

Rewriting Children's Rights Judgments: From Academic Vision to New Practice

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There is a long history around children's rights – arguments about whether children are *capable* of being rights-holders at all; debates around whether it is *good* for children that discussion focuses on their rights; queries about whether talking about rights has any *practical benefit* for children. In general, though with exceptions, those debates have moved in the direction of increasingly seeing children as rights-holders, and as this status being important for both rhetorical and practical purposes.

One area where some progress has been seen is in court judgments. It is increasingly common in international and senior appellate courts, at least, to see reference to the UN Convention on the Rights of the Child 1989 and other sources of children's rights (the African Charter, the European Convention, and so on). However, judges remain cautious. Too many cases, argued by and from the perspective of adults, end up being debated and decided on the basis of more conventional, adult-focused legal and moral grounds.

For some schools of thought, this may appear unproblematic – it might be argued that 'the law is the law', and that judges apply a value-neutral approach to determining the dispute before them. However, that view has long been challenged by more critical scholars, approaching the issue from, for example, a CLS or feminist perspective. The children's rights perspective has increasingly been making a claim to similar status as a challenger of liberal legal theory, and the practical utility of children's rights when challenging judgments, legislation, policy decisions, and other state actions has been established by numerous scholars over recent years.

Now, in a major new collection, editors Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore show how a children's rights perspective can be used by judges to think through cases involving children in different ways. Drawing on the earlier *Feminist Judgments Project* as inspiration, *Rewriting Children's Rights Judgments: From Academic Vision to new Practice* demonstrates, on judges' own terms, how 28 cases involving children could have been reasoned differently if they had drawn on a children's rights perspective. As with its forerunner, the 'rules' for rewriting judgments are, basically, that the 'new' judgment can either be a fictional appeal or a concurring or dissenting judgment in relation to the existing decision; the broad conventions of judgment-writing have to be complied with (as to style, but also in terms of appropriate sources for a legal decision); and the authors must draw only on materials which were available to the court at the time of the original decision – the point is to show how the actual cases under discussion could, realistically, have been argued differently at the time.

Rewriting Children's Rights Judgments opens with three chapters from the editors, all foremost experts in the field of children's rights and child law. These chapters form a valuable opening, and would constitute an important contribution to the literature in this field in their own right even without the rest of the book.

The first chapter talks about the methodology of judgment rewriting and its value from an academic and practitioner (judge) perspective. The editors also provide a thematic overview of the collection. These themes include concerns over the interests of children being subsumed by or lost entirely within discussion of adults' interests; questions about how children are to be heard (adequately) within court proceedings; and issues around procedural fairness in cases concerning children.

Chapter 2 offers an important discussion of children's rights within the judicial framework in general from Stalford and Hollingsworth. As well as justifying the project's focus on 'children's rights' per se, this chapter makes a powerful argument in favour of judges becoming children's rights advocates. The authors also point out a number of trends where the courts have tended to perform less well in this respect – reinforcing fixed conceptions of children and of childhood; refusing to see children as rights-holders at all, or assuming that rights are adequately protected by an assessment of a child's welfare or best interests (which the editors think should not be seen as interchangeable terms in the way most jurisdictions treat them); or the sidelining of children within the legal process or as legal agents at all. Recognising that some of these difficulties stem from aspects over which individual judges may have little control, Stalford and Hollingsworth suggest that at least a large part of the problem comes from judges' lack of exposure to examples of thinking from a children's rights perspective – a deficit which this collection aims to start to make up.

Chapter 3 expands that aim with a discussion of what Hollingsworth and Stalford see as 'the primary characteristics of a children's rights judgment' (p 53). While there is no *one* way of writing such a judgment, the authors here identify the core: 'the overarching aim of a children's rights judgment is to increase the visibility of children within the law by ensuring that their status as rights-holders is recognised, that their voices are heard and that their interests are identified and factored into judicial decision-making' (p 53).

These chapters therefore set the stage for the 28 chapters that follow. In each, there is a (reasonably short) introduction to the original case, setting out the legal context and some of the major themes or controversies of the decision being critiqued. This is followed by the rewritten judgments, most of which speak directly to the originals in explaining – in restrained, judicially-appropriate terms – their shortcomings when viewed from a children's rights perspective. While most of the rewritten judgments do differ from the originals in terms of the outcome to which they come, that is not a necessary component of this exercise – the reasoning process can be as important as the actual outcome, and will naturally affect that outcome in a great many cases.

Various themes can be seen through this collection of rewritten judgments. One trend picks up on something seen in the Supreme Court of the United Kingdom, but in few other courts, to give children fictitious names, rather than anonymising them with initials. This habit, as ‘Lord Justice Gilmore’ says in his judgment on *Re W (A Minor) (Consent to Medical Treatment)*, ‘should at least serve to remind the Court and those reading this judgment that we are dealing with the life of a young person whose personhood and full range of interests warrant our very careful attention and utmost respect’ (p 220).

Other cases show the use that can be made of a wider range of materials than judges tend to reference. Cases are typically argued based on legislation, case law and evidence prepared for the case itself; courts of final appeal are often the only places where broader arguments are aired, drawing on policy documents, advisory reports or academic writing. However, the rewritten judgments demonstrate the shortcomings of this approach in relation to the lower courts – the new judgment of ‘Lady Justice Williams’ in *Re P-S (Children)* makes use of General Comment 12 of the UN Committee on the Rights of the Child (p 171), while ‘Lord Arthur’ in *R v JTB* looks at the Beijing Rules (the UN Standard Minimum Rules for the Administration of Juvenile Justice) (p 433), to take just a couple of example.

Some cases in the collection do a particularly fine job of highlighting the importance of children’s rights for disambiguating the interests of adults from those of the children who are the subjects of the decisions. ‘Lady Justice Fenton-Glynn’, for example, in her dissenting judgment in *Re C v XYZ County Council*, argues that the local authority in care proceedings has a duty to seek to identify the father of a child and to assess him (if he can be found) as well as members of the child’s maternal (and possibly paternal) family as potential carers for a young child, despite opposition to this plan from the mother. Similarly, ‘Lord Gilmore’ and ‘Lord Freeman’ write speeches allowing a hypothetical appeal in *Re T (A Minor) (Wardship: Medical Treatment)* where the Court of Appeal had previously made an order which refused a liver transplant to a young child on the basis that his parents opposed it, with the inevitable consequence that the child would die.

This collection is an outstanding contribution to the field, and its practical value can already be seen. Lady Hale has written a foreword to the book, but can also be seen to have taken its message to heart: very shortly after the book’s publication, the Supreme Court of the United Kingdom gave judgment in *R (on the application of HC) v Secretary of State for Work and Pensions* [2017] UKSC 73. Lord Carnwath gave the leading – conventional – judgment on the issue of what rights so-called ‘*Zambrano* carers’ and their children have to state financial support. The appeal was dismissed. However, while concurring in the result, Lady Hale gave a separate judgment which can be seen as a ‘real-world’ example of a children’s rights judgment. For example, her Ladyship opens her judgment by commenting: ‘It is not a case about adults’ rights. It is a case about children’s rights - specifically the right of these two very young British children to remain living in their own country and to have the support which they need in order to enable them to do so’ (para 39). Later, in commenting on evidence for the Secretary of State, Lady Hale comments that she was ‘not impressed’: the evidence was ‘addressed to the parents, viewed as third country nationals rather than

Zambrano carers, and not to the children. A child-focused approach would have been quite different' (para 51).

The practical implication of Stalford, Hollingsworth and Gilmore's collection is therefore clear, and this book has potential to lend serious weight to the drive towards giving children and their rights the prominence and respect which they deserve. *Rewriting Children's Rights Judgments* is essential reading for anyone working in this field, whether as an academic, a legal practitioner, a policy-maker or in the third sector. It will also make a valuable teaching tool, and offers potentially interesting ideas for teaching and assessment of students as well. I congratulate the editors and authors involved with this impressive collection, and recommend it in the strongest terms.