

CHILDREN AND THE LAW

**AN INTERDISCIPLINARY APPROACH
WITH CASES, MATERIALS, AND COMMENTS**

KATHERINE HUNT FEDERLE

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Preface

IT IS AXIOMATIC THAT THE BEST LAWYERS INTEGRATE THEORY WITH PRACTICE. IN THE child-law field, a rich understanding of legal theory may be especially critical because so much of the underlying theory about the rights of children remains undeveloped. Moreover, to practice in the field requires more than just legal knowledge; an understanding of child psychology, child development, neuroscience, history, and social work is critical to serving as an effective advocate for the child client. Therefore, the best child advocates have a familiarity with and understanding of the value that other disciplines provide. This approach to treating the whole child (a “holistic” model) is widely viewed as a best-practices model.

This coursebook is designed to integrate theory and practice while placing child law in a larger multidisciplinary context. While gaining a critical perspective on how other disciplines may or may not inform legal and social policy choices, students will develop a deeper understanding of the law. Not only is this essential to an appreciation of the law’s complexity, but it is also critical to a more nuanced approach to practice in a field that is inherently interdisciplinary. Thus, by examining articles, studies, and research from other disciplines in addition to legal cases and statutes within the context of a best-practices model, this coursebook seeks to bridge the artificial division between legal theory and the practice of law.

Section I of the coursebook is designed to provide students with an overview of four different perspectives on the juvenile court and juvenile law. These four—from history, philosophy, international and comparative law, and social science—form the basis for subsequent investigations of the underlying political, legal, and legislative policy choices undergirding juvenile law. The instructor may choose to teach these materials together or integrate them into the other sections of the coursebook.

Because of its practice orientation, this book is organized around issues that frequently arise in juvenile court. The text is divided into four main sections: II, Children and Crime; III, Children and Protection; IV, Children and Restraints on Liberty; and V, Children and Decision Making. Section II focuses broadly on the criminal capability, culpability, and accountability of children. Section III examines the laws and policies relating to the protection of children in their families. In section IV, students will explore status offenses and other restrictions on liberties. Section V considers issues related to children in schools, medical decision making,

First Amendment freedoms, and emancipation. Each section contains cases, selected statutes, and excerpts from legal writings designed to provide students with a grounding in the law. There also are extensive excerpts from writings in other disciplines.

Because courses in juvenile law are diverse, this coursebook is designed flexibly, to allow instructors to tailor the materials to their needs. For those wishing to teach a survey course in children and the law, the entire coursebook may be assigned. Its shorter length permits broad coverage of the materials. If the book is assigned for a course in juvenile justice, sections I, II, and IV offer material that is sufficiently rich to allow more in-depth coverage. For a course in child protection, sections I and III and portions of section V provide materials for a detailed semester course. Instructors also may wish to integrate subsections of section V into the material in section II. Alternatively, section V may be omitted if time is short.

I extend my thanks to my students in my Children and the Law classes over the years who have shared their enthusiasm for and commitment to juvenile law. I am indebted to the many student research assistants who have worked on various parts of this coursebook and whose hours in the library perusing arcane materials and state codes enabled me to go beyond the anecdotal to offer the reader some hard data. Thanks also are due to the librarians at the Ohio State University Moritz College of Law and especially Katherine Hall and Stephanie Zimmer, who always were willing to help me find an elusive text or a misplaced source. I would be remiss if I failed to thank Dean Alan Michaels and the Moritz College of Law for the support that made this book possible.

Most important, I wish to thank my husband, Paul Skendelas, for his love, help, support, and enthusiasm for this project, without which I would still be writing. And to my children, from whom I continue to learn so much, I remain deeply grateful for your love and understanding.

For the Student

IF YOU ARE READING THIS INTRODUCTION, YOU PROBABLY ARE ENROLLED IN A COURSE ON children and the law. You may be wondering what “children and the law” is, about the scope of the course, and why child law is an area worthy of study. The law treats children as a distinct and special group, worthy of protection but also warranting constraint and punishment. The law recognizes the culpability of children while simultaneously acknowledging that their incapacities subject them to parental control and custody. Moreover, because children have a special status, certain substantive areas of law may develop special rules for children.

This coursebook is intended to help you not only to explore what the law governing children is but also to understand how and why it has evolved as it has. Moreover, the coursebook will help you critically examine the laws and policies affecting children and their families. Especially important to your study are the information and insights that other disciplines offer. The materials in the coursebook, then, include not only cases, statutes, and legal text but also research, studies, articles, and statistical information from social scientists, doctors, philosophers, and historians. In addition, international and comparative perspectives are offered to give you an additional context from which to evaluate the laws affecting children.

This coursebook also is designed to integrate theoretical understandings within a practical context. Because “children and the law” is a broad subject, this coursebook focuses primarily on the legal issues that arise in juvenile court. Judges and lawyers have the most direct contact with children and their legal problems in the juvenile-court setting. In 2008, for example, juvenile courts in the United States handled more than 1.5 million delinquency cases and more than 156,000 status offense cases. Because juvenile-court practice is multidisciplinary—requiring lawyers and judges to work with social workers, doctors, psychologists, psychiatrists, and other professionals to craft solutions to the problems faced by children—this coursebook will facilitate your understanding of how these other approaches may differ from, or even be antithetical to, the legal perspective.

The coursebook is divided into five main sections. Sections II, III, IVA, and V share a similar structure. Each of these sections begins by exploring the constitutional framework within which the law is situated. In sections II, III, IVA, VB, and VC, the procedural framework for

resolving legal issues is considered. Finally, the ways in which the state responds to the child's behavior or problems are considered in the dispositional framework.

Section I of the coursebook is designed to provide an overview of four different perspectives on the juvenile court and juvenile law. These perspectives form the basis for subsequent discussions about the underlying political, legal, and legislative policy choices undergirding juvenile law. The first subsection provides a brief overview of the development of the juvenile court from a historical perspective. In the next subsection, you will examine the justifications for state involvement in the lives of children and explore the jurisprudential bases for acceding children rights. The third subsection introduces you to the United Nations Convention on the Rights of the Child, a document signed by every country in the world except the United States and Somalia. In its final part, section I provides an overview of social-science methodologies and explores the limits the law has placed on these methodologies.

Section II, Children and Crime, focuses broadly on the criminal capability, culpability, and accountability of children. The materials cover the constitutional framework for treating juveniles as delinquents, the procedural framework in which a delinquency case is processed, and the various dispositional options available once a juvenile is found to be delinquent. Specialized dispositions, such as those for juveniles found to be sexual offenders, are examined. The materials also explore hybrid legal approaches such as blended sentencing, in which a juvenile receives a suspended adult sentence in addition to a traditional juvenile disposition. The dispositional materials end with a discussion of the various mechanisms for trying a juvenile as an adult. Throughout the section, students will examine the underlying legal policy assumptions by exploring relevant findings from other disciplines, such as sociology, psychology, and neuroscience.

Section III, Children and Protection, explores the laws and policies relating to the protection of children in their families. The materials cover the constitutional and legal bases for removing children from their families, the legal grounds for finding that a child is abused or neglected, and the dispositional alternatives available once a parent is found to be abusive or neglectful. This includes an examination of foster care and the reasons state intervention may be terminated. Last, the materials analyze the legal and constitutional grounds for terminating parental rights. Source materials from law, medicine, psychology, sociology, and social work are excerpted to provide a greater understanding of the constitutional and legal frameworks.

In section IV, Children and Restraints on Liberty, you will explore the constitutional and procedural frameworks for status offenses. In addition, you will examine the welter of state and federal laws that restrict children's liberty. These include alcohol, tobacco, and firearms regulations; restrictions on driving and voting; and labor laws. Within the legal context, you will consider the state's authority to constrain liberty and whether such constraints violate the rights of children and their families. As with the preceding sections, the materials will introduce research and findings from other disciplines. These fields include medicine, criminology, sociology, child development, political science, and women's studies.

Finally, section V, Children and Decision Making, will examine issues related to children in schools, medical decision making, First Amendment freedoms, and emancipation. The coursebook includes materials on relevant United States Supreme Court cases on free speech, religion, and abortion, plus other legal materials on these subjects. Selected cases and statutes on medical decision making are included, along with materials examining the use of corporal

punishment, school discipline, and emancipation. You also will explore the perspectives of other disciplines and consider the policy choices the law has made.

I believe I have compiled materials that will inform you of the many deeply theoretical and substantive issues in juvenile law. But these are not simply the musings of an “ivory tower” academic. Because my own experience is that of a lawyer for children and a law professor, I know that these complexities are faced by the many juvenile-court judges and practitioners who struggle on a daily basis to find workable solutions for the problems faced by children. Despite these challenges, many juvenile-court judges and practitioners are dedicated, hard-working professionals who derive considerable satisfaction from helping children and their families. It is my hope that you will come away from this course not only better informed but also inspired to do the same.

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INTRODUCTION

A. Historical Perspectives

Holly Brewer, *The Transformation of Domestic Law, in*

THE CAMBRIDGE HISTORY OF LAW IN AMERICA

288, 288–289, 302, 303–304, 311

(Michael Grossberg & Christopher Tomlin, eds., 2008).

Relationships, particularly the status of “dependent” groups, usually thought of as static throughout the colonial and early national periods of American history, and in early modern Britain too, were recreated over the course of the eighteenth century through common law justifications of a particular domestic order. These acts of creation occurred during a period of dramatic struggle over the basis of authority, not only over abstract political authority but over the rules that should govern the household and indeed over the very definitions of household and domestic. The results diminished the legal powers of lords and masters and increased those of fathers and husbands. These changes were accomplished with a legal sleight-of-hand that made the powers of husbands and fathers seem eternal within the common law and obscured the frequent conflicts between the authority of masters and those of fathers and husbands... Consequently, the struggle over domestic space and authority was central to a larger struggle over rights and political authority...

Parents’ custodial authority was weak in early-modern Anglo-America, far weaker than it would be by the late eighteenth century...

As a concept, custody in its modern sense of parental authority and responsibility simply did not exist, partly because the idea was not needed in a world where children could enter their own binding contracts and possessed a legal identity no different from that of adults. Children... could be punished for many different crimes—especially once older than age 8—and could form many kinds of contracts...

Childhood per se entailed few legal restrictions. Teenagers could be elected to Parliament in England or to the House of Burgesses in Virginia during the seventeenth century. Legally a male could hold most appointed offices at age eleven... In England and Virginia one qualified to sit on a jury at age fourteen (higher in New England). At least in the early seventeenth century, one could testify at any age. In this part of the legal landscape, as elsewhere, status trumped everything else. All criminal records, for example, stated the status of the accused: virtually none stated the age. Those who held positions of political and legal authority while still teenagers—John Randolph, for example, who was appointed king’s attorney for several Virginia counties at age eighteen—came from the most powerful families. Those bound into apprenticeships by the churchwardens though both parents might be alive came from the least powerful, the families of the poor.

As consent became more important to the law over the course of the early modern period (growing out of broad religious and political debates), childhood would emerge as a much clearer category of law and experience. Children lost their independent legal and political identity, and parents gained the power to make decisions for them. These changes challenged old elite practices that allocated authority by birth status irrespective of age. They also reflected changing norms about the meaning of consent that grew out of broad economic and political changes...

By the end of the eighteenth century and the beginning of the nineteenth, Anglo-American domestic law had begun to take coherent form.... Blackstone was key to this transition

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 332, 368, 372–373 (1765).

The three great relations in private life are, 1. That of *master and servant*... 2. That of *husband and wife*... 3. That of *parent and child*, which is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated...

[T]he duties of parents... principally consist in three particulars; their maintenance, their protection, and their education...

The *power* of parents over their children is derived from... their duty... partly to enable the parent more effectually to perform his duty, and partly at a recompense for his care and trouble... 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 as the age of twenty-one: 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. Yet till that age arrives, this empire of the father continues...

The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honour and reverence ever after.

HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 174, 338–343, 347 (2005).

Coke, Hale, and Blackstone were the most important of the common law reformers, not only because they tried more to shape the law but because their authority was so great that they largely succeeded. Each openly acknowledged that he sought to make the law conform to “reason”; each ignored precedents that did not fit with his revision and reduction of the common law. While they sometimes justified reform on a theoretical level, they rarely acknowledged their alterations as new, always camouflaging them as precedent...

When he encountered Blackstone’s admission that “some of our common lawyers have held that an infant of any age (even four years old) might make a testament,” the eminent legal scholar William Holdsworth wrote, “This is clearly a misprint for fourteen.” Those who