RESPONSE TO McMURTRY

Realism and Legal Policy

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Professor John McMurtry’s reforming zeal on behalf of children is impressive. However, as I believe myself to be an advocate of children’s rights, I did not expect to be the target of such harsh criticisms. In earlier published papers (Magsino, 1977; 1979), I have argued for stringent legal scrutiny of educators’ accountability regarding in-school practices and arrangements harmful to young people. I have also suggested constitutional entrenchment of students/children’s welfare rights such as access to education, equal educational opportunity, due process, care and protection, reasonable punishment and, indeed, whether there should be any punishment at all. Moreover, regarding children’s option rights, I have advocated what is analogous to adult rights — freedom of press, speech, association, etc., and freedom in appearance and conduct — for inclusion in student bills of rights or codes of conduct. Contrary to McMurtry’s observations, such bills of rights have already been adopted widely in the United States and Canada — even in Ontario. When such a bill is approved by a school board, it has at least a quasi-legal force which stops arbitrary action by educational authorities.

Again, not unlike McMurtry, I have consistently argued for the development of rational autonomy in children. Hopefully, such autonomy would help individuals attain personal fulfillment and, at the same time, contribute to the improvement of humankind. (A closer look at my schema on page 12 would have revealed this to McMurtry and made his criticisms on my utilitarian perspectives unnecessary.)

McMurtry might have furthered our dialogue more significantly by discussing the central concerns of my paper. As it is, because of a faulty interpretation of my position, he attacks a largely non-existent adversary. Of course, I cannot blame him for not knowing about my earlier works. However, responsible commentary required of him an open-minded consideration of at least the last three paragraphs of my section on children’s rights.

Still I puzzle over his claim that I am partial to parents (or to other adults such as educators) and biased against children. My summary recalled not only my rejection of the rhetoric of parents and educators but also my espousal of balancing coupled with some utilitarian presuppositions. These include the greatest happiness of the greatest number principle which certainly requires equal non-discrimination against any group, including children individually or collectively (see p. 9). My discussion on pages 2-4, particularly in the last paragraph of that section, suggested broad limitations on parental rights. Further (p. 7), I signified my affinity with the United Nations Declaration on the Rights of the Child, a document imposing wide obligations and restraints on various societal institutions. Having said all this, how can I be charged with bias against young people? Might I not conclude that, regretfully, McMurtry’s zeal has obscured his objective analysis of my paper?

For all McMurtry’s criticisms, I think that he and I are not far apart on children’s welfare rights. Concerning their option or freedom rights, however, I
am not sure, because he is very unclear about what sort of rights he is advocating. Is he speaking of children's human/moral rights, or of their alleged legal rights? McMurtry does not take note of this distinction which has currency in legal philosophy. The fact is that much hangs on this distinction insofar as public — particularly legal — policy is concerned. There are children's rights which ought to be recognized as human/moral rights but which cannot be insisted upon as legal rights for one valid reason or another, such as their being unenforceable. Take children's right to their thoughts. While morally this may be accepted as every child's right, would it make sense to pass a law guaranteeing it? McMurtry seemed to recognize that I was attempting to develop largely legal parameters in cases of conflicting rights; yet did he want me to suggest legalization of every moral relationship adults have with children?

The institution of law being what it is, policy-making in this area cannot afford to formalize what is virtually impossible to implement. Now imagine what would happen if we legalized "full partnership" status for children. (I will assume McMurtry demands rights for children equal to parents' rights on any given issue. While "full partnership" may involve junior and senior partners, he rejects subordination of the young). Whenever a parent and his child fail to resolve their differences (e.g., despite my arguments, my boy thinks that his happiness is an Atari video set!), a third deciding party, perhaps a small claims court or an ombudsman, must enter into the dispute. Multiply disputes between children and all adults and what have we got? Surely McMurtry cannot intend or want this nightmare?

Suppose, however, that some imaginative genius could succeed in implementing McMurtry's views. Are they worthy of implementation in the first place? Here, I suspect, is where McMurtry and I really differ. Unlike him, I do not wish to disregard commonsense perception — not to mention the psychological findings inspired by Piaget — of children's capacities and incapacities at various stages in their development. I do not know why we would want to base legal policy on the myth of children knowing their best interests, at least before adolescence (and perhaps even during early adolescence), or on simple comparisons between children and the mentally incapacitated or senile.

I see no wisdom in applying to children of all ages the idea of lawyers representing their interests if what this means is simply following children's wishes. While I approve of legal representation and consideration of children's wishes (Magsino, 1981, p. 24) I regard the issue to be much more complicated than McMurtry seems to think. In the words of Leon:

With specific regard to the provision of legal representation for children, a detailed consideration of the types of proceedings in which a lawyer should be made to assert the view of the child is required. Whether presentation of the child's case should be in terms of the child's desires, or in terms of the lawyer's perception of the child's interests, must be clarified. The nature of appropriate representation is not necessarily the same for children of all ages (1979, pp. 23-24). Also, see Catton, 1978; Genden, 1976; and Leon, 1978.

Again, unlike McMurtry, I do not see evil in paternalism if it is applied appropriately during children's stages of genuine incapacity and, if intended to foster rational autonomy, is then withdrawn when the child reaches that state. (I just cannot see what hangs on McMurtry's claim that children are characterized by the law as parental "possession." Parents cannot legally do whatever they wish with their children because of existing federal and provincial legislations. I do not mean that present legislation is adequate; I simply want to note that McMurtry's language is extremist and out of touch with legal realities.) Perhaps I am naive enough to regard parents as still the best bet for