Legal Concepts of Childhood (Book Review)

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Scholars and practitioners in the field of child advocacy have long grappled with the question of how our legal systems should regard children. Are children highly vulnerable persons requiring extensive protection? Individuals who should be held accountable for their actions? Rights-holders on the same level as adults? Partially developed moral and intellectual beings? Some combination of all of these? Much recent legal scholarship in the United States has focused on the closely related issue of the proper role of a child’s legal representative.\(^1\) Relatively little, however, has been written on the more general question of how the legal system, as a whole, should regard children.\(^2\) Legal Concepts of Childhood, a collections of essays by English practitioners and scholars in the areas of law and mental health, seeks to provide an answer to that difficult and important question. While the collection, edited by Julia Fionda, dramatically illustrates the vastly different ways children are treated depending on the legal context, it does not in the end offer a central thesis on how children should be regarded. The essays do, nevertheless, provide rich and thought-provoking perspectives on the differing ways children are in fact treated. In addition, because Legal Concepts of Childhood focuses on English legal philosophies and developments, it provides an important mechanism for scholars and practitioners in the United States to compare our treatment of children with a similar, but far from identical, legal culture.


Before beginning its examination of how children are regarded in different legal fora, Legal Concepts opens with three chapters which discuss psychological, sociological and philosophical perspectives on childhood. The chapter on psychological and psychiatric perspectives, by psychiatrist Quentin Spender and psychologist Alexandra John, outlines the emotional and intellectual development of children, the understanding of which is crucial to any fully informed assessment of how children should be regarded by the legal system. Some might find the subsequent chapters on sociological and philosophical concepts of children, as well as a later chapter on literature’s portrayal of the child, impractical and esoteric, or at the very least irrelevant in a book on legal concepts. If one can move beyond the expectation of a more legal analysis, however, it can be remarkably refreshing to step outside of the usual legal discussions and analyses of issues such as capacity, best interests, and rehabilitation and consider broader conceptions of who children are. Chris Jenks’ chapter on Sociological and Media Representations of Childhood, for example, proposes a fascinating new “taxonomy” on how society perceives children. These chapters provide an important background to the chapters that follow which, for the most part, analyze how children are perceived in various types of legal proceedings including torts, housing law, education law, and social security law. While the later essays are generally trenchant and thoughtful, of particular interest to lawyers for children are pieces focusing on delinquency law, family law, and how children are treated in court.

Julia Fionda’s chapter on Youth and Justice provides an outline of the development of delinquency law in England which is strikingly similar to its development in the United States. In particular, Fionda highlights the disturbing trend to view children between the ages of ten and fourteen as competent enough to bear full responsibility for their actions. Tied to this trend, of

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3 Jenks proposed categories include the “socially developing” child, the “socially constructed” child, the “tribal” child, the “minority group” child, and the “social structural” child. Chris Jenks, Sociological Perspectives and Media Representations of Childhood, in LEGAL CONCEPTS OF CHILDHOOD at 33-42 (Julia Fionda, ed. 2001).
course, is the shift toward a more punitive treatment of adjudged delinquents, and away from a more rehabilitative approach. As Fionda indicates, these shifts are tied to political motivations rather than any sort of new research showing children are more competent at younger ages. Perhaps Fionda can take some solace in the fact that, unlike in the United States, children in England are not subject to the death penalty. While the trend Fionda describes in England is surely disturbing, our Supreme Court has refused even to consider the issue of whether it is appropriate to sentence children to death.

Allan Levy, in his chapter on Children in Court, describes recent progress in making the courtroom experience both less traumatic for child witnesses and more fair to child defendants. The developments show an increasing awareness that children need special protections when they appear in court, whether as victims or defendants. Like courts in the United States, English tribunals have become much more sensitive to the traumatic effects court appearances can have on children, especially children who have been victims of violence who most testify against the perpetrators. The English courts seem generally to make thoughtful efforts to minimize those effects through such mechanisms as the use of video links and screens.

Most heartening, however, are the developments made in how children accused of crimes are treated. Interestingly, the case which had the most profound effect was one in which the ultimate ruling was made on appeal to the European Court of Human Court Rights, not to an English court. In that case, two ten year-old boys abducted a two year-old toddler, beat him to death, and left him on a railway track to be run over. The boys were tried, sitting on a raised dock, in a courtroom packed with a hostile crowd. Before the trial, they were taken through the courtroom, introduced to the procedures and people involved in a trial. They were also allowed one ten-minute break per hour of trial to go to a play area with their parents. Although some
efforts were clearly made to make the experience more tolerable for the child defendants, the European Court nevertheless found their right to a fair trial had been violated. The Court noted particularly that because of the boys’ immaturity and disturbed emotional state, the hostility of the crowd, and the public scrutiny, the boys were not able to participate effectively in their own defense. Unlike the United States, England has an international court to which it must answer on many basic questions of how children are treated in the courtroom, leading to a strikingly more progressive approach. Levy notes that England is nevertheless far behind many European countries on significant issues such as the age at which children are considered to have the capacity to be criminally responsible for their actions. The United States—not bound by any international tribunal or agreement—is, unfortunately, even further out of step with international progress.

Michael Freeman’s chapter on The Child in Family Law illustrates that the United States differs from England, and perhaps Europe in general, in its conceptualization of children and the deference their wishes, as opposed to their “best interests,” should be given in the family court. The English Children Act 1989, for example, not only provides children the standing to seek residence with a person with whom they wish to live, it also specifically emphasizes the special weight a child’s wishes and feelings should be given in court decisions. The cases described by Freeman, however, seem to indicate that the English courts have been quite slow to account for that special weight, illustrating how difficult it is, even for laws, to change ingrained attitudes.

While the comparison of how children are treated in the United States and England is fascinating, some aspects of Legal Concepts are at times frustrating. For example, there is very little done to tie together the various conceptions of children: should there only be one? Is the fragmentary way children are perceived appropriate? Can the treatment of children in one type
of legal proceeding be instructive to practitioners from other disciplines? Perhaps, however, these are questions beyond the scope of the book, and we should be grateful they are being raised at all. This book can provide a broad outline of how our colleagues in England are approaching the problem of how children should be treated by the legal systems in which they are participants, and as such is a valuable and interesting read.