

**APPLICATIONS BY CHILDREN UNDER THE CHILDREN ACT  
1989: CHILDREN 'DIVORCING' PARENTS**

**Thesis submitted for the degree of  
Doctor of Philosophy  
at the University of Leicester**

**by**

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## **Applications by Children Under the Children Act 1989: Children 'Divorcing' Parents.**

**By Jeff Murray**

The Children Act 1989 recognized for the first time, in statutory form, that children can apply, with the leave of the court, for orders relating to their upbringing including an order relating to where he or she might wish to reside. This ability has led to the suggestion that children can 'divorce' their parents.

This work considers these changes in two parts. Part I contains a theoretical examination of the relationship between children and the law. It is argued that children, like all human beings and because they are human beings, are radically autonomous (are ends in selves) and thereby are the holders of strong (ontological) rights which provide the moral basis for law. It is posited that it is the responsibility of the superior courts to uphold the ontological rights of citizens (including children) and to ensure that all human beings are treated as ends in selves.

Attitudes to children in law are, however, at present predicated on welfare concerns which are underpinned by the philosophy of paternalism which sits in contradistinction to the proposition that children be treated as ends in selves. This is true both in various mainstream theoretical analyses of how the law should look at children and, as is shown in Part II, in past and current practice of how the law has and is looking at children.

In Part II the theoretical position advanced in Part I is used to assess whether the Children Act itself and its interpretation in the courts accords with the strong rights thesis. It is argued that as the Children Act is predicated on welfare and not autonomy that it does not accord with this thesis and it is suggested that the courts' in considering the new legal rules are doing so paternalistically; a position which is ontologically indefensible.

## **Acknowledgements**

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Finally, and most significantly I would like to thank my partner, Alex Mackenzie, whose existence brings meaning to my own.

I would like to dedicate this work to the memory of my grandfather, Hugh Martin Murphy, whose life had such significant import on my own childhood.

# **Applications by Children under the Children Act 1989: Children 'Divorcing' Parents**

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## Introduction

### Of Law, Philosophy, and the Children Act 1989

"It is always said that we are nicer  
to our animals than we are to our  
children. I hope we've set that right.  
After all, we have a very good  
Children Act".<sup>1</sup>

Twining has written that "the most important theoretical function of all is the sustained teasing out, articulation, and critical examination of the general assumptions and propositions underlying the discourse of any discipline at a given moment in history. In this view, one of the main jobs of jurisprudence is the critical exploration and evaluation of prevailing assumptions underlying legal discourse - both law talk and talk about law."<sup>2</sup>

Milan Kundera has written that "The future is an indifferent void no one cares about, but the past is filled with life and its countenance is irritating, repellent, wounding, to the point that we want to destroy or repair it."<sup>3</sup>

These two quotes compliment each other well. In the first instance, Kundera is right - the past is always easier to write about, easier to comprehend, easier to explain. The future is not ascertainable.<sup>4</sup> The present moment on the other hand, is immediate. We have, as Twining rightly points out, to address arguments to the present moment. It is not controlled and should not

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<sup>1</sup> The former Secretary of State for Health, The Right Honourable Virginia Bottomley MP, speaking on the BBC Nine O'clock News, 26th September 1994.

<sup>2</sup> Twining, W, "Globalization and Legal Theory: Some Local Implications" (1996) 49 CLP 1, at 12-13

<sup>3</sup> Kundera, M, *The Book of Laughter and Forgetting*, Faber and Faber. 1996, at 30

<sup>4</sup> At a deeper level perhaps future, present and past are all one, that is that time is intertwined. See Eliot, T.S., 'Burnt Norton' in 'Four Quartets': 'Time Present and time Past / Are both perhaps present in time future / And time future contained in time past / of all time is eternally present / All time is unredeemable'

be contrived by the past. Historical analyses of children and the law, for example, are useful to justify a particular way of doing things. As interesting as such analyses are they might not reflect how things should be done. They provide no philosophical justification for continuing to do things in a particular way. In this regard Kundera has also written that "The struggle of man against power is the struggle of memory against forgetting."<sup>5</sup> This observation sums up brilliantly the fundamental problem of politics in any period of time. The present moment needs to be informed by memory and not forgetting.

This brings us to the issue of the relationship between children and the law, or more appropriately how the law has looked and is looking at the status of childhood. The idea of childhood as a status of non-age, of innocence and purity is replicated throughout twentieth century literature.<sup>6</sup> Deep within this view is the philosophy of paternalism. This view does not properly reflect, however, that childhood itself is a fundamental paradox. Children and their childhood's are as diverse and complex as their number. Nevertheless, the myth or fairy tale view of childhood is the one that informs the politics of children at this moment. Hence, the fundamental aim of every legal rule in relation to children in the twentieth century has had, we are to believe, one overriding aim: to promote the welfare of the child.<sup>7</sup> And it is only recently that this very bedrock of the relationship between children and the law has been challenged from a child-autonomy centred perspective i.e. that children themselves should be permitted a place in a domain to which they previously were not a part where rules were designed to be used in their favour to protect or promote their welfare rather than a system where a child

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<sup>5</sup> *ibid.* at 4

<sup>6</sup> And earlier. See for example Wordsworth, W, 'Ode: Intimations of Immortality from Recollections of Early Childhood' in *The Poetical Works of William Wordsworth*, Oxford Clarendon Press. 1958, at 279-285.

<sup>7</sup> For commentary see the judgment of Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 420. The welfare principle is now enshrined in Children Act 1989 s 1(1). For discussion of it see chapter 6 of this work.

might use rules to achieve his or her own end.<sup>8</sup> Children have taken their place inside a circle of rules to which they have little or no access because of the fairy-tale view of childhood.

Kundera has used the metaphor of circularity to illustrate how belonging with, and having connection to other human beings is an important, if not essential, part of the human condition. He says:

"That is when I understood the magic of the circle. If you go away from a row, you can still come back into it. A row is an open formation. But a circle closes up, and if you go away from it, there is no way back."<sup>9</sup>

In politics, religion, philosophy and other discourses the circle brings strength and necessary external validation of self. This circularity concept is easily applied to both the idea of law and how it looks at children. At this moment in time there is little doubt that the positive / doctrinal analysis of law constitutes the dominating view of what law is amongst the public, policy makers and lawyers.<sup>10</sup> There are, as Twining makes clear prevailing assumptions endemic in this approach. An analysis of law using this approach would simply analyse the legal rules themselves and ask whether or not they are procedurally and jurisprudentially accurate or adequate. This approach, however, does not permit the legal rules themselves to be challenged in a critical or analytical manner. Analysis of the rules becomes the method whilst their function and purpose is left unchallenged. This catalogue or list method of doing law is inappropriate. Contrarily, an inter-disciplinary approach to law provides the proper framework for constructive analysis. This does not simply entail the adding on of a critical legal or socio-legal tag, or to deconstruct the rules to find some pre-ordained or forgotten historical pattern. The task is, instead, to begin from scratch, to begin again and ask what law is, why do we have it?

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<sup>8</sup> See further O'Donovan, K, *Family Law Matters*, Pluto Press. 1993, at chapter six for a discussion of the law's treatment of children as objects.

<sup>9</sup> Kundera, n 3 above, at 92

<sup>10</sup> Although this is less and less true amongst academics.

The aim of this work is to ask this question - to analyse the moral reasons for having law and to then go on and analyse the legal rules relating to children contained in the Children Act 1989 and ask whether those rules are in accordance with the moral basis for law. The end product will be to challenge the orthodox paternalistic approach taken in the construction of rules relating to children and in their application in the courts.

In this regard I would like to endorse the description given by Twining of the Jurist whom he describes as being "a licensed subversive."<sup>11</sup> To subvert something is to upset it, to challenge or overturn it. Now subversion is not something that should be chased for its own sake. But when questions need to be asked and assumptions need to be challenged it is the role of the academy to weaken and overthrow conventional orthodox approaches, both to particular beliefs about law (which are theoretical) to the everyday functions of the courts (which are practical). The important task of the jurist is to get from the theoretical (ought) to the practical (is), in other words from truth to action. It is axiomatic that without the actual practice of law, the application of legal rules by the courts, the study of law would be absurd. As Detmold has put it "[l]aw is a practical thing."<sup>12</sup> Each Act of Parliament, each decision by a tribunal or a court affects the lives of particular individuals or a particular individual. However, law is not an entity which survives for itself. The study of black letter law outlined above too often makes this mistake. The rules themselves are only the by-product of a deeper, more theoretical intellectual endeavour. The community has courts and legal rules for good reasons, reasons which need to be explored in detail and made clear. The relationship between the concept of law (as Hart put it) and the practice of law will be the basis of this thesis.

Family law, which deals with the regulation of human relationships in their most intimate form, is one of the more interesting ways to make the journey from the abstract to the actual. There is a close connexion between thinking about family law and thinking about what law is. Family law has changed dramatically over recent years to reflect this connexion. Family law is

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<sup>11</sup> Twining, n 2 above, at 12

<sup>12</sup> Detmold, M, *Courts and Administrators*, Weidenfeld and Nicolson. 1993, at 94

having to continuously re-invent itself, by assessing its boundaries, and challenging its conventional orthodoxy. This change has been reflected by Dewar who has written that:

"Once upon a time things were easy for family lawyers. Their object of study was clearly marked out (marriage, divorce, and their consequences), whilst theoretical debate about the subject was rare or non-existent. Although it is difficult to locate this Garden of Eden in real time, most family lawyers would share the perception that things have become more complex of late."<sup>13</sup>

This complexity has re-invigorated family law. Family lawyers are having to look beyond the black letter approach which was predominant. As a result, family lawyers are engaged in sociological, psychological, philosophical, economic, as well as traditional legal analysis and this has been reflected in the change in traditional doctrinal family law textbooks.

At the time of writing this thesis, family law is once again at a critical moment in its development for a different reason than things becoming more theoretically complex. As Andrew Bainham has pointed out in his novel textbook contribution, *Children: The Modern Law*,<sup>14</sup> the part of the family law course which is dedicated to the study of children and the law has expanded rapidly over the last twenty years and in 1998, as in 1993 when the first edition of his book was published children still "dominate and occupy at least half of the time spent on a typical family law course."<sup>15</sup> The existence of a textbook like Bainham's in itself (the first undergraduate text to deal solely with this subject) is an indication of the growth in the study of the law relating to children. In law schools across the country, the study of children and the law has developed and is still developing faster than any other subject. But just as family law generally has become complex, so too has the study of how the law should look at children.

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<sup>13</sup> Dewar, J, "Family Law and Theory" (1996) 16 OJLS 725, at 725

<sup>14</sup> Bainham, A, *Children: The Modern Law*, Family Law: Jordans. 1993.

<sup>15</sup> *ibid.* at vii

As an undergraduate student studying family law at the University of Leicester, I was unfortunate enough to be caught in a rather paradoxical period for the law relating to children. The Children Act 1989 had been passed by Parliament and received the attention of the monarch's signature and had just come into force. Unfortunately, study on the part of the course dedicated to children was restricted to a line by line, section by section, analysis of the Act itself, as there was insufficient case law for a proper doctrinal analysis as reference could only be made to the 'old law'. This approach in itself, however, was deeply flawed. Seven years on there is a thriving amount of case law on the various provisions of the Children Act 1989 to enable a proper doctrinal analysis, but there is also so much more and Bainham's textbook is an excellent example of this. The study of children and the law (like the study of family law) cuts across many of the areas involved in the study of law and increasingly by looking at law from an inter-disciplinary perspective.

For example, philosophy has been invited to the study of children and the law, and this has only gone to increase the intellectual diversity and interest of the subject itself. Both legal philosophers and political philosophers have made both personal and vicarious appearances onto the scene of children and the law, and their arguments have been used both directly and indirectly. The construction of childhood and the position of children within various theories of rights has, in particular, been a vigorous area of intellectual debate. Neil MacCormick's<sup>16</sup> contribution to test whether children could be described as rights-holders has been an important one, as has the contribution of John Eekelaar<sup>17</sup> who has examined in particular the development of legal rights for children through analysis of the work of Joseph Raz.<sup>18</sup> Similarly, the work of Rawls in his *A Theory of Justice*<sup>19</sup> has

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<sup>16</sup> MacCormick, N, "A Test Case for Children's Rights" (1976) 62 Archiv fur Rechts und Sozialphilosophie 305

<sup>17</sup> See for example Eekelaar, J, "The Emergence of Children's Rights" (1986) 6 OJLS 161

<sup>18</sup> Raz, J, "Legal Rights" (1984) 4 OJLS 1

<sup>19</sup> Rawls, J, *A Theory of Justice*, Harvard University Press. 1972.

been developed further by both Michael Freeman<sup>20</sup> and Worsfold<sup>21</sup> to incorporate children into the infamous "original position."<sup>22</sup> All of these approaches to the concept of children's rights are a central feature of Bainham's book and any scholar approaching the study of child law must consider them.

The approaches to the rights debate listed above have, however, become an orthodoxy. Bainham himself has sought to draw what he describes as "common ground"<sup>23</sup> between the theories, although he admits that there might be a danger of over-simplification and this is no doubt the case. As a result of their similarities these works have come to constitute the mainstream, and over-emphasis on particular theories should be avoided. The licensed subversives are being silenced. There is a tendency to ignore the important work, in relation to children and the law, of what can only be described reluctantly as more marginal academic analysis. Katherine O'Donovan in her recent book *Family Law Matters*,<sup>24</sup> has also highlighted this trend and that book goes some way to address the serious questions which relate to the area, questioning the foundations of these rights discourses as the proper basis for the analysis of children and the law and introducing students to a wider range of theoretical and intellectual perspectives. There is evidence that the chase for truth is part and parcel of the study of family law.

What I hope to illustrate in this thesis is that the doing of law and the doing of philosophy are inseparable. I am not saying that the philosophical account has to be accepted at face value by the readers of this work (that would be a ridiculous thing to ask- perhaps it is naive of me to think that anyone will read this work *per se* apart from those under academic obligation), but it should be considered. Nor am I suggesting that this work

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<sup>20</sup> Freeman, M, *The Rights and Wrongs of Children*, Frances Pinter. 1983.

<sup>21</sup> Worsfold, V, "A Philosophical Justification for Children's Rights" (1974) 44 Harvard Educational Review 142

<sup>22</sup> Rawls, n 19 above, at 118

<sup>23</sup> Bainham, n 14 above, at 92-93

<sup>24</sup> O'Donovan, n 8 above.

is a definitive philosophical argument on my part. It is merely what will later be described as a particular view from a particular window, the result of a number of years thinking about the concept of law. To my mind, there is no foundational rights theory widely discussed in the area of children and the law which reflects the true nature of the human condition and hence the true purpose of law. Detmold has made reference to Dicey's famous hypothetical statute which required the execution of all blue eyed babies and has used it to highlight the inadequacies of the positive black letter approach as a proper theory of law.<sup>25</sup> Consideration of such a statute goes to the heart of the relationship between children and the law, the nature of rights and the constitutional function of the courts and it provides an excellent test case to bridge the gap between legal theory and legal practice.

In presenting a particular view about the relationship between children and the law a new and subversive philosophical approach to the area will be taken to challenge the more orthodox approaches to children's rights advanced thus far. As a result some new philosophers will be invited to critical family law, such as Wittgenstein (particularly his later analysis of language), Sartre (particularly his very early contribution to ontology) and Detmold (for his analysis of the relationship between law and morality and the nature of rights) all of whose influences on this work are immense. The purpose here is to give a different philosophical spin on the subject, which will in O'Donovan's words no doubt always exist on the margins. This marginal but I hope philosophically sound theoretical analysis will take up the first part of this thesis and will challenge the prevailing orthodoxy referred to above.

The second part of this thesis will concern itself more directly with the actual title of this work, that is to ask what the expression 'children divorcing parents' actually means. The theoretical analysis undertaken in the first part will permit in depth consideration and critical analysis of the Children Act 1989, particularly in light of those sections which seemingly give children greater autonomy. Section 10(8) of the Children Act 1989 permits children

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<sup>25</sup> Dicey, A, *Introduction to the Study of The Law of the Constitution*, Macmillan. 9th ed, 1939, at 81. See further Detmold, n 12 above, at 95

who are said to have sufficient understanding to apply for leave to ask for a section 8 order (including a residence order which might result in a change to where an individual child will live). Moreover, rule 9.2A of the Family Proceedings Rules 1991 makes clear that a child may be able to proceed in family proceedings (including wardship) without a next friend or guardian ad litem. The combination of these provisions have, however, been met with a high degree of scepticism (and criticism) by particular members of the judiciary. This concern has been expressed in Children Act cases and also publicly in a series of academic articles and seminars. The basis for this scepticism is that children are said to be vulnerable from parental manipulation and over-zealous members of the legal profession. Moreover, as the Children Act 1989 is not itself clear about the precise importance which should be attached to the autonomy of mature minors and because it is predicated on the philosophy of welfare the paternalistic method which has been prevalent in the courts' assessment of cases involving children has continued. Indeed, the cases brought under the legal rules cited above have, according to a Practice Direction from the President of the Family Division, to be heard in the High Court.<sup>26</sup> Children are denied access to the lower courts, and one of the central aims of the Children Act 1989, to bring some degree of unification to proceedings involving children has been questioned. Informed by the first (theoretical) part of this work, the second (practical) part will examine why this should be the case and will question whether there is any justification for the seeming reluctance on the part of senior members of the judiciary to act in a way which distances individual children from legal rules which could, if constructed positively, allow them the authority to make decisions that directly affect their own lives.

The following theses will be put forward:

1. All human beings, whatever their age or level of understanding (meaning whether they are Professors of Law or blue eyed babies) are radically autonomous.

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<sup>26</sup> Practice Direction (*Applications by Children: Leave*) [1993] 1 All ER 820

2. They therefore are the holders of strong ontological rights which insist that human beings be treated as ends in selves. Strong rights are distinguished from weak rights. Strong rights have ontological primacy whereas weak rights are the simple correlatives of duties (statutes can only ever confer weak rights.)

3. Strong rights provide a moral basis for law and are prior to everything else in the world, including the supremacy of Parliament.

4. It is the responsibility of the superior courts to uphold the strong rights of citizens. In other words it is the role of the court to act morally. In relation to children this takes the form of a dual self-validating jurisdiction:

- to protect the strong rights of children
- to assert the strong rights of children

Correlative to this, as a child my radical autonomy enables me strong rights to:

- protection (of my autonomy); and
- personal autonomy (which allows me to control my own ends when end efficient, a point embraced by Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402).

5. Despite the apparent importance of the *Gillick* decision attitudes to children in law are generally, however, predicated on the philosophy of paternalism which sits in contradistinction to the proposition that children be treated as ends in selves. Such paternalism is reflected in the legal rules which relate to children, both in common law and statutory jurisdictions, including the Children Act 1989 and the powers that the court exercises through its inherent jurisdiction. Such paternalism is also reflected in orthodox legal theory relating to children.

6. Nevertheless, the Children Act 1989 has given to children new statutory rights (necessarily weak) to apply with the leave of the court for orders which permit them to make changes to their upbringing, including to change with whom they live. The Act itself is, however, problematic in relation to the strong rights thesis. It is predicated on the paternalistic notions of welfare and not autonomy. In this manner children are objects of law and

not subjects in it. Individual children who are deemed to be end efficient are therefore not given proper respect.

7. As the courts are the "ultimate institutions"<sup>27</sup> in a common law legal system it is for them to review legislation to ensure the rules in it accord with the strong rights thesis. However, referring back to 6 above, the attitude of the courts in matters relating to children are paternalistic and in relation to the provisions contained within the Children Act 1989 which give mature minors increased access to the courts, the courts themselves have been cautious in their interpretation, more cautious and more paternalistic than the Act itself envisaged. Indeed, it is an approach which is in accord with the philosophy found in wardship, the mechanism which allows access to the inherent *parens patriae* jurisdiction of the court.

8. By imposing on individuals who are end efficient a particular way of seeing the world the courts act in contradiction to the strong rights thesis. Every decision made by a court which is antithetical to the proposition that human beings are ends in selves is ontologically indefensible. Examples of such decisions are found in the cases, referred to in 6 above, where children ask the court to assert their personal autonomy.

9. The problem confronted by the courts in such cases is that of dealing with children whose expressed wishes do not coincide with others (including the courts themselves) but who are efficient ends in selves (have sufficient understanding). It is a problem which is necessarily philosophical. It goes, referring back to 2, 3 and 4 above, to the moral basis of law - its ontological foundation: the proposition that individuals should be free to determine their own ends, whatever the opinions of others. See number 1 above.

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<sup>27</sup> Detmold, n 12 above, at x

## Chapter 1: Creating a Framework for (Children's) Rights

"The only perfect and genuine republic is that which comprehends every living being." <sup>1</sup>

"Instead of oneself as the only human on earth think of oneself as a child. One's first awareness of the world is of things (including the humans) to be manipulated and used. One is, literally, then the only end on earth. The process of growing up is certainly the process of becoming more efficient as an end, and more self-aware in that exercise; but it is also the process of becoming aware of others as ends in themselves (some, in this latter regard never grow up). Thus the process of the foundation of politics are as commonplace as a baby's cry"<sup>2</sup>

### Introduction

For Wittgenstein a philosophical problem was expressed in terms of "I don't know my way about."<sup>3</sup> The methodology he used to address such problems, in both his periods of academic activity, was to look for the limits of language. Language (as a method or linguistic style of expression) consists of a great bundle of words (they are the tools through which we communicate). To understand words we need (as human beings) to share

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<sup>1</sup>Shelley, P, "On Jesus Christ's Doctrines of Universal Love and Equality" in R Holmes (ed), *Shelley on Love*, Flamingo. 1996, at 66

<sup>2</sup>Detmold M, *Courts and Administrators*, Weidenfeld and Nicolson, 1989, at 123 (cited in this work as Detmold).

<sup>3</sup>Wittgenstein L, *Philosophical Investigations*, Basil Blackwell. 2nd ed, 1958, at 123 (cited in this work as Wittgenstein).

contexts. Words are, however, subtle concepts and are often the root cause of philosophical problems. Such problems arise, for example, when we talk of 'rights'. The noun 'right' and term 'rights' pervade our understanding of law generally and of particular legal rules. Nevertheless, they also have application throughout moral and political discourse.<sup>4</sup> 'Rights' have been described by Jean-Paul Sartre as "something like triangles and circles"<sup>5</sup> - so perfect that they do not exist. Recourse to rights discourse, he suggests, can in some circumstances be used as a mechanism to escape from our freedom and responsibility. Seeking definition through the language of rights he regards as being as empty as other concepts "like mathematical symbols and religious dogma."<sup>6</sup> Within the framework of positive law the noun 'right' has a different meaning altogether, but even within analytical jurisprudence the concept has no definitive agreed application. For example, for Bentham or Austin a 'right' was only synonymous with a fully developed legal system.<sup>7</sup> Ergo, the noun 'right' can only ever be seen as a legal proposition. In contrast, Hart was able to distinguish between legal and natural rights, although a child could not be a rights holder under either heading as he or

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<sup>4</sup> See Raz, J, *The Morality of Freedom*, Oxford University Press. 1986; and White A, *Rights*, Clarendon Press. 1984 for further application of rights in various forms of discourse.

<sup>5</sup> Sartre J.P., "The Childhood of a Leader", in Sartre J.P., *Intimacy*, Panther. 1973, at 218.

<sup>6</sup> *ibid.* at 218. For Sartre, a circle (or a triangle for that matter) has no contingency, no relationship with the rest of the world, unlike animate and inanimate objects. It has its own definition within itself. It *is*. This is the sense in which a mathematical proposition (like a religious doctrine or to claim a right) can be seen to be perfect and "beyond existence" (see further, n 1 above). This theme is reflected in other of Sartre's works. See in particular: Sartre, J.P., *Nausea*, Penguin. 1970, at 146-147, and at 247-249. For analysis and criticism of this idea see further, Thody, P, *Sartre*, Studio Vista. 1970, at chapter 3. In *The Childhood of a Leader* the protagonist Lucien finds the definiteness of his existence through the oppression of others via the adoption of an anti-Semitic standpoint. He declares, at 218: "I exist because I have the right to exist." Sartre is correct in one respect, 'rights' are certainly non-corporeal. To say 'I have a right' is not the same as saying I have a pen or a glass of beer. One, in this sense, has to pin down Lucien's proclamation of 'right'.

<sup>7</sup> For a discussion of the English Analytical school of which Bentham and Austin were a part see Paton, G, and Derham, D, *Jurisprudence*, Oxford University Press. 4th ed, 1972, at chapter one (cited in this work as Paton and Derham).

she would be incapable of the having of the right. These various analyses of rights, however, are only some examples of how the term 'rights' is used. There are others, and this is precisely the problem with 'rights' discourses. One has to try and find a way about.

The diversity (and uncertainty) surrounding the definition and conceptualization of the term 'rights' is nowhere more prevalent than in academic writing.<sup>8</sup> Indeed, Detmold has observed that "[m]any philosophers of rights haven't actually bothered about the ontological question, what rights exist?"<sup>9</sup> Instead, many scholars assume rights as a given without seeking any form of philosophical foundation to make valid their assertions. Rights talk in relation to children is no exception. The language of rights is a central feature of scholarly literature on the status of children in society and in particular on how the law looks at children and understands the concept of childhood.<sup>10</sup> Whilst it has now been seemingly readily accepted that children have rights<sup>11</sup> there have been very few attempts to clarify a starting point (a beginning) upon which the expression of such rights could be based, or to define in what sense the term is being used. Instead, competing and necessarily contradictory interpretations of the definition of rights are offered based on seemingly incompatible and multiform usage of the noun 'right'. As Bainham has commented:

"The issue of children's rights cannot sensibly be broached unless the question of what it is to have "rights" is first addressed (a point forcibly made by William R. Lucy in "Controversy About Children's Rights" in David Freestone (ed.), *Children and the Law* (1990)). When we think we know what "rights" are the next question must be whether children have them at all (see Neil MacCormick's answer to this in "Children's Rights: A

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<sup>8</sup> particularly amongst legal scholars

<sup>9</sup> Detmold, n 2 above, at 115

<sup>10</sup> See Bainham, A, *Children: The Modern Law*, Jordans. 1993, at chapter 3

<sup>11</sup> There is now international agreement that children have rights. See further: McGoldrick, D "The United Nations Convention on the Rights of the Child" (1991) 5 Int'l J L & Fam 132; Rosenbaum, M and P Newell, *Taking Children Seriously*, Calouste Gulbenkian Foundation. 1991. Precisely what is meant by the term 'rights' in this context will be discussed later in this chapter.

Test Case for Theories of Rights" 62 Archiv fur Rechts und Sozialphilosophie 305 (1976)). Only then should we move on to consider the individual substantive rights which children may plausibly claim."<sup>12</sup>

In a neat attempt to encapsulate the problems of rights discourse in relation to children Rodham, in a widely quoted expression, has referred to the term 'children's rights' as being "a slogan in search of a definition"<sup>13</sup> and a series of academic commentators have pointed to the problem that in relation to children the term 'children's rights' incorporates a mixed bundle of ideas and notions.<sup>14</sup> There are good reasons for this diversity in approach, one of which is to be found only in the complexity of language itself. This observation is not without notice in the field of family law. Again, Bainham has more recently commented that:

"The use of particular language more often than not reflects an ideological position with which individuals may agree or disagree. As everyone knows, statutory provisions require interpretation, and it is through interpretation and comment that we reveal our own values and ideological standpoints."<sup>15</sup>

In light of this view that language is reflective of ideology one has to assert that it is not possible to give a definitive definition as to what children's rights actually are and so long as we attempt to do so we will continue to go

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<sup>12</sup> Bainham, A , "Book Review: Taking *Children Seriously* by Martin Rosenbaum & Peter Newell (Calouste Gulbenkian Foundation, 1991) A Critique of the Proposal for a Children's Rights Commissioner" [1992] JSWFL 552, at 554-555

<sup>13</sup> Rodham, H, "Children Under the Law" (1973) 43 Harvard Educational Review 487. Quoted by Franklin, B, "Introduction", in Franklin, B, (ed), *The Rights of Children*, Basil Blackwell. 1986, at 12 and by Freeman, M, *The Rights and the Wrongs of Children*, Frances Pinter. 1983, at 32

<sup>14</sup> For examples and discussion of this see: Bainham, n 10 above, at chapter 3; Freeman, *ibid.* at 32-65; Geiser, R, "The Rights of Children" (1977) 28 Hastings Law Journal 1027; Wringle, C, *Children's Rights*, Routledge & Kegan Paul. 1985.

<sup>15</sup> Bainham, A, "Changing Families and Changing Concepts - Reforming the Language of Family Law" (1998) 10 Child and Family Law Quarterly 1, at 2

around in intellectual circles (a metaphor for not knowing one's way about).<sup>16</sup>

Nevertheless, in accordance with the specifications laid out by Bainham above (and rightly so), the aim of the first part of this work is to elucidate the various features of the 'rights' debate and to provide a theoretical framework through which a definition of rights can be offered. That definition will be broadly drawn from a form of the philosophy of liberal existentialism. It will provide an ontologically sound basis for a theoretical evaluation of rights, and a distinction will be drawn between what will be called strong (ontological) rights and weak rights. From that ontology will flow the framework under which one can then proceed to classify what rights children have and to ask whether children should be permitted to exercise their autonomy in a way which would allow them to make decisions regarding their own lives? This theoretical analysis will then permit a critical evaluation in chapter three of alternative approaches to the problem of children's rights, both mainstream and marginal, and in subsequent chapters of the legal rules relating to children, particularly those contained in the Children Act 1989 which affect the way children can exercise their autonomy.

The purpose of this section then "is not merely to describe, but also explain and to understand"<sup>17</sup> the various languages of rights in their proper context as tools which are used in a broad attempt to comprehend the human condition. It is therefore not proposed that the philosophical definition of rights which will be offered will encapsulate all other understandings of the term 'right'. Such a broad attempt has already been made, to my mind,

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<sup>16</sup> According to Thody, n 6 above at 44, a circle is by definition "the rotation of a straight line about one of its extremities." It is a mathematical proposition, and realistically unachievable. It is the opinion of this author that the search for a definitive definition of particular 'children's rights' is a futile one. A search for a definition of rights within its own theoretical framework, however, is much more ascertainable. This point will be elaborated on later in connection with children's rights specifically and rights discourse generally.

<sup>17</sup> Pears, D, *Wittgenstein*, Fontana. 1979, at 21

unsuccessfully within the field of positive law by Raz<sup>18</sup> and elsewhere by White<sup>19</sup>. Instead, the definition offered will create a frame of reference, or starting point, through which one might analyse what is to be understood by the term 'moral' or 'ontological' right with a view to analysing legal rules. In this regard, this chapter represents a particular view from a particular window of the nature of being. As Jukes has explained, every window must also have a frame and a perspective.<sup>20</sup> What I will seek to show is that at the heart of the moral perspective to be advanced is a monistic proposition, notably that in ontological discussion and hence at the heart of rights talk and talk about law there is something which is universally applicable as a starting point. That starting point is the simple recognition between human beings. This recognition will be called love. The first part of this thesis will elaborate a new perspective on how the law *should* relate to children in light of that starting point, with particular emphasis on their personal autonomy.

It should be highlighted at this point that one important feature of the frame of reference proposed is that it will be antithetical to the view presented by the doctrinal view of law encapsulated in legal positivism. This positive view of law is well represented in academic literature and judicial dicta in all areas of legal study and its hold is a strong one. Like other views, legal positivism has a frame, a particular outlook on law - what legal rules are, how they are formulated and of the various functions of the legislature, the executive and the judiciary. That outlook, or so it seems, is shared amongst

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<sup>18</sup> Raz, n 4 above, *passim*.

<sup>19</sup> White, n 4 above, at 72. For an application of White's 'catch-all' definition of rights to the seemingly endless dispute between the interest theory and the will theory and their understandings of children's rights see: Lucy, W, "Controversy about Children's Rights" in Freestone, D, (ed), *Children and the Law*, Hull University Press. 1990, 213 at 229 where he comments that: "[t]he characterisation of the concept of a right I recommend, which is both sufficiently abstract to cover all the criteria of the concepts and begs no questions between the will and interest theories, holds that a right be understood as an entitlement. Thus what 'one has a right to do is what one is entitled to do, and that in virtue of which one has a right, the ground of the right is what entitles one'. Such an abstraction, however, will not cover all analyses of a right, including the one to be advanced in this thesis. See further chapter 3 of this work.

<sup>20</sup> Jukes, P, *A Shout in the Street*, Faber and Faber. 1990, at xii

many in the academy and in the legal profession. Its main hallmark is that the law is an entity in itself, an historically developing mass, and that the law and legal rules existing within it have no necessary concrete relationship with morality, and hence moral rights. A further purpose of this and the following two chapters is to show that this view is a distortion of the true nature of the concept of law as it fails to account for the true nature of being. If one rejects the foundations of legal positivism, and embraces the view that law and morality are inseparable (as suggested earlier) then the concept 'moral right' becomes increasingly significant. It must underpin and necessarily inform any analysis of law, including the law relating to children.

Adopting the idea that simple recognition between human beings provides the theoretical basis with which law can be analysed has interesting implications for family law. This is because it is necessary to start a study of how legal rules relate to children by looking not directly at the specific doctrinal rules themselves but at the environment in which children find themselves, families. The view taken here is that families are no more than a collection of individual human beings. Hence, any study of family law (of which children and the law is a part) must begin at the level of analysing human relationships. Human relationships are a complex business and to analyse them involves an in depth analysis of the nature of being itself. The frame of reference to be proposed in this chapter will therefore be one where ontological considerations are dominant. However, given that rights talk itself is philosophically problematic it is necessary first to analyse the linguistic problems of ordinary language which arise when rights talk is engaged. It will be argued that human beings are not bound by any particular form of language. The writer is always free to express himself or herself and language is merely a tool used to describe the world, to bring meaning (or life) and structure to his relationship with other objects, both animate and inanimate. In this regard it will be proposed that there are *ontological* reasons for using rights in spite of the linguistic problems which arise when other forms of rights are used as a basis for advocating children's rights. At the heart of this discussion there will be two philosophical themes, and two necessary conflicts: the relationship between the world and oneself and between oneself and the other. One's vision of the world and one's

relationship with objects and language will provide the necessary material to help resolve these conflicts and have a fuller understanding of human relationships, the concept of law, and of the true significance of 'moral right'.

To this end this chapter will be separated into three parts. Part one will analyse in further detail the precise problems involved when rights talk is engaged. Part two will then elaborate a starting point on which a definition of moral rights can be based. Part three will distinguish ontological rights from other ways in which the term is used. That definition will then itself be used as a basis for understanding the concept of law. That concept will lead to the elaboration of a theory of law which takes sides. It will therefore provide an attack on other perspectives and definitions of law. What I will seek to do is to tackle head on the problem involved in the languages of rights, before going on to elaborate a committed basis on which a conception of rights and necessarily a conception of law can be based.

### **The Problem with Rights and Wittgenstein's Theory of Games as a Contribution to the Analysis of Rights.**

To reduce philosophical problems to linguistic misunderstandings may be regarded as somewhat simplistic. Nevertheless, there are, as already suggested, many definitions and meanings to the noun 'right' and as a result talk about rights can be confused and illogical which leads to philosophical problems. This section will ask the question why is this the case? And the answer to this question lies in the application of simple philosophical analysis. Part of the later works of Wittgenstein, in particular, can be used to provide a useful insight into the multitudinous uses of particular words in their various contexts.<sup>21</sup> To say 'I have a right' is to make a normative statement, to set a standard, that much is clear. This is because rights are practical things (there can be no use for such thing as a right in theory. Rights are *de facto* practical. Even if my rights are infringed, I still have them.) What we have established earlier is that what is not always apparent

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<sup>21</sup> See particularly Wittgenstein, n 3 above, *passim*. The later works of Wittgenstein reject the essentialist approach he himself adopted in his earlier *Tractatus Logico-Philosophicus*, Routledge & Kegan Paul. 1922.

when rights talk is taking place is the standard which has been set when the term rights is being used or to put it another way what definition of rights if any is being offered. One of Wittgenstein's key observations was that ordinary language itself is both complicated and unclear which leads us, sometimes, to talk nonsense. Moreover, as Murdoch has made clear, "the living and radical nature of language is something which we forget at our peril."<sup>22</sup> Language is anarchical.<sup>23</sup> Its variety and usage should not be underestimated and a simple investigation into language provides an excellent starting point to understand rights talk and the limitations of the noun 'right'. The following analysis will illustrate that the standard (or yardstick, criterion or frame of reference) which discerns a concept is the most important determinant in clearing up philosophical problems.

It is particularly within Wittgenstein's precept of a language-game that a better determination of the concept right can be more fully understood. Language-games represent "linguistic entities in which linguistic signs, human activity and objects are incorporated into the totality of the performance of human action (where the expression game is intended to bring out certain analogies between human linguistic activity and games)."<sup>24</sup> For Wittgenstein, there were only language-games. He thus favoured a more empirical analysis of the phenomenon of language itself, of language as a social practise. The 'language-game' as the basis of this phenomenon has many levels of application. Most interestingly, for purposes of this analysis of the noun 'right', is that under one understanding of the term 'language-game' there are "certain partial language systems, functional entities or applicational contexts that constitute part of an organic whole"<sup>25</sup>. One such applicational context is the perplexity of searching for the feature common to things called by the same name i.e. an individual word which has many modes of application, such as the noun 'right'. A similar proposition could

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<sup>22</sup> Murdoch, I, *The Sovereignty of Good*, Routledge & Kegan Paul. 1970, at 34

<sup>23</sup> The observation that language is anarchical may be at odds with Wittgenstein's own metaphor but it is, I believe, more consistent with how people play games.

<sup>24</sup> Specht, E, *The Foundations of Wittgenstein's Philosophy*, Manchester University Press. 1969, at 37

<sup>25</sup> *ibid.* at 25

be advanced in relation to the word 'law' and there has been significant dispute over its definition.<sup>26</sup> Such words are said by Wittgenstein to have no definitive meaning, but rather constitute a "family of meanings":

"I am saying that these phenomena have no one thing in common which makes us use the same name word for all - but that they are related to one another in many different ways. ...I can think of no better expression to characterise these similarities than 'family resemblances'; for the various resemblances between members of a family; build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way."<sup>27</sup>

There is thus no one true understanding of law or of right just as there is no definitive definition or interpretation of the discipline of philosophy or of definitions of art.<sup>28</sup> There is simply no basic pattern to be found in ordinary language. Yet there are single, specific, alternative features and explanations. The art metaphor is itself a particularly useful example. To search for what might be described as a common denominator within all works of art is futile although the various art forms combined could unite under one heading of what is to be described as 'art'. You might think of art as being only representational (consisting of drawings, pictures and sculptures, literature etc.) In opposition, I might suggest that some art forms can be non-representational (dance, music, even the scoring of a goal in a particular football match). Following Wittgenstein's analysis both would be true. Any argument between us would be over the use of a particular word.

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<sup>26</sup> For a thorough analysis of the problems of defining 'law' see further Paton and Derham, n 7 above, at chapter 3

<sup>27</sup> Wittgenstein, n 3 above, at 65-66

<sup>28</sup> See Pears, n 17 above, at 17-25 who asks a similar set of questions. Some might posit, for example, that perfectly sound definitions of what constitutes 'art' have already been produced. See for example: the significant form Theory in Bell, C, *Art*, Oxford University Press. 1987; or the idealist theory of Collingwood, G, *Principles of Art*, Clarendon Press. 1974; or more recently Dickie's analysis of various forms of art in Dickie, G, *Art and the Aesthetic: An Institutional Analysis*, Cornell University Press. 1974. None of these attempts at definitions prove to be adequate and simply emphasise the importance of Wittgenstein's contribution to this area of the philosophy of language (that there is a lack of unanimity).

There is simply a family resemblance between the various art forms and just as I might look a little like my grandfather, my grandfather might look like my mother and my mother like my sister, there may be no observable feature which is identifiable in all of us. And so this is true of particular words. Thus, there are various sub-categories for what might be described as 'rights' but there is no one right answer to determine what is to have a 'right'. This has important implications.

Because ordinary language is so diverse and complicated one has to reject the view that language can be treated in a simple scientific manner. Austin<sup>29</sup> sought to do precisely this by restricting his definition of 'law' to a sovereign state which rules through sanction, although this view was questioned in light of anthropological evidence in relation to small scale communities by amongst others Malinowski<sup>30</sup> who found sources of law in reciprocal obligations among the community of the Trobriand Islanders.<sup>31</sup> Detmold

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<sup>29</sup> Austin, J, *The Province of Jurisprudence Determined*, Weidenfeld and Nicolson. 1954.

<sup>30</sup> Malinowski, B, *Law and Custom in Savage Society*, Routledge & Kegan Paul. 1926.

<sup>31</sup> Austin, n 29 above, argued that a certain definitive meaning could be given to the word 'law' and other notions present in all systems of law such as 'right', 'power' etc. For him, 'law' was a word which could only be associated with a mature legal system. Similarly, Bentham had argued that there was only one way in which the term 'rights' could ever be understood and that was within the framework of positive law. Contrarily, but still within the positive tradition of law (the thesis that law is a separate study from morality) Hart used Wittgenstein's later analysis to identify the use of the word 'right' in isolation within a particular legal system i.e. a legal right as opposed to a right within any other language-game (See further Hart, *Definition and Theory in Jurisprudence*, Oxford 1953, at 16-17). For more pluralistic analyses of the terms identified above see the discussion in Roberts, S, "Law and the Study of Social Control in Small Scale Societies" (1976) 39 MLR 663 *passim*. In English law, the tort of defamation insists that words do indeed have a "natural and ordinary meaning" despite the seemingly obvious assertion that words can mean different things to different people. In the absence of a legal innuendo, it is these meanings that determine whether a particular form of words, for example, can be defamatory. (See: *Lewis v Daily Telegraph* [1964] AC 234; *Gillick v BBC*, The Times, 20 October 1995). However, see the comments of Diplock LJ in *Slim v Daily Telegraph* [1968] 2 QB 157, 171 where he grapples with the problems posed by the philosophy of language: "Words are an imprecise instrument for communicating the thoughts of one man to another. The same words

has recently posited that there is no such thing as the law which rules. Contrarily he advocates a negative idea of law in terms of "nothing which has not the authority of law (nothing which is not unlawful) is to rule. And its positive substance is the citizen's radical autonomy."<sup>32</sup> This latter view of law is one which fits the argument of this thesis and we shall return to it later. For the moment it is enough to say that whilst there may not be an entity called law which rules, there are still rights which fit into the negative conception of law. But of what kind and how are they to be arrived at? The project of one who is attempting to advocate a rights based theory is to create a theoretical framework to give a precise meaning of what it is to have a 'right', to carve out or create a particular understanding of the word.

What Wittgenstein tells us is that to contrarily assimilate various definitions of particular words is to cause confusion. Thus, as Specht has identified:

"Philosophical problems arise... because different spheres of language are brought into parallel relationships with each other and because it is supposed that what is valid for the one sphere must be valid for the other."<sup>33</sup>

The catch-all phrase of 'children's rights' is an example of this. What am I saying when I say "children have rights?" It depends on what I mean by the word 'right'. When a particular family lawyer or philosopher posits that children are the holders of rights, they state a particular fact. That fact is necessarily a truth. It is a necessary truth because it is a belief (belief cannot be questioned in any authoritative way as to question a man's belief is to question his vision of reality). However, what they often do not say is that in using the term 'right' they are not stating a fact about language (the fact alluded to by Wittgenstein). That fact is that meaning is only to be found in application. Linguistic statements are always underpinned by a theoretical definition or perspective - but that perspective should always be made clear

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may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey."

<sup>32</sup> Detmold, n 2 above, at 61

<sup>33</sup> Specht, n 24 above, at 12-13

by the user of the term. Lack of clarity over context leads to problems with meaning.

It should be noted that the use of Wittgenstein's analysis outlined above does not lead to a position of a language which is radically indeterminate i.e. that as words can never be properly understood other than by their user meaning is difficult (if not impossible) to ascertain. Indeed, Wittgenstein himself rejected any notion of a private language i.e. a language which can only be understood by one person<sup>34</sup> (and rightly so). It is true to say that there must be linguistic conventions if human beings are to communicate anything. However, there are degrees of communications and as Iris Murdoch has commented the actual understanding of language "is far more idiosyncratic than has been pointed out"<sup>35</sup> and she argues it is only through analysing the impact of linguistic philosophy and its relationship between traditional methods of enquiry that the problem is better understood. In relation to normative statements, such as 'I have a right', the context in which the maker of the statement uses the phrase is of central importance to the way it should be understood. Thus, for Murdoch:

"Words said to particular individuals at particular times may occasion wisdom. Words, moreover, have both spatio-temporal and conceptual contexts. We learn through attending to contexts, vocabulary develops through close attention to objects, and we can only understand others if we can to some extent share their contexts. (Often we cannot). Uses of words by persons grouped round a common object is a central and vital human activity. The art critic can help us if we are in the presence of the same object and if we know something about his scheme of concepts. Both

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<sup>34</sup> the rejection of a notion of a private language, leads for Wittgenstein to a rejection of solipsism. On this view, the reality of other people is a necessary part of language. The objects of the world are interconnected with language, as language is involved in the construction of objects. There, of course, can be no language that is absolutely private to each individual subject. This would make no sense. Language is an activity that is essentially collective, but the point Murdoch is making is that understanding of it is personal to each subject.

<sup>35</sup> Murdoch, n 22 above, at 34

contexts are relevant to our ability to move towards 'seeing more' towards 'seeing what he sees'."36

Thus, Murdoch goes on to say that when an art critic tells us that a particular "picture has 'functional colour' or 'significant form' "we need to know not only the picture but something about his general theory in order to understand his remark."<sup>37</sup> When different contexts collide, communication can break down and philosophical problems arise. Linguistic interpretation is contextually personal. Knowledge of context becomes key. Moral language and talk about morality (moral argument) are at the beginning exercises in the differentiation of context. Language is an integral part of the phenomena which goes to the heart of what it is to be *me*, to how *I* see the world. It is, for Murdoch, in part developed by looking,<sup>38</sup> to see how others see the world. In this sense, one's understanding of language is as unique as the way one organizes images in one's mind.<sup>39</sup> As Philip Mairet has put it in his description of phenomenological perceptions of the mind:

"If we draw, for example, a black Maltese cross upon a white square, we can perceive either the cross itself, or the spaces between the limbs, as the statement that is being made, but we cannot perceive it both ways at once. In the latter case - taking the black as spaces between - we see the figure as a conventionalised four-petalled flower in white upon a black ground. What makes us perceive it as one or the other? A gardener would perhaps be more likely to see it as a flower, and a military man as the cross. Perception depends upon the pre-existing element of choice, which determines the form in which we perceive not only all the varieties of geometrical figures but every phenomenon of which we become aware. What is perceived is not the

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<sup>36</sup> *ibid.* at 32

<sup>37</sup> *ibid.* at 34

<sup>38</sup> See for example the analysis of Murdoch, n 22 above, at 31-35 for how analysing words can be associated with visual imagery.

<sup>39</sup> When I see an image on a page, I organize it in a way which correlates to what I actually know. What I see is shaped by my experience of the world. In *Imagination* Sartre sought to show that because we can imagine things not perceived by our immediate senses then we must be free (see further Sartre, J. P., *Imagination*, Cresset Press. 1962, *passim*.)

reflection of something objective which the mind duplicates within itself; it is the result of that something and of the mind's percipient activity; and this again is a function of some tension or tendency towards a certain goal.

...There is, therefore, no objectivity."<sup>40</sup>

This tendency towards a certain goal is reflected not only in perception, but also in language. Thus as Caws has put it "these words are my words, these images my images."<sup>41</sup> Meaning is predicated in language. How am I to know what you mean by a particular word if I do not know the precise use to which it is being put? It is otiose to search for a basic pattern in various phenomena and there are significant drawbacks if this is attempted. The search for patterns is either an attempt to find order or to reorder a world that is through its plurality mysterious, even absurd. I, for example, always see the flower (I am not a gardener, by any means). In the same way various philosophers have various understandings of rights as a basis of their search for the truth. For some rights can be seen solely in terms as being the correlatives of duties, for others as powers and others as claims. All of these analyses of the concept of rights are worthy of further consideration, but none of them advance rights as having ontological significance, of being connected to being itself. There is, for *me*, only one way of perceiving, seeing and understanding the world. This is true for all of us. This is subjectivity. Often, we share the contexts of others and more than often we do not. The problem lies in converting one's own way of seeing things into a moral order and finding some universal principle on which a moral theory could be based.

The search for absolute truth (apodictic certainty) is not in this manner an unassailable proposition (as it would be for those who are "swept along"<sup>42</sup> by Wittgenstein's language-games). This is the proper task of philosophy -

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<sup>40</sup> Mairet, P, "Introduction" in Sartre, J.P., *Existentialism & Humanism*, Methuen. 1968, at 13

<sup>41</sup> Caws, P, *Sartre*, Routledge & Kegan Paul. 1979, at 50. Although for Sartre, n 39 above, at 125 "there is nothing under the words, behind the images." Despite this, there is still has to be a sense of a private life as an existential subject. The real problem is getting out of the subjective consciousness and into the world. This will be discussed below.

<sup>42</sup> Pears, n 17 above, at 168

to find truth, to seek out the reference point, ascribe solid foundations and create a moral theory. The proper task for jurisprudence (the philosophy of law) is to adequately define the relationship between law and morality. Thus, "[w]hat ends law has served is a question for legal history: what ends law should serve is a matter for legal philosophy."<sup>43</sup> Providing ones own foundational understanding is thus the essence of the intellectual exercise: the search for individual truth and the discovery for oneself how to comprehend the phenomena of the world and to seek definition within it. Although there are no fixed reference points, there are particular individual reference points (which need to be fixed).

Wittgenstein's own investigations into the social practices of language leads one to question the very basis of Cartesian ontology. Precisely because there are language games as the dominant factual discourse various philosophical problems are answered and other methods of analysing them excluded. As mentioned above, for Wittgenstein philosophy was best performed through the search for the limits of language<sup>44</sup> and the language-game constitutes its starting point. *Philosophical Investigations* itself is full of anecdotal examples of varying specific uses to which language is put.<sup>45</sup> But what of the deeper ontological question: the justification for the existence of self and of others in the world? Is it right to start and finish the philosophical project solely through looking at language? Empiricism informs us that in ordinary language there is no unity, or in other words it tells us to reject monism. I will argue below that a return to Descartes' *cogito* presents the essential element in the creation of a moral theory.

### **A Frame / The Fixing of a Point of Reference**

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<sup>43</sup> Paton and Derham, n 7 above, at 97

<sup>44</sup> although some have argued that there are certain ontological conclusions to be drawn from various language-games. See for example, Pole, D, *The Later Philosophy of Wittgenstein: A Short Introduction with an Epilogue on John Wisdom*, Athlone Press.1958, *passim* which highlights the two approaches.

<sup>45</sup> See also Wittgenstein, L, *The Blue and Brown Books*, Basil Blackwell. 1958.

If one accepts the thesis that in most academic writing on children's rights and rights generally different meanings of the noun 'right' are advanced as a basis for further development of ideas, each with their own definition and usage then if one uses the term rights one must place it in its proper context. Paton and Derham have put this in simple metaphorical terms:

"If a Frenchman and an Englishman are arguing about the length of a path, they would not be so stupid as to use different standards (metres or yards) without attempting to use common units for the purposes of solving the dispute - but in the sphere of Jurisprudence we sometimes find bitter disputes because of reckless ambiguity in the use of the term 'right'."<sup>46</sup>

In order to avoid this reckless ambiguity I wish to propose a definition of rights which has not before been used as a critique of legal rules which relate to children. I will then go on to analyse other language-games of rights.

To attempt a separate critique of varying rights theories without a yardstick with which to judge them would be fraught with the philosophical problems outlined above. However, it might be argued that it is unfair to then go on and criticise or judge a work by some strange and distinctly separate standard based on a different language-game but as Pears has pointed out in his analysis of the works of Wittgenstein, "it would be silly to allow it [the piece of work to be judged] to dictate the standard to be used simply with a view to its own success. Everything is the size that it is, and extreme tolerance would end in tautology and banality."<sup>47</sup> We really do need to find out how good things are. Alternative theoretical analyses of what it is to have a 'right' are not beyond reproach from another philosophical approach. One can still assess the frame of reference provided (to question the basis of the belief, for this has been the basis of philosophical argument for centuries, the "sustained teasing out"<sup>48</sup> referred to by Twining earlier in the introduction). A particular theoretical position may be internally coherent,

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<sup>46</sup> Paton and Derham, n 7 above, at 284

<sup>47</sup> Pears, n 17 above, at 107

<sup>48</sup> Twining, W, "Globalization and Legal Theory: Some Local Implications" (1996) 49 CLP 1, at 12-13.

but it does not follow that it is correct. In the end it comes down to asking which theoretical approach is the best and this is why Malinowski's analysis of primitive law questioned so vividly the thesis of Austin and others in analytical jurisprudence.

The analysis of the concept of 'right' within positive law (which may be linguistically coherent), for example, is liable to criticism from outside the sphere of positive law (e.g. through the development of more general moral theory) on the basis that the system in which such definition is offered is itself seriously philosophically flawed (by rejecting the unity between law and morality). As Lucy has pointed out the true basis for analysis of what he describes as 'essentially contested concepts' such as rights, "can have meaning at the level of claims about the disputed concept, that meaning being indeterminate at the level of claims about the best conception of the concept insofar as such conceptions rank the criteria of the concept differently on the basis of incommensurate values."<sup>49</sup> As a result of this, he suggests that "the criteria for the application and evaluation of the concept of a right are open."<sup>50</sup> It is the provision of the criterion itself which is the essential factor, a criterion which will allow for a proper definition of what it is to have a 'right' which will allow for the proper evaluation of other definitions and understandings of the concept. At the root of such a definition must lie some yardstick or frame through which one can establish ontological right (as distinct from institutional rights such as legal rights). As Bradney has highlighted:

"Any attempt at a comparative description of these languages [of rights], and after that analysis of them, presupposes some criterion against which to measure them. Such a criterion cannot be found in a formal analysis of the meaning of 'right' within a particular language game. Rather, it is necessary to provide a criterion against which to measure why something is a right; to provide a criterion which will establish moral right."<sup>51</sup>

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<sup>49</sup> Lucy, n 19 above, at 236

<sup>50</sup> *ibid.* at 225

<sup>51</sup> Bradney, A, *Religions, Rights and Laws*, Leicester University Press. 1993, at 22

The presentation of that criterion must therefore be the point of departure of a discourse of rights and the choice of that criterion will determine the outcome of the ultimate enquiry.

To summarize, Wittgenstein had elaborated that language itself is fraught with difficulty, which causes philosophical problems. It is not the structure of language that is important, but the actual use to which words are being put. Particular single words have many definitions, each within its own language system, but are nevertheless related to one another in a way which might resemble a familial setting. No one common denominator can be found which might enable a single definition. However, that does not mean that analysis of one language system is beyond reproach from another language system which is outside its own terms of definition. Such language systems can be analysed in relation to one another by assessment and analysis of the starting point, or criterion, upon which that language system is based. If the underpinning criterion is seen to be flawed, then the very system it supports can be seen to be flawed as it lacks any solid foundation. Here, one is entering the "domain"<sup>52</sup> of the philosophical theory of the author concerned. In this way, even the surreal makes sense (pluralism is embraced). One can, however, judge such theories from ones own domain or theoretical perspective. This project is the chase for truth. The rest of this chapter will be dedicated to the presentation and assessment of the criterion or reference point to establish moral right, and examples of its application to law generally and specific legal rules will be given. The purpose here is to apply the concept moral right to how the law should look at children.

### **Beginning Rights Talk - An Ontological Foundation**

What is it to be moral? What is the ontological foundation of the human being? In answering these questions the project shifts from being one which analyses linguistic indeterminacy to a more basic investigation of what it is to be a human being.

Waldron has observed that:

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<sup>52</sup> Caws, n 41 above, at 30

"Human agency, will, and the initiation of action is a profoundly complicated business: it is the locus of one of the most intractable problems in metaphysics, and it is also the source of some of the deepest exultation and despair in human experience. Our essence of what it is to exercise freedom is bound up with our perception of ourselves as persons and of our relation to value, other people and the casual order of the world."<sup>53</sup>

The precise nature of this locus has as many explanations as there are human beings who seek to find it. The embracing of man as a being whose will is influenced by his belief goes some way to completing the journey from the abstract (theoretical) to the actual (practical), to getting from ontology to the practical aspects of rights and law (and the complexities of language). Understanding one's being in the world and one's relationship to it, particularly the relationship between oneself and other people, is central to the creation of the starting point to establish a moral theory:

"The fundamental predicament of human existence is the relationship between I, the owner of ends, and the world outside."<sup>54</sup>

Detmold has sought to address this problem through a mystic philosophical tradition. He has thus written of the mystery of the world. The delineation of the world outside of self is integral to the formulation of moral philosophy:

"Wittgenstein said: 'It is not how things are in the world that is mystical but that it exists' (Tractatus, 6.44). The pure existence of the world is mysterious. The importance of this for moral philosophy is that it identifies what in the world requires respect.

There are two senses of the word mystery involved here. In the weaker sense if the existence of the world were in principle explicable though not

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<sup>53</sup> Waldron, J *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press.1993, at 39

<sup>54</sup> Detmold, n 2 above, at 124

yet explained, there would be mystery of a kind, requiring no doubt a modicum of self regarding caution. But not respect. The stronger idea of mystery is needed for this, where the existence of the world is conceived as ultimately transcending explanation. The rationality of other regarding unconditional reasons for action depends upon what is reasonable to believe about the ultimate nature of the world. If the existence of the world is beyond explanation it is mysterious, in the stronger sense of the world, and respect is required."<sup>55</sup>

The idea of strong mystery echoes existential absurdity.<sup>56</sup> The world outside of self is certainly intelligible to the individual human being, yet there is no real explanation available as to why it exists, and the images received via the senses which inform the subject about that inexplicable external world seem to be no more than mere invention on his or her part. The senses cannot be trusted in any absolute way, although sensory perception provides a foundation for possible knowledge. This goes to make the world what Detmold describes as being mysterious in the strong sense but what Camus and Sartre amongst others would regard as it absurdity.<sup>57</sup> If one accepts this thesis of strong mystery or existential absurdity, then one is confronted with an initial and fundamental philosophical difficulty, how to construct an understanding of the external world? Understanding of self, and necessarily of the existence of self has to be the starting point, as there is no other avenue available, literally. In essence, I know that absolute truth can only pertain to the internal sphere which I refer to as 'I'. I know nothing but that I exist (there is only my subjective consciousness). All else is mere perception - objects, other people - which all pertain to the world outside of self, a world of probability (and ultimately possibility), of casual uncertainty. To define what it is to have a moral 'right' means first that I must understand

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<sup>55</sup> Detmold, *The Unity of Law and Morality*, Routledge & Kegan Paul. 1984, at 4

<sup>56</sup> For Sartre, if the world has no creator then it follows that there is no reason at all for both its existence and one's own existence. The idea that this induced a form of sickness (or nausea) is reflected in his early novels. The world, in this regard, weighs heavy on one's self. If, as human beings, we think about our situation then its absurdity is clear. See further Sartre, J.P., *Nausea*, Penguin. 1970.

<sup>57</sup> See Camus, A., *The Outsider*, Penguin. 1983.

what it is to be a human being. To understand what it is to be a human being is the necessary step to comprehend and combat the mystery or absurdity of the world. Metaphysical perception of self therefore provides the necessary criterion (or starting point) to establish "moral right".<sup>58</sup> It is at this point that it is important to consider the process of 'Cartesian Doubt' and the foundation for Descartes theory of knowledge: *cogito ergo sum* (*I think therefore I am*):

"[a]t the point of departure, there cannot be any other truth than this, *I think, therefore I am*, which is the absolute truth of consciousness as it attains to itself. Every theory which begins with man, outside of this moment of self-attainment, is a theory which thereby suppresses the truth, for outside of the Cartesian *cogito*, all objects are no more than probable, and any doctrine of probabilities which is not attached to a truth will crumble into nothing. In order to define the probable one must possess the true. Before there can be any truth whatever, then, there must be an absolute truth, and there is such a truth which is simple, easily attained and within the reach of everybody; it comes in one's immediate sense of one's self"<sup>59</sup>

The *cogito* is a metaphysical ultimate, it is the only given or certainty. It forms the foundation for the proper understanding of my (as a human being, an independent *cogito*) relationship to the world, of things and of other people, much as for Wittgenstein the notion of the 'language-game' as a "form of life"<sup>60</sup> formed the "indubitable basis, a rock of certainty"<sup>61</sup> for his later analysis of the philosophy of language.<sup>62</sup> One in this regard cannot "refuse to hear the voice of the *cogito*."<sup>63</sup> For philosophers like Kierkegaard and Heidegger the ultimate anxiety of man was to know that he or she exists. This preoccupation with the existence of self forms the basis of what was to

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<sup>58</sup> Sartre, J.P., *Existentialism and Humanism*, Methuen. 1990, at 22

<sup>59</sup> *ibid.* at 44

<sup>60</sup> Per Wittgenstein, n 3 above, at 23 "[t]he word 'language-game' is here meant to bring into prominence the fact that the speaking of the language, or a form of life."

<sup>61</sup> Smart, H.R., "Language Games" (1957) 7 *The Philosophical Quarterly* 232

<sup>62</sup> as advocated in his *Philosophical Investigations*, n 3 above, *passim*.

<sup>63</sup> Sartre, J.P., *Saint Genet: Actor & Martyr*, Heinemann. 1988, at 36

be described as man's anguish, abandonment and despair<sup>64</sup> and what has been described above as the absurdity of everyday experience. As a human being, "I admit it: above all things I fear absurdity."<sup>65</sup> Thus for Camus,

"This world in itself is not reasonable, that is all that can be said. But what is absurd is the confrontation of the irrational and the wild longing for clarity whose call echoes in the human heart. The absurd depends as much on man as on the world. For the moment it is all that links them together. This is all I can discern clearly in this measureless universe where my adventure takes place."<sup>66</sup>

To accept the theory advanced within these pages it is necessarily to accept the proposition that there is only one thing that cannot be doubted: the existence of self, and this is the necessary point of departure:

"I think therefore I am makes mind more certain than matter, and my mind, for me more certain than the minds of others. There is thus in all philosophy derived from Descartes a tendency to subjectivism, by inference from what is known of mind....modern philosophy has very largely accepted the formulation of its problems from Descartes, while not accepting his solutions."<sup>67</sup>

For Sartre, and other existentialist thinkers the departure from the solutions of Descartes begins at the point of enquiry when one assesses the true nature of the human condition i.e. that existence precedes essence:

"Atheist existentialism...declares with greater consistency that if God does not exist there is at least one being whose existence comes before its

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<sup>64</sup> Sartre, n 58 above, at 30

<sup>65</sup> Rushdie, S, *Midnight's Children*, Picador. 1982, at 9

<sup>66</sup> Camus, A, *The Myth of Sisyphus*, Hamish Hamilton. 1955, at 24. Quoted by King, A, *Camus*, Oliver and Boyd. 1966, at 22-23

<sup>67</sup> Russell, B. *History of Western Philosophy*, Routledge. 1995, at 548

essence, a being which exists before it can be defined by any conception of it. That being is man, or as Heidegger has it, the human reality."<sup>68</sup>

This is of course, not to suggest that atheism is a fundamental prerequisite of existentialism, or that it is necessary to describe oneself as an existentialist to accept this initial point of departure. Atheistic existentialism is only one form of a broad philosophical tradition which I believe share "an immersion in the real world."<sup>69</sup> It is this attachment to the real world, to its mystery for some or to its absurdity for others that lies at the bottom of this theoretical perspective.

Attachment to the world of real things need not involve a rejection of God. For Kierkegaard the greatest philosophical difficulty was relating the subjectivity of man not only to the world around him, but also in relation to God. Whilst there is no ontological proof for the existence of God (as there is for the existence of self), it is not in any way ridiculous to believe in Him. What is involved is a mere attachment or leap of faith even though it may be groundless. The strong idea of mystery described by Detmold above simply involves no such leap. Existentialism is a simple acceptance of the underlying principle that existence precedes essence, that is to say that there is no preordained human nature, no *a priori* definition of man. Rather, man is free. His or her only individual existence is, and this is might be a source

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<sup>68</sup> Sartre, n 57 above, at 27-28

<sup>69</sup> Warnock, M, (ed.) in *Women Philosophers*, London. 1996, at xliii. It should be noted that atheist existentialism, is the form of the philosophy that this writer would advocate. Only through an atheistic perspective can one accept that the world is mysterious in the strong sense outlined above. As Detmold, n 54 above, at 4-5 has written: "[w]hat explanation could be given of the existence of the world? One explanation is the postulation of a necessary cause or reason, called God. Now, if God exists it is obvious that there is a foundation for morality: there is a simple basis for the requirement of respect for this creation, and every part of it... But if we do not say that God exists, what explanation could there be of the existence of the world? Any non-theistic explanation must either enlarge the world, make it infinite, or infinitesimal, or turn it in on itself to complete a circle. In each case the explanation postulates the existence of something about which the mystery of the existence continues to obtain. This is the strong sense of mystery, and it seems there is no way we can get away from it."

of despair. Murdoch has rejected the view posited by existentialist thinkers that the world is one of solitude and loneliness.<sup>70</sup> She, like Detmold, prefers the idea of mystery to show how the world really is. Despite the criticism that the existential description of the human condition has been subjected to, and whatever the merits of the theory itself or of the criticism itself, at the basis of both traditions is something which is universally applicable which relates to the ontological condition of the human being and the way he or she regards himself or herself in relation to the world and more particularly the other. In other words, whether one surrenders to the idea of God or not is irrelevant to the force of the radical autonomy which particular human beings have and its appropriate basis as an analysis of law and of rights. It is important however to point out that atheist existentialism and its emphasis on radical freedom and radical choice is the belief that I believe best describes the human condition. As a young Sartre commented:

"If man as the existentialist defines him is not definable, it is because to begin with he is nothing. He will not be anything until later, and then he will be what he makes of himself. Thus, there is no human nature, because there is no God to have a conception of it. Man simply is."<sup>71</sup>

To summarize, at the core of each individual's interpretation of self in the world there are two central observations. Primarily, by using the process of Cartesian radical doubt one can establish the existence of self. Indeed, one necessarily cannot possibly deny the existence of self. This is the 'truth' of the human condition. Secondly, it has been posited that existence precedes essence, and if this accepted then each and every human being must find their own definition. Each individual is thus free in the sense that he or she exists and his or her existence simply *is*. Each individual's existence therefore takes precedence over the world, as the world is mysterious in the strong sense. But what of the world around us? What of its strong sense of mystery requiring respect? A world consisting of perceptions not only of self but of objects and other people - a world of infinite possibilities. If man exists in a state where only his or her consciousness can be assured: "[a]s

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<sup>70</sup> Murdoch, n 22 above, at 27

<sup>71</sup> Sartre, n 58 above, at 28

material for the building of a world it is not, perhaps, very promising"<sup>72</sup> One cannot possibly deny the existence of self, but what of other people ? What of community? For if law has as its presupposition the idea of community how can one establish community? How does one achieve the transition from the ultimate truth of the existence of self to the probability of the existence of others.

As an independent cogito (aware only of my only my own consciousness) I necessarily own the world. I am the only end in self in the world. However, ontology is not as simple as that. There are other corporeal objects in the world and I am not without the abilities which enable me to draw certain presumptive conclusions about them. My senses, perceptions inform me in this process. Some of these objects are different (there is first of all a dichotomy between the animate and inanimate). There is, however, a further dichotomy between the animate objects. Some of them act like me, talk like me, behave as I do, but I cannot know with absolute certainty that they think, that they have the consciousness that I know with certainty that I possess. I can only speculate:

"I am in world now of some three billion humans, a very large number of stones, and rather fewer lions. What distinguishes them? Each is a source of danger to me. Each can be used to my ends. Each is a source of comfort (concubine, pet, cave). Each is beautiful. Dissected, each yields the common matter of the Universe: no radical autonomy, no soul, awaits discovery under some microscope. Humans, lions, stones, each of them go to make up the world outside me; this world outside the inner self called 'I'."<sup>73</sup>

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<sup>72</sup> Caws, n 41 above, at 62. See also: Sartre, J.P., *The Transcendence of the Ego*, Noonday Press. 1957, *passim* where Sartre rejects the idea of a transcendent ego which stands behind consciousness as Husserl had advocated but observes rather that consciousness has no contents. It is empty. It is like an onion. If one takes all the skin off an onion one ends up with nothing - consciousness is like this. It is in the world. It can therefore, never be alone. This makes the world intelligible (yet absurd or mysterious).

<sup>73</sup> Detmold, n 2 above, at 122

The process which enables me to escape the inner self and accept the existence of other independent *cogito's* requires an intellectual gamble on my part. If I reject this gamble, then the prospects are grim: I confront absolute solitude - a solipsistic, egocentric, elitist state (how arrogant of me to reject the possibility of other existentially free human beings) where there is only the private I :

"A totally private life lacks the reality and differentiation that emerges from interacting with others, being seen and heard by them. As Hannah Arendt puts it "The privation of privacy is the absence of others."<sup>74</sup>

The absence of other is the "state of nature."<sup>75</sup> Such terminology has, of course, been invoked by other political philosophers such as Hobbes and Locke. Although the state of nature described by Hobbes is notoriously one which is "solitary, poore, nasty, brutish and short"<sup>76</sup> it is rather different from that described by Detmold. The Hobbesian state is one where there exists a human nature, and indeed a God to act as a guide where absolute authority is the methodology used to escape into political community.<sup>77</sup> The atheistic predicament described here is, however, a much more intriguing and challenging state of being. In this manner I must act as my own God (self-apotheosis), and it is I who must not only make sense of the world around me but construct, expand and through my actions and my choices, create a moral framework within which I might reduce its absurdity to being within my grasp.

The philosophy of solipsism is not rejected because it is philosophically flawed at its basic level, for absolute proof of the existence of other people is

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<sup>74</sup> Arendt, H, *The Human Condition*, University of Chicago Press. 1958, at 58-59

<sup>75</sup> Detmold, n 2 above, at 122

<sup>76</sup> Hobbes, T, *Leviathan* , Penguin. 1968, at 186

<sup>77</sup> Although it is accepted that Hobbes, *ibid.* was making an anthropological point as much as a philosophical one i.e. that primitive man existed in a state of war. cf Kropotkin, P, *Ethics*, Prism Press. 1979, at 249-254 who believed that man is a social species by hereditary habit. For discussion see further Bradney, A, "Taking Law Less Seriously - An Anarchist Legal Theory" (1985) 5 Legal Studies 133

difficult if not impossible. This question has troubled philosophers for many years. It is rather the consequences of solipsism that must be rejected and to escape those consequences a mechanism to establish the existence of others is required. An imaginative leap based on sense-perception alone has been rejected by many philosophers,<sup>78</sup> including most notably Sartre. It is, however, as Caws has pointed out, completely satisfactory (I can hope for nothing more from speculation). If I make this speculative leap, then community and rights talk are possible and real.<sup>79</sup> The foundation of law and of moral rights is here in a simple act of recognition - through a look, a touch, eventually a conversation. I am accepting that there are other ends in selves in the world, who also have radical autonomy. The recognition of other radical autonomies creates, necessarily, radical competition in the world. It is at this point that rights talk is invoked.<sup>80</sup>

Through my action of accepting other people, who I perceive through my senses, I accept that they share the world with me. I speculate that *they* think in the same way as I do. I accept their radical autonomy. If I accept that I necessarily assert my own radical autonomy. I have a right to my radical autonomy over the world. I necessarily must do the same for the other, recognize him or her as an end in self. The other is also an existentially free, independent *cogito*, with his or her own radical autonomy. I am accepting that for them too, their existence precedes their essence, that they are "undetermined and undeterminable."<sup>81</sup> When I look into the eyes of a child and accept him or her as an end in self I invoke talk of their right to be treated as such. This right is simple and complete. It is ontological and prior over the world.

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<sup>78</sup> According to Caws, n 40 above at 63, Hegel, Husserl, Heidegger, Sartre all refused to accept that what amounts to "a thin play of appearances" could suffice as an answer for the "Quest for Being." However, he argues that the Quest for Being "might have been satisfied with this." I am arguing here, that I am satisfied with it, despite its apparent simplicity.

<sup>79</sup> This leap of the imagination is based on something apparently real, my sense perception. It is not like the leap of faith involved in the recognition of a higher being discussed earlier in this chapter.

<sup>80</sup> See further Detmold, n 2 above, at chapter 7

<sup>81</sup> Caws, n 41 above, at 114

Such rights are described by Detmold as strong rights,<sup>82</sup> by Bradney as moral rights.<sup>83</sup> Either way, only human beings can have such an ontological right; they are an essential attribute of what it is to be human. In accepting the gamble, one embraces community, at the heart of which is the recognition of the other. This recognition is an act of love.<sup>84</sup> "Love is knowledge of the individual."<sup>85</sup> Love, in this manner, is simply recognition - an affirmation of community:

"[i]t all depends at the very beginning on whether I recognise the second human as a second end in himself and therefore as a competitor in the matter of my rights (my ownership of the world). I cannot be forced to make this recognition. But there is a very strong reason in favour of it. If I do not recognise him my life remains one of radical loneliness. If I do, the possibility of love is opened. So love is at the bottom of rights talk."<sup>86</sup>

Strong rights are not man made, created by him and thus able to be terminated with or without notice - they simply are. Implicit in the recognition of other ends in selves is an assertion that I own my own life, control my own destiny, that my will is an ultimate (the same is true for the other). This has a significant bearing on how the law (that great bundle of rules) and the courts (the machinery which act as a link between my radical autonomy and the law) deal with my status as an end in self (even as a child). This is the theoretical heart of this thesis. In the words of Shelley:

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<sup>82</sup> Detmold, n 2 above, at 1

<sup>83</sup> Bradney, n 51 above, at 22

<sup>84</sup> Murdoch, n 22 above, at 2 has argued that one of the problems with the existential approach to freedom is that the idea of love is problematic. This observation is certainly true on reading the younger Sartre's major philosophical work, *Being and Nothingness*, where love in the sense I have described above does not appear possible. See further Sartre, J.P., *Being & Nothingness*, Methuen, 1969, at 364 where he comments that "[c]onflict is the meaning of being-for-others."

<sup>85</sup> Murdoch, n 22 above, at 28

<sup>86</sup> Detmold, n 2 above, at 122

"You ought to love all mankind, nay every individual of mankind; you ought not to love the individuals of your domestic circle less but to love those who exist beyond it, more. Once make the feelings of confidence and affection universal and the distinctions of property and power will vanish; nor are they to be abolished without substituting something equivalent in mischief to them, until all mankind shall acknowledge an entire community of rights."<sup>87</sup>

The community of rights in the strong sense provides the basis for the development of and ultimate analysis of legal rules. This is why one has naturally to be sceptical about rules. The negative idea of law reflects this. Ontological rights enable us to be free (radically autonomous) and no legal rule can change this. Thus, the positive idea of law, which posits that there is something called the law and that through its commands it can control us, fails. That the law can command is a statement of truth however as legal rules do this. The relevant issue here is not to whether or not a rule is lawful but whether it is right, in a philosophical sense, by asking if it in any way it challenges an individual's ontological rights in the community of rights. If a rule is not right in this sense then it follows that it cannot be law.<sup>88</sup>

### **Differentiating Weak Rights from Strong Rights.**

Now that the basis and nature of strong rights has been established, it is important to go back and differentiate it from other language games in which the concept of rights is used before going on in the next chapter to analyse the implications of strong rights for children. More particularly, it is necessary to distinguish ontological rights described above from other types of rights which are claimed.

At this point in this work it is enough to distinguish strong rights from weak rights. Weak rights are the simple correlatives of various duties. They might be described as claims, as entitlements, as powers. In his book

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<sup>87</sup> Shelley, n 1 above, at 66

<sup>88</sup> See Detmold, n 55 above, at 37-38, and 215-217. See also the analysis of The Rt. Hon Lord Woolf of Barnes, "Droit Public - English Style" (1995) PL 57. Discussed, below, in chapter 2.

Wringe<sup>89</sup> has undertaken an exhaustive investigation into the various rights which are claimed on behalf of children. He comments that "a most fertile source of confusion and conflict regarding the rights of individuals is the assumption that a definition of a right can be given which is at once simple and informative, and that claims to rights which do not fit such a formula are rejected out of hand."<sup>90</sup> He highlights the multifarious ways that the expression rights is used including those referred to above such as the relationship between rights and powers<sup>91</sup> rights as correlatives of duties<sup>92</sup> and rights as claims<sup>93</sup> all of which he rightly argues offer unsatisfactory definitive explanations of what rights actually are. The same is true, I will argue in chapter three, of the various interests which are claimed on behalf of children as a basis for them claiming rights. The definition of rights or of interests in both these senses does not have ontological primacy and this is the essential point.

Thus a legal right has been characterized as a right "recognized and protected by the legal system itself."<sup>94</sup> It is positive. Take as a random example s 20(1) of the Children Act 1989 which states that:

'Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of -

- (a) there being no person who has parental responsibility for him;
- (b) his being lost or having been abandoned; or
- (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.'

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<sup>89</sup> Wringe, n 14 above.

<sup>90</sup> *ibid.* at 37

<sup>91</sup> *ibid.* at 23

<sup>92</sup> *ibid.* at 25

<sup>93</sup> *ibid.* at 28

<sup>94</sup> Paton and Derham, n 7 above, at 284

This part of the legislation creates a duty in law for a local authority to provide accommodation for children in need. It can therefore be seen to create a simple legal right that a child may claim when he or she is categorized as being 'in need' of accommodation. This legal right is correlative of the duty of the local authority to provide accommodation. It can therefore be described as a weak right.<sup>95</sup> It is weak because it is the mere correlative of a duty i.e. you cannot have the right without a corresponding duty or the duty without the corresponding right. It is a weak right because as easily as the right was given it can be taken away, in this instance by the institution of Parliament. It might also be a right in the strong sense, given that it is an important aspect of the protection of a child's autonomy, but we will come to that at the start of the next chapter. Most rights which people claim are weak rights e.g. the right to hunt foxes with hounds, the right that someone should not trespass on your land or block out the light into your home. All of these things are granted through the legal system and as they affect the ordinary autonomy of individuals relevant legislation or common law judicial pronouncement could rescind them. They only affect ordinary autonomy because by consent one gives Parliament the authority to determine such matters.

Most theories of children's rights found in law textbooks, law monographs and legal academic journals are theories of weak (legal) rights i.e. they pertain to rights that are existent within the legal system or to rights which form the basis of potential rights to be incorporated into a legal system.<sup>96</sup> Thus, some theories and analyses of children's rights do not only talk in terms of what legal rights children can be said to have but also to what moral rights children can be said to possess. However, moral theories which do not give ontological primacy to the rights they advocate must also be seen as

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<sup>95</sup> Here again, this is the terminology of Detmold, n 2 above, at 1. It is referred to as a weak right as it lacks the ontological primacy of a strong right i.e. there is no close connexion with the radical autonomy of the individual.

<sup>96</sup> A thorough investigation into the various theories of weak rights, i.e. rights that pertain to the legal system itself or some other duty of government is undertaken in chapter 3 of this work, most notably the distinction between the so-called will theory and the interest theory of children's rights.

theories of rights in the weak sense, in this case of rights as the correlatives of moral duties. This is an important distinction.

It is within the positive study of law, however, that much of the debate in relation to rights has been (wrongly) framed. As Waldron has highlighted:

"It is widely believed that talk about individual rights is most at home in the context of positive law, and that theories of natural, moral, or human rights which go beyond the rights secured by particular legal systems are at best parasitic on this. As Bentham put it, 'right is with me the child of law. ...a natural right is a son that never had a father.'"<sup>97</sup>

Even though this is so, it is also true that theories of natural, moral, or human rights which do not give rights ontological primacy are also to be regarded as weak theories of rights. Thus a standard textbook description has provided that "[a] theory of natural law may be made the basis for the deduction of natural rights which it is argued inhere in every human being by virtue of his personality and are inalienable and imprescriptible."<sup>98</sup> Such rights are brought into the formation of community from the state of nature. In the existential state of nature, however, it has been identified that there are no rights (strong or weak, moral or legal), and even though I might use

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<sup>97</sup> Waldron "Introduction" in J Waldron (ed), *Theories of Rights*, Oxford University Press. 1985, at 4

<sup>98</sup> Paton and Derham, n 7 above, at 284. For an example of such an elaboration of the natural rights issue see: Hart, H.L.A., "Are there any Natural Rights" in Waldron, J (ed), *Theories of Rights*, Oxford University Press. 1985, at 77 where he begins by stating: "I shall advance the thesis that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free. By saying that there is this right, I mean that in the absence of certain special conditions which are consistent with the right being an equal right, any adult human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (i.e. is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other person." Children, under this understanding of the term, do not have natural rights.

everything to my ends I don't have any rights.<sup>99</sup> And, as it is impossible for me to have undoubted knowledge of the existence of others (they are merely part of the phenomena that goes to make up the external world, the world outside of self), then it is a logical juxtaposition that there are no natural rights. Strong rights begin through the act of recognizing the other, that act of love again. Hence, strong rights can only be said to be natural in the strict sense that such rights are implicit in the natural state of the human being.<sup>100</sup> It is oxymoronic for one to suggest that one has a *right* to do anything<sup>101</sup> as it would be in some traditional conceptions of the state of nature (a state of having natural rights). Strong rights have primary justification (over everything else in the world), and they have at their base only the probability of other ends in selves (a gamble that I have to take).

The traditional analysis of the distinction between moral and legal rights is, in this manner, overly simplistic as it has at its base the mistaken two-pronged formulation that rights are either positive or natural. All legal rights can be described as being weak rights in the sense that they are positive, ergo they can be taken away by some positive institution as they are the simple correlative of a duty imposed on another. Strong rights are different. They are neither natural or positive in the way traditionally understood. The existential state of nature is necessarily historical but the state of nature itself is not a thing of history, as in the works of Locke,<sup>102</sup> Hobbes,<sup>103</sup> and Ritchie,<sup>104</sup> it is a momentary state of existence, a state of denying the

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<sup>99</sup> See Detmold, n 2 above, at 135

<sup>100</sup> *ibid.* at 2

<sup>101</sup> Although this is the view of Hobbes, n 74 above, at 190 who describes the Right of Nature as the "right of doing anything" and that it "followeth, that in such a condition, every man has a right to everything ; even to one another's body. And therefore, as long as this natural Right of every man to everything endureth , there can be no security to any man, (how strong or wise so ever he be.)" This Right is given up to the Sovereign in favour of peace and security.

<sup>102</sup> Locke, J, *Two Treatises of Government*, Cambridge University Press. 2nd ed, 1967. For an enthusiastic view of Locke's view of the relationship between parents and their children see Freeman, M, *The Rights and Wrongs of Children*, Frances Pinter. 1983, at 52-53

<sup>103</sup> Hobbes, n 74 above.

<sup>104</sup> Ritchie, D.G., *Natural Rights*, Allen & Unwin. 1952.

existence of other radical and free thinking human beings, of solipsism. The creation of rules is a method to escape it and the constitution of freedom provides the litmus paper to test those rules. Radical autonomy, and the strong right concomitant of it is the substance of law, of individual legal rules (the moral fibre of the concept of law).

That much has been claimed in the name of rights for children cannot be denied. Indeed, I am not arguing here that children are not regarded as human beings by legal rules. Recently, various international agreements have been made as an attempt to trump the rights of children. The United Nations Convention on the Rights of the Child 1989<sup>105</sup> was introduced as an attempt to obtain greater world-wide recognition of children's rights. Perhaps the most important of the rights ascribed to children by the Convention is that contained in Article 12(1) which is interpreted by some as going some way to recognizing internationally that children are individual human beings in their own right and not the chattels of their parents or of the state.<sup>106</sup> It reads that states should:

"assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

It is possible perhaps to describe such a right as a moral one i.e. the right to be treated as an end in self. The key question following this observation is how is such a recognition of autonomy, however small, to be enforced in the many legal systems which have to deal with the varying kinds of familial relationship which exist in the respective countries, including the United Kingdom, which have signed the Convention. In relation to the Convention Bainham has identified the fact that the different kinds of rights lead to separate and distinct problems:

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<sup>105</sup> See McGoldrick, n 11 above.

<sup>106</sup> Barton and Douglas, *Law and Parenthood*, Butterworths. 1995, at 42

"[e]ven where rights can be seen to exist there are several distinct species of these so that, at the very least, some effort should have been made to differentiate between legal and moral claims. A good deal of the claims made for children in the UN Convention are the "manifesto variety" and would be unrecognizable to lawyers as rights (see the discussion in M.D.A. Freeman, *The Rights and Wrongs of Children* (1983) especially at pp.43-45). Although Rosenbaum and Newell refer to these claims as "minimum standards" they are completely unenforceable. What, for example, are we to make of Article 24(1) which requires States to "recognize the right of the child to the enjoyment of the highest attainable standard of health" or Article 27(1) which enjoins them to "recognize the right of every child to a standard of living adequate for the child's mental, spiritual, moral and social development." These are worthy aspirations but they are hardly "minimum standards" and it is difficult to see how they could be enforced as rights."<sup>107</sup>

It is not only to positive lawyers that the use of rights in this manner proves problematic. Even as a statement of moral rights, the Convention has difficulties given its neutral and collaborative derivation. However, the Convention raises a more interesting set of questions which relate to individual legal systems themselves, including that of Great Britain.

It is widely observed that the objectives of Article 12(1) have readily been met by the provisions already implemented in the Children Act 1989, provisions which are the concern of this thesis. However, Bainham is right to allude to the fact that a positive legal system has problems with what he calls moral claims as distinct from legal claims. How is the moral claim, for example, that children should be respected as individuals (separate ends in selves or put it another way radically autonomous individuals) to be dealt with in a positive legal system which simply analyses individual legal rules? Indeed, can it? If legislation is required which recognizes human beings as autonomous, whatever their age, is the system itself an adequate one? Surely, something somewhere is not right. Moreover, a vision of the world which sees the provision of food, clothing, shelter and health as unenforceable as rights of any type, whatever the merits of the Convention's

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<sup>107</sup> Bainham, n 12 above, at 556

terminology, is one bereft of simple philosophical thinking. To ask particular legal systems to embrace certain international standards in relation to autonomy represents a challenge to traditional legal method itself. Indeed, I will argue that the strong rights thesis itself represents such a challenge (although it is by no means the only challenge) to the doctrinal positivist conception of law.

It was mentioned above that the strong rights thesis provides a litmus test for legal rules. It is one thing to say that children have strong (ontological) rights, but what difference does it make. Or to put it another way, what is the significance of blue eyed babies having strong rights?

## Chapter 2: The Rights of Blue Eyed Babies: From Dicey to *Gillick*

"When a citizen stands before a court asserting his radical autonomy he stands not as a member of a class, not as a candidate for the executive implementation of a (reasonable) policy, but as a particular human being. I, radically lonely, the litigant before the court, seek the court's decision of my case. This constitutes the special intimacy between a superior court and the individual (human particular)."<sup>1</sup>

### Introduction - On Blue Eyed Babies

Given that the concerns of this thesis is the relationship between children and the law, and that the first part of it is about the creation of a moral framework to establish children's rights, one thing should be made absolutely clear from the outset of this chapter. The strong rights of radical autonomy described in the previous chapter are not restricted to the adult population of the world. Neither are they restricted to those who have the intellectual capacity to understand the application of Heidegger's category of *Mit-sein* or indeed of the details of Descartes' concept of radical doubt on which strong rights are founded. Children, be they aged one day, one month, one year, or ten years are an integral part of the scheme. When I look into the eyes of a child I also make the necessary imaginative leap and accept that he or she, like me, is an end in self, a subject with radical autonomy. There is no great philosophical difficulty here. Ascribing rights to children has proved a difficult problem for jurists for many years, be they simple weak legal rights or moral rights. Children, and others of whom it is said lack the requisite capacity to consent are no less human than me, and this can equally be said of others who do not possess the requisite mental capacity to communicate, such as the mentally handicapped or those in a

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<sup>1</sup> Detmold, M, *Courts and Administrators*, Weidenfeld and Nicolson. 1989, at 102-103

state of unconsciousness or coma. I cannot possibly know the intellectual capacity of a Professor of Law, and it is probably more limited than I might anticipate. What I do know is that *I* think, and when I make the leap to recognize the other I am accepting that they think much the same as I do, that they are existentially free. I make a presumption based on my experience of the external world, and I choose to make that presumption in favour of Professors of Law and of children. I am simply looking for a mirror of my self, a kindred approximation which enables imaginative connection. If I reject a child as a human being then I necessarily reject the world, and I return to the state of nature. In summary, children, like adults, are holders of strong rights. The strong rights of children are not greater than or less than those of any other human being. The mental state of the human being in question is of no relevance to rights talk in this sense.

There are some, like Hart<sup>2</sup> for example, who have argued that children and the mentally handicapped are simply unable to hold 'rights' because of the uncertainty as to their mental state whether they are natural rights or legal rights. Such an analysis is not appropriate in relation to the strong rights theory advocated above for the simple reason that strong rights are ontological. This can be illustrated through a simple allegory used by Detmold and taken from Dicey. Interestingly enough, its topic is how a particular statute might affect a particular group of children, blue eyed babies:

"Suppose Parliament passed Dicey's famous statute requiring the execution of all blue-eyed babies (Dicey, *The Law of the Constitution*, London, 1885, 81). What does reason, which if the judges adopt is the law, require here? What are the judges to decide?"<sup>3</sup>

Detmold makes clear here that under a positive construction of law, where the common law courts have a duty to look for and follow the will of

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<sup>2</sup> As Hart himself put it, "[i]f common usage sanctions talk of rights of animals or babies it makes an idle use of the expression a 'right'. " See "Are There Any Natural Rights" in Waldron, *Theories of Rights*, Oxford University Press. 1985, at 77

<sup>3</sup> Detmold, n 1 above, at 95

Parliament, the statute would have to be enforced. The will of Parliament would have to be followed by the courts and consequently the babies would have to be killed. The moral consequences of such a statute become irrelevant in the face of the force of the law. Whilst a positivist might argue that such a course of action would be morally unacceptable such an argument would not influence the legal rule and its enforcement. What then is the importance of saying that children have strong rights of radical autonomy? What does the analysis say about the relationship between law and morality?

It was highlighted at the end of the last chapter that Wringer<sup>4</sup> in his book was able to distinguish between various species of rights. Perhaps most interesting however are his comments on the relationship between positive law and moral rights. What is its locus? He asks the question like this: Are moral rights parasitic on the law? and he gives an unequivocal and correct answer in the negative. Franklin similarly draws a simple distinction between legal and moral rights, the latter being simply a legally unsatisfied but "justifiable entitlement."<sup>5</sup> Wringer himself has properly argued that to analyse all rights discourse in terms of entitlements is simplistic and uninformative. To say "I have a right to X" and "I am entitled to X" is to meddle in synonyms.<sup>6</sup> The complicated language-games of rights are made no easier by this process and the relationship between moral rights and positive legal rights is not being adequately explored. That children have both legal and moral rights is indisputable for Wringer as it would be for this author. But what are the moral rights that Wringer suggests children can be said to possess? He lists five categories of moral rights including 1. Rights of Freedoms in the Sense of Liberties; 2. Claim Rights of Freedom; 3. Rights of Democratic Participation; 4. Special Rights; and 5. Welfare Rights. Now, a full critique of Wringer's view of morality lies outside the remit of this thesis, but his views about the relationship between law and morality is worthy of discussion. He argues that the moral rights he advocates may be

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<sup>4</sup> Wringer, C, *Children's Rights*, Routledge & Kegan Paul. 1981.

<sup>5</sup> Franklin, B, "Introduction" in Franklin, B (ed), *The Rights of Children*, Basil Blackwell. 1986, 1 at 13

<sup>6</sup> Wringer, n 4 above, at 36 - 37

"both characterized and justified independently"<sup>7</sup> and as a result they exist to inform and support the legal framework. Thus, he posits "[t]hat one's activities and decisions blatantly infringe the moral rights of individuals is a proper ground for public criticism."<sup>8</sup> Merely public criticism? Is that it? What of the threat to the blue eyed babies? The problem with Wringer's approach is that the moral rights he advocates do not have ontological primacy. They are weak. If they did have ontological primacy it would be unacceptable for such rights to be infringed by legal rules. And in this observation lies the philosophical basis for making strong rights prior to everything else including legal rules. There is in this sense a unity between what is moral and what is legal.

The strong or moral right of radical autonomy (that as a human being I am the owner of my own ends) is absolute and presents a mechanism through which one can analyse the legitimacy of individual legal rules, like the rules set out in sections 8 and 10 of the Children Act 1989, which are the central feature of this thesis. They do not have to be enshrined in black and white ink in the statute books of Parliament to give them legitimacy. An International Convention or a Bill of Rights or written constitution might encapsulate some strong rights, but the theory of jurisdiction outlined here is one where such rights should *already* be protected in the legal system, that the system itself is a result of and dependent on the moral theory. The views of Wringer outlined above and others like Franklin<sup>9</sup> and Holt,<sup>10</sup> whose approaches to rights will be discussed in the next chapter, that moral rights whilst not parasitic on law exist independently to support it are plainly inadequate as full theories of children's rights.<sup>11</sup> What is being suggested in this chapter is that rather than moral rights being "parasitic" on rights contained within the legal system, or being unjustified entitlements or the basis for potential public criticism, the truth is much more radical and more

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<sup>7</sup> *ibid.* at 45

<sup>8</sup> *ibid.* at 162

<sup>9</sup> Franklin, n 5 above.

<sup>10</sup> See Holt, J, *Escape from Childhood*, Penguin. 1974.

<sup>11</sup> Both Holt and Franklin belong to a school described as child-liberationists. See Fox-Harding, L, *Perspectives in Child Care Policy*, Longman. 1991.

powerful than this, that legal rules should always be referenced to strong or moral rights to test their validity (precisely because they are ontological). The precise implications of such moral rights on how the law should look at children is brought to light by Dicey's statute. If Parliament did introduce such legislation to whom would one turn for redress? The answer to this is, of course, the courts. But what power do the courts have here? The answer to this is the power to protect the freedom of ends in selves from unauthorized power. The exercise of that power is by saying that a statute requiring the execution of blue eyed babies cannot logically be law. A blue eyed baby case cannot be determined by rule but by moral consideration. In morally considering such a case a judge is saying that it is not law, "that is, that the norm is not to be recognized."<sup>12</sup>

Although the power of Parliament to make law is prior to that of the judiciary, in a different sense and in a true reflection of the separation of powers the judiciary has the precious duty to protect radical autonomy.<sup>13</sup> Courts should only be bound by Acts of Parliament to the extent that they do not challenge radical autonomy. This theory of jurisdiction is a radical one. It is not reflected in the works of most of the constitutional law texts.<sup>14</sup> It might well be argued that such an analysis is of how things *should* work rather than how they *do* work (but such is the task of jurisprudence). Such an argument would, however, be simplistic and there are cases which show the willingness of the superior courts to adopt such an approach overtly<sup>15</sup> and other cases such as *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402 <sup>16</sup> ( a case which deals directly with the autonomy of children) which will be discussed later in this chapter in which the superior courts address the right (of those with sufficient understanding to do so) to give or withhold their consent in matters concerning them (a matter of strong rights).

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<sup>12</sup> Detmold, M, *The Unity of Law and Morality*, Routledge & Kegan Paul. 1984, at 217

<sup>13</sup> See Detmold, n 1 above, at chapter 6

<sup>14</sup> See for example Wade, H.W.R., *Administrative Law*, Oxford Clarendon Press. 7th ed, 1994.

<sup>15</sup> See for example *R v Collins and Others, Ex Parte S*, *The Times*, 8th May, 1998, p. 45

<sup>16</sup> Discussed below at 26-35

Lord Woolf in a recent contribution has recognized that the relationship between Parliament and the courts is more complex than the fairy tale view offered in traditional analyses. He quotes Mann who asks a similar question to that of Detmold. Thus:

"Suppose Parliament enacts a statute depriving Jews of their British nationality, prohibits marriage between Christians and non-Christians, dissolving marriages between blacks and whites or vesting the property of all red haired women in the State. Is it really suggested that English judges would have to apply such a law? Do not evade the issue, do not avoid the legal test by asserting that as we all hope and believe, no English Parliament would ever pass such a statute. Would the hypothetical question really have to be answered in the affirmative, while a similar German statute was condemned by four Law Lords as constituting "so grave an infringement of human rights that the courts ought to refuse to recognize it at all"<sup>17</sup>?"<sup>18</sup>

In accordance with this view Lord Woolf considers that the relationship between Parliament and the courts is one of partnership. On that basis, he argues, they are "engaged in a common enterprise involving the upholding of the rule of law."<sup>19</sup> If Parliament therefore passes legislation that affronts the rule of law, the courts have the duty to point it out. He posits rightly that "there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold."<sup>20</sup> It is the extent of this inalienable responsibility which is important. I believe that it extends to the treatment of individuals whether adults, children, Jews or red-heads as ends in selves, as owners of their own lives.

Let us now return to the rights of the blue eyed babies in the hypothetical statute. The only way that the statute can be struck down is through the courts. The only way the courts can strike it down is from a child centred

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<sup>17</sup> *Oppenheimer v Cattermole* [1976] AC 249 at 278 per Lord Cross

<sup>18</sup> Mann, F.A., 3rd Blackstone Lecture, (1978) at 91 quoted by The Rt. Hon Lord Woolf of Barnes, "Droit Public - English Style" (1995) PL 57, at 68

<sup>19</sup> The Rt. Hon Lord Woolf of Barnes, n 18 above, at 69

<sup>20</sup> *ibid.* at 69

perspective, a particular blue eyed baby case. A hard case. The radical autonomy of the child's parents or his or her grandparents is not at issue. No reference to the child's potential capacity to exercise autonomy is necessary.<sup>21</sup> Indeed, what of Hart's argument that children cannot hold rights because of their lack of capacity to consent?<sup>22</sup> Quite simply such an argument does not apply. It matters not that they are unable to eloquently address a court of law *vis a vis* that their right has in some way been challenged. Babies, children, adults all have strong rights simply because they are members of the human race, each as an independent *cogito*. The court of reason need simply look into his or her eyes. The act of recognition, of eros.

Instead of the hypothetical statute proposed by Dicey, consider a different situation. Consider a group of children in a common law country in which there was such a thing as an Apartheid Act (an act which meant racism was a part of the country's constitution). Consider that as part of that legislation all children had to be taught in a certain language, Afrikaans. Consider a refusal by that group of children to be taught in a language that was not native to them. What of them? What of the courts of reason?

To summarize, strong rights are the foundation stone of community. Without community, there would be no necessity for law. Without community rights talk has no place. Law is merely a by-product of the formation of community. Any state action which challenges the radical autonomy of the individual is an act beyond its jurisdiction. Strong rights therefore form the starting point of a theory of jurisdiction for the courts.<sup>23</sup> Of course, by its actions the state can never take away my freedom (my right to radical autonomy), but it can challenge it. It is the function of the superior courts in these circumstances to protect the radical autonomy of the individual, and declare void any transgression of government, be it through

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<sup>21</sup> This is a theme which is prevalent in alternative approaches to discussing children's rights. See for example: Freeman, M, *The Rights and the Wrongs of Children*, Frances Pinter. 1983, at

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<sup>22</sup> Hart, n 2 above

<sup>23</sup> See Detmold, n 1 above, at chapter 1

inefficiency, negligence, recklessness or through deliberate intent.<sup>24</sup> In interpreting legislation and developing the common law, the judiciary is not competing with the political power of Parliament but is fulfilling its role as the guardian of each radically autonomous member of the community. The decisions of the superior courts are nevertheless always valid (even if mistaken). Whilst the hypothetical Dicey statute represents an extreme example of how individuals might have their strong rights challenged it illustrates a point. A theme of this work will be to now go on and suggest that in its consideration of children the courts have failed to properly protect their strong rights and that the legislature has done little even after the introduction of the Children Act 1989 to adequately reflect the precise nature of children's personal autonomy, of their status as human beings.

### **The Implications of Strong Rights for Children**

Despite the argument in the previous section that all children whatever their age are the holders of strong rights there is little doubt that the efficiency of a child in his or her earlier years, as an end in self, is problematic for both lawyers and philosophers. A child aged two or three, for example, does not yet have the resources to fully and cogently express in a way which can be understood precisely what he or she wants or desires in the same way and with the same range of resources as an adult (although it is true that the same can be said for many 'fully developed' human beings, including Professors of Law), and it is only through experience of the external world, of other people, that a child can seek definition. In this sense "[l]anguage may prevent or enhance opportunities to participate."<sup>25</sup> The process of defining oneself as a child is the beginning of creating the essence which is the corollary of human existence. Speech, syntax, language, expression are an integral part of this essence.<sup>26</sup> Through language we communicate with

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<sup>24</sup> *ibid.* at 2. See also The Rt. Hon Lord Woolf of Barnes, n 18 above, at 69

<sup>25</sup> Masson, J, "Representation of Children" (1996) 49 CLP 245, at 264

<sup>26</sup> I use the words "speech, syntax, language, expression" here in a broad sense, i.e. as methods of communication, and for absolute clarity I am not suggesting that deaf and dumb people can

other independent *cogitos* in the world. Language is then a central feature of what it is to be a human being. Citing the work of Sauserre,<sup>27</sup> Katherine O'Donovan has highlighted that the world is "only intelligible through discourse."<sup>28</sup> She writes:

"There is no access to the reality of self and others except through language. Without language thought is vague and uncharted: 'There are no pre-existing ideas, and nothing is distinct before the appearance of language. The characteristic role of language with respect to thought is not to create a material phonic means for expressing ideas, but to serve as a link between thought and sound.' Language enables differentiation, the making of distinctions."<sup>29</sup>

O'Donovan goes on to argue that "it is with entry into language that the child becomes a full subject. To participate in the society into which it is born, to be able to act deliberately within that society, the child has to enter into language."<sup>30</sup> She uses the term *full subject* here to encapsulate active participation in community. Use of language and expression through language thus becomes a crucial factor in the relationship between children and the law. Through language, a child learns to communicate and express himself or herself. Language permits the *expression* of radical autonomy. As Bradney has commented:

"Human speech follows from human existence. If I exist I must speak. In creating my world I am constantly engaged in an argument addressed primarily to myself. The justification for purported constraints of positive law, whether the positive law be an international or municipal legal system,

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never express their radical autonomy as they are incapable of audible speech. Language involves any method of expression (including sign language).

<sup>27</sup> Sauserre, F, *Course in General Linguistics*, Fontana. 1974, at 112

<sup>28</sup> O'Donovan, K, "Engendering Justice" (1989) 39 University of Toronto Law Journal 127, at 143

<sup>29</sup> *ibid.* at 143

<sup>30</sup> *ibid.* at 144

have to be viewed in the light of that fact. 'Free speech is the whole thing, the whole ball game. Free speech is life itself.' Literally."<sup>31</sup>

At some stage in a child's development he or she reaches a stage of efficiency as an end in self at which the exercise of decision making that was in the past taken by others on his or her behalf, including parent or representative of the machinery of the state (teacher, doctor, social worker, judge etc.) is transferred as a result of the unequivocal capacity of the child expressed through language. This point about the acquisition by a child of a means of expression is therefore of crucial significance when assessing the relationship between child, parent and state, and in particular when assessing the validity of a legal rule which treats the cogent child as object rather than as subject and a legal system which must equip itself to deal appropriately with children. Where there is expression through language it is incumbent on the practical legal system to listen, to accept and enhance participation. Before this stage of communicative capacity is reached, however, it is the duty and responsibility of primarily parents and secondly the state to ensure that the child concerned is protected and treated with respect as a radically autonomous subject.<sup>32</sup>

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<sup>31</sup> Bradney, A, *Religion, Rights and Laws*, Leicester University Press. 1993, at 95

<sup>32</sup> It is arguable that the Children Act 1989 has finally removed the notion of any prior parental "rights" over their children. The shift away from the absolute language of "rights" and towards "parental responsibility" (see Children Act 1989 s 2) can be seen as more than a change in terminology. It perhaps represents a significant shift away from the view that children are the chattels of their parents with automatic rights over them. Writing before the introduction of the legislation the Law Commission stated: "A fundamental principle which guided both the Review of Child Care Law and the Government's response to it was that the primary responsibility for the upbringing of children rests with their parents. ...The present law, however, does not adequately recognise that parenthood is a matter of responsibility rather than rights, while at the same time it may encourage the State (which includes the courts) to intervene unnecessarily in the discharge of those responsibilities." Law Commission *Family Law: Review of Child Law: Guardianship and Custody* Report No 172, HMSO. 1988, at para 2.1. More recently, however, Barton and Douglas in their book *Law and Parenthood*, Butterworths. 1995, at 19-22 have argued that parents can be said to have a proprietary interest in their children. Thus, they say, *ibid.* at 19, that "[p]arenthood carries with it rights, including that of possession, because otherwise, the desirable

A theory which begins with the proposition that all human beings own their own ends and advocates that each of them has strong rights has significant implications on how the courts should look at legal rules relating to children. As a child, my radical autonomy enables me strong rights to:

i) **Protection** (of my radical autonomy) - such protection entails that as a child I am protected from the state of nature discussed earlier and those who wish to return to it by treating me as a means rather than an end in self through neglect, abuse etc. It is the responsibility of the community and ultimately the courts to ensure that my autonomy remains intact and is asserted.

ii) **Personal Autonomy** (as a reflection of my radical autonomy) - such recognition affirms that as an individual human being I have certain primary rights. Ultimately, I have the right to control my own ends. Logically flowing from that is the proposition that I cannot be used by others as a means to their own ends. This applies to my parents and the state and any law introduced by it or interpreted by the courts on its behalf.<sup>33</sup>

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activity of parenthood could not be protected" and that "having children is a 'selfish' activity. It is very difficult for people to explain, still yet *justify*, why they have become, or wish to become, parents." (cf; Montgomery, J, "Children as Property" (1988) 51 MLR 323). This "philosophical" approach is to be rejected, however, for its failure to adequately grasp "Kant's principle" (a phrase used by Barton and Douglas, at 19) that the child is also an end in self. This necessarily entails that children should not be treated as property. To suggest that parents have a form of time-limited ownership or possession is unnecessary lawyerism in the relationship between parents and children. See *Re KD (A Minor) (Ward: Termination of Access)* [1988] 2 WLR 398 where the House of Lords indicate that parents do have a primary claim to look after their children, but that claim can be terminated by the court where the actions are not in the interests of the child concerned. For discussion of the new terminology see further chapters four and six of this work, *passim*.

<sup>33</sup> Detmold has also made a case for individual human beings to have strong welfare rights, but reference to them is not important here. See Detmold, n1 above, at chapter 10

Protection and personal autonomy are to be seen in this regard as part of the same package. It is because children are human beings that they have the right to have their radical autonomy both protected and emphasized. There is here a recognition that childhood is an incremental process of efficiency.<sup>34</sup> Adler and Dearling<sup>35</sup> have rightly observed that in order to be adequate any theory of children's rights must recognize that childhood itself is a developmental process, and it is accepted here that the strong rights thesis must reflect this. They point to three theoretical perspectives on childhood which fail adequately to address this problem. They are the parentalism approach<sup>36</sup>, the child libertarian approach<sup>37</sup> and that of the protectionist or paternalist movement.<sup>38</sup> In recognizing the failure of the three perspectives to deal adequately with the developmental nature of childhood they advocate a form of modified protectionism which embraces the best aspects of each of the theoretical approaches, including the autonomy aspect advocated by child libertarians. It is certainly the case that to ignore outright or contrarily to overemphasize the developmental nature of childhood is to have a mistaken view of precisely what childhood is. However, whether such an observation justifies the introduction of paternalistic constraint is questionable.

Any theory which allows a role for paternalism in any form is antithetical to the ontological theory described above. Franklin has argued that "[p]aternalism involves intervention in an individual's freedom of choice and/or action in an attempt to enhance or secure the best interests of that

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<sup>34</sup> See Detmold, n 1 above, at 102-103

<sup>35</sup> Adler R, and Dearling, A, "Children's Rights: A Scottish Perspective" in B Franklin (ed), *The Rights of Children*, Basil Blackwell. 1986, at 205

<sup>36</sup> For Adler and Dearling, *ibid.* at 206, "[p]arentalists hold that parents are and should be the final judges of their children's interests."

<sup>37</sup> *ibid.* at 206 "[c]hild libertarian's...argue that children have no special rights arising from their perceived helplessness and dependency. On the contrary, children have or should have exactly the same rights of adults. No distinction should be made between the two groups."

<sup>38</sup> *ibid.* at 206-207 "[p]rotectionists, like parentalists, focus on the relative dependency of children and insist that children may sometimes have to be protected against their own actions by intervention on the part of adults (not necessarily parents) 'for their own good'."

individual, even though the individual concerned may not recognize any advantage in such intervention or indeed may perceive it to be injurious."<sup>39</sup> Paternalism involves a denial of freedom. If I decide for you when you are capable of deciding for yourself then I use you as a tool by imposing my ends, my project on you. In this way, neither of us are free. I, for not seeing you as an independent human being and you for not being part of my project (then my lack of freedom). However, adults do take decisions on behalf of children necessarily and the question follows, if intervention in the actions of young children cannot be justified through paternalism, how can it be justified? If, for example, a five year old child wishes to run into a road or experiment with toxic substances on what basis do we as a community have the right to intervene. The answer to this lies not in an attempt to deny children of their subjectivity but to recognize that younger children are naturally dependent on adults to become efficient human beings, that in other words they may not fully realise the logical consequences of their choices. In this sense protectionism is justified, but it need not involve any element of paternalism (of necessary coercion). It is part of the project of freedom. When a child wishes to assert their autonomy the question becomes one not of whether the child should be taken seriously, or to decide what we as individual adults would have decided in the same situation, but at that particular moment in time is the child expressing his or her own autonomy. This is a difficult problem, and one that judges have to deal with.<sup>40</sup> But, if they as particulars, see me as part of a project that is not my own then they too deny the importance of freedom.

It is worthwhile at this point to draw a distinction between what has been described as the normative and institutional concepts of childhood.<sup>41</sup> On this view, an institutional concept of childhood is defined by positive legal rules

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<sup>39</sup> Franklin, B, "Children's Political Rights" in Franklin, B, (ed) *The Rights of Children*, Basil Blackwell. 1986, 24 at 27

<sup>40</sup> The law currently deals with this through the concept of sufficient understanding (another way of expressing end efficiency). See further chapter 7 below which will be dedicated to an expansion of this argument.

<sup>41</sup> Kleinig, J, "Mill, Children and Rights" (1976) 8 *Educational Philosophy and Theory* at 1; See also Wringer, n 4 above, at 96

whereas a normative concept of childhood is directly connected with the efficiency or capacity of the child as an end in self. Now, one's institutional conception of childhood is directly based on one's normative conception of childhood. Thus, in other words the way we treat individual children is dependent on the way we perceive childhood and this is reflected in our legal rules. The problem is, and Lord Scarman in the *Gillick* case to be discussed below understood this, that the two conceptions should in an ideal world reflect one another. But, often, they clash. This means to say that a particular child may be perfectly able to exercise capacities for decision making in relation, for example, to where they would like to go to school or reside, or to use contraception. Indeed, it is logically difficult to argue that some eleven year olds do not have a greater understanding of practical politics than many adults over eighteen but chronological age constraints prevent his or her involvement in practical politics. And this is why an analysis of childhood through strong rights is so pertinent. If one's efficiency as an end in self is not reflected in positive legal rules then it is the responsibility of the courts to ensure that such rules do not infringe one's strong right to radical autonomy. Whilst this role is not an easy one for the courts it is one they are philosophically connected to. It is a validation of the concept that individuals are themselves the best people to decide matters in relation to their own lives, and that when individuals stand before a court it is his or her autonomy as a radically lonely human being that needs asserting.<sup>42</sup>

Feminist analysis of law has been pivotal in highlighting both the fact that childhood is a developmental process and that the nature of the legal framework and legal discourse treat children as legal objects outside the remit of positive legal rules. O'Donovan has observed that "[t]here is a space in legal discourse, an emptiness, where a child's individuality should be. General social conditions of children's vulnerability and dependence largely account for this, but also, perhaps, adult power."<sup>43</sup> She rightly notes the simple fact that it is difficult for young children to assert positive rights. It is easier therefore for the courts and the state to treat children as objects of

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<sup>42</sup> This idea will be developed in chapter 3 below.

<sup>43</sup> O'Donovan, K, *Family Law Matters*, Pluto Press. 1993, at 90

concern rather than individuals in their own right. Thus "[f]amily law ways of talking about children are paternalistic and predictive: the child's welfare is central to decisions, whether about upbringing, adoption, residence. Behind the word welfare lies a claim to knowledge of what is in the child's interests."<sup>44</sup> Underneath these predictions, she argues, lie doubts about whether the right course of action is being undertaken by the state machinery but such doubts are suppressed through the language of welfare. Such a method of enquiry is quite plainly questionable when one is dealing with a more mature minor who is capable of expressing their autonomy. In such cases, like those of children who wish to 'divorce' their parents there is evidence that the child's point of view will be listened to.<sup>45</sup> However, as will be discussed in later chapters such expressions of autonomy are conflated with welfare concerns and its intuitive paternalism, and one has to ask if such a procedure is necessary.

This critique of the attitude to children in the law is persuasive. However, what answers does feminism have to this problem? If the legal system is neither "objective or neutral"<sup>46</sup> in its attitude to women, children and other marginal groups and as a result they lack a voice within it then how should the community organize itself to ensure such concerns are addressed? One answer is in part reflected by what has become known as the public - private dichotomy.<sup>47</sup> Such a dichotomy is gendered.<sup>48</sup> Thus, it sees the domain of law as part of a male domain, of public values, of liberalism, of the market, of the individual and his rights. The antithesis of this is the private sphere, where there is family and the home, which is hallmarked by caring for others and communitarian values. Law has traditionally excluded

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<sup>44</sup> *ibid.* at 92

<sup>45</sup> Children Act 1989 s 10(8)

<sup>46</sup> O'Donovan, n 28 above, at 140

<sup>47</sup> See: O'Donovan, K, *Sexual Divisions in Law*, Weidenfeld and Nicolson. 1985; For discussion of the dichotomy see: Bainham, A, "The Privatisation of the Public Interest in Children" (1990) 53 MLR 206; Freeman, M, "Towards a Critical Theory" (1985) 38 CLP 153; Eekelaar, J, "What is 'Critical' Family Law" (1989) 105 LQR 244

<sup>48</sup> See: Collier, R, *Masculinity Law and the Family*, Routledge. 1995, at 59-67; Thornton, M, "The Public Private Dichotomy: Gendered and Discriminatory" (1991) 18 J Law & Soc 448

itself, it is argued, from the private sphere, and hence those human beings who are at the centre of this sphere, women and children, are subordinated and their interests not reflected in the creation of legal rules. Rather than advocating that the law should enter into the private sphere it is argued that the values represented in the private sphere should through exhortation be embedded in the public sphere, so that the subordination of women and children will cease.

This public - private critique is not only aimed at legal regulation but at the language of law which is regarded as the language of men and male ideology. O'Donovan comments that "[l]anguage, as part of the community's signifying system is public, not personal."<sup>49</sup> Meaning, she suggests is "given" and "predicated on convention"<sup>50</sup>. Thus, the precepts of language have been developed by and are controlled in the public domain by men. To challenge this male dominant approach she argues that women should assert their own linguistic subculture, aside from the dominant model: "Women may have a reality of their own, but have no means of encoding it linguistically"<sup>51</sup> In this way it would be possible "for all members of society to attempt to influence content."<sup>52</sup> Implicit in the argument that women need a separate linguistic sub-culture is an apparent acceptance that women experience the world in a way that is different to men.<sup>53</sup> Whilst this may have some credence, there is no real evidence advanced that women *think* in a different way to men *per se*. Such an observation would necessarily involve the rejection of the *cogito* as metaphysical ultimate. Groups consist only of individuals, and there is no one voice in the feminist critique.

A call for a separate linguistic subculture is also inherently problematic when it is applied to children whose voices it is argued have also been excluded. There are not only viewpoints that are predominantly male and

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<sup>49</sup> O'Donovan, n 28 above, at 134

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.* at 144

<sup>52</sup> *ibid.* at 147

<sup>53</sup> *ibid.* at 144

predominantly female. Rather, there are as many viewpoints as there are human beings. Each human being must question predicated convention. No human being is a prisoner of an historical language in any sense and as a result language should not bind the individual human spirit.

The analysis of the world offered in this text is not one, for example, that would be accepted within either the positivistic legal tradition or by other deontological theories. It is in the personal sense, language as personal to me, that predication of language ought to be undermined. This is why language must be contextually personal. When I speak, when I write:

"I too am not a bit tamed....I too am untranslatable,  
I sound my barbaric yawp over the roofs of the world."<sup>54</sup>

My "yawp" involves a rejection of tradition, of much that I have been told, not only when studying law, but in all convention, all descriptions of external phenomena. I write to read *myself*.<sup>55</sup> The collaborative language advocated in the feminist critique is conceptually difficult. As an individual I know what I mean, as a member of a group there will always be a problem with meaning. It may well be the case that it can be argued cogently that some women experience the world in a different way to some men, but to argue as for example Gilligan has that the values held by all women are communitarian values and those by all men individualistic values is to generalize.<sup>56</sup> The 'communitarian' values which mean that human

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<sup>54</sup> Whitman, W, "Song of Myself" in *The Portable Walt Whitman*, Penguin Books. 1977, at 96

<sup>55</sup> Sartre used this form of words to describe Genet saying "[i]f he speaks it is order to hear himself *As Another*, when he writes, it is in order to read himself" in Sartre, J, *Saint Genet; Actor and Martyr*, George Braziller. 1963, at 427. Quoted by Caws, P, *Sartre*, Routledge & Kegan Paul, 1979, at 24

<sup>56</sup> See Gilligan, C, *In a Different Voice*, Harvard University Press. 1982, at 1 where she comments that "[t]his book records different modes of thinking about relationships and the association of these modes with male and female voices..." Gilligan also seems to reject out of hand any notion of the separate self. She states, *ibid.* at 98, that "[t]he concept of the separate self and moral principles uncompromised by the constraints of reality is an adolescent ideal, the elaborately wrought philosophy of a Stephen Daedalus whose flight we know to be in jeopardy."

interactions are mediated by "love, duty and a common understanding and purpose"<sup>57</sup> are values that I would wish to pursue as an individual, indeed they are values which I propose should underpin and necessarily be used to underpin legal rules.

The propriety of rights discourse is, however, rejected by O'Donovan because rights themselves are individualistic tools. Thus:

"Rights-based liberalism, whilst providing some of the conditions for respect for persons, fails to recognize the morality of communitarian values."<sup>58</sup>

This is not true for *all* rights-based liberal theory. The central tenets of liberalism have often been improperly prescribed by its advocates in political theory. In reciting Hume, Murdoch has commented that "[g]ood political philosophy is not necessarily good moral philosophy".<sup>59</sup> To reject out of hand all liberal theory on the basis that it has at its foundation the individual (as O'Donovan has in support Carol Gilligan)<sup>60</sup> is logically flawed. In contrast, to reject those liberal theories which have historically and conceptually failed to create the correct frame of reference within which all individual members of the community have their subjectivity taken into account is to question the description of the world found in such theories. Hence, to reject the theories of Hobbes, Locke, Mill and others as individual liberal thinkers is not to reject liberalism itself, but to reject their departure from the *cogito* as metaphysical ultimate (or their failure to have the *cogito* at their foundation). They are poor moral theories (and hence poor theories through which one can analyse law).

Perhaps one of the key criticisms of the public - private dichotomy is the manner in which it seeks to transform that which it criticizes by introducing the altruistic components of the private sphere into the domain of the male

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<sup>57</sup> O'Donovan, n 43 above, at 5

<sup>58</sup> *ibid.* at 207

<sup>59</sup> Murdoch, I, *The Sovereignty of Good*, Routledge & Kegan Paul. 1970, at 81

<sup>60</sup> See Gilligan, n 56 above.

public sphere. As Collier has put it, "[l]aw is said to constitute the dichotomy in the first place, yet the dichotomy is then used to justify, or to critique, where the respective boundaries of legitimate state intervention have been drawn. However, it is not simply a matter of shifting the boundaries - a little more privacy here, a little less privacy there - but more a question of rejecting the boundaries *per se*."<sup>61</sup> Collier rejects wholesale grandiose theories of law and favours a more familialist approach to law<sup>62</sup> but his observation is a critical one. Others have questioned the propriety of the dichotomy as seeing the family as being in opposition to the state<sup>63</sup> but as Montgomery has pointed out any complete analysis of rights must take on board the issues raised by the dichotomy.<sup>64</sup> There is clearly a problem with the way the law presently looks at children. Whilst the conceptualization of childhood as part of the dichotomy might be somewhat simplistic it nevertheless alludes to a state of affairs where the objectivity of children is being questioned and that is a crucial observation.

The problem with the feminist conception of rights is that it sees them in the limited form of entitlements (as rights in the weak sense). This is an observation which has been made by Rhode who argues that:

"to rely on that paradigm [of individual entitlements] as a framework for true sexual equality is to misread the legacy of liberal legal ideology. Equal rights, at this historical moment are restricted in legal content and too divisive in political connotations to serve as an adequate feminist agenda."<sup>65</sup>

Collier has argued that to look for equality through law rather than questioning the epistemological status of law itself is misplaced. Any liberal legal analysis of law which seeks to change the status of individuals through the introduction of extra entitlements is philosophically weak. This, to me,

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<sup>61</sup> Collier, n 48 above, at 67

<sup>62</sup> *ibid.* at 68 -69

<sup>63</sup> Freeman, n 47 above, at 170

<sup>64</sup> Montgomery, J, "Children as Property" (1988) 51 MLR 323, at 332

<sup>65</sup> Rhode, D, "Feminist Perspectives in Legal Ideology" in Mitchell, J and A Oakley (eds), *What is Feminism?*, Blackwell. 1986, at 150. Quoted by Collier, n 48 above, at 65

represents the essence of the problem for children. The question has been: to what extent should the law be changed to give children a few more entitlements? rather than what should the law be doing to protect the radical autonomy of individuals. The tokenism of rights as entitlements offered in traditional liberal legal analysis is thus an inadequate mechanism to secure equal treatment for all marginalized individuals.

I have argued, therefore, that children like all human beings can be treated as subjects within a moral liberal theory, the strong rights thesis. And, in response to O'Donovan's argument that "[t]he legal reasons why constructing children as rights holders may not work is that rights untranslated into positive law do not tell us what should be done"<sup>66</sup> is that the theory of strong rights advocated involves a challenge to the basis of the positive construction of law and determines how women, children and other marginal groups should be seen by legal rules, legal language and in legal regulation, as ends in selves with radical autonomy.

### **Children of the Family in Family Law: Echoes of Patriarchy and Challenges to Radical Autonomy - An Historical Overview**

The paternalistic and predictive way that family law talks about children is reflected in the history of family law in relation to children. Law and legal rules have had and still do have different and competing conceptions about what constitutes a family and this is reflected in the way law talks about the concept of childhood. As there is no one definitive definition that can be given to the notion of family, various pieces of research inform us too that the nature and meaning of childhood has shifted over the centuries into its modern form. Indeed, there is some apparent confusion in the modern law as to what point an individual becomes eligible to partake in certain activities which are demarcated by age criterion. As a result of the 'Latey Report',<sup>67</sup> the Family Reform Act 1969 fixed the age of majority at eighteen which stands as the age of full legal capacity in the current law. Thus, one can vote when one is eighteen. One remains a ward of court until one is

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<sup>66</sup> O'Donovan, n 43 above, at 101

<sup>67</sup> *Report of the Committee on the Age of Majority (the Latey Report)* Cmnd 3342 (1967)

eighteen (if the procedure is instigated). One can drink alcohol at eighteen. But one can drive when one is seventeen. One can leave school, buy a lottery ticket, or have sexual intercourse at sixteen. One can marry at sixteen, with parental consent. Yet, to be a member of Parliament one must be 21. These are only a few examples of how the modern law cannot agree on a particular age at which the responsibilities that are associated with adulthood can begin. Indeed, the case of *Gillick*<sup>68</sup> which will be discussed in detail below has settled once and for all the view that a child cannot have any legal capacity at all until the age of majority.

The date of the *Gillick* case is a reflection that it is not until comparatively recently that has one been able to talk about the autonomy of children in relation to law with any great significance (this is why *Gillick* is such a significant case). Indeed, it was not until the introduction of the Children Act 1989 that emphasis has been placed in statutory form on the importance of the views of an individual child in matters which affect him or her. The new statutory procedures of the Act which give effect to these changes and accompanying changes to the law of evidence are radical in this respect and they were very much introduced on the back of the philosophy of the majority judgment in *Gillick*. They will be discussed and analysed in detail in Part II of this thesis. Before discussing the case in detail it is important, however, to ask briefly how such a juncture was arrived at.

Until recently the philosophy of the legal rules which affected children was quite simple: children had little or no right to any legal autonomy<sup>69</sup> and this was well summed up by Sir William Blackstone writing in the eighteenth century:

"The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) over the persons of his children ceases at

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<sup>68</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402

<sup>69</sup> See Bainham, A, *Children: The Modern Law*, Jordans. 1993, at 16 who has identified that "the first statutory recognition of the child's legal right to autonomy' is to be found in the Custody of Children Act 1891, s 4 which provides that the court had the power to consult the wishes of the child when determining religious upbringing.

the age of 21: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason."<sup>70</sup>

Thus, the absolute authority of the father and his 'empire' remained intact until the gradual progression of legal reforms led in the 1970's to the eventual equalization of parents rights over their children,<sup>71</sup> a process arguably set in train by the Custody of Infants Act 1839,<sup>72</sup> which was followed later by s 5 of the Guardianship of Infants Act 1886 giving the court power to make an order for custody or access on the application of the child's mother but which was not completed until the introduction of s 1(1) of the Guardianship Act 1973. The fact that it was not until 1973 that mothers did not receive equal rights in relation to their children emphasises the patriarchal way in which the law looked at relations and power structures inside the family. It also emphasises the recent progress that has been made in analysing children and the law.

It was not until the middle of the nineteenth century that the legislature was willing to give the courts the power to challenge the absolute authority of the

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<sup>70</sup> Blackstone, Sir William, *Commentaries on the Laws of England*, Oxford, Clarendon Press. 4th ed, 1770, Book 1, Ch. 15, section 2

<sup>71</sup> See Eekelaar, "What are Parental Rights ?" (1973) 89 LQR 211 who writing in 1976 provides a thorough analysis of the rights and duties of parenthood highlighted in legal rules (statute and common law) at that time, and of their imminent fragmentation. They included the right to possession, right to visit the child, right to determine education, religious upbringing, to discipline the child, to choose medical treatment, to give the child a name, consent to marriage and the right to services. The article is particularly noteworthy, as it marks a defining period in legal change. The author comments, *ibid.* at 211, that "[t]he proclamation of children's rights has hitherto mainly taken the form of a propagandist exercise. However, it is not improbable that the concept will acquire legal significance." It is interesting to note that sixteen years later in 1992 the same author argued that it is important to ascribe 'rights' to children even though they might be unenforceable via legal rules. See Eekelaar, J, "The Importance of Thinking That Children Have Rights" (1992) 6 Int'l J Law & Fam 221

<sup>72</sup> See *Warde v Warde* (1849) 2 Ph 786

father thus beginning legitimate interest by the state in child rearing. Section 33 of the Matrimonial Causes Act 1857 which allowed the court some discretion in matters involving children included the wider use of its already existing powers through the wardship jurisdiction to protect children. However, the case of *Re Agar-Ellis* (1883) 24 Ch D 317 is an example of how in relation to the wardship jurisdiction the courts were still unwilling to interfere with the natural rights of the father of the child. The facts of *Re Agar Ellis* are worthy of mention to emphasise this point. It is also interesting from the point of view of being a nineteenth century case which considers the relationship between a mature minor, the courts and her parents.

The father of the children at the heart of the case agreed on his marriage to any children of the family being brought up within the Roman Catholic faith. On the birth of his first child, however, the father changed this opinion and expressed the view that he wished his children to be brought up as Protestants, as he himself was. Contrary to that opinion, the mother of the children took them to a Roman Catholic church as a result of which the children expressed the view that they did not wish to attend a Protestant church. The father successfully applied to make his children wards of court and the court ordered that the mother should be restrained from taking the children to Roman Catholic confession. The court maintained that it was for the father to look after the spiritual welfare of his children. Subsequently, the father took the children from their mother and placed them with other carers, and refused the mother regular access. As a result of the children being wards of court, one of the children who was aged 16 and was the second daughter of the family, wrote an impassioned letter to the judge appealing that she be able to reside with her mother and to be able to exercise her religion. The father agreed that the young girl should be able to exercise her religion but refused her request to live with her mother. The daughter then wrote a further letter to her solicitor asking that the permission of the court be obtained so that she could spend a short time with her mother in the summer.<sup>73</sup> The mother and the daughter therefore petitioned the court.

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<sup>73</sup> See the letter, *ibid.* at 318-319, which reads: "Dear Mr Hastings [Solicitor], I write again to ask you to apply to the Judge for leave that I may spend my vacation with my mother. As you know,

The court refused the petition at first instance and on appeal in the Court of Appeal. The views of the child and of her mother were regarded in the case as irrelevant in the face of the absolute and sacred rights of the father.<sup>74</sup> The Court of Appeal believed, according to Bowen LJ, that to interfere with the natural rights of the father would be to "ignore the principle which is the most fundamental of all in the history of mankind."<sup>75</sup> The Court here drew a line in the sand as to the types of cases in which it could interfere through the inherent jurisdiction. Only where, according to Bowen LJ, the father had acted in an unnatural way would the court be able to intervene. This conclusion was reached in spite of reservations expressed in the court as to the precise actions and choices of the father in the *Re-Agar Ellis* case. Thus Bowen LJ commented:

"if we were not in a Court of Law, but in a court of critics capable of being moved by feelings of favour or disfavour, we might be tempted to comment, with more or less severity, upon the way in which, so far as we have heard the story, the father has exercised his parental right. But it seems to me the Court must not allow itself to drift out of the proper course; the Court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except in be in those special cases in which the state is called upon, for reasons of urgency, to set aside the parental authority and intervene for itself."<sup>76</sup>

Of course, Bowen LJ makes the fundamental mistake of differentiating the court's philosophical responsibility from what he perceives to be its actual

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for the last two years I have been moved about from place to place, and have only had part of one vacation with my mother, which the judge ordered. The people I am with now are very kind to me, but they want to go abroad in July and are unable to take me with them. Father has no place to take me to, and with one exception has never spent a vacation with us over four years. I am always amongst strangers. I am longing to see some of my relations. I know you will do what you can for me. Yours very truly, Harriet Agar-Ellis."

<sup>74</sup> *ibid.* per the judgment of Bowen LJ at 337

<sup>75</sup> *ibid.* at 337

<sup>76</sup> *ibid.* at 334-335

responsibility in the face of natural law. Courts by their nature exist to criticize. Indeed, in one of the more important statements of the law relating to children Lord Cottenham in *Re Spence* (1847) 2 Ph 247 commented that:

"The cases in which the Court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of *any body* who is suggested to be improperly detained."<sup>77</sup>

And in this lies a statement of where the responsibility of the court's should lie in relation to the children and the law. Where there is improper detainment the court's responsibility is to intervene and assert the necessary particular of the child (a statement of radical autonomy) either through refusing to grant a writ for *habeas corpus* where there was potential detainment or using it to remove a child from improper detainment. Of course, Lord Cottingham ties the role of the court to the duty of the Crown as *parens patriae*, as ultimate parent, which is an historical justification for state intervention. It need not be put in these terms. The Court has power to intervene to protect the human particular without references to the paternalistic role of a monarch. The case of *Re Agar-Ellis* shows how the courts did (and still do) lose their way. Yet, there are a series of authorities discussed in *Re-Agar Ellis* where the court refused a writ of *habeas corpus* on application by a father in relation to intellectually competent minors. As examples, in *Re Shanahan* 20 LT. 183 a writ for *habeas corpus* was refused to a father in relation to a 14 year old boy where the father wished him to be removed from a Protestant institution. In *Reg. v Howes* 3 E. & E. 332 the age of 16 was discussed as being the age of discretion. Most interesting, for our purposes, is *Re Connor* 16 Ir. C L Rep 112 where a boy of 14 was allowed to choose where he would live. In these cases, the *habeas corpus* writ by fathers was refused precisely because to grant it would lead to unreasonable detainment (although these authorities were not followed by the Court in *Re-Agar Ellis*). The Court of Law became the court of critics in these cases. *Re Agar-Ellis* highlights, nevertheless, that the objectification and subordination of children has been a prominent feature in the history of

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<sup>77</sup> Quoted by Lowe, N and White, R, *Wards of Court*, Barry Rose. 2nd ed, 1986, at 3- 4 (cited in this paper as "Lowe and White").

English law<sup>78</sup> and that the wardship jurisdiction in cases like it was limited in the face of the power of the natural parent. The jurisdiction gave the courts a manifestation of the role of the crown as *parens patriae*.<sup>79</sup> A twentieth century conception of wardship is certainly alien to its expression in *Re-Agar Ellis*, however. It is also far removed from the way that I would wish to understand Lord Cottenham's perception of the role of the court.

The nature of the jurisdiction has without doubt changed considerably over time. Thus, Lowe and White have commented that in its current form, "[a] fundamental characteristic of wardship is that both the ward's person and property are subject to the court's control and that the parents' rights are superseded. In the past it was said that the court became the wards 'guardian.'"<sup>80</sup> The jurisdiction is concerned with the welfare of the child, a concept developed by the courts in wardship,<sup>81</sup> which eventually gained statutory expression in s 1 of the Guardianship of Infants Act 1925 and was eventually translated into s 1 of the Guardianship of Minors Act 1971 following the now landmark case of *J v C* [1970] AC 668 where it was

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<sup>78</sup> See Cornish, W and G de N Clark, *Law and Society in England 1750-1950*, Sweet & Maxwell, 1989; Thane, P, "Childhood in History" in King, M (ed), *Childhood, Welfare & Justice*, Billing & Son. 1981, at 6

<sup>79</sup> See the comments of Lord Esther MR in *R v Gyngall* [1893] 2 QB 232, at 239: "Wardship was a parental jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of the parent, and as if it were the parent of the child thus superseding the natural guardianship of the child." Further, *ibid.* at 250, he says that "[t]he Court of Chancery, from time immemorial, has exercised another and distinguishable jurisdiction - a jurisdiction resting on the paternal authority of the Crown, by virtue of which it can supersede the natural guardianship of a parent, and can place a child in such custody as seems most calculated to promote its welfare."

<sup>80</sup> See Lowe and White, n 77 above, at 6 who argue that in more recent cases that the court has accepted that it does not in any sense "become vested with parental rights" but that the court simply "takes over the ultimate responsibility of the child" per Lord Scarman in *Re E (SA) (A Minor)(Wardship)* [1984] 1 All ER 289, at 290. Either way, the Court of Chancery was and still is imbued with a sense of paternalism in relation to cases involving children that come before them. The paternalistic overtones of wardship will be discussed in detail in chapter 4 below.

<sup>81</sup> See *R v Gyngall* [1893] 2 QB 232

decided that the welfare of the child was the "first and paramount" consideration. In other words, when analysing the child's upbringing the child's welfare is the only criterion in issue. It is this proposition which forms (though slightly amended being just the court's "paramount consideration.")<sup>82</sup> the basis of s 1 of the Children Act 1989 and which covers all family proceedings, including the wardship jurisdiction.

The wardship jurisdiction is paternalistic in its modern form. On this basis it might be argued that family law is in a state of crisis.<sup>83</sup> The powers of the court when exercising the inherent jurisdiction are now regarded as being theoretically unlimited.<sup>84</sup> In deciding a matter in relation to the child's welfare it is apparent that it is up to the court to determine it acting as the judicial reasonable parent.<sup>85</sup> However, there are few issues which relate to children which remain to be determined through the inherent jurisdiction alone. The jurisdiction exists to fill the lacunae of the statutory scheme of the Children Act 1989. The Act itself for the first time gives children unique opportunities as never before to make representations to courts regarding their upbringing.<sup>86</sup> This development received significant impetus from one particular case in the 1980's when the child - parent relationship was examined in full by the House of Lords in the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402. This decision is of particular importance to this work as it tackled directly the law relating to young people under the age of 16. The reason for noting this is that under the Children Act 1989 a court cannot make a section 8 order in respect of persons over 16 years of age, a matter heavily influenced by the House of Lords ruling in the case.

To summarize, it has been identified that there have been a series of shifts in the law which relates to the relationship between the child, the family and the state. The early law is embodied by the language used by Blackstone

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<sup>82</sup> Children Act 1989 s 1(1)

<sup>83</sup> If one accepts that radical autonomy cannot be equated with paternalism.

<sup>84</sup> *Re X* [1975] Fam 47; *Re R (A Minor)(Wardship: Consent to Treatment)* [1992] FCR 229

<sup>85</sup> *J v C* [1970] AC 668, per Lord Upjohn at 723

<sup>86</sup> Children Act 1989, s10(8)

above and is prevalent in the case law.<sup>87</sup> The family (foremost the father) had total authority over the child until the age of discretion. Secondly, that the state has a legitimate interest in child-rearing justifying the involvement of the judiciary and the legislature in the parent-child relationship, not least to equalize the standing of both parents. This in turn has led to the shift from centre stage of first father, then parents equally until more recently (in the past twenty-five years) children have occupied the centre of family law discourse, first through highlighting what is in the 'best interests of the child', and onto the more recent sanctity of the welfare of the child as exemplified in s 1 of both the Guardianship of Minors Act and the Children Act 1989. On the basis of this Collier has commented that the "emerging welfare principle... fractured the basis of the father-right of *Agar-Ellis* through providing an alternative and child-centred moral imperative."<sup>88</sup> The debate has moved full circle. Until recently however, the moral imperative was not expressed in terms of children's autonomy but in terms solely of their welfare or best interests. In this context, children have been the objects and not the subjects of the legal rules and the legal procedure affecting them. And it is not until very recently that this view too has come under challenge, as calls for the autonomy of children themselves grew louder. The result, it will be identified, is a kind of post-Children Act dichotomy in the debate, between those who would wish to hold on to the quasi-paternalistic nature of the earlier law to those who are willing to recognise in full that children are autonomous and therefore should be permitted to exercise their autonomy.

### ***Gillick***

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<sup>87</sup> Note the words of Bowen J in *Re Agar-Ellis* 24 Ch D 317, at 337 who commented: "Then we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense it would be a fallacious test to apply to the way the court exercises its jurisdiction by way of interference with the father. It is not the benefit to the infant as conceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can."

<sup>88</sup> Collier, n 48 above, at 190

The facts of the *Gillick* case are well documented and are now enshrined in the memory of every family lawyer. They are nevertheless worthy of reciting. In 1980 the Department of Health sent a Circular<sup>89</sup> to all medical practitioners to the effect that a Doctor could give contraceptive advice and / or treatment to a girl under the age of 16 without the prior permission or consent or consultation with her parent or guardian. The social policy at issue here was that respective doctors could protect women under the age of 16 the effects of sexual intercourse, including unwanted pregnancy. The notice was sent out to all Area Health Authorities in England and Wales and communicated directly to individual doctors. The Circular was issued irrespective of existing legal rules which meant it was unlawful for any person in the United Kingdom to have sexual intercourse with a girl under 16 years of age per s 6(1) of the Sexual Offences Act 1956. The parent of five daughters under the age of 16, Victoria Gillick, sought the assurances of her Area Health Authority in Norfolk that none of her five daughters would be privy to such advice without her consultation and full permission. Ms Gillick did not receive a response as a result of which she petitioned the courts with the ambition of having the Circular ruled unlawful on the grounds that it interfered with the rights of parents.<sup>90</sup>

The case was considered in three separate courts by some nine judges. Five of the judges decided in favour of Ms Gillick, and four were of the opinion that the Circular did not contravene the law. In spite of this Ms Gillick lost her case in two of the courts which had considered it. She lost her case at first instance, won in the Court of Appeal without dissent, and lost three - two in the House of Lords. These statistics not only illustrate the precise nature of the dispute between individual judges on the facts of a particular Department of Health Circular, but also on the status of parental rights, the nature of children's rights and the relationship between parents, children and the state.

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<sup>89</sup> HN (80) 46

<sup>90</sup> The parental rights referred to in this context by Ms Gillick were those founds in the Children Act 1977, s 85 and s 86

At the heart of the *Gillick* decision was a highly significant argument as to whether children should be able to make decisions on their own behalf. The case has left a significant legacy, and even after the introduction of the Children Act 1989 there remain bitter disputes in the courts, particularly in relation to medical decisions taken by children, about the precise implications of the argument. The case has been respectively affirmed, denied and circumscribed by the courts, and in particular has raised problems when the court is exercising powers through the inherent jurisdiction in relation to issues where the court has to consider overriding the wishes of even a *Gillick* competent child.<sup>91</sup> Nevertheless, the *Gillick* decision remains the most significant in the history of how the law has looked at children.<sup>92</sup> The case not only illustrates the apparent confusion and contradictions in the various forms of rights discourse outlined earlier in

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<sup>91</sup> See *Re R (A Minor) (Consent to Treatment)* [1992] 2 FCR 229; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] 2 FCR 785; *Re S (A Minor) (Consent to Medical Treatment)* [1994] 2 FLR 1065. For commentary on these cases which all involve children's capacity in relation to medical decisions see: Alderson, P and Goodwin, A, 'Contradictions Within Concept's of Children's Competence', (1993) 1 Int'l J of Children's Rights 303. It is worth noting at this point that wardship was also used in some of the earlier cases involving children applying for s 8 orders under the Children Act 1989. See for example *Re T (A Minor) (Independent Representation)* [1993] 1 FCR 646 and compare the approach of the Court of Appeal in *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, 455 where Waite LJ ruled that the use of wardship proceedings would not secure "any advantage not available in ordinary family proceedings under Part II of the Act." See further chapter five of this work, *passim*. It should also be noted here that *Gillick* itself was not a wardship case.

<sup>92</sup> The importance of the decision is reflected in the impact that the case has had on various provisions contained in the Children Act 1989 and by the volume of academic response to the case. Indeed, it is significant that after over a decade since its consideration the case is still the subject of significant debate, not least the importance the case has had on my own consideration of the issues and as a central part of this thesis. However, perhaps the case is a friend to every point of view, even that of Victoria Gillick who continues to advocate the importance of parental authority. For further discussion see: Bainham, A, "Growing Up in Britain: Adolescence in the post-Gillick Era" (1992) *Jur Rev* 155; Williams, G, "The Gillick Saga" (1985) 135 *NLJ* 1156; Eekelaar, J, "The Eclipse of Parental Rights" (1986) 102 *LQR* 4; Freeman, M, "Can Children Divorce their Parents?" in Freeman, M (ed), *Divorce: Where Next?*, Dartmouth. 1996, 159

this chapter but it also highlights the apparent contradictions in the positivistic approach relating to the jurisdiction of the superior courts. It is therefore worthy of thorough investigation.

Where there is a lack of clarity or ambiguity in an area of law, in this case the legality of a guidance note, according to Lord Scarman:

"The House's task...as the supreme court in a legal system largely based on rules of law evolved over the years by the judicial process is to search the overfull and cluttered shelves of the law reports for a principle or set of principles recognised by the judges over the years but stripped of the detail which, however, appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work."<sup>93</sup>

It should be noted here that Lord Scarman is not an advocate of the strong rights theory advocated earlier in this chapter, and it would be wrong to seek to impose a particular philosophical spin on his judgment, even though he himself places a particular spin on all of the previous law. Yet his judgment is a brilliant one in the way that it distinguishes between the institutional and normative conceptions of childhood referred to earlier. However, when analysed from his own doctrinal standpoint his judgment is logically incoherent and jurisprudentially unsound. At one and the same time he seeks to throw out<sup>94</sup> all previous decisions but yet holds on to a vague and incomprehensible principle which he argues has been prevalent throughout the common law relating to children (which is brilliant):

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<sup>93</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, at 419 per Lord Scarman. See also Lord Fraser, with whom Lord Scarman agrees, who states, at 409: "I conclude that there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve."

<sup>94</sup> Per Lord Scarman *ibid.* at 409 : "In this appeal, therefore, there is much in the earlier case law which the House must discard; almost everything I would say but its principle."

"The underlying principle of the law was exposed by Blackstone. ...It is that the parental right yields to the child's right when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."<sup>95</sup>

This view is certainly a liberal interpretation of Blackstone's analysis as outlined above. Nevertheless, Lord Scarman admits that it is the task of the judges in the superior courts to, in some way, manipulate the law to best suit the needs of a particular moment in time:

"It is of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted on. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times and to apply principle in such a way as to satisfy the needs of his own time. If judge-made law is to survive as a living body of law, we must make the effort, however inadequate, to follow the lead of the great masters of the judicial art."<sup>96</sup>

Lord Scarman's analysis of the law here is quite wrong. The basis for his perspective on the relationship between child, parent and state is a fictitious and selective search for principle which might reflect modern mores. This is simply inadequate as a philosophical basis for such a radical change in the law. The same technique could just as well end up with the opposite scenario, where children would remain tied to the rights of their parents. Indeed, this is precisely what was done in the Court of Appeal decision in the same case where Eveleigh LJ comments, for example:

"I would emphasis the role of the court as Parker LJ has done. We have to decide the case according to law. The relevant authorities have been

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<sup>95</sup> *ibid.* at 186

<sup>96</sup> *ibid.*

referred to, and in my judgment they lead to the order which we propose to make."<sup>97</sup>

Both judges use the same methodology to reach different conclusions, the search in the great books for the true essence of the law. Accordingly it is difficult to judge which of the two judgments are jurisprudentially accurate. In reality the great books were silent by ambiguity in relation to this issue. Whatever its jurisprudential merits, however, the decision of Lord Scarman is highly significant. As a result of his statement, children began to be seen more in relation to their autonomy (their rights) at the apparent expense of overarching concerns in relation to their welfare.

There are though, other, very good reasons not used by Lord Scarman but noted earlier in this chapter which give philosophical credence to the conclusions he comes to in his decision - the constitutional imperative to protect the radical autonomy of individuals. The *Gillick* case is one where strong rights talk is apt. This is the philosophical justification for Lord Scarman's conclusion that when an individual reaches a particular stage of efficiency in his or her development that he or she has the sole power to make any decision regarding their own lives. Such an argument has been the purpose of this chapter. It might be suggested that what Lord Scarman did in *Gillick* was to take what he describes as "judge-made common law" to this point of logical conclusion, to say, in effect, that the autonomy of the individual is prior to all else on any matter regarding decision about their own self. However, this is a radical interpretation of that case and by virtue of that also a naive one. It remains, however, a philosophically superior analysis by virtue of the argument in this and the previous chapter. If this radical interpretation had been the legacy of *Gillick*, both in subsequent cases and in the formulation, implementation and interpretation of the Children Act itself, on which the decision had significant impact then the law relating to children would be in a much better state. In any case, *Gillick* is authority for the view that maturity is a flexible commodity and that end

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<sup>97</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* (CA)[1985] 1 All ER 556, per Eveleigh J.

efficiency or sufficient understanding is an important consideration in the relationship between children and the law.

There are however a series of interpretations of *Gillick* ranging from the radical one above to one that is more consistent with the principles of the Children Act 1989 which would view sufficient understanding not as absolute as regards the outcome of the decision to be made. Whilst there is agreement amongst commentators that *Gillick* is an important case interpretations differ when one analyses its impact on the relationship between children, their parents and the courts.<sup>98</sup> The key issue is which interpretation *ought* to be the state of the law rather than which interpretation *is* the best reflection of the law. This enables one to ask what kinds of decisions a *Gillick* competent child should be able to take. The three possible interpretations as to the impact of *Gillick* on the relationship between parents, children and the courts are:

i) that the court has no power because to override the wishes of a child who is *Gillick* competent because its role as "judicial parent" in the words of Upjohn J in *J v C* [1970] AC 668 would be cancelled out when the child reaches a position of sufficient understanding. In other words if a child's right to self determination defeats their parents right then logically it should defeat the rights of the court per se.<sup>99</sup>

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<sup>98</sup> See for example the views of Montgomery, J, "Parents and Children in Dispute: Who Has the Final Word?" (1992) 4 JCL 85, at 88 who lists the possible interpretations of *Gillick* with particular reference to its implications for the wardship jurisdiction; See also Montgomery, J, "Children as Property?" (1988) 51 MLR 323; Eekelaar, J, "The Eclipse of Parental Rights" (1986) 102 LQR 4; Williams, G, "The Gillick Saga" (1985) 135 NLJ 1156; Bainham, A, "The Balance of Power in Family Decisions" (1986) CLJ 262; Bainham, A, "Growing Up in Britain: Adolescence in the post-Gillick Era" (1992) Jur Rev 155; Murphy, J, "W(h)ither Adolescent Autonomy?" [1992] JSWFL 529; Brahm, D, "The Gillick Case: a Pragmatic Compromise" (1986) 136 NLJ 75

<sup>99</sup> See Eekelaar, n 98 above, and Bainham, n 98 above, both of whom accept this interpretation but argue against it.

ii) the view expressed above that the court has no power to override the wishes of a *Gillick* competent child simply because they are *Gillick* competent.<sup>100</sup>

iii) that the court has absolute power to override the wishes even of a *Gillick* competent child although it will consider his or her views, the key rubric being that the child's individual wishes must be in accordance with what the court thinks is best for his or her welfare. This view is heavily imbued with the notion of paternalism. Moreover, responsibility for analysing each in relation to health care would be left to individual doctor's who could decide a matter taking into account the wishes of the person in question and potentially those of his or her parents.<sup>101</sup>

Of these three views, it is the last one which must be supported in light of the Children Act 1989 itself and the decisions made in relation to the court's powers under the inherent jurisdiction. It is the latter view which is also the most unsatisfactory for one who is seeking to apply a theory of strong rights. The outcome of this analysis is that there is the potential for a marriage between the court's attitudes when exercising the inherent jurisdiction and its consideration of the Children Act 1989, where through the welfare of the child the court can exercise paternalistic constraint.<sup>102</sup>

Through this approach personal autonomy takes a back seat to other factors. Acceptance of the radical interpretation of *Gillick* would involve not only parents, but judges and other branches of the state having to step back when a particular individual is making a decision about themselves at a particular point in their development. It then follows that the traditional paternalism of the courts and other state agencies must end when a person reaches a state of end-efficiency or what Lord Scarman describes as a sufficient understanding. More recent post Children Act cases such as *Re R (A Minor)*

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<sup>100</sup> The view I would prefer to support, but one that is radical given the nature of the Children Act 1989. See further chapter 6 of this work, *passim*.

<sup>101</sup> See Bainham, A, *Children, Parents and the State*, Sweet & Maxwell. 1988, at 147 who argues that one interpretation of *Gillick* is that it gives greater say to doctors. See further chapter 7 below

<sup>102</sup> See Walsh, E, "Applications by Children: Paternalism v Autonomy" [1994] Fam Law 663

(*Wardship: Consent to Treatment*) [1992] 2 FCR 229<sup>103</sup> *Re W (A Minor)* (*Medical Treatment: Court's Jurisdiction*) [1992] 2 FCR 785,<sup>104</sup> which will be discussed in Part II of this thesis have, however, not taken the radical approach. The outcome of this is that where there is a conflict between what is believed to be in the best interests of the child and the child's autonomy and it is down to the court to determine the matter, his or her efficiency to decide for him or herself is the discarded factor. The courts are willing to draw a line to say that in certain circumstances a child's decision must be ignored where there is an apparent conflict between the decision itself and what the courts consider to be appropriate to protect the child's welfare. Indeed, as Bainham has put it the "general principle which seems to have emerged from this wave of litigation is that, while there are limits to the legal competencies of parents, children and other, the courts' jurisdiction is largely unlimited and it is often appropriate to exercise it."<sup>105</sup> This is an unsatisfactory state of affairs. Such activity is a challenge to the child's radical autonomy and should be rejected. In the following chapter it will be argued that such paternalism is not only prevalent in judicial decision making as regards children's rights, but also in the leading theories of children's rights. The question will be posed whether paternalism itself is ever justified?

If one interprets *Gillick* competence in an alternative strict sense i.e. that when a person is making a decision they must understand all of the consequences of that decision then one is faced with a practical difficulty.

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<sup>103</sup> *Re R* was a case which asked whether under the wardship jurisdiction the court could insist on the administration of sedatives drugs to a 15 year old girl whose mental state was said to fluctuate although during lucidity she expressly refused her consent. The court found R not to be competent and ordered that the treatment take place. See further chapter seven of this work, at 15-20.

<sup>104</sup> *Re W* was a case involving a 16 year old anorexic female who did not wish to attend a treatment unit. Although it was not, by virtue of W's age, a case which turned on her competence the court ordered that she should without her express consent be sent to the unit. See further chapter seven of this work at 15-20.

<sup>105</sup> Bainham, "Non-Intervention and Judicial Paternalism" in Birks, P (ed). *The Frontiers of Family Law Volume 1*, Oxford University Press. 1994, 161, at 161

Every day, adults make decisions which are ill-judged. Adults make decisions that affect other people in a way that returns them to the state of nature, they may commit tortious acts, criminal acts, ignore their contractual obligations all of which require vindication through the courts. However, in relation to decisions that affect themselves individual adults in a liberal democracy are free to do as they please. Their autonomy is sacrosanct. Problems arise around the boundary between adulthood and childhood and the courts feel authorized to intervene. However, the extent of that intervention must be checked by simple philosophical notions which apply to all human beings. Radical autonomy implies respect and not the well meaning regulation of paternalism reflected by an underlying subordination and the view that the court knows best. In social policy, it cannot know best. In philosophy it should know better.

At the beginning of this chapter a series of questions relating to rights were asked. At the end of this chapter, a position has been arrived at where it is possible to provide categorical answers to them. Every human being has the strong right (moral right) outlined in this chapter. They come from the very nature of each of us as a human being, our radical autonomy. They are universally applicable. They are the basis of community and the substance of law. Children, contrary to many beliefs, do not have more rights than adults, but they do have strong rights to radical autonomy at every age. The courts have often failed to properly implement the strong rights of children, but there are signs that the issue of children's autonomy is being taken more seriously by them (as in *Gillick*). It is for all these reasons that strong rights provide the best way of discussing the relationship between children and the law.

What is needed is for children to be emancipated from the state of nature which we, as adults commit them to. The emancipated view taken by the court in the *Gillick* case needs to be taken to its logical conclusion for this ambition to be achieved. Indeed, there are signs that in the higher courts in relation to cases involving the Children Act 1989 that judges are indeed taking the views of children more seriously. Consider, for example the views of Sir Thomas Bingham MR, as he then was, in the Court of Appeal in

*Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, 15 where he commented that:

"The Children Act 1989 enables and requires a judicious balance to be struck between two considerations. First, is the principle to be honoured and respected in their own right with individual minds and wills, views and emotions, which should command serious attention. A child's wishes are not to be discounted or dismissed simply because he is a child. He should be free to express them and decision-makers should listen. Second is the fact that a child is, after all, a child. The reason why the law is particularly solicitous in protecting the interests of children is because they are liable to be vulnerable and impressionable, lacking the maturity to weigh the longer term against the short, lacking the insight to know how they will react and the imagination to know how others will react in certain situations, lacking the experience to measure the probable against the possible. Everything, of course, depends on the individual child in his actual situation. For purposes of the Act, a babe in arms and a sturdy teenager on the verge of adulthood are both children, but their positions are quite different: for one the second consideration will be dominant, for the other the first principle will come into its own. The process of growing up is, as Lord Scarman pointed out in *Gillick* (at [1986] AC 112 at 186), a continuous one. The Judge has to do his best, on the evidence before him, to assess the understanding of the individual child in the context of the proceedings in which he seeks to participate."

*Simpliciter.* We will return again to this comment at the end of chapter three to assess its importance and in Part II of this work how the courts are dealing with cases of mature minors who are seeking orders by virtue of the provisions in the Children Act 1989.

## Chapter 3: A Critique of Alternative Discourses on how the Law Should Look at Children

"I am not confident that I could give, far less justify, a comprehensive list of the rights that children have, but I feel no unease in saying that they do have rights. I don't have a theory of children's rights, but I do at least have a theory of rights which can make sense of saying that children have them. Just because the concept of 'children's rights' is difficult to square with some theories of what it is for anyone to have a right, children's rights are a good test case for theories of rights in general."<sup>1</sup>

"Children will now have, in wider measure than ever before, that most dangerous but most precious of all rights: the right to make a mistake"<sup>2</sup>

### Introduction

Only individual human beings have moral (strong) rights. In chapter one it has been illustrated that individual children are like all human beings the holders of strong rights (they are radically autonomous), and that they are existentially free (their existence precedes everything else). It has been argued that the radical autonomy of individuals provides the moral basis for a theory of law. In chapter two the decision of Lord Scarman in the *Gillick* case has been given as an example of how the autonomy of children has been given greater credence within the remit of positive legal rules in recent years, and although this development is welcomed, it is not a recognition of

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<sup>1</sup> MacCormick, N, "Children's Rights: A Test-Case for Theories of Right" (1976) 62 *Archiv fur Rechts und Sozialphilosophie* 305 (cited in this work as "MacCormick")

<sup>2</sup> Eekelaar J, "The Emergence of Children's Rights" (1986) 6 *OJLS* 161, at 182.

the strong rights theory outlined in chapter one. Strong rights have been differentiated from weak rights; the former have ontological primacy whilst the latter are simple correlatives of duties. This difference will become increasingly significant. Ostensibly, this thesis is concerned with the legal rules contained within a particular statute, the Children Act 1989.

To say 'I have a right' or 'X has a right' is to make a normative statement, to establish a standard. The linguistic analysis of chapter one has shown that the interpretation of the individual standard-bearer has greater significance than the use of the word concerned. Thus, the use of the noun 'right' to describe the relationship between children and the law reflects a multitude of discourses. Each definition of the noun 'right' is necessarily rigged at its foundation by its exponent. The purpose of this chapter is to analyse further and challenge at their philosophical foundation the various perspectives in modern family law thinking, paying particular attention to various theories and analyses of 'rights' which have been used to illustrate the relationship between parents, children and the state. Such an investigation is necessitated by the sheer volume of literature that the area of children's rights has generated in recent years. The subject has become a debating ground for competing rights theories, both in relation to institutional rights (weak rights) and other schemes which describe themselves as being moral rights theories.

Whilst it is dangerous to assume that any general themes can be drawn from all the competing discourses, there are certain factors which in a small way unite some of the perspectives to be discussed.<sup>3</sup> Particularly within mainstream theories of children's rights there is the view that "[c]hildren's rights must embrace elements of both qualified self-determination and limited paternalism."<sup>4</sup> Such paternalism must be exacted via judicial intervention with regard to matters involving children if it is to have any

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<sup>3</sup> For a précis of various approaches to the more mainstream approaches to children's rights see further: Bainham, A, *Children: The Modern Law*, Jordans. 1993, at 76-105; Fox-Harding, L, *Perspectives in Child Care Policy*. Longman. 1991. For a discussion of the public/private dichotomy as an approach to family law see chapter one of this work.

<sup>4</sup> Bainham, n 3 above, at 93

significance in law. It is the idea that some form of paternalism is necessary when analysing the relationship between children and the law that will be challenged in light of the theoretical position advanced in chapter one to reflect the view of Caws who has written that "if the world is organized by the Other it ceases to be my world and becomes his world or their world."<sup>5</sup>

It will be suggested that the imposition of paternalism and its incorporation into mainstream analyses necessarily focuses attention away from the autonomy rights of children in order to emphasise what has been described as their welfare rights (or interests).<sup>6</sup> The issue then becomes one of deciding what is best for children in the eyes of others rather than allowing children who have the capacity to express themselves to determine matters affecting themselves. The traditional position of English law to support the welfare interests of children discussed in the last chapter is in this manner also reflected in the theoretical orthodoxy of commentators in the area of the relationship between children and the law. There is, unsurprisingly, a unity between what is happening in the courts and what is being written about in books.

Perhaps the best known of the theories discussing children's rights are those of John Eekelaar, Neil MacCormick, and Andrew Bainham all of whom advocate an interest theory model for children's rights. In contrast, Michael Freeman has proposed a theory of rights for children based on the work of Rawls in his *A Theory of Justice*.<sup>7</sup> Such theories are antithetical to other more extreme positions in relation to children ranging from those who believe that children are incapable of holding rights at all to those who believe that the liberation of children via rights discourse will help abolish discrimination against children based on age and those on the other extreme who wish to exercise complete paternalistic constraint against children. What I will propose is that none of these explanations are theoretically adequate to analyse how the law should treat children. In order to establish

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<sup>5</sup> Caws, P, *Sartre*, Routledge & Kegan Paul. 1979, at 100

<sup>6</sup> On the dichotomy between protecting children's welfare and promoting their rights, see generally Bainham, n 3 above, at 77 -78.

<sup>7</sup> Rawls, J, *A Theory of Justice*, Oxford University Press. 1973. (cited in this work as "Rawls")

this, however, one must analyse each theory in detail in order to test the strong rights theory against them.

### **Rawls' *A Theory of Justice* as a Basis for Freeman's Liberal Paternalism**

Following on from Worsfold's earlier analysis, Freeman<sup>8</sup> argues that:

"Of all moral theories, and whatever its defects, (a discussion of which lies outside the remit of this book), it is Rawls' notion of equality at the stage of a hypothetical social contract which comes closest to expressing the idea of treating persons as equals with respect to their capacity for autonomy. The principles of justice which Rawls believes we would choose in the 'original position' behind the veil of ignorance are equal liberty and opportunity as an arrangement of social and economic inequalities so that they are both to the greatest benefit of the least advantaged and attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>9</sup>

In the original position and under the veil of ignorance each participant is unaware of his or her particular capability (physical or intellectual), sex, racial origin, age etc. Such matters would be taken into account by the participants in the hypothetical state when determining the construction of the core principles which would govern the institutions in society and the principles of justice. Hence:

"no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of national assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conceptions of the good, or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged

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<sup>8</sup>Freeman M, *The Rights and the Wrongs of Children*, Frances Pinter. 1983. (cited in this work as "Freeman").

<sup>9</sup> ibid. at 55

in the choice of principles by the outcome of natural chance or the contingency of social circumstance."<sup>10</sup>

Rawls' theory is different from the strong rights theory advocated in chapter one in the key respect that it is a duty based theory. Thus, the participants in the transcendental scheme have a series of natural duties and they have priority over any other consideration (they are ontologically superior):

"[i]t is characteristic of natural duties that they apply to us without regard to our voluntary acts. Moreover, they have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements. Thus, we have a natural duty not to be cruel, and a duty to help another, whether or not we have committed ourselves to those actions."<sup>11</sup>

Drawing on these duties allows Freeman to justify and elaborate a fourfold classification of correlative children's rights.<sup>12</sup> They include welfare rights<sup>13</sup>, child protection<sup>14</sup>, rights to be treated like adults<sup>15</sup> and rights against parents<sup>16</sup>. Welfare rights, he identifies, are rights such as those contained in the United Nations Declaration of Rights for the Child 1959<sup>17</sup> (and now presumably the United Nations Convention on the Rights of the Child of 1989). They are a group of mainly uncontroversial rights such as the right to

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<sup>10</sup> Rawls, n 7 above, at 12

<sup>11</sup> *ibid.* at 115

<sup>12</sup> See Freeman, n 8 above, at chapter 2. This classification is based broadly on that of Wald, M, "Children's Rights: A Framework for Analysis" (1979) 12 University of California Davis Law Review 255. For commentary see Bainham, n 3 above, at 88 - 92; and Fox-Harding, n 3 above, at 166-169.

<sup>13</sup> Freeman, n 8 above, at 40

<sup>14</sup> *ibid.* at 43

<sup>15</sup> *ibid.* at 45

<sup>16</sup> *ibid.* at 48

<sup>17</sup> Resolution 1386 (XIV) adopted 20 November 1959. See Hodgson, D, "The Historical Development of "Internationalisation" of the Children's Rights Movement" (1992) 6 Aust J Fam Law 252

adequate nutrition, the right to an education etc. which assist in human flourishing.<sup>18</sup> Many of them are "rights against everyone"<sup>19</sup> and are therefore not enforceable against anyone in particular (they are vague). The second class of rights, which relate to the protection of children, emphasise their state of vulnerability and impose duties on parents and the state to ensure that the child is fully protected from harm. Such protection rights ensure minimum standards of treatment. Treating children like adults, the third class of rights under the scheme, are more contentious. On the one hand they mean that age-limits should undergo constant review in all areas of law since the construction of aged based disability might infringe the basic human rights of children, but on the other they ensure that children should be able to enjoy a full and proper childhood. Finally, the category rights against parents would allow adolescent children to act independently and challenge the decision making, in relation to major issues, of their parents in front of the courts if necessary (with the courts reserving the right to overrule the views of the child in certain cases).

Underpinning this four-fold classification of children's rights is a requirement that some degree of limited paternalism be used "which justifies interference with a person's liberty of action...by reasons, referring to welfare, good, happiness, needs, interests or values of the person being coerced." <sup>20</sup> On this basis it is within the work of Locke that for Freeman a proper application of what is described as liberal paternalism which can be applied to children are to be found. He accepts that necessary to any definition of paternalism is some form of coercion so that in the words of Rawls:

"[t]hose who care for others must choose *for them* (my emphasis) in light of what they will want whatever else they want once they reach maturity. Therefore, following the account of primary goods, the parties presume that their descendants will want their liberty protected.

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<sup>18</sup> Freeman, n 8 above, at 40-43

<sup>19</sup> *ibid.* at 41

<sup>20</sup> *ibid.* at 52 quoting Dworkin, G, "Paternalism", in Wasserstrom, R (ed), *Morality and the Law*, Wadsworth Publishing Co.1971, 107 at 108

At this point we touch upon the principle of paternalism that is to guide decisions taken on behalf of others. We must choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally."<sup>21</sup>

Now, the problems with the application of *A Theory of Justice* have been, as Freeman states, well documented.<sup>22</sup> Such problems seem, however, not to be insurmountable for him to apply the theory as foundation on which the concept of children's rights outlined above is based. Although he admits in his book to his own previous scepticism and subsequent rejection of a previous application of *A Theory of Justice* to children by Worsfold<sup>23</sup> he does not analyse the problems in any detail.<sup>24</sup> Such problems are, I believe, philosophical. As such, those who make use of Rawls' theory have to overcome them. Because the problems are philosophical it will be shown that the theory itself and its use of paternalism mean it is inappropriate to apply to children.. Indeed it appears, to narrate Freeman's own words used to criticise the work of another, that he too "is not as confident as he would like to be"<sup>25</sup> in the Rawlsian framework. To suggest, as he does, that the theory merely "*comes closest*" to expressing the idea of treating persons as equals with respect to their capacity for autonomy"<sup>26</sup> (my emphasis) is an indication of this justifiable lack of confidence.<sup>27</sup> The problems with his

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<sup>21</sup> Rawls, n 7 above, at 208-209

<sup>22</sup> See for example Daniels, N (ed.), *Reading Rawls*, Basil Blackwell. 1975.

<sup>23</sup> Worsfold, V, "A Philosophical Justification for Children's Rights" (1974) 44 *Harvard Educational Review* 142

<sup>24</sup> See Freeman, n 8 above, at 56 where he comments, "[d]o children fit into Rawls' scheme of justice and, if so, how? I used to be rather sceptical but I believe now that we can think about children within this framework. In Rawls' theory, children are participants in the formation of the initial social contract to the extent that they are capable." For an illustration of his earlier sceptical outlook see: Freeman, M, "The Rights of Children in IYC" (1980) 33 *CLP* 1, at 19

<sup>25</sup> Freeman, n 8 above, at 48. Freeman aims this criticism at Cohen, H, *Equal Rights For Children*, Littlefield Adams. 1980.

<sup>26</sup> Freeman, n 8 above, at 55

<sup>27</sup> Freeman makes no modification to Rawls' theory, although he does emphasise the fact that Rawls himself did not specifically refer to children in the text of his book, but only to the rather

analysis are insurmountable and a thorough analysis of them must lie within the remit of this work.<sup>28</sup>

The first criticism which can be levied at the theory is that to deny each participant in the original position the essential attributes of what it is to be a human being, as Rawls does, is necessarily to deny humanness itself.

Universalization is flawed as a basis for philosophical method. Thus, each of the parties in the original position is both "rational and mutually disinterested."<sup>29</sup> It is an accepted 'hypothetical state':

"In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. The original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice."<sup>30</sup>

Freeman believes that to ascribe rights to children, that "the exercise must perforce be hypothetical"<sup>31</sup> as we are asking "ourselves the question: from what actions and decisions would we wish, as children, to be protected, on the assumption that we would in due course desire to be rationally

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precarious state of 'the age of reason' which marks the beginning of rationality (see Rawls, n 7 above, at 209). However, no particular age or indication of age is given. Rather, decisions are made by participants in the original position to protect themselves in the event that they may be "irrational" in the real world (see Rawls, n 7 above, at 248-249). The principles of paternalism then allow others to act on our behalf during irrationality. Thus, "[t]hose who care for others must choose for them in light of what they will want once they reach maturity." (Rawls, n 7 above, at 209). Freeman and Worsfold imply from this that "as children's competencies develop, their participation should increase" (See: Worsfold, n 23 above, at 146; and Freeman, n 7 above at 56.)

<sup>28</sup> The defects of the theory were said by Freeman, n 8 above at 55, to lie "outside the remit of his book."

<sup>29</sup> Rawls, n 7 above, at 18

<sup>30</sup> *ibid.* at 12

<sup>31</sup> Freeman, n 8 above, at 4

autonomous, capable of planning our lives and deciding on our own system of ends as rational beings."<sup>32</sup> The original position is suitable for this exercise. Indeed, such a retrospective methodology is supported elsewhere.<sup>33</sup> Nonetheless, the very fact that one must resort to a hypothetical transcendental mechanism to evaluate a previous age related state leads to problems. By necessity, the analysis leads to the rejection of the complex real world of real people and thus of real decisions. As human beings we have to confront our condition. As such a moral theory must deal with how, as human beings, we really are. If we try and analyse the human condition in a scientific and hypothetical manner mistakes are bound to be made as one cannot universalize a particular. The goal that Freeman is aiming for through this method is a "a morally neutral theory of the good,"<sup>34</sup> and such an ambition is a worthy one. Of course, this depends in the end what Freeman means by the term "good" and to derive it mechanically is nonsensical.

His purpose in using this hypothetical mechanism is to reach a position where "a child has rights whether or not he is capable of exercising any autonomy."<sup>35</sup> In this respect, the rights elaborated would be as applicable to a blue eyed baby as they would to a *Gillick* competent minor. This objective is one that is shared by strong rights theory elaborated in chapter one. However, the problem with the rights that Freeman allocates to children is that they are no more than mere tokens because they do not bear full connection to the child as an end in self, as the strong rights theory does. The reason why this is so is because the hypothetical state is merely a substitute for truth. Moreover, even if a child is regarded as being "capable of exercising any autonomy"<sup>36</sup> he or she may be denied the exercise of his or rights on the grounds that the decision he or she takes would not be one taken by particular participants in the original position.

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<sup>32</sup> *ibid.* at 4

<sup>33</sup> See for example, Douglas, G, "The Retreat from *Gillick*" (1992) 55 MLR 569, at 574.

<sup>34</sup> Freeman, n 8 above, at 4

<sup>35</sup> *ibid.* at 57

<sup>36</sup> *ibid.*

This is not to say that Rawls' theory does not recognize human beings as ends in selves nor that the theory itself does not work (it does, like an elaborate mosaic within its own frame of reference). However, the lack of any connection to the real world means that it pays a heavy price. The scheme does not even begin with a particular belief, a particular view of the world which is the necessary avenue to find truth. The project deserts any discussion of the human condition. In doing this it fails to fully embrace the concept of love. It is, as Detmold has put it simply "nearly an exercise in love."<sup>37</sup> This is because the conception of love that the theory has is a universal one. Yet, the act of love just isn't like that. It is particular. It is based on choice. A choice exercised through the act of recognition. Thus that it is 'nearly' an exercise in love should not be good enough for the moral philosopher or for those seeking a neutral theory of the good. Because the idea and not the practice of love is given (by Rawls) to the participants in the original position then the theory must fail. To have only "an idea of love"<sup>38</sup> is to not understand it. Love is at the heart of strong rights talk which underpins community.

As there are no particular actions in the original position then Detmold has elaborated there can be no particular ends.<sup>39</sup> In the real world which is made up of particular actions and choices, how can the principles of justice which are advocated in the hypothetical transcendental state apply ? In the original position justice is the end of each participant. As each participant is an end in self, then it follows as night follows day that the principles of justice apply to myself, and to myself only. The problem is, that in the real world of real actions and other people (other ends in selves) I can impose my will upon them by virtue of the fact that it is my end in accordance with the principles of justice (which necessarily determine action in the real world):

"[I] can only act on the principles (of justice) if they become my end. And when I act on them in respect of another, or in the name of another, who has not taken them as his end (for example, when I punish him, or require him to

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<sup>37</sup> Detmold, M, *Courts and Administrators*, Weidenfeld and Nicolson. 1989, at 127

<sup>38</sup> *ibid.* at 127

<sup>39</sup> *ibid.*

keep the laws) I find myself imposing my end on another by virtue of the idea that humans are ends in themselves. It is apparent that when the 'I' of this paragraph is extended to the whole of my political community the contradiction raised is a fundamental contradiction of politics."<sup>40</sup>

Thus, the principles of justice only allow the pursuance of *my* end.

This approach has significant implications for the treatment of children by adults as it brings into focus the precise problem of applying paternalism to children. This is because the form of quasi-paternalism accepted by Freeman arising out of the original position implores the imposition of my end on that of another, not because he or she is an end in self, but because *I* am an end in self. There is an idea that the other is an end in self, but there is no true embracement of it. How then is a real decision in the real world of a real adult over a real child to be justified or determined? How is it the end of the child in relation to whom the decision is being made. Moreover, how is a judge in a court supposed to apply this hypothesis. Freeman allows the views of children to be heard in such cases, and sometimes such views may be the overriding determinant with regards to the decision to be made. However, there is no certainty as regards the child's opinion. The end of the child is merely a consideration. I can justify the repression of his or her opinion because of what I decided was my end in the original position. How can this be a determinant in relation to a decision which is someone else's end? It logically cannot be, and this is a serious deficiency in Freeman's approach. In the end the decision which is made will come down to a value judgement on the part of the maker of the decision, and in relation to rights against parents Freeman would prefer that individual to be a judge in a court of law. But on what criteria are they to decide? To allow, as he seems to, parents, judges, doctors, etc. to make decisions for children using Rawls' notion of paternalism is necessarily to deny him or her as an end.

To not allow the mature child to make a decision whatever the views of others, even in the original position, is to challenge his or her radical autonomy, their existence as a human being. To base it on the basis of a

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<sup>40</sup> *ibid.*

convoluted form of paternalism is weak. Take an example. "[T]he adolescent" Freeman argues, "would be less prepared to become a rationally autonomous person"<sup>41</sup> without a form of compulsory education (although he rightly rejects indoctrination). Yet, as Franklin has rightly stated "some of us genuinely believe that much of the educational provision we received was a valueless waste of time."<sup>42</sup> Whilst this point might go merely to the type of education one received as a child it also confirms that to try and enforce mature children to partake in certain activities is problematic in that it is trying to legitimate intervention based on a mere possibility of future consent. It is axiomatic that adults make decisions on behalf of children, but the value judgements necessary in Freeman's paternalism involve a form of coercive activity by the adult world over children when such an approach is unnecessary. A.S. Neill in his book *Summerhill*<sup>43</sup> argued that children should be freed from the constraints of formal and compulsory education. He sees education as being connected to freedom:

"I hold that the aim of life is to find happiness, which means to find interest. Education should be a preparation for life."<sup>44</sup>

Education is seen in this way as a mechanism through which society creates a better set of human beings. Yet it involves no element of compulsion or force. Indeed, it is on this basis that Neill is critical of formal education.<sup>45</sup>

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<sup>41</sup> Freeman, n 8 above, at 60

<sup>42</sup> Franklin, B, "Children's Political Rights" in Franklin, B (ed), *The Rights of Children*, Basil Blackwell. 1986, 24 at 35

<sup>43</sup> Neill, A, *Summerhill*, Pelican. 1970.

<sup>44</sup> *ibid.* at 36

<sup>45</sup> *ibid.* at 38 where he comments that "When I lecture to students at teacher training colleges and universities, I am often shocked by the ungrownupness of these lads and lasses stuffed with useless knowledge. They know a lot; they shine in dialectics; they can quote the classics - but in their outlook on life many of them are infants. For they have been taught to *know*, but have not been allowed to *feel*. These students are friendly, pleasant, eager, but something is lacking - the emotional factor, the power to subordinate thinking to feeling. I talk to these of a world they have missed and go on missing. Their textbooks do not deal with human character, or with love, or with freedom, or with self-determination. And so the system goes on, aiming only at standards of

Now, Freeman rightly believes that education is necessarily tied to one's capacity for autonomy<sup>46</sup> (although Franklin believes this argument to be a "naive and liberal" one)<sup>47</sup> but he implicitly does not connect autonomy in this way with freedom, and such a view is mistaken. The implications and the language of paternalism must be taken out of the debate regarding the upbringing of children and be replaced with a theory which gives to children the autonomy with which they are born.

Paternalism by its nature and whatever its form requires the imposition of what one individual as the *pater* figure thinks is good for another.

Paternalism in any form implies control and not respect. It should be rejected on that basis, *simpliciter*.<sup>48</sup> Liberal paternalism may compel the recognition of children's rights, but it does not overcome the fact that children still to a large degree remain treated as objects. Decision makers, be they parents, health professionals, or High Court judges will always entertain doubts as to the appropriateness of their actions in cases involving children. Such doubts exist because the decision makers themselves are human beings who are radically tied to the moment when their decisions are taken. No universalization of humanity assists in this process. How does Rawls' theory help in the complicated cases which are brought before the courts? Well, the judge need only imagine what he or she devoid of all his or her idiosyncrasies would have liked to have happened in their particular cases. Such a process is ludicrous. We are individual human beings full of

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book learning - goes on separating the head from the heart. " Bradney has also highlighted how in relation to children's religious education that in England and Wales that "the law requires the pupils to be treated as though they were essentially British and, usually, essentially Christian. In both cases education is designed to fit a child for a mould." Bradney, A, *Religions, Rights and Laws*, Leicester University Press. 1993, at 73

<sup>46</sup> See Freeman, n 8 above, at 58

<sup>47</sup> Franklin, n 42 above, at 35-36

<sup>48</sup> See Barton, C and Douglas, G, *Law and Parenthood*, Butterworths. 1995, at 121 who argue that Lord Scarman in the *Gillick* case "combined recognition of children as persons with a degree of paternalism, perhaps sharing Michael Freeman's view that when parental 'representativeness' ceases, as being inconsistent with the pursuit of 'primary social goods, then court intervention may follow."

idiosyncrasies, inadequacies and inconsistencies or we are nothing and moral theories need to take that fact on board.

In the end, the implicit value judgements found in the Rawlsian analysis have no attachment to the truth found in the existential approach outlined earlier. The real phenomena of the external world are rejected in favour of a world of transcended hypothesis, where everything in the end makes sense, even the legal system seems to fit and forms part of a wonderful tapestry which has at its intuitive centre "justice as fairness."<sup>49</sup> An integral part of the scheme is a justification of paternalism. The only real way to be just and fair is to respect the other as an end in self, to necessarily love him. To objectify an individual child, a necessary part of this paternalism is to reject him or her.

To reject paternalism as a philosophical approach is not to endorse the belief, found in some of the literature relating to the child liberationists, that all children should be treated like adults and therefore be left to their own devices. The family forms the principle of his or her upbringing. The familial tie is, as Althusser<sup>50</sup> has pointed out, the most intense and influential tie in one's life. It is not usually broken lightly, neither by adult (in the case of divorce) or by children (in the case of rejecting the immediate psychological link of his or her parents - their responsibility to make the decision for the him or her.) Respect needs to be afforded to a child expressing himself or herself in this regard. Children are and should be treated as human beings. Childhood remains a special state, and this will always be the case. As a baby, it is obvious that protectionism is the most important philosophical approach - protection of the radical autonomy of the child concerned (to prevent neglect, abuse etc.). A baby is inefficient as an end in self and needs this protection, asserted by the courts. Protectionism need not mean paternalism, but respect.<sup>51</sup> As a child becomes more efficient

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<sup>49</sup> Rawls, n 7 above, at 3

<sup>50</sup> Althusser, L, *The Future Lasts Forever*, Chatto and Windus. 1993.

<sup>51</sup> See Freeman, n 8 above, at 44 who argues that protectionism as rights is "a highly paternalistic notion." His basis for this is that we do not ask children if they wish to be protected? Yet we don't need to ask this, we simply need to look at the other as mirror of self.

it is then that he or she must have the overriding say over his or her own life - the true exercise of what it is to be an end in self. This is the true acceptance of the radically autonomous individual.

### **The Will Theory / Interest Theory Dichotomy**

Within the field of children's rights there has been an acrimonious dispute (which still continues) between those theorists who advocate the will theory and those advancing the interest theory as to the precise nature of rights (both 'legal' and 'moral'). Both theories are simple analyses of duties (in the Hohfeldian sense) and are, therefore, theories of weak rights. The split between the authors of the tradition can be seen in this respect as a debate within a debate. One particular focus of that debate has been on whether children are capable of being rights holders. The will theory rejects this proposition whilst the interest theory embraces it. It is on this basis that MacCormick has argued that those who argue that children do not have rights suffer from "moral blindness."<sup>52</sup> Reference is made in both theories to institutional and non-institutional rights, although this phrasing in itself is somewhat limited and misleading. As Lucy has pointed out "the former must arise under some institutional practice whilst the latter need not."<sup>53</sup> Whilst the former group of rights are easy to identify (they are the logical correlative of a duty presented in a particular legal rule or even in an international statement of human rights (according to Lucy)) the latter are more vague and have been referred to by MacCormick as moral rights and by Hart as natural rights. Either way, they do not have ontological primacy. Nevertheless, the significance of both theories within the legal academy should not be underestimated, although the precise nature of the debate is often misunderstood (sometimes, by its authors).<sup>54</sup> In particular, the theory that children can be said to have certain interests is the dominant theory among legal scholars as to the precise nature of the children's right debate. It is worthwhile noting at this point that the interest theory also has the notion

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<sup>52</sup> MacCormick, n 1 above, at 155

<sup>53</sup> Lucy, W, "Controversy About Children's Rights" in Freestone, D (ed), *Children and the Law*, Hull University Press. 1990, at 217

<sup>54</sup> For an explanation of these misunderstandings see Lucy, *ibid.*, *passim*.

of limited paternalism at its foundation. This is why both theories need to be discussed in some detail.

### **The Will Theory**

Perhaps the most famous lawyer who is associated the will theory is H.L.A. Hart (he is also perhaps the best known positive lawyer). His jurisprudential analysis is deeply influenced by linguistic philosophy.<sup>55</sup> Thus, for Hart, the role of jurisprudence is to elucidate what is to be understood by the term 'law' as a separate language-game. Hence, law is valued as a separate and independent study. He argues that there is only a historical connexion between law and morality. An important part of separate study of law is the determination of various terms which act as concepts within the legal system itself, such as rights and duties etc. Hart was, as was highlighted at the beginning of chapter one, able to differentiate between a natural right and a legal right. Yet, there is no inseparable link between the two.

Hart shares with others in analytical jurisprudence the aim to determine the various concepts of law. As to the actual determination of these concepts however, there is significant differences in the critique of law between those who can be said to follow the utility / welfare (Bentham and Austin) approach and those who advocate the liberty / autonomy approach (Hart). It is within this dichotomy that the dispute between the interest and will theory lies.<sup>56</sup>

To ask, for example, what constitutes a 'right' within a legal system is different from any other understanding of the noun. Thus for Hart a right in law could be described as follows:

"A statement of the form 'X has a right' is true if the following conditions are satisfied:

(a) there is in existence a legal system.

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<sup>55</sup> Hart was deeply influenced, for example, by the views of Wittgenstein discussed in chapter one. See for example Hart, H, "Positivism and the Separation of Law and Morals" (1958) 71 Harv L R 593; and Hart, H, *Concept of Law*, Oxford. 1961.

<sup>56</sup> See Lucy, n 53 above, *passim*.

- (b) under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.
- (c) this obligation is made by law dependent on the choice either of X or some person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorized person) so chooses or alternatively only until X (or such person) chooses otherwise.

(2) A statement of the form 'X has a right' is used to draw a conclusion of law in a particular case which falls under such rules."<sup>57</sup>

In light of this particular use of the term legal right it is a practical impossibility to suggest that children are capable of holding a right, as they are incapable of the choice (the will theory is sometimes called the choice theory) to authorize or abstain from the particular action concerned. Rights are, in this respect, causal to the exercise of human will. Children are thus incapable of the exercise of what is their will and hence cannot have rights.

Hart's analysis also extended to the concept of natural rights. He argued that there was only one natural right, the right to be free.<sup>58</sup> Again, however, children (classified with animals by Hart) are incapable of exercising their freedom and again could not be said to have natural rights.

Rights which pertain to the legal system, are for those who advocate the will theory, are then by definition superior to moral rights. It may be desirable for such rights to be contained within the legal rules of the system under consideration, but a legal rule can never be made void by an external moral argument. This is why the will theory must be analysed as a theory of weak rights - there is no close connexion between it and the radical autonomy of the individual. The rights described by it can be described merely as entitlements<sup>59</sup> or claims. On this basis it is inadequate as a description of rights, both for adults and for children.

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<sup>57</sup> Hart, *Definition and Theory in Jurisprudence*, Oxford. 1953, at 16-17

<sup>58</sup> Hart, H, "Are there any Natural Rights?" in Waldron, J, *Theories of Rights*, Oxford University Press. 1985, at 77

<sup>59</sup> Lucy, n 53 above, at 229

Hart's argument here as to the nature of rights, both natural and legal, is quite plainly philosophically faulty. To attach capacity as a rights holder to the exercise of will is difficult. It was suggested earlier that statutes only relate to weak rights. Statutes create a series of duties on the state and individuals to carry out. To suggest that a child cannot receive the right concomitant to that duty by virtue of his or her mental incapacity is to analyse the concept of the law from the wrong starting point. A statute which, for example, sought to relieve child neglect, poverty or assist in children's education has at its heart the moral task of improving their potential as human beings. Now, modern statutes need not and do not conceive of the receipt of such benefits in terms of rights for children. But the ontological analysis of rights requires us as a community to look at statutes in such terms by virtue of treating human beings as ends in selves whatever their age.

### **The Interest Theory**

In opposition to the advocates of the will theory of rights, interest theorists argue that on the basis that the will theory cannot ascribe rights to children it should be rejected, and it is only through a thorough analysis of interests that the issue of the importance of rights is properly addressed, both within and outside of the legal system. This analysis in itself makes the interest theory sound attractive. Again, however, the analysis offered by the interest theory pertains only to rights in the weak sense. The rights and duties under discussion do not have ontological primacy, and they end up being the mere correlatives of various duties. Although the interest theory accepts that children have legal and moral rights, there is like in the will theory no necessary connection between the two and no connection between the definition of rights advanced and the radical autonomy of the individual. Rather, it is the role of those involved in the discussion, creation and application of legal rules to review moral arguments and place into law those rights that are deemed to be in the best interests of the rights holder concerned. The emphasis is thus on the actionable claims of the legal system and the important external application of moral principles. The growth in the importance of children's rights in the external world of the

legal system is thus eventually embraced by the legal system when the interests of the group concerned are properly accepted by the community.

### **MacCormick's Theory of Interests**

That the will theory was incompatible with the concept of children's rights was highlighted by MacCormick who advocated that only through a theory of interests could one establish a proper basis for the rights of children.<sup>60</sup> The interesting thing about MacCormick's analysis of children's rights is that he was able to give children rights based on their interests which would form the basis for imposing a duty on someone else to satisfy.

MacCormick posits that "in broad and general terms there are two competing theories as to the nature of rights."<sup>61</sup> The broad and general nature of this admission should not be underestimated. He argues that moral and legal rights are derived from specific interests that might be advanced and this is the basis of children's rights. Thus, McCormick begins by making what he describes as:

"a simple and barely contestable assertion: at least from birth, every child has a right to be nurtured, cared for, and, if possible loved, until such a time as he or she is capable of caring for himself or herself. When I say that, I intend to speak in the first instance of a moral right. I should regard it as a plain case of moral blindness if anyone failed to recognise that every child has that right."<sup>62</sup>

As it is in the child's interests to have such a right, then it the duty of his or her parents to satisfy it. On this basis, McCormick challenges those who might be morally blind (an argument aimed specifically at will theorists):

"There are, however, morally acute and clear-sighted people who would deny not the substantive moral tenet involved in ascribing rights to children,

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<sup>60</sup> MacCormick, n 1 above.

<sup>61</sup> *ibid.* at 305

<sup>62</sup> *ibid.*

but the appropriateness of expressing the moral tenet through the linguistic device of the noun 'a right'. Say if you will, that morality demands or the law demands, that all children be nurtured, cared for, and, if possible, loved, but do not say that they have a right to such treatment, for to use the term is to obfuscate."<sup>63</sup>

The rhetorical argument that McCormick advances here, goes to the critique of the will theory. To suggest that children cannot have rights is to engage in obfuscation. This is because, he argues, it is perfectly possible for rights to be given to children if one isolates their interests. Thus as isolated interest for a child, creates a right for a child which in turn will lead to the imposition of a duty, either legal or moral on the holder of the duty to fulfil. In this way, the giving of rights to children is not problematic because it bears no relation to the will or choice of the person in question.

Whilst McCormick's critique of the will theory is extremely persuasive given the intransigence of the will theory in relation to the legal and moral rights for children, its own limitations must be recognized. McCormick's use of the word right here is accurate within the frame of reference he adopts. It should be remembered, however, that McCormick's analysis is of the weak rights discussed in chapter one, and like the rights discussed in the will theory, they do not have ontological primacy. McCormick describes legal and moral rights as being analogical in form. But is this good enough? It is on this basis that McCormick claims for example that children have a right to proper nurturing, care and affection. And because he isolates this right it is logical to argue that the child's parents hold the duty to satisfy it. However, some of the interests and necessarily rights that McCormick claims for children are highly contentious. For example, he argues that children have a right to be properly disciplined as this makes them better human beings.<sup>64</sup> Such a claim is philosophically baseless. To argue that children have a right to be controlled as it is in their best interests (and that consequently they have a right to that) is precisely to deny their moral right (strong right under the conception of moral right advanced earlier). The

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<sup>63</sup> *ibid.* at 306

<sup>64</sup> *ibid.* at 316

moral rights that MacCormick claims to be indisputable - to a safe environment, to be disciplined, to the possibility of love - are in fact highly disputable. The theory is thus a theory of weak rights - of claims that may or may not be true. As a result of this criticism one might ask if one does not accept such interests as rights is one therefore "morally blind"?<sup>65</sup> Well the answer to this is an emphatic no. In the end, it all comes down to what one thinks it means to act morally. The moral right emanating from the strong rights theory described earlier has deep attachments - to the radical autonomy of each individual human being, a philosophy derived from love itself. Morality, for MacCormick involves elements of prohibition, of paternalistic constraint. A moral right is one that may involve an element of force on a particular individual (there is a similarity here with Freeman's liberal paternalism) One is saying here: As your parent I am depriving you of your dinner this evening, as this is your (moral) right. Language is being used here to lull the reader into a different mind set (the lawyer - MacCormick admits this - but lawyers are easy to fool). Thus a moral question can become one of control. The language works, MacCormick constructs a wonderful polemic in favour of children's rights that has been seized on by family lawyers, but it needs challenging. What belies the language are specific philosophical assertions that are hidden and need digging up by asking a few very simple questions.

### **Eekelaar's Conceptualization of Children's Rights Based on their Interests**

Like Neil MacCormick, John Eekelaar has rejected the will theory in favour of an analysis of the interests that children might be said to possess as a basis for their legal and moral rights. Eekelaar, however, has taken the argument one step further and has tried to conceptualize the rights that children might be said to have by referring to the interests that children have. He has argued that:

"contemporary society has still to determine the full extent of what the interests of children are and the degree to which, by restraining the

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<sup>65</sup> *ibid.* at 305

fulfilment of conflicting interests of adults, the children's interests should be promoted to the status of rights."<sup>66</sup>

In this capacity the interests theory is a pragmatic adaptation of positive moral interests into fully constituted legal rights. To this extent, the rights espoused are regarded as being creatures of the law rather than being its foundation. The interests are not fixed, but range over time. It should be pointed out again that this makes Eekelaar's framework one which discusses merely weak rights (rights without ontological primacy).

Eekelaar bases his conceptualization on the definition of rights proposed by Joseph Raz, who suggests that:

"a successful definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why. The definition may advance the case of one such theory, but if successful it explains and illuminates all. In this spirit I shall first propose a definition of rights and then explain various features of the definition of rights and criticise some alternative definitions.

Definition: 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.

Capacity for Possessing rights: An individual is capable of having rights if and only if his well being is of ultimate value or he is an 'artificial person' (e.g. a company).<sup>67</sup>

Analysing rights through this definition leads Eekelaar to track the growth and decay of parental rights and the increasing importance of children's rights within the legal system historically. The articles provide a wonderful historical documentation of legal rights within the field of family law and

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<sup>66</sup> Eekelaar, n 2 above, at 170

<sup>67</sup> Raz, J, *The Morality of Freedom*, Oxford University Press. 1986, at 166. See also, Raz, J, "Legal Rights" (1984) 4 OJLS 1

show how, over time, the emphasis has shifted to a situation where now the importance of children's rights has become a crucial legal issue. It is worthy of note here that in contrast to Freeman above, Eekelaar lists the interests that children might be said to possess and not their rights. It might be said that the interests children have are uncertain, and as a result the concomitant rights might yet have to be determined.

The interests that a child may have are categorized in this regard as basic interests, developmental interests and autonomy interests and Eekelaar asks whether any of those respective interests have assumed the character of rights in "the late twentieth century."<sup>68</sup> The interests of children are independent of their parents. The first category of interests which Eekelaar claims for children are basic interests.<sup>69</sup> These are reflected in a series of duties, most notably on the part of parents but also by the state (he uses Section 1 of the Children and Young Persons Act 1969 as an example) to ensure that the child is properly nurtured, and has his or her physical emotional and intellectual needs taken care of. The developmental interests that a child might be said to have ensure that a child gains maximum possible opportunity and does not suffer disproportionate disadvantage in relation to others. They are reflected in a series of duties primarily vested in the state but also in the child's parents. (For example, the Education Act 1944 ensures children a right to education but per s. 1 of the Act it is the duty of a child's parents to ensure that their child is educated.) The final, and for Eekelaar, least important of the interests that children can be said to have are autonomy interests i.e. "the freedom to choose his own lifestyle and to enter social relations according to his own inclinations uncontrolled by the authority of the adult world, whether parents or institutions."<sup>70</sup> Such autonomy interests are subordinate to the basic and developmental interests on the basis that few adults would choose that their opinions not be given centre-stage as this would, he implies, be "at the price of putting them at a disadvantage as against other children in realizing their life-chances in

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<sup>68</sup> Eekelaar, n 2 above, at 171

<sup>69</sup> *ibid.* at 170

<sup>70</sup> *ibid.* at 171

adulthood."<sup>71</sup> Thus when there is a clash in the interests the latter category of autonomy interests, which are reflected in the *Gillick* <sup>72</sup>decision, must give way. However, where the autonomy interests can be exercised without threat to the other interests their "claim for satisfaction must be high."<sup>73</sup>

Eekelaar in this respect, like Freeman and MacCormick above, subordinates the autonomy interests of children on the basis of a form of limited paternalism. This is in response to the inevitable "problem"<sup>74</sup> as he puts it "that children often lack the information or ability to appreciate what will serve them best." Therefore, in a similar principle to the Rawlsian paternalism outlined above, he argues that in assessing those interests which might form the basis of rights one must decide for a child on the basis that one is merely acting for a child as if he or she was making the decision as a fully mature adult. He suggests that "[i]t is necessary therefore to make some kind of imaginative leap and guess what a child might retrospectively have wanted once it reaches a position of maturity."<sup>75</sup> This idea of an imaginative guess is certainly preferable to Freeman's hypothesis, but on what basis is the guess to be made? Which fully mature adult should make it? One like Freeman, one like Eekelaar, a judge perhaps. We shall come to this issue at the end of this chapter.

Now, Eekelaar is probably the leading functionalist thinker in family law.<sup>76</sup> Elsewhere, he has outlined the protective, adjustive and supportive role that he believes that the law should play in relation to the family.<sup>77</sup> Rather than simply stating the precise legal rules, Eekelaar sets out a series of goals that the law should aspire to in relation to children. The goals for law in this instance, it seems, is to properly reflect the interests that children have. The

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<sup>71</sup> *ibid.* at 171

<sup>72</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402

<sup>73</sup> Eekelaar, n 2 above, at 171

<sup>74</sup> *ibid.* at 170

<sup>75</sup> *ibid.*

<sup>76</sup> For a succinct and helpful analysis of the functionalist perspective see: O'Donovan, K, *Family Law Matters*, Pluto Press. 1993, at 19-20

<sup>77</sup> Eekelaar, J, *Family Law and Social Policy*, Weidenfeld and Nicolson. 2nd edn, 1984.

problem is that the goals that family law is to achieve remain far from clear. Beneath the elaboration of these interests lie subjective value judgements as to how the law should relate to children. But behind a particular value judgement lies a particular view of the world and as we have seen in chapter one there are as many views of the world as there are human beings. Academic life would be banal if we all agreed about everything.

It is this criticism which cuts through the interests theory as a true philosophical basis for ascribing rights. On what basis should one give children interests? Who determines and decides them? Moreover, why precisely are one's autonomy interests as a child reduced in significance in comparison to the welfare interests (basic and developmental) that he argues are the most important? Elsewhere, Eekelaar has elaborated a concept of what he describes as 'dynamic self-determinism'<sup>78</sup> which means that as a child matures he or she will be able to make contributions to how he or she is brought up, but as Barton and Douglas have suggested this reconciliation of welfare and autonomy "is little more than a plea to parents and others to 'remember the child' for whom they take responsibility."<sup>79</sup> The autonomy interests continues to play second fiddle to its master.

Because the autonomy interests does play second fiddle to the basic and developmental interests for Eekelaar, the decision of the House of Lords in the *Gillick* case is to be regretted because it goes a step too far by removing the state's involvement in child-rearing. He would prefer to have an age cut-off point at which the necessary consideration of the autonomy interest be activated, a view directly rejected by Lord Scarman in that decision and also a view which fails to account for the differences between the normative and institutional concepts of childhood discussed in the previous chapter. He suggests that as a result of the *Gillick* decision the question to be asked by the court is not what is in the best interests of the child but whether the child has the capacity to make the decision. The rhetorical conclusion of Eekelaar is "that children will now have, in wider measure than ever before,

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<sup>78</sup> Eekelaar, J, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" (1994) 8 Int'l J L & F 42

<sup>79</sup> Barton and Douglas, n 48 above, at 32

that most precious and most dangerous of rights: the right to make their own mistakes."<sup>80</sup> In fact this has turned out to be a false dawn.

In his analysis of the interest theory and the will theory as adequate explanations for rights, Lucy has pointed out that for the interest theory to be credible its exponents have to deal with the problem of what he describes as "individuation"<sup>81</sup> i.e. "of determining which interests, out of the vast range of interests which can be generated in this way create rights."<sup>82</sup> Thus, MacCormick has given his list and Eekelaar has related his in more delicate detail. The interests themselves, however, are not fixed. What for one person might be regarded as being in the interests of a child might be alien to someone else (at least this problem is avoided by Freeman). The importance of raising the question of rights for children, is not to give a very weak moral justification for their control by adults, but rather to allow all individual children to assert their individualism in the world around them (this was, I would argue, the legacy of *Gillick*). Of course the real problem with Eekelaar's elaboration of interests begin in his use of Raz's catch all definition of rights and what constitutes a rights-holder. Any theory of rights which is able to categorize human beings with corporations (who are also rights holders in this sense) is questionable as the basis for the elaboration of the relationship between legal rules and individual human beings. He argues that "while a philosophical definition of rights may well be based on a particular moral or political theory (the theory dictates which features of rights, traditionally understood, best explain their role in political, legal and moral discourse) it should not make that theory the only one which recognizes rights. To do this is to try to win by verbal legislation."<sup>83</sup> I, for one believe, that the interest theory is a useful way to ascribe rights to individuals, so long as one recognizes that its application is restricted to rights that are weak. This is not verbal legislation, but simple philosophical fact. Beneath the interests theory lies an analysis of how we should look at the world. The same criticism levied at Freeman's and MacCormick's

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<sup>80</sup> Eekelaar, n 2 above, at 182

<sup>81</sup> Lucy, n 53 above, at 240

<sup>82</sup> *ibid.*

<sup>83</sup> Eekelaar, n 2 above, at 166

approaches can also be levied at the Eekelaar in this regard: a world that is controlled by the Other is not my world. If it is not my world, then my radical autonomy is challenged.

### **Bainham's Test Case for the Interest Theory**

Whereas MacCormick derived that the interest theory is the best way to analyse the rights that children might have, and Eekelaar has sought to conceptualize those interests more carefully, Andrew Bainham has recently sought to rank the various interests that children and parents have and has sought to test them by examples.<sup>84</sup> Bainham expresses support for Eekelaar's use of interests by describing their use as "the crucial development in the conceptualization and recognition of children's rights."<sup>85</sup> In an attempt to take the interest theory a step further by using the analysis of parental rights given by Alexander McCall Smith<sup>86</sup>, Bainham asks: "How in any given family situation, are conflicting interests to be weighed?"<sup>87</sup> Through an analysis of interests and parental rights he seeks to solve what he regards as being the "crucial issue"<sup>88</sup> of "when and on what basis the law should prioritise either the claims of parents or those of children."<sup>89</sup> Bainham is right. This is the *crucial issue*, not only for this thesis, but for any point of conflict between individual human beings, be they members of the same family or not. The answer to it is quite simple, but first Bainham's own framework and answer to it will be considered.

Bainham prefers to abandon rights-talk for what he describes as the more neutral language of interests on the back of which he seeks to address *the* crucial issue. He argues that it is necessary to provide a criterion through

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<sup>84</sup> Bainham, A, "Non-Intervention and Judicial Paternalism" in Birks, P (ed), *The Frontiers of Liability*, Oxford University Press. 1994, at 161

<sup>85</sup> *ibid.* at 162

<sup>86</sup> McCall Smith, A, "Is Anything Left of Parental Rights?" in Sutherland, E and McCall Smith, A (eds), *Family Rights: Family Law and Medical Advance*, Edinburgh University Press. 1990, at 4

<sup>87</sup> Bainham, n 84 above, at 173

<sup>88</sup> *ibid.* at 173

<sup>89</sup> *ibid.*

which various interests of parents and children can be ranked. He classifies that there are "primary interests"<sup>90</sup> and "secondary interests,"<sup>91</sup> and in some cases the primary interest will be with the child and sometimes with the parent and the same is true of the secondary interest. Thus:

"The more fundamental the interest in question, and the more serious the consequences of failing to uphold it, the more likely it would be that interest would be regarded as the primary interest."<sup>92</sup>

To assess this framework Bainham gives five hypothetical situations which might have to be confronted by the courts, the final one of which tackles head on the kind of situation considered in this thesis. It is worthwhile assessing all of these examples, not only to judge Bainham's own framework, but to compare it with the strong rights thesis.

#### *Example 1*

"Child C requires a life-saving blood transfusion. Parent (P), a Jehovah's Witness, objects on religious grounds. Here the interests at stake are C's interests in survival and P's interests in freely practising his religious beliefs and raising C according to these."<sup>93</sup>

In this case, Bainham ranks the interests of the child as greater to that of his or her parents and hence it is the primary interest and a court should, if confronted by such a situation, make sure the transfusion takes place.

#### *Example 2*

"Parents (M) and (F) are unhappy and intend to separate with a view to divorce. Child (C) is devastated and implored them to stay together."<sup>94</sup> Here, Bainham regards the "autonomy interests" of (M) and (F) as greater than those of the child. He comments that "Personal autonomy is highly valued in a liberal democracy and I, along with most people, would rank this

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<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.* at 174

<sup>94</sup> *ibid.*

above any interest C may have in forcing (M) and (F) to stay together (even if it were possible)". This, for Bainham represents the philosophical basis for divorce laws.

### *Example 3*

"Time has passed and M and F have divorced. C resides with M. F at first visited C regularly but of late his visits have become irregular and M, who by this time has remarried, is not anxious to facilitate "intrusions" by her former husband. F, for his part, is finding the efforts an inconvenience and is inclined to let contact lapse."<sup>95</sup>

In this situation, Bainham places the interest of C as greater and is best served by her maintaining contact with her father. Bainham is therefore inclined to think that the courts would be justified in imposing a legal duty on M and F to continue contact between parents and their children.

### *Example 4*

"Parents (F) and (M) habitually visit M's parents in the United States at Christmas. Child C (aged 12) dislikes making the trip and is refusing to go this year. There is no responsible person with whom F and M can leave C. Can F and M insist that C make the trip?"<sup>96</sup>

Bainham regards this as a clash between the autonomy interests of the parents and the child, and he ranks the primary autonomy interests of the parents over those of the child. Using directly the test of Eekelaar, outlined above, Bainham asserts that as there is no question of the child's "basic" or "developmental" interests being challenged but only his or her autonomy interests this is a situation where the court's intervention would be unjustified.

### *Example 5*

"C (aged 14) dislikes both her parents (M) and (F). She wants to move in with relatives. M and F are refusing to allow her to leave home."<sup>97</sup>

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<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

This case is regarded by Bainham as the most difficult and borderline case of the five he discusses. Interestingly it is the exact situation envisaged covered by the legal rules discussed in this thesis. It is his view that court intervention to assist the child would only be justified if there was some evidence that the child's basic interests were challenged, by either physical or sexual abuse, and this would make his or her interests primary. If, on the other hand, C only wishes to take such action because his or her parents are authoritarian, or because they are "overbearing her autonomy interest"<sup>98</sup> then the interests of M and F "in continuing to exercise parental responsibility"<sup>99</sup> would be primary and hence court intervention unjustified.

These five examples are, like the Dicey statute discussed in chapter two, an excellent test of any philosophical theory of law, whether it be of interests or of a wider theory of children's rights. It has been previously stated, that without practical application, the idea of law would be meaningless. It would therefore be of interest to apply the strong rights theory outlined earlier, not only to test it, but to compare it to the interest theory. It should be noted from the outset, however, that Bainham describes the examples he puts forward as being "tentative".<sup>100</sup> His aim in creating the framework of primary and secondary interests is "to provoke debate about how we might move towards a consensus on how the appropriate balance might be struck in some commonly recurring areas of family conflict."<sup>101</sup> Moreover, he believes that the framework he adopts can account for, what he describes as, "the co-existence of Gillick competence and parental responsibility and can provide a basis for judicial intervention and state paternalism."<sup>102</sup>

There are, however, a series of problems with Bainham's analysis, the most stark of which are its simplicity, malleability, and lack of philosophical grounding. There is and always will be radical competition between human beings which can be starkly reflected in family relations and family conflicts

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<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.* at 173

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.* at 174

and the resolution of this is the crucial issue, but a vague and uncharted application of the interest theory does not provide the requisite tools with which the courts could make sound and consistent decisions. Rather, one is still left after reading Bainham's analysis, in a way similar to Eekelaar's work, with no satisfactory understanding of what the interests of children actually are. Instead, one is left with a set of intuitive value judgements. Bainham himself admits this, for he comments that:

"I am conscious that the preferences for particular interests which I disclose are somewhat unrefined and to some extent reflect my personal value judgements. My purpose is not to convince anyone of this scale of values."<sup>103</sup>

Value judgements should not be underestimated for when one expresses a particular value judgement one is engaged in philosophical activity. By placing one interest above another in the five examples given, Bainham's scale of values is extremely pertinent to his argument. Creating primary and secondary interests might make the task easier for a judge to decide a case, but according to whose value judgements? This is what interest theorists do not provide. For example, Bainham's use of interests could provide justification for decisions like those given in *Re R*<sup>104</sup> and *Re W*,<sup>105</sup> where in the case of the former the court ordered that R a female of 15 years and ten months should be given sedative drugs to control her fluctuating mental state despite her opinion to the contrary which was expressed during moments of lucidity, and in the latter case where W a 16 year old anorexic female was ordered to attend a treatment centre against her wishes despite the fact that her competence was not in issue (both these cases will be discussed in great detail in the second part of this work). Value judgements decided these cases, wrongly (if viewed in light of the strong rights thesis).

The crucial question arising from the *crucial issue* Bainham refers to is when and on what basis can a court intervene in relationships between parents and

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<sup>103</sup> *ibid.*

<sup>104</sup> *Re R (A Minor)(Wardship: Consent to Treatment)* [1992] 2 FCR 229

<sup>105</sup> *Re W (A Minor)(Medical Treatment: Court's Jurisdiction)* [1992] 2 FCR 785

their children? The answer to that is when the radical autonomy of an individual child or parent is in need of assertion or reassertion, for this is the most important interest one could ever have.

Thus, the court is justified in intervening in example one above, because the court should respect the child's radical autonomy by requesting that the blood transfusion take place. It is wrong that the religious affiliation of a parent should be allowed to decide whether another human being, who lacks the required capacity to consent to such a decision, should die. No human being can control the destiny of another in this manner and court intervention is justified to assert this. Where such consent is possible, as in *Re W*, then court intervention cannot be justified and the individual must be allowed to exercise his or her will over his or her life.

In example 2, the same argument applies. A child cannot be permitted to control the lives of others, even his parents, and legal rules should reflect this. Bainham refers to the importance of personal autonomy in a liberal democracy. It is, rather, its very basis.

The situation outlined in example 3 is more difficult, as Bainham makes clear. It does not involve the assertion of the radical autonomy of any of the parties concerned. However, his view that a legal duty should be imposed on both parents to maintain contact arrangements is problematic. Certainly, no court should enforce an order in such a case to somehow cease contact between birth father and child, without justification. This is, rather, a matter for the conscience of the birth father. If he sees his child as not being an important enough part of his life, then there is little to be gained from a court order. In this case, court intervention is neither practical or helpful. It would, however, be a different matter should the child concerned ask that his father be refused contact but acts of cynical manipulation of relationships by parents should not be encouraged.

Example 4 also contains no issue of radical autonomy and on the facts given court action would not be justified. This is a matter that should be resolved within the family. However, should this not be possible, and the child concerned is intent on not going abroad with his parents under any

circumstances, then the state should be willing to step in and assist with arrangements for caring for the child. This would give the child concerned a choice, one which only the very unhappiest of children would exercise.

It is within example 5 that the difference between Bainham's answer to the crucial question is at most disagreement with my own. Given the state of affairs of a very unhappy child, who for whatever reason wishes to live somewhere other than with his parents, and another party in this case a relative is willing to take the child in, the child should be permitted to leave even in the absence of sexual or physical abuse. Freeman has made the point that a child who is willing to go to a court and ask for a residence order in favour of someone other than his or her parents is a very unhappy one indeed.<sup>106</sup> This is, I would argue, a situation where should a court fail to act to enforce the will of the child it would not be respecting his or her radical autonomy of the child concerned.

It should be noted that the enforcement of radical autonomy through the courts is a necessary rejection of state and judicial paternalism, which Bainham seeks to justify. The use of the interest theory to justify judicial paternalistic intervention is one of its hallmarks. Indeed, Eekelaar has rejected a radical interpretation of the *Gillick* decision, by stating that it gave children the "most precious of rights: the right to make a mistake."<sup>107</sup> The problem with the arguments of the interest theorists is that the debate has not yet developed to the extent that they realise that this might not be such a dangerous thing after all. Interest theorists, are however, as pragmatic as the philosophy they espouse. It will not be too long, before the autonomy interest is given its true value.

The analyses of the relationship between children and the law outlined above focus attention on the welfare / protectionist interests or rights (moral and legal) that children might have. They all have some element of what is described as justified paternalistic intervention which is in opposition to the

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<sup>106</sup> Freeman, M, "Can Children Divorce Their Parents?", in Freeman M (ed) *Divorce: Where Next?* Dartmouth. 1996, 159 at 168

<sup>107</sup> Eekelaar, n 2 above, at 182

personal autonomy of children. The overriding view here is that someone else knows what is best for the child rather than the child himself or herself. In Part II of this work it will be shown that by focusing attention away from autonomy whilst giving some limited credence is a philosophy which is echoed in the Children Act 1989. It is this attitude, that a form of paternalism is necessary in the relationship between children and the law which needs to be challenged with a theory of law that properly recognizes children as owners of their own ends.

### **The Child Liberationists**

The perspectives outlined above also have in common a total rejection of the ideas expressed in recent times of the so-called child liberationists or "kiddie-libbers." Perhaps the most important of these works have been those of Franklin,<sup>108</sup> Holt<sup>109</sup> and Farson,<sup>110</sup> all of whom have expressed the belief that children ought to be given the same rights as adults. It is worthwhile to consider briefly some of their arguments in order to distinguish their analysis from the strong rights theory espoused in chapter one.

Through looking at the historical development of childhood Franklin argues that childhood is a social construct, a state of non-age in the twentieth century.<sup>111</sup> He points out, for example, drawing on the work of Aries<sup>112</sup> that it is only since the period of the enlightenment that the modern day conception of childhood has evolved. In medieval times, due to other social factors including a very low level of life expectancy, children were accorded a higher degree of autonomy than is currently thought to be necessary. He argues, that in relation to such things as the right to vote, that age demarcation ought to end and children should be enfranchised into political life.

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<sup>108</sup> Franklin, n 42 above.

<sup>109</sup> See Holt, J, *Escape From Childhood*, Penguin. 1975.

<sup>110</sup> Farson, R, *Birthrights*, Penguin. 1978.

<sup>111</sup> Franklin, n 42 above.

<sup>112</sup> Aries, P, *Centuries of Childhood*, Jonathan Cape. 1962.

The work of Holt is similarly aimed at questioning the institution of childhood itself. He argues that as human beings our lives reflect a sort of curve which begins at birth and rises to our physical and intellectual peak in adulthood before declining into old age. However, he suggests that "[c]hildhood as we know it has divided that curve of life, that wholeness, into two parts - one called Childhood, the other called Adulthood, or Maturity. It has made a Great Divide in human life, and made us think that the people on the other side of this divide, the Children and the Adults, are very different."<sup>113</sup>

It is on this basis that Holt proposes that the "rights, privileges, duties, responsibilities of adult citizens be made available to any young person, of whatever age, who wants to make use of them."<sup>114</sup> He then classifies some eleven rights that children might claim including the right to vote, the right to legal responsibility, the right to employment, the right to privacy, the right to manage one's own education, the right to a minimum level of income from the state, the right to choose one's guardian, and ultimately the "right to do, in general, what any other adult may legally do."<sup>115</sup> The list goes on, but the ultimate aim of them is to achieve respective changes in the legal rules which affect children.

Holt's work has been subjected to various levels of reproach including from one writer who has accused the analysis of the child liberationists as being "politically naive, philosophically faulty and [one that] plainly ignores the psychological evidence."<sup>116</sup> It is certainly true that much of the evidence that Holt uses to justify treating children as adults is anecdotal. Thus for example he narrates the story of how he asks for a show of hands amongst a group of school children to justify claims that children might wish to earn money, live

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<sup>113</sup> Holt, n 109 above, at 21

<sup>114</sup> *ibid.* at 15

<sup>115</sup> *ibid.* at 16

<sup>116</sup> Freeman, n 8 above, at 3

temporarily away from their parents and vote in elections.<sup>117</sup> He claims, in this respect, to have pressed a "magic button."<sup>118</sup>

The problems with the methodology of the child liberationists is therefore questionable. The works of any real philosophical evidence and contain no philosophical discussion as such. Their use, also, of historical analyses has been doubted in light of the work of other historians.<sup>119</sup> The vast majority of the work of Aries is taken at face value even though it is arguable that the latter author did by no means intend for his work to be used in this fashion. Whilst historical analysis is important, whatever happened in the past, should not be used as evidence for future behaviour.

However, it is in their analysis of children's rights that their philosophical argument is most suspect. It has been noted elsewhere in this work how Franklin discusses only rights in the weak sense, i.e. as rights of entitlements. Holt has a chapter in his book entitled "On the Use of the Word Rights"<sup>120</sup> but that chapter is bereft of any argument on which rights for children could be based. Rights are taken at face value. The rights that are claimed for children are ostensibly legal rights. We are not told anything about the use of the word rights. As Wringe has pointed out the locution "children have the right to..."<sup>121</sup> is used as a basis for advocating an extension of children's legal rights. But on what moral basis? Feinberg, Berger<sup>122</sup> and even Franklin do not get much further. Thus, whatever as philosophers we think about the conclusions of the kiddie-libbers because their methods are suspect, or philosophically faulty, their analysis must be taken with a large pinch of salt.

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<sup>117</sup> See Holt, n 109 above, at 24-25

<sup>118</sup> *ibid.* at 25. For examples of anecdotal evidence to justify his claims see for examples pages 17-20, 154-155.

<sup>119</sup> See Pollock, L, *Forgotten Childhood*, Cambridge University Press. 1983; de Mause, L, "The Evolution of Childhood", in *The History of Childhood*, Souvenir Press. 1976.

<sup>120</sup> Holt, n 109 above, at chapter 16

<sup>121</sup> Wringe, C, *Children's Rights*, Routledge & Kegan Paul. 1981, at 44

<sup>122</sup> See Berger, N, *Rights*, Penguin. 1974 and "The Child, the Law, and the State" in Adams, P et al, *Children's Rights*, Elek Books. 1971.

However, the work of the child liberationists cannot be rejected totally out of hand. They have made important contributions to how we look at the institution of childhood, and many of their observations are valid. Thus, one thing that the child liberationists have rejected is paternalism, a notion which forms the basis of Freeman's analysis. In this respect they are right. Paternalistic concerns involve coercion of children, and that has to be rejected. They have also highlighted the inconsistencies in the institutional and normative concepts of childhood and how the law in matters where age is used as a criterion to control an individual's activities is at a simple level littered with philosophical problems. Their views that childhood should be cherished, paternalism rejected and freedom embraced should be listened to.

### **Rejecting Rights as Answers - Alternative Approaches to how the Law Might Look at Children**

There is a growing trend, particularly within feminist legal studies, to reject rights as the appropriate mechanism for dealing with the problems encountered by children within the signifying system of which law and law makers (politicians and judges) are a central feature.<sup>123</sup> In her recent book *Family Law Matters*, Katherine O'Donovan has suggested that "it is difficult to bring children into the framework of rights for three reasons associated with practical politics."<sup>124</sup> These reasons are i) that children are unavoidably dependent on adults; ii) that because paternalistic language is still used and is regarded as being appropriate in relation to children that any claims for rights by children over the heads of those who control the system is impossible because of their vulnerability; and iii) that manifesto rights like those discussed above in the United Nations Convention on the Rights of the Child aren't claimable because there is no one in relation to whom they might be claimed against.

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<sup>123</sup> An analysis of the contribution of feminist legal studies to the area of children and the law can be found in chapter two of this work.

<sup>124</sup> O'Donovan, n 76 above, at 101

As a result of these reasons various scholars have proposed new ways of conceptualizing that the relationship between children and the law would be through either the concept of a trust or through a theory of fundamental obligations.<sup>125</sup>

A theory of fundamental obligations would enable one to discuss the relationship between children and the law by determining what obligations as a society we have to younger members.<sup>126</sup> As well as the obvious obligations that a community might have, O'Neill argues, that such a theory would enable recognition of various imperfect obligations. The problem with this account is that the obligations could be as variable as the interests that children might be said to possess. Moreover, as O'Donovan points out, what if the obligations of children are violated?<sup>127</sup> On what basis are the obligations vindicated? Although the theory does get round the impracticality of ascribing positive rights to children, it has been noted throughout this work that weak rights are practically difficult for children to claim. Obligations of this kind would be the same.

A further alternative to ascribing rights to children is through analysing the relationship between children and the law through the legal concept of a trust. O'Donovan, in discussing the concept of trust in her book gives the idea her own methodological spin although she is not the first scholar to highlight the potential of the trust model as a basis for the treatment of children.<sup>128</sup> The basis of a trust is that a the legal ownership of a trustee over a form of property etc. is recognized within the legal system and an equitable duty is imposed on the trustee to handle the trust in a manner as specified with a view to handing over the property of the trust at an agreed date to the

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<sup>125</sup> It should be noted here that the aims of O'Donovan, n 76 above, in discussing these different approaches to the relationship between children and the law are in "trying to identify and record the voices of those excluded from other textbooks; to find and document aspects of law that have been forgotten by other textbooks." (ibid. at xiv)

<sup>126</sup> O'Neill, O, "Children's Rights and Children's Lives" (1988) 98 Ethics 445

<sup>127</sup> O'Donovan, n 76 above, at 102

<sup>128</sup> See Beck, C, Glavis, G, Glover, S, Barnes Jenkins, M, and Nardi, R, "The Rights of Children: A Trust Model" (1978) 46 Fordham LR 669

beneficiaries of the trust. In English law at present, where children are unable to deal adequately with a particular item of property (because of their dependency status) an arrangement is made so that the particular item of property concerned be placed in a trust for the benefits of the child concerned. The children are, in this sense, the owners of the property in equity.

Using this argument O'Donovan suggests that there should be an extension of the concept of a trust to the child's person:

"What I want to suggest is that since we are willing to use such a notion for the care of the infant's property, consideration should be given to its extension to the care of the infant's person."<sup>129</sup>

Beck *et al* had suggested that any rights which could be ascribed to children would in effect be held for them in trust by both their parents and the state and as such would be responsible collectively for making decisions in relation to an individual child. This overcomes the problem that it is difficult because of their inevitable dependency for children to exercise rights. Any decisions made on behalf of children by their parents would, in this sense, have to have regard to the child's interests.

O'Donovan argues that because existing legal rules already cater for any violations of a child's trust through criminal law and family law the trust model is an attractive one. Thus, for example, a child's physical well-being is catered for in criminal law, a child can be removed from his or her home if he or she is at risk of significant harm. Moreover, civil law remedies allow for adults to sue for ill treatment they received as children. All of these notions fit the idea of the child's person being held in trust because such activities are violations of trust. This in turn, helps solve the problem of how the law treats children as objects that was identified in chapter two so that:

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<sup>129</sup> O'Donovan, n 76 above, at 103

"Children will be constructed as beneficiaries of a trust, and become subjects in that way. There is a hortatory element in such a restructuring of concepts"<sup>130</sup>

O'Donovan herself raises two problems with the application of the trust concept. The first she sees is that intimate relationships between parents and their children would in effect be legalized. The second objection she alludes to is that if parents are termed as trustees in relation to their children some kind of licence may be required before individuals should be allowed to become parents, or in other words that the standards of parenthood are raised to a high level. Kymlicka has suggested, for example that, the trust model could lead to an "Orwellian world"<sup>131</sup> where judicial intervention is prevalent and parents would need to obtain licences to parent.

Such a criticism is a highly valid one. There are limitations in law on who can hold property in trust and to logically apply that argument to children is dangerous. Barton and Douglas have raised further problems in relation to the application of the trust concept along these lines. They ask "who is the object, who is the settlor, and who is the beneficiary"<sup>132</sup> in relation to the trust under consideration thus making the concept of a trust somewhat incoherent to its sister which deals with the property of a child. They also argue, although clearly tentatively, that the trust concept necessarily ignores parental rights to possession over their child and hence that parental rights are ignored. In the end, they suggest that neither ownership nor trusteeship are appropriate methods when relating the relationship between parents and children.<sup>133</sup>

On these grounds the notion of a trust is clearly as difficult to apply to children than the various theories of rights which have been put forward. In my view, to meddle with a legal concept like a trust to conceptualize the relationship between children and the law is no replacement for a full

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<sup>130</sup> *ibid.* at 105

<sup>131</sup> Kymlicka, W, "Rethinking the Family" (1991) 20 *Philosophy and Public Affairs* 77, at 91

<sup>132</sup> Barton and Douglas, n 48 above, at 25

<sup>133</sup> *ibid.* at 28

discussion of moral philosophy. O'Donovan points to a clear problem, notably that "the denial of children's legal subjectivity, of their juridical capacity to act, is a problem, in any theory of justice."<sup>134</sup> I believe that the strong rights theory represents the best way to endorse this subjectivity. Trusts are not an adequate moral mechanism with which to view the human condition. Through saying that children have ontological rights certain things follow: love, respect and recognition as an end in self.

## **Postscript to Section One**

I have used these three chapters as an attempt to analyse (or criticize) a past history and the various structures (theoretical and institutional) of how the law thinks, has thought, and should think about children.

From that analysis one might conclude that the branch of family which looks at children is in a state of crisis. There is evidence for this proposition:

- its judges and its theoreticians occupy an orthodox centre ground where paternalistic concerns about a child's welfare are greater than and superior to talk about his or her autonomy.

- the institutional conception of childhood and the normative conception of childhood are at odds, thus leaving the law in a state of flux. Thus, whilst on the one hand the Gillick case has presented us with the possible proposition that a child's right to decide matters for himself or herself supersedes those of his or her parents at an age of sufficient understanding (an age which is not institutionally fixed) institutional positive rules present a different picture insisting on age demarcation and an age of majority of 18.

Perhaps these factors paint a picture of an area of law in transition rather than crisis, of a move towards the marriage between the normative and institutional conceptions of childhood. Yet this is no easy task. It means the law must be flexible.

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<sup>134</sup> O'Donovan, n 76 above, at 105

Theoreticians have put forward a series of views about how we should look at the question of deciding things in relation to children. We have seen that Freeman opted for the hypothetical framework of asking from what as adults would we wish to be protected on the basis that we will become autonomous. Eekelaar has supported a similar act of retrospection via an imaginative leap to ask what we as adults would have opted for in the same circumstances. Both of these ways of analysing such issues are inadequate and the courts are well aware of this.

Thus we have seen in *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, 15 at the end of chapter two how Sir Thomas Bingham MR approached the matter. As a reminder he commented that "[e]verything depends on the individual child in his actual situation. For the purposes of the [Children] Act a babe in arms and a sturdy teenager on the verge of adulthood are both children, but their situations are quite different."

Now this is no easy task. Yet only the courts can perform it. But the task is attached to moment, not retrospection, of an individual child standing before a judge. There are encouraging signs.

The following chapters will be dedicated to that moment.

## **PART II: A Practical Application**

### **Chapter 4: Why have a Children Act 1989?**

"Don't be alarmed. This is not to be a moral exhortation. I wish to place in its proper perspective an area of law which has far too long been relegated to the second division of Legal Practice. Until comparatively recently Matrimonial and Family law was but an optional subject in professional examinations, whilst most University courses avoided it as a major subject. ...But the law mirrors society and times are radically changing."<sup>1</sup>

#### **Introduction**

It has been posited in Part I of this thesis that the unity of law and morality, as Detmold has put it, is a feature of law which has long been overlooked (including within University law schools and their approaches to family law). To that end, this thesis has been a moral exhortation. The aims of this part of the thesis are to apply the moral philosophy of the strong rights theory to the Children Act 1989 and in doing this to ask whether the law reformers, the law makers and the law interpreters are respecting children appropriately as ends in selves. This will involve analysing the consultation process leading up to the Act, the Act itself, and its interpretation in the courts.

It is important at this point to be precise about the direction that the argument will take in the practical part of this work. In this chapter the need for a new piece of legislation will be analysed. This will entail an overview

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<sup>1</sup> Brown, Sir Stephen (President of the Family Division of the High Court), "Reform and the Rise of Family Law" Address given to the Holdsworth Club, March 9th, 1990, at 1

of the consultation process which preceded the legislation and in particular the Law Commission's review of the private law relating to children. In its review the Law Commission was looking at the efficacy of past practices and philosophies underpinning the private law relating to children. This presents us with the opportunity to apply the theoretical position advanced in Part I of this work to how the law previously looked at children and to the Law Commission's own determination of how it should be looking. Of particular significance to this analysis is wardship, the means of access available to the court to its inherent *parens patriae* jurisdiction, the paternalism of which is indicative of how senior judges approach the relationship between children and the law. In chapter five the actual detail of those provisions of the Children Act which give greater autonomy to children by allowing them to seek the leave of the court to apply for orders, including an order which would determine where an individual child might wish to live, will be discussed alongside a critique of how the courts, by incorporating the philosophy and practices of wardship, are interpreting the new statutory provisions. In chapter six the underpinning philosophy (or philosophies) of the Act will be subjected to critique in order to assess the importance that the legislation itself places on children's autonomy. In chapter seven the concept of end efficiency or sufficient understanding which I argued in chapter two was the legacy of *Gillick* will be discussed and the strong rights thesis will be placed in its proper context. The purpose of this practical analysis is to show that the conception of the child, in past practice and in current law, is ignorant of the fact that children are radically autonomous ends in selves.

This chapter, in effect, picks up the history of child law after the case of *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402 which was discussed at the end of chapter two.<sup>2</sup> In that chapter it was argued that the *Gillick* case was *the* most significant piece of case law in the history of children and the law particularly as between the relationship between children and their parents. By placing, for the first time, significant emphasis on the autonomy of children it is not surprising that the philosophy of the *Gillick* case was to have some influence on how

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<sup>2</sup> See further chapter two of this work at 26-35

subsequent legal rules were to look at children. Of course, the key question here is what impact it did have?

It is clear that one of the fundamental aims of the Children Act 1989 was to strike a balance between the rights of children, the rights (or newly phrased responsibilities) of their parents and when and under what circumstances it was legitimate for the state to intervene.<sup>3</sup> For those scholars, who occupy what Dewar has described as the "liberal tradition",<sup>4</sup> this is the classic problem which has confronted family law over the centuries. It raises key issues not only about how children are seen by legal rules to relate to their parents, but also in relation to the state. We have seen, in chapter two, how it was dealt with in *Re Agar-Ellis*.<sup>5</sup> We have seen also, subject to interpretation, how the House of Lords dealt with it in *Gillick*. We have seen, in chapter three, how various theoreticians (some also within the liberal tradition) would like it to be dealt with. Indeed, I myself have advocated that the strong rights thesis is the most appropriate way for this issue to be addressed and I have argued that it is because of the special relationship which exists between the courts and individual human beings, that the courts have a special responsibility to uphold their strong rights.

Returning to the Children Act, if there is one thing that commentators are agreed upon it is that the legislation was unique in the sense of its size and its scope.<sup>6</sup> However, it was also remarkable with regard to the issue of children's autonomy. For the first time in the history of legislation passed by Parliament, children were given independent access to the courts, as highlighted above, which would allow them to make representations about their own upbringing by applying for leave to apply for orders.<sup>7</sup> Whilst such a development is unparalleled in the statutory provisions relating to children it should be noted preliminarily that the Children Act 1989 is not a radical

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<sup>3</sup> See further Hoggett, B, "The Children Bill: The Aim" [1989] Fam Law 217

<sup>4</sup> Dewar, J, "Family Law and Theory" (1996) 16 OJLS 725, at 731

<sup>5</sup> 24 Ch D 317

<sup>6</sup> See further Bainham, A, *Children: The New Law*, Jordans. 1990, at 1; White, R, Carr, P, and Lowe, N, *The Children Act in Practice*, Butterworths. 1996, at chapter one.

<sup>7</sup> See Children Act 1989 s 10(8)

statute in terms of children's autonomy in the sense advocated in the strong rights thesis. Indeed, the Act is more concerned with the welfare of children to which expressions of autonomy may be a part. True radicalism would mean more than consolidation, or changes to size and scope. It would encompass methodology, a change in the way as a community we do things, of necessarily, per Twining, challenging the underlying assumptions and propositions of the way we think about children and their relationship to their parents and to the state.<sup>8</sup>

Notwithstanding this lack of radicalism as regards the issue of children's autonomy, historians writing about the Children Act 1989 will no doubt comment that it was an extremely significant moment in the history of family law. Sir Stephen Brown, President of the Family Division of the High Court, in a lecture given in March 1990 summed up well its significance when he said of the Act that it was "the most comprehensive piece of legislation which Parliament has ever enacted about children."<sup>9</sup> He was right. The then Lord Chancellor, Lord Mackay of Clashfern, introduced the legislation to the House of Lords in December 1988. As Sir Stephen Brown remembers it, "[i]ts entire passage through the House of Commons occupied less than twelve months. When it returned to the House of Lords from the House of Commons it had virtually doubled in size. It comprises some 108 sections and 15 schedules."<sup>10</sup> It gained Royal Assent in November 1989. It came into force on 14th October 1991.<sup>11</sup> It has had, at the time of writing, over six years to be considered and interpreted. Time enough, to see both the improvements it has made to the relationship between children and the law and its flaws and failures. Time too, for those who felt the legislation to be either flawed or contrarily well-founded from the outset to have their opinions either vindicated or arraigned.

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<sup>8</sup> See further Twining, W, "Globalization and Legal Theory: Some Local Implications" (1996) 49 CLP 1, at 12-13

<sup>9</sup> Brown, n 1 above, at 5

<sup>10</sup> *ibid.*

<sup>11</sup> although Children Act s 5(11) and (12) which concerned the preservation of the High Court's power under the inherent jurisdiction to appoint a guardian of the child's estate did not come into force until the 1st of February 1992.

## The Law Commission's Review of the Private Law

The law in relation to children can roughly be separated into two parts: private law and public law. It is within the realms of private law that the issue of whether children should be able to choose where they might reside pertains. The Children Act 1989 came about as a result of two major reviews of the law which fit into this dichotomy. The reforms to the public law derived from recommendations of the House of Commons Select Committee<sup>12</sup> to establish an Interdepartmental Working Party<sup>13</sup> to review the public law relating to children as well as a series of disturbing cases in the 1980's concerning the deaths of individual children<sup>14</sup> and the now infamous debacle in Cleveland.<sup>15</sup> Alongside this, the Law Commission was undertaking an exhaustive review of the private law in relation to children beginning with its report on *Illegitimacy*<sup>16</sup> which culminated in the Family Law Reform Act 1987 and the subsequent examination of every other area of the private law in relation to children which formed the basis of a series of

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<sup>12</sup> See Further: House of Commons, Second Report from the Social Services Select Committee, Session 1983-84, *Children in Care* HC. 360

<sup>13</sup> Culminating in the Review of Child Care law (DHSS, 1985) and subsequently the White Paper "The Law on Child Care and Family Services" 1987 Cm 62.

<sup>14</sup> See: *A Child in Trust: Report of the Panel of Inquiry Investigating the Circumstances Surrounding the Death of Jasmine Beckford* (London Borough of Brent, 1985) ; *Whose Child? The Report of the Public Inquiry into the Death of Tyra Henry*, (London Borough of Lambeth, 1987); *A Child in Mind: Protection of Children in a Responsible Society, Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Kimberly Carlisle*, (London Borough of Greenwich, 1989).

<sup>15</sup> *Report of the Inquiry into Child Abuse in Cleveland 1987* (The Butler-Sloss Report), Cmnd 412, 1988, HMSO.

<sup>16</sup> Law Commission, *Illegitimacy*, Report No 118, HMSO. 1992.

working papers. They were: *Guardianship*,<sup>17</sup> *Custody*,<sup>18</sup> *Care, Supervision and Interim Orders in Custody Proceedings*<sup>19</sup> and *Wards of Court*.<sup>20</sup>

It is within the Law Commission's final *Review of Child Law: Guardianship and Custody*<sup>21</sup> that the seeds of the private law aspects of the Children Act 1989 were planted:

"This Report deals with the rules of common law and statute under which responsibility for bringing up or looking after a child is allocated to particular individuals, usually his parents. The main principles of the law are reasonable, clear and well accepted. The details, however, are complicated, confusing and unclear. The result is undoubtedly unintelligible to ordinary people, including the families involved, and on occasion may prevent them or the courts from finding the best solution for their children."<sup>22</sup>

There are two points arising out of this statement which are worthy of further development. The first is that the law in relation to children was in practice a complicated mess.<sup>23</sup> The statutory framework was haphazard and overdeveloped and some of the case law derived from it was unnecessarily

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<sup>17</sup> Law Commission, *Family Law: Review of Child Law: Guardianship* Working Paper No 91, HMSO. 1985.

<sup>18</sup> Law Commission, *Family Law: Review of Child Law: Custody* Working Paper No 96, HMSO. 1986

<sup>19</sup> Law Commission, *Family Law: Review of Child Law: Care, Supervision and Interim Orders in Custody Proceedings* Working Paper No 100, HMSO. 1987.

<sup>20</sup> Law Commission, *Family Law: Review of Child Law: Wards of Court* Working Paper No 101, HMSO. 1987.

<sup>21</sup> Law Commission, *Family Law: Review of Child Law: Guardianship and Custody* Report No 172, HMSO. 1988.

<sup>22</sup> *ibid.* at para 1.1

<sup>23</sup> Thus the Law Commission saw that one of the main aims of the legislation was to simplify and clarify the law. See Law Comm Rep 172, n 21 above, at para 1.3. See further Hoggett, n 3 above, *passim*.

complex.<sup>24</sup> The second and more important point is that even though the law was complicated in detail the general principles underpinning it were apparently well developed and as the Law Commissioners saw it relatively sound. The importance of this cannot be overemphasised. The actual principles underpinning the law, it's *philosophy*, a philosophy governed by the notion of welfare (not autonomy), was regarded by the Law Commissioners to be fine whilst the detail led to problems for some in the determination of that philosophy.<sup>25</sup> Of course, saying that something is reasonable, clear and well accepted does not mean it is philosophically right and I shall address this issue in this and subsequent chapters. Nevertheless, the opportunity presented itself for a new statutory framework to clarify both the public and private spheres, even though both spheres should be seen as distinct and separate in many respects. According to the Law Commissioner ... Brenda Hoggett (now Hale J), the Children Bill, as it then was, had two primary aims:

"The first is to gather in one place , and (it is hoped) one coherent whole, all the law relating to children and the provision of social services for them. The second is to provide a consistent set of legal remedies which will be available in all courts and in all proceedings. Such simple aims should not be as revolutionary as, in fact, they are."<sup>26</sup>

To bring into one place all of the public and private law aspects into one place was indeed revolutionary.<sup>27</sup> The second aim of the Bill referred to by Hoggett is, however, particularly noteworthy. The essence of the legislation was that orders that could be made in the High Court could also be made in the lower magistrates court with, of course, cases according to their difficulty being transferred upwards to the higher courts. This concurrent jurisdiction was one of the unique features of the framework of the Bill. Thus, an individual applying for an order in a higher court would equally be

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<sup>24</sup> See Law Comm Rep 172, n 21 above, at para 1.3

<sup>25</sup> *ibid.* For a discussion of the philosophy of the law relating to children after the Children Act 1989 see further chapter six of this work.

<sup>26</sup> Hoggett, n 3 above, at 217

<sup>27</sup> Excluding, of course, education and adoption.

able to apply for the same order in a lower court. In relation to applications by children this, as we shall discuss in chapter five, is significant.

The Law Commission's review also recommended important changes in the terminology which had previously been used to express the relationship between children, their parents and the state as well as a series of conceptual changes which would inform the reasonable, clear, and well accepted principles described above which underpin how that relationship should be practically expressed through legal rules.<sup>28</sup> These areas will be considered in critical detail in chapter six after an analysis in the next chapter of how children can exercise the weak rights given to them by the legislation which allow them to apply for orders under the legislation, but they are worthy of initial mention here because of their significance when assessing why a Children Act 1989 was seen to be needed. In summary, the view presented here is that the Children Act 1989 may have been revolutionary because of its structure, but its contents as far as the issue of children's autonomy was concerned was by no means radical. The Act, therefore, did not represent a radical shift in perspective from that which had preceded it. This is not to say that there aren't shifts in emphasis in the Children Act 1989. There are subtle changes in language which, in effect, make the general principles which support the law relating to children easier to comprehend. Shifts away, for example, from the complex language of rights and towards the more neutral language of responsibilities.

Combined, the new terminology and new concepts represent a new way of expressing the relationship between children and their carers and when it is legitimate for the state to intervene and not a radical new way of seeing and doing things - for example by placing the autonomy of children at the top of the agenda. This is not to say that the statutory recognition of children's autonomy is unimportant.<sup>29</sup> The value attached to such autonomy, however, has to be tempered by the philosophy of the Act itself. The reaffirmation of the intrinsic and essential philosophy which governs the relationship between children, parents and the state might be seen as helpful in clarifying

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<sup>28</sup> Law Comm Rep No 172, n 21 above, at para1.1

<sup>29</sup> Children Act s 10(8)

any grey areas left, for example, after the decision in the *Gillick* case, which had an influence on the legislation.<sup>30</sup> But whether such principles conform to the basic philosophical proposition advocated by the strong rights theory is another matter, and in that lies the yardstick by which the Law Commission's consultation and formulation, the legislature's consideration and the judiciary's interpretation remain to be measured. Change in any area of law has to be justified. That the law is haphazard may be justification enough. That the law is unreasonable would present critical grounds for change. Yet the Law Commissioner's determined that the law was reasonable. But why? In the next section I shall turn to this issue.

### **Parental Responsibility**

Perhaps one of the most important developments arising out of the consultation which led up to the Children Act 1989 was a discussion about how the relationship between parents and their children was to be conceptualized. The Law Commission recommended that the concept of parental guardianship be removed and replaced by the more "coherent legal concept of parenthood."<sup>31</sup> In this regard the idea that the relationship between parents and their children could be expressed solely in terms of parental rights and duties was questioned and deemed to be inappropriate. The Law Commission commented that "to refer to the concept of "right" in the relationship between parent and child is... likely to produce confusion."<sup>32</sup> The term "parental responsibility" was recommended as a replacement for terms such as parental rights or duties or powers or claims although it is clear that this does not mean that parents do not have rights. According to the Act itself parental responsibility refers to "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation

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<sup>30</sup> A point discussed by Bainham, n 6 above, at 4-5

<sup>31</sup> Law Comm Rep No 172, n 21 above, at para 2.2. The term guardianship is now restricted to those who take the place of a parent or parents upon their death. Guardianship is dealt with by sections 4 and 5 of the Children Act 1989.

<sup>32</sup> *ibid.* at para 2.4

to the child and his property."<sup>33</sup> There is little doubt that parenthood is established by the Children Act 1989 as the key legal status as regards children and the notion of parental responsibility supports the long-standing proposition that it is the welfare of children that should inform the relationship between child, parent and state.<sup>34</sup> The term parental responsibility tidies up the law significantly. But is it merely a cosmetic change? It is convenient jurisprudentially to refer to parental responsibility as it represents a catch-all expression which reflects all circumstances and incidents of an individual child's relationship with their respective carer. Thus, not only biological parents can have parental responsibility. A child who wants to move out is effectively asking that parental responsibility be vested in the person with whom they wish to reside. The term has wide application. Nevertheless, the notion of parental responsibility is

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<sup>33</sup> Children Act 1989 s 3 (1). A comprehensive definition of what parental responsibility comprises was rejected by the Law Commission as being a "practical impossibility" (at para 2.6, page 6) although the Children (Scotland) Act 1995 s 1(1) has attempted such a definition. It posits that:

'a parent has in relation to his child the responsibility-

- (a) to safeguard and promote the child's health development and welfare;
- (b) to provide, in a manner appropriate to the stage of development of the child-
  - (i) direction
  - (ii) guidance

to the child;

(c) if the child is not living with the parent to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative,

but only so far as compliance with this section is practicable and in the interests of the child.'

<sup>34</sup> For Hoggett, n 3 above, at 217 the new conceptualization was extremely significant and she argues that "[t]he Bill assumes that bringing up children is the responsibility of their parents and that the State's principal role is to help rather than to interfere. To emphasize the practical reality that bringing up children is a serious responsibility, rather than a matter of legal rights, the conceptual building block used throughout the Bill is parental responsibility. This covers the whole bundle of duties towards children, with their concomitant powers and authority over him, together with some procedural rights to protection against interference."

philosophically determined.<sup>35</sup> It has underpinnings and exclusions, and some commentators argue that it gives greater strength to parents in their relationship with the state.<sup>36</sup> The precise implications of this will be considered in the chapter six when analysis will turn to the importance of the philosophy of parental responsibility in light of applications by children under the Act itself.

### **Principles Governing Court Orders<sup>37</sup>**

A further conceptual change recommended by the Law Commission was in relation to the orders that would be available under the new statutory scheme. Thus, it was recommended that the old custody order should be replaced by the newly named residence order.<sup>38</sup> Access orders should be replaced by new contact orders.<sup>39</sup> A specific issues order could incorporate one of the most valuable parts of the wardship jurisdiction into the statutory scheme<sup>40</sup> as would the prohibited steps order.<sup>41</sup>

Governing the administration of such orders should be the series of general principles based on welfare considerations which would apply in all cases determining any aspect of a child's upbringing.<sup>42</sup> They are reflective of and include the reasonable, clear and well accepted principles referred to above which had become the backbone for consideration of cases involving

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<sup>35</sup> See Eekelaar, J, "Parental Responsibility: State of Nature or Nature of the State" [1991] JSWFL 37 who gives two possible definitions of parental responsibility arising out of the Law Commission's consultation papers; See also: Fox-Harding, L, "The Children Act in Context: Four Perspectives in Child Care Law and Policy" [1991] JSWFL 179

<sup>36</sup> *ibid.* See also: Cretney, S, "Defining the Limits of State Intervention" in Freestone, D, (ed) *Children and the Law*, Hull University Press. 1990.

<sup>37</sup> This expression is used by the Law Commission in its report. See Law Comm Report 172, n 21 above, at 14

<sup>38</sup> *ibid.* at paras 4.12 - 4.16

<sup>39</sup> *ibid.* at para 4.17

<sup>40</sup> *ibid.* at para 4.18

<sup>41</sup> *ibid.* at para 4.20

<sup>42</sup> Discussed in detail in chapter six of this work.

children but with new more specific and streamlined definitions to iron out the difficulties of the detail of the law and making the law more intelligible to judges, practitioners and ordinary people alike. They include:

1. The principle that the child's welfare is the paramount consideration when analysing all aspects relating to a child's upbringing or his property.<sup>43</sup>
2. That the court should have regard to a welfare checklist when applying the welfare principle.<sup>44</sup>
3. That delay in cases involving children is prejudicial to them.<sup>45</sup>
4. The principle that the court should not intervene and make an order unless doing so would be better than not making an order.<sup>46</sup>

### **The welfare principle and its accompanying checklist**

The Law Commission expressed its unanimous support for the continuation of the philosophical underpinning of the law relating to children, the welfare principle.<sup>47</sup> The welfare principle has, we noted in chapter two, for a long time been the governing criterion when matters regarding the upbringing of children are being decided. No substantive change was recommended by the Law Commission in this regard, although instead of the welfare principle being the "first and paramount consideration" as per section 1 of the Guardianship of Minors Act 1971 the Commission recommended that the expression "first and paramount" be removed and replaced by the more simple phrase that the welfare of the child be the court's "only concern".<sup>48</sup>

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<sup>43</sup> Children Act 1989 s 1(1)

<sup>44</sup> Children Act 1989 s 1(3)

<sup>45</sup> Children Act 1989 s 1(2)

<sup>46</sup> Children Act 1989 s 1 (5)

<sup>47</sup> Law Comm Report 172, n 21 above, at para 3.12

<sup>48</sup> *ibid.* at para 3.14. In its draft Bill, *ibid.* at 73, the Law Commission placed in section 1(2) the following form of words: "When determining any question under this Act the welfare of any child likely to be affected shall be the court's only concern." It is interesting to note that the Law Commission, *ibid.* at para 3.13, was critical of the phrase "first and paramount" for two reasons. Primarily, because the expression paramount is ambiguous when the interests of more than one child is under examination (see further, *ibid.* at para 6.16) Secondly, because the word "first" caused confusion for courts who in some circumstances had weighed other factors against the

The Commission also recommended that the welfare principle be accompanied by a checklist of factors which would assist in achieving more clarity in the application of the welfare principle and would also assist "parents and children in endeavouring to understand how judicial decisions are made."<sup>49</sup>

### **The principle of non-intervention<sup>50</sup>**

The Law Commission was concerned that in the past, orders had been made by the courts when they were unnecessary, particularly in relation to court orders on divorce.<sup>51</sup> It therefore recommended that a key principle which should govern the legislation is that an order should only be made "where this is the most effective way of safeguarding or promoting the child's welfare."<sup>52</sup> This reflects the view again that the best people to decide what is best for a particular child are invariably his or her parents and when a child has a good relationship with his or her parents then the court should not intervene. Now this principle can be seen in one of two ways. One commentator has argued that it started out as a simple statement of common sense on the part of the Law Commission but it is now widely considered to be a check on state intervention in family life by placing too great an

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child's welfare. The recommendation of the Law Commission to use the words "only concern" was not taken up by the legislature. Instead the child's welfare shall be the court's "paramount consideration" per Children Act 1989 s 1(1).

<sup>49</sup> Law Comm 172, n 21 above, at para 3.18. The details and efficacy of the checklist will be considered in chapter six of this work.

<sup>50</sup> Also referred to as the no-order principle. I refer to it as the no necessary order principle in accordance with the neutral meaning given to the idea in the Law Commission's review, *ibid.* at paras 3.2 - 3.4 and discussed by Bainham, A, "Changing Families and Changing Concepts" (1998) 10 Child and Family Law Quarterly, 1 at 4. The Law Commission in s 1(1) of its draft Bill, *ibid.* at 73 stated that "No court shall make an order under this Act with respect to a child unless it considers that making an order is the most effective way of safeguarding or promoting the child's welfare." This was not the form of words which ended up in the Act itself.

<sup>51</sup> Law Comm Working Paper 96, n 18 above, at para 4.18. The Commission reached this conclusion by referring to various pieces of empirical research. See Law Comm Report 172, n 21 above, at 14 n 4

<sup>52</sup> Law Comm Report 172, n 21 above, at para 3.3

emphasis on agreements reached by parents in relation to their children.<sup>53</sup> We shall analyse the debate surrounding this general principle in chapter six.

### **Delay is Prejudicial**

A further concern of the Law Commission and arguably a further display of practical reasoning was its observation that in cases involving children, delay should be avoided. The Commission observed:

"Prolonged litigation about their future is deeply damaging to children, not only because of the uncertainty it brings, but also because of the harm it does to the relationship between parents and their capacity to co-operate with one another in the future. Moreover, a frequent consequence is that the case of a parent who is not living with the child is severely prejudiced by the time of the hearing."<sup>54</sup>

Whilst the no delay principle did not form part of the general principles in Part I of the Law Commission's draft Bill, it was along with the checklist which accompanied the welfare principle, contained as a general principle in Part II.<sup>55</sup> Both principles were promoted to Part I in the Children Act 1989 itself to general principles, thus increasing the clarity of the general principles underpinning the Act and the significance of the no delay principle itself.<sup>56</sup> The implications of no delay are that the court should be obliged to draw up a timetable in order to oversee the progress of individual cases and to imbue a presumption that delay conflicts with the welfare of the child unless evidence is produced to the contrary.<sup>57</sup>

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<sup>53</sup> See Bainham, n 50 above, at 4

<sup>54</sup> Law Comm Report 172, n 21 above, at para 4.55

<sup>55</sup> *ibid.* at 79 ( s 9 of the draft Bill)

<sup>56</sup> See Children Act 1989 s 1(3) for the statutory checklist, and Children Act s 1(5) for the no delay principle

<sup>57</sup> Law Comm Report No 172, n 21 above, at para 4.57. See also *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290, a case where Ward J viewed delay as sometimes being in accordance with the welfare of the child.

It is unsurprising that the proposals of the Law Commission were broadly accepted and form the foundations on which the Children Act 1989 is built. Although the welfare of the child was to remain the courts "paramount consideration"<sup>58</sup> and not as the Law Commission preferred it the 'only concern' its dominance in how the law looks at children was to continue. In this sense, the Children Act itself was declaratory to the courts, a point which has been recognized by senior members of the judiciary.<sup>59</sup> Because of its declaratory nature however, "[t]he Children Act does not provide the answer to certain questions regarding the legal position of children. The very nature of the legal relationship between parents and children still falls to be determined at common law."<sup>60</sup> To a large degree, this is due to the failure of the Law Commission to address adequately the conflicts between the notion of welfare and the issue of children's autonomy addressed by Lord Scarman and Lord Fraser in the *Gillick* case. The opportunity presented itself, after the decision in *Gillick*, to place the issue of autonomy particularly in relation to older children, in its proper (moral) perspective.

We shall turn to those provisions of the statute which deal with children's autonomy in the next chapter. Before embarking on that project, however, I would like to analyse two very important aspects of the Law Commission's examination of the law which are crucial to any complete assessment of the relationship between children and the law. The first of these is how the Law Commission addressed the *Gillick* question, i.e. its view as to what role a mature child, who through language is quite able to express and determine his or her own ends, could play within the statutory code. The second issue, which is very much linked to the *Gillick* question is the rather interesting views as to the future of the wardship jurisdiction. The first three working papers of the Commission are well represented in its final report. The fourth working paper on *Wards of Court*,<sup>61</sup> however, was not taken any further and as a result the Commission did not make any final recommendations.

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<sup>58</sup> Children Act 1989 s 1(1)

<sup>59</sup> See the judgment of Sir Thomas Bingham MR (now the Lord Chief Justice) in *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 6

<sup>60</sup> Bainham, A, *Children: The Modern Law*, Jordans. 1993, at 37

<sup>61</sup> Law Comm Working Paper 101, n 20 above.

Wardship illustrates quite clearly the philosophy of the courts when they address matters involving the protection, care and upbringing of children. It shows the state of mind, the attitude of the courts in cases involving children, a point which was discussed in chapter two. Many of the general principles that the Law Commission cherished were developed in the common law by the Courts of Chancery in wardship, most notably the welfare principle. Whilst the problems that the Commission highlighted in relation to the court's exercise of its functions in wardship were jurisdictional rather than philosophical, the working paper remains a source of intrigue for those concerned with the operation of the legislation and particularly with what the court considers its function to be in children cases. Such a discussion addresses the crucial issue highlighted at the beginning of this chapter "of how and on what basis the law should prioritise *either* the claims of parents or their children."<sup>62</sup> and on what basis the state might intervene. The wardship court has its own view of that issue as does the new statutory scheme. The relationship between a universal common law jurisdiction and a statutory jurisdiction is fruitful ground. For that reason it is worthy of further examination.

## 1. The Views of the Child

The various interpretations that could be given to the case of *Gillick v West Norfolk Area Health Authority and another* [1985] 3 All ER 402 were noted at the end of chapter two of this work and its influence on the consultation and legislative process leading up to the Children Act 1989 was considerable.<sup>63</sup> The radical interpretation given to that case and favoured by the author of this work was not one favoured by the Law Commission in its consideration of the weight that ought to be attached to the views of a minors in proceedings with regard to their upbringing. As a result, it is not one that

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<sup>62</sup> Bainham, A, "Non Intervention and Judicial Paternalism" in P Birks (ed), *The Frontiers of Liability: Volume 1*, Oxford University Press. 1994, 161 at 173

<sup>63</sup> See further Law Comm Report 172, n 21 above, at para 3.24; Law Comm Working Paper 101, n 20 above, at 63 n 154; See also the debates in the Parliament, particularly HL, Vol 502, cols 1147-1155, December 19, 1988 where the issue of the precise weight which should be given to the opinions of mature children was discussed. See further chapter six of this work, *passim*.

is reflected in the statute itself and does not accord with the strong rights thesis advocated in Part I of this work. There is, however, some recognition by the Law Commission that the views of children in proceedings affecting them should be regarded as important. This takes two forms: in proceedings which involve children generally, and more importantly for the purposes of this work that children themselves should be able to influence matters in relation to their own upbringing. Thus, in its working paper on *Custody*<sup>64</sup> the Law Commission canvassed the view that in contested cases the views of children should be given some form of recognition in legislative form. It commented:

"The opinion of our respondent's was almost unanimously in favour of the proposal to give statutory recognition to the child's views. Obviously there are dangers in giving them too much recognition. Children's views have to be discovered in such a way as to avoid embroiling them in their parent's disputes, forcing them to "choose" between their parents, or making them feel responsible for the eventual decision. Similarly, for a variety of reasons the child's views may not be reliable, so that the court should only have to take due account of them in light of his age and understanding. Nevertheless, experience has shown that it is pointless to ignore the clearly expressed wishes of older children."<sup>65</sup>

This scenario envisages the types of situation in family law proceedings where children are embroiled in disputes *between* their parents such as after a child's parents have divorced. Such cases are the most common kind confronted by family law courts. In such circumstances, of course, it would be wrong to allow the child to dictate not only his or her own life but the lives of others, most notably those of his or her parents, by imposing on the parent's the child's own preferred outcome. This was a point highlighted in chapter three of this work and accords with the general proposition that each individual is an end in self. It is inappropriate to treat any human being as a means to an end, and this applies as equally to individual parent's as it does to their children. The Law Commission rightly recognised that to make an

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<sup>64</sup> Law Comm Working Paper No 96, n 18 above.

<sup>65</sup> Law Comm Rep No 172, n 21 above, at para 3.23

order in disregard of older children's views, however, is unhelpful. This is important. For example, for a court to say that child X should stay with his or her mother when he or she wishes to reside with his or her father or vice versa would not help relations within the family.<sup>66</sup> However, what is not envisaged here are situations where a child is at odds with his or her parents and is seeking the assistance of the court in a matter involving his or her own life directly in contradistinction to the opinion of the his or her parents.

In its separate working paper on *Guardianship* the Law Commission did canvass the view that an individual child should be able to apply for the removal, replacement or appointment of a guardian,<sup>67</sup> a process which would allow any individual child to have a greater say in matters which affect him or her directly.<sup>68</sup> In its final report, it concluded that the consultation process had not raised any dissent in this regard. It commented that:

"The discharge of parental responsibility orders and agreements is in the same category as the removal of guardians. Although the matter was not raised in our Working Paper on Custody, several respondents urged that the child should be able to make applications about his own upbringing. It is already open for a child to make himself a ward of court for this purpose. The number of applications would probably be small but it may be important for a child to have access to the courts to protect himself in this way. At present, he is automatically a party in care and supervision proceedings and thus able to apply in his own right for orders to be varied or discharged. Although he is not normally a party to proceedings between private individuals, it is important that the law can achieve consistency where this is

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<sup>66</sup> For a case of similar facts see *Re C (Residence: Child's Application for Leave)* [1996] 1 FCR 461 where a 14 year old girl sought an order so that she could live with her mother rather than her father using the provisions of the Children Act 1989.

<sup>67</sup> or to use the new phraseology an individual with parental responsibility.

<sup>68</sup> For a brilliant discussion of the history of guardianship and its various forms including parental guardianship and non - parental guardianship see Law Comm Working Paper 91, n 17 above, at paras 2.1-2.35

needed. Hence we recommend that children should themselves be able to apply for these orders, but again only with leave of the court."<sup>69</sup>

It is within this brief paragraph that the basis is found for the present law's recognition in statutory form that a child, with sufficient understanding, should be able to go to a court and ask for the leave of the court to determine a matter about his or her upbringing.<sup>70</sup> Concomitantly, a child could ask the court if he or she could live with someone other than their biological parent or other legal guardian. And where, under the new proposals, a child is given leave by the court to seek an order it would be axiomatic for him or her to have the status as a party in those proceedings even though such a situation, particularly in private family law proceedings, was highly unusual in the law preceding the Children Act 1989.<sup>71</sup> A recommendation was therefore advanced that all courts have the power to make the child a party to proceedings.<sup>72</sup>

By recommending that children have access to the court's in this manner the Law Commission was recommending something new. Such proposals would mean an albeit limited form of recognition for children's autonomy in statute. However, the principles which were to inform the law generally clearly contradict an absolute recognition for children to be able to determine matters affecting their own lives. Given, for example, that "a fundamental principle of the Review of Child Care Law and the Government's response to it was that the primary responsibility for the upbringing of children rests with their parents"<sup>73</sup> and that "the state should only intervene compulsorily only where the child is placed at unacceptable risk"<sup>74</sup> conflicts in perspective become apparent.

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<sup>69</sup> Law Comm Report 172, n 21 above, at para 4.44

<sup>70</sup> Children Act 1989 s 10(8)

<sup>71</sup> Law Comm Report 172, n 21 above, at paras 4.44 and 6.26

<sup>72</sup> *ibid.* at para 6.26

<sup>73</sup> Law Comm Rep No 172, n 21 above, at para. 2.1

<sup>74</sup> *ibid.*

There is a lack of clear philosophical direction here. Is the emphasis to be on autonomy or lack of intervention in parent-child relationships? At one and the same time the Commissioners define the status of parenthood as the key legal status to govern parent-child relationships and yet allow children access to a procedure to challenge it. Overhanging both of these notions is, however, the over-arching welfare principle. In this respect the conflicts left by *Gillick* remained unsolved. The Law Commissioners posit that the court should only have to take into account the child's views in light of his age and understanding. But what if the child concerned is end efficient or has sufficient understanding? Should not his or her opinion then determine outcome? The strong rights thesis suggests that it should. There is a lack of attachment to freedom in the Law Commission's considerations, of recognizing that individuals who are end efficient should be allowed to have a decisive say in matters relating to their own lives. By failing to embrace this fundamental philosophical proposition and by relying on the indeterminacy of welfare considerations and emphasising the importance of parenthood and lack of intervention an opportunity to prominently emphasise children's autonomy in statutory form was lost. Moreover, it would be for the courts to have the final say - to determine in common law the proper legal relationship between child parent and state, which brings us neatly to the issue of wardship and the deficiencies of past practice.

## **2. Wardship - Its functions and status**

Chapter two briefly highlighted how the wardship jurisdiction has changed into its modern form. Perhaps the most interesting development to come out of the Law Commission's Review of Private Law was as a result of its examination of the future role of the wardship jurisdiction and its potential relationship with the statutory jurisdiction.<sup>75</sup> Before discussing those

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<sup>75</sup> It is common parlance to talk of the wardship jurisdiction. Wardship is not a jurisdiction itself but provides access to the inherent jurisdiction of the High Court. It is merely a mechanism to access the inherent jurisdiction. However, wardship brings special protection for children. In wardship all steps relating to an individual child's life must be sanctioned by the court. If the High Court was to exercise its inherent jurisdiction not through wardship it could theoretically take any decision in relation to a child's welfare. However, only through wardship can the High Court take

recommendations, however, it is worthwhile to consider in some detail how the court through its inherent *parens patriae* jurisdiction operates in cases involving children, particularly mature minors. The importance of the inherent jurisdiction in relation to children should not be underestimated. As one commentator has put it, "[n]o examination of family proceedings can ignore the role of the 'inherent' jurisdiction, for it is in the exercise of this jurisdiction that the courts developed their most powerful protective activities."<sup>76</sup> There is little doubt that this is the case. The mechanism of wardship is an embodiment of the protectionist role of the court and that is highly paternalistic in application. It is unsurprising therefore that its legacy, as will be shown in the next chapter, has had a significant bearing on the cases arising under the Children Act 1989 where children have sought to utilise the proposals recommended by the Law Commission of seeking orders about their own upbringing. Indeed, if ever a definitive definition needed to be given to paternalism then one need look no further than the court's exercise of its own inherent jurisdiction through the machinery of wardship. As Lowe and White put it:

"The law knows no greater form of protection for a child than wardship. Although the jurisdiction is now primarily concerned with the ward's welfare this has by no means always been so. Indeed it is ironic that a jurisdiction which began essentially by exploiting infants should now be pre-eminent as a jurisdiction for securing their welfare"<sup>77</sup>

Wardship is an embodiment of the Crown's prerogative as *parens patriae*, as protector of those who cannot look after themselves. How the High Court sees its role as protector though is highly significant. I argued in chapter two of this work that there is a significant difference between a protecting an

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a continuing role in supervising the affairs of a child. For discussion see: White R, Carr, P, and Lowe, N, n 6 above, at chapter 12; Parry, M, "The Children Act 1989: Local Authorities, Wardship and the Revival of the Inherent Jurisdiction" [1992] JSWFL 212.

<sup>76</sup> Eekelaar, J, "A Jurisdiction in Search of a Mission: Family Proceedings in England and Wales, (1994) 57 MLR 839 at 849-50.

<sup>77</sup> Lowe, N, and White, R, *Wards of Court*, Barry Rose. 2nd ed, 1986, at 1 (cited in this work as "Lowe and White").

individual child and being paternalistic when exercising that protection. It is perhaps pertinent to say that there are varying degrees of protectionism ranging from on the one hand intervention to assert a child's radical autonomy to a form of protectionism associated with patriarchy and paternalism. O'Donovan has written that:

"Patriarchy is a term in political science. It is used to describe a stable, hierarchical, authoritarian order of male dominance. A feature of such an order is that it affects the psychology of those who live under it."<sup>78</sup>

Now, the days of the court endorsing a system of patriarchy are, arguably, long gone.<sup>79</sup> However, the days of the court itself acting paternalistically, by limiting freedom through well meant intentions and regulation, are still very much with us. When the court uses wardship it acts in this respect. The jurisdiction is a paternal one.<sup>80</sup> This is because when a child is made a ward of court the High Court becomes his or her custodian, guardian, or "judicial reasonable parent"<sup>81</sup> as it was put in *J v. C* [1970] AC. 668. What this means

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<sup>78</sup> O'Donovan, K, *Sexual Divisions in Law*, Weidenfeld and Nicolson. 1985, at 22

<sup>79</sup> *contra* the Law Commission's comments on the cases involving recalcitrant teenagers. See Law Comm Working Paper 96, n 18 above, at paras 3.48-3.51. For commentary see Bradney, A, "The Judge as *Parens Patriae*" [1988] Fam Law 137, at 141 who argues that even though such cases are rare given their gender specificity wardship used in this manner "can easily be characterised as being a mere imposition of patriarchal assumptions." For an opposite view see Turner, N, "Wardship: The Official Solicitor's Role" (1977) 2 Adoption and Fostering 30

<sup>80</sup> although according to Waite J in *Re R (A Minor) (Wardship: Consent to Treatment)* (FD) [1992] 2 FCR 236, "[t]he fact that a jurisdiction is paternal does not entitle the court to be paternalistic." His justification for this statement stems from his view that when confronted by a mature minor who is not the victim of his own immaturity the "[j]urisdiction of the court to intervene would be abdicated." Nevertheless, for Waite J the power of the judge to determine whether a child is a victim of his or her own immaturity remains intact and when that power is exercised with flexibility, as it was in *Re R*, then passing the maturity test is very difficult indeed. For in depth discussion of this case and issues surrounding sufficient understanding see chapter seven.

<sup>81</sup> See *J v C* [1970] AC 668 per Upjohn J at 723. For a discussion of what is meant by the "judicial reasonable parent" see further the views of the former Master of the Rolls, Lord Donaldson in *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] FCR 229, at 245 who

is that before any important step can be taken in relation to a child's life, whether it is about his or her protection or his or her upbringing, the leave of the court must be sought. Moreover, when the court decides a matter concerning a child's life it can make *any order* it deems to be necessary.

Since the decision of the House of Lords in *J v. C* wardship proceedings have generally been governed by the welfare principle which is regarded as the first and paramount consideration for the court. However, the application of the welfare principle is not the only criterion which the court need refer to when making an order (or when refusing to make an order). To say that the welfare of the ward is the court's first and paramount consideration in all cases is somewhat misleading. Thus, there may be a series of factors which outweigh the child's welfare. For example, where freedom of publicity clashes with the interests of a minor the minor's welfare may be a secondary consideration as in *Re X (a minor)* [1975] Fam 47. Or, where the more wider public interest is deemed to be more important than the protection of the ward as in *Re S (Minors) (Wardship: Disclosure of Material)* [1988] 1 FLR 1. Or, as a challenge to immigration decisions as in *Re Mohammed Arif (An Infant)*, *Re Nirbhai Singh (An Infant)* [1968] Ch 643. The court may also, of course, decline to use wardship.<sup>82</sup>

In their seminal work on wardship, Lowe and White<sup>83</sup> argued that the weight to be placed on the welfare of a particular ward is dependent on whether the court is exercising its custodial or protective jurisdiction.<sup>84</sup> On this view, the custodial jurisdiction is used when the court is considering matters which relate to the care and upbringing of a child and would be bound by the paramountcy of the welfare criterion which was elaborated in *J v C* and given statutory recognition in s 1 Guardianship of Minors Act 1971 (and

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argues that wardship is neither derived from or limited by the power of parents but can be used to override parents and children regarded as "Gillick competent."

<sup>82</sup> See *A v Liverpool City Council* [1982] A C 363; *Re W* [1985] AC 791 See also Law Comm Working Paper No 101, n 20 above, at para 2.23

<sup>83</sup> See further Lowe and White, n 77 above, at chapter 7

<sup>84</sup> Lowe and White, *ibid.* at 146, justify this dichotomy by the decision of the House of Lords in *S v McC; W v W* [1972] AC 24.

now s 1(1) Children Act 1989). In contrast, when exercising its protective jurisdiction the court is not bound by the paramountcy of the welfare principle as it can do anything to protect a child by preventing him or her from sustaining harm. More importantly the court can, as referred to above, consider other compelling reasons not to exercise its jurisdiction to protect a child. *Re X (A Minor)* [1975] Fam 47 above was a case such as this, where a balance had to be struck between the welfare of the ward and the wider public interest when deciding whether to restrain the publication of a piece of literature which had references to a 14 year old's deceased natural father's sexual behaviour. The girl was made a ward of court at the request of her step-father who had argued that it would be in the child's best interests for the book not to be published because of the ward's volatile state. The court, rightly, refused this course of action, believing that the wider interests of the public to read the book had to be greater than the child's welfare. This case not only illustrates the possible extent of the court's power but the drawbacks of placing too great an emphasis on the welfare of children, which has to be measured appropriately.

This distinction between the court's custodial and protective jurisdictions is however persuasive and it is interesting for another reason which will become increasingly significant later in this work. According to Lowe and White the court would not be bound to apply the welfare principle under its custodial jurisdiction where, following the *Gillick* case, a minor was of an age of sufficient maturity to be able to decide the matter for himself or herself.<sup>85</sup> However, the presence of sufficient maturity in an individual would not mean that the court could not ward a mature minor through its protective jurisdiction. The court could, Lowe and White point out, "override a ward's otherwise valid consent to medical treatment"<sup>86</sup> if it thought that to endorse such consent would be harmful to the child. However, the court could not do so in matters which concerned the upbringing of a child such as deciding where he or she might like to reside. When assessing whether to use its protective jurisdiction, the court is asking whether a child will be harmed. If harm cannot be identified then it follows

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<sup>85</sup> See Lowe and White, n 77 above, at 154

<sup>86</sup> Lowe and White, n 77 above, at 158

that the court could not exercise its jurisdiction as protector. According to this thesis the key factor prior to the Children Act 1989 in wardship cases concerning custody and upbringing would, if their analysis is accepted, be simply a question of whether or not a child had sufficient understanding to decide the matter. The welfare principle would on this basis be irrelevant if the child did possess sufficient understanding (in matters custodial). This would be in accord with the strong rights thesis advanced in chapter one.<sup>87</sup>

It is clear from the discussion earlier in this chapter that the Law Commission did not consider the issue of children's autonomy in this way. Whilst the level of understanding was regarded as important it is clear that sufficient understanding would not lead to a child being able to determine outcome. The analysis offered by Lowe and White turns on one's interpretation of the *Gillick* case, discussed at the end of chapter two. If *Gillick* is given the interpretation given to it by them then it is axiomatic that once of a certain age then the power of the court is as limited as that of a parent when considering matters which arise under the custodial jurisdiction. For example, they comment that:

"...the older the child is the more latitude must be given to him. As Lord Denning MR said in *Hewer v Bryant* [1970] QB 337 at 369 (and approved by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112):

The legal right of a parent to the custody of a child...is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with the right of control and ends with little more than advice.

Although of course in wardship ultimate control of the child vests in the court similar considerations must operate. In any event it is worth remembering that as with all court actions wardship has only a limited value, so that while it may prove useful where a ward is amenable to persuasion, it is unlikely to produce fruitful results if the child remains unrepentant."<sup>88</sup>

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<sup>87</sup> Although the strong rights thesis would apply equally to the court's protective jurisdiction.

<sup>88</sup> Lowe and White, n 77 above, at 128

Looked at in this way, the wardship jurisdiction is seen as a positive mechanism for an older child to assert his or her rights even by making himself or herself a ward of court which was procedurally possible.<sup>89</sup> It certainly has interesting ramifications. Indeed, had the Law Commission accepted this thesis the Bill it recommended would no doubt have given greater weight to the child's view in matters covered by the custodial jurisdiction in wardship. A child's understanding, his capacity to give valid consent, becomes *the* most important criterion for deciding cases involving issues about a child's upbringing. An essentially paternalistic mechanism is thereby metamorphosed into a mechanism to promote children's autonomy. Perhaps one might argue that this would be reason enough for the jurisdiction to be maintained.

Lowe and White's analysis should not, however, be taken at face value. It is a radical thesis and there is little evidence in case law to substantiate it and they admit this.<sup>90</sup> Moreover, individual applications by children were, even in wardship, exceptional and as a result not properly developed.<sup>91</sup> It is only one interpretation of how wardship might have operated had the *Gillick* principle been tested in such a way as to permit a mature minor to ask the court to intervene in matters relating to his or her upbringing.<sup>92</sup> There are clearly other ways of seeing the possible influence of *Gillick*. Some of these other ways of seeing belong to senior members of the judiciary whose views matter in the day to day practical decisions of the courts. One such opinion would be that this jurisdiction is derived not from any comparative analysis of parenthood, of allowing an end efficient child to have the final say in matters between parent and child, but from the "delegated performance of the duties of the Crown to protect its subjects and particularly children who are the generations of the future."<sup>93</sup> On this view the paternalism of the

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<sup>89</sup> See Lowe and White, n 77 above, at 40-41

<sup>90</sup> *ibid.* at 147

<sup>91</sup> *ibid.* at 41 where the authors accept this point.

<sup>92</sup> *ibid.* at 154

<sup>93</sup> per Lord Donaldson MR in *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] FCR 229, at 245

court remains comparatively unfettered.<sup>94</sup> In subsequent chapters of this work it will be illustrated and I will put forward the view that since the Children Act 1989 came into force, the courts have co-opted the wider paternalistic methods of wardship into their consideration of the legislation itself, particularly when minors seek applications for leave to apply for orders independently - even in matters relating to upbringing. In this manner, matters which would be regarded as custodial, per Lowe and White, such as the ability of children to move out are treated in a wider, more protectionist (more paternalistic) way. Thus, as one senior judge recently put it '[t]he court in the exercise of its wardship or statutory jurisdiction has power to override the decisions of a "*Gillick* competent" child as much as those of parents or guardians."<sup>95</sup> It will be later shown that even if a child has sufficient understanding it is, at the end of the day, for the court to decide whether he or she would be successful, taking into account the welfare principle and other general principle drawn up by the Law Commission which should underpin the law. It will be argued that the court's look at cases, even of *Gillick* competent children, with a degree of paternalism which is endemic in wardship cases and in doing so are supported by the general philosophy of the Children Act itself.

Now, in the previous part of this work it was argued that paternalism implied control of persons and not respect for them.<sup>96</sup> On this basis a paternalistic jurisdiction is a bad one and should be abolished. For Lowe and White the jurisdiction need not be paternalistic, however. It could empower. Whilst the Law Commission did not in any form share the view that paternalism itself was a bad philosophy it did, nevertheless, suggest that wardship as one of a range of options might be abolished to make way for the new all

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<sup>94</sup> As a result of this view the court has the power to determine the outcome of a case. See the judgment of Farquharson LJ in *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] 2 FCR 229, at 252 who argues that the exercise of the wardship jurisdiction ought not to be constrained to deciding questions of whether a child did or did not have sufficient understanding but to applying the welfare principle.

<sup>95</sup> Lord Donaldson of Lynton MR in *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] 2 FCR 229, at 246.

<sup>96</sup> See particularly chapter two, *passim*.

encompassing statutory scheme it was proposing.<sup>97</sup> In other words, another good reason to have a Children Act was to replace the now outdated creature of the common law known as wardship with a more contemporary statutory jurisdiction for children. As the Commission themselves put it in their working paper on the subject:

"We need to consider whether a jurisdiction with such a remote ancestry remains relevant to the needs of the present day and whether its continuance as a common law system is acceptable within the predominantly statutory framework of family law."<sup>98</sup>

In considering whether wardship could be justified the Law Commission considered its functions and possible future role alongside the proposed statutory scheme. According to the Law Commission wardship fulfilled four separate functions in relation to statute law:

- as an alternative jurisdiction, running alongside the statute law.<sup>99</sup>
- as an independent jurisdiction, filling the lacunae of the statute law.<sup>100</sup>
- as a supportive jurisdiction, to assist the statutory codes in achieving better results;<sup>101</sup> and
- as a review or appellate jurisdiction which would allow challenges to decisions taken under statute law.<sup>102</sup>

Of all these functions, the Law Commission considered that it could see no reason why the functions of wardship as either an alternative or appellate jurisdiction be retained given the scope of the statutory reform it envisaged,

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<sup>97</sup> Law Comm Working Paper 101, n 20 above, at paras 4.21-4.26

<sup>98</sup> *ibid.* at para 1.4

<sup>99</sup> *ibid.* at para 4.4

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

that its use as an independent jurisdiction would lead to inconsistencies with the statutory code and saw its function as a supportive jurisdiction as being limited once the new statutory code was up and running given that the new code should be able to envisage problem situations.

The Commission therefore considered a series of options for reform of wardship including:

- its retention as a separate jurisdiction.<sup>103</sup>
- making it a residuary jurisdiction;<sup>104</sup> and
- to abrogate wardship and incorporate its important components into the legislation.<sup>105</sup>

It is clear from the language of the Working Paper on *Wards of Court*<sup>106</sup> that the Law Commission provisionally believed that the jurisdiction ought to be abolished as a separate jurisdiction, therefore favouring the last of the three alternatives outlined above.<sup>107</sup> The Commissioners saw that the problems of retaining wardship as a separate jurisdiction were insurmountable mainly because of the fact that a separate jurisdiction would render the statutory scheme nonsensical given that the functions that the jurisdiction fulfilled would in any case be covered by any statutory code.<sup>108</sup> Moreover, the rationing of cases via wardship to the High court would be inappropriate given the possibilities of a concurrent jurisdiction<sup>109</sup> which was eventually proposed by the Commission in its final report.

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<sup>103</sup> *ibid.* at paras 4.6-4.14

<sup>104</sup> *ibid.* at paras 4.15-4.20

<sup>105</sup> *ibid.* at paras 4.21-4.26

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.* at

<sup>108</sup> *ibid.* at para 4.9

<sup>109</sup> *ibid.* at para 4.12

By maintaining wardship as a residuary jurisdiction, the second possible alternative for reform, would have meant that the jurisdiction would merely play a supportive function. However, the Commission considered that this course too was inappropriate on the grounds that any argument that wardship would make good deficiencies in a statutory code is in itself otiose. They commented:

"Unfortunately, we see great difficulty in defining the circumstances in which this residuary jurisdiction would arise. What test could be adopted to distinguish between those cases in which it was supporting or acting independently of the statutory codes and those in which was circumventing them? A test based on the presence of a "lacuna" raises this problem immediately: how can one distinguish a deliberate gap left for good reason from an inadvertent one for which no good reason can be divined? A test based on "exceptional circumstances" or some similar formula runs into the same problem, because exceptional circumstances are likely to be construed to mean either "not covered by the statutory code" or, perhaps worse, "covered by the statutory code but exceptional even so"."<sup>110</sup>

This argument is key given what was to happen after the Children Act 1989 came into force in October 1991. The proposals of the Law Commission to abolish the jurisdiction were not taken any further as a result of responses after consultation. In its final report on *Guardianship and Custody*<sup>111</sup> the Commission concluded:

"We have decided to postpone making any substantial recommendations for the reform of the courts' inherent powers in wardship proceedings. The response to our Working Paper on Wards of Court indicated considerable support for some reform, but only once the statutory procedures in both private and public law had themselves been reformed. Our aim has therefore been to incorporate the most valuable features of wardship into our recommendations for a new statutory system. As with the review of child care law, this should reduce the need to resort to wardship proceedings save

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<sup>110</sup> *ibid.* 4.17

<sup>111</sup> Law Comm Report No 172, n 21 above.

in the most unusual and complex cases. It will also enable the true scope for a residual power for the courts to assume guardianship over certain children to be determined."<sup>112</sup>

Wardship has, as a result, remained as a separate jurisdiction even after the introduction of the Children Act 1989. Its use has, nevertheless, been heavily circumscribed by the legislation. Its philosophy, its paternalism and its often autocratic, albeit well meaning, way of dealing with the problem those members of the community who need guidance is retained. Bainham has argued that wardship is an integral part of the law relating to children.<sup>113</sup> The true value of wardship, he argues, "lies not exclusively, or even primarily, in the number of children assisted by it, but in the knowledge that there exists a potentially comprehensive mechanism of protection. Even if few children have been the recipients of this protection, it is potentially available to all children. Everyone wants to believe that the legal system is capable of coming to the aid of any child in difficulty. In this sense, wardship salves the collective conscious of society, enticing us to trust in its largely unlimited protective role. If it should go, the English legal system would lose its, arguably, most romantic procedure."<sup>114</sup> But is this argument anything more than mere sentimentality? The romance that Bainham describes is picturesque falsehood. There is no real attachment to individual human beings in a paternalistic vision of the world. Law is all about romance, about connexion, and that has been the hallmark of this thesis. Yet the romance of the wardship jurisdiction is not an affair of love. It neglects to respect the fact that individuals are ends in selves.<sup>115</sup> It is a jurisdiction which belongs to a by-gone era.

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<sup>112</sup> *ibid.* at para 1.4

<sup>113</sup> Lowe and White certainly support the view that a specialist High Court jurisdiction is required. See Lowe and White, n 77 above, at 12- 16. See also Lowe, N, "Caring for Children" (1989) 139 NLJ 87

<sup>114</sup> Bainham, A, "The Children Act 1989: The Future of Wardship" [1990] Fam Law 270, at 273

<sup>115</sup> See for example *Re SW* [1986] 1 FLR 24; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 2 FCR 785; *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] 2 FCR 229. For discussion of the cases see further chapter seven of this work.

It is, of course, a poor argument to say that because a jurisdiction has feudal origins it should be abolished. It is a better argument, and the one employed by the Law Commission, to say that on a technical level wardship should be abrogated because it might conflict with an all encompassing statutory jurisdiction. However, it is even more pertinent to assess wardship by looking at what it stands for. That the courts should have a protective role over children is an axiom. However, when protection involves coercion and control of a child who is *Gillick* competent the moral grounds for the existence of a jurisdiction which sanctioned it become suspect. I would, contrary to Lowe and White's thesis employ this argument in relation to matters custodial and protective. The absolute nature of strong rights, rights of radical autonomy, mean that wardship is rendered unreasonable because it fails to respect individuals as ends in themselves:

"Radical autonomy defines the moral status of human beings as ends in themselves. It is an incommensurate thing: not something to be put in scales and weighed against other things. Everything else in the world is different...The incommensurate status of human beings is shown clearly in Ivan Karamazov's question to his brother. Would you if the choice were available purchase happiness for mankind into eternity by the torture of one innocent child? Alyosha answered no."<sup>116</sup>

By failing to respect the views of a mature child the court, even when it thinks its actions are justifiable, acts unreasonably. When the wardship jurisdiction is used by the courts as a mechanism to check the opinions of a mature individual, whether or not that decision is seen by others as not being in the best interests of the person concerned, its acts offend the strong rights of individuals. It does not engage in an appropriate exercise of law. It is all about an attitude of mind - of how the court in wardship considers children.

The Law Commission's arguments for the abolition of wardship were based on the constitutional argument that it would be improper for the courts to have a separate jurisdiction which might curtail or replace the express will of the elected members of Parliament. We have argued earlier that the courts

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<sup>116</sup> Detmold, M, *Courts and Administrators*, Weidenfeld and Nicolson. 1989, at 162

have a responsibility to protect the radical autonomy of individuals and this may even mean they might strike down a statute. But what if the courts themselves, in their own common law jurisdiction, act in flagrant breach of the strong rights of individuals? Well, family law would be in crisis. If a common law jurisdiction protected strong rights, as it should, there would be no difficulty. Any statute in breach of that jurisdiction could be invalidated, as with the blue eyed babies statute.

The philosophy of wardship means that family law is in conceptual crisis. It shows how the courts see cases involving children. The *Gillick* case, which was not a case involving wardship, represented a significant step in favour of children's autonomy. Even if wardship were abolished, the court would still retain its powers under the inherent jurisdiction. It would merely find another way of imposing its view. It is the way the courts think that is the key. *Gillick* illustrates how the courts should be thinking. Its philosophy is closely associated with personal autonomy. The inherent jurisdiction as seen through wardship, however, illustrates how the courts think paternalistically with a large degree of control instead of protection. The Children Act 1989 has tried to absorb both these philosophical perspectives, taking on board the caution of wardship and some of the philosophy of *Gillick*. Its success in terms of respect for strong rights can only be judged by looking at it more closely. This will be discussed in the following three chapters.

## **Conclusion**

It is apparent from the discussion in this chapter that there are tensions between welfare and autonomy concerns in the law relating to children. It is clear from the brief overview of the Law Commission's consideration of how the law should look at children that "the priority given to the welfare principle needs to be strengthened rather than undermined."<sup>117</sup> And so, in the Children Act 1989 it was. This, however, has implications for children's rights which can be easily illustrated:

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<sup>117</sup> Law Comm Working Paper 96, n 18 above, at para 6.9

What if a child, who is end efficient, wants (P) but the court does not consider (P) to be in the best interests of the child. Is it then legitimate for the court, being an organ of the state, to refuse the child (P)?

According to Lowe and White's thesis the child should be allowed (P) if (P) is outside the court's wider protectionist powers in the inherent jurisdiction (i.e. (P) pertains to an issue of upbringing.)

According to the strong rights thesis advocated in Part I of this work an external determination of the welfare of the child by any court, tribunal, doctor or social worker should be irrelevant if an individual is end efficient to decide (P). (P) could be anything. It could be a child wishing to move out, change religion, obtain contraceptives, consent to and refuse medical treatment. The issue is not the individual's welfare but his or her status as an end in self.

The problem with the Law Commission's recommendations to reform the law relating to children is that it failed in an attempt to address the *Gillick* question authoritatively i.e. should children with sufficient understanding have the right to determine the matter for themselves? And, whilst the Commissioners determined that children should be allowed access to the courts independently there is no threat to the welfare principle.

At the beginning of this chapter it was posited that the Act was remarkable because it introduced, for the first time, measures which would allow children to apply, with the leave of the court, for orders about their own upbringing. Bainham has commented that "without these changes it might have been difficult to speak with any conviction of children's rights. Rights are arguably of little value, and certainly of less value, where the machinery does not exist for their enforcement."<sup>118</sup> His observation pertains to rights in the weak sense that have been recognized by the legal system itself, of children having greater legal standing or access to law. Whilst these changes are welcome do they in any way recognize that children have ontological rights, rights of radical autonomy? This it is has been argued is

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<sup>118</sup> Bainham, *Children: The Modern Law*, Jordans. 1993, at 445

the function of the courts. Of what value are strong rights when they are not recognized by the machine that oversees legal rules?

For Lowe and White wardship was viewed as a vehicle for the changes envisaged by Lord Scarman in *Gillick*.<sup>119</sup> Their analysis, however, neglects the paternalistic way in which the court acts and whilst their interpretation of the effects of *Gillick* on wardship is a useful one and one this author would like to have seen gain fruition subsequent cases have revealed it to be tenuous. What I will seek to show is that applications by children under the Children Act 1989 are seen by the courts as exceptional cases, the kind of cases which the court previously dealt with under wardship. The very idea that a child might decide where he or she might wish to live is alien to a court whose history is enveloped in deciding what is perceived to be in the best interests of children rather than allowing children to determine the issue for themselves, by asserting their radical autonomy. This philosophy of paternalism which pervaded the courts' consideration of cases in wardship has been transferred to its consideration of the Children Act 1989. In light of its lack of radicalism in philosophy the Act endorses this process. The reason why strong rights are valuable is that they allow one to test legal rules, jurisdictions, and judicial decisions. If *Gillick* laid solid foundations for the recognition of children's autonomy, to what extent did the Children Act 1989 build on it? According to Bainham, "it would be blinkered legalism not to recognise that many of the Act's provisions have been put there to comply with the spirit if not the letter, of *Gillick*." <sup>120</sup> On this basis, he suggests that the Children Act is the first legislative attempt in which children's rights are not identified exclusively with the concept of welfare.<sup>121</sup> I cannot accept this view. The rights that are given to children under the age of sixteen by the legislation are only of use when the court accepts that they accord with the child's best interests. In the next chapter, I shall turn to the rights that the Act has given to children and then in chapter

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<sup>119</sup> Lowe and White, n 77 above, at 244

<sup>120</sup> Bainham, A, "The Children Act 1989: Adolescence and Children's Rights" [1990] Fam Law 311, at 311

<sup>121</sup> *ibid.*

six will discuss how those rights are valued by looking again at the general principles of the legislation.

## **Chapter 5: Rights and Hurdles: How Children Make Applications Under the Children Act 1989: The Statutory Provisions**

"Only a momentary legal system is of practical significance. And this is because action (which is what distinguishes the practical from the theoretical) is logically tied to moment. Theoretical thought is concerned with knowledge and belief. Thus one's theoretical thought can range through history. Whereas practical thought is concerned with action; and it is a logical truth that a human being can only act at his present moment (it would be a logical nonsense to contemplate acting in the past; or acting in the future before the future became the present moment). Now, the law is a practical thing. Statutes concern nothing but the actions of citizens."<sup>1</sup>

### **Introduction**

It has been noted in the first part of this thesis that the substance of the negative idea of law is the radical autonomy of the individual human being. The strong rights theory elaborated in chapter one allows for the examination of individual legal rules in a critical way by asking whether such rules take into account the radical autonomy of particular individuals who stand before a court. Using the theory allows one to ask whether the legislature and the judiciary have created legal rules which may or may not have violated the strong rights of citizens or in other words whether particular individuals are being treated as ends in selves. I have argued that children, like all human beings, and because they are human beings, have

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<sup>1</sup> Demold, M, *Courts and Administrators*, Weidenfeld & Nicolson. 1989, at 94

strong rights. The key now is to test whether these necessarily ontological rights that children possess are being given their proper place in certain legal rules and their consideration by the courts.

To this end, the following chapter will be concerned with the actual statute under consideration, the Children Act 1989, which introduced a new regime to govern the relationship between children and the law, and for the first time, as was noted in chapter four, places some emphasis on the autonomy of children. Whilst the previous chapter of this section concentrated on how and why the Children Act 1989 came about, the following two chapters will analyse the statutory framework in the legislation and the substantial case law which has developed since the Act came into force on 14th October 1991 and will assess how the courts are protecting and enforcing the autonomy interests of children. This will allow, in chapter seven, for the issue of end efficiency or sufficient understanding which is integral to the strong rights thesis to be critically analysed.

Statutes are made to create a new moment in law. They concern, per Detmold, action.<sup>2</sup> Rules in statutes should, as discussed in Part I of this thesis, logically be tied to truth. I have argued that it is the role of the courts to point this out. The particular purposes of a statute may be diverse. According to the Law Commission the Children Act 1989 was clarificatory, clearing up problems of complexity in the detail of the old law. It is worth repeating again that the Commission argued that the "main principles of the law [were] clear and well accepted."<sup>3</sup> The Children Act 1989 consolidated the law and reasserted a series of ideological viewpoints, most notably the importance of welfare. It fails however to address categorically important questions. Much ink, for example, has been expended on the precise impact of the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402. In that case Lord Scarman said of the landmark decision that it was "the beginning, not the conclusion, of a legal development in a field glimpsed by one or two judges in recent times

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<sup>2</sup> *ibid.*

<sup>3</sup> Law Commission, *Review of Child Law: Guardianship and Custody*, Report No 172, HMSO. 1988, at para 1.1

(notably Butler-Sloss J in *Re P (a minor)* (1981) 80 LGR 301)."<sup>4</sup> He was, without doubt, referring to the recognition of the personal autonomy of minors. The Children Act 1989 was the next step in the process, the next moment. However, the Act has done little to resolve the problems which were left by *Gillick*, particularly the legal relationship between children and their parents, although it has sought to address them. Thus, the Act promotes both the idea of parental responsibility but it also recognizes that children should also have rights. Because of the failures of the Act to promote autonomy over other issues, including welfare, much has been left to the courts. In this chapter I would like to focus on the rights that the Act gives to children, particularly those which allow children to move out, and of the response of the courts to those new rights. This will allow us to ask whether the legal rules themselves and the actions of the courts accord with the theoretical position advanced in the first part of this work.

### **Children's Rights and the Children Act 1989**

The rights of children under the age of 16 were given practical significance by the Children Act 1989 in two main ways: i) by giving children the opportunity to apply for section 8 orders under the statute, including an order as to where he or she should live;<sup>5</sup> and ii) by enhancing the opportunities of children to participate as a party in such proceedings and even by self initiating a private law action without a next friend or guardian ad litem.<sup>6</sup> However, whilst such procedures are welcome they are only piecemeal developments in themselves and what the statute and its accompanying procedural rules giveth the courts have greatly tempered.

### ***A New Statutory Right: How to Apply for a Residence Order***

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<sup>4</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 414

<sup>5</sup> Children Act 1989 s 10(8)

<sup>6</sup> Family Proceedings Rules 1991, r 9.2A

Through section 10 of the Children Act 1989 children under the age of sixteen<sup>7</sup> were given a new statutory ability to apply, with the leave of the court, for a section 8 order in any family proceedings.<sup>8</sup>

For the purposes of the Act family proceedings means "any proceedings under the inherent jurisdiction<sup>9</sup> of the High Court in relation to children"<sup>10</sup> and those under the enactment's listed in s. 8(4).<sup>11</sup> Four kinds of order are

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<sup>7</sup> This is in accordance with the views of the Law Commission. See Law Comm Report 172, n 3 above, at para 3.25. Thus, Children Act 1989 s 9(7) and (6) provide that no section 8 order should be made in respect of a child who is aged sixteen or over and that no order should be made which will have effect beyond a child's sixteenth birthday unless the circumstances are exceptional. Sections 91(10) and (11) state that an order will cease to have effect when a child reaches the age of 16 or 18 where the circumstances were deemed exceptional. For an example of exceptional circumstances see *Re M (A Minor) (Immigration: Residence Order)* [1993] 2 FLR 858; *Re SW (A Minor) (Wardship: Jurisdiction)* [1986] 1 FLR 24. For commentary on this latter case see Bradney, A, "The Judge as *Parens Patriae*" [1988] Fam Law 137

<sup>8</sup> Children Act 1989 s10(1)

<sup>9</sup> meaning wardship and the inherent jurisdiction

<sup>10</sup> Children Act s8(4)

<sup>11</sup> Per Children Act 1989 s 8(4):

"The enactments are-

- (a) Parts I, II and IV of this Act;
- (b) the Matrimonial Causes Act 1976;
- (c) the Domestic Violence and Matrimonial Proceedings Act 1976;
- (d) the Adoption Act 1976;
- (e) the Domestic Proceedings and Magistrates' Courts Act 1978;
- (f) sections 1 and 9 of the Matrimonial Homes Act 1983;
- (g) Part III of the Matrimonial and Family Proceedings Act 1984."

available<sup>12</sup> : a contact order<sup>13</sup>, a prohibited steps order,<sup>14</sup> a specific issues order,<sup>15</sup> and finally and most pertinently to this thesis a residence order. A residence order "means an order settling the arrangements to be made as to the person with whom the child is to live."<sup>16</sup> The residence order replaced the previous custody order and was favoured by the Law Commission for its flexibility as it could deal with a wider range of situations, including the possibility of joint custody.<sup>17</sup>

The granting of a residence order itself is to be guided by the welfare principle contained in s 1(1) of the Act and the principle of non-intervention of s1(2) of the Act and where an application for a residence order is contested, the court must pay regard to the statutory checklist of factors contained in s1(3) of the Act.<sup>18</sup> It is this ability of an individual child to initiate proceedings to obtain a residence order which has led to talk of children being able to 'divorce' their parents. Whilst this new found ability in itself sounds exciting "the \$64,000 question", as one commentator has put it, "is whether the law does support the right of the mature adolescent to move out?"<sup>19</sup> In England and Wales such cases came on the back of the now

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<sup>12</sup> Children Act 1989 s 8(1). For details on how to complete an application form for a s 8 order see Mallender, P and Rayson, J, *How to Make Applications in the Family Proceedings Court*, Blackstone Press. 1992, at chapter 9.

<sup>13</sup> Children Act 1989 s 8(1) "a contact order' means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other"

<sup>14</sup> Children Act 1989 s 8(1) "a prohibited steps order' means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by the person without the consent of the court."

<sup>15</sup> Children Act 1989 s 8(1) "a specific issues order' means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child."

<sup>16</sup> Children Act 1989 s 8(1)

<sup>17</sup> Law Comm Report 172, n 3 above, at para 4.12

<sup>18</sup> See further chapter six of this work.

<sup>19</sup> Bainham, A, "See You in Court, Mum': Children as Litigants" (1994) 6 JCL 127, at 130

infamous American cases of Gregory Kinglsey<sup>20</sup> and Kimberly Mays<sup>21</sup> both of whom sought orders, from courts in the United States of America, to live elsewhere than with their parents.

It should be made clear from the outset that under the Children Act 1989 a residence order is not made in favour of the child himself or herself. There is something of a paradox in this. Although an order is applied for by the child it will be in favour of another person. It is clear from s 12(2) of the Act which states that "where the court makes a residence order in favour of any person who is not the parent or guardian of the child concerned that person shall have parental responsibility for the child while the residence order remains in force." This may raise the question of why the person who is to eventually have parental responsibility does not apply for the order themselves. This matter was addressed by Booth J in *Re SC (A Minor)* [1994] 1 FLR 96, at 100 where she commented:

"It is quite clear that a residence order cannot be made in favour of the child himself. But it is equally clear that the Act enables a child to apply for a s 8 order and a residence order is not excluded. In my judgment the court should not fetter the statutory ability of the child to seek any s8 order, including a residence order, if it is appropriate for an application to be made. Although the court will undoubtedly consider why it is that the person in whose favour a proposed residence order would be made is not applying, it would be wrong in my opinion be wrong to import into the Act any requirement that only he or she should make the application."

This view is in accordance with that of the Law Commission. An application for an order by a child under sixteen who is viewed as being

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<sup>20</sup> *Kingsley v. Kingsley* 623 So. 2d 780 (Fla. Dist. Ct App. 1993). See also the various materials referred to by Freeman, M, "Can Children Divorce Their Parents?" in Freeman M (ed), *Divorce: Where Next?*, Dartmouth. 1996, 159, at 174 n 1

<sup>21</sup> See "Girl Who Divorced Parents Goes Home" *The Times*, March 10, 1994, p. 13. It should be noted that the Mays case was complicated by the fact that Kimberly was accidentally switched at birth. The order she initially sought was to sever all legal ties between herself and her natural parents.

'Gillick competent' can only give it greater weight.<sup>22</sup> This is an encouraging development especially to those who before the Children Act wished that greater emphasis be placed on the personal autonomy of children in accordance with the argument in *Gillick v West Norfolk Area Health Authority and another* [1985] 3 All ER 402. However, such encouragement is quickly tempered by the fact that when a child is applying for an order he or she must overcome a series of hurdles. He or she must apply for leave and the application for leave is to be heard only in the High Court. Once he or she has clambered over these obstacles the general principles of the Act, referred to above, also need to be satisfied.<sup>23</sup>

## **The Hurdles**

### **1. The Leave Requirement**

Before considering in detail all of the various provisions listed above relating to the actual granting of a section 8 order, it is necessary to highlight the fact that in order to initiate an application for an order a child, unlike a parent or other person with parental responsibility, must apply for leave to apply for such an order.<sup>24</sup> The purpose of this leave criterion is so that the court can filter out any unnecessary and time consuming applications. It reflects one of the fundamental aims of the Children Act 1989 which was to operate an open door policy as regards those who wish to apply for one of the section 8 orders with respect to an individual child.<sup>25</sup> The requirement for leave is simply an operational safeguard in that process.<sup>26</sup> It should be

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<sup>22</sup> although it will not determine the issue.

<sup>23</sup> See further chapter six of this work.

<sup>24</sup> Children Act 1989 s 10(8)

<sup>25</sup> See Law Commission, *Review of Child Law: Custody* Working Paper No 96, HMSO. 1988, at para 5.37, for reasons why the open door policy came into operation: "The simplest way of removing the arbitrariness, gaps and inconsistencies in the present law is to allow non-parents the same rights to apply for custody as have parents. They already have the right to apply for care and control in wardship proceedings, so that no new principle is involved in extending the statutory provisions to them."

<sup>26</sup> *ibid.* at para 5.39: "It may therefore be that a requirement of leave, which currently applies to most interventions in divorce suits, would be a sufficient deterrent against unwarranted

emphasised, however, that a child's application for leave via the statute is not treated in the same way as other individuals who require the leave of the court. When considering granting leave to a child the court does not have to take into consideration a determined checklist of factors which contained in section 10(9) of the Act. It reads:

"Where the person applying for leave to make an application ... is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to -

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant's connection with the child;
- (c) any risk there might be of the proposed application disrupting the child's life to such an extent that he would be harmed by it; and
- (d) where the child is being looked after by a local authority -
  - (i) the authority's plans for the child's future; and
  - (ii) the wishes and feelings of the child's parents".

Instead, and in accordance with s10(8) of the Children Act 1989 the court, the court simply has to consider whether the child is 'Gillick competent'. It reads that:

"Where the person applying for leave to make an application for a section 8 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 8 order."

As a result of a perceived lack of guidance in the legislation about the application of s 10(8) a series of problems have been highlighted in relation to the leave requirement when applications are made by children. In judicial circles the debate has been centred on whether, in assessing if a child should be given leave to apply for a section 8 order, the welfare principle is a relevant criterion. There has also been a divergence of opinion in academic

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applications and would allow the court to judge whether the applicant stood a reasonable prospect of success in the light of all the circumstances of the case."

circles as to whether the criterion for leave is a necessary one for children, and if it is, whether the welfare principle should be the guiding factor or as one commentator has put it "the golden thread"<sup>27</sup> running through the legislation. In considering this debate I want to ask whether the leave requirement accords with view that children are the holders of strong rights.

In their consideration of the early cases the courts dealt with this issue in two distinct ways which are neatly summarized by the facts of two of the cases, *Re C (A Minor) (Leave to Seek Section 8 Orders)* [1994] 1 FLR 26 and *Re SC (A Minor)* [1994] 1 FLR 96. Whilst the question of law which forms the dispute at the hearts of these cases has now been developed in more recent cases, and we shall turn to them shortly, *Re C* and *Re SC* are important for discussion because they show the different approaches of how individual judges think when dealing with applications by children under the Children Act 1989 and point to potential conflicts.

*Re C* was a case involving a girl three weeks away from her fifteenth birthday whose relations with her own parents had become strained. With their permission she had stayed with a friend (A) and her family for two weeks during the Easter vacation, at the end of which she did not want to go home. Relations between C's own father and those of the divorced father of her friend (F) became fraught resulting in a confrontation. As a consequence F consulted his local authority and conversed with social workers who advised that C approach a solicitor. This she did and the solicitors applied for legal aid and sought the leave of the court to apply for a residence order and a specific issues order, as per the Children Act s 10(8), the former to allow her to live with her friend's family and the latter so that she could take a holiday abroad with them to Bulgaria.

The case came before Johnson J who, as a question of law, considered that given the criteria laid out in s 10(9) of the Act did not apply to applications by children themselves then the issue should be determined in accordance with the general principles which governed the Children Act 1989. In doing this he ignored completely s10(8) of the Act which stated that to apply for

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<sup>27</sup> Freeman, n 20 above, at 168 (quoting Dunn J in *Re D* [1977] Fam 158)

leave a child need only possess sufficient understanding, the criterion used to establish "*Gillick* competence." In failing to do this and applying the general principles he declined to entertain C's application for a residence order and adjourned it with liberty for C to restore it. In relation to the specific issue involving the holiday to Bulgaria order he said:

"I have not found this an easy question. As yet judges are not familiar with applications such as this, and, no doubt, with the advantage of the experience of the working of this jurisdiction, Judges will find the matter easier than I have."<sup>28</sup>

It is quite clear from this that Johnson J had difficulty understanding the legislation. His analysis is liable to the same criticism levied at decisions taken in wardship that he exercised his power in a way which led him to "subordinate third part interests (and even children's rights) to [his] subjective evaluations of a child's welfare"<sup>29</sup> in spite of the fact that he recognized that the legislation did confer such rights on children. Moreover, Johnson J interestingly distinguished between what he described as important and unimportant issues and argued that the latter were not of legitimate concern of the courts.<sup>30</sup> Thus, in relation to the specific issues order which C had applied for so that she might go on holiday he commented that:

"In my view this jurisdiction should be reserved for the resolution of matters of importance. This is not a matter that I regard as important."<sup>31</sup>

According to Eekelaar Johnson J was wise to observe that court interventions like this could do more harm than good<sup>32</sup> and he offers his

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<sup>28</sup> *Re C (A Minor: Leave to Seek Section 8 Orders)* [1994] 1 FLR 26, at 28-29

<sup>29</sup> Eekelaar, J, "Family Proceedings in England and Wales: A Jurisdiction in Search of a Mission" (1994) 57 MLR 839, at 852

<sup>30</sup> See Bainham, n 19 above, at 129 who agrees with this analysis and describes it as "something of a relic of the old law."

<sup>31</sup> *Re C (A Minor: Leave to Seek Section 8 Orders)* [1994] 1 FLR 26, at 29

<sup>32</sup> Eekelaar, n 29 above, at 855

general support for the view expressed by Johnson J that such intervention should be restricted to matters of importance. This raises the question, however, as to what is to be regarded as an important issue? As Bainham<sup>33</sup> has rightly observed, to demarcate court intervention by referring to important and unimportant issues leads to uncertainty about where the line should be drawn in relation to court intervention. Moreover, he argues that to analyse the matter in this way does not reflect the will of Parliament, as Johnson J argued it did, when it envisaged allowing children to apply for all orders under section 8 of the Children Act 1989. Indeed, in the previous chapter it was shown how in relation to the views of children the Law Commission advocated an open door policy precisely to allow children access to the courts which, in any case, they had previously enjoyed via the wardship jurisdiction.<sup>34</sup> This goes only to endorse the fact that an open door policy means precisely what it says. At least, however, Johnson J recognizes that a child asking to live elsewhere other than with his or her natural parents raises an issue of importance and by virtue of that one which should lie within the remit of court intervention. It is, however, the philosophy which lies behind such intervention which is crucial and we shall come to that shortly.

*Re SC*, in contrast to *Re C*, involved an application by a 14 year old who was in the care of a local authority for some 8 years and who had not been successfully placed with foster parents. She wished to reside with the family of her friend who, the court heard, could provide her with a good home. She approached a solicitor with a view to applying for leave to seek a residence order. The application was opposed by S's natural mother who had retained parental responsibility. Booth J granted the application for leave. In doing so, she argued that the general principles of the Act were not of concern to the court when assessing applications for leave. The court had, however, to consider only as per s 10(8) Children Act 1989 whether the individual in question had sufficient understanding .

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<sup>33</sup> *ibid.*

<sup>34</sup> Law Comm Report 172, n 3 above, at para 4.44

In deciding that the general principles of the court were not relevant to applications for leave by children who sought a section 8 order Booth J was able to rely on *Re A (Minors) (Residence Order: Leave to Apply)* [1992] Fam 182 where in the Court of Appeal Balcombe LJ gave a clear determination as to why s10(9) leave applications were similarly not to be referred to the welfare principle.<sup>35</sup> He posited:

"In my judgment the judge was wrong in holding that on an application for leave to apply for a section 8 order by a person other than the child concerned, the child's welfare is the paramount consideration. I reach that conclusion for the following reasons. (1) In granting or refusing an application for leave to apply for a section 8 order, the court is not determining a question with respect to the upbringing of the child concerned. That question only arises when the court hears the substantive application. ... (2) Some of the express provisions of section 10(9) - for example paragraphs (c) and (d)(i) - as to matters which the court is to have particular regard in deciding an application for leave would be otiose if the whole application were subject to the overriding provisions of section 1(1). (3) There would have been little point in Parliament providing that the court was to have particular regard to the wishes and feelings of the child's parents, if the whole decision were to be subject to the overriding (paramount) consideration of the child's welfare."<sup>36</sup>

In light of this argument it is difficult to support the construction of s10(8) Children Act 1989 given to it by Johnson J In *Re C*. It would be absurd to make an application for leave subject to the same criterion as a substantive application under the legislation. It is an approach which has also been rejected in recent case law, including most recently by Stuart-White J in *Re*

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<sup>35</sup> although it has been found that the s 10(9) guidelines do not provide an exclusive list of criteria and the court can consider other factors contained in the welfare checklist such as the views of the child, given his age and understanding. See the judgment of Hollings J in *Re A (A Minor) Residence Order: Leave to Apply* [1993] 1 FLR 425

<sup>36</sup> *Re A (Minors) (Residence Order Leave to Apply)* [1992] Fam 182, at 184

*C (Residence: Child's Application for leave)* [1996] 1 FCR 461,<sup>37</sup> who supports the analysis of Booth J although he accepts that in deciding such matters that "the best interests of the child are of importance, though I hold, for the purpose of this application, they are not paramount in the sense which the word is used in s 1(1) of the Act."<sup>38</sup> In other words, the court is always whatever the matter concentrating on the interests of the child in question.

Whilst on construction of the legislation Booth J's analysis in *Re SC* is preferable to that of Johnson J in *Re C* it is not without its own problems. This is in part because Booth J herself added a proviso that even if a child had sufficient understanding the court should be satisfied that his or her case had a reasonable chance of success. She commented that "it is right for the court to have regard to the likelihood of success of the proposed application and to be satisfied that the child is not embarking upon proceedings which are doomed to failure."<sup>39</sup> What criterion, in these circumstances, should the court refer to when deciding if an application has a reasonable chance of success? This raises a whole new set of problems not least because a reasonable chance of success means that a child must not only show that he or she has sufficient understanding but that his or her request will be one that the court is willing to entertain. Evidence of 'Gillick competence' is therefore in itself not, according to Booth J, enough to get past the leave criterion. But why not? The purpose of the leave criterion was to act as a filter. The filter paper for applications by children was, according to the legislation, to be their level of understanding, *simpliciter*. If the court considers the chances of success by what authority does it act and what indeterminate set of criterion should it consider? Is it considering the child's best interests in a more limited sense as Stuart-Smith J suggests in *Re C*? If it is then is that not another way of applying the welfare criterion. Booth J

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<sup>37</sup> The case involved a fourteen year old girl who successfully obtained the leave of the court to apply for an order which would enable her to live with her mother rather than her father. For further support of Booth J's position see also the judgment of Douglas Brown J in *North Yorkshire County Council v G* [1994] 1 FCR 737.

<sup>38</sup> Per Stuart-Smith J in *Re C (Residence: Child's Application for Leave)* [1996] 1 FCR 461, at 463

<sup>39</sup> *Re SC (A Minor) (Leave To Seek Residence Order)* [1994] 1 FLR 96, at 99

does not make clear why she thought SC had a reasonable chance of success other than saying that the child had sufficient understanding and the person with whom she lived had written a statement stating the adequacy of her accommodation. The former Law Commissioner Hale J in *C v Salford City Council* [1994] 2 FLR 926 has held that, in relation to leave applications under s10 (9), a reasonable chance of success does not mean that the case will be bound to succeed.<sup>40</sup> Whilst this case is only instructive in relation to applications by children for leave it is worthy of mention.

According to s 10(8) however, sufficient understanding in itself should enable access and surely in itself shows that the chances of success are likely to be high. In Booth J's world sufficient understanding may not even allow access. Yet it is clear that any question other than ascertaining the child's level of understanding should, on literal construction of s 10(8), be left to the substantive hearing. The problem raised by the addition of this extra proviso is that there is a possibility of a case of a 'Gillick competent' child whose case is judged by the court to be doomed to failure and by virtue of that will have no chance of redress. In other words, he or she will have no access to the courts.

Returning to the thesis advanced in Part I of this work that end efficient human beings should be able to control their own ends it has to be asked whether end efficiency or sufficient understanding should not only determine access but outcome? In this sense, if it is accepted by the court that a child has sufficient understanding shouldn't it follow that he or she should have the final say on the matter? The very existence of the leave requirement fails to accord with the strong rights thesis. 'Gillick competence' or sufficient understanding reflects a point in time at which an individual human being is able to determine his or her own ends. Its presence in the Children Act 1989 reflects the philosophy of *Gillick*. The legacy of *Gillick* in regard to mature minors should not be that they should simply be allowed access to the court's but, as I have argued, that there should be no room for the court or for the child's parent to impose a contrary

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<sup>40</sup> This was a response to a judgment by Booth J in *G v Kirklees Metropolitan Borough Council* [1993] 1 FLR 805.

view, even if in the view of the court or the child's parents that their view is more in tune with their external judgement of the child's best interests. In this regard the act does not break the circle of paternalism reflected in thinking about children because it is predicated on welfare concerns and not autonomy. The leave criterion allows the court to act cautiously in relation to the autonomy of children by allowing them to clear away cases, even of children who have sufficient understanding, that it does not consider worthy of state interference. Such autonomy can, however, only be asserted via the courts, and it has been argued in Part I of this thesis that this is the basis of the special intimacy which exists between the courts and individual human beings.<sup>41</sup>

Freeman is one commentator who is unhappy that children are required to obtain leave to apply for a section 8 order before going on to the substantive hearing, although for different reasons than those highlighted above. He would prefer that applications by children be treated in the same way as those who have parental responsibility. Such a proposal would, he argues, in effect equalize court access as between parents and their children. He presents a powerful argument for this. He posits that such "applications are not made by happy children, but by troubled ones who are seeking help. To distinguish leave and the substantive application in such a way as to withdraw welfare paramountcy concerns from the former is not only artificial but, I believe, fails those children who need these concerns to be addressed. If a parent confronted by a child about to apply for a residence order were to ward the child, the child's welfare would be the 'golden thread' running through the parent's application."<sup>42</sup> On this basis he goes on to support the views of Johnson J in *Re C*, that the paramountcy of the child's welfare as contained in s 1(1) of the Act, should be the key factor in deciding whether or not a child should be granted leave to apply for a section 8 order. The effect of this, of course, would be to necessarily remove the leave criterion from applications by children. The drawback of the way the current law stands is that if a child fails in his or her application for leave then his or her voice remains unheard and this might happen even if a child

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<sup>41</sup> This will be discussed further in chapter seven of this work.

<sup>42</sup> Freeman, n 20 above, at 169

has sufficient understanding. The law as regards access to the courts discriminates against children by imposing barriers which do not exist for those with parental responsibility.

Nevertheless, the efficacy of Freeman's argument depends on whether, even if the leave criterion were removed for applications by children, such applications would be treated any differently if the child concerned applied for the order directly. The answer to this lies in an assessment both of the framework of the statute itself and the way such cases are treated by the courts. It is interesting here to refer back to the position of Balcombe J cited above *vis a vis* the application in *Re A (Minors) (residence order: leave to apply)* [1992] Fam 182 by a foster mother for leave to apply for a residence order in favour of children of sufficient age who wish to say no to a place of residence provided by a previous local authority foster mother. It seems in that case that the views of the children would be outcome determinative. Moreover, had the children themselves applied for an order to remove themselves from the residence of the foster parent Balcombe J would have us believe that the court would have entertained it "since no court would make a residence order in favour of the foster mother against the wishes of the children concerned who are of an age to know their own minds."<sup>43</sup> However, it seems that an application for a change of residence away from a natural parent is a different prospect for the courts altogether for it not only raises issues of children's autonomy but challenges the whole status of parenthood itself.

The problem with Freeman's approach is that it subjects sufficient understanding to the welfare criterion, to the subjective value judgement of the courts. The problems with wardship were in part related to its golden thread, the welfare principle. There is an inevitable conflict between sufficient understanding and the welfare principle and the court has to determine it. Section 10(8) Children Act 1989 at least recognizes that *Gillick* competence is an important factor. A statute which stated that children could apply for orders whatever their level of competence would mean that children who applied for orders would still be at the mercy of its

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<sup>43</sup> *Re A (Minors) (Residence Order: Leave to Apply)* [1992] Fam 182, at 186

general principles. To what extent this is an improvement on the present situation as far as children who are '*Gillick* competent' is concerned is questionable and we shall turn to it in the following chapter. It will later be argued, in chapters six and seven of this work, that the test of sufficient understanding itself and not adherence to an indeterminate welfare principle should be the only test which determines whether the full substantive order is granted i.e. that the child is a competent end in self. Section 10(8) at least, on literal construction, allows children who have sufficient understanding to achieve *something*, however small it may be. Lord Mischon, speaking in a debate in the House of Lords on the Children Bill highlighted that s 10(8)<sup>44</sup> was a negative provision.<sup>45</sup> The reason why it is negative, he argued, was because it did not make clear that a child is able to apply for a section 8 order and he argued that the legislation should have had contained within it a provision which made clear that children could make an application to join or initiate family proceedings<sup>46</sup> thus ensuring that children themselves could be informed of the possibility of being assuming party status in family proceedings.

As it stands, the decision of the Court of Appeal in *Re A* above as regards the criteria for granting leave is the correct and clear one, that in accordance with s10(8) of the Act a child need only show that he or she has sufficient understanding for leave to be granted. As applications for leave do not, in the view of Balcombe LJ, raise any questions regarding the upbringing of the child then there is no need to entertain the welfare principle and its accompanying checklist. This can and will be done when the court hears the substantive application by the child for the order itself. Bainham has written that this is a statutory recognition for Lord Scarman's decision in the *Gillick* case.<sup>47</sup> This depends, inevitably, on how one interprets that case. To this author, the true essence of *Gillick* is not present in the legislation.<sup>48</sup>

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<sup>44</sup> It was s 9(7) of the draft Children Bill [HL] (1988-1989)

<sup>45</sup> HL, Vol 502 col.1342, February 6, 1989

<sup>46</sup> HL, Vol 502, cols 1335-36, February 6, 1989

<sup>47</sup> Bainham, A, *Children: The Modern Law*, Jordans. 1993, at 448

<sup>48</sup> See further chapter two of this work.

***ii. Applications by Children are Exceptional Cases and Should Only be Heard in the High Court: The Practice Direction.***

Not only must a particular individual child satisfy the court that leave should be granted for him or her to be able to apply for a section 8 order such an application should only be made by the High Court. This means that, in the view of one High Court judge, the hurdle of obtaining leave will be much harder<sup>49</sup> and it is difficult to disagree with this comment. On October 14th 1991 the procedure for obtaining leave was governed by rule 4.3 of the Family Proceedings Rules 1991 as regards the High Court and county court and rule 3 of the Family Proceedings Courts (Children Act 1989) Rules 1991 in the case of the magistrate's court. This is no longer the case. In *Re AD (a minor)* [1993] 1 FCR 573 one of the first cases of a child seeking leave to apply for a residence order, Sir Stephen Brown, the President of the Family Division made it explicitly clear that given the complexity of applications by children for leave to apply for section 8 orders under the Children Act 1989 should only be made in the High Court. Commenting directly on the application for orders by children under the Act it was said that:

"The court will keep control, and I should like to say that in future, although it is interesting to see this provision of the Children Act has been used and has in fact enabled the matter to be brought to the attention of the court, it is not a course of action which one expects to be repeated very frequently. For that reason I want to say that any application for leave by a child to take proceedings for an order under s.8 of the Children Act ought to come to the High Court. If it is initially made in some other court, it ought to be referred to the High Court at the earliest opportunity, then this court with all its powers will be able to ensure that the matter is dealt with sensitively and objectively."<sup>50</sup>

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<sup>49</sup> See Mr Justice Thorpe, "Independent Representation for Minors" [1994] Fam Law 20, at 21

<sup>50</sup> *Re AD (A Minor)* [1993] 1 FCR 573, at 575

To back up this judgment, the President immediately issued a Practice Direction<sup>51</sup> to all courts specifically relating to applications by children for leave:

"Under section 10 of the Children Act 1989, the prior leave of the court is required in respect of applications by the child concerned for section 8 orders (Contact, prohibited steps, residence, and specific issues orders). Rule 4.3 of the Family Proceedings Rules 1991 and rule 3 of the Family Proceedings Courts (Children Act 1989) Rules 1991 set out the procedure to be followed when applying for leave.

Such applications raise issues which are more appropriate for determination in the High Court and should be transferred there for hearing."<sup>52</sup>

Through issuing such a Practice Direction it was being made clear by the President that applications by children for orders were to be treated as novel. Implicit in this is a recognition that such cases are complex, even exceptional, cases. Precisely why they should be regarded as complex cases when they were directly envisaged by the legislation itself is difficult to determine. However, given the nature of the other types of cases which the High Court has kept within its own preserve there is a link between the kinds

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<sup>51</sup> It is interesting to note the precise significance of Practice Directions. According to 37 *Halsbury's Laws of England*, Butterworths, 4th ed, 1976, at 21, para 12, "Practice Directions provide a source of civil procedural law, although strictly they do not have the force of law. They provide directions as to matters of practice and procedure for the assistance and guidance of litigant's in the conduct of their proceedings, and in the administration of civil justice generally, and, although they lack the force of law, they are of enormous value to the courts, to practitioners and to all who are involved in the civil justice process. Practice Directions are issued from time to time by all courts to regulate the mode and manner of procedure in their respective jurisdictions. The authority for such practice directions lies in the inherent jurisdiction which empowers the court to regulate and control their own process."

<sup>52</sup> *Practice Direction (Applications by Children: Leave)* [1993] 1 All ER 820; [1993] 1 WLR 313; [1993] 1 FLR 668.

of cases it considered in wardship.<sup>53</sup> It is perhaps right that complex cases should be heard in the highest possible court. This is a view supported by the Law Commission.<sup>54</sup> Is, however, an application for leave really that exceptional? The problem with the President's decision in *Re AD* and the subsequent Direction is that there is no indication within the framework of the legislation itself that such cases should be treated in such a manner.<sup>55</sup> When the President commented that "this court with *all its powers* will be able to ensure that the matter is dealt with sensitively and objectively" what powers was he referring to?

It has been noted in the previous chapter that one of the fundamental aims of the Children Act 1989 was to create a concurrent jurisdiction. One of the purposes of this, as the Lord Chancellor Lord Mackay of Clashfern himself highlighted during the debates on the Children Bill in the House of Lords, was to "create a flexible system under which cases, according to their complexity, can be heard at the appropriate level of court."<sup>56</sup> Whilst the concurrent jurisdiction rightly enabled difficult cases to be transferred upwards to ultimately the High Court it also has another important function,

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<sup>53</sup> There are now a series of types of case which are regarded as complex and exceptional for purposes of the private law in relation to children. They are: i) Applications for leave under the Children Act 1989 to apply for s 8 orders (see: Practice Direction [1993] 1 All ER 820); ii) sterilisation of children cases (see Practice Note: *Official Solicitor: Sterilisation* [1993] 3 All ER 222 and *Re H G (Specific Issue Order: Procedure)* [1993] 1 FLR 587; iii) cases involving the testing of children for the human immunodeficiency virus (HIV) (see *Re X* [1994] 2 FLR 116n); iv) cases involving a dispute about a blood test (see *Re F (A Minor) (Blood Tests: Parental Rights)* [1993] Fam 314); v) cases which would involve the imposition of some restraint on the freedom of the press (see *Re H-S (Minors) (Protection of Identity)* [1994] 3 All ER 390.

<sup>54</sup> See Hoggett, B, "The Children Bill: The Aim" [1989] Fam Law 217, at 217

<sup>55</sup> Indeed, there is evidence that in practice the direction is causing confusion in the courts particularly where a child wishes to utilize Children Act 1989 s 10(8) during existing proceedings. Because the application for leave has to be heard in the High Court then there may be two courts hearing the same proceedings in ignorance of one another. This has led to practitioners complaining to the Principal Registry of the Family Division. See the note "Re Applications under s 8" [1997] Fam Law 65-66

<sup>56</sup> HL, Vol 502, col. 494, 6 December, 1988.

notably that the courts should exercise the jurisdiction in the same way at every level.<sup>57</sup> The Children Act itself gives no indication that the applications of children by virtue of s 10(8) for leave would be so complex as to require the matter to be heard in the Family Division of the High Court. The only extra powers that the High Court could exercise would be through the court's function of *parens patriae* through the machinery of wardship. In *Re AD* Stephen Brown P. commented:

"it is hoped that the sensational aspect of this matter will be allowed to disappear. I stress that this is not a "divorce from parents" case such as was thought possible by certain organs of the press. That label is not wholly surprising, having regard to something that happened in the United States. But that is not the situation here. This case has become - and will continue to be - a case of the kind with which the courts have been dealing for a very long time in the exercise of their wardship jurisdiction."<sup>58</sup>

In this way the President took refuge in the wardship jurisdiction. A leap to wardship, it has been argued elsewhere in this work, is a leap in the direction of paternalism. A leap to paternalism is, where children's rights are being discussed, a leap in the wrong direction. In *Re AD* the child was herself made a ward of court to the satisfaction of all the parties concerned. This was regrettable. The Children Act 1989 was quite capable of dealing with this type of case given that it envisaged them and in this respect the case was decided wrongly.<sup>59</sup>

For different reasons this too was a scenario envisaged by the Law Commission, where the High Court would use wardship as an alternative jurisdiction, and was one of the main reasons that it argued the possibility of

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<sup>57</sup>See the judgment of Ward J in *K v P (Children Act Proceedings: Estoppel)* [1995] 1 FLR 248 on this matter.

<sup>58</sup> *Re AD (A Minor)* [1993] 1 FCR 573, at 574-575

<sup>59</sup> Although Waite LJ in the Court of Appeal in *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, 455 distinguished *Re AD* on the grounds that intense media interests necessitated the use of wardship by the President of the Family Division.

its abolition.<sup>60</sup> It has been noted elsewhere that it was possible for wardship to be used as a mechanism by children to take action against their parents. Lowe and White<sup>61</sup> believed that wardship could provide the catalyst for the implications of the decision in *Gillick v West Norfolk Area Health Authority and another* [1985] 3 All ER 402. Wardship was, arguably, best put to use when it dealt with novel cases. The court, in effect, would build a solution from scratch. Many cases which it brought within its remit were undeveloped and this criticism can certainly be applied to cases where an individual child asked the court to make him or her a ward with a view to determining decisions about his or her future. As one commentator has put it:

"The inherent jurisdiction of wardship, because it suffers from the deficiencies of the case-by-case approach and because even now there are relatively few cases in any one area, will always be in the process of building a solution. Wardship, by providing partial solutions to problems, may defer implementation of the full solution that only a statutory code can provide."<sup>62</sup>

This critique cuts to the heart of the decision in *Re AD* even though it was written many years before it. The Children Act 1989 did provide a full solution for cases such as *Re AD* but the President preferred to ignore it in favour of his own partial solution. As a result of the Practice Direction, the delicate balance of power which already existed between children, their parents and the courts shifted a little further in the direction of the courts. The open door policy envisaged by the Law Commission which gave children access to the courts was altered to the extent that whilst the door would remain open it would have a cautious key master. It will be shown below that the ruling of the Court of Appeal in *Re T (a minor)* [1993] 2 FCR 445 would put pay to the myth that the High Court could cling to the wardship jurisdiction in cases clearly envisaged by the Children Act 1989.

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<sup>60</sup> Law Commission, *Family Law: Review of Child Law: Wards of Court*, Working Paper No 101, HMSO. 1987, at para 4.17

<sup>61</sup> Lowe, N, and White, R, *Wards of Court*, Barry Rose. 2nd ed, 1986, at 154.

<sup>62</sup> Bradney, n 7 above, at 141

Nevertheless, *Re AD* remains distinguished and the Practice Direction which followed it remains intact. In determining sufficient understanding as far as obtaining leave is concerned the matter is solely one for the High Court. Given the other circumstances in which sufficient understanding needs to be obtained for purposes of the legislation this too, I believe, is far from comprehensible. Moreover, it is not ontologically defensible given the strong rights that children with sufficient understanding have - they should be able to determine their own ends. It is clear from the Direction that the High Court is reluctant that such applications should be common. By maintaining cautious control, the High Court has ensured that the rights that the Children Act gives to children will be watched over carefully.<sup>63</sup>

**A Further New Right: Children as Party to Proceedings: Applications by a Child without a Next friend or Guardian ad litem.**

Even though a child, for purposes of the Children Act 1989, can seek with the leave of the court to initiate proceedings to obtain leave to apply for a section 8 order it is still necessary that he or she be represented in those proceedings. Traditionally, for purposes of the law, a child is seen to be under a disability by virtue of his or her age. As a result, the child would only be able to act via a next friend where he or she brings a case and a guardian ad litem where he or she is defending one. This is reflected in the Rules of the Supreme Court which state that a child:

"may not bring, or make a claim, in any proceedings except by his next friend and may not acknowledge service, defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his guardian ad litem."<sup>64</sup>

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<sup>63</sup> See further Barton, C, and Douglas, G, *Law and Parenthood*, Butterworths. 1995, at 148-149 who suggest that because of the practice direction the perceived threat that the new rights given to children by the Children Act 1989 might have on parental power is less than was initially feared and that claims that children can divorce their parents are "extravagant." They are right.

<sup>64</sup> Rules of the Supreme Court 1965, SI 1965/1776, Order 80, r 2(1)

The Children Act 1989 draws a distinction between the representation of children in private and public law cases. In public law cases, known as "specified proceedings",<sup>65</sup> the court is required to appoint a guardian ad litem for the child unless it is satisfied that it is not necessary to do so in order to safeguard his or her interests.<sup>66</sup> It is the responsibility of the guardian ad litem to appoint a solicitor for the child.<sup>67</sup> If a child does not have a guardian ad litem to act for him or her then the court may appoint a solicitor to act on his or her behalf, or if the child is '*Gillick* competent' and wishes to instruct a solicitor then the court may assist him in doing so, or where the court considers it is in the child's best interests to be represented by a solicitor it may appoint one to represent him.<sup>68</sup> By contrast, although subject to exceptions, the position of children in private law family proceedings in Part II of the Act is different.<sup>69</sup> The child will not ordinarily be a party to the proceedings. Nor will he be normally represented by a guardian ad litem. It would be exceptional for a child, therefore, to be represented by his own solicitor. Nevertheless, under the legislation children can apply for section 8 orders. If they have sufficient understanding, it has been illustrated, they can become plaintiff's in an action in the courts.<sup>70</sup> Sections 10(1)(2) and (5) of the Children Act 1989 show the situations where a child may become a party to proceedings in private law and s 41 governs the procedure in public law. In wardship cases prior to the Children Act 1989, where a child sought to bring wardship proceedings, the child would have required a next friend who would be the Official Solicitor<sup>71</sup> to

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<sup>65</sup> As defined in Children Act s 41(6)

<sup>66</sup> Children Act 1989 s 41(1). The procedure is governed by Family Proceedings Rules 1991 r 4.11 for the High court and county court and by Family Proceedings Courts (Children Act 1989) Rules 1991 r 11 for magistrate's courts.

<sup>67</sup> Children Act 1989 s 41(2); FPR 1991, r 4.11(2) and FPCR 1991, r 11(2)

<sup>68</sup> Children Act 1989 s 41(3), (4).

<sup>69</sup> For a discussion of the distinction between representation in public and private Children Act proceedings see further Sawyer, C, "The Competence of Children to Participate in Family Proceedings" (1995) 7 Child & Family Law Quarterly 180, at 180-183

<sup>70</sup> See the discussion in the House of Lords as to the party status of children in the Children Bill at HL, Vol 502, cols 1335-40, February 6, 1989.

do so. This practice has continued under the Children Act 1989 so that where a child is made a party to proceedings he or she would be represented by a next friend or guardian ad litem who would usually be the Official Solicitor.<sup>72</sup>

An amendment to the Family Proceedings Rules 1991 by the Family Proceedings Rules Committee, however, has substantially changed this position and the position of '*Gillick* competent' children in private law proceedings has been made similar to that of those in public law proceedings. This is a separate, but nonetheless highly significant, development which breaks through the disability engendered in RSC Order 80 r. 2(1) above. An amendment to Rule 9.2 of the Family Proceedings Rules 1991, in the form of Rule 9.2A and titled 'Certain minors may sue without next friend etc.', was introduced in 1992.<sup>73</sup> Thus, as well as having the ability to seek leave to apply for a section 8 order the accompanying procedural rules allow children, who have been given leave to seek a section 8 order, to apply for one without the assistance of a next friend or guardian ad litem. Rule 9.2A of the amended Family Proceeding Rules 1991 and reads:

"(1) Where a person entitled to begin, prosecute or defend any proceedings to which this rule applies, is a minor to whom this Part applies, he may, subject to paragraph (4), begin, prosecute or defend, as the case may be, such proceedings without a next friend or guardian ad litem where -

- (a) where he has obtained the leave of the court for that purpose; or
- (b) where a solicitor -
  - (i) considers that the minor is able, having regard to his understanding, to give instructions in relation to the proceedings; and
  - (ii) has accepted instructions from the minor to act for him in the proceedings and, where the proceedings have begun, is so acting."

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<sup>71</sup> See Turner, N, "Wardship: the Official Solicitor's Role" (1977) 2 Adoption and Fostering 30, at 31

<sup>72</sup> See further the discussion about the role of the Official Solicitor in private law family proceedings below.

<sup>73</sup> Family Proceedings (Amendment) Rules 1992, SI 1992/456.

Paragraph (4) of Rule 9.2A referred to above makes it possible to remove a next friend or guardian ad litem in proceedings that have already begun and to continue without them. In those circumstances he or she requires the leave of the court in accordance with FPR 9.2A (1)(a). In determining whether to grant leave either at beginning or during proceedings the court should have regard to whether the child "[h]as sufficient understanding to participate as a party in the proceedings without a next friend or guardian ad litem."<sup>74</sup>

As in relation acquiring leave to apply for a section 8 the key that unlocks the door of disability is the requirement that an individual has sufficient understanding. It is perhaps a further illustration of the importance of '*Gillick* competence.' According to Thorpe J, however, who was a member of the Family Proceedings Rule Committee Rule 9.2A was no more than an historical accident. He comments:

"This proposed amendment was thought not to be of sufficient moment to justify a meeting of the Family Proceedings Rules Committee. The memorandum circulated to all members of the committee, together with the proposed amending Rules, advanced the argument that there was inconsistency in allowing relaxation in public proceedings but not in private proceedings, and further that there was inconsistency between the practice in magistrate's courts and practice in the higher courts. The example chosen to illustrate the need for early amendment was that of the mother, herself a minor, who was resisting an application for a care order in respect of her infant son. In such circumstances, it was presumably thought that the guardian ad litem's role attached more cogently to the child of the child, rather than the child mother. At the time, that explanation for the need for change seemed to me reasonably persuasive and I did not question a proposal of no particular significance designed to achieve a sensible improvement in the practice. After 18 months of experience of the Rule in operation, I now see it as a radical departure from long-established practice which has, no doubt, been of benefit in many cases but which has at the

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<sup>74</sup> Family Proceedings Rules 1991 r 9.2A(6)

same time created risks and dangers in other cases, which I, as one of the members of the Family Proceedings Rules Committee, never foresaw."<sup>20</sup>

Thorpe J's lack of foresight over Rule 9.2A was also shared by the Official Solicitor, PM Harris.<sup>75</sup> He too expressed the view that r.9.2A FPR 1991 was intended to cover a situation of a child mother who could be represented by a guardian ad litem in a case relating to her own child and he points to two specific problems. The first, he argues, is that the rule does not require a child who is applying for leave apply to instruct a solicitor direct, by virtue of FPR 9.2A(1)(b), to be made on notice. The second problem is that by removing the guardian ad litem from proceedings the court loses an objective view of the child's interests. He argues that this is inconsistent with r. 4.11 FPR 1991 which enables the court to retain the guardian ad litem in public (specified proceedings) even though he or she may be independently represented by a solicitor. As a result of this, it may be suggested that r. 9.2A FPR 1991 has had an impact on the law which was not foreseen. Nevertheless, the rule is here to stay. It is, if Thorpe J and the Official Solicitor are to be believed, an accident but it is a welcome accident. It truly is liberating to children. It adds further impetus to children who wish to apply for orders as they can do it without the shackles of a next friend or guardian ad litem. It is, perhaps, real evidence of children with sufficient understanding being able to begin proceedings independently.<sup>76</sup>

As a result of its complexity and of questions being raised as to its origins rule 9.2A FPR 1991 has been examined in a series of cases and in subsequent academic commentary. Perhaps the most important examination of the issues raised by rule was in the case of *Re T (a minor) (independent representation)* [1993] 2 FCR 445 where the Court of Appeal addressed the

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<sup>75</sup> Harris, P, "Procedural Problems in Representing Children" (1995) 7 JCL 52

<sup>76</sup> It should be noted that whilst rule 9.2A FPR 1991 amended the Family Proceedings Rule 1991 which govern the High Court and county courts, no change was made to the Family Proceedings Courts (Children Act 1989) Rules 1991 under which no provision existed for children to be joined as parties in family proceedings in a magistrate's court. A child may become a party in specified proceedings in a magistrate's courts by virtue of rules 10 and 12 of the Family Proceedings Courts (Children Act 1989) Rules 1991.

issue after a decision by Thorpe J in the Family Division of the High Court.<sup>77</sup> *Re T* is important for two distinct reasons. The first because it outlines the law in relation to the application of r.9.2A FPR 1991 more clearly and secondly because it gives clear guidelines on how wardship should be used in relation to proceedings under the Children Act 1989.

The facts of *Re T* are pertinent to this discussion. It is not a case of a child wishing to divorce her natural parents but of a child who sought to resume contact with her natural aunt and her grandmother, who lived in the same house, with a view to living with them permanently. After the breakdown of her parents marriage, C and her sister went to live with their mother. Subsequently, they were placed with foster parents who one year later formally adopted them. The relationship between C and her adoptive parents became difficult which led at one stage to her running away and to being placed with new foster parents. With the permission of the local authority, however, C re-established contact with her natural aunt and her grandmother. C, who at the time was aged 13, obtained the leave of the court to apply for a residence order after consulting with a solicitor. She also sought to begin the proceedings without a next friend by virtue of r.9.2A FPR 1991 after the solicitor had assessed her to have sufficient understanding. This aspect of the case is highly significant as the Court of Appeal had to decide on construction of the rule whether the solicitor was to have the final say in assessing whether a child had sufficient understanding for the purposes of beginning proceedings without a next friend or guardian ad litem. C was granted leave by a local district judge who considered that C had sufficient understanding.<sup>78</sup> The case was transferred from the county court and was heard by Thorpe J in the Family Division of the High Court.

In the High Court Thorpe J heard that C's adoptive parents had applied to make C a ward of court and issued proceedings against C herself, her aunt

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<sup>77</sup> *Re T (Child Case: Application by Child)* [1993] 1 FCR 646

<sup>78</sup> The order by the district judge was granted on October 27th 1992 which was prior to the Practice Direction of the President of the Family Division which directed that such applications be heard in the High Court. See *Re AD (A Minor)* [1993] 1 FCR 573 and Practice Direction [1993] 1 All ER 82.

and the local authority. Thorpe J considered the case to be of unusual complexity and asked two questions: "So, what to do with these proceedings?"<sup>79</sup> and "How are we to do it?"<sup>80</sup> He took direction in his approach from the decision of the President of the Family Division, discussed above. He said:

"In all this I am fortified by the decision of the President in the case of *Re AD (A Minor)* [1993] 1 FCR. 573. I am in no doubt at all that the course that was taken on that occasion is an excellent guide to the resolution of the issues that I have to decide this morning."<sup>81</sup>

As in *Re AD*, which it should be noted was uncontested unlike *Re T*, Thorpe J turned to the wardship jurisdiction. As a result, the Official Solicitor was appointed as C's guardian ad litem as she was now defending proceedings. Thorpe J considered the range of options at his disposal and drew an interesting conclusion. He commented:

"It would be possible, of course, to expand the present proceedings, by making provision for the aunt to issue her section 8 application more or less forthwith. It would be possible to embrace the local authority in the proceedings by way of direction. It is more difficult to bring Mrs. and Mrs. T [C's adoptive parents] into the proceedings, since on the face of it, as legal parents of the child, there is no relief within the band of section 8 orders they could apply for. It would be possible to bring the Official Solicitor into the case by inviting him to act as *amicus curiae* in recognition of its obvious difficulty.

Those are makeshifts, in my judgment, compared with the alternative solution [of making the child a ward of court.]"<sup>82</sup>

Thorpe J did not consider at any length the clear rules in relation to self initiation of proceedings by children under the Children Act 1989. He found

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<sup>79</sup> *Re T (Child Case: Application by Child)* [1993] 1 FCR 646, at 650

<sup>80</sup> *ibid.* at 651

<sup>81</sup> *ibid.* at 652

<sup>82</sup> *ibid.* at 651

it regrettable that such a burden should fall onto a minor and that the important role of the guardian ad litem might not be available court.<sup>83</sup> It was, nevertheless, the matter of minor initiated actions as well as the efficacy of using wardship as an alternative jurisdiction to its statutory relative which formed the basis of the appeal of his decision to the Court of Appeal.

The Court of Appeal decision in *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445<sup>84</sup> considered the makeshift referred to by Thorpe J as well as the construction of r 9.2A FPR 1991. It is, to date, probably the most significant consideration of the issues surrounding applications by children under the Children Act 1989. As a result of it, the law is now clearer although the over-arching paternalism of the court clearer still. The court considered r 9.2A FPR 1991 and the relationship between wardship and the statutory jurisdiction. It is to this latter point I shall turn to first.

Waite J, who gave the leading judgment in the case, considered that Thorpe J was wrong to revert to the wardship jurisdiction. Indeed, the Court of Appeal was unanimous in its view that it was wrong to use wardship where the Children Act already provided a remedy. Waite LJ directed that whilst the court has a wide discretion to allow proceedings in wardship they also had a duty to loyally apply the Children Act 1989. Whilst, therefore, after the legislation wardship was maintained as a jurisdiction it was circumscribed by the provisions of the legislation.

Waite LJ was, however, reluctant to let go of wardship in this respect. With nostalgia he reflected that "in placing this child under the protection of a

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<sup>83</sup> This is a view shared by some solicitors and court welfare officers. See for example, Bennett, S, and Armstrong Walsh, S, "The No Order Principle, Parental Responsibility and the Child's Wishes" [1994] Fam Law 91, at 93 who argue that r. 9.2A FPR 1991 gives too much power to children and raises the prospect of emotional abuse as it ignores the fact that children develop autonomy gradually.

<sup>84</sup> sub nom *Re T (A minor) (Child: Representation)* [1994] Fam 49, [1993] 4 All ER 518 and *Re CT (A Minor)(Wardship: Representation)* [1993] 2 FLR 278

prerogative jurisdiction of great antiquity, which until the coming into force of the Children Act had become refined by the courts into an effective instrument for achieving continuity and flexibility in judicial supervision of child care proceedings, the court was giving her, in juridical terms, the most favourable treatment possible."<sup>85</sup>

In other words, Thorpe J was justified in logic but not necessarily in law in his leap to wardship. According to Waite LJ because wardship proceedings are regarded as family proceedings by the legislation then r. 9.2A FPR 1991 applied equally to wardship. Therefore, a child has exactly the same rights to dispose of a next friend or guardian ad litem in wardship as in other family proceedings. Moreover, the jurisdiction ought only to be invoked where a question arose which could not be resolved by the provisions of the Children Act 1989 and its subsidiary legislation. *Re T* was not such a case and Thorpe J's determination of it was inappropriate.

As to the construction of r. 9.2A the Court of Appeal considered that it was not the intention of the draftsman to allow the solicitor to be the final arbiter as to whether a child had sufficient understanding for the purposes of instructing him to remove a next friend or guardian ad litem, and that it was open to the court to reassess the decision of the solicitor and decide for itself whether or not the child had sufficient understanding. Where the solicitor's decision was regarded as being unsustainable it was open to the court to appoint a next friend or guardian ad litem in accordance with the power afforded to it by virtue of r. 9.2A (10) FPR 1991.

Now, there are problems which have been alluded to by Murphy<sup>86</sup> in relation to Waite LJ's construction of r.9.2A FPR 1991. He argues that such a construction does not accord with the *literal* rule of statutory interpretation. He is certainly right that on construction of the words of the rule it appears that a solicitor is to be the final arbiter when he or she assesses whether a child has sufficient understanding for the purposes of disposing of a next

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<sup>85</sup> *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, at 455

<sup>86</sup> Murphy, J, "Re CT: Litigious Mature Minors and Wardship in the 1990's" (1993) 5 JCL 186, at 187.

friend or guardian ad litem. Rule 9.2A(10) allows the court to appoint a next friend or guardian ad litem where the conditions specified in r. 9.2A(1)(b)(i) and (ii) is "no longer fulfilled". The key phrase here is "no longer fulfilled". Rule 9.2A(1)(b)(i) and (ii), as we have seen, states that a solicitor may decide to accept instruction from a child to remove a next friend or guardian ad litem if he or she is satisfied that the child has sufficient understanding. Thus, for those conditions not to be fulfilled it should be that the solicitor, not the court, has either changed his mind about the understanding of the child or that he no longer wishes to represent the child. Waite LJ's view that r. 9.2A(10) gave the court the power to undermine the views of the solicitor is on this basis questionable.

However, Waite J considered the wider picture and commented in the case that:

"if the rule is to be construed according to the whole tenor of the Act and its subsidiary legislation, it must in my view be taken to reserve to the court the ultimate right to decide whether a child who becomes before it as a party without a next friend or guardian has the necessary ability, having regard to his understanding to instruct his solicitor."<sup>87</sup>

This, it is regrettably submitted, represents the current law on the matter and given the history and origins of r.9.2A and the views of the Official Solicitor is, indeed, in accordance with the general theme of the legislation. Murphy judges that Waite LJ's decision is "predicated upon paternalistic concerns, thinly disguised, and presented as welfarism, which are given preference over the child's interest in self-determination."<sup>88</sup> He is right. The interpretation given to r.9.2A by Waite LJ is a further example of the courts' fight back against greater autonomy for mature minors. It was possible for Waite LJ to construct rule 9.2A as it was written. To do so, however, would be to disenfranchise the court from determining whether an individual does, in fact, have sufficient understanding. Ultimately, the power to determine that question determines access to many areas of law. For the courts to lose

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<sup>87</sup> *Re T* [1993] 2 FCR 445, at 457

<sup>88</sup> Murphy, n 86 above, at 187

it would mean they would lose a large chunk of their paternalistic power. Perhaps, a more interesting point is precisely where the locus of determining sufficient understanding now lies and we shall consider this issue fully in chapter seven.

**A Further Hurdle: The (New?) Role of the Official Solicitor: As Next Friend, as Guardian ad Litem, and as *amicus curiae*.**

The new ability of children to act without a next friend or guardian ad litem has led to an interesting development as regards the role of the Official Solicitor. It seems that through the Office of the Official Solicitor the court has retained a heavy investigative capacity which must be seen as a further hurdle in relation to applications by children who wish to take part in proceedings without a next friend or guardian ad litem. The use of the Official Solicitor now takes three forms as regards family proceedings under the Children Act 1989: as guardian ad litem; as next friend; and now, given the judgment of Booth J in *Re H (A Minor) (Independent Representation)* [1993] 2 FCR 437 and the support of the Court of Appeal in *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, as *amicus curiae*, as friend and advisor to the court in certain proceedings. It is his role as *amicus curiae*, in particular, which has should concern amongst those who seek to advocate the cause of children's rights.

In accordance with Practice Note [1996] 1 FCR 78 and *Re H* above, where children are deemed to be 'Gillick competent' and have the requisite level of understanding for the purposes of acting without a next friend or guardian ad litem the Official Solicitor can be appointed to act as *amicus curiae*. This is an interesting development and represents as Eekelaar has put it "a substantial modification of the orthodox adversarial process." He views this new role for the Official Solicitor as one which in which the courts are seeking to reassert their paternalistic control in children cases. He argues that:

"Where individual children assert their 'rights'...the courts have retained a heavy investigative capability as a safeguard against too complete a loss of their protectionist function."<sup>89</sup>

The use of the Official Solicitor as *amicus curiae* is certainly not a new one. In wardship proceedings it was by no means unusual for the Official Solicitor to undertake an investigative role on behalf of the court (see for example *Re N (Infants)* [1967] Ch 512, 552). Indeed, it is difficult not to see this new function for the Official Solicitor as a further example of the court importing the paternalistic protection of wardship into the more liberal approach of certain aspects of the Children Act 1989 with regard to children's rights. This is a view which is certainly supported by the judgment of Waite J who, in *Re T (A Minor) (Independent Representation)* (C.A.) [1993] 2 FCR 445, 458 considered this role for the Official Solicitor:

"The history of the Official Solicitor is one of constant adaptation, and it may be that adjustment of the role of amicus to meet the demands of the recent changes in the procedures for the hearing of private law family cases will provide another instance."

Before considering a critique of this role for the Official Solicitor it is apt to consider the status of his office. Literature on the Office of the Official Solicitor is largely restricted to a small number of articles written by him or by members of team.<sup>90</sup> Judicial pronouncements are perhaps the best source as to the functions of the Official Solicitor.<sup>91</sup> On the one hand the Official Solicitor is an officer of the court. He reports to the court on the welfare of the child. He is also a solicitor. In this regard, he can represent the child during the proceedings. He can act as a guardian ad litem or as a next friend depending on the proceedings. His roles can be multiple. Of course, this

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<sup>89</sup> Eekelaar, n 29 above, at 858

<sup>90</sup> See for example: Turner, n 71 above; Venables, D, "The Official Solicitor; Outline and Aspects of his Work" [1990] Fam Law 53; For a critique of the role of the Official Solicitor in specified proceedings under the Children Act 1989 see Masson, J, "The Official Solicitor as the Child's guardian ad litem under the Children Act 1989" (1992) 4 JCL 58

<sup>91</sup> See, for example, Goff J in *Re R (PM) (An Infant)* [1968] 1 All ER 691, 692

raises the possible accusation that there is an inevitable conflict of interests between the Official Solicitor's role in relation to his client and the court as he owes duties to both in key respects. We shall address that issue shortly.

For the moment it is apt to consider the number of ways in private law family proceedings under the Children Act 1989 for a child to express his or her views to the court: via the report of a welfare officer; through a next friend or guardian ad litem; and through the child's own solicitor. In accordance with the recommendations of the Law Commission<sup>92</sup> section 7 of the Children Act 1989 gives the court the power to order welfare reports when it is considering any question under the Act.<sup>93</sup> This creates a flexible system since it gives the court a great deal of discretion regarding the ordering of reports in private law proceedings. Reports can, in accordance with Children Act 1989 s 7(3), be either oral or in writing. It should be highlighted at this point, however, that welfare officers are officers of the court and do not in any way represent the child in private law proceedings. Their reports provide the court with an objective evaluation of the case only a part of which may be the views of the child concerned.

By contrast the role of the child's next friend or guardian ad litem is much wider. The key to it is that the next friend or guardian ad litem gives the child a voice in proceedings. He or she will do on behalf of the child who is deemed to be under a disability anything which is required to be done by the party as if he were not under a disability.<sup>94</sup> According to Waite LJ the next friend or guardian ad litem "has an independent function to perform, and must act in what he believes to be the minor's best interests, even if that should involve acting in contravention of the wishes of a minor who is old enough to articulate views of his own... These functions can be performed by anyone who has no interest in the proceedings adverse to those of the child: there is no need for a next friend or guardian ad litem in private law proceedings to be professionally qualified, or even a member of the panel of guardians recruited to discharge the public functions established by s.41 of

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<sup>92</sup> Law Comm Rep 172, n 3 above, at paras 6.14-6.21

<sup>93</sup> Children Act 1989 s 7(1)

<sup>94</sup> see RSC Ord 80, r 2(3).

the Children Act." This is in essence why r.9.2A FPR 1991, however accidental it may have been, is so liberating to mature minors. It literally breaks through the barrier of someone else deciding what may or may not be in the best interests of a mature minor.

It was noted earlier that it is comparatively rare for a child to be a party to proceedings in private law cases. Nevertheless, if the court decides that a minor does require separate representation, as he would if applying for a section 8 order, the child should be made a party.<sup>95</sup> Such cases are regarded, however, as exceptional and where a child is joined as party to proceedings and where the case has been transferred to the High Court it is preferred practice that the Official Solicitor should act as the child's guardian ad litem when defending such proceedings or as his or her next friend where he or she wishes to begin proceedings. In applications by children for leave to obtain a section 8 order it possible, if not preferable, for the Official Solicitor to act as the child applicant's next friend.<sup>96</sup>

Such practice is a product of the procedure in wardship.<sup>97</sup> In *Re C (a Minor) (Wardship Proceedings)* [1984] FLR 419, Dunn J commented that "the Official Solicitor should be the first person to be asked whether he consents to being appointed as guardian ad litem" in such cases.<sup>98</sup> It has continued into the Children Act 1989 although it has been constrained by r.9.2A FPR 1991 which now allows for the removal of the Official Solicitor. In wardship proceedings prior to the introduction of the Children Act 1989 it was possible for the court to impose the Official Solicitor as guardian ad litem for a child made party to proceedings. This is, indeed, what Thorpe J sought to do in *Re T* above and by virtue of wardship avoid r.9.2A FPR

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<sup>95</sup> Family Proceedings Rules 1991 r 9.5. See also: *L V L (Minors: Parties)* [1994] 1 FLR 156

<sup>96</sup> See Practice Note: *The Official Solicitor: Appointment in Family Proceedings* [1996] 1 FCR 78 para 6 which reads: "[s]ubject to r.9.2A of the Family Proceedings Rules, the Official Solicitor may also act as next friend of a child seeking leave to make an application under the 1989 Act or in other family proceedings. If the court refuses leave under r.9.2A, or revokes it under r. 9.2A(8), it may also appoint the Official Solicitor to represent the child by virtue of r.9.2A(10)."

<sup>97</sup> See Turner, n 71 above, *passim*.

<sup>98</sup> See also the views of Heilbron J in *Re JD (Wardship: Guardian ad Litem)* [1984] FLR 359

1991. However, the Court of Appeal have made it clear that as wardship proceedings are family proceedings for the purposes of the 1989 Act r.9.2A FPR 1991 also applies to them.<sup>99</sup> It is not surprising, however, that a court with a set of judges who are used to experiencing cases such as this in wardship should favour a wide-ranging function for the Official Solicitor whose Office they are used to dealing with. Indeed, Booth's ingenuity in *Re H* means that the Official Solicitor will now not be removed even when he has been removed as guardian ad litem or next friend. And, as noted above, such ingenuity has been rubber stamped by the Court of Appeal in *Re T*. Moreover, the new roles for the Official Solicitor are now clearly outlined in a recently issued Practice Note. In relation to his appointment as guardian ad litem in non specified private law proceedings under the Children Act 1989 and wardship proceedings or proceedings under the inherent jurisdiction of the High Court it states that:

"He [The Official Solicitor] will almost invariably accept appointment in a case which falls into the classes of case upon which judicial guidance has been given about his appointment, that is to say:

- (1) where a child has sought separate representation by a solicitor but the court does not consider he is competent (*Re T (A Minor) (Independent Representation)* [1993] 2 FCR. 445; *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1) - see also para 6 below;
- (2) if a child is separately represented but the court needs the assistance of the Official Solicitor as amicus curiae (*Re H (A Minor) (independent Representation)* [1993] 2 FCR 437);"

What, however, is the role of the Official Solicitor in this latter regard? Booth J in *Re H (A Minor) (Independent Representation)* [1993] 2 FCR 437, at 443-444 explains it well:

"The role of amicus must, in my judgment, be extended now to cover the wide range of assistance which it may be appropriate for the Official Solicitor to give to the court in light of the new procedures. In that role the

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<sup>99</sup> *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445

Official Solicitor will be subject to the directions of the court and by its direction must be furnished with all necessary authority to carry out such investigations and inquiries as the court requires. He must receive all papers, reports and other documents in the case and must be able to apply for such directions and make such applications as he thinks fit. In that capacity, however, he acts not as guardian ad litem of the child. Although he may carry out similar inquiries with a view to advising the on the child's best interests he does not represent the child. He is strictly in the position of an independent advisor to the court. That being so, I do not consider that it is appropriate for the Official Solicitor, when invited to act as amicus to be joined as a party to the proceedings".

In *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, at 458 the Court of Appeal heard from counsel for the Official Solicitor that his role as *amicus curiae* would, however, be limited in key respects when used in this way. He would not, for example, be able to consent to medical treatment on behalf of a minor, he may not be able to maintain an appeal, all of which could be done by a next friend or guardian ad litem. It was also suggested that an amicus does not "normally exercise the investigative functions carried out by a court welfare officer (or by the Official Solicitor when he is acting as guardian ad litem)." <sup>100</sup> He could, however, call witnesses although in the past such an ability was limited to calling on academic evidence. <sup>101</sup> It is therefore difficult to see why this role of the Official Solicitor is necessary not least justified.

Eekelaar is one commentator who has argued that such a role is justified. As the leading functionalist writer in law he is concerned at its marginalization in family matters. He welcomes the fight back of the courts in an attempt to restore its protectionism. He argues that "[i]t would be ironic if the development of representation of children became the cause of a resurgence of court-centred investigation through the office of the Official Solicitor." Ironic it may be, but it also appears otiose.

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<sup>100</sup> *ibid.*

<sup>101</sup> See *Re Keyes* [1921] P. 204; *Re Gaskill* [1921] P. 425

## Conclusion

The wardship jurisdiction was inquisitorial by nature. The Children Act 1989, by contrast, gives to children new abilities to enter a litigious process. It presents them with certain rights. They can apply, with leave and on condition they have sufficient understanding, for section 8 orders.<sup>102</sup> They could do so without a next friend or guardian ad litem.<sup>103</sup> The Higher Courts have however responded to this by incorporating features of wardship into its consideration of the legislation. Thus, a minor can apply for leave to obtain a section 8 order but must do it in the High Court. When they do, the Official Solicitor could be their next friend. If they try to remove him in substantive proceedings the court has the power to retain his services as amicus. All of this makes the application for an order under the Children Act 1989 significantly more difficult and certainly different from the procedures envisaged in the legislation. As Barton and Douglas have said, in light of the hurdles that have been placed on applications by children it is "extravagant"<sup>104</sup> to talk of children 'divorcing' their parents. This chapter has illustrated the state of mind of the courts. That mind set is paternalistic although, as we shall see in the next chapter, it is one that is hidden behind a philosophy of welfarism which the Act itself has done little to curtail.

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<sup>102</sup> Children Act 1989 s 10(8)

<sup>103</sup> Family Proceedings Rules 1991, r 9.2A

<sup>104</sup> Barton and Douglas, n 63 above, at 148

## Chapter 6: Hurdles, More Hurdles: In Whose Best Interests? The General Principles Reassessed

"A protective role is only ethically defensible if it does not interfere with personal autonomy."<sup>1</sup>

"Family law ways of talking about children are paternalistic and predictive: the child's welfare is central to decisions, whether about upbringing, adoption, residence. Behind the word welfare lies a claim to knowledge of what is in the child's interests. In giving a decision about a child's future a court has to couch its justification in the language of welfare; this is a claim to know and to predict."<sup>2</sup>

### Introduction

Writing specifically about the new statutory ability of children to apply for orders under the Children Act 1989 Bainham has said that:

"[W]e have now arrived at the point where no lawyer could confidently advise a parent or adolescent about their respective rights to take decisions on any number of matters. Leaving or staying away from home is, *pace* Johnson J, one of the more significant of these. Does this reflect discredit on the legal system? I have reached the conclusion that it does not. There is an inevitability about the current situation if we wish to avoid the absolutism of parental authoritarianism or the extremes of child liberation. Unless the law is to enshrine a *prima facie* rule that parents decide, or that children decide,

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<sup>1</sup> Bradney, A, "The Judge as *Parens Patriae*" [1988] Fam Law 137, at 141

<sup>2</sup> O'Donovan, K, *Family Law Matters*, Pluto Press, 1993. at 92

specified matters, it is inevitable (failing agreement between them) that a court should have to rule."<sup>3</sup>

In other words there is doubt. For Bainham it is justifiable doubt. But is it? In the previous chapter the legal rights that children have been given by the Children Act 1989 have been discussed in some detail. It has been posited that it is difficult to be certain whether or not an application by a child *for leave* to apply for a residence order will be successful. This is in part because of the extra hurdles placed on the applications by children by the courts in accordance with their mind set to protect those in the community who are viewed as not being capable of looking after themselves. It has also been noted that prior to the Children Act 1989 such cases would have been dealt with in wardship. Even in wardship, however, they would be exceptional. But wardship proceedings, as it has been pointed out, are family proceedings and no extra advantage can be gained through wardship as over the new statutory procedures.<sup>4</sup> Under the Children Act 1989 therefore these cases are exceptional. The courts have responded, however, by treating leave applications as special and by invoking a heavy investigative role where children seek to begin or continue to defend a substantive application without a next friend or guardian ad litem. And that is not the end of the matter - the court still has to determine the substantive application in accordance with the legislation's underpinning ideology (or ideologies.)

The problem with the Act is that its underpinning is not one which either supports conclusively the absolutism of parental authoritarianism or those who would wish to advocate an indeterminate list of weak rights which children would have over other individuals.<sup>5</sup> In the previous part of this thesis I have rejected both these approaches as well as the mainstream thesis that some degree of limited paternalism, such as that advocated by Bainham, is justified in relation to children. Instead, a strong rights thesis has been put forward which argues that whilst protectionism is a valid philosophical

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<sup>3</sup> Bainham, A, "See You in Court, Mum': Children as Litigants" (1994) 6 JCL 127, at130

<sup>4</sup> *Re T (A Minor) (Independent Representation) (CA)* [1993] 2 FCR 445

<sup>5</sup> See further chapter three of this work.

position in relation to children it is, as Bradney has pointed out above, only justifiable if it does not in any way import on personal autonomy.<sup>6</sup>

There is little doubt that the law would be simpler to comprehend if parents were able to decide all matters as regards the upbringing of the children within their care. Victoria Gillick would be happy.<sup>7</sup> Contrarily, the law would be simpler if all children were permitted to decide all matters relating to their upbringing. Perhaps, John Holt<sup>8</sup> would be happy. One has to decide on an approach which is philosophically justifiable. The High Court has assumed the role as a Court of Critics in relation to leave applications and we have argued that it is difficult to find its approach justifiable.<sup>9</sup> The key question in this chapter is to what extent the underpinnings of the Children Act 1989 assist minors who wish to exercise their autonomy in front of that Court of Critics by asking that a residence order be made in favour of someone other than their current carer, who could be their natural parents.

Now the Children Act 1989 is not, as one commentator has put it, "about empowerment."<sup>10</sup> It is certainly not a charter for children's rights or their autonomy. That is not to say it does not recognize that children should have a greater say in matters affecting their upbringing. The statutory rights of children to have *a say* in such matters is clearly enshrined in a number of features of the Act<sup>11</sup> and a number of judges have said that, as such, they

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<sup>6</sup> Bradney, n 1 above.

<sup>7</sup> It was Victoria Gillick who brought an action to have the departmental circular (HN (80) 40) declared unlawful. She is also a leading parent's rights campaigner. See *Gillick v West Norfolk Area Health Authority and another* [1985] 3 All ER 402

<sup>8</sup> Holt, J, *Escape From Childhood*, Penguin. 1975.

<sup>9</sup> See chapter five of this work at 7-15

<sup>10</sup> Freeman, M, "Can Children Divorce their Parents?" in Freeman, M (ed), *Divorce: Where Next?*, Dartmouth. 1996, 159 at 160

<sup>11</sup> See Children Act 1989 s 1(3) which recognizes that children's wishes and feelings should be taken into account the welfare principle, discussed below; s 10(8) allows children with leave to begin proceedings; s 22 says that a child's views should be taken into account in local authority planning; s 38(6) states that a child can refuse a medical assessment during an interim care order; s 43(8) and s 44(7) state that a child can refuse a medical or psychiatric examination.

should not be impeded.<sup>12</sup> However, the checks that exist in relation to their applications for leave are only the start of the process. A court cannot make an order under the Children Act 1989 without certain conditions being met. Whilst these have been discussed in relation to the Law Commission's review of the private law in chapter four it is now apt to consider them in more detail in relation to the statute. They are respectively the welfare principle and its accompanying checklist, the principle of non-intervention, the notion of parental responsibility, and the belief that delay is prejudicial to cases involving children. Even if a child has satisfied the court that he or she has sufficient understanding and has obtained leave to apply for a residence order and even has satisfied the court that he or she is able to begin the proceedings without a next friend the court must be satisfied that its decision is one in accordance with the underlying philosophies of the Act.

Such an analysis is complex, not least because some of the principles are unclear in themselves and, as will be shown below, are regarded by some commentators as being incoherent in relation to one another. This incoherence leads to doctrinal inconsistencies and tensions. Such tensions have to be determined by the courts. Perhaps, however the greatest inconsistency that exists in the legislation is that between these general principles, which are predicated on welfare concerns and act as a veil for paternalistic concerns, and the personal autonomy of mature minors.<sup>13</sup> This chapter will focus on such tensions and will ask to what extent they might conflict with the strong rights thesis?

### **The Welfare Principle Reassessed**

As an introductory precursor to the Children Act 1989 the senior Law Commissioner Professor Hoggett wrote that "[i]t is an attempt to achieve a balance between those who believe that the child, as he grows older, is entitled to determine his fate and those who believe, not only that he is not

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<sup>12</sup> See the judgments of Johnson J in *Re C (A Minor) (Leave to Seek Section 8 Orders)* [1994] 1 FLR 26, at 27 and Booth J in *Re SC (A Minor) (Leave to Seek Residence Order)* [1994] 1 FLR 96 at 100

<sup>13</sup> See further chapter four of this work.

so entitled, but that it is an abuse of his childhood even to attempt to ascertain his wishes."<sup>14</sup> And therein lies its fundamental weakness. The Act represents a conflict of views and opinions. It will be argued in this chapter that the Act does not resolve the contradictions in the law left by the House of Lords in the *Gillick* case as to the precise level of permissible autonomy for children by legal rules. Like the decisions of their Lordships in that case the Children Act is a mass of contradictory signals, which have to be dissembled and ultimately determined by the courts. Plainly, this is the fundamental problem with statutes in general - they deal in universals, not particulars.<sup>15</sup> Individual cases are envisaged by but not catered for by statutes and although they concern the actions of citizens it is for the courts to determine how a statute is interpreted to affect the actions of particular individual citizens. The powers of the courts and individual judges in this regard are immense.<sup>16</sup>

It is within the framework of the Act's universality that Freeman's observation about the Children Act not being about empowerment pertains.<sup>17</sup> The autonomy of children is not the most important guiding factor behind the Act. Rather, as Freeman has said autonomy "must often take a back seat" to the welfare principle and I have argued in chapter four that this is true.<sup>18</sup> The welfare principle is the underpinning criterion of the Children Act to which all substantive decisions must take regard. Its importance is

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<sup>14</sup> Hoggett B, "The Children Bill: The Aim" [1989] Fam Law 217, at 220-1

<sup>15</sup> See further Detmold, M, *Courts and Administrators*, Weidenfeld and Nicolson. 1989, at 93-110 who makes this point and argues that it is the superior court which deals in particulars and not universals (i.e. the particular cases of radically autonomous, existentially free human beings.) Thus, he comments, *ibid.* at 110, that "[w]hen a superior court enforces against illegitimate power a citizen's right it enforces the particular right of a particular citizen to have applied to him only his constitution. *His* constitution. Not the constitution of some bureaucratic or tyrannical usurper. And not the constitution from which he has been excluded (Jew, Wednesbury red-head)." And, I have argued, also child. See further chapters one and two of this work, *passim*.

<sup>16</sup> Detmold, *op cit.*, at chapter six, *passim*.

<sup>17</sup> Freeman, n 10 above, at 160

<sup>18</sup> See further chapter four of this work at 3-4, and 30-33

reflected in its position within the framework of the legislation. Thus section 1(1) of the Children Act 1989 provides that:

"When a court determines any question with respect to -  
    (a) the upbringing of a child; or  
    (b) the administration of a child's property or the application of any income arising from it,  
the child's welfare should be the court's paramount consideration."

It has been noted above that the welfare principle does not apply where a child merely seeks the leave of the court to make an application for a section 8 order, but it does apply whenever a court is considering making a section 8 order, as such an order is directly to the child's upbringing. The welfare principle has a long history. Its vagueness has allowed for the maximum of adaptability by individual judges. An analysis of the various judgments in the *Gillick* case referred to earlier, shows this to be the case.<sup>19</sup> The welfare

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<sup>19</sup> Compare and contrast, for example, the use of the welfare principle by Lord Scarman and Lord Templeman (dissenting) in *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402. The latter comments, at 432, that "[p]arental power must be exercised in the best interests of the infant and the court may intervene in the interests of the infant at the behest of the parent or at the behest of a third party... The court will be guided by the principle that the welfare of the infant is paramount. But, subject to the discretion of the court to differ from the views of the parent, the court will, in my opinion, uphold the right of the parent having custody of the infant to decide on behalf of the infant all matters which the infant is not competent to decide." Later, he says that "the decision to authorise and accept medical examination and treatment for contraception is a decision which a girl under 16 is not competent to make." Cf. Lord Scarman, at 420, who comments that "when a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child; but is also a warning that parental right must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not." The second principle, discussed at 422, is that the "parental right yields to the child's right to make his own decision when he reaches a sufficient understanding and

principle was strongly supported by all of them, yet the decisions were strikingly different. The welfare principle is a reflection of a general principle of public policy, that the child's welfare is the first and paramount consideration. What, however, does it mean to act in the interests of a child's welfare? Simon Lee has identified the problems that the judges had in the case of *Gillick* of determining the public policy of whether females under the age of 16 should be allowed access to contraceptives. He comments:

"So from where do the judges derive their conflicting interpretations of public policy ? In *Gillick*, as I have said, they did not draw on any evidence, either in the form of facts and statistics or in the form of evidence from medical and ethical experts. The judges are merely offering their own views, the hunches of five wise old men. Any group of five old men might have split 3-2, as did the Law Lords, on the public policy...the judges differing hunches as to the desirability of the likely consequences determined the results and indeed the conflict...I have yet to meet anyone who is particularly interested in what the seventeenth century cases say about the very recent phenomenon of teenagers being prescribed the contraceptive pill. What worries people is that they disagree vehemently over the best strategy for dealing with early sexual activity. That is how they judged the judges in the *Gillick* case. That is how the judges probably judged the matter for themselves."<sup>20</sup>

In both the Court of Appeal and the House of Lords the decision centred on the welfare of the child being the most important consideration, yet the two decisions are palpably different. How? To one judge welfarism can be equated with parental authority whereas for another children's autonomy may be an important part of it. Now, I have argued that Lord Scarman's analysis of the law in *Gillick* was quite wrong.<sup>21</sup> He searched the books for principle and the principle he saw as most important was the welfare

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intelligence..." At this point autonomy and welfare are co-joined and one's best interests are determined by self. See further chapter two of this work at 30-31.

<sup>20</sup> Lee, S, *Judging Judges*, Faber. 1989, at 85-87

<sup>21</sup> See chapter two of this work, at 27-35

principle. Lee's critique goes to this point. The views of the judges in that case were expressions of personal value judgements. It may be said that there is nothing untoward in this activity if their value judgements accord with the fact that the world is made up of radically autonomous individual human beings who should be respected as ends in selves. However, in engaging in such activity, judges act morally (in accordance with the strong rights thesis advanced in chapters one and two of this work). They engage in the practice of love. As Detmold has put it:

"What has my freedom (my love) to do with law? I and a judge are equivalent. Adjudication, the activity of judging, is what distinguishes law from leviathan. Adjudication is the decision of single cases. Thus a judge's freedom to respond to the particulars of those cases is at the basis of law. Thus my freedom is at the basis of law."<sup>22</sup>

The observation that is no difference between myself and a judge is important. I too, have to act morally. Often, however, as in the Court of Appeal decision in *Gillick*, the judges confuse the philosophy of law and the philosophy of love. If that decision had been the final word on the *Gillick* case the law relating to children would perhaps be somewhat different today and perhaps the Children Act 1989 would reflect its harsh parentalism. The law would, however, be much simpler. Parents would have authority to control the lives of their children, but it would be less in accord with the strong rights thesis and a step closer to the *Re Agar-Ellis v Lascelles*[1883] 24 Ch D 317 scenario.<sup>23</sup> Cretney has argued that in assessing whether a girl under the age of sixteen should have access to contraceptives that the Law Lords were engaged in inappropriate questions about social policy which involved them acting in a quasi-political capacity.<sup>24</sup> He asks whether they are able to determine issues which go beyond the facts of particular cases.<sup>25</sup> He is right to suggest, of course, that judges should not engage in social

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<sup>22</sup> Detmold, M, *The Unity of Law and Morality*, Routledge & Kegan Paul. 1984, at 263

<sup>23</sup> discussed in chapter two of this work, at 21-24

<sup>24</sup> Cretney, S, "English and Scottish Approaches" in P Birks (ed), *The Frontiers of Liability Volume 1*, Oxford University Press. 1994, chapter 15, at 201

<sup>25</sup> *ibid*.

policy. It is appropriate for others, with expertise, to determine such matters. Often, however, it is difficult to avoid such activity. This is particularly true in those hard cases like *Gillick* where the Law Lords, I have argued, were engaged in determining whether an individual who is end efficient should be able to determine those ends. In this respect, it was surely right for the Law Lords to be involved as the supreme British court, the final court of rights (this is why I have argued *Gillick* is such a significant case). Nevertheless, the point highlighted by Cretney about the impropriety of the Law Lords engaging in social policy is an important one as it can be applied as a critique of the welfare principle itself. In determining matters relating to the welfare of children the courts do engage in social policy considerations - by discussing factors such as religion<sup>26</sup>, race<sup>27</sup>, sexuality<sup>28</sup>, and marriage<sup>29</sup> as part of the welfare criterion.<sup>30</sup> Welfare concerns in this way encourage paternalistic method, of dictating to individuals what is functional and what is not, what is socially acceptable and what is not. There is a distinction to be made between cases like *Gillick*, where the court is asserting that individuals with sufficient understanding are best placed to decide for themselves matters relating to them and cases where the court questions the suitability of individuals with lifestyles (such as homosexual or lesbian parents) that do not accord with the judge's way of seeing the world. In the former the court

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<sup>26</sup> See for example *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163; *Re M (Infants)* [1967] 3 All ER 1071

<sup>27</sup> See for example *Re M (Section 94 Appeals)* [1995] 1 FLR 546

<sup>28</sup> See for example *C v C (Custody of Child)* [1991] 1 FLR 223 where the Court of Appeal held that lesbianism was a factor to be considered in considering care proceedings. See also *Re D* [1977] AC 617. For commentary see further: Collier, R, *Masculinity, Law and the Family*, Routledge, 1995, at 202 who argues that the law ascribes the status of 'dysfunctional' to families without paternal masculinity (as in the case of lesbians parents) or where paternal masculinity is not considered to be ideal (as in relation to male homosexual parents); See also O'Donovan, n 2 above, at chapter 5, *passim*.

<sup>29</sup> Although Eekelaar believes that the courts have given up their mission to uphold marriage. See Eekelaar, J, "A Jurisdiction in Search of a Mission: Family Proceedings in England and Wales" (1994) 57 MLR 839, at 858

<sup>30</sup> This is borne out by the new list of considerations the court considers when determining what is in a child's best interests (Children Act 1989 s 1(3))

gets it right - personal autonomy is valued. In the latter the court considers questions which lie outside the question of law - and the status of certain individuals as human beings is being questioned.

The indeterminacy of the welfare principle as a legal rule therefore allows for a diversity in approach in cases involving mature minors that cannot be acceptable to those who advocate the strong rights thesis. Radical autonomy is a definitive status. The strong right concomitant to it are absolute. In cases involving children it is appropriate for the courts, I have suggested, to do two things: protect the radical autonomy of each individual child and to assert it.<sup>31</sup> This is an alternative to welfarism. By accepting it paternalism is shifted and indeterminacy removed. In chapter one of this work the philosophy of Wittgenstein was briefly considered in relation to an analysis of rights.<sup>32</sup> The same argument can be applied to a definition of welfare. The word implies notions of good fortune, prosperity, happiness, well-being. Its definition is out in the open. The Law Commission has given some guidance as to a definition of welfare by drawing on the determination given to it by Hardie Boys J in *Walker v Walker and Harrison*: [1981] NZ Recent Law 257<sup>33</sup> who said that:

"'Welfare' is an all encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents."

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<sup>31</sup> See the *Introduction* to this work, at 9 (point 4) and in chapter two, *passim*.

<sup>32</sup> See chapter one of this work, at 8-16

<sup>33</sup> Quoted by the Law Commission, *Review of Child Law: Custody*, Working Paper No 96, HMSO. 1985, at para 6.10

Does this guidance help? Because the word welfare is all encompassing such a definition does not, despite its literary merits, bring us any closer to determining precisely how decisions are made with the welfare of the child in mind. What if the stability and security between a child and his or her parents has broken down or the warm and compassionate relationship which is presumed to exist between a child and his or her parents has been frustrated or was non-existent. How then is a decision to be made by a court? Given the importance of the welfare principle as *the* underpinning notion of the law relating to children such a lack of definition is a cause for concern. In his textbook on children and the law, Bainham<sup>34</sup> rightly highlights the indeterminacy of welfare so that students are from the outset aware of problems in relation to it.<sup>35</sup> The crucial issue, he argues, is not the concept of welfare itself but how individual decision makers approach it. Thus, "[w]hat is in or is not in children's interests depends on who asked the question."<sup>36</sup> He gives an excellent example of the approach of Goldstein, Freud and Solnit<sup>37</sup> who, in their now notorious work, approach the issue of children after the divorce of their parents by advocating that custody should rest exclusively with one psychological parent, an approach rejected by the Children Act 1989<sup>38</sup> and now by s 12 of the Family Law Act 1996.<sup>39</sup> By

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<sup>34</sup> Bainham, A, *Children: The Modern Law*, Jordans. 1993. cf. Lowe, N, and White, R, *Wards of Court*, Barry Rose. 1986, at chapter 7 whose analysis of the welfare principle is bereft of any general definition of it other than to say that the court acts in the interests of the ward.

<sup>35</sup> Criticism of the indeterminacy of the welfare principle is not a new phenomenon. See for example Mnookin, R, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law and Contemporary Problems* 22

<sup>36</sup> Bainham, n 34 above, at 43

<sup>37</sup> Goldstein, J, Freud, A, and Solnit, A, *Before the Best Interests of the Child*, Burnett Books. 1979; and *Beyond the Best Interests of the Child*, Burnett Books. 1980.

<sup>38</sup> Children Act 1989 s 11(4) allows for a residence order to be made in favour of more than one person. See particularly the judgment of Ward LJ in *Re H (Shared Residence)* [1995] 2 FLR 883

<sup>39</sup> Family Law Act 1996 s 12 (4)(c) states that if the court determines that an order under the Children Act 1989 needs to be made, in relation to a child under the age of sixteen, during proceedings for a divorce or separation order the "welfare of the child is best served by -  
(i) his having regular contact with those who have parental responsibility for him and with other members of his family; and

contrast, there are others who believe that contact with both parents best accords with the interests of the child.<sup>40</sup> Of course, both approaches reflect a value judgement on the parts of the respective authors. In the end, however, a choice has to be made. Invariably, a judge will make it. In doing so, he or she will say that his or her determination accords with the child's welfare. Is it, however, as a criterion for making a decision which is out of sync with the wishes of a mature minor, who the court has decided has sufficient understanding for purposes of the Children Act 1989 justifiable?<sup>41</sup> This author thinks not. There is an inevitable conflict between welfare and self-determination, a conflict which is echoed throughout those particular cases where mature minors wish to decide for themselves.<sup>42</sup>

The malleability of the welfare principle was also recognized by the Lord Chancellor in House of Lords debates on the then Children Bill.<sup>43</sup> He commented:

"In Part I we have the keynote proposition of the existing law. It is that the child's welfare should be the paramount consideration when the courts reach decisions about his upbringing. That principle governs not only the making of orders in private cases, such as divorce, but also the court's decision on whether to place a child in the care of a local authority or under its supervision. Clear as the statement of paramountcy is in Clause 1, there is always a danger that such a broad principle can lead to inconsistent practice and even to courts overlooking relevant matters of detail."<sup>44</sup>

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(ii) the maintenance of as good a continuing relationship with his parents as is possible."

<sup>40</sup> See Wallerstein, J, and Kelly, B, *Surviving the Break-up*, Grant McIntyre. 1980.

<sup>41</sup> See Maidment, S, *Child Custody and Divorce*, Croon Helm. 1984, at 149 who argued that the welfare principle is not about children but about adults.

<sup>42</sup> For an attempt to reconcile the best interests principle with the notion of personal autonomy see Eekelaar, J, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" (1994) 8 Int'l J L & F 42. The problem with this analysis, however, is that when a mature child takes a decision which is seen by others (who are said to know better) to be contrary to his or her self-interest the concept of dynamic self-determinism is disappplied.

<sup>43</sup> Children Bill [HL] (1988 -89)

<sup>44</sup> HL, Vol 502, cols 489-490, December 6, 1988

This begs the question, however, as to whether *paramountcy* itself is at all clear. Indeed, it leads to a certain amount of doctrinal incoherence. As Bradney has highlighted the word paramountcy "indicates that there is an indeterminate list of other less important considerations"<sup>45</sup> What are they? It was difficult to say what they were in wardship because of a lack of judicial determination on the matter. And, whilst the Children Act spells out what factors might be considered when assessing what is in the best interests of a child when determining his or her welfare in the form of the checklist, it is silent on what considerations might be less important.<sup>46</sup> It is perhaps the case that one of those considerations would be the personal autonomy of children. The wording of s 1(3)(a) of the Act asks the court merely to obtain the ascertainable wishes of the child rather than them being outcome determinative when the child is of sufficient age and understanding. This, it is said, accords with Article 12 of the UN Convention on the Rights of the Child which states that a child should have the opportunity to be heard in judicial and administrative proceedings which affect him or her.<sup>47</sup> But is it enough? There is, as noted earlier, an obvious conflict between welfarism and autonomy. It is interesting to note again that Lord Scarman in the *Gillick* case equated the welfare of the child with personal autonomy, indicating perhaps, that what is best for the welfare of the child is what he or she wants when he or she reaches a state of end efficiency. The court, the child parents, and other interested parties, it might be argued, must in this state of affairs step back and allow the child to make his or her own decision. This view, however, is not embraced by the Children Act in any definitive way, and as a result the Act does not emancipate children. Rather, the court in no circumstances has to endorse the view of a mature child, but merely make sure that the view is aired.<sup>48</sup> In other words, the uncertainty of welfare never gives way to the certainty of autonomy, which it is the constitutional

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<sup>45</sup> Bradney, n 1 above, at 141

<sup>46</sup> Children Act 1989 s 1(3)

<sup>47</sup> Article 12(1) requires that the state should "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the views and maturity of the child."

<sup>48</sup> Children Act 1989 s 1(3)

function of the courts to protect. The principle allows the courts to say to a child, to a parent, to a guardian, that it is for the courts to determine what is in the child's best interests, what is best for his or her welfare. Its paramountcy can provide authenticity to judicial paternalism, and endorses the judge's role as the ultimate protector of individual children.

Of course, the former Lord Chancellor advocated that the indeterminacy of the welfare principle could be reduced through the checklist of factors, an idea of the Law Commission.<sup>49</sup> The checklist is contained in s.1(3) of the Act and should be considered in contested private proceedings.<sup>50</sup> The factors are:

"(a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);  
(b) his physical, emotional and educational needs;  
(c) the likely effect on him of any change in his circumstances;  
(d) his age, sex, background and any characteristics of his which the court considers relevant;  
(e) any harm which he has suffered or is at risk of suffering;  
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;  
(g) the range of powers available to the court under the Act in the proceedings in question."

The unique statutory appearance of this list was meant to break down the vagaries of the welfare principle and to permit judges and practitioners alike to have a clearer, more systematic way of understanding of how decisions made under the Act were to be arrived at.<sup>51</sup> It has rightly been criticised for

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<sup>49</sup> Law Commission, *Review of Child Law: Guardianship and Custody*, Report No 172, HMSO. 1988, at para 3.18

<sup>50</sup> The checklist also applies in all public proceedings under the Act, but does not apply in uncontested private proceedings. See Children Act 1989 s 1(4)

<sup>51</sup> See Hoggett, B, *Parents and Children: The Law of Parental Responsibility*, Sweet & Maxwell. 4th ed, 1993, at 75

a number of reasons.<sup>52</sup> It does little to reduce the indeterminacy of the welfare principle.<sup>53</sup> It is by no means a complete list and provides only a minimum standard as to the principles that the court might apply. It is arguable that the checklist simply exacerbates the difficulty in understanding what the welfare principle actually means. For example, it is perhaps noticeable that the ascertainable wishes and feelings of the child have been placed at the top of the checklist. Whilst there is no particular significance to this, as there is no order of priority to the factors, the former Lord Chancellor Lord Mackay made clear in the House of Lords at the time its status in the list is of symbolic importance:

"What we have done...is to put in the forefront of the particular circumstances to be applied or to be considered in applying that principle, the ascertainable wishes and feelings of the child concerned, considered in light of his age and understanding. We have chosen that phrase - not any decision of the child but the child's wishes and feelings - to indicate that this is a matter that must be looked at seriously and principally. As I have said, we have given it the first importance. These are not necessarily in order of importance but with that in mind we have put it in the first place in our checklist."<sup>54</sup>

This passage is somewhat oxymoronic. Yet, it highlights a significant problem. It is quite possible for the wishes of the child to be completely ignored by one judge and be emphasised emphatically by another. In *Re J (A Minor)* [1992] Fam Law 229n, for example, Thorpe J held that the fact that the wishes and feelings of the child were at the top of the list was of no significance whatsoever. In *Re P (minors) (wardship: care and control)* [1992] 2 FCR 681 Butler-Sloss LJ was a little more inviting to the fact that the views of older children will have an important influence on the court. They are, however, only determinative where the court does not consider their requests to be unreasonable. The checklist allows the possibility for individual judges to take different approaches and impose their own value

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<sup>52</sup> See Bainham, n 34 above, at 42-47

<sup>53</sup> Bainham, A, "The Children Act 1989: Welfare and Non-Interventionism" [1990] Fam Law 143

<sup>54</sup> HL, Vol 502, col 1152, December 19, 1988

judgments on individual cases hiding beneath the generous umbrella of welfarism thus re-emphasising Lee's point that the law may be decided by hunch rather than reasonable critical argument.

It is interesting to note that the illumination of s.1(3) by the former Lord Chancellor above was made in light of a rather interesting amendment moved by Baroness David in the Children Bill debate in the House of Lords, who had sought to give the *Gillick* principle greater significance within the framework of the legislation. She wished to have inserted after the checklist the following:

"Where the court has ascertained the wishes and feelings of the child under subsection (1)(a) above, and is satisfied that the child has sufficient understanding to make an informed decision about the issue in question he shall be entitled to determine it, unless the court considers his welfare would be prejudiced if he did so."<sup>55</sup>

There is little doubt that such an amendment would have given greater weight to the autonomy of mature children and given that Act itself more bite. However, Baroness David herself did not wish to challenge in any way the welfare principle. As such, she did not wish to give the child with sufficient understanding the final word in matters affecting his or her upbringing. There is, what she describes as, a "let out" in the form of the welfare principle.<sup>56</sup> Without the final thirteen words of her amendment the Children Act 1989 might have become a very different and important piece of legislation indeed. Perhaps, it would have been about empowerment. As it stands, the ability of children with sufficient understanding to determine the outcome of a case relating to his or her upbringing is not present in the legislation, and whilst the voices of children will be heard, they will not necessarily be listened to. Even when the child concerned has satisfied the test of having sufficient age and understanding in both obtaining leave and in applying the welfare checklist when applying for an order, the welfare

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<sup>55</sup> HL, Vol 502, col 1147, December 19, 1988

<sup>56</sup> HL, Vol 502, col 1155, December 19, 1988

principle remains to be satisfied. Given the vague nature of the welfare principle, it has to be questioned whether this is a satisfactory state of affairs.

The authenticity that the welfare principle gives to the paternalistic role of the courts is a source of deep concern to those who advocate the personal autonomy of individuals. Where there is a conflict between the protective role and the personal autonomy of the individual, I have argued, it is the former should always give way to the latter. Thus, where the child's wishes and feelings, with a view to a case, can be expressed and a particular view arrived at, he or she should have the sole deciding right to reach that decision. The Law Commission, however, was concerned that putting pressure on individual children to determine the outcome of a case was too great a burden, and hence the idea of children determining the outcome of cases needed to be watered down.<sup>57</sup> This is a powerful argument. It is, however, clearly contradictory to argue that an individual with sufficient understanding to make an informed decision should not be permitted to make it because there may be other factors to be considered, particularly when the elucidation of those factors is shrouded in doubt. It is contradictory because the understanding of the individual in question is sufficient.<sup>58</sup> It is nevertheless a valid concern of those who advocate a more paternalistic approach to the upbringing of children that pressure might be placed on children who do not wish to take the decision, that children will be 'abandoned to their rights'.<sup>59</sup> However, this need not to be the case. If a child does not wish to make the decision, then the court should make sure

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<sup>57</sup> Law Comm Report 172, n 48 above, at para 3.23 See also the views of Lord Renton in the Children Bill debates, HL Vol 502, col 1148, December 19, 1988 where he comments: "I do not think the child should be allowed to shift the responsibility onto itself and that the courts should accept that proposition. ...The wishes and feelings of the child, even if it has sufficient understanding to make an informed decision about the issue, should not be the only consideration." Similar comments were made by the then Lord Chancellor, Lord Mackay. See HL, Vol 502, col 1131, December 19, 1988.

<sup>58</sup> For discussion of sufficient understanding see further chapter seven of this work.

<sup>59</sup> This phrase is derived from Hafen, B, "Puberty, Privacy and Protection: The Risk of Children's Rights", (1977) 63 American Bar Association Journal 1383 and quoted by Freeman, M, *The Rights and the Wrongs of Children*, Frances Pinter. 1983, at 4

that no pressure is placed on him or her to do so. In this way, the court is recognizing that the particular individual concerned is not yet efficient as an end in self. It is then for the court to weigh up the relevant factors and make a relevant order. This is a recognition of developing autonomy and an acknowledgement that children are dependent on adults, sometimes even to take decisions for them. The law as it is at the moment, however, is couched negatively as regards the involvement of children and the welfare principle is the vehicle for such negativity. Rules of law and procedural rules with a more positive outlook towards the involvement of children would assist those individual children who might wish to assert their autonomy but it does not follow that all children should be compelled to decide the matter. A positive rather than a negative approach towards the involvement of children in proceedings affecting them would lead to greater clarity which would in turn lead to practitioners being more aware of the statutory rights of their young clients and individual children themselves being better informed about his or her legal rights.

But what does the welfare principle mean for children who wish to seek an order to live elsewhere than with their parents? Well, it makes life more difficult because it represents a further hurdle for a child to stumble over. It means, in effect, that even if the child is an efficient end in self (and the court has itself determined that question by granting the child leave to apply) that the court has the power to decide. As to the outcome of the case, it is impossible to say. To gauge how it will decide one has to look at its record on cases where children's autonomy clashes with welfare considerations. In the previous chapter it was highlighted that in relation to applications by children under the Children Act 1989 for residence orders the court has reacted paternalistically. This is no surprise. Another illustration of the conflict between welfarism and personal autonomy are those cases which involve children who can consent or refuse to consent to medical treatment. The Children Act 1989 in a number of ways acknowledges that mature children should be able to refuse a medical examination.<sup>60</sup> In these cases too, the court has determined that what a child may want may not be what is best for their welfare and has reserved for itself the right to impose a course

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<sup>60</sup> Children Act 1989 s 43(8) and s 44(7)

of action which is regarded as being in the best interests of the child. We shall refer to them in more detail in the final chapter of this thesis which considers the true significance of sufficient understanding.

### **The Principle of Non-Intervention Reassessed**

Whilst the welfare principle is well grounded and etched into the conscience of any individual who is involved with the law relating to children, accompanying it are a series of new and innovative further checks on applications by children under the Children Act 1989, the most significant of which are the so called principle of non-intervention found in s 1(5) of the Act and the new notion of parental responsibility found in sections 2, 3 and 4 respectively. Both have had significant commentary. Both are highly significant. Whilst the former principle has been interpreted as meaning that the court ought to draw back from family life, the latter it is suggested recognizes that parents are best placed to decide issues in relation to themselves and their children. If this is true, what effect do they have on applications by children under the Children Act 1989? Should the courts be getting involved in disputes between parents and their children? And what are the implications of the strong rights thesis?

Under the principle of non-intervention a court must not make an order "unless it considers that doing so would be better for the child than no order at all."<sup>61</sup> The principle should be read alongside the welfare principle and represents part of the backbone of the legislation. This is because an unnecessary order is not in accord with the child's welfare. Its purpose is to prevent children and their families being subject to unnecessary and restrictive court intervention and emphasises a general philosophical position that families ought to be treated as independent decision making units, free from overarching state involvement.<sup>62</sup> In effect, however, it acts as a regulator on the relationship between parents, children and the state as the court has to ask itself whether an order is necessary. It constitutes

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<sup>61</sup> Children Act 1989 s1(5)

<sup>62</sup> See Department of Health, *Introduction to the Children Act 1989*, HMSO. 1989, at para 1.3 which expresses this position.

expression of the view that decisions relating to children should on the whole be taken by their parents, and given the prominence within the Act to the concept of parental responsibility this is undoubtedly the case.<sup>63</sup> It is arguable therefore that the Act envisaged a reduced role for the state in parent-child relationships and concomitant to that a reduction in the role of the courts.

Various commentators have criticized the principle of non-intervention for a number of reasons and from a wide variety of perspectives. Those interested in maintaining a protectionist role for the court in matters involving children have expressed concern that s 1(5) might lead to a reduction in the role of the state in various aspects of family life. Eekelaar, for example, is concerned that the principle is part of a general policy in both public and private aspects of family law of non-intervention and non-legal policy methods and might lead to a reduction in the importance of the framework of law by restricting the involvement of the courts to being one of last resort.<sup>64</sup> Similarly, Bainham has made clear that the "danger of having an overarching principle or philosophy of non-interventionism is that children's interests will be too closely identified with their parents and the role of the State, in protecting the independent interests of children, will be undermined."<sup>65</sup> However, it has been highlighted elsewhere that Bainham and Eekelaar alike are more interested in children's interests, not specifically with the kind of personal autonomy advocated in Part I of this thesis.<sup>66</sup> The problem for them is that what is being undermined by the principle of non-intervention is the limited form of justifiable judicial intervention which is regarded as an important function of the legal system.

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<sup>63</sup>For commentary on the relationship between the principle of non-intervention and parental responsibility see further: Bainham, A, *Children - The New Law*, Jordans. 1990, at 15; Bennett, S, and Armstrong Walsh, S, "The No Order Principle, Parental Responsibility and the Child's Wishes" [1994] Fam Law 92.

<sup>64</sup> Eekelaar, n 29 above, at 857-8. See also Eekelaar, J, "Parental Responsibility: State of Nature or Nature of the State" [1991] JSWFL 37

<sup>65</sup> Bainham, A, "The Children Act 1989: Welfare and Non Interventionism" [1990] Fam Law 143, at 145

<sup>66</sup> See the analysis in chapter three of this work, at 21-33.

This fits in with Eekelaar's overall belief that it is the proper function of the state to intervene in family life when there is a threat to the public interest.<sup>67</sup> The role of law in all of this is pivotal, and it is on this basis that Eekelaar rejected the importance of the contribution made by the public-private dichotomy to family law.<sup>68</sup> However, both these perspectives raise probably the most important question for family lawyers - when is it legitimate for the state to intervene in family life? The no order principle contained in s 1(5) of the Children Act 1989 highlights one way that question might be answered. Both Cretney<sup>69</sup> and Bainham<sup>70</sup> have suggested that the principle of non-intervention can be seen as a privatisation of the state's interests in children, or in other words, privatisation of the family itself. Douglas<sup>71</sup> has referred to the principle as having a deregulatory effect. The principle is certainly an endorsement of a more minimal role for the state in family relations, a belief which is found in the philosophy of the Conservative government under whom the Act was introduced. Whilst this is a crude analysis, it does have some merit. The principle of non-intervention represents a recognition of the autonomy of the family unit itself. This is emphasised by the fact that the principle continues to apply when there has been a breakdown within the family. Disputes are seen as best resolved by parents. It is this point which represents a particular barrier for individual children who wish to assert their autonomy before the courts. If the court considers that by granting the order the situation of the child would not be made any better, it must not make that order.

Elsewhere, and more recently Bainham has identified that his initial fears over the precise impact of the principle of non-intervention have not been

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<sup>67</sup> See Eekelaar, J, "What is 'Critical' Family Law?" (1989) 105 LQR 244

<sup>68</sup> Eekelaar, *ibid.* For an elucidation of the public-private dichotomy see further Freeman, M, "Towards a Critical Theory of Family Law" (1985) 38 CLP 153

<sup>69</sup> Cretney, S, "Privatising the Family: The Reform of Child Law" [1989] Denning LJ 15

<sup>70</sup> Bainham, A, "The Privatisation of the Public Interest in Children" (1990) 53 MLR 206

<sup>71</sup> Douglas, G, "Family Law under the Thatcher Government" (1990) 17 J L & Soc 411

realised. The courts have been willing to intervene in family matters.<sup>72</sup> Judicial paternalism remains in situ. Indeed, he has even questioned whether the Children Act should be seen as a non-interventionist statute at all and has expressed the view that s 1(5) as envisaged was a mere matter of common sense.<sup>73</sup> He expresses the view that the principle as expressed by the Law Commission is a neutral one that was intended to ensure that court orders which were not useful should not be made, particularly after divorce.<sup>74</sup> Viewed in this manner, the "no unnecessary order principle", which he suggests is an apt name for it, is entirely consistent with the welfare principle.<sup>75</sup> Nevertheless, he argues that because of the interpretation given to it by commentators, judges and practitioners alike the interventionist / non-interventionist dichotomy is part of Children Act 1989 culture and that with "'receptive' minds and parrot-like repetition we now have a principle, policy and philosophy of non-interventionism in defiance of the facts surrounding the history of the provision."<sup>76</sup>

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<sup>72</sup> He identifies *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758 and *Re R (A Minor) (Wardship Medical Treatment)* [1991] 4 All ER 177 in particular as examples of the willingness of the courts to apply its view despite the principle of non-intervention.

<sup>73</sup> Bainham, A, "Non-Intervention and Judicial Paternalism" in Birks, P (ed), *The Frontiers of Liability Volume 1*, Oxford University Press. 1994, 161, at 169-171; See also Bainham, A, "Changing Families and Changing Concepts - Reforming the Language of Family Law" (1998) 10 Child and Family Law Quarterly 1 at 2-4.

<sup>74</sup> Section 12 of the Family Law Act 1996 now governs what factors the court must consider in proceedings for a divorce or separation order, one of which is whether there are any children of the family (s 12(1)(a)) and whether it should exercise any of its powers under the Children Act 1989 in relation to them (s 12(2)(a)). Where the court considers that a Children Act order is necessary it may direct that the divorce or separation order not be made. The court, shall, in these circumstances treat the child's welfare as paramount (s 12(3)) and is required to have regard to a checklist of factors (s 12(4)).

<sup>75</sup> See also Hoggett, n 51 above, at 80-81 who supports the idea that the no order principle does not mean that it is usually better for children not to make an order.

<sup>76</sup> Bainham, A, "Changing Families and Changing Concepts - Reforming the Language of Family Law" (1998) 10 Child and Family Law Quarterly 1, at 4

Whether the Children Act 1989 was intended to be interventionist or not, however, s 1(5) has had an impact on cases where children wish to obtain access to the courts and there is an inevitable conflict for the autonomy of children when the legislation places at a premium the concept of parental responsibility and a reduction in the role of the court through the no order principle. On one view, what is good for children is necessarily what their parents consider is good for them and court intervention should be restricted to crises in that relationship. The problem with a principle which tries to restrict the activities of the courts in parent-child relationships is that the individual autonomy of children will necessarily be put on the back burner.<sup>77</sup> Despite the liberal rules contained in the Children Act 1989, which allow individual children to apply for orders when they have obtained the leave of the court, the principle of non-intervention can act as a restraining mechanism preventing the court's intervention where in essence it considers that doing so would not be to the benefit of the child. This is what happened in *Re C (Minor: Leave to Apply for Order)* [1994] 1 FCR 837<sup>78</sup> where Johnson J considered the precise implications of s 1(5). He argued that even though children had been given statutory rights to *apply* for orders under the legislation, and they should not in any way be impeded by the courts, that the courts nevertheless had to consider such applications in light of the whole framework of the legislation. He posited:

"It seems to me...that I should give effect to the direction given to me by Parliament that in considering whether or not to make an order under the Children Act 1989 I should not make the order unless I consider that doing so would be better for C than making no order at all. I am not satisfied that there is any identifiable advantage to C in my making a residence order, at

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<sup>77</sup> There is possibility for this to happen in uncontested private proceedings as per s 1(4) Children Act 1989 the welfare checklist of s 1(3) does not apply. In such cases therefore, the court is not required to ascertain the wishes and feelings of the child in accordance with his or her age and understanding per s 1(3)(a) but does consider s 1(5)(a). It is questionable whether such a provision accords with Art 12 of the United Nations Convention on the Rights of the Child 1989 which states that the child should be given the opportunity to be heard in *any* judicial and administrative proceedings affecting him or her. See, above, n 47.

<sup>78</sup> discussed in detail in the previous chapter of this work.

least in making a residence order at this stage. Her parents want her to live with them, their door is open, but C wants to stay away. Not only do I see no identifiable advantage to C in my making such an order, but I suspect there might be possible disadvantages because it would enshrine in a court order a state of affairs that, in my view, ought better to be resolved by discussion between C and her parents."<sup>79</sup>

Whilst s 1(5), in accordance with Court of Appeal decision in *Re A (Minors) (Shared Residence: Leave to Apply)* [1992] Fam 182, probably does not apply in considering applications for leave under the Children Act 1989, it is apt to illustrate a point of how the courts may approach the matter. It is very easy for the courts to step back, as Johnson J did above, from the situation and say that the court has no business in the matter, and with the authority of the legislation ensure that the matter is one best resolved within the family.<sup>80</sup>

Whatever interpretation is given to the non-intervention principle it is interesting to question whether there is inevitable tension between it and the wide ranging protective role for the court that is favoured by those commentators who seek to justify a form of limited paternalism in relation to children. Court intervention is vital. Anyone who advocates any theory of rights has to recognize that. One who advocates the belief that human beings are ends in selves gives the courts a significant position as it is by definition their constitutional function to protect and assert the strong rights of individuals.<sup>81</sup> For those commentators like Bainham, Cretney and Eekelaar court intervention is desirable because the state has a legitimate and paternalistic interest in the lives of children to the extent that it is the responsibility of the court to promote the interests of children.<sup>82</sup> Yet such an approach can contradict the strong rights that mature minors with sufficient

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<sup>79</sup> *Re C (Minor: Leave to Apply for Order)* [1994] 1 FCR 837, at 839

<sup>80</sup> Where the court decides not to make an order then it must make a formal order to that effect per Family Proceedings Rules 1991, r 4.21(4); Family Proceedings Courts (Children Act 1989) Rules 1991, r 21(6). This leads to the rather unusual situation of the court making an order not to make an order or a no order order.

<sup>81</sup> See further chapter two of this work, *passim*.

<sup>82</sup> A point emphasised in chapter three of this work, at 16-31.

understanding possess. We have seen in the previous chapter how the courts are fighting back to retain their protective role in relation to applications by children under the Children Act 1989. Moreover, in admittedly more controversial, post-Children Act cases the higher courts have been willing to intervene in decisions taken by family members and have used the Children Act 1989 and the inherent jurisdiction to impose a decision which reflects its own view of what is in the child's best interests.<sup>83</sup> The court has the best of both worlds. Where it sees a need to intervene it will do so. Where it is apt to step back it can do so.<sup>84</sup> Rather than being antithetical to the court's paternalistic overview, the non-intervention principle, in this regard, can provide further ammunition to restrict children's autonomy.

The precise impact of s 1(5) on private law family proceedings particularly on actions initiated by children is therefore highly significant. The incoherence prevalent in the Children Act 1989 leaves unclear the precise relationship between children, parents and the state. The problem with the non-interventionist approach on the one hand and the paternalistic approach advocated by Bainham and others is that the matter is not resolved in any decisive way. Autonomy is not the premium or judging criterion and this is unacceptable. Seen in conjunction with the welfare principle, the principle of non-intervention represents a further barrier to the proper consideration of personal autonomy. The inconsistency between a fleeting recognition of the *Gillick* principle in the statutory checklist and the overriding philosophy of the legislation itself, much of which is embedded in the welfare principle and the principle of non-intervention, needs to be pointed out. It is this inconsistency which led to a justifiable state of misunderstanding in the case

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<sup>83</sup> See for example the cases involving refusal consent to medical treatment discussed in chapters two and seven of this work.

<sup>84</sup> Various authors from the feminist critique have argued that non-intervention is really intervention by another name. This is because it is a policy in itself. It allows the state to stand back and do nothing and by doing nothing it expresses a value judgement. See for example Brophy, J, "Custody Law, Childcare and Parenthood in Thatcher's Britain" in Smart, C and Sevenhuijsen, S (eds), *Child Custody and the Politics of Gender*, Routledge, 1989; Smart, C, *The Legal and Moral Ordering of Child Custody*, University of Warwick, Department of Sociology, 1990, at 82-92.

law relating to children who have made their own applications under the legislation. This is highlighted not only in the engagement of the welfare principle and the principle of non-intervention in such cases but in the issuing of practice directions, the use of the wardship jurisdiction in some cases, the appointment of the official solicitor to act as *amicus curiae* in others.<sup>85</sup>

## **Parental Responsibility Reassessed**

As was noted in chapter four the concept of parental responsibility is a new and key conceptualization of the relationship between parents and their own children and read alongside the principle of non-intervention further endorses the view that it is parents and not the state who are best placed to bring up and make decisions in relation to their children. The notion is a far cry from the terminology used in *Re Agar Ellis* and is seen by some<sup>86</sup> as a more appropriate way to reflect the parent child relationship than traditional rights discourse. It is clearly more consistent<sup>87</sup> and has been welcomed by practitioners and those in the probation service,<sup>88</sup> even though it is open to broad interpretation. It is defined in s 3 of the Children Act 1989 as follows:

"3. - (1) In this Act 'parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of

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<sup>85</sup> For further discussion see chapter five of this work.

<sup>86</sup> See for example Cretney, S, "Defining the Limits of State Intervention: The Child and Courts" in Freestone, D, (ed), *Children and the Law*, Hull University Press. 1990, at 74

<sup>87</sup> See White, R, Carr, P, and Lowe, N, *The Children Act in Practice*, Butterworths. 2nd ed, 1995, at 35

<sup>88</sup> See for example, Bennett, S, and Armstrong Walsh, S, n 63 above, at 92

the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect -

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property."

Now, the Law Commission, as we have seen, did not see a list of what parental responsibility comprises as being practicable given the changing nature of parental responsibility over time to meet different circumstances.<sup>89</sup> This leaves the concept open to the criticism that it is by no means determinate in its definition and concomitantly subject to the same kind of doubt that is endemic in the welfare principle and the principle of non-intervention. The key question is whether the concept of parental responsibility represents anything more than a mere cosmetic change? It is a unitary concept and uses language that encompasses a broad range of perspectives. Yet, as Bainham<sup>90</sup> has made clear its understanding of the relationship between parents and children is extremely similar to that of the earlier law, as contained in s 85(1) of Children Act 1975.<sup>91</sup> Thus, certain questions remain unanswered now as they did prior to the enactment of the Children Act 1989: What are the rights and powers that parents have in relation to their children? What are their duties? The Law Commission raised the problem that under the old law there existed significant ambiguity in relation to the conceptualization of the relationship between children and their parents particularly when talking about parental rights, but has the notion of parental responsibility made the true essence of that relationship any clearer? The new legislation seemingly replaces the conceptual muddle of the previous law with a concept which is itself bereft of clear definition.

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<sup>89</sup> Law Comm Report 172, n 49 above, at para 2.6. See further chapter four of this work.

<sup>90</sup> Bainham, n 34 above, at 64

<sup>91</sup> which refers to all "the rights and duties which by law the mother and father have in relation to a legitimate child and his property."

This point is further endorsed by other commentators who have analysed the new definition. In a brilliant analysis Eekelaar<sup>92</sup> has highlighted two distinct species of parental responsibility in relation to the Children Act 1989 as envisaged by the Law Commission. The first is that parents have responsibility for the upbringing of their children - their education, material well being, legal representation - in other words that parents should behave responsibly towards their children. The second manifestation of parental responsibility gives to parents the autonomy to bring up their children in a way that is free from interference from any other person or entity, including the state where "the focus is...upon the distance between the parent and others in making the provision for the child, on the degree of freedom given to parents in bringing up their children. And the more scope that is given to parental autonomy, the less room there is for external supervision over the way duties...are discharged."<sup>93</sup> When read alongside the principle of non-intervention this aspect of parental responsibility can be interpreted as leading to a reduced role for the state in family life.

It is apt also to consider in this regard the notion parental responsibility as a check on applications by children under s 8 of the Children Act 1989. It is quite clear that the most obvious responsibility that an individual with parental responsibility has in relation to a child is to provide a place of residence<sup>94</sup> as part of a more general duty to bring up a child in a responsible manner. Barton and Douglas have used a useful metaphor to describe this aspect of the application of parental responsibility:

"Imagine that a child is born in a hospital, and is abducted from the nursery. When a few hours, or days later, the child is found and returned to the parents, this is because he or she is regarded as their child. The baby is not the child of the state, to be placed in a community nursery until the genitors, or perhaps others who might make better parents, are entrusted with caring for him or her. The baby is regarded as *belonging* to the parents. We are

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<sup>92</sup> Eekelaar, J, "Parental Responsibility: State of Nature or Nature of the State" [1991] JSWFL 37

<sup>93</sup> *ibid.* at 39

<sup>94</sup> See the judgment of Balcombe LJ in *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495

concerned here with contrasting the parents' position with that of the state, and of the importance of parenthood and family in the liberal state."<sup>95</sup>

When a child is born, in the absence of evidence of neglect or risk, he or she is taken home by his or her parents. This is a simple fact and the law must reflect it. Anyone who seeks to remove a child from his or her parents without their consent commits a crime<sup>96</sup> and a tort.<sup>97</sup> Parents also have the power to discipline their child and to control his or her movements within reasonable limits.<sup>98</sup> However, whether a parent can or should be able to exercise control over a *Gillick* competent child is another matter altogether, particularly in a liberal state.<sup>99</sup> Any argument that parents have a proprietary interests in their children until a particular point in time or that parents should be able to take decisions free of interference from the community is liable to challenge. Children are not the property of their parents. They are ends in selves and the community must reserve for itself the ability to interfere in that relationship, via the courts. This is why the second idea of parental responsibility identified by Eekelaar above is dangerous when a court is considering an application by a child to live elsewhere than with his or her natural parents. Like the cases involving a child's consent or refusal to consent to medical treatment, applications by a child for a change in his or her place of residence, questions the heart of that aspect of parental autonomy (or parental rights and powers as the Children Act 1989 s 3 has put it) which is an essential part of parental responsibility. Parental autonomy is, however, irrelevant when faced with the radical autonomy of a particular individual human being who is competent enough to determine his or own ends. Leaving or staying away from home is, as Bainham identified, one of the more significant things a child can call upon the community to assist him in doing. It involves no element of protection, but rather an assertion of his or her autonomy. It is apt again to recall Lowe and White's

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<sup>95</sup> Barton, C, and Douglas, G, *Law and Parenthood*, Butterworths. 1993, at 20

<sup>96</sup> Child Abduction Act 1984 s 2

<sup>97</sup> *Murray v Ministry of Defence* [1988] 2 All ER 521

<sup>98</sup> *R v Rahman* (1985) 81 Cr App Rep 349

<sup>99</sup> *Hewer v Bryant* [1970] 1 QB 357; *Gillick v West Norfolk Area Health Authority and another* [1985] 3 All ER 402

thesis that when exercising its custodial jurisdiction in wardship the court should step back when faced with a child of sufficient understanding. This is because the court would be in the same position as a parent and in accordance with Lord Scarman's view in *Gillick* the right of the parent would cease.

What is lacking in the definition of parental responsibility is a direct statutory principle stating clearly that in relation to the more mature child parental responsibility will gradually evaporate over time.<sup>100</sup> Instead, by virtue of s 105(1) of the Children Act 1989 which defines a child to be any human being under the age of 18, parental responsibility continues until that age.<sup>101</sup> This is plainly inappropriate given the nature of the *Gillick* decision and the proposition advanced in Part I of this work that end efficient human beings should have power to determine those ends. The long lasting nature of parental responsibility further highlights the importance of the belief that decisions in relation to children are best made by their parents except in the extremely limited circumstances state intervention is deemed to be justified.

To summarize, in conjunction with the welfare principle and the principle of non-intervention the concept of parental responsibility is a further statement that the Children Act 1989 is not about the autonomy of children, but is about the importance of the family unit with a limited recognition that within that unit exist individual radically autonomous human beings, referred to as children. The three provisions make clear however, that decisions are best made for children and not by them, and that when decisions are made by their parents, the courts should rarely interfere to undermine them.

### **The No Delay Principle Reassessed**

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<sup>100</sup> See the comments of Lord Denning MR in *Hewer v Bryant* [1970] 1 QB 357 at 369 to the effect that the parental right of custody is a dwindling right.

<sup>101</sup> This is in accordance with the age of majority per the Family Law Reform Act 1969 s 1 and follows the recommendations of the *Report of the Committee on the age of Majority* (the Latey Committee), Cmnd 3342, (1967).

Less controversial is the principle of no delay.<sup>102</sup> It is a new feature which did not start out its life as a key principle. It is relatively uncontroversial given that it reflects that time is an important feature when children are involved in legal proceedings. Section 1(2) Children Act 1989 provides that:

"In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

There is here a presumption that delay is prejudicial. In applications for section 8 orders in private law proceedings the court is directed by virtue of s 11(1) to draw up a timetable with a view to determining the case and give relevant directions to ensure adherence to it.<sup>103</sup>

There are two points about the presumption which are worthy of mention in relation to applications by children for residence orders. The first is that it is an inquisitorial feature which attempts to give the court greater control over court proceedings.<sup>104</sup> The second point is that given the Practice Direction of the President of the Family Division of the High Court<sup>105</sup> indicating that applications by children for leave under s 10(8) Children Act 1989 should be transferred to the High Court this will, when used alongside s 1(2), be done swiftly enabling the High Court to impose very quick control over such

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<sup>102</sup> See Butler, I, "The Children Act and the Issue of Delay" [1993] Fam Law 412

<sup>103</sup> See Children Act 1989 s 32 which deals with the public law requirement for the court to draw up a timetable.

<sup>104</sup> The President of the Family Division of the High Court has issued Practice Note: *Case Management* [1995] 1 All ER 586 which emphasises the importance of cost and delay in family proceedings and as a result per para 1 "makes it necessary for the court to assert greater control over the preparation for and the conduct of hearings than has hitherto been customary."

Concomitant to this the court can per para 2 limit discovery, the length of opening and closing submissions, the time allowed for examination and cross examination of witnesses, the issues to be addressed, and the reading aloud of documents and authorities. Whether this is desirable practice in relation to applications by children is questionable.

<sup>105</sup> Practice Direction [1993] 1 FLR 668

cases. It might be suggested this combines to give such cases the immediacy of control that the court had in wardship thereby boosting the Courts inquisitorial capacity.<sup>106</sup> Whilst wardship was quick to assert that the court's powers over the ward by asserting that no important decision be taken in respect of the ward without the prior leave of the court it was by no means a quick procedure, and by allowing the court to impose any order it sought fit consistent with the welfare principle, decisions were partial, fragmented and cannot provide the clear, concise and understandable rules available in a statutory procedure.<sup>107</sup>

### **The Philosophy of the Children Act 1989 - The Relationship Between the Key Concepts - When is it Legitimate for the State to Intervene in Family Life?**

Much has been written about tensions and incoherence in the Children Act 1989. Leading commentators have generally concentrated on the tensions between the welfare principle and the principle of non-intervention and the new conceptualization of parental responsibility. The clearest tension of all however, is between children's autonomy and all of the general principles (which are predicated on welfare concerns) referred to in this chapter. There

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<sup>106</sup> For examples of timetabling of applications by children for a residence see: *Re T (Child Case: Application by Child)* [1993] 1 FCR 646, a case started before the issuing of Practice Direction [1993] 1 FLR 668, an application for leave to apply for a residence order was made to a District Judge on October 21 1992, granted on October 27 and then transferred by a county court judge to the High Court until December 22 1992 with a view to further directions being applied for in the High Court on March 4 1993. The child was made a ward of court by Thorpe J on January 28 1993 although the Court of Appeal said he was wrong to do so on May 6 1993 and thereafter the proceedings continued, as they began, as an application for a residence order (see Waite LJ in *Re T (A Minor) (Independent Representation) (CA)* [1993] 2 FCR 445, 459; and *Re SC (A Minor)* [1994] 1 FLR 96, a case heard in accordance with Practice Direction [1993] 1 FLR 668, where the case was transferred to the High Court immediately and was heard *ex parte*. The child S had approached her solicitor in February 1993 and was granted leave to apply for a residence order on July 2 1993.

<sup>107</sup> *Re T(Child Case: Application by Child)* [1993] 1 FCR 646 supports this proposition that when compared with the statutory code wardship is not only inappropriate but inadequate.

is an inevitable conflict between the proposition that children are, as one judge has put it, "human beings in their own right, with individual minds and wills, views and emotions, which should command serious attention"<sup>108</sup> and the idea that the privacy of the family unit ought to be protected from overbearing state interference, an idea given credence by the backbone of the legislation.

In conclusion to this chapter it has to be said that the various provisions in the Children Act relating to private law family proceedings are therefore somewhat paradoxical. Whilst on the one hand, the Act introduces new capabilities for children to be heard in disputes between them and other family members, the courts retain considerable safeguards in order to ensure that what they subjectively believe to be in the best interests of the child to ensure that the welfare of the child is the first and paramount consideration. There seems to be, as Eekelaar has highlighted, "a degree of convergence of policy"<sup>109</sup> in public and private family law proceedings where "'non-legal,' 'voluntary,' 'co-operative' modes are to be preferred, but a legal option remains as a last resort."<sup>110</sup> With that legal option however, the courts in cases involving children exercising their autonomy remain cautious and paternalistic. We have seen that Eekelaar is encouraged by this, but is generally wary of the general policy of non-legal remedies on the grounds that the protectionist function of the court in relation to the child's welfare is in real danger of being compromised. To marginalize the courts he argues, is to marginalize the role of the law itself. However, the danger of such marginalization is not for this author that the courts will lose their traditional protectionist (meaning paternalistic function), but that the very basis of law itself, the autonomy of individuals is compromised.<sup>111</sup> The answer to that as ever complex question, when is the state justified in intervening in family relations turns on this very issue. Eekelaar is happy for the court to substitute its incontrovertibly subjective view over the individual children at

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<sup>108</sup> Per Sir Thomas Bingham MR, as he then was, in *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 15

<sup>109</sup> Eekelaar, n 29 above, at 857

<sup>110</sup> Eekelaar, n 29 above, at 857

<sup>111</sup> A point made in the *Introduction* to this work, at 10 (point 7)

the heart of the cases they consider.<sup>112</sup> Indeed, he accepts that the inherent jurisdiction itself, under which paternalistic interventions are justified, is vulnerable to such criticism. To define the limits of state intervention in the way that it has in both private and public family law proceedings, however, the Children Act has failed to be clear about the direction that the law should take.

There is therefore, as was noted at the beginning of this chapter, much in the provisions of the Children Act 1989 for those who adopt various philosophical perspectives. For those who believe that the decisions of children should be given greater weight in legal decisions affecting them there are the provisions which allow children under sixteen to make their applications, and for their wishes and feelings to be given serious consideration. For those who believe in the sanctity of the family and in parental rights there is the concept of parental responsibility and, of course, the principle of non-intervention. The Children Act 1989 has done little to clear up the contradictions in the old law. On this basis, the Law Commission's assertion that the principles of the law were clear and well accepted was a deeply flawed analysis.<sup>113</sup> The principles are unclear and unsatisfactory. They are dominated by indeterminate welfare concerns which provide room for paternalistic constraint by judges. Notwithstanding the Law Commission's intentions regarding the principle of non-intervention, its interpretation is further ammunition to those who criticise the traditional liberal conception of law which relegates issues of family life to the private sphere, and not an area of legitimate public interests. For Eekelaar the proper role of law is as a regulative force to counteract conflicting values in society. Therefore law is instrumental when things go wrong in the sphere of the family. It would therefore be wrong to remove from the state its legitimate interests when things do go wrong and the public interest is threatened. Indeed, as we saw earlier he has used this argument to reject the very basis of the public/private critique of law itself. However, a legitimate criticism of Eekelaar's own critique is that his own analysis

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<sup>112</sup> This is subject, of course, to the condition that decisions taken by children are contrary to their self-interest. See further Eekelaar, n 42 above, *passim*.

<sup>113</sup> For discussion of this point see chapter four of this work.

involves a particular conception of what the public interests actually is. Indeed, O'Donovan has asked, for example, whether there is a public interest in individual human rights?<sup>114</sup> In relation to children, it is well known that Eekelaar is concerned about too much assertion of children's autonomy as it can conflict not only with other interests that a child might have, but also with the interests or rights of the child's parents. An existentialist vision of the world has at its heart the notion of the individual. Implicit in individualism are notions such as freedom, autonomy, privacy, and freedom from state intervention. Strong rights have priority over the world - state intervention, however, has a place: its place is to assert and protect autonomy, privacy and freedom.

I would like to offer absolute support for Eekelaar's analysis of Lord Scarman's judgment in the *Gillick* case, an analysis that he himself found hard to swallow. He argued that:

"The significance of Lord Scarman's opinion with respect to children's autonomy interests cannot be over-rated. It follows from his reasoning that where a child has reached capacity, there is no room for a parent to impose a contrary view, even if this is more in accord with the child's best interests. For its legal superiority to the child's decision can rest only on its status as a parental right. But this is extinguished when the child reaches full capacity. More importantly, the argument catches the court itself. Should the child be ward, custody of the child vests in the court. The inherent jurisdiction of the High Court to intervene in the lives of children rests on the doctrine of the Crown's role as *parens patriae*. But on what principle can the Crown retain the parental jurisdiction when the parent himself has lost it, not through deprivation, but due to the superior right of the child? The primary question in wardship cases involving older children can no longer be: what is the best interests of the child? It must be, has the child capacity to make his own decisions?"<sup>115</sup>

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<sup>114</sup> O'Donovan, n 2 above, at 25

<sup>115</sup> Eekelaar, "The Emergence of Children's Rights" (1986) 6 OJLS 161, at 181

This will bring the analysis of Lord Scarman's judgment full circle. It is simple. It embraces love. It asserts radical autonomy. This should have been the basis for the relationship between children and the law in the Children Act 1989.

Given the key concepts described above, it has to be asked whether the Children Act 1989 is a coherent piece of legislation. The Act is all things to all people. One aspect of its lack of clarity, is the key concept, which has popped up throughout this thesis of sufficient understanding. Sufficient understanding is the cement / glue to children's autonomy. It is apt in the following and final chapter to consider judicial determination of it.

## Chapter 7: End Efficiency or "Sufficient Understanding": The Cement of Strong Rights

"The court in the exercise of its wardship or statutory jurisdiction has power to override the decisions of a "Gillick competent" child as much as those of parents or guardians."<sup>1</sup>

"Just as in many adults there lurks a Peter Pan who surfaces at times to mock the status of maturity, so in many children there is a wisdom to be found beyond their years. ...The fact that a jurisdiction is paternal does not entitle the court to be paternalistic."<sup>2</sup>

"Peter Pan is popular with children - not because he does not grow up - but because he can fly and fight pirates. He is popular with grownups because they want to be children, without responsibilities, without struggles. But no boy really wants to remain a boy."<sup>3</sup>

### Introduction

In chapter one of this thesis an ethical theory of rights was advanced. In chapter two that theory was applied to children. In chapter three the theory was distinguished from other philosophical perspectives on the relationship between children and the law. In chapter four, the need for a Children Act was analysed. In chapter five the statutory provisions which give children a greater say in matters relating to their upbringing were discussed in detail

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<sup>1</sup> Lord Donaldson of Lynton MR in *Re R (A Minor) (Wardship: Consent to Treatment)* (CA) [1992] 2 FCR 229, at 246

<sup>2</sup> Per Waite J in *Re R (A Minor) (Wardship: Consent to Treatment)* (FD) [1992] 2 FCR 229, at 236

<sup>3</sup> Neill, A, *Summerhill*, Pelican Books. 1971, at 272

and in chapter six the underpinning philosophy (or philosophies) of the legislation which underpin those statutory provisions was subjected to critique. In this chapter I would like to draw themes from all the previous chapters in discussion of the issue, highlighted in chapter two, of when and at what point a child is expressing his or her own autonomy. Pivotal to the theoretical argument advanced in Part I was that children are radically autonomous, that they are ends in selves. That is not to say that from taking their first breath that children are efficient ends in selves. They are not. Decisions need to be taken for them by adult members of the community. There is no problem in this regard with very young children who have only tropic or instinctive reactions. There is also no problem with a child who wants both (P) and not (P) at the same time. This is an expression of infantilism. In ignoring his or her expressed desires one merely is describing the world to him or her as it really is. Thus, as human beings we have to stop young children from doing dangerous things, such as walking of cliffs and drinking poison. A point is reached, however, in the life of an individual human being when he or she should be able to throw himself or herself off that cliff and this is where problems arise i.e. the child whose wishes do not coincide with others when they are an efficient end in self. Thus, the child who wants to move out, take contraceptive measures when under the age which legal rules see as the age of discretion, the child of Christian parentage who wants to be Muslim and is female, the Jehovah's Witness child who refuses a blood transfusion.<sup>4</sup> Such choices, it has to be said, may not accord with what others consider to be in the best interests of the individual concerned. But so what? As an individual it is part of my essence that I can dispose of my ends in any way I see fit. The recognition of that ability is the ultimate exercise in love.

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<sup>4</sup> See for example *Re E (A Minor) (Wardship: Medical Treatment)* [1992] 2 FCR 219, the case of a fifteen year old Jehovah's witness who for religious reasons refused a blood transfusion. Ward J, authorized the transfusion and said, at 227, that the "court, [when] exercising its prerogative of protection, should be very slow to allow an infant to martyr himself." Consider, however, the death of Seneca (c. 5 B.C.-65 A.D.)

Lord Scarman, in his judgment in the House of Lords in *Gillick*, referred to this point in time as the acquisition of "sufficient understanding"<sup>5</sup> which is, as will be discussed below, a rather unfortunate expression. It is though, an expression which has become prevalent in the Children Act 1989 and in the exercise of the court's powers under the inherent jurisdiction, including via wardship when assessing the relevant standing of children in family law proceedings. Whilst it was noted earlier, however, that sufficient understanding unlocks doors for children under the age of sixteen years of age in a number of ways, it does not by any means under the Children Act 1989 determine the outcome of the case.<sup>6</sup> That is not to say that the outcome to a case will not be in accordance with the child's expressed wishes. It may do, where his or her wishes accord with the court's view of what is in the best interests of the child, in accordance with the welfare principle.<sup>7</sup> Before considering how the courts have dealt with the concept of sufficient understanding in pre and post Children Act cases two initial questions need to be answered: when is it important? and by whom is it to be decided?

### **When is Sufficient Understanding Important?**

Perhaps the first question which arises in relation to sufficient understanding or "Gillick competence" is when is it to be determined? As a general principle, since the introduction of the Children Act 1989, the issue of sufficient understanding is relevant whenever a court of law is assessing the relevance of "Gillick competence" in cases where such competence would have a bearing on the case, as prescribed by the Children Act 1989. More specifically, in relation to applications by children under the Children Act 1989 they are: (i) when the court is considering an application by a child for leave to apply for a section 8 order,<sup>8</sup> in which case the welfare principle is not a relevant consideration;<sup>9</sup> (ii) when the court is considering an

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<sup>5</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 422

<sup>6</sup> See further chapter five of this work, *passim*.

<sup>7</sup> See further chapter six of this work, at 4-16.

<sup>8</sup> Children Act 1989 s 10(8)

<sup>9</sup> *Re SC (A Minor) (Leave To Seek Residence Order)* [1994] FLR 96

application by a child for leave to begin, prosecute or defend proceedings without his or her next friend or guardian ad litem in which case again the welfare principle is not a relevant consideration;<sup>10</sup> and, (iii) when the court is considering the substantive application by a child for a section 8 order, where the court must consider all of the principles contained in Part I of the legislation, including the welfare principle<sup>11</sup> and the welfare checklist where the court is directed that it should give credence to the child's wishes and feelings in light of his age and understanding<sup>12</sup> but where it is clear that such age and understanding will not be outcome determinative;<sup>13</sup> (iv) Finally, where a solicitor consider the child to be able to begin, prosecute or defend proceedings without a next or guardian ad litem.<sup>14</sup>

The concept has also remained significant in a number of cases where the court still exercises its inherent jurisdiction.<sup>15</sup> The decision as to whether an individual possesses sufficient understanding and the significance of it has been left to the discretion of the courts to decide on a case by case basis. Whilst many commentators and judges alike have considered the concept it is far from easy to give a precise interpretation to that form of words.

### **Who Decides it?**

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<sup>10</sup> Per Family Proceedings Rules 1991 r 9.2A(1)(a) and (6)(b)

<sup>11</sup> Children Act 1989 s 1(1)

<sup>12</sup> Children Act 1989 s 1(3)(a)

<sup>13</sup> See for example the judgment of Stuart-White J in *Re C (Residence : Child's Application for Leave)* (FD) [1996] 1 FCR 461, at 463

<sup>14</sup> Family Proceedings Rules 1991 r 9.2A(b)

<sup>15</sup> Subject to the ruling in *Re T (a minor)(Independent Representation)* 2 FCR 445, sub nom *Re CT (A Minor)* [1993] 2 FLR 278. For the possible remaining uses of wardship after the introduction of the Children Act 1989 and the ruling in *Re T* see further Murphy, J, "Re CT: Litigious Mature Minors and Wardship in the 1990's" (1993) 5 JCL 186, at 189 who identifies medical treatment, handicapped new borns, protecting a child from publicity and abduction cases as possible areas where the court will continue to exercise wardship. See further White, R, Carr, P and Lowe, N, *The Children Act in Practice*, Butterworths. 2nd ed, 1995, at 271-272 who identify a similar list of uses for wardship.

The next important question after when sufficient understanding is an important criteria is who decides the matter? In relation to applications by children under the Children Act 1989 this role falls into the hands of a very small number of High Court judges<sup>16</sup> and of solicitors.<sup>17</sup> In relation to this it has been questioned whether a lawyer, be they a judge, a solicitor, or a barrister, is in fact capable of assessing the level of understanding of a particular individual.<sup>18</sup> However, to ask a professional psychiatrist to determine the matter would still not lead to a consistent approach given the possibilities for debate in that profession also. Notwithstanding this however, members of the solicitors profession are clearly concerned by the weighty responsibility which has been given to them.<sup>19</sup> One practitioner has argued that "the issue of assessment of a child's understanding is among the most difficult that the Act has thrown up"<sup>20</sup> and has accepted that "[a]s one who is required to assess understanding, I accept - that my qualifications for doing so are limited."<sup>21</sup> The Court of Appeal has expressed the view that the judgement of solicitors is to be respected although not determinative in relation to determining sufficient understanding.<sup>22</sup> It is also worth noting

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<sup>16</sup> when they consider sufficient understanding when deciding whether to grant leave to a child to apply for a section 8 order per Children Act 1989, s 10(8) and in accordance with Practice Direction [1993] 1 All ER 820; [1993] 1 WLR 313; [1993] 1 FLR 668

<sup>17</sup> rule 9.2A Family Proceedings Rules 1991

<sup>18</sup> This is the view of Dr Eileen Vizard, consultant child psychiatrist at the Tavistock clinic, who also questions the suitability of Court Welfare Officers in the interviewing of children, for the purposes of assessing their level of understanding. See further Walsh, E, "Applications by Children: Paternalism v Autonomy" [1994] Fam Law 663

<sup>19</sup> See Sawyer, C, "The Competence of Children to Participate in Family Proceedings" (1995) 7 Child and Family Law Quarterly 180 who has explored the assessment processes of solicitors in this regard. She found, *ibid.* at 188, that none of the solicitors who responded to her survey relished the idea of a fifteen year old being involved in private law family proceedings.

<sup>20</sup> Burrows, D, "A Child's Understanding" [1994] Fam Law 579, at 580

<sup>21</sup> *ibid.* at 580

<sup>22</sup> See the judgment of Sir Thomas Bingham MR, as he then was, in *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, at 457 sub nom *Re CT (A Minor) (Wardship: Representation)* [1993] 2 FLR 278, at 291

that the Legal Aid Board must be satisfied that the case of the child has merit before granting to him or her a certificate to pursue the case in the courts.<sup>23</sup>

Uncertainty surrounding the idea of sufficient understanding is to some extent inevitable given the complicated issues that the court has to consider. However, this has more to do with the concept itself than who is to decide it. It was pointed out in chapter two of this work that I cannot possibly know the intellectual capacity of a Professor of Law, but I make an intellectual leap to afford him or her the status as an existentially free human being, an end in self. The problem with the test for sufficient understanding in all its applications, including in relation to children who wish to make applications under the Children Act 1989, is that the construction of the level of understanding required is very high indeed. This is clear from judicial determination on the matter where certain trends are clearly visible. They are that:

1. Understanding is not dependent on age
2. Sufficient understanding depends on the nature (or kind) of the proceedings in question
3. Sufficient understanding is not outcome determinative

#### **1. Understanding is not dependent on age.**

A good starting point to comprehend the concept of sufficient understanding is the decision of Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402 who made clear that age is not in itself a sufficient guide to determine whether or not a particular

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<sup>23</sup> Legal Aid Board Act 1988 s 15(2). See further Burrows, n 20 above, at 579-580. See also Barton, C and Douglas, G, *Law and Parenthood*, Butterworths. 1995, at 149 n4, who argue that there is anecdotal evidence that Legal Aid Committees may be reluctant to support certain applications by children under the Children Act 1989. See further Burrows, D, "Legal Aid for Children" [1994] Fam Law 38 who provides evidence from his own experience of inconsistent practice by the Legal Aid Board in relation to applications by children, including one case of two boys aged 10 and 12 who lived with their father and contrary to his views wished to have the contact with their mother reduced. Their application for legal aid was refused on application, but was subsequently granted when they appeared at the appeal.

child is mature enough to make decisions about his or her own life. The rigidity of a fixed age demarcation for purposes of determining whether a child has sufficient understanding for purposes of the Children Act 1989 was, in accordance with his view, rejected by the Law Commission and subsequently by the legislature.<sup>24</sup> As Lord Scarman himself said, although a fixed aged limit might bring certainty, "it brings with it an inflexibility and rigidity which in some branches of the law can obstruct justice, impede the law's development and stamp on the law the mark of obsolescence where what is needed is the capacity for development. The law of parent and child is concerned with the problems of the growth and maturity of the human personality"<sup>25</sup>

Concomitant to this lack of age demarcation significant discretion has been given to individual judges to determine whether a child has sufficient age and understanding. Determining the issue is a question of fact, either for a judge or a solicitor.<sup>26</sup> Thus, in a series of cases, children for different purposes have been deemed to have sufficient understanding at a variety of ages. Thus, in two cases children aged 11 years were deemed to have sufficient understanding to make an application for a section 8 order.<sup>27</sup> We

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<sup>24</sup> Law Commission, *Family Law: Review of Child Law: Guardianship and Custody* (1988) Report No 172, HMSO. at paras 3.22-3.24, 6.22-6.29

<sup>25</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 421. Some commentators have advocated a more rigid demarcation based on age. See for example, Eekelaar, J, "The Emergence of Children's Rights" (1986) 6 OJLS 161, at 181-182 who supports an upper age limit at which might restrict the scope of paternalistic power. See also Douglas, G, "The Retreat from Gillick" (1992) 55 MLR 56, at 574 who argues that age demarcation for life threatening decisions could be fixed at 18 and this would be preferable to undermining the principle of *Gillick*.

<sup>26</sup> It can also be a question of fact for the jury in criminal law cases. See for example the judgment of Lord Brandon in *R v D* [1984] 2 All ER 449, at 457 who considered that sufficient understanding would determine the outcome in a case of child kidnapping (referred to by Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, at 423-424)

<sup>27</sup> See "Girl, 11, First in England to Divorce Parents" *The Independent*, 11 November 1992; and "Judges to Give Guidelines on Child Divorce Actions" *The Independent*, 12 November, 1992.

have already seen how, in *Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445<sup>28</sup> a thirteen year old girl was given leave to apply for a residence order to be made in favour of her natural aunt. In *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, however, an eleven-year-old who had successfully intervened in the divorce of his parents and was represented by the Official Solicitor, failed to satisfy the court that he was of sufficient understanding to continue the case without the Official Solicitor. These examples are certainly interesting but are merely anecdotal. They do not in any way assist in comprehending how the court reaches the decision that a particular individual possesses the requisite level of understanding. What they do show, however, is how the court approaches the question of determining the level of cognisance required to have sufficient understanding.<sup>29</sup>

One of the problems with the concept of sufficient understanding in the modern law is that despite its prevalence the Children Act 1989 itself gives no guidance as to what the courts are to consider when determining whether a particular child has sufficient understanding. It merely states that a child should have sufficient understanding in order to take part in certain proceedings.<sup>30</sup> Lord Scarman's decision in *Gillick* is also inadequate in this respect for there is no mention of how the court should decide that an individual has sufficient understanding for purposes of overriding the ability of others to decide what is in the best interests of that individual.<sup>31</sup>

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Quoted by Freeman, M, "Can Children Divorce their Parents" in Freeman, M,(ed), *Divorce: Where Next?*, Dartmouth. 1996, 159 at 178 n 110. See also Houghton-James, H, "Children Divorcing Their Parents" [1994] JSWFL 185

<sup>28</sup> sub nom *Re CT (A Minor) (Wardship: Representation)* [1993] 2 FLR 278

<sup>29</sup> See further Jones, S, "The Ascertainable Wishes and Feelings of the Child" (1992) 4 JCL 181 who discussed sufficient understanding and its importance in the Children Act 1989.

<sup>30</sup> Children Act 1989 s 10(8)

<sup>31</sup> although he does discuss what kind of understanding would be required for an individual to take contraceptives. See *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 424

Nevertheless, the Court of Appeal in *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1 have affirmed the *Gillick* application of the concept as appropriate to considering the Children Act 1989. Per Sir Thomas Bingham MR, and now the Lord Chief Justice:

"We accept that what has become to be known as "Gillick competence" is the appropriate test in relation to the sufficiency of the child's understanding under the Act and rules. This was expressed by Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 188A as 'the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests'."32

However, this begs the question as to what is meant by an age of sufficient discretion? This is merely a synonym for sufficient understanding. The only way one can analyse this is to take a look at the case law. Thus, in *Gillick v West Norfolk Area Health Authority and another* [1985] 3 All ER 402 Lord Scarman himself said that in applying the test specifically to the giving of contraceptive treatment to an individual female under the age of sixteen that:

"[i]t is not enough that she should understand the nature of the advice which she is being given; she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents: long-term problems associated with the emotional impact of pregnancy and its termination; and there are risks to health of sexual intercourse at her age, risks which contraception may diminish but will not eliminate."33

With respect to his Lordship, this is an impeccably high standard of understanding for any adult, let alone an individual who wants to engage in sexual intercourse and has had the sense to see a medical practitioner before undertaking the act.

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32 *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 14

33 *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 424

Similarly, in *Re H (a minor) (Independent Representation)* [1993] 2 FCR 437 Booth J, in a case involving a child seeking the removal of the Official Solicitor as her representative, commented at 440 that:

"The test is clear. The court must be satisfied that H, in this instance, has sufficient understanding to participate as a party in the proceedings without a guardian ad litem. Participating as a party, in my judgment, means much more than instructing a solicitor as to his own views. The child enters the arena among other adult parties. He may give evidence and be cross-examined. He will hear other parties, ... give evidence and be cross-examined. He must be able to give instructions on many different matters as the case goes through its stages and to make decisions as need arises."

There are very few adults who would not shudder at this list of required capabilities. One has to question here whether all adults who have reached the age of majority would be able to satisfy such a level of legal understanding.<sup>34</sup>

By contrast, in *Re SC (A Minor)(Leave to Seek Residence Order)* [1994] 1 FLR 96 the same judge, Booth J, restricted her analysis of sufficient understanding in relation to a child seeking leave to apply for a residence

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<sup>34</sup> There is a recognition in Booth J's judgment in *Re H (A Minor) (Independent Representation)* [1993] 2 FCR 437 that court proceedings are essentially adult proceedings. They may affect children, but are not essentially about children representing themselves. Sufficient understanding therefore seems not only to encompass a particular decision about one's own life, but attached to that is an understanding of the forum in which that decision may be given legal authority. It should be noted here that court proceedings are notoriously complicated (necessarily so in some circumstances) and can be adversarial. Perhaps better protection rather than exposure to such proceedings is warranted. However, such protection can take two forms. Firstly, if the child is regarded as being unable to take on this burden then the court could maintain the child's next friend or guardian ad litem. Alternatively, the adversarial nature of the proceedings themselves could be looked at and an alternative form of resolution to disputed cases involving children could be developed.

order to two factors, the way she had instructed her solicitor and the fact that she did not suffer from a mental disability.<sup>35</sup>

Although the Court of Appeal in *Re S* has echoed the views of Lord Scarman in the *Gillick* case it remains far from clear even after analysing these cases what sufficient understanding is in the case under consideration. In *Re S* Sir Thomas Bingham MR referred to a further three cases put to him by counsel where consideration had been given to the concept of sufficient understanding under the Children Act 1989. They too, are instructive. The first case, *Re H (Minors)* <sup>36</sup> was a case involving two children aged 7 and 10, in which Butler-Sloss LJ suggested that r.9.2A of the Family Proceedings Rules 1991 was likely to only be valuable to the more mature minor.<sup>37</sup> This received the support of the Court of Appeal and they applied it in *Re S*. It would seem from this that the courts, although accepting Lord Scarman's thesis that age demarcation leads to too rigid an approach, have in mind some line as regards age below which cases will be exceptional in relation to an application to remove a next friend or guardian ad litem. That age line is somewhere between ten and thirteen.<sup>38</sup> As regards applications for residence orders the case law is just as mixed. In one case an eleven year old succeeded in obtaining an interim residence order in favour of her former foster parents<sup>39</sup> whilst a 13 year old in another case failed in her attempt to

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<sup>35</sup> *Re SC (A Minor) (Leave to Seek Residence Order)* [1994] 1 FLR 96, at 98

<sup>36</sup> *Re H (Minors)*, Court of Appeal, unreported, August 6, 1992

<sup>37</sup> *ibid.* transcript p. 7G

<sup>38</sup> It is interesting to note that in relation to adoption the law currently states that courts and adoption agencies, per the Adoption Act 1976 s 6, must ascertain the wishes and feelings of the child regarding the decision and give due consideration to them having regard to his [or her] understanding. This is similar to the requirement in Children Act 1989 s 1(3)(a) that the court should give consideration to the child's views in family proceedings (See further Law Comm Report 172, n 24 above, at para 3.22) See, however, the *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group, Department of Health and Welsh Office*, 1992 who recommend, at para 9.3, that the court should not be able to grant an order in relation to a child of twelve years and over unless the child expressly agrees to it.

<sup>39</sup> "Top Judge Hears Case for Child Divorce" *The Times*, November 6, 1992

obtain an order in favour of her father as against the foster parents with whom she resided.<sup>40</sup>

The other two cases referred to in *Re S* were decided by Thorpe J in the High Court and go to endorse the point made above. The first of them, *Re T (Child Case: Application by Child)* [1993] 1 FCR 646 involved a 13 year old who also sought through r.9.2A to begin proceedings without a guardian ad litem. He said:

"I am bound to say that in an issue of this great complexity, and with a child of only 13 years of age, I doubt whether, on an application for leave, I would have been persuaded that she had sufficient understanding to participate without the aid of a guardian. In a case of this sort, which is referred to the High Court with much complexity and delicacy, I would have certainly regarded the Official Solicitor as the appropriate guardian ad litem..."<sup>41</sup>

The second case which the Court of Appeal supported, *Re H (A Minor) (Care Proceedings)* [1993] 1 FLR 440 is even more disturbing for those who wish children to have a greater say in matters affecting them. In that case he said that it is by no means axiomatic that a child aged fifteen years and eight months should be taken as having sufficient understanding. This, in effect, means that a child who is only four months away from a situation where the court cannot, save in exceptional circumstances, make a section 8 order in relation to him or her may still be deemed to not have sufficient understanding when the Children Act 1989 itself is clear that the age of sixteen arguably represents the age where *Gillick* competence is a certainty rather than a matter for court assessment.<sup>42</sup>

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<sup>40</sup> "Judge Tells Foster Girl She is too Young to Decide Her Future" *The Times*, November 7, 1992

<sup>41</sup> *Re T (Child Case: Application by Child)* [1993] 1 FCR 646, at 650

<sup>42</sup> Children Act 1989 s 9(6) and (7). This is in accordance with the view of the Law Comm Report 172, n 24 above, at para 3.25. For examples of exceptional circumstances see *Re M (A Minor) (Immigration: Residence Order)* [1993] 2 FLR 858; Although to support Thorpe J's approach see *Re SW (A Minor) (Wardship: Jurisdiction)* [1986] 1 FLR 24 where a woman of seventeen years and eight months was deemed incompetent to determine her own ends.

For the Court of Appeal to support the reticent approach of Thorpe J in both of these cases was unfortunate. On his reasoning it would be difficult to envisage any situation where a child below the age of sixteen would satisfy the harsh criteria of having sufficient understanding.<sup>43</sup> He has admitted that the professional judiciary is incorporating past paternalistic practices embodied in the wardship jurisdiction into its consideration of the Children Act 1989.<sup>44</sup> He has also reflected his deep seated concerns that the concept of sufficient understanding should be determined by ordinary members of the legal profession.<sup>45</sup> By using them as examples and by agreeing with his comments as to what constitutes sufficient understanding, the Court of Appeal in *Re S* failed to clear up this extremely important issue and is sending a negative message as regards sufficient understanding on top of the already cumbersome procedural checks put in place by the court to limit applications by children under the Children Act 1989. In *Re S*, Sir Thomas Bingham MR expressed the view that '[e]verything, of course, depends on the individual child in his actual situation.'<sup>46</sup> I have, in Part I of this work, argued that this is true. A child stands before a court as a human particular, as the owner of ends. This is why the relationship between the court and the individual is so special. However, judges like Thorpe J have a particular way of seeing the relationship between children and the law and are more comfortable where the child's wishes can be discounted. In the cases referred to above he has used sufficient understanding as a mechanism to stop children accessing the legal rules which were supposed to enable them a greater say in their own lives. This is not acceptable. The judge is the final arbiter as to access for children. By interpreting sufficient understanding in the way that they have done and are doing the courts are failing in their role as upholders of strong rights. *Re S* itself supports this proposition. It is a marginal case. However, the negative approach taken in *Re S* to sufficient understanding has done much to limit independent actions by children.

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<sup>43</sup> As further evidence of Thorpe J not being convinced by the capacity of minors to instruct independently see *Re K, W and H (Minors) (Medical Treatment)* [1993] 1 FLR 854

<sup>44</sup> See Walsh, n 18 above, *passim*.

<sup>45</sup> See Mr Justice Thorpe, "Applications by Children Under the Children Act" [1994] Fam Law 20

<sup>46</sup> *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 15

Various psychological studies have confirmed that it is wrong to assume that children are generally incompetent to decide matters in relation to their own lives.<sup>47</sup> This is a further argument against paternalistic intervention. Other research has pointed out that children can cope well with the practical legal framework provided that such a framework suits the way children express themselves.<sup>48</sup> A.S Neill some time ago advocated that by giving children more responsibility, more capacity to express their autonomy, that their efficiency or competence increases.<sup>49</sup> This too, is supported by recent psychological studies.<sup>50</sup> Given therefore the difficulties in assessing the intellectual competencies of Professors of Law pointed out in chapter two of this work it is difficult to understand why the professional judiciary appear to interpret sufficient understanding in such a strict manner. It is, of course an intuitive view of children's incompetence and one which simple philosophical thinking and psychological evidence is increasingly questioning.

To sum up this part of the discussion, it is clear that "*Gillick* competence", sufficient understanding, or as I would prefer to call it end efficiency is imbued with probability and doubt rather than certainty. There is no escaping this. Probability and doubt cause philosophical problems. There are however two ways to look at a philosophical problem such as this, two opposing paths. The first is a positive path, a path which is willing to let the imagination leap, a path which accepts that at the end of the day that hard

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<sup>47</sup> See further Flavell, J, Miller, P, and Miller, S, *Cognitive Development*, Prentice Hall. 3rd ed, 1993; Meadows, S, *The Child as Thinker*, Routledge. 1993; Rosser, R, *Cognitive Development: Psychological and Biological Perspectives*, Boston: Allyn and Bacon. 1994.

<sup>48</sup> Peterson-Badali, M, and Abramovitch, M, "Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?" (1992) 34 Canadian Journal of Criminology 139. For commentary on this and other psychological research in relation to sufficient understanding see the analysis by Freeman, n 27 above, at 170-172

<sup>49</sup> See Neill, n 3 above, at 102-113

<sup>50</sup> See for example Lewis, S, "Decision Making Related to Health: When Could / Should Children Behave Responsibly?" in Melton, G, Koocher, G, and Saks, M (eds), *Children's Competence to Consent*, New York: Plenum Press. 1993.

cases raise issues of human autonomy and in such cases human autonomy should be the overriding factor. We shall call this the path of possibility. The other path is a negative one, one where the doubts and fears associated with probability surface, where well meaning regulation takes over from freedom, where to avoid the possibility of failure caution is the watchword. This is the path of paternalism. In the cases highlighted above, it is clear that this latter path is well worn. Yet we are dealing here with human life / human autonomy. To stifle the will of a young person on the basis that he or she is a young person is to fail to accord to him or her due respect.

## **2. Sufficient understanding depends on the nature (or kind) of the proceedings in question**

What is clear from the decision of the Court of Appeal in *Re S* is that the understanding of the child must be considered in relation to the issues raised in the case under consideration and this is worthy of further consideration to highlight the negative path being trodden by the courts. In this respect, having sufficient understanding to do *x* is not the same as having sufficient understanding to do *y*. In relation to this, Sir Thomas Bingham MR commented that:

"Different children have different levels of understanding at the same age. And understanding is not an absolute. It has to be assessed relative to the issues in the proceedings. Where any sound judgement on these issues calls for insight and imagination which only maturity and experience can bring, both the court and the solicitor will be slow to conclude that the child's understanding is sufficient."<sup>51</sup>

Support is also found for this viewpoint in the judgment of Thorpe J in *Re H (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 FLR 440 where he highlighted that the understanding to instruct a solicitor would be less than to refuse to consent to medical treatment.<sup>52</sup> Of course, what is not clear from this statement is what level of understanding is required by a child who wished to make a change of residence, or for that matter why sufficient

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<sup>51</sup> *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 11

<sup>52</sup> *Re H (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 FLR 440, at 440

understanding varies by degree according to the type of issue under discussion. This point is pivotal. Freeman is one commentator who has highlighted its inconsistencies. He asks whether it is *obvious* that a child cannot instruct a solicitor even if they have some emotional disturbance.<sup>53</sup> *Re H* is a case in point, even though it is a public law case. H was 15 years of age but regarded as emotionally disturbed. He was, however, highly intelligent for his age being in the top stream in his grammar school. Yet Thorpe J made clear that in order to remove a next friend or guardian ad litem<sup>54</sup> a child must have sufficient understanding and that if he or she were suffering from some form of emotional disturbance the question of the level of his or her rationality should be made subject to the opinions of experts already involved in the case.

Thorpe J sees cases like *Re H* as a hard case. Deciding whether children should be able to live elsewhere than with their natural parents are also viewed by him and other members of the judiciary as hard, but important, cases. This is evident from their special treatment by the High Court and the very few cases which have arisen in this area discussed in chapter five. No assessment of the law relating to children would now be complete without reference to the approach that the court takes in other hard cases where the notion of sufficient understanding has been pivotal. The interpretation of some commentators after the *Gillick* decision placed great emphasis on the fact that the autonomy level of children would be the key factor in determining the outcome of the case. Indeed, the albeit, for Eekelaar, regrettable conclusion of the *Gillick* case had been that the court's own power would be subsumed where the child had sufficient understanding.<sup>55</sup> In light of recent decisions, however, particularly in relation to medical treatment this argument has, regrettably, been rendered redundant. In three cases in particular the court has grappled with and made absolutely clear the proper status of the law in relation to the relationship between parents and their children (of which *Gillick* is the authoritative case), and more importantly the relationship between children and the courts. Those cases

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<sup>53</sup> Freeman, n 27 above, at 162

<sup>54</sup> In accordance with Family Proceedings Courts (Children Act 1989) Rules 1991 r 12(1)(a)

<sup>55</sup> See further Eekelaar, n 25 above, *passim*.

are *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] 2 FCR 229, *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 2 FCR 785 and more recently in *Re C (A Minor) (Detention for Medical Treatment)* [1997] 3 FCR 49.

There is a thread running through cases involving children who seek the court's permission to live away from their parents and cases involving the right to consent to or refuse medical treatment. Indeed, as Bainham<sup>56</sup> has observed these cases have given the courts the opportunity to clear up the uncertainties left by the *Gillick* case, by the Children Act 1989 and by the United Nations Convention on the Rights of the Child. That thread is the notion of children's autonomy. When the court is considering questions of autonomy it engages in hard borderline cases.

There is little doubt that *Re R* and *Re W* respectively are difficult cases. They are also very different cases. The former involves the circumstances of a 15 year old girl who was a ward of court and did not wish to receive anti-psychotic medication from medical professionals in an adolescent psychiatric unit. The latter, in contrast, involved a girl of 16 who was refusing treatment for anorexia nervosa. Similar to that case is the more recent case of *Re C* where a girl of 16 who was also suffering from anorexia nervosa was admitted to a specialist clinic where, she too, refused treatment and sought to discharge herself. In *Re W* and *Re C* respectively, the local authorities to whom the individuals were in care asked the court to invoke its inherent jurisdiction. In both cases, the court considered the relationship between children, their parents, their carers and the courts. In *Re R* the court considered its role under the wardship jurisdiction and the importance of an individual being "*Gillick* competent." The resulting decisions bring significant clarity to the law and in particular to the question of *Gillick* competence, and it is to this issue that I wish to turn first.

In *Re R* the minor was lucid only at certain periods and as a result was described as having a fluctuating mental state. It was during one of her more

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<sup>56</sup> Bainham, A, "Non-Intervention and Judicial Paternalism" in Birks, P (ed), *The Frontiers of Liability Volume 1*, Oxford University Press. 1994, at 161

lucid periods that R contacted a social worker and expressed her desire for her treatment to be ceased. The Local Authority considered that if the minor was competent she could refuse treatment. However, the clinic where R was resident refused to take care of R unless she continued with her treatment. As a result, R was made a ward of court. The court had to decide if R's treatment could continue despite her protestations.

The Court of Appeal decided unanimously that R was not "*Gillick* competent" because her mental state fluctuated in such a way. The fact that R was in certain periods lucid was rendered irrelevant by the fact that on some days she was not. This provides therefore that even if an individual is *Gillick* competent on some days the fact that he or she is *Gillick* incompetent on other days means that as a general assessment he or she is *Gillick* incompetent. Montgomery has pointed to a series of problems in relation to this unusual assessment.<sup>57</sup> Primarily, he argues that English law generally supports the view that consent is valid in lucid periods, for example in relation to the making of a will<sup>58</sup> or in relation to a marriage.<sup>59</sup> Secondly, and more importantly perhaps is that if the court refuses to respect the autonomy of individuals who suffer from a mental disorder even during their lucid periods will it ever respect their autonomy, the innate ability they have to decide certain matters for themselves. Moreover, such an approach appears to give doctors a free reign as the point of least lucidity can be viewed as the point at which to assess the ability to consent. Such a critique reaches to the heart of the question of sufficient understanding. Radical autonomy is an incommensurate thing. It simply *is*. Taking this view, any expression of it is valid. Ivan Karamazov's question to his brother regarding the happiness of mankind and the torture of an innocent child becomes pertinent again.<sup>60</sup> The metaphor has many levels. In giving to R, against her will, anti-psychotic drugs the Court of Appeal addressed it at one level. In whose best interests was the court acting? The judgments address the issue

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<sup>57</sup> Montgomery, J, "Parents and Children in Dispute: Who Has the Final Word" (1992) 4 JCL 85

<sup>58</sup> See for example *Cartwright v Cartwright* (1793) 1 Phill Ecc 90 at 100

<sup>59</sup> See for example *Turner v Meyers* (1808) 1 Hag Cons 414

<sup>60</sup> See chapter four of this work at 29-30. See further Detmold, M, *The Unity of Law and Morality*, Routledge & Kegan Paul. 1984, at 232-237

by saying in the best interests of R. Yet R chose that her interests be addressed differently when she was competent to do so. Perhaps then, it was in the best interests of mankind?

In *Re R* Lord Donaldson in any case considered that *Gillick* competence, whilst important in the modern law relating to children, was in no way so significant that the court had to adhere to it. He commented:

"If [the court] can override such consents [of parents and guardians]...I see no reason whatsoever why it should not be able, and in an appropriate case willing, to override decisions of "Gillick competent" children who are its wards or in respect of whom applications are made for, for example, s 8 orders under the Children Act 1989."<sup>61</sup>

The court's powers in this respect seem to be unfettered either by parental wishes or those of a *Gillick* competent child under the age of sixteen. Moreover, both *Re W* and *Re C* takes this principle a step further by making clear that the court's powers in relation to individuals over the age of sixteen is much the same. In both these cases the individual's affected were sixteen years of age. In *Re W* therefore, the court had to consider whether an individual aged sixteen was legally competent to refuse medical treatment and considered whether the court had the power to override the clear wishes of an individual aged over sixteen. Thorpe J in the Family Division of the High Court decided that W was able to make what he described as an "informed decision."<sup>62</sup> In spite of this finding, however, he concluded that W should undergo treatment, a course of action endorsed by the Court of Appeal, although they rejected Thorpe J's finding that W had sufficient understanding.<sup>63</sup>

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<sup>61</sup> *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] 2 FCR 229, at 245

<sup>62</sup> *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (FD) [1992] 2 FCR 785, at 793

<sup>63</sup> See *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (CA) [1992] 2 FCR 785, at 803-804 where according to Lord Donaldson of Lymington MR (as he then was) "I have no doubt that the wishes of a 16- or 17-year-old child or indeed of a younger child who is "Gillick competent" are of the greatest importance both legally and clinically, but I do doubt whether Thorpe J was right to conclude that W was of sufficient understanding to make an informed decision. I do not

There has been much academic controversy over these cases.<sup>64</sup> One point raised by this commentary is to what extent the court *should* be able to override the wishes of an individual under the age of eighteen who is deemed to have sufficient understanding, whether that understanding is temporary in moments of lucidity as in *Re R* or whether in relation to individuals over the age of sixteen where an assessment of sufficient understanding should not surely be relevant, although according to Lord Donaldson it is.<sup>65</sup> In both scenarios the court has imposed its belief of what is in the best interests of the child. It is apposite at this point to return to the various theoretical positions advanced in chapter three of this work in order to draw a distinction between the kind of limited paternalism advocated by orthodox writers in the field and the kind of paternalism being exercised by the court in cases like *Re R*, *Re W*, and *Re C*. Bainham has argued that the answer to the question whether or not the court should override the wishes of a mature minor depends directly on what view is taken on the limits to which

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say this on the basis that I consider her approach irrational. I personally consider that religious or other beliefs which bar any medical treatment or treatment of particular kinds are irrational, but that does not make minors who hold those beliefs any less *Gillick* competent. They may well have sufficient understanding fully to appreciate the treatment proposed and the consequences of the refusal to accept that treatment. What distinguishes *W* from them is, and what with all respect I do not think that Thorpe J took into account (perhaps because the point did not emerge as clearly before him as it did before us), is that it is a feature of anorexia nervosa that it is capable of destroying the ability to make an informed decision. It creates a compulsion to refuse treatment or only to accept treatment which is likely to be ineffective." On this basis those who suffer from anorexia nervosa cannot have sufficient understanding. Can therefore an individual with anorexia ever refuse the medical treatment proposed by a doctor?

<sup>64</sup> See further Bainham, A, "The Judge and the Competent Minor" (1992) 108 LQR 194; Douglas, G, "The Retreat from *Gillick*" (1992) 55 MLR 569; Eekelaar, J, "White Coats or Flak Jackets? Doctors, Children and the Courts - Again" (1993) 109 LQR 182; Masson, J, "Re *W*: Appealing from the Golden Cage" (1993) 5 JCL 37; Murphy, J, "W(h)ither Adolescent Autonomy?" [1992] JSWFL 529; Thornton, R, "Multiple Keyholders - Wardship and Consent to Medical Treatment" (1992) 51 CLJ 34

<sup>65</sup> See, n 63 above.

the state can intervene in the lives of individual children who, in the spirit of the decision in *Gillick*, wish to exercise their rights. He posits:

"One theory of children's rights would admit state intervention only to the extent that this is necessary to enable children to mature into rationally autonomous adults. According to this a limited form of paternalism, which protects children against those decisions which might inhibit or prevent healthy development, can be defended (see M.D.A Freeman, *The Rights and Wrongs of Children* (1983) esp. at pp. 52-60). Which decisions fall into that category must be determined by asking which decisions rational adults, looking at the matter retrospectively, would have wished to be protected against while children. On this view, judicial intervention can never be justified where a child has already achieved sufficient rationality to make an informed decision. The retrospective enquiry is, in these circumstances, redundant. The present decision falls foul of this theory. It can only be justified by a different perspective on children's rights which would reserve to the State, through the courts, a wider paternalistic role based on what adult decision-makers consider to be "good" for children - whether or not as adults those children would be likely retrospectively to agree."<sup>66</sup>

By contrast to Freeman, we have seen that Eekelaar prefers an imaginative leap made by adults to guess retrospectively what actions a child would take when he or she is a mature adult.<sup>67</sup> But the point remains the same. The decisions of the courts in these cases involving refusal to consent to medical treatment go beyond this limited paternalism. It is a wider form of paternalism which the courts are exercising in relation to these matters. I believe that this same kind of paternalism is being exercised by the courts in

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<sup>66</sup> Bainham, n 64 above, at 196

<sup>67</sup> Discussed in chapter three of this work at 22. It is also worthwhile noting here that Eekelaar has sought to reconcile the best interests principle with the idea of autonomy through the concept of dynamic self-determinism. However, such self-determinism is only fruitful where the individual goals of a child are consistent with his or her best interests, as prescribed by those who are deemed to be in a better position to judge what those interests are. See Eekelaar, J, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" (1994) 8 *Int'l J L & F* 42, at 51-53

their interpretation of the Children Act 1989 where children (under the age of sixteen) wish to seek an order which would allow them to live elsewhere than with their natural parents. And in taking that approach to the issue of sufficient understanding the courts can only be encouraged by the Children Act 1989. For the purposes of the legislation the fact that a child has sufficient understanding is only the start of a process. The decisions of children who are deemed competent are by no means decisive for the purposes of obtaining a section 8 order. It is the wishes and feelings of children that are important as part of an assessment of an individual child's best interests.

In *Re C (Residence: Child's Application for leave)* [1996] 1 FCR 461, for example, Stuart-White J made clear that applications by children under the Children Act 1989 should be treated "cautiously"<sup>68</sup> by the courts. In that case a fourteen year old girl sought a residence order so that she could move to live with her mother rather than her father who had a residence order in his favour. The judge was satisfied that C had sufficient understanding and therefore gave C leave to apply for a s 8 order in favour of her mother. The application was opposed by her father. In granting leave he said that "[a]ny judge considering this application will be considering the wishes of a 14-year-old who, if not now, certainly very soon will be in a position to decide for herself where she lives. That judge is going to need to know and to assess for himself what her true wishes are and what she is likely to do following any decision which the court may make."<sup>69</sup> This begs the question that if C had sufficient understanding for the purposes of obtaining the leave of the court, why does she not have the requisite amount of understanding to decide the matter outright? Her true wishes were that she wished to reside with her mother rather than her father. There is a factual similarity here between this case and that of *Re Agar-Ellis* (1883) 24 Ch D 317 discussed in chapter two.<sup>70</sup> In that case, as in *Re C* it is the child's true view that should be given its proper place.

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<sup>68</sup> *Re C (Residence: Child's Application for Leave)* [1996] 1 FCR 464, at 463

<sup>69</sup> *ibid.* at 465-466

<sup>70</sup> See chapter two of this work at 21-24.

Of course, sufficient understanding is irrelevant as a concept when the judge hears the substantive application. What the judge does have to consider, and Stuart-White J is absolutely right in this regard, are the wishes and feelings of the child in light of his or her age and understanding.<sup>71</sup> The views of the child are not decisive but merely instructive. This is in spite of the fact that in granting leave Stuart-White J in *Re C* was aware that "once a child is a party to proceedings between warring parents, that leads the child to be in a position in which that child is likely to be present hearing the evidence of those parents, hearing the parents cross-examined, hearing perhaps of many matters which, at the tender age of the child, it would be better for her not to here..."<sup>72</sup> In cases like this sufficient understanding itself, as a mark of end efficiency, should be all that the court considers. If child *x* goes to court and asks that her will as an end efficient human being be respected, the court should grant that request.

The consequences of not granting such a request could, as Stuart-Smith J recognises, be further disruption to the child. Denying the autonomy of a particular individual with sufficient understanding is inappropriate. Indeed there is a similarity between this and the teenage wardship cases prior to the introduction of the Children Act 1989.<sup>73</sup> The Law Commission was quick to recognize that in those case orders were only effective where the teenager concerned was willing to let that order be effective.<sup>74</sup> There is a similarity, a unifying thread, in all of these cases - in the medical cases of *Re R*, *Re W*, *Re C*, in *Re C (Residence: Child's Application for leave)*, and *Re SW* [1986] 1 FLR a teenage wardship case where a 17 year old who persistently ran away from home was ward placed with foster parents and subsequently committed to the care of her local authority by the High Court. It was thought she needed to be controlled. Yet, in all of them the individuals had sufficient understanding at some point or other. But this made little difference to the actual outcome of the cases. The outcome in all of them

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<sup>71</sup> Children Act 1989 s 1(3)(a)

<sup>72</sup> *Re C (Residence: Child's Application for Leave)* [1996] 1 FCR 464, at 465

<sup>73</sup> See for example, *Re SW* [1986] 1 FLR 24

<sup>74</sup> Law Commission, *Family Law: Review of Child Law: Wards of Court* (1987) Working Paper No 101, HMSO. at paras 3.48-3.51

was or would be decided by a judge or judges in accordance with what he, she or they considered to be in the best interests of the child. The paternalism of the court was not the kind discussed by those theorists who advocate a form of limited paternalism which is relevant in child care law. It logically cannot be. It was, as Bainham pointed out above, of a kind that imposes a particular form of behaviour, a particular set of mores, on individuals who themselves do not accept them.

In a more recent article Bainham has expressed the view that his own earlier response to the decision in *Re R* was too simplistic.<sup>75</sup> I don't think it was. He now believes that decisions like those in *Re R* and *Re W* are philosophically justifiable and that the key question is, per Eekelaar,<sup>76</sup> whether we are to allow individuals with sufficient understanding the right to make a mistake? On this he says:

"My own view is that it rather depends on the mistake which we are contemplating but there is considerable scope for argument about this. Looking at the question theoretically, should paternalism exist simply to assist those who lack the capacity for rational decision making, or should it embrace those who have it but are in fact about to take an irrational decision judged objectively? This was arguably the position in *Re W*, where W, despite her illness, was capable of articulating precisely what she wanted for herself, but was not on an objective evaluation acting in her own best interests. I would agree with the conclusion of the Court of Appeal that the court should step in to protect a young person, whether competent or not, who is electing irrationally to pursue a life-threatening course of action."<sup>77</sup>

With respect to Bainham, this is a dangerous form of paternalism which cannot be equated with a theory of rights which is of value. The real and fundamental weakness with the concept of competence is that when the court does not like the decision of an individual it will simply say he or she

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<sup>75</sup> Bainham, n 56 above, at 169

<sup>76</sup> Eekelaar, n 25 above, at 182

<sup>77</sup> Bainham, n 56 above, at 165

is lacking in sufficient understanding.<sup>78</sup> Bainham's approach is more open, that much is certain. It may also accord with the thesis proposed by Lowe and White that when there is a distinction between the court's protective and custodial jurisdictions - that when exercising the former jurisdiction the court can declare the views of even a *Gillick* competent child irrelevant if they do not accord with his or her best interests.<sup>79</sup> Or does it? It is worthwhile looking again at the example given by Bainham in chapter three of this work as an attempt to justify the interest theory he advocated where he put forward a hypothesis about a child wanting to move out.<sup>80</sup> Thus, "C(aged 14) dislikes her parents (M) and (F). She wants to move in with relatives. M and F are refusing to allow her to leave home."<sup>81</sup> Of all the examples he gave, it is worthy to recall, Bainham regards this as the most borderline, the most taxing and it is evident that the courts agree with him. In the absence of neglect or abuse he is reluctant to accept that the child should have the legal right to move out. The courts too, it seems, agree with this. However, it misses a fundamental point - that competent people do act in any number of ways. Others may view such choices as irrational. Individuals can choose who they like and don't like. They can choose where to live and with whom they live with. Sometimes, they even choose to die. Their own radical autonomy dictates that such decisions should be adhered to and that it is the responsibility of the courts when individuals are expressing their autonomy to assert it rather than engage in finding individuals to be competent but declaring them irrational or finding them both incompetent and irrational.

The courts' willingness to differentiate between the level of understanding which is required in different kinds of situation is problematical. A child wishing to move away his or her parents is viewed as a different kettle of fish from a child who because of his or her choices might die as a result of not eating or refusing a blood transfusion. It could be argued, per Lowe and

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<sup>78</sup> A point made by Eekelaar, J, in "Parents' Right to Punish - Further Limits after *Gillick*" (1986) 28 *Childright* 9

<sup>79</sup> See further chapter four of this work at 23-30

<sup>80</sup> See further chapter three of this work at 29 -32.

<sup>81</sup> Bainham, n 56 above, at 174

White, that the former is a custodial issue by virtue of which the child's opinion should be the final word on the matter, although that argument is obfuscation. Of course, the problem with the method of the courts' is that there is a lack of clarity as to what type of understanding will be required in a particular situation. Given the decisions in *Re R*, *Re W* and *Re C* mentioned above it is now highly unlikely that a child below sixteen will ever have a sufficient level of understanding to *refuse* medical treatment, although it remains the case following *Gillick* that a mature minor can consent to medical treatment at an age of sufficient understanding.

Should not sufficient understanding be sufficient understanding? If a human being has the capacity to consent to medical treatment, where is the logical justification for arguing that he or she could refuse medical treatment having the same mental capacity? This issue has troubled commentators. Douglas, for example, is unhappy with this possible state of affairs and refers to the case of *Re E (A Minor) (Wardship: Medical Treatment)* [1992] 2 FCR 219, the case of a 15 year old Jehovah's Witness who refused a blood transfusion which would save his life.<sup>82</sup> For Douglas the court is right to impose the transfusion on the child without his will although she is a staunch defender of the *Gillick* principle. She argues that:

"Surely a court could not, in conscience, permit the child to die? Here, a court could more justifiably hold the child not to be competent to decide. A child must understand all the implications of his or her decision and it is arguable that even a 15-year-old cannot really be adjudged to understand these in this situation. As Freeman has argued, the correct question is to ask, a la Rawls what sorts of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding our own system of ends as free and rational beings? We would choose principles that would enable children to mature to independent adulthood.

On this basis, we could hold the child not mature. Alternatively, Parliament could lay down fixed age limits for deeming maturity to determine life-

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<sup>82</sup> See n 4 above for discussion of this case.

threatening decisions, where probably 18 would be better than 16. In a sense, both of these solutions are evasions, but still preferable in my view, to undermining the whole essence of the *Gillick* principle by allowing a court, on the one hand, to hold a child mature, and on the other, to ignore that maturity and disregard the child's firmly held wishes."<sup>83</sup>

The problems with Douglas' approach here are manifest. How is it justifiable to deny the ends of one child to save a legal principle, the essence of which is to precisely embrace the fact that children are the owners of their own ends? If a child is sufficiently mature to decide an issue it should be irrelevant what that issue relates to. If one accepts that argument, why accept evasive paternalistic solutions. Either the principle is all encompassing or it is nothing. Elsewhere, she suggests that rather than meddling with the *Gillick* principle in *Re R*, it would have been better for the court to 'section' R under s 63 of the Mental Health Act 1983. Yet, all of these "evasive" techniques she suggests to save the sacred principle espoused in *Gillick* run in direct contradiction to it. There is in her argument a lack of philosophical thought. How can it be satisfactory to maintain a principle that a child with sufficient understanding will have a decisive say in relation to certain issues, but where that issue is complicated as in the refusal of medical treatment the court should 'section' the person concerned or declare them incompetent, or pass Parliamentary legislation which would deny them any say whatsoever on the grounds that the decision concerned is not one that would be made by a hypothetically rational adult human being. Such an approach is not only paternalistic, it is patronising and defeats the objective of philosophically justifying children's autonomy being given legal recognition. *Re R* is a disgraceful decision, and Lord Donaldson's interpretation of the *Gillick* principle should not be accepted as the last word on this issue. However, *Re W* and *Re R* are both Children Act cases, and it is through the lack of clear guidance in that legislation on the subject of children's autonomy that the Children Act must be accepted as not a step forward but a step sideways on the issue of mature minors and their capacity to consent or to refuse consent.

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<sup>83</sup> Douglas, n 64 above, at 574

It is a view accurately supported by Nolan LJ who has equated the welfare principle found in s 1(1) of the Children Act 1989 with the principle role of the court under the inherent jurisdiction. He says:

"The general approach adopted by the House of Lords (in Gillick) to the weight which should be attached to the views of a child who has sufficient understanding to make an informed decision is clearly of great importance, but it is essential to bear in mind that their Lordships were concerned with the extent of parental rights over the welfare of the child. They were not concerned with the jurisdiction of the court. It is of the essence of that jurisdiction that the court has the power and the responsibility in appropriate cases to override both the child and the parent in determining what is in the child's best interests. Authoritative and instructive as they are, the speeches in Gillick do not deal with the principles which should govern the exercise of the court's jurisdiction in the present case. In my judgment, those principles are to be found in s.1 of the Children Act 1989."<sup>84</sup>

There is here, in Nolan LJ's interpretation a co-existence between the courts role under the inherent jurisdiction and the statutory formula of the Children Act. In both cases, the views of the child can be only a peripheral part of the overall picture. However, Nolan goes on to say that he is "very far away from asserting any general rule that the court should prefer its own view as to what is in the best interests of the child to those of the child itself. In considering the welfare of the child, the court must not only recognize but if necessary defend the right of the child, having sufficient understanding to take an informed decision, to make his or her own choice. In most areas of life, it would not only be wrong in principle but also futile and counter-productive for the court to adopt any different approach. In the area of medical treatment, the court can and sometimes must intervene."<sup>85</sup>

The analysis of the judges in these cases is rendered even more complicated when one considers the case of *R v Collins and Others, Ex Parte S, The Times*, 8th May 1998, at 45 where a woman who was detained under the

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<sup>84</sup> *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 2 FCR 785, at 815

<sup>85</sup> *ibid.*

Mental Health Act 1983 and forced to undergo a caesarean section to assist in the birth of her unborn child despite her refusal for such a course of action to take place successfully obtained leave to sue the approved social worker involved in the case, the National Health Care Trust where she was forced to give birth and the Mental Health Services Trust which had detained her. The Court concluded that such a course of action was an improper use of the Mental Health Act as an adult who was of sound mind was entitled to refuse treatment whether or not his or her life depended on it. According to Judge LJ such a right reflected the personal autonomy of individual human beings stemming from their right of self determination. This was despite Ms S being described as having a history of depression and as having difficulty forming relationships, having obtained an abortion and sustaining a miscarriage in the three years previous to her pregnancy. Judge LJ commented that "The 1983 Act could not [be] deployed to achieve the detention of an individual against her will merely because her thinking process was unusual, even apparently bizarre and irrational, and contrary to the view of the overwhelming majority of the community at large."<sup>86</sup> Thus, even a decision which is regarded as being and described as "morally repugnant"<sup>87</sup> the court had no jurisdiction to override the settled will of the individual concerned.

The court's acceptance in the case that the right to self-determination is superior to any other right, including those of an unborn child is welcome. Nevertheless, it is difficult to square the logic of this with the logic in *Re R*, *Re W*, *Re C*, and *Re SW*. The grounds for the distinction are, of course, that certain individuals including children can lack the capacity to make an informed decisions about whether or not to consent to medical treatment. If a decision is made by a person over the age of 18 is regarded by the court as being morally repugnant their cognisance is not a relevant matter. The relevant fact is that the court cannot in all conscience allow an individual under the age of 18 to make a decision which is contrary to the views of the majority of society generally. However, because such a view is contrary to that popular view does not render that human being any more or any less

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<sup>86</sup> *The Times*, 8th May 1998, at 45

<sup>87</sup> *ibid.*

autonomous. The Court of Appeal in *R v Collins and Others Ex Parte S* have confirmed the rubric that "[e]ach adult may legally go to hell in his or her own way."<sup>88</sup> Despite the way laid by *Gillick* individuals under 18 certainly cannot, whatever their level of understanding, choose goals which conflict with what the court sees as being in their best interests. In the words of Nolan LJ "the present state of the law is that an individual who has reached the age of 18 is free to do with his life what he wishes, but it is the duty of the court to ensure so far as it can that children survive to attain that age."<sup>89</sup>

### **Conclusion: Sufficient Understanding and Outcome Determination**

A.S. Neill hit upon the problem highlighted in this chapter when he wrote that "[f]reedom works slowly; it may take several years for a child to understand what it means. ...I should like to be able to say that, since freedom primarily touches the emotions, all kinds of children - intelligent and dull - react equally to freedom. I cannot say it."<sup>90</sup> I too, am unable to say it. The type of freedom which Neill refers to here is described by him is that which would "allow the child to live his own life."<sup>91</sup> Of course, freedom is often misinterpreted by some who believe that to give children freedom is to abandon them to their own devices to those who go too far in its advocacy who as Neill sees it "do not have their feet on the ground."<sup>92</sup> It is thus absurd to allow very young children to research the effects of walking of cliffs, of drinking poison, of putting their hands in fires. Such an activity is not a true expression of autonomy. Per Caws, "[t]he truth of human freedom, we might say, is to turn spontaneity into project, to accept contingency and ride it, as it were, rather as one might ride a wave."<sup>93</sup> To be able to make the project and ride the wave, I must be free to determine my

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<sup>88</sup> Bradney, "The Judge as *Parens Patriae*" [1988] Fam Law 137, at 141

<sup>89</sup> *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 2 FCR 785, at 816

<sup>90</sup> Neill, n 3 above, at 113

<sup>91</sup> *ibid.* at 110

<sup>92</sup> *ibid.* at 105

<sup>93</sup> Caws, P, *Sartre*, Routledge & Kegan Paul. 1979, at 117

own ends. I have argued that in all this a special role is given to the courts to protect children's autonomy - to not allow babies to be thrown off cliffs, fed poison or placed in fires. Its other role is to assert that autonomy - to vindicate it and make sure that it is cherished. In order to recognize this kind of autonomy however, one has first to embrace it. Only then can it be appropriately asserted. In relation to children the courts have failed and continue to fail to embrace autonomy - to allow children to live their own lives - in key respects. The concept of sufficient understanding and its interpretation and assessment is an example of that failure.

It is all about attitude, I can do no better than that. The court has to decide on its own terms whether an individual does or does not have sufficient understanding. To determine it in the negative is to say that an individual is incapable of living his or her own life, of determining his or her own desires, of riding the wave. To say this however is dangerous. It is arguably one of the most dangerous activities a judge can enter into because his or her freedom is dependent on the recognition that others are free.<sup>94</sup> As Neill put it, "our disastrous habit of teaching and lecturing and coercing renders us incapable of realizing the simplicity of true freedom."<sup>95</sup> All this is present in the philosophy of paternalism. This philosophy underpins the Children Act 1989 and the decisions made in the courts after its introduction reflect it.

In this respect there are two problems with concept of sufficient understanding. Firstly, it is interpreted negatively (paternalistically). Secondly, its effect in any sense is limited. It merely opens doors in Children Act proceedings and in relation to refusal to consent to medical treatment it is of little other than theoretical value to the court. There are two solutions to this. The concept should be interpreted more liberally, more positively, more imbued with that sense of freedom discussed above. It should also determine outcome, not just access. The Children Act 1989 itself is at fault in this respect. For those who advocate paternalism this may be difficult to accept - it will mean coming to terms with some difficult outcomes in the cases discussed in this chapter. It will mean that children

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<sup>94</sup> See further Detmold, n 60 above, at 243. See further chapter one of this work, *passim*.

<sup>95</sup> *ibid.* at 110

under the age of sixteen might be able to remove themselves from a relationship with their parents to allow them to go and live elsewhere. It will mean individuals under the age of majority will be able to control their own destiny, and that might mean they could die. It will mean, *pace* Eekelaar, that these individuals will be able to make mistakes.<sup>96</sup> Of course they may not be mistakes. The arch-enemy of freedom per Neill is fear.<sup>97</sup> It is, for this author, the place of the superior courts to banish fear and embrace freedom. In relation to children they cannot bring themselves to do it - and that is the real mistake. No change in a statute can alter this. It goes to the state of mind of the courts, a state of mind which is ontologically indefensible.

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<sup>96</sup> Eekelaar, n 25 above, at 180-181

<sup>97</sup> Neill, n 3 above, at 110-111

## Conclusion

### Towards the Changing Conception of the Child in Law

"I know not the internal constitution of other men, nor even yours whom I now address. I see that in some external attributes they resemble me, but when misled by that appearance I have thought to appeal to something in common and burden my inmost soul to them, I have found my language misunderstood like one in a distant and savage land."<sup>1</sup>

The journey from the theoretical to the practical, from truth to action is never an easy one to make. This is especially the case when the practice being considered is far removed from the theoretical position being advanced. Notwithstanding this, however, I have tried in this thesis to make it. The purpose of making that journey was to posit an alternative way for the law to look at children precisely because the way the law has looked and is looking at children is deficient. The reasons for that deficiency and the solution to it have been the aims of this work. I have argued that the deficiency takes three forms: i) in theoretical analysis about children and the law; ii) in past practice relating to children and the law; and iii) in current practice relating to children and the law as reflected in the legal rules contained in Children Act 1989. The purpose of this conclusion is to both summarize these weaknesses and tie together some of the observations made in previous chapters of this work in order to assess any contribution it might make towards how the law should look at children.

The private law in relation to children, to which this thesis has specifically related, is clearly reflective of the deficiencies pointed out above. It has

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<sup>1</sup> Shelley, P, "Essay on Love" in Holmes, R, (ed), *Shelley on Love*, Flamingo. 1996, at 55

therefore, I have argued, provided an excellent basis through which one can analyse generally how the law looks at children. The issue of whether or not children should be able to move out or 'divorce' their parents is a case in point. The issues raised by such cases go beyond a simple analysis of the legal rules themselves. They go to the heart of the meaning of law, and our relationship to it. This is a point more or less embraced by Sawyer who has commented that:

"The transition from the child being the object of the legal process to that of speaking subject has implications, particularly in private law, which go beyond the mere capacity and competence of the individual child, and involve judgements which are not scientific but which necessarily reflect social and cultural values."<sup>2</sup>

The implications of such a transition are quite clear. Children will have a voice, a greater say in matters affecting them. They may be able to move out. They will, as Neill put it, be allowed to live their own lives.<sup>3</sup> Perhaps the real question in all of this, the real conflict, is whether individuals should be able to live their own lives when other well meaning human beings think that they can make better decisions. Of course this is dependent on one's vision of the world and one's approach to love, the monistic proposition which I suggested in chapter one is the universally applicable starting point on which the foundation of law is based. We shall turn to this final point after assessing the deficiency of current thinking about children and the law.

### **Theoretical Deficiency**

The relationship between legal rules and children is problematic for those who write about it. To some extent this is understandable. For example, there has, as was noted in chapter one been considerable controversy over the issue of children's rights - whether they have such things as rights and if they do what form they should take. I have advocated in chapter one of this

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<sup>2</sup> Sawyer, C, "The Competence of Children to Participate in Family Proceedings" (1995) 7 Child and Family Law Quarterly 180, at 182

<sup>3</sup> Neill, A, *Summerhill*, Pelican Books. 1971, at 110

work that children do have rights, not because they are children but because they are human beings. We all as human beings have rights precisely because we are human beings and because the practices of love necessarily determine it. Such rights are ontological - they go to the very heart of the metaphysical quest for being and they relate to the nature of the human condition itself. This is why, per Detmold, one can describe them as strong.<sup>4</sup>

In chapter two of this work the strong rights thesis was applied to children. It was also used to reject the positivistic method as an approach to law and to promote the view that law and morality are inseparable. Concomitant to children having ontological rights is the proposition that children, like all human beings, should be treated as ends in selves and I argued in chapter two that it is the responsibility of the superior courts to both protect the strong rights of children and to assert them when the individual reaches a stage of end efficiency.

In chapter three it was highlighted that such a theoretical position is antithetical to more orthodox and traditional theories of children's rights which advocate a form of limited liberal paternalism in relation to children. Whilst such paternalism may compel the recognition of rights for children the implication remains that in certain circumstances children are objectified by legal rules. As a result, such paternalism enables others to take decisions for children which are considered to be in their best interests. It was suggested in chapter three that such an approach is inadequate as it fails to properly consider the very point that children are the holders of strong rights, of rights which are more significant to anything else in the world and which form the very underpinning of law.

### **Deficiencies in Past Practice and in the Current Law**

The focus of the second part of this work was to apply the theoretical position outlined above to an analysis of those provisions of the Children Act 1989 which give to children a greater say in matters about their upbringing, including where and with whom they wish to live. In chapter

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<sup>4</sup> Detmold, M, *Courts and Administrators*, Weidenfeld & Nicolson. 1993, at chapter 7

four it was shown how prior to the enactment of the Children Act 1989 there was a clear need for a new statute on children and the law not least, as the Law Commission pointed out, because the legal rules were haphazard and confused. The revolution of the Children Act 1989 was perhaps that it brought together all the legal rules relating to children in one place.<sup>5</sup> One might suggest that its success lay in its consolidation. It was not, however, a revolution that was radical - the philosophy which informed the rules themselves remained intact, particularly the sanctity and paramountcy of the welfare principle, a point emphasised in chapter six, and embraced by Sir Thomas Bingham MR, as he then was, in *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 6 when he said that:

"The purposes of the Act were not... solely legislative. They were in part declaratory of the attitudes and purposes that were to inform and direct the courts and other agencies in dealing with children. The child's welfare was to be treated uniformly as the paramount consideration. Delay was to be avoided. Basic freedoms were to be emphasized and officiousness discouraged, through application of the rubric that no order should be made in respect of a child unless the court considered that to do so would be better for the child than making no order at all. Every opportunity was to be afforded for the child's own views to be communicated and, where appropriate, explained through independent representation."

One of the main problems with the Act in this respect is that it does not make a clear determination between autonomy and welfare, and given the courts' attitude to children in previous practice highlighted in chapter four this is regrettable. The Act is all things to all people. In chapter six we have seen that it is a statute about welfare,<sup>6</sup> about parents and their responsibilities,<sup>7</sup> about the non-intervention of the state<sup>8</sup> and all this is interspersed with a scattering of autonomy for mature minors.<sup>9</sup> Because of

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<sup>5</sup> See Hoggett, B, "The Children Bill: The Aim" [1989] Fam Law 217

<sup>6</sup> Children Act 1989 s 1(1)

<sup>7</sup> Children Act 1989 s 2

<sup>8</sup> Children Act 1989 s 1(5)

<sup>9</sup> For example, Children Act 1989 s10(8)

this, the idea of end efficiency is not appropriately embraced, a point highlighted in chapter seven when considering the issue of sufficient understanding which was the legacy of *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402. A radical interpretation of that case allows one to conclude that when an individual reaches a level of end efficiency or sufficient understanding then his or her determination of any matter relating to his or her own life should be final. No court or tribunal, parent, doctor, social worker should be able, on this view, to make a separate determination. The Children Act did not however accept this interpretation. It failed to resolve several problems which remained after the *Gillick* decision. Thus, it was shown in chapter five how in the legal rules, which enable us to talk of autonomy rights for children, that sufficient understanding determines access and not outcome. Thus children need the leave of the court to seek a section 8 order.<sup>10</sup> Such a proposition - of having to obtain leave to access the courts it was posited, fails to accord to the strong rights thesis.

This is not, moreover, the only hurdle with the respect to applications by children under the Children Act 1989. In chapters five and six it was shown that there are others, not least the general principles which underpin the legislation and referred to above.<sup>11</sup> It is clear from the development of the law thus far, as discussed in chapter five, that the courts are determined to ensure that applications by children for orders about their upbringing, particularly those relating to a change in residence, are treated as exceptional. They have therefore employed a heavy investigative strategy, particularly when applications are made without the assistance of a next friend or guardian ad litem.<sup>12</sup> Such a strategy has been carried over from how the court looked at children in wardship. There are clear similarities between the philosophy of past practice, embodied by the exercise of the courts powers in the inherent jurisdiction, and the High Court's construction of the rules contained in the Children Act 1989 which give children more autonomy rights.

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<sup>10</sup> Children Act s10(8)

<sup>11</sup> discussed in chapter six

<sup>12</sup> Per Family Proceeding Rules 1991 rule 9.2A , discussed in chapter five of this work.

## The Courts

This brings us neatly to a wider point about the courts. Saying that children have strong rights and providing a structure for their appropriate recognition are clearly separate matters. This, I have argued, is the responsibility of individual judges sitting in superior courts - to ensure that the chase for truth (connected with love), necessarily philosophical, remains central to its attitude to law. Lord Scarman in the *Gillick*<sup>13</sup> case got close to it, close to embracing both the idea and the practices of love. Such a position is not, however, one which prevails in the courts' consideration of the relationship between law and children in Children Act cases. And, perhaps therein lies the fundamental problem for one who is attempting to apply the strong rights thesis to the law relating to children.

For example, you (as the reader) might repost that such a thesis, such practices will never imbue the relationship between children and the law. I accept that such an observation is probably true. I have only sought, however, to present a better argument - necessarily moral and connected to the practice of love - of what it is appropriate for the courts to be doing in cases involving children, including under the Children Act 1989. I have argued that the superior courts have a responsibility to uphold the strong rights of individuals and I am aware that often they do not do it (I am aware that they may never have heard of the strong rights thesis). I am also aware, however, that in every single case judges do philosophy - they cannot get away from this. They make moral judgements, and such judgements must accord with the principle that end efficient human beings should be respected as end efficient human beings. This is particularly difficult in cases involving mature minors who would like things which senior judges think to be inappropriate (to move out, change religion, refuse a blood transfusion, engage in a sexual relationship, even choose to die).

The problem with journey from the theoretical to the practical is placed in perspective in this respect - there is a clear difference between what the

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<sup>13</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402

courts are doing and what they should be doing - and I have only sought to point that out. Detmold himself has grappled with this problem in his application of the strong rights thesis to administrative law. He comments that:

"Any theory of institutions is a theory of their history. And it is always selective and distorting of what at any particular time those institutions actually do. This is because history is beyond (both behind and in front of) any particular time. Still, the reader [of his book] may find the theory of the courts...too selective, too distorting (too romantic). To him [or her] I address two requests.

First, read it as though it were not about the courts at all, but about the reasons of one free individual (yourself) in the face of unauthorized power. Think hard to be free. And second, having done that, think what it would be like not to have courts of particular concern in which you yourself (your particular self) could address the question of reason and freedom. At this point you, the reader, are considering your (particular) connexion to history.

We make our history by the way we make our connexions to it. In that sense we make our institutions what we want and need. And the act of making it is sometimes just the act of imagining."<sup>14</sup>

Consider this in relation to children. What are the courts doing? Is it justifiable? The paternalism which I have argued is the mainstream underpinning philosophical position with regard to children and the law is institutionalized (part of the policy of the institutions themselves). I have tried to show this, and in this sense what the courts are doing in relation to single cases involving children is ontologically indefensible. Thus, in chapter four it was highlighted how, through the mechanism of wardship, the courts consider and considered cases relating to children under the age of 18. In chapter five it was illustrated how the paternalistic practices of wardship have been carried over into its consideration of the new found ability of children to apply for leave to apply for orders under section 10(8) of the

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<sup>14</sup> Detmold, n 4 above, at Postscript 2

Children Act 1989 which allow them to have a greater say in matters relating to their upbringing, including as to where and with whom they wish to live. The Children Act itself, however, is not totally clear about the approach the court should take in respect of children's autonomy, a point illuminated in chapter six of this work. It is tentative. As a direct result of these two factors individual children are denied the precise access, referred to by Detmold, to those places where questions about their reason and freedom should be considered. On the one hand the Act gives no clear direction to the courts on the issue of autonomy and on the other the courts themselves are employing a way of doing things which is morally suspect.

The problem is that the institutionalized and normative conceptions of childhood are confused in the Children Act 1989 and by the courts' consideration of cases involving the autonomy of mature minors.<sup>15</sup> The distinction drawn by Sir Thomas Bingham MR, as he then was, between "a babe in arms and a sturdy teenager"<sup>16</sup> highlights this problem. The courts are clearly concerned about where the line as to when an individual should be able to determine his or own ends should be drawn. As a result, it was highlighted in chapter seven, the key concept of sufficient understanding has also been constructed paternalistically and negatively when issues of children's autonomy, their capacity to take decisions for themselves, to even make mistakes, are raised.

Thus, the conclusion to be drawn here is that both the legal rules contained in the Children Act 1989 and the courts' determination of them in single cases are out of sync with the basic principle that human beings should be treated as ends in selves. The Children Act gives to children with sufficient understanding special entitlements. For the first time a statute has recognized that end efficient individuals should have a say in matters affecting them. It does not, however, go far enough and the courts should be pointing this out.

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<sup>15</sup> The distinction between institutionalized and normative conceptions of childhood was discussed in chapter 2 at p. 11-12. See further Kleinig, J, "Mill, Children and Rights" (1976) 8 Educational Philosophy and Theory at 1

<sup>16</sup> See *Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1, at 15. Quoted in Chapter 2 at p. 33

Instead, the courts are incorporating into those rules overarching paternalistic method and in doing so ignore the basic principle that individuals, even under the age of sixteen have strong rights of radical autonomy. These are grounds enough for concluding that family law is in crisis simply because children continue to be objects of concern.

The courts have not, however, been dealing with cases like those permitted by the Children Act 1989 for very long. They are new. This is a point embraced by Stuart-White J in *Re C (Residence: Child's Application for Leave)* [1996] 1 FCR 461, at 464 when he said:

"The jurisdiction provided by the Children Act for children to make applications of this kind is still comparatively new and the area of law is developing, and these applications all need to be considered very carefully."

And I repeat the point that the law may be in transition.<sup>17</sup> Perhaps there is a move toward greater respect for younger members of the community and away from their objectification and applications by children are part of the process started in *Gillick*. But where is the evidence for this? It is certainly not present in cases involving refusal to consent to medical treatment discussed in chapter seven.<sup>18</sup> It is not yet present in the courts' consideration of autonomy matters arising out of the Children Act 1989 and discussed in Part II of this work. It may be worthwhile referring again to Lowe and White's distinction of how in wardship the court exercised a protective as well as a custodial jurisdiction.<sup>19</sup> It may be possible to distinguish the cases on this basis. In other words, as applications for residence orders only raise custodial considerations the level of understanding of the child applying should be the sole guiding factor and the welfare principle would be inapplicable. In cases involving medical treatment the court, in the exercise of its protective jurisdiction, could override the wishes of a *Gillick* competent child in a paternalistic capacity of knowing what is best for

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<sup>17</sup> See further Postscript to Section 1 of this work.

<sup>18</sup> See chapter seven of this work 14

<sup>19</sup> Lowe, N and White, R, *Wards of Court*, Barry Rose. 1986 (2nd ed), at 154. See chapter four of this work at 17-20

children. Of course, such a development would be a compromise. It would not accord with principle central to the strong rights thesis that end efficiency is more important than the world. It is one direction that the law might take, although it is admitted that predicting the future is impossible.

It was highlighted in chapter six of this work how Freeman rightly described the Children Act 1989 as not being about empowerment.<sup>20</sup> He is optimistic that what he describes as "[a]n emancipation statute lies in the future."<sup>21</sup> I am not entirely sure what he means by this. Given his own philosophical perspective, discussed in chapter three of this work, such emancipation would have to be equated with the liberal paternalism that he believes is necessary in relation to children. If an emancipation statute means a piece of legislation which would be radical in its treatment of children's autonomy - by allowing the decisions of mature children to determine outcome and not just access in cases which could be describes, per Lowe and White, in matters custodial as well as protective it would be a welcome development. It is, however, highly unlikely. It fails to consider the courts, and their paternalistic mind set, a kind of paternalism which goes beyond that advocated by Freeman and states that the courts should be permitted to decide for children on the basis that the court knows best, irrespective of whether they have sufficient understanding. That is the real problem in all of this. Without their assent, emancipation is difficult to talk about. However, as Lord Scarman himself said in *Gillick* "[i]t is... a judicial commonplace to proclaim the adaptability of the judge-made common law. But this is more frequently proclaimed than acted on."<sup>22</sup>

Perhaps the judges will in time fulfil their constitutional function by embracing both the idea and the practice of love and to go on and apply it to children.

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<sup>20</sup> Freeman, M, "Can Children Divorce their Parents" in Freeman, M (ed), *Divorce; Where Next?*, Dartmouth. 1996, 159 at 161

<sup>21</sup> *ibid.* at 173

<sup>22</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402, at 419

## **Towards an Appropriate Place for Children in Law**

To conclude this work I would like to return to the proposition referred to in chapter one of this work and at the beginning of this chapter - love. Why is love so important in the study of legal rules? Rushdie has written that:

"Love can lead to devotion, but the devotion of the lover is unlike that of the true believer in that it is not militant. I may be surprised - even shocked - to find that you do not feel as I do about a given book or work of art or even person; I may very well attempt to change your mind; but I will finally accept that your tastes, your loves, are your business and not mine."<sup>23</sup>

These remarks were related to the importance of freedom of expression. They apply equally to law. It is all about acceptance, about the imaginative leap in the dark from one free thinking human being to another - the simple act of love - of recognizing the other as existentially free, with his or her own tastes and loves. Rules which try to stop human beings expressing, desiring and implementing their own ends (imaginative or real) are unsatisfactory. The embracement of love and the practice of law are in this way undeniably linked. The strong rights theory, outlined and discussed in Part I of this work, provides an important basis through which such rules can be challenged (if a legal rule is out of sync with the strong rights thesis, in other words if it is not moral, can it be described as law at all given the philosophical assumption advanced above that law and philosophy, law and morality are so intimate?)<sup>24</sup>

Iris Murdoch has written that "[t]o do philosophy is to explore one's own temperament, and at the same time attempt to discover the truth."<sup>25</sup> In the Introduction to this thesis it was suggested that the doing of philosophy and

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<sup>23</sup> Rushdie, S, "Is Nothing Sacred?" in Rushdie, S, *Imaginary Homelands*, Granta Books. 1991, at 416

<sup>24</sup> See chapter one, below at 28. See also Detmold, *The Unity of Law and Morality*, Routledge & Kegan Paul. 1984, at 37-38

<sup>25</sup> Murdoch, I, "On God and Good" in Murdoch, I, *Existentialists and Mystics*, Chatto & Windus. 1997, at 337

the doing of law were one and the same thing.<sup>26</sup> In every legal rule, in every judgment in a court or tribunal there is no escaping this. It is not enough to say, as a positivist would, that the rule is the rule and it must be implemented. The blue-eyed babies statute, discussed in chapter two, highlights the weakness in this argument. The doing of law involves an exploration of self in order to discover what the truth is.<sup>27</sup>

And so Kundera's metaphor of the circle returns.<sup>28</sup> To truly emancipate children, to let them live their own lives, means that the circle of positivism will have to be broken and the mind set of the superior courts in relation to children changed. Through adopting paternalism, of any kind, we condemn children to a state of objectivity, to the state of nature (a state of not being and end in self). It is the role of members of the academy, the "licensed subversives" as Twining put it, to challenge the basic beliefs and underpinning philosophies of a community and to offer a new way of looking at things.<sup>29</sup>

There is no escaping the way I as an individual see the world. In this thesis I have simply tried to describe that way of seeing in relation to children and the law by questioning some of the presumptions underpinning various theoretical positions, past practice and the current rules relating to children. I have offered a perspective based on love which lies at the heart of law. It is apt to give the last word on this to Shelley who asked:

"What is love? It is that powerful attraction towards all that we conceive, or fear, or hope beyond ourselves, when we find within our own thoughts the chasm of an insufficient void and seek to awaken in all things that are a community with what we experience within ourselves. If we reason, we would be understood; if we imagine, we would that the airy children of our

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<sup>26</sup> See Introduction of this work, at 1

<sup>27</sup> See further Murdoch, I, *The Sovereignty of Good*, Routledge & Kegan Paul. 1970, at 100 who embraces this point when she says that "[t]he world is aimless, chancy and huge, and we are blinded by self."

<sup>28</sup> Kundera, M, *The Book of Laughter and Forgetting*, Faber & Faber. 1996, at 92

<sup>29</sup> Twining, W, "Globalization and Legal Theory: Some Local Implications" (1996) 49 CLP 1, at 12

brain were born anew with another's; if we feel, we would that another's nerves should vibrate to our own, that the beams of their eyes should kindle at once and mix and melt into our own, that lips of motionless ice should not reply to lips quivering and burning with the heart's best blood. This is love."<sup>30</sup>

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<sup>30</sup> Shelley, n 1 above, at 55

## Bibliography

- Adler R, and Dearling, A, "Children's Rights: A Scottish Perspective" in B Franklin (ed), *The Rights of Children*, Basil Blackwell. 1986.
- Alderson, P and Goodwin, A, "Contradictions Within Concept's of Children's Competence" (1993) 1 Int'l J of Children's Rights 303
- Althusser, L, *The Future Lasts Forever*, Chatto and Windus. 1993.
- Arendt, H, *The Human Condition*, University of Chicago Press. 1958.
- Aries, P, *Centuries of Childhood*, Jonathan Cape. 1962.
- Austin, J, *The Province of Jurisprudence Determined*, Weidenfeld and Nicolson. 1954.
- Bainham, A, "Book Review: *Taking Children Seriously* by Martin Rosenbaum & Peter Newell (Calouste Gulbenkian Foundation, 1991) A Critique of the Proposal for a Children's Rights Commissioner" [1992] JSWFL 552
- Bainham, A, "Changing Families and Changing Concepts - Reforming the Language of Family Law" (1998) 10 Child and Family Law Quarterly 1
- Bainham, A, *Children, Parents and the State*, Sweet & Maxwell. 1988.
- Bainham, A, *Children: The Modern Law*, Jordans. 1993.
- Bainham, A, *Children: The New Law*, Jordans. 1990.
- Bainham, A, "Growing Up in Britain: Adolescence in the post-Gillick Era" (1992) Jur Rev 155
- Bainham, A, "Non-Intervention and Judicial Paternalism" in Birks, P (ed), *The Frontiers of Liability Volume 1*, Oxford University Press. 1994.
- Bainham, A, "See You in Court, Mum': Children as Litigants" (1994) 6 JCL 127
- Bainham, A, "The Balance of Power in Family Decisions" (1986) CLJ 262
- Bainham, A, "The Children Act 1989: Adolescence and Children's Right's" [1990] Fam Law 311
- Bainham, A, "The Children Act 1989: The Future of Wardship" [1990] Fam Law 270
- Bainham, A, "The Children Act 1989: Welfare and Non-Interventionism" [1990] Fam Law 143
- Bainham, A, "The Judge and the Competent Minor" (1992) 108 LQR 194
- Bainham, A, "The Privatisation of the Public Interest in Children" (1990) 53 MLR 206
- Barton, C, and Douglas, G, *Law and Parenthood*, Butterworths. 1995.
- Beck, C, Glavis, G, Glover, S, Barnes Jenkins, M, and Nardi, R, "The Rights of Children: A Trust Model" (1978) 46 Fordham LR 669
- Bell, C, *Art*, Oxford University Press. 1987
- Bennett, S, and Armstrong Walsh, S, "The No Order Principle, Parental Responsibility and the Child's Wishes" [1994] Fam Law 92.

Berger, N, *Rights*, Penguin. 1974 and "The Child, the Law, and the State" in Adams, P et al, *Children's Rights*, Elek Books. 1971.

Blackstone, Sir William, *Commentaries on the Laws of England*, Oxford, Clarendon Press. 4th ed, 1770.

Bradney, A, *Religions, Rights and Laws*, Leicester University Press. 1993.

Bradney, A, "Taking Law Less Seriously - An Anarchist Legal Theory" (1985) 5 Legal Studies 133

Bradney, A, "The Judge as *Parens Patriae*" [1988] Fam Law 137

Brahams, D, "The Gillick Case: a Pragmatic Compromise" (1986) 136 NLJ 75

Brophy, J, "Custody Law, Childcare and Parenthood in Thatcher's Britain" in Smart, C and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender*, Routledge, 1989

Brown, Sir Stephen (President of the Family Division of the High Court), "Reform and the Rise of Family Law" Address given to the Holdsworth Club, March 9th, 1990.

Burrows, D, "Legal Aid for Children" [1994] Fam Law 38

Burrows, D, "A Child's Understanding" [1994] Fam Law 579

Butler, I, "The Children Act and the Issue of Delay" [1993] Fam Law 412

Butler-Sloss, Dame E, *Report of the Inquiry into Child Abuse in Cleveland 1987*, Cmnd 412, HMSO. 1988.

Camus, A, *The Myth of Sisyphus*, Hamish Hamilton. 1955.

Camus, A, *The Outsider*, Penguin. 1983.

Caws, P, *Sartre*, Routledge & Kegan Paul. 1979.

Cohen, H, *Equal Rights For Children*, Littlefield Adams. 1980.

Collier, R, *Masculinity, Law and the Family*, Routledge. 1995.

Collingwood, R, *Principles of Art*, Clarendon Press. 1974.

Cornish, W and G de N Clark, *Law and Society in England 1750-1950*, Sweet & Maxwell. 1989.

Cretny, S, "Defining the Limits of State Intervention: The Child and Courts" in Freestone, D, (ed), *Children and the Law*, Hull University Press 1990, at 74

Cretny, S, "English and Scottish Approaches" in P Birks (ed), *The Frontiers of Liability Volume 1*, Oxford University Press. 1994, at 201.

Cretny, S, "Privatising the Family: The Reform of Child Law" [1989] Denning LJ 15

Daniels, N (ed.), *Reading Rawls*, Basil Blackwell. 1975.

Department of Health and Welsh Office, *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group*, HMSO. 1992.

Department of Health, *Inter-Departmental Review of Child Care Law*, HMSO. 1985.

Department of Health, *Introduction to the Children Act 1989*, HMSO. 1989.

Department of Health, *The Law on Child Care and Family Services*, Cm 62, HMSO. 1987.

Detmold, M, *Courts and Administrators*, Weidenfeld and Nicolson. 1989.

Detmold, M, *The Unity of Law and Morality*, Routledge & Kegan Paul. 1984.

Dicey, A, *Introduction to the Study of the Law of the Constitution*, Macmillan. 9th ed, 1939.

Eekelaar, J, *Family Law and Social Policy*, Weidenfeld and Nicolson. 2nd edn, 1984.

Dewar, J, "Family Law and Theory" (1996) 16 OJLS 725

Dickie, G, *Art and the Aesthetic: An Institutional Analysis*, Cornell University Press. 1974.

Douglas, G, "Family Law under the Thatcher Government" (1990) 17 J Law & Soc 411

Douglas, G, "The Retreat from Gillick" (1992) 55 MLR 569

Dworkin, G, "Paternalism" in Wasserstrom, R (ed), *Morality and the Law*, Wadsworth Publishing Co. 1971.

Eekelaar, J, "A Jurisdiction in Search of a Mission: Family Proceedings in England and Wales" (1994) 57 MLR 839

Eekelaar, J, "Parental Responsibility: State of Nature or Nature of the State" [1991] JSWFL 37

Eekelaar, J, "Parents' Right to Punish - Further Limits after *Gillick*" (1986) 28 Childright 9

Eekelaar, J, "The Eclipse of Parental Rights" (1986) 102 LQR 4

Eekelaar, J, "The Emergence of Children's Rights" (1986) 6 OJLS 161

Eekelaar, J, 'The Importance of Thinking That Children Have Rights' (1992) 6 Int'l J L & Fam 221

Eekelaar, J, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" (1994) 8 Int'l J L & Fam 42

Eekelaar, "What are Parental Rights ?" (1973) 89 LQR 211

Eekelaar, J, "What is 'Critical' Family Law?" (1989) 105 LQR 244

Eekelaar, J, "White Coats or Flak Jackets? Doctors, Children and the Courts - Again" (1993) 109 LQR 182

Eliot, T.S., 'Burnt Norton' in 'Four Quartets' in Eliot, T.S., *Collected Poems 1909-1962*, Faber and Faber. 1974, at 189-191.

Farson, R, *Birthrights*, Penguin. 1978.

Flavell, J, Miller, P and Miller, S, *Cognitive Development*, Prentice Hall. 3rd ed, 1993

Fox-Harding, L, "The Children Act in Context: Four Perspectives in Child Care Law and Policy" [1991] JSWFL 179

Fox-Harding, L, *Perspectives in Child Care Policy*. Longman. 1991.

Franklin, B, "Children's Political Rights" in Franklin, B (ed), *The Rights of Children*, Basil Blackwell. 1986.

Franklin, B "Introduction" in Franklin, B (ed), *The Rights of Children*, Basil Blackwell. 1986.

Freeman, M, "Can Children Divorce their Parents", in Freeman, M,(ed), *Divorce: Where Next?*, Dartmouth. 1996, at 159

Freeman, M, *The Rights and the Wrongs of Children*, Frances Pinter. 1983.

Freeman, M, "The Rights of Children in IYC" (1980) 33 CLP 1

Freeman, M, "Towards a Critical Theory of Family Law" (1985) 38 CLP 153

Geiser, R, "The Rights of Children" (1977) 28 Hastings Law Journal 1027

Gilligan, C, *In a Different Voice*, Harvard University Press. 1982.

Goldstein, J, Freud, A, and Solnit, A, *Before the Best Interests of the Child*, Burnett Books. 1979 Goldstein, J, Freud, A, and Solnit, A, *Beyond the Best Interests of the Child*, Burnett Books. 1980.

Hafen, B, "Puberty, Privacy and Protection: The Risk of Children's Rights" (1977) 63 American Bar Association Journal 1383

*Halsbury's Laws of England*, Butterworths. 4th edn, 1976.

*Hansard*, HL, Vol 502, cols 489-490, December 6, 1988, HMSO.

*Hansard*, HL, Vol 502, col 494, December 6, 1988, HMSO.

*Hansard*, HL, Vol 502, col 1131, December 19, 1988, HMSO.

*Hansard*, HL, Vol 502, col 1147-55, December 19, 1988, HMSO.

*Hansard*, HL, Vol 502, cols 1335-40, February 6, 1989, HMSO.

*Hansard*, HL, Vol 502, col 1342, February 6, 1989, HMSO.

Harris, P, "Procedural Problems in Representing Children" (1995) 7 JCL 52

Hart, H, "Are there any Natural Rights?" in Waldron, J, *Theories of Rights*, Oxford University Press. 1985,

Hart, H, *Concept of Law*, Oxford. 1961.

Hart, H, *Definition and Theory in Jurisprudence*, Oxford. 1953.

Hart, H, "Positivism and the Separation of Law and Morals" (1958) 71 Harv L R 593

Hobbes, T, *Leviathan*, Penguin. 1968.

Hodgson, D, "The Historical Development of "Internationalisation" of the Children's Rights Movement" (1992) 6 Aust J Fam Law 252

Hoggett B, *Parents and Children: The Law of Parental Responsibility*, Sweet & Maxwell. 4th ed, 1993.

Hoggett, B, "The Children Bill: The Aim" [1989] Fam Law 217

Holt, J, *Escape From Childhood*, Penguin. 1975.

Houghton-James, H, "Children Divorcing Their Parents" [1994] JSWFL 185

House of Commons, Second Report from the Social Services Select Committee, Session 1983-84, *Children in Care* HC. 360

Jones, S, "The Ascertainable Wishes and Feelings of the Child" (1992) 4 JCL 181

Jukes, P, *A Shout in the Street*, Faber and Faber. 1990.

King, A, *Camus*, Oliver and Boyd. 1966.

Kleinig, J, "Mill, Children and Rights" (1976) 8 Educational Philosophy and Theory at 1

Kropotkin, P, *Ethics*, Prism Press. 1979.

Kundera, M, *The Book of Laughter and Forgetting*, Faber and Faber. 1996.

Kymlicka, W, "Rethinking the Family" (1991) 20 Philosophy and Public Affairs 77

Latey, *Report of the Committee on the Age of Majority (the Latey Report)* Cmnd 3342 (1967)

Law Commission, *Family Law: Review of Child Law: Care, Supervision and Interim Orders in Custody Proceedings*, Working Paper No 100, HMSO. 1987.

Law Commission, *Family Law: Review of Child Law: Custody*, Working Paper No 96, HMSO. 1985.

Law Commission, *Family Law: Review of Child Law: Guardianship*, Working Paper No 91, HMSO. 1985.

Law Commission, *Family Law: Review of Child Law: Guardianship and Custody*, Report No 172, HMSO. 1988.

Law Commission, *Illegitimacy*, Report No 118, HMSO. 1982.

Law Commission, *Family Law: Review of Child Law: Wards of Court*, Working Paper No 101, HMSO. 1987.

Lee, S, *Judging Judges*, Faber & Faber. 1989.

Lewis, S, "Decision Making Related to Health: When Could / Should Children Behave Responsibly?" in Melton, G, Koocher, G and Saks, M (eds), *Children's Competence to Consent*, New York: Plenum Press. 1993.

Locke, J, *Two Treatises of Government*, Cambridge University Press. 2nd ed, 1967.

London Borough of Brent, *A Child in Trust: Report of the Panel of Inquiry Investigating the Circumstances Surrounding the Death of Jasmine Beckford* (London Borough of Brent, 1985)

London Borough of Greenwich, *A Child in Mind: Protection of Children in a Responsible Society, Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Kimberly Carlisle*, (London Borough of Greenwich, 1989)

London Borough of Lambeth, *Whose Child? The Report of the Public Inquiry into the Death of Tyra Henry*, (London Borough of Lambeth, 1987)

Lowe N, "Caring for Children" (1989) 139 NLJ 87

Lowe, N, and White, R, *Wards of Court*, Barry Rose. 1986.

Lucy, W, "Controversy About Children's Rights" in Freestone, D (ed), *Children and the Law*, Hull University Press. 1990.

MacCormick, N, "Children's Rights: A Test-Case for Theories of Right" (1976) 62 *Archiv fur Rechts und Sozialphilosophie* 305

Maidment, S, *Child Custody and Divorce*, Croon Helm. 1984.

Mairet, P, "Introduction" in Sartre, J.P., *Existentialism & Humanism*, Methuen. 1968.

Malinowski, B, *Law and Custom in Savage Society*, Routledge & Kegan Paul. 1926.

Mallender, P and Rayson, J, *How to Make Applications in the Family Proceedings Court*, Blackstone Press. 1992.

Mann, F.A., 3rd Blackstone Lecture, (1978).

de Mause, L, "The Evolution of Childhood", in *The History of Childhood*, Souvenir Press. 1976.

Masson, J "Representation of Children" (1996) 49 CLP 245

Masson, J, "Re W: Appealing from the Golden Cage" (1993) 5 JCL 37

Masson, J, "The Official Solicitor as the Child's guardian ad litem under the Children Act 1989" (1992) 4 JCL 58

McCall Smith, A, "Is Anything Left of Parental Rights?" in Sutherland, E and McCall Smith, A (eds), *Family Rights: Family Law and Medical Advance*, Edinburgh University Press. 1990.

McGoldrick, D "The United Nations Convention on the Rights of the Child" (1991) 5 Int'l J L & Fam 132

Meadows, S, *The Child as Thinker*, Routledge. 1993.

Mnookin, R, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 Law and Contemporary Problems 22

Montgomery, J, "Children as Property" (1988) 51 MLR 323

Montgomery, J, "Parents and Children in Dispute: Who Has the Final Word?" (1992) 4 JCL 85

Murdoch, I, "On God and Good" in Murdoch, I, *Existentialists and Mystics*, Chatto & Windus. 1997.

Murdoch, I, *The Sovereignty of Good*, Routledge & Kegan Paul. 1970.

Murphy, J, "Re CT: Litigious Mature Minors and Wardship in the 1990's" (1993) 5 JCL 186

Murphy, J, "W(h)ither Adolescent Autonomy?" [1992] JSWFL 529

Neill, A, *Summerhill*, Pelican Books. 1971.

O'Donovan, K, "Engendering Justice" (1989) 39 University of Toronto Law Journal 127

O'Donovan, K, *Family Law Matters*, Pluto Press. 1993.

O'Donovan, K, *Sexual Divisions in Law*, Weidenfeld and Nicolson. 1985.

O'Neill, O, "Children's Rights and Children's Lives" (1988) 98 Ethics 445

Parry, M, "The Children Act 1989: Local Authorities, Wardship and the Revival of the Inherent Jurisdiction" [1992] JSWFL 212

Paton, G, and Derham, D, *Jurisprudence*, Oxford University Press. 4th ed, 1972.

Pears, D, *Wittgenstein*, Fontana. 1979.

Peterson-Badali, M and Abramovitch, M, "Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?" (1992) 34 Canadian Journal of Criminology 139

Pole, D, *The Later Philosophy of Wittgenstein: A Short Introduction with an Epilogue on John Wisdom*, Athlone Press. 1958.

Pollock, L, *Forgotten Childhood*, Cambridge University Press. 1983

Rawls, J, *A Theory of Justice*, Oxford University Press. 1973.

Raz, J "Legal Rights" (1984) 4 OJLS 1

Raz, J, *The Morality of Freedom*, Oxford University Press. 1986.

Rhode, D, "Feminist Perspectives in Legal Ideology" in Mitchell, J and A Oakley (eds), *What is Feminism?*, Blackwell. 1986.

Ritchie, D.G., *Natural Rights*, Allen & Unwin. 1952.

Roberts, S, "Law and the Study of Social Control in Small Scale Societies" (1976) 39 MLR 663

Rodham, H, "Children Under the Law" (1973) 43 Harvard Educational Review 487

Rosenbaum, M and Newell, P, *Taking Children Seriously*, Calouste Gulbenkian Foundation. 1991.

Rosser, R, *Cognitive Development: Psychological and Biological Perspectives*, Boston: Allyn and Bacon. 1994.

Rushdie, S, "Is Nothing Sacred?" in Rushdie, S, *Imaginary Homelands*, Granta Books. 1991.

Rushdie, S, *Midnight's Children*, Picador. 1982.

Russell, B. *History of Western Philosophy*, Routledge. 1995.

Sartre, J.P., *Being & Nothingness*, Methuen. 1969.

Sartre, J.P., *Existentialism and Humanism*, Methuen. 1990.

Sartre, J. P., *Imagination*, Cresset Press. 1962.

Sartre, J.P., *Nausea*, Penguin. 1970.

Sartre, J.P, *Saint Genet; Actor and Martyr*, George Braziller. 1963.

Sartre J.P., "The Childhood of a Leader" in Sartre J.P. *Intimacy*, Panther. 1973.

Sartre, J.P., *The Transcendence of the Ego*, Noonday Press. 1957.

Sausserre, *Course in General Linguistics*, Fontana. 1974.

Sawyer, C, "The Competence of Children to Participate in Family Proceedings" (1995) 7 Child and Family Law Quarterly 180

Shelley P, "On Jesus Christ's Doctrines of Universal Love and Equality" in R Holmes (ed), *Shelley on Love*, Flamingo. 1996, at 66-75.

Shelley, P, "Essay on Love" in Holmes, R, (ed), *Shelley on Love*, Flamingo. 1996, at 55-57.

Smart, C, *The Legal and Moral Ordering of Child Custody*, University of Warwick, Department of Sociology. 1990.

Smart, H, "Language Games" (1957) 7 The Philosophical Quarterly 232

Specht, E, *The Foundations of Wittgenstein's Philosophy*, Manchester University Press. 1969.

Thane, P, "Childhood in History" in King, M (ed) *Childhood, Welfare & Justice*, Billing & Son. 1981, at 6

*The Independent*, 11 November 1992, "An Unnatural Kind of Parting"

*The Independent*, 12 November, 1992. "Girl, 11, First in England to 'Divorce' Parents"

*The Times*, 6 November, 1992, "Top Judge Hears Case for Child Divorce"

*The Times*, November 7, 1992, "Divorce Case Girl is Ward of Court"

*The Times*, March 10, 1994, "Girl Who Divorced Parents Goes Home"

Thody, P, *Sartre*, Studio Vista. 1970.

Thornton, M, "The Public Private Dichotomy: Gendered and Discriminatory" (1991) 18 J Law & Soc 448

Thornton, R, "Multiple Keyholders - Wardship and Consent to Medical Treatment" (1992) 51 CLJ 34

Mr Justice Thorpe, "Applications by Children Under the Children Act" [1994] Fam Law 20

Turner, N, "Wardship: the Official Solicitor's Role" (1977) 2 Adoption and Fostering 30

Twining, W, "Globalization and Legal Theory: Some Local Implications" (1996) 49 CLP 1

United Nations, *Convention on the Rights of the Child 1989* (1989)

Venables, D, "The Official Solicitor; Outline and Aspects of his Work" [1990] Fam Law 53

Wade, H, *Administrative Law*, Oxford Clarendon Press. 7th ed, 1994.

Wald, M, "Children's Rights: A Framework for Analysis" (1979) 12 University of California Davis Law Review 255

Waldron, J, *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press. 1993.

Wallerstein, J and Kelly, B, *Surviving the Breakup*, Grant McIntyre: 1980.

Walsh, E, "Applications by Children: Paternalism v Autonomy" [1994] Fam Law 663

Warnock, M, (ed.) *Women Philosophers*, London. 1996.

White A, *Rights*, Oxford: Clarendon Press. 1984.

White, R, Carr, P and Lowe, N, *The Children Act in Practice*, Butterworths. 2nd ed, 1995.

Williams, G, "The Gillick Saga" (1985) 135 NLJ 1156

Whitman, W "Song of Myself" in *The Portable Walt Whitman*, Penguin Books. 1977, at 96.

Wittgenstein L, *Philosophical Investigations*, Basil Blackwell. 2nd ed, 1958.

Wittgenstein, L, *The Blue and Brown Books*, Basil Blackwell. 1958.

Wittgenstein, L, *Tractatus Logico-Philosophicus*, Routledge & Kegan Paul. 1922.

Rt. Hon Lord Woolf of Barnes "Droit Public - English Style" (1995) PL 57

Wordsworth, W, 'Ode: Intimations of Immortality from Recollections of Early Childhood' in *The Poetical Works of William Wordsworth*, Oxford: Clarendon Press. 1958, at 279-285.

Worsfold, V, "A Philosophical Justification for Children's Rights" (1974) 44 Harvard Educational Review 142

Wringe, C, *Children's Rights*, Routledge & Kegan Paul. 1981.

### **Table of cases**

*A v Liverpool City Council* [1982] AC 363

*Cartwright v Cartwright* (1793) 1 Phill Ecc 90 at 100

*C v Salford City Council* [1994] 2 FLR 926

*C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290

*C v C (Custody of Child)* [1991] 1 FLR 223

*G v Kirklees Metropolitan Borough Council* [1993] 1 FLR 805

*Gillick v BBC, The Times*, 20 October 1995

*Gillick v West Norfolk and Wisbech Area Health Authority and another (CA)* [1985] 1 All ER 556

*Gillick v West Norfolk and Wisbech Area Health Authority and another* (HL) [1985] 3 All ER 402  
*Hewer v Bryant* [1970] 1 QB 357  
*J v C* [1970] AC 668  
*Kingsley v. Kingsley* 623 So. 2d 780 (Fla. Dist. Ct App. 1993)  
*K v P (Children Act Proceedings: Estoppel)* [1995] 1 FLR 248  
*L V L (Minors: Parties)* [1994] 1 FLR 156  
*Lewis v Daily Telegraph* [1964] AC 234  
*Murray v Ministry of Defence* [1988] 2 All ER 521  
*North Yorkshire County Council v G* [1994] 1 FCR 737  
*Oppenheimer v Cattermole* [1976] AC 249  
*Practice Direction: (Applications by Children: Leave)* [1993] 1 All ER 820; [1993] 1 WLR 313; [1993] 1 FLR 668  
*Practice Note: Case Management* [1995] 1 All ER 586  
*Practice Note: Official Solicitor: Sterilisation* [1993] 3 All ER 222  
*Practice Note: The Official Solicitor: Appointment in Family Proceedings* [1996] 1 FCR 78  
*R v Collins and Others, Ex Parte S, The Times*, 8th May, 1998, p. 45  
*R v D* [1984] 2 All ER 449  
*R v Gyngall* [1893] 2 QB 232  
*R v Rahman* (1985) 81 Cr App Rep 349  
*Re A (Minors) (Shared Residence : Leave to Apply)* [1992] Fam 182  
*Re A (A Minor) Residence Order: Leave to Apply)* [1993] 1 FLR 425  
*Re AD (A Minor)* [1993] 1 FCR 573  
*Re Agar Ellis* 24 Ch D 317  
*Re C (A Minor) (Leave to Seek Section 8 Orders)* [1994] 1 FLR 26  
*Re C (Minor: Leave to Apply for Order)* [1994] 1 FCR 837  
*Re C (A Minor) (Wardship Proceedings)* [1984] FLR 419  
*Re Connor* 16 Ir. C. L. Rep 112  
*Re C (Residence : Child's Application for Leave) (FD)* [1996] 1 FCR 461  
*Re D* [1977] AC 617  
*Re D* [1977] Fam 158  
*Re E (A Minor) (Wardship: Medical Treatment)* [1992] 2 FCR 219  
*Re E (SA) (A Minor)(Wardship)* [1984] 1 All ER 289  
*Re F (A Minor) (Blood Tests: Parental Rights)* [1993] Fam 314  
*Re Gaskill* [1921] P. 425

*Reg. v Howes* 3 E. & E. 332  
*Re H (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 FLR 440  
*Re H (A Minor) (Independent Representation)* [1993] 2 FCR 437  
*Re H (Minors)*, Court of Appeal, unreported, August 6, 1992  
*Re H (Shared Residence)* [1995] 2 FLR 883  
*Re H G (Specific Issue Order: Procedure)* [1993] 1 FLR 587  
*Re H-S (Minors) (Protection of Identity)* [1994] 3 All ER 390  
*Re JD (Wardship: Guardian ad Litem)* [1984] FLR 359  
*Re KD (A Minor) (Ward: Termination of Access)* [1988] 2 WLR 398  
*Re K, W and H (Minors) (Medical Treatment)* [1993] 1 FLR 854  
*Re Keyes* [1921] P. 204;  
*Re M (A Minor) (Immigration: Residence Order)* [1993] 2 FLR 858  
*Re Mohamed Arif (An Infant), Re Nirbhai Singh (An Infant)* [1968] Ch 643  
*Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495  
*Re M (Section 94 Appeals)* [1995] 1 FLR 546  
*Re M (Infants)* [1967] 3 All ER 1071  
*Re P (A Minor)* (1981) 80 LGR 301  
*Re R (A Minor) (Wardship: Consent to Treatment) (CA)* [1992] 2 FCR 229  
*Re R (A Minor) (Wardship: Consent to Treatment) (FD)* [1992] 2 FCR 229  
*Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163  
*Re R (PM) (An Infant)* [1968] 1 All ER 691  
*Re S (A Minor) (Consent to Medical Treatment)* [1994] 2 FLR 1065  
*Re S (A Minor) (Independent Representation)* [1993] 2 FCR 1  
*Re S (Minors) (Wardship: Disclosure of Material)* [1988] 1 FLR 1  
*Re SC (A Minor) (Leave To Seek Residence Order)* [1994] FLR 96  
*Re Shanahan* 20 L. T. 183  
*Re Spence* (1847) 2 Ph 247  
*Re SW (A Minor) (Wardship: Jurisdiction)* [1986] 1 FLR 24  
*Re T (Child Case: Application by Child)* [1993] 1 FCR 646  
*Re T (A Minor) (Independent Representation)* [1993] 2 FCR 445, sub nom *Re CT (a minor)* [1993] 2 FLR 278  
*Re W* [1985] AC 791  
*Re W (A Minor) (Medical Treatment: Court's Jurisdiction) (FD)* [1992] 2 FCR 785  
*Re W (A Minor) (Medical Treatment: Court's Jurisdiction) (CA)* [1992] 2 FCR 785  
*Re X (A Minor)* [1994] 2 FLR 116  
*Re X* [1975] Fam 47

*S v McC; W v W* [1972] AC 24  
*Slim v Daily Telegraph* [1968] 2 QB 157  
*Turner v Meyers* (1808) 1 Hag Cons 414  
*Warde v Warde* (1849) 2 Ph 786

### **Table of Statutes**

Adoption Act 1976  
Child Abduction Act 1984  
Children Act 1975  
Children Act 1989  
Children (Scotland) Act 1995  
Custody of Infants Act 1839  
Domestic Proceedings and Magistrates' Courts Act 1978  
Domestic Violence and Matrimonial Proceedings Act 1976  
Family Law Act 1996  
Family Law Reform Act 1969  
Guardianship of Infants Act 1886  
Guardianship of Minors Act 1971  
Legal Aid Board Act 1988  
Matrimonial and Family Proceedings Act 1984  
Matrimonial Causes Act 1857  
Matrimonial Causes Act 1976  
Matrimonial Homes Act 1983  
Mental Health Act 1983  
Sexual Offences Act 1956

### **Table of Statutory Instruments**

Family Proceedings (Amendment Rules) 1992, SI 1992/456  
Family Proceedings Rules 1991, SI 1991/1247  
Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395  
Rules of the Supreme Court 1965 SI 1965/1776