷⁴ In fact, the Crime and Disorder Act also introduced measures that have been roundly criticised, such as “anti-social behaviour orders”¹⁷⁵ and “local child curfew schemes”.

6 2 4 Northern Ireland

Restorative justice has a singular history in Northern Ireland. It is rooted in informal justice and initially developed as an alternative, not only to the

¹⁷¹ (2003) 18.

¹⁷² These orders are a primary sentencing disposal applicable to 10 to 17year-olds pleading guilty and convicted for the first time by the courts. The young offender is referred to a “youth offender panel”, which agrees a “contract” with the young person. According to the Home Office (“No More Excuses” (1997) 31-32) the work of the youth offender panels is governed by the “principles underlying the concept of restorative justice”.

¹⁷³ “The Crime and Disorder Act and the Prospects for Restorative Justice” 1999 *Criminal Justice Review* 48-60.

¹⁷⁴ (1999) 58.

¹⁷⁵ Anti-social behaviour is defined as “a matter that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household”. The orders, known as ASBOs, are civil, requiring a civil burden of proof, but the breaches of the order are dealt with as criminal offences. McCarney “Are ASBOs the Answer?” 2005 (14) *Chronicle of the International Association of Youth and Family Judges and Magistrates* 5: “ASBOs breach international human rights standards, including the UNCRC, the Beijing Rules, the Riyadh Guidelines and the ECHR. It is questionable whether they ultimately serve to protect the public from persistent unruly behaviour. It is certain that they criminalise young people for behaviour which is not criminal.”

mainstream criminal justice system, but also to para-military punishment beatings.¹⁷⁶ Restorative justice projects were established in both Republican and Loyalist communities, receiving their referrals directly from the community. The signing of the Good Friday Agreement¹⁷⁷ in Northern Ireland established a number of public bodies, including an independent commission on policing and a civil service led review of the criminal justice system.

The Criminal Justice Review acknowledged that the restorative justice schemes that had developed in Northern Ireland have made restorative justice an issue of public debate, but that they have remained marginal.¹⁷⁸ The Review favoured a more state managed approach, and recommended accreditation of programmes by government. It was recommended further that the police should be the referral agency rather than the programmes receiving their referrals directly from the community.

The Criminal Justice Review also made a recommendation to adopt a system for young offenders based on diversion¹⁷⁹ by both prosecutors and courts to family group conferences. This recommendation has been given life through the Justice (Northern Ireland) Act 2002, which provides that, save for certain

¹⁷⁶ McEvoy and Mika "Restorative Justice and the Critique of Informalism in Northern Ireland" 2002 *Brit J Criminol* 534 535.

¹⁷⁷ This agreement established a political structure for a devolved administration in Northern Ireland.

¹⁷⁸ Criminal Justice Review *Review of the Criminal Justice System in Northern Ireland* (2000) 204.

¹⁷⁹ In cases where the child acknowledges responsibility for the offence.

specified exclusions,¹⁸⁰ children are to be diverted to a family group conference.¹⁸¹ The outcomes of the family group conferences are individual plans, to be approved by the courts. This new legislation is perhaps the boldest attempt to “mainstream”¹⁸² restorative justice in a youth justice system outside of New Zealand.

6.3 *The Role of Restorative Justice in Serious Crimes Committed by Children*

Whilst there seems to be wide-spread support for restorative justice approaches for child offenders and less serious offences, attitudes tend to harden when it comes to serious cases or repeat offenders.¹⁸³ Thus “it is frequently only first time offenders, or those who commit minor offences, who are considered ‘good candidates’ for most restorative justice interventions”.¹⁸⁴ Therefore most restorative justice initiatives do not attempt to include serious offenders in their programmes. Although it is accepted that some young offenders will end up in secure care facilities or prison, because the safety of the community demands it, this is not a reason why restorative justice approaches cannot be utilised for this group of young offenders, either during

¹⁸⁰ Purely indictable offences and those for which the penalty may be life imprisonment are excluded.

¹⁸¹ This is modelled on the New Zealand system with some variations.

¹⁸² Tickel and Akester (2004) 72.

¹⁸³ Farrington and Loeber (2002) 206-207.

¹⁸⁴ Corrado *et al* “Multi-Problem Violent Youth: A Challenge for the Restorative Justice Paradigm” in Weitekamp and Kerner (eds) *Restorative Justice in Context: International Practice and Directions* (2003) 1.

or following their incarceration. In fact such work would enhance public safety,¹⁸⁵ because if the offender is to be released back into the community (and almost all prisoners are paroled at some stage) he or she will arguably¹⁸⁶ be less of a risk to public safety, having been exposed to a restorative justice programme.

Numerous projects have been launched to meet this challenge. Gustafson¹⁸⁷ has analysed the results of “what is believed to be the first government - authorised and funded victim-offender mediation programme designed for use in crimes of severe violence”¹⁸⁸ in Langley, British Columbia. Gustafson says it is a myth that victims do not want to meet face-to-face with offenders

¹⁸⁵ Chief Justice Bayda of Saskatchewan gave an excellent demonstration of this (retold in the introduction to Strang and Braithwaite (eds) *Restorative Justice and Civil Society* (2001) 4): “Bayda invited his audience to imagine they were alone late at night in the dark streets of a metropolis. There are two routes home. On one street live 1000 criminals who have been through the Canadian prison system. On the other street are 1000 criminals who have been through a restorative justice process. Which street do you choose?” The self-evident reply to this question proves that society instinctively understands that incarceration makes offenders more dangerous, and that restorative justice holds some prospect of making them less so.

¹⁸⁶ A contrary argument is raised by Levrant *et al* (“Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?” 1999 *Crime and Delinquency* 3-27) who consider it unlikely that recidivism can be reduced amongst high-risk offenders unless the programmes are intensive. Their view is that an hour-long victim-offender mediation session is insufficient to change patterns of offending in these offenders.

¹⁸⁷ “Exploring Treatment and Trauma Recovery Implications of Facilitating Victim-Offender Encounters in Crimes of Severe Violence: Lessons from the Canadian Experience” in Elliot and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice and Evaluation* (2005) 193-227.

¹⁸⁸ (2005) 194. The crimes dealt with by the programme include first and second degree murder, attempted murder, rape, armed robbery, aggravated assault, kidnapping.

following a serious crime.¹⁸⁹ Gustafson's analysis of the programme considers the experiences of both victims and offenders who have been through the victim-offender mediation programme. Most of them experienced the process as "a healing intervention, eclipsing other attempts at remedy, enabling them to establish other therapeutic goals that have eluded them in other processes".¹⁹⁰

Flaten¹⁹¹ describes a project that used victim-offender mediation with young offenders¹⁹² in the case of serious crimes, including murder. Key factors to the programme's success are identified as careful preparation of participants and a time lag of about one year between the offence and the mediation.¹⁹³ The mediations resulted in an exchange of information, expression of emotions, and an increased understanding.

¹⁸⁹ In 1988 research was conducted (Gustafson and Smidstra "Victim Offender Reconciliation in Serious Crime: A Report on the Feasibility Study Undertaken for the Ministry of the Solicitor-General, Canada" (1989) unpublished report) into the attitudes of those most impacted by serious and violent crime concerning how they might feel about the need for an avenue of safe communication with the victim / offender. The results were positive, and thus the programme was launched.

¹⁹⁰ Gustafson ((2005) 221): "Trauma survivors have reported that post-traumatic symptoms have been greatly diminished, if not extinguished, by their participation".

¹⁹¹ Flaten "Victim-Offender Mediation: Application With Serious Offences Committed by Juveniles" in Galaway and Hudson (eds) *Restorative Justice: International Perspectives* (1996) 387-402.

¹⁹² They had all been convicted were residing at the McLaughlin Youth Centre, a correctional facility.

¹⁹³ This is an interesting finding, as most juvenile justice systems emphasise that legal processes involving children be processed as speedily as possible. Restorative justice in serious cases, however, appears to take more time.

6 4 Risks for Children in Restorative Justice Practice

The chapter has thus far explored the two “classical” approaches to dealing with children in the criminal justice system, and has proposed that restorative justice can be seen as a new approach that has a number of benefits. It also has weaknesses, in that it may place children at risk.¹⁹⁴ The concerns relating to risks will now be investigated.¹⁹⁵ The risks can broadly be divided into two categories: risks to due process rights specific to children, and risks arising from power imbalances.

6 4 1 Due Process Risks Specific to Children

There are a number of often-cited risks relating to restorative justice that are worryingly familiar to the field of child justice, as pronounced upon by the United States Supreme Court in *In re Gault*. Informality of the proceedings and a lack of legal representation were two of the criticisms levelled at the juvenile court, and these two characteristics are also typically referred to in lists of concerns about restorative justice.¹⁹⁶ The informality of restorative justice proceedings holds many positive features for a child. It is generally less intimidating than a formal trial (though the encounter with the victim can be very difficult for the child). The informality encourages participation and

¹⁹⁴ Dumortier “Neglecting Due Process for Minors: A Possible Dark Side of Restorative Justice Implementation” (2000) unpublished conference paper.

¹⁹⁵ The general risks of restorative justice are set out in more detail in chapter 3, par 3 4 4 above.

¹⁹⁶ Feld (1999) 20-22.

the child is more likely to be able to explain the reasons why the crime happened, and to feel and express empathy with the victim. It is this very informality that leads to some restorative justice processes being powerful, life-changing experiences. To remove this feature would be to destroy something of the essence of restorative justice process. Is it possible to minimise risks whilst keeping the process informal? In the *Gault* case the proceedings were so informal that the charge was not properly formulated. The majority of restorative justice referrals are premised on an admission of responsibility, and at that stage the child must have the charge clearly explained to him or her, and must be in a position to make an informed choice. This stage usually occurs whilst the child is still being dealt with by officials in the formal criminal justice system. With regard to the restorative justice process itself, a lack of formality does not mean that there are no rules. Morris¹⁹⁷ explains that in fact, almost all restorative justice processes do operate according to guidelines, rules or principles that are set out in manuals or codes of conduct, some follow “scripts”.

Another risk to due process rights, which will be dealt with here because of the emphasis placed on it in the *Gault* case, is the right to legal representation for children. One of the fundamental ideas of restorative justice is that the victim and the offender are at the centre of the process. Some restorative justice advocates argue that the presence of lawyers trained in the adversarial

¹⁹⁷ Morris 2002 *Brit J Criminol* 601.

approach may in fact result in the conflict being “stolen” by the lawyers.¹⁹⁸ This may be particularly acute with lawyers representing children (unless they are specially trained lawyers) who often tend to act like “wise parents” of their child clients, instead of really listening to them and taking instructions from them.¹⁹⁹ There are ways of accommodating the right to legal representation without fundamentally changing the nature of the restorative justice process. Morris²⁰⁰ gives the example of South Australia where young people can consult with lawyers prior to admitting guilt and prior to agreeing with the proposed agreements. Dumortier²⁰¹ provides a similar example from Belgium. In both cases the lawyers generally do not attend the actual conference. In the Real Justice project in the United States lawyers have a “watching brief” at conferences and they can interrupt if they feel that a breach of the young person’s rights is happening or is imminent.²⁰² In New Zealand a lawyer (provided by the state) may be requested if there is any concern about the rights of the young person attending a family group conference.²⁰³ The facilitator would also have a responsibility to ensure that the rights of the child are not infringed by the proceedings of a restorative justice process.

¹⁹⁸ Dumortier (“Legal Rules and Safeguards Within Belgian Mediation Practices for Juveniles” in Weitekamp and Kerner (eds) *Restorative Justice in Context: International Practice and Directions* (2003) 197 202) refers to this as “rejuridication”.

¹⁹⁹ Zaal and Skelton “Providing Effective Representation for Children in a New Constitutional Era” 1998 *SAJHR* 546.

²⁰⁰ 2002 *Brit J Criminol* 601

²⁰¹ (2003) 203.

²⁰² Morris 2002 *Brit J Criminol* 601.

²⁰³ Morris *et al Being a Youth Advocate: An Analysis of Their Role and Responsibilities* (1997) 7.

Net-widening is a concern for children being referred from the criminal justice system to alternative processes. It is not uncommon for children accused of trivial or petty offences to be referred to a restorative justice process. These efforts may result in an expansion of the reach of the criminal justice system (albeit through a restorative programme) to problems that would previously have been dealt with in the school setting or by agreements between neighbours.²⁰⁴ Morris²⁰⁵ points out that it is not only restorative justice processes that are vulnerable to this criticism, “it has been made about the introduction of a whole raft of diversionary practices”.²⁰⁶ Bazemore and Schiff²⁰⁷ make the interesting point that whilst holding a restorative justice process to deal with a relatively petty crime may seem like a waste of time, it can sometimes “accomplish other important goals, such as promoting open communication between parents and youth, or reinforcing mutual support for prosocial, consistent childrearing”. Other benefits are likely to include relationship building, agreeing on shared values and finding ways to prevent future harm.

Whilst the risk of net-widening does exist, particularly in systems that tend to refer less serious cases to restorative justice processes,²⁰⁸ it is a problem that can fairly easily be resolved by getting referral agencies to agree on which

²⁰⁴ Bazemore and Schiff ((2005) 4) point out that this can be dangerous in a “zero tolerance” environment. See further Dohrn (2001) 89-113.

²⁰⁵ 2002 *Brit J Criminol* 602.

²⁰⁶ See, for example, Skelton “Diversion and Due Process” in Muntingh (ed) *Perspectives on Diversion* (1995) 31-37.

²⁰⁷ (2005) 4.

²⁰⁸ Dumortier (2003) 197-207.

cases are suitable to refer, or having a code of practice that ensures that very petty cases that would previously have simply resulted in no action being taken do not get referred, unless other clearly identified goals or benefits would be likely to accrue.

6.4.2 Power Imbalances

Children lack power in a system that, inevitably, is managed by adults. They may not feel sufficiently confident to argue or complain about aspects of the process with which they may feel uncomfortable.²⁰⁹ Coercion to acknowledge responsibility is the first issue to be encountered, as in most systems this will be a pre-requisite to being referred to the restorative justice process.²¹⁰ Whilst an adult will be able to make a decision, weighing up the relative advantages and disadvantages of making acknowledgements in return for the benefit of being referred to the programme, a child may not have sufficient life experience to make a good choice. In addition, he or she may be put under pressure by his or her parents or by criminal justice professionals, and may

²⁰⁹ See however Maxwell *et al* (*The Preliminary Report on the Achieving Effective Outcomes in Youth Justice Research Project* (2001) 7-20) who demonstrate that over half of a group of 300 young people who had gone through a family group conference felt involved in making decisions, more than two thirds said they had had the opportunity to say what they wanted to.

²¹⁰ This is a rights issue as well as a power imbalance issue, see Skelton and Frank (2004) 205: "Because most current restorative justice processes require the offender to acknowledge responsibility before referral to a restorative justice program, the rights to be presumed innocent until proven guilty and to remain silent are no longer applicable. Some argue that the offender is voluntarily relinquishing these rights in order to benefit from the restorative justice option, but the extent to which these decisions are made voluntarily is in doubt."

thus sometimes be tempted to acknowledge responsibility even though there is in fact a defence. There is much that can be done to reduce the risk of coercion, particularly concerning how the option of a restorative justice process is offered to the child. Training can ensure that practitioners are aware of the child offender's rights and that they develop the necessary skills to describe the options fairly without "pitching" one too strongly.²¹¹

Having decided whether to opt for the restorative justice process, the child must then also face a process which, if not properly managed, may result in domination.²¹² Haines²¹³ has observed that the situation where a young offender is being upbraided by a roomful of adults is to be strenuously avoided. There is also a concern that, once in the process, the child may be inclined to give undertakings that he or she cannot really meet, such as agreeing to very high compensation to be paid, or to working to pay money back in situations where this is not really feasible.²¹⁴ These criticisms are only valid if the child faces a restorative justice process unsupported, which should never be the case.²¹⁵ He or she should always be supported by family members, and once again, the facilitator should ensure that the child receives

²¹¹ Skelton and Frank (2004) 205.

²¹² Braithwaite 2002 *Brit J Criminol* 563-577.

²¹³ "Some Principled Objections to a Restorative Justice Approach to Working With Juvenile Offenders" in Walgrave (ed) *Restorative Justice for Juveniles: Potentialities, Risks, and Problems for Research* (1997) 93-113.

²¹⁴ Dumortier (2003) 199-202.

²¹⁵ Braithwaite "Principles of Restorative Justice" in Von Hirsch *et al* (ed) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* 9.

extra support where needed, particularly where social realities enhance the power imbalance.²¹⁶

Extra vigilance is required when dealing with children due to their vulnerability. The history of child justice has caused those in the field to be wary of accepting new approaches without examining their likely effects properly. What is more, the majority of nations experimenting with restorative justice today are constitutional democracies, all of whom (except the United States) have ratified the United Nations Convention on the Rights of the Child. Restorative justice practice with children must thus be compatible with a child rights approach. Sloth-Nielsen²¹⁷ raises the following concern:

“Although attempts have been made to illustrate the congruence of international children’s rights law and restorative justice, there is some doubt as to whether, in fact, the two perspectives can be reconciled”.

However, as has been discussed in chapter 3,²¹⁸ the restorative justice field has become increasingly aware of the need to ensure rights protections. The development of standards augurs well for restorative justice practice. The

²¹⁶ In some cases race or class realities may compound the power imbalance, see Mbambo and Skelton 271-183. Gallinetti *et al* 2004 SACJ 39-40 found that in South Africa inter-class and inter-race conferencing is not common, but that the class and race issues can be managed with effective facilitation. Some writers have noted that girl offenders may also need specific support, especially in cultures where “shaming” of women enforces pre-existing stereotypes. See Alder “Young Women Offenders and the Challenge of Restorative Justice” in Strang and Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (2000) 105-120; Raye (2004) 325-336.

²¹⁷ (2001) 95.

²¹⁸ Par 3 4 4.

children's rights movement is, and should continue to be, vigilant about the practical effects of restorative justice processes on children's rights.

7 Conclusion

The welfarist model viewed children as needing "protection". It was a paternalistic model, with children being the objects of the quasi-parental concern of the state. In the 1960s, with the growth in civil rights, the realisation developed that children were in fact bearers of rights. This led to more calls for children to be seen as rational (if immature) beings who could participate in decisions to be made about themselves. The development of children's rights during the 1980s and 1990s was taking place at the same time as the rise of punitiveness with regard to child offenders (particularly in the United States), and at the same time as the development of restorative justice as a motivating paradigm for child justice reform. On the negative side, the new concept of childhood involving greater autonomy led to the view that children can be punished for their actions, and this in turn led to an increase in harsher treatment through more prosecutions and tougher penalties. On the positive side, the idea that children had some autonomy and that their views should be heard and considered, led indirectly to the idea that they could also be held accountable for their actions, and should be brought to understand the impact of their behaviour on others.²¹⁹ This accords with restorative justice.

²¹⁹ This also accords with article 40(1) of the United Nations Convention on the Rights of the Child, which provides that a child should "be treated in a manner consistent with the promotion of that child's sense of dignity and worth, which reinforces the child's respect

Child justice is a barometer for society's broader concerns about safety and stability. Adults feel that children should be manageable, and when they seem to be out of control, this gives adults a feeling that they are losing control of everything. The world seems unpredictable when children act in ways that are untypical of adults' expectations of children. At the same time, people generally understand, at least in relation to their own children, that childhood and adolescence is a time of experimentation and that awkward and difficult behaviour during the teenage years is part of the journey from childhood to adulthood and does not necessarily spell a negative future. This is the tension that society experiences in relation to children who commit crimes. That tension is reflected in the confused picture that emerges from an analysis of the theoretical approaches. It is the reason why it is possible that contemporary child justice systems are at times "schizophrenic",²²⁰ pulling in the opposite directions of the tough-on-crime agenda, and increased use of restorative justice at the same time.

for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

²²⁰ Stafford and Kyckelhahn (2002) 552. The authors give a striking example of the "inevitable tension from granting both protecting and liberating rights to juveniles" in the problem faced by the American Civil Liberties Union (ACLU) in 1989. ACLU lawyers had prepared a draft brief for the Supreme Court arguing that teenagers are ineligible for the death penalty because they lack capacity to make effective choices about committing capital offences. At the same time, other ACLU lawyers were arguing before the court in an abortion case that teenage girls *do* have the capacity to make effective choices about abortion. Recognising the difficulty of arguing both positions, they ACLU declined to file a brief in the death penalty case.

The difficulty that this poses is the “fit” between the restorative justice and the wider criminal justice system as it pertains to children.²²¹ Many initiatives remain on the periphery of the system, seen as alternatives to the court process in less serious cases. The state remains the gate-keeper of the system in most models, thus the type of cases that criminal justice officials are likely to consider referring to restorative justice processes depends on their perspective of what kinds of cases the system can “let go of”. A concern that this raises is whether the end result will be a bifurcated system in which the state decides who is dealt with in the punitive justice system, and who may be referred to a more community based process.

The reality facing criminal justice systems for children today is that all persons below the age of eighteen years cannot be treated as one homogenous group. Whilst all lack maturity, and all should be considered less culpable due to their youthfulness, there is within that understanding a graduated response from the public that allows for more societal understanding and tolerance for some children and certain crimes than others. Where very young children commit crimes, their lack of capacity is an enormously important feature, below a certain age it excludes them from criminal prosecution completely.²²² Societal tolerance towards older adolescents is understandably less durable, particularly if the crime committed is violent. It is this reality that results in a “bifurcated” approach, characterised by the system being permissive towards

²²¹ Crawford and Newburn (2003) 40. The authors observe (58): “Restorative justice occupies an awkward relationship to the existing system of criminal justice, seeking both to fit with it and simultaneously transform it.”

²²² Feld (1999) 31-35.

first offenders and those committing less serious crimes, and on the other hand being highly punitive on repeat offenders or those young people committing serious crimes. To some extent, this is inevitable. However, this differentiation is much less “schizophrenic” if there is one, unifying theory of justice as the departure point for the child justice system, and preferably for the criminal justice system as a whole. Restorative justice is a theory that can underpin the way that justice is done, it can be applied as an approach at different stages of the system, even when, for the safety of the community, an offender must be deprived of his or her liberty.²²³

Restorative justice cannot change the face of child justice systems if it is seen merely as “a diversion programme” or “a non-custodial sentencing option”. It is an approach to crime that offers the opportunity to communicate denunciation of wrongdoing and to establish in the young offender a sense of empathy with the victim, and connectedness to family and community. It requires active participation by the offender to make amends. To be fully successful as a paradigm for child justice, restorative justice must be the standard approach,²²⁴ the default system, from which referrals to the courts and prisons are seen as necessary only as a last resort in cases where community safety requires it. Restorative justice approaches can be applied at all stages of the system, including the use of restorative justice

²²³ Walgrave (2005) 3-25.

²²⁴ Walgrave “Towards Restoration as the Mainstream in Youth Justice” in Elliot and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005) 3-25.

programmes for those young offenders who end up in prison.²²⁵ Bazemore and Schiff²²⁶ observe as follows: “The international popularity of restorative justice is due largely to the potential suggested by the restorative justice vision for a more holistic, more effective response to youth crime.”

²²⁵ Vanfraechem “Evaluating Conferencing for Serious Juvenile Offenders” in Elliot and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice, Evaluation* 278-295 (2005); Robert and Peters “How Restorative Justice is Able to Transcend the Prison Walls: A Discussion of the ‘Restorative Detention’ Project” in Weitekamp and Kerner *Restorative Justice in Context: International Practice and Directions* (2003) 95-122.

²²⁶ (2005) 5.