

# Towards a logology of law: The notion of “child” as a social construct

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Résumé de l'article

Inspiré par les travaux du professeur Lars Noah, cet article présente l'importance de la « logologie », ou la « science des sciences », et son utilité en droit. Dégagées de toute prétention ontologique, les notions juridiques afférentes aux droits de l'enfant peuvent être (re)considérées sous un jour nouveau. La logologie des notions juridiques permet d'en révéler la nature profondément intersubjective et dynamique, et rappelle que ces dernières sont les produits de contextes et de conflits. Ce faisant, tout en permettant une réflexion proche de la sociologie du droit, la logologie peut également agir comme « remède » à tout positivisme latent en droits de l'enfant et, par le fait même, favoriser la protection des droits de l'enfant.

## TOWARDS A LOGOLOGY OF LAW: THE NOTION OF “CHILD” AS A SOCIAL CONSTRUCT

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### **Résumé**

Inspiré par les travaux du professeur Lars Noah, cet article présente l'importance de la « logologie », ou la « science des sciences », et son utilité en droit. Dégagées de toute prétention ontologique, les notions juridiques afférentes aux droits de l'enfant peuvent être (re)considérées sous un jour nouveau. La logologie des notions juridiques permet d'en révéler la nature profondément intersubjective et dynamique, et rappelle que ces dernières sont les produits de contextes et de conflits. Ce faisant, tout en permettant une réflexion proche de la sociologie du droit, la logologie peut également agir comme « remède » à tout positivisme latent en droits de l'enfant et, par le fait même, favoriser la protection des droits de l'enfant.

**Mots-clés :** Droits de l'enfant, logologie, sociologie du droit, Lars Noah.

### **Abstract**

Prompted by the work of Professor Lars Noah, this article presents logology, the “science of sciences”, and potential uses for the legal discipline. Unburdened by any pretention to an “ontological” truth, legal notions, such as those relating to the field of Child Law, can be revisited in a new, more context-sensitive, way. A logology of legal notions reveal the deep dynamism and intersubjectivity present at their core: they are the product of contexts and of conflicts. While akin in this regard to sociology of knowledge, logology can also offer a

“remedy” to latent positivism in Child Law. Thus, logology acts as a mean of protecting children and their rights.

**Keywords:** Child Law, logology, sociology of knowledge, Lars Noah.

In a tradition perhaps more vibrant in philosophy than in legal theory, the present reflection note aims to offer a concise reply to the article “*A Postmodernist Take on the Human Embryo Research*”, written by professor Lars Noah from the University of Florida. Encompassing law, social sciences and medicine, Noah’s article<sup>1</sup> puts forward a wide-angled approach on the meaning of the word “embryo.” Often charged with moral presuppositions, the (bio)legal arguments surrounding the definition of such key terms as “embryo,” or even “child” and “adolescent”, are fraught with challenges, and rely largely on unarticulated assumptions concerning life, the body, the mind, and the law. The present response modestly aims to emphasize the need, in law, for a means to observe and shed light on such unarticulated assumptions operating in legal reasoning.

As an example, in the domain of child and youth law, the very notion of “child” is deeply entrenched in various socio-historical contexts: the emergence of child rights is often understood by leading authors as being a postindustrial phenomenon<sup>2</sup>, in other words the modern sense of what constitutes the definition of a child in the western world has Victorian-era<sup>3</sup> origins:

Ariès’s greatest contribution, however, is his insistence on the historicity of childhood: that childhood was not an essential condition, a constant across time, but something that changed—or, if childhood itself, bound by biologically—and psychologically-determined phases of development, is constant, then the understanding of it differed, as did the way it was experienced by both adults and children. A modest successor to earlier overviews of this sort, including

those by Hugh Cunningham (1998), Richard Vann (1982), and Adrian Wilson (1980), this essay reflects on the study of the history of childhood (often embedded in studies of household and family) since Ariès. Focusing primarily on the early modern period, but making, where appropriate, occasional forays beyond its boundaries, it maps out some of the main lines of inquiry and suggests issues that remain unresolved<sup>4</sup>.

One solution to this inherent polysemy resides in adopting what authors such as Habermas have coined as an “intersubjective” approach in what ought to be deemed as a “valid” truth. The “intersubjectivity of mutual understanding”<sup>5</sup> allows for a variety of view points to prevail: it is not the role of one individual, and we add, nor the role of one individual discipline or field of knowledge, to decide on the meaning of key notions such as “child”, “youth” or “embryo”. With these different view points, this approach offers an enlarged framework to work from and includes the possibility of concurring, competing—and sometimes even redundant—definitions of the same legal concepts. A broader, and context-sensitive perspective, would allow the monolithic vision of the legal concept to overcome its limitations, and make room for the various “layers” of meanings encapsulated in key notions. In his article, Noah offers a shining example of the possible “sedimentation”<sup>6</sup> of definitions, and how the scientific, legal, and political stakes can be interwoven in the production of meaning:

Kiessling’s strategy of distinguishing parthenotes and “ovasomes” from “embryos” suffers from a number of flaws, to say nothing of the fact that it flies directly in the face of the expansive definition that Congress has selected for the moment. First, isn’t the ceaseless expansion of terminology just going to confuse matters still further, shrouding the relevant issues in scientific jargon or a semantic sleight of hand? The

scientific community opted for “therapeutic cloning” in order to differentiate embryonic stem cell research from “reproductive cloning,” then it began to shy away from any use of the loaded term cloning in favor of the more technical terminology SCNT<sup>7</sup>. Is Kiessling simply adding to the embryological Tower of Babel? Where, for instance, would intracytoplasmic sperm injection (ICSI), a technique that circumvents the normal process of sperm fusion with an egg cell, fit into her terminological scheme? Perhaps we should try adopting new nomenclature that encompasses both early (pre-implantation) “embryos” and “ovasomes,” calling them “ovanoma” (a reference to mysteriously proliferating mature eggs, which may result from fertilization, parthenogenesis, SCNT, or perhaps tumorigenesis). Other fanciful options include “(n)ova,” “sporsicle,” and “zygotosome<sup>8</sup>.”

As Noah rightly points out, setting a legal definition often begets a mechanism of avoidance by the addressees. Alternatively, setting legal definitions also entails the exercise of a preset scope of possible legislative applications on certain categories of situations and individuals, while not on others<sup>9</sup>. Indeed, there is a plethora of situations where the very notion of “child” has been (ab)used. There is its weaponization potential in the context of international, or local conflicts<sup>10</sup>. And what of the implications of this notion’s scope in the nature and profile of criminal activities<sup>11</sup>? Additionally, the connection between the notional fields of the terms “youth” and “child” should not remain unexamined: they have the potential to find their way into certain historical and political projects that make them incompatible, or otherwise, reciprocally undermining.

While the conclusions of Noah’s article call for a renewed political and personal investment in a postmodern world where the “political” is

“personal”, our conclusion calls for further investigation into the utility of a “logology” of legal notions. A postmodernist account of the legal notion of “child” must perhaps be more open-ended about what it is to be a child, allowing it to be either overlapping, competing, concurring, or redundant, if not a bit of each altogether, at times. As an example, one of the very first iterations in common law concerning the notion of “child” took on the form of a defense: the defense of infancy<sup>12</sup>. This still permeates a wide variety of matters in law as it relates to children, such as: the age of legal responsibility, the age of contractual capacity, the age of criminal responsibility. Some of these approaches share a common history in the *doli incapax* defense, applicable to both children, by reason of their youth, and to the criminally insane. The emergence of the defense of infancy is contingent on a specific historical and socioeconomic context that may very well not be shared by other circumstances where the notion of “child” is assessed.

This changing ecology of the legal fora where the notion of “child” is discussed leads to a variety of consequences, legal, and otherwise. As another example, the rules purporting to the constructions of statutes tend to vary by (legal) domain: the notion of “child” as defined in the criminal code does not call for the same reasoning habitus as the notion of “child” found in immigration or medical law.

In a postmodernist perspective (i.e. one bearing the mark of ontological skepticism), there is therefore no “true” definition of what a “child” is. Continuously subject to cultural influences, the “child” is a construct:

How do children construct views of themselves? How do they internalize their experiences to form representations and evaluations of themselves? These questions have been debated by scholars since the early days of psychology. Although their perspectives differ, scholars agree that social relationships are at the heart of self-development. William James (1890) noted that “a man has as many social selves as there are individuals who recognize him and carry an image of him in their mind” (p. 294). Symbolic interactionists viewed the self-

concept as socially constructed (Cooley, 1902; Mead, 1934), assuming that children come to see themselves as they believe they are seen by significant others. That is, children internalize the reflected appraisals of others, forming their self-concept as if through a “looking glass” (Tice & Wallace, 2003). Since these classical perspectives emerged, scholars from various backgrounds (e.g., psychology, psychiatry, sociology, ethology) have argued that children develop their self-concept through their interactions with others<sup>13</sup>.

The need for a legal logology (or a sociology of legal knowledge) is increasingly heralded by a variety of authors; the monolithic approach to legal notions—unsensitive to contexts—is insufficient in truly capturing the complexity of key legal notions. In the matter of child and youth law, recognizing, through logology, that notions evolve may also lead to the recognition that children and youth themselves have a corresponding role in their (self-) definition<sup>14</sup>. Apart from its value as an investigative tool, the very possibility of a logology of legal notions pokes holes in the fabric of traditionally authoritatively-derived<sup>15</sup> legal definitions. Through an intersubjective approach to meaning, logology can also be used to empower those seeking social justice and enable that very “child” or “youth” to have a voice and thus further contribute to a richer, and more humane, field of child and youth law.

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<sup>1</sup> Lars Noah, “A Postmodernist Take on the Human Embryo Research Debate” (2004) 36:4 Connecticut L Rev 1133 [Noah, “A Postmodernist Take”].

<sup>2</sup> Albeit the iterations of the notions of “childhood” have proved to be cultural-sensitive, and vary greatly in non-western contexts: Sadaf Shallwani, “Racism and imperialism in the child development discourse: deconstructing ‘developmentally appropriate practice’” in Gaile S. Cannella & Lourdes D. Soto, eds, *Childhoods: A Handbook* (New York, NY: Peter Lang, 2010) at 231; Megan Hicks, *Empire of the Imagination: Imperialism and the Child Reader of Victorian and Neo-Victorian Children’s Literature* (Master’s Thesis, Bucknell University, Lewisburg, PA, 2018) at 199; Anna Davin, “Imperialism and Motherhood” (1978) 5 Hist Workshop 9.

<sup>3</sup> Thomas E. Jordan, *Victorian Child Savers and Their Culture: A Thematic Evaluation* (Lewiston, NY: E Mellen Press, 1998); Peter Coveney, *The Image of Childhood: The Individual and Society: A Study*

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of the *Theme in English Literature*, revised ed. (Baltimore, MD: Penguin, 1967); Catherine Robson, *Men in Wonderland: The Lost Girlhood of the Victorian Gentleman* (Princeton, NJ: Princeton UP, 2001); Troy Boone, *Youth of Darkest England: Working-Class Children at the Heart of Victorian Empire* (New York, NY: Routledge, 2005).

<sup>4</sup> Margaret L. King, “Concepts of Childhood: What We Know and Where We Might Go” (2007) 60:2 *Renaissance Q* 371 at 371, citing Hugh Cunningham, “Histories of Childhood” (1998) 103:4 *American Historical Rev* 1195; Richard T. Vann, “The Youth of Centuries of Childhood” (1982) 21:2 *Hist & Theory* 279; Adrian Wilson, “The Infancy of the History of Childhood: An Appraisal of Philippe Ariès” (1980) 19:2 *Hist & Theory* 132.

<sup>5</sup> Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York, NY: Pantheon, 1988) at 320.

<sup>6</sup> David Hyder & Hans-Jörg Rheinberger, eds., *Science and the Life-World: Essays on Husserl’s ‘Crisis of European Sciences’* (Stanford, CA: Stanford UP, 2010) at 245; Edmund Husserl (translated by David Carr), “The origin of geometry” in Edmund Husserl, eds., *The Crisis of European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy* (Evanston, IL: Northwestern UP, 1970) at 353; Peter Woelert, “Human cognition, space, and the sedimentation of meaning” (2011) 10:1 *Phenomenology & Cognitive Sci* 113.

<sup>7</sup> Somatic cell nuclear transfer.

<sup>8</sup> Noah, “A Postmodernist Take”, *supra* note 1 at 1156.

<sup>9</sup> Seira Yun, “Breaking Imaginary Barriers: Obligations of Armed Non-State Actors Under General Human Rights Law—The Case of the Optional Protocol to the Convention on the Rights of the Child” (2014) 5:1/2 *J Int Hum L Stud* 213.

<sup>10</sup> Mariane C. Ferme, “‘Archetypes of Humanitarian Discourse’: Child Soldiers, Forced Marriage, and the Framing of Communities in Post-Conflict Sierra Leone” (2013) 4:1 *Humanity: Int JHR, Hum, & Dev* 49.

<sup>11</sup> Children used by adults in the commission of crime (CUBAC). See the *Pilot Project on Children used by adults in the commission of crime*: Cheryl Frank, “ABUSE OF A DIFFERENT KIND: Adults using children to commit crime” (2006) 16 *South Afr Crime Q* 13.

<sup>12</sup> Victoria Slade, “The Infancy Defense in the Modern Contract Age: A Useful Vestige” (2011) 34:2 *Seattle UL Rev* 613 at 616–17.

<sup>13</sup> Eddie Brummelman & Sander Thomaes, “How Children Construct Views of Themselves: A Social-Developmental Perspective” (2017) 88:6 *Child Dev* 1763 at 1765, citing William James, *The Principles of Psychology* (New York, NY: Henry Holt, 1890) vol 1; Charles Horton Cooley, *Human Nature and the Social Order* (New York, NY: Charles Scribner’s, 1902); George Herbert Mead, *Mind, Self and Society* (Chicago, IL: University of Chicago Press, 1934); Dianne M. Tice & Harry M. Wallace, “The reflected self: Creating yourself as (you think) others see you” in Mark R. Leary & June Price Tangney, eds., *Handbook of Self and Identity* (New York, NY: Guilford, 2003) 91.

<sup>14</sup> *Id.*

<sup>15</sup> Known as the rational-legal authority: Sebastián G. Guzmán, “Substantive-rational authority: The missing fourth pure type in Weber’s typology of legitimate domination” (2015) 15 *J Classical Soc* 73.