

2002

A Casebook with Purpose: Shedding Light on Children's Rights and Remedies

Miriam Dillard

Follow this and additional works at: <https://scholarship.law.ufl.edu/jlpp>



Part of the [Law and Society Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Dillard, Miriam (2002) "A Casebook with Purpose: Shedding Light on Children's Rights and Remedies," *University of Florida Journal of Law & Public Policy*. Vol. 14: Iss. 2, Article 5.

Available at: <https://scholarship.law.ufl.edu/jlpp/vol14/iss2/5>

This Book Review is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in University of Florida Journal of Law & Public Policy by an authorized editor of UF Law Scholarship Repository. For more information, please contact rachel@law.ufl.edu.

BOOK REVIEW

A CASEBOOK WITH PURPOSE: SHEDDING LIGHT ON CHILDREN'S RIGHTS AND REMEDIES

*Miriam Dillard**

Child Rights and Remedies: How the U.S. Legal System Affects Children. By Robert C. Fellmeth. Clarity Press, 2002. Pp. 600. \$39.95.

In *Child Rights and Remedies: How the U.S. Legal System Affects Children*,¹ author Robert Fellmeth offers a comprehensive assessment of the current conditions of children in the United States. Part casebook, part status report, Fellmeth's book serves as a thorough compilation of knowledge concerning the differing elements of the U.S. legal, political, and social systems that come to bear on the life chances of children. Encompassed in Fellmeth's conception of child rights are ideas of well-being, such as adequate housing, safe neighborhoods, and educational opportunity. Additionally, the book discusses the rights children can exercise on an individual basis, including the right to testify in court, the right to recover in tort, and First Amendment rights of free expression. This book review will concentrate on the book's usefulness to two potential audiences: law students using the book in the classroom setting, and lawyers and child advocates employing the book as a resource in their work. Finally, mention will be made of the questions raised by reading Fellmeth's book, fundamental questions which challenge the reader to examine the value placed upon children in the United States.

Upon first glance, *Child Rights and Remedies* appears to be a casebook, with approximately half the pages made up of judicial opinions, primarily from the U.S. Supreme Court. This is the type of textbook employed in many law school classrooms, where the professor asks students to read case law and then poses questions concerning what they read in class.

* A.B. in Sociology, 1995, University of Georgia; J.D. expected May 2004, University of Florida Levin College of Law. I would like to thank my father Philip Dillard who taught me the love of learning, and my mother Carolyn Dillard who made me do my homework. I also extend thanks to the *Journal* staff for their encouragement and to my fabulous friends who bring me worlds of joy.

1. ROBERT C. FELLMETH, *CHILD RIGHTS AND REMEDIES: HOW THE U.S. LEGAL SYSTEM AFFECTS CHILDREN* (2003).

Such an approach is designed to teach the law and stimulate class discussion. To that end, Fellmeth provides highly insightful questions after each case, which have the potential of sparking engaging and exploratory discussions when handled by a thoughtful professor. For example, after *Brown v. Board of Education of Topeka*,² Fellmeth asks if the United States has afforded, or should afford, the same integrated learning environment to Native American children that it has attempted to provide to African American children.³ While the questions Fellmeth posits can be fascinating, they can also be quite argumentative. One of the numerous instances of this technique is found after *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴ Fellmeth mentions that Justice Antonin Scalia, in his dissenting opinion, argues that the extension of fundamental liberty interests should be governed by tradition. Fellmeth then asks the reader to consider what result would have occurred had such a standard been applied in the *Scott v. Sandford*⁵ or *Brown* decisions.⁶ These questions are thought provoking, but after reading many with such a slant, the reader may begin to feel annoyed and question Fellmeth's objectivity. That being said, the questions remain one of the most valuable elements of the casebook. They explain some tenets of the law regarding children's rights and stimulate the reader to think critically about the issues posed.

Another facet of the casebook element of *Child Rights and Remedies* is its expansive coverage of the areas of law relating to children's rights. There are chapters focusing on inequality, reproductive rights, child care, children with disabilities, the rights of abused and neglected children, the rights of children in tort and contract, juvenile offenders, and freedom of expression. Fellmeth should be commended for both his broad coverage of the law relating to children and for his sensible organization of this information into cohesive sections. These factors make the book an excellent choice for a law school class focusing on children's rights. However, it should be noted, that while there are classic constitutional

2. *Id.* at 186-87 (citing the text of *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), a landmark case which mandated racial integration of public schools).

3. *Id.* at 188.

4. *Id.* at 113-23 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), concerning laws requiring minors to notify parents before being able to obtain an abortion).

5. *Scott v. Sandford*, 60 U.S. 393 (1856).

6. FELLMETH, *supra* note 1, at 125. Fellmeth believes that Scalia's logic would have resulted in continued racial segregation in public education, by a different verdict in *Brown*. See *supra* text accompanying note 2. He also feels that Scalia's rule would legitimize the notorious *Dred Scott* case, which not only reinforced the power of slaveholders but also precluded slaves from bringing cases before the court. See FELLMETH, *supra* note 1, at 125.

cases included like *Brown* and *Tinker v. Des Moines Independent County School District*,⁷ the book is an advanced one, expecting the student to be familiar with concepts such as compelling state interest⁸ and the rules regarding class actions.⁹ With that caveat, persons without a legal background will likely still find the book valuable, as it discusses current social problems and proposed solutions regarding children.

Fellmeth begins each chapter with an impressive display of statistics to illustrate how a particular issue affects children. For example, in the chapter on reproductive rights, Fellmeth begins by quoting figures about poverty among children of unwed mothers.¹⁰ He follows the statistics in each chapter with a discussion of recent legislative developments regarding that issue. Such analysis could be valuable to students of law or a myriad of other disciplines, including public policy, sociology, social work, or political science.

Going beyond the realm of the classroom, Fellmeth's book can be a highly useful resource for lawyers or child advocates. While the book is effective as an educational text, it also contains sophisticated analyses of legal issues, particularly in the areas of child custody,¹¹ foster care,¹² and juvenile offenders.¹³ Fellmeth is clearly an expert on these topics, and his articulation of the complex issues involved could be immensely valuable either to a novice lawyer wanting to learn more about children's rights, or to an experienced lawyer in the field needing to examine a specialized issue. In that way, the book could be utilized more like a reference guide and less as a tutorial. Also, the argumentative questions that follow the cases, while possibly seeming frustrating and biased to the student, could be quite useful to the lawyer in identifying issues, arguments, or pointing out likely strategies of the opposing side.

Aside from the legal discussions, the policy sections that begin each chapter might provide recent, relevant statistics to advocates, suggest ideas for new programs and legislation, and stimulate thought as to how to argue

7. FELLMETH, *supra* note 1; *Brown*, 347 U.S. 483; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 549-54 (1969).

8. FELLMETH, *supra* note 1, at 571. Fellmeth refers to the compelling state interest in regards to laws concerning religious freedom. Courts require that the interests of the state in enacting a law be "compelling" under the strict scrutiny test that the court uses for laws that discriminate on the basis of membership in a protected class of people. Children are not considered a class that requires the strict scrutiny test. *Id.* at 69.

9. *Id.* at 41; FED. R. CIV. P. 23(b)(3).

10. FELLMETH, *supra* note 1, at 96-100.

11. *Id.* at 468-98.

12. *Id.* at 316-20.

13. *Id.* at 409-40.

for changes in policy. For example, Fellmeth gives information concerning parenting education that advocates would likely find very useful.¹⁴ In the section on child abuse and neglect, he discusses the advantages of requiring parenting education in secondary schools. He first offers data on effectiveness of the programs, compares it with the costs of not providing the education, mentions the arguments against the programs, and then counters those arguments.

There are two negative aspects to the advocacy element of *Child Rights and Remedies*. First, occasionally the book seems to read like an antipoverty polemic. For example, Fellmeth decries tax decreases because they do not apply to those who have no taxable income, and because they take money away from the government — money that could have been used for programs for children.¹⁵ Yet, many of these tax benefits, including the child tax credit, education credits, and the Education IRA, illustrate a heightened legislative priority for children.¹⁶ Even though these incentives may not benefit the poorest of families, they are still important to the families who receive them. Of course, living in poverty affects a child's life chances, and, to Fellmeth's credit, he does give statistics to show the detrimental effects of poverty.¹⁷ However, poverty also affects the health, relationships, and life chances of adults.¹⁸ Furthermore, many children who are not in poverty still face dangers like abuse and neglect, environmental degradation, unsafe products, and restrictions on their speech rights.¹⁹

14. *Id.* at 316-17. Fellmeth discusses the debate between advocates of adding parenting education to the school curriculum and persons who argue that schools cannot afford time spent away from traditional arts and sciences courses. *Id.* He feels that such education is more cost-effective than having social workers conduct in-home visits with new mothers. *Id.*

15. FELLMETH, *supra* note 1, at 86-87.

16. The heightened legislative priority for children and families can be seen in the credit for dependent care expenses (I.R.C. § 21), the child tax credit (I.R.C. § 24), and the hope and lifetime learning education credits (I.R.C. § 25). Though these credits are non-refundable and therefore do not benefit the poorest of taxpayers, the child tax credit and education credits do begin to be phased out at reasonable income levels. Also, the child tax credit is a refundable credit for families with more than two children.

17. FELLMETH, *supra* note 1, at 136-39.

18. See generally BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2002) (examining how poverty affects the health, relationships, and life chances of adults).

19. Children of all economic levels are affected by some issues. See CHILDREN: CONSUMPTION, ADVERTISING, AND MEDIA (Flemming Hansen et al. eds., 2002) (explaining children as targets of advertising); see also EILEEN HEYES, TOBACCO U.S.A.: THE INDUSTRY BEHIND THE SMOKE CURTAIN (1999) (discussing children and tobacco); see also LAURIE MOTT ET AL., OUR CHILDREN AT RISK: THE 5 WORST ENVIRONMENTAL THREATS TO THEIR HEALTH (1997) (outlining the environmental impacts that most directly affect children).

Another downside to the advocacy element of *Child Rights and Remedies* is its bleak perspective. After reading about the dire conditions of child poverty, the difficulties in attaining freedom from abuse and neglect, and the political and legal obstacles to bringing about change in the system, one is left depressed about the state of children in the United States. The main bright spot to contradict this feeling is the book's cover photograph of an eager young child in school, smiling and wide-eyed, with his hand raised to answer a question. This picture seems to encourage the reader to keep on learning and striving in spite of the difficulties. Additionally, despite the bleak nature of the book, the cases and discussions do serve as excellent material for use by the student or advocate.

Finally, *Child Rights and Remedies* does an excellent job of challenging the reader to ask questions about the role of children in U.S. society. The title of the book includes the word "rights," a term which can be interpreted in many ways.²⁰ One can conceive of rights as constitutional rights, such as freedom of expression or the right to trial by jury. However, Fellmeth's concept of rights, based on the subjects covered in his book, is much more expansive, including rights of health, safety, child care, and decent housing.

Another view of the term "rights" is one that excludes economic rights but includes the rights exercised by adults.²¹ Fellmeth points out that children do not even enjoy the same constitutional rights as adults.²² His reasons for the difference include parental control (thus, a lack of state action),²³ limited access to the judicial system,²⁴ and the presumption that

20. The word "rights" can be considered to include basic civil liberties such as freedom of speech and freedom of expression, or it can be interpreted to include benefits such as safe, quality childcare, affordable housing, and a clean environment.

21. Adults enjoy many rights children do not, such as the right to vote, the right to purchase certain regulated substances, the right to determine their own medical treatment, the right to have an abortion, and the right to express themselves in school settings. Additionally, children do not have their own counsel in custody hearings, have different rights under the Juvenile Justice System, and historically have not been allowed to enter into binding contracts. FELLMETH, *supra* note 1, at 419, 468, 528.

22. *Id.* at 547. Most of children's rights are framed in their "best interests" or on their behalf, such as appointing a guardian ad litem in custody hearings. *Id.* at 34. Children do have the right to own property, but are presumed to be incapable of managing it. *Id.* at 517. Children do have standing to sue, but their ability to procure legal counsel is limited. *Id.* at 33-36.

23. *Id.* Fellmeth acknowledges that most limiting of children's civil liberties stems from actions by parents or guardians, not state actors, persons, or institutions against whom the U.S. Constitution allows a remedy. *Id.*

24. *Id.* at 548. Lack of access includes many elements such as requirements to establish standing to sue and the lack of a mechanism to compensate attorneys.

children lack the mature decision-making abilities of adults.²⁵ However, if one argues that children should enjoy the same rights as adults, conflicts would arise from the perspective of the best interest of the child (or children in general), and the individual child's right of self-determination.²⁶ Further exploration of this theme would have been an interesting addition to the book.²⁷

Fellmeth's book is certainly comprehensive, but a chapter giving a historical perspective would also have been a nice addition in order to give the reader an idea of the evolution of children's rights and provide a context for seeing children's rights as a social movement with a future.²⁸ The chapter on children's rights and international law does give a taste of this idea by printing and discussing the U.N. Convention on the Rights of the Child.²⁹ The Articles drafted during the convention articulate what the signing member states see as a child's rights. The definition is a broad one including, among other provisions, economic rights, freedom of expression, and a prohibition on capital punishment of minors.³⁰ The United States has opposed and never ratified the Articles.³¹ Fellmeth lists the reasons for the refusal by the United States as reluctance to accept higher child labor standards, disagreement with the ban on capital punishment of minors, conflicts with the states if these rights are enforced on the federal level, conflicts with traditional notions of parental authority,

25. *Id.* at 548. However, Fellmeth notes a growing trend to realize that as children age, they become more mature and can be recognized as a "mature minor" for judicial purposes. *Id.*

26. FELLMETH, *supra* note 1. Fellmeth contemplates the possibility of such conflicts arising in situations where the child's interests differ from the interests of the child's parents or with the interests of the state. *Id.*

27. *See, e.g.*, TRACY TRULY, *TEEN RIGHTS: A LEGAL GUIDE FOR TEENS AND THE ADULTS IN THEIR LIVES* (2002) (examining in-depth the rights of children as individuals, such as the right to an abortion, confidentiality, medical treatment, and freedom of expression).

28. Most of the resources available strive to give a current picture of children's rights to serve as practical guides. *See, e.g.*, ROBERT H. MNOOKIN & ROBERTA A. BURT, *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW, REFORM, AND SOCIAL POLICY* (1996) (for a historical perspective that studies the role of judicial activism in the evolution of children's rights, giving an analysis of five U.S. Supreme Court cases on the topic).

29. FELLMETH, *supra* note 1, at 582-87; *see also* U.N. General Assembly Resolution 44/25 11/20/1989, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Apr. 9, 2003).

30. FELLMETH, *supra* note 1, at 583-87. Fellmeth includes selected provisions from the Articles. *Id.*

31. *Id.* at 583; *see* Status of Ratifications of the Principal International Human Rights Treaties, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Apr. 9, 2003) (for the list of countries that have signed or ratified the articles); *see also* U.N. Secretary General, *We the Children* (updated report) (Sept. 2001) *passim*, available at <http://www.unicef.org> (last visited Apr. 9, 2003).

and fear of obligation in the realm of social and economic rights.³² The refusal of the United States on these grounds leaves the reader with the disturbing yet interesting question about how much the United States really does value children.

In summary, *Child Rights and Remedies* accomplishes three major achievements. First, it covers the current status of children in the U.S. legal system. Second, advocates can use the book as a reference guide to specific areas of law or as a source for analytical frameworks for advancing the issues on which they work. Finally, *Child Rights and Remedies* causes the reader to question and explore his or her ideas about the status of children in U.S. society.

32. FELLMETH, *supra* note 1, at 587.

