

TOWARD A NEW LAW OF EARLY CHILDHOOD?

*Laura A. Rosenbury**

Family law in the United States has long subsumed early childhood within the doctrines of parental rights and family privacy. Recent scholarship critiques that move, highlighting ways that law might better support children under the age of five and their families. This development is promising so long as scholars do not exclusively focus on young children's dependency, thereby reinforcing the traditional framework governing the legal regulation of children. This Essay proposes an alternative approach, one rooted in young children's interests beyond dependency and the responsibilities and rights that flow therefrom.

Early childhood is often overlooked in family law doctrine and literature. Laws relating to children of any age tend to be removed from the field of family law and placed in the field of children and law. The field of children and the law, in turn, focuses almost exclusively on the question of who should have authority over children—parents or the state. Given this focus on authority, children under the age of five, who are not yet subject to compulsory education laws,¹ are almost entirely subsumed with the doctrines of parental rights and family privacy. Young children's interests collapse into those of their parents except in cases of abuse and neglect.

Recent scholarly interventions, including those of this symposium, seek to bring young children's complex interests and experiences to the fore.² This is an important step toward challenging the monolithic status that law assigns to children when it uses the age of majority to create the legal categories of adult and child. Because children are defined in relation to adults—children are on one side of the dividing line and adults are on the other—children are often viewed as having identical interests regardless of age, sex, race, socioeconomic status, and other identity

* Dean and Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law. This essay draws upon my co-authored work with Anne Dailey, the Evangeline Starr Professor of Law at University of Connecticut School of Law, and I am truly grateful for Anne's thoughtful and inspiring collaboration since 2012. I also thank Nancy Dowd, the David H. Levin Chair in Family Law at the University of Florida Levin College of Law, for conceptualizing and organizing this interdisciplinary symposium on early childhood and law. Finally, I thank the editors of the *Florida Law Review*, particularly Kelsey Burgess, for their insight and care in editing the essays arising from the symposium.

1. See, e.g., FLA. STAT. § 1003.21 (2018).

2. In addition to the essays published in this symposium, see Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755, 761 (2017); Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 820 (2009).

categories.³ A focus on children under the age of five disrupts this essentialism, reminding us of the diversity of children's lives.⁴

This Essay applauds this focus on children under the age of five and sets forth some principles for guiding legal analysis of early childhood, building upon the recently published *The New Law of the Child*.⁵ First, in addition to considering children's dependency and developmental needs, legal analysis of early childhood must acknowledge the diversity of children's interests and experiences beyond dependency. Second, legal analysis of early childhood must focus on responsibilities for young children, moving beyond parental rights to also focus on parental and state duties. Finally, legal analysis of early childhood provides an opportunity to articulate a set of affirmative rights for children, rights designed to ensure young children may flourish throughout their lives.

I. CHILDREN'S INTERESTS AND EXPERIENCES BEYOND DEPENDENCY

Children under the age of five have multiple interests and experiences, but current law tends to focus only on young children's dependency.⁶ This focus is logical because children under the age of five are dependent on adults for virtually every aspect of their lives. Law therefore rightly focuses on what young children need from adults and how young children may best acquire the skills and capacities to move from their dependency to adult autonomy. Yet existing law does so by asking who has authority over children and their development—parents or the state.

This “authorities framework”—identified, described, and critiqued in earlier work⁷—masks important aspects of children's experience that are not controlled by their developmental status. The authorities framework tends to treat all children, and particularly young children, as “people-in-process,” or pre-adults, instead of people in their own right.⁸ In doing so,

3. See Pia Christensen & Alan Prout, *Working With Ethical Symmetry in Social Research With Children*, 9 CHILDHOOD 477, 480 (2002) (finding that children's interests are researched by investigating their parents, neglecting the “understanding of children as social persons in their own right”).

4. For other considerations of the diversity of children's lives and law's failure to adequately address such diversity, see NANCY DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 61–63 (2018); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 80–91 (2002); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 555–57 (2000).

5. Anne E. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018).

6. *Id.* at 1476; see also Christensen & Prout, *supra* note 3, at 480 (finding child research to be based upon an assumption of children's dependency).

7. See Dailey & Rosenbury, *supra* note 5, at 1456–78.

8. For examples of case law embracing this construction, see *Troxel v. Granville*, 530 U.S. 57, 68 (2000); *Parham v. J.R.*, 442 U.S. 584, 602 (1979). For examples of scholarship assuming this construction of children, see Emily Buss, *Allocating Developmental Control Among Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27, 32; Anne C. Dailey, *Developing Citizens*, 91 IOWA

the framework suggests that children's lives have little value or purpose beyond becoming adults.

A focus on children under the age of five within law therefore risks reifying a construction of children as dependent beings, a construction that assumes children's lives are lesser versions of adult lives or mere way stations on the road to autonomous adulthood, tying children's needs and interests to a baseline of adulthood. Many scholars have emphasized that childhood itself is a "culturally constructed idea, rather than a universal fact[,]"⁹ and analyses of subsets of children—whether younger or older—do not free us from such constructions. Instead, such analyses may reinforce the current construction of childhood by emphasizing the dependency of young children or suggesting that older children may free themselves of such dependency, thereby moving themselves into the category of adult.¹⁰

Yet dependency and autonomy are not the only aspects of children's lives, and law may recognize a broader range of children's interests if it moves beyond the authorities framework. Instead of exclusively focusing on children's dependency or future autonomy, law may focus on young children's unique strengths and capacities as well as the special vulnerabilities that distinguish human experience in this early stage of life. In other words, law may focus on children's lives in the here and now, considering young children's broader interests.

Even young children have interests beyond their long-term investment in becoming adults, interests that are tied to a broad range of capacities, skills, and experiences as children. Children under the age of five have present interests in multiple relationships, including those with their parents and other caregivers, but also non-hierarchical relationships with siblings, other children, and adults who are not their parents.¹¹ Children under the age of five also have present interests in exposure to new ideas in ways that will spur their curiosity, learning, and exploration of their own identities.¹² As they engage with these new ideas, children under the age of five begin to express their present identities.¹³ This expression in turn reveals children's interests in being agents of their own lives, even

L. REV. 431, 482–88 (2006); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 1002–11 (2003).

9. Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 113. For literature outside of law, see PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 155–63* (Robert Baldick trans., Random House 1962) (1960); VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 3–12* (1985).

10. *See, e.g.*, Scott, *supra* note 4, at 550–51, 589–98.

11. Dailey & Rosenbury, *supra* note 5, at 1484–92.

12. *Id.* at 1493–96.

13. *Id.* at 1496–1500.

at relatively young ages.¹⁴ Children experience agency within dependency, even as children's present interests are always filtered through a vision of the adults they will become.

Legal analysis of early childhood must recognize these broader interests instead of solely focusing on children's dependency. One way to do so is by recognizing and protecting the range of young children's relationships, even when those relationships are not with parents or similar caregivers. For example, state legislatures and the federal government should do even more to preserve sibling relationships when young children are removed from the home.¹⁵ Judges in divorce, custody, immigration, or visitation proceedings should also give more weight to preserving young children's relationships with parents, grandparents, foster parents, stepparents, paid caregivers, siblings, and other children.¹⁶ Such preservation recognizes young children's interests in forming and maintaining multiple relationships and in being exposed to a range of ideas through such relationships, thereby enabling young children to begin to express their identities and exercise agency amidst dependency.

II. SHARED RESPONSIBILITIES FOR YOUNG CHILDREN

To embrace young children's interests beyond dependency and the relationships that foster those interests, legal analysis of early childhood must also reconceptualize current understandings of adult responsibilities for children. The existing authorities framework prioritizes parental rights over such responsibilities, considering parental responsibilities only to the extent they are derivative of parental rights.¹⁷ Parents are not charged with specific responsibilities beyond providing basic necessities because such an articulation is thought to contravene the freedom from governmental control at the heart of parental rights.¹⁸ State officials and other adults are not charged with responsibilities for young children because such responsibilities are also thought to be in conflict with parental rights.¹⁹

Legal analysis of early childhood must resist the existing framework and instead articulate a broader set of actors, including parents, other adults, and state officials, who carry legally recognized and shared

14. See BARRIE THORNE, *GENDER PLAY: BOYS AND GIRLS IN SCHOOL* 11–27 (1993); Buss, *supra* note 8, at 34.

15. Dailey & Rosenbury, *supra* note 5, at 1489–90, 1511, and sources cited therein.

16. *Id.* at 1510–11.

17. See, e.g., Anne C. Dailey, *Children's Constitutional Rights*, 96 MINN. L. REV. 2099, 2169–70 (2011); Dailey & Rosenbury, *supra* note 5, at 1470–72.

18. Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689, 696 (1990).

19. See, e.g., CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 100–01 (2014).

responsibilities toward children. Parents and custodial caregivers will likely maintain primary responsibility, but other adults may work alongside parents or fill gaps in parent-child relationships. Moreover, these adult responsibilities must encompass duties beyond those related to young children's dependency, including broader duties related to nurturing young children's relationships, protecting their mental and physical health, fostering their education, and otherwise preparing children for their participation in the wider world.²⁰

This broader articulation of responsibilities situates young children within a web of diverse relationships, each with the potential to further young children's well-being. With such a concept of shared responsibilities, young children will be supported by their parents but not subject to their exclusive control. For example, in response to religious exemption laws that permit parents to deny medical care to their children, states might impose a duty upon parents to certify that their children are seen by a medical professional at least once a year.²¹ States might also require some parents to obtain multiple medical opinions before deciding to circumcise young children or to provide intersex infants with so-called normalization surgery.²² Finally, states might limit the use of corporal punishment in the home in light of studies indicating that such punishment has few developmental effects and may reduce the quality of the relationships between young children and their caregivers.²³

With this broader conception of shared responsibilities, parents might also be better supported by the state. Many parents are overwhelmed by the demands of an expansive and exclusive notion of parental childrearing authority and in fact rely on relatives, friends, and paid caregivers to help perform childrearing duties.²⁴ A concept of shared responsibilities better reflects the realities of most parents' lives. Even more so, the state might directly assume more responsibility for preserving parents' relationships with their children. When parents and other custodial caregivers struggle because of poverty, for example, states could help those parents and caregivers rather than removing children from the home.²⁵ States could also ensure incarcerated or detained parents

20. See Dailey & Rosenbury, *supra* note 5, at 1517–23.

21. *Id.* at 1518.

22. *Id.*

23. Elizabeth T. Gershoff, *More Harm Than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW & CONTEMP. PROBS. 31, 43–47 (2010); Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 PSYCHOL. PUB. POL'Y & L. 231, 238–40 (2007).

24. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390 (2008); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 841–46 (2007).

25. Dailey & Rosenbury, *supra* note 5, at 1518–19.

are able to maintain relationships with their children.²⁶

Finally, young children's education might be reconceptualized as a responsibility shared by parents and states, ultimately leading to greater equality among children. Parents and other custodial caregivers generally provide foundational learning experiences for young children, but most parents struggle to find affordable preschool programs and lack the time or experience to provide quality preschool instruction on their own.²⁷ Many children's formal education is therefore delayed until public schooling begins, generally at the age of five, creating inequalities that often persist throughout children's lives.²⁸ By providing more funding for high-quality daycare and preschool, states would better support parents while also assuming more direct responsibility for providing quality early education for all children.²⁹

III. YOUNG CHILDREN'S AFFIRMATIVE RIGHTS

This reconceptualization of adult responsibilities for children in turn provides an opportunity to articulate a set of affirmative rights for young children, rights rooted in young children's broader interests and adult responsibilities for fostering those interests.³⁰ Unlike most notions of children's rights, affirmative rights do not operate solely to protect older children from coercive state action or parental demands. Instead, these affirmative rights recognize and protect young children's interests in certain relationships, opportunities, and experiences in the here and now. For example, adult responsibilities for children's education and custody might create corresponding rights to education, custody, and safety inside and outside the home.

Of course, federal courts have interpreted the federal Constitution to provide solely negative, as opposed to positive, rights; rights are negative liberties protecting a sphere of autonomous decision-making rather than an entitlement to certain goods or services. In *DeShaney v. Winnebago County Department of Social Services*,³¹ the Supreme Court explicitly held that this negative conception of rights governs children as well as adults, holding that children have no affirmative right to safety within the home.³² State constitutions, in contrast, provide children of school age

26. *Id.* at 1519–20.

27. Ellen Boylan, *High Quality Pre-Kindergarten as the First Step in Educational Adequacy: Using Courts to Expand Access to State Pre-K Programs*, 27 CHILD. LEGAL RTS. J. 24, 24 (2007).

28. See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 56–58 (2006).

29. Dailey & Rosenbury, *supra* note 5, at 1521–22.

30. *Id.* at 1528–32.

31. 489 U.S. 189 (1989).

32. *Id.* at 202.

with a positive right to education,³³ but courts have interpreted state constitutions to provide children no other affirmative rights.³⁴ Under existing law, then, children of any age enjoy only those affirmative rights rooted in federal and state statutory law, including some entitlements to food, housing, healthcare, and other basic needs.³⁵

Focusing on early childhood challenges this case law, providing a foundation for overruling *DeShaney* and articulating a set of affirmative constitutional rights for children. Even if adult rights are appropriately limited to negative liberties, young children's lives are sufficiently different from adult lives to warrant different treatment. Young children are always in the custody of others,³⁶ and they generally are unable to take steps to protect themselves. Young children, and likely all children, therefore have special claims to custodial relationships, protection in the home, and the education they need to become self-sufficient adults.

A new conception of affirmative rights would therefore grant to young children entitlements that are not enjoyed by adults. At the very least, young children should have affirmative rights to custody, protection, and education, including rights to quality preschool. Young children's affirmative rights might even extend to rights to preserve some relationships with non-custodial adults and other children, rights to exposure to ideas and people outside the home, and rights to engage in play, creative arts, sports, and other activities that are vital to young children's development. The scope of young children's affirmative rights should not be limited by understandings of adult rights. Instead, young children's affirmative rights must be calibrated to ensure they receive what they need to flourish throughout their lives.

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Young children's interests and experiences are largely overlooked by law's embrace of parental rights and family privacy. As scholars more fully consider, interrogate, and reimagine early childhood and the law, the complexity, diversity, and potential of young children's lives will come to the fore. This Essay provides some guiding principles for future

33. *E.g.*, FLA. CONST. art. IX, § 1.

34. *See* *McCleary v. State*, 268 P.3d 227, 248 (Wash. 2012) (“The vast majority of constitutional provisions, particularly those set forth in . . . our constitution’s declaration of rights, are framed as negative restrictions on government action. . . . [T]he role of the court is to police the outer limits of government power, relying on the . . . negative rights to set the boundaries.”).

35. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 25 (2014). (“So strong is the Court’s ideal of negative liberty, and so extreme is its skepticism about state power, that it has insulated the state from any responsibility to protect children—even against vicious and foreseeable parental attacks.”).

36. In fact, the Supreme Court has stated that all children are “always in some form of custody.” *Schall v. Martin*, 467 U.S. 253, 265 (1984).

analysis, principles rooted in children's interests beyond dependency and the responsibilities and rights that flow therefrom. These principles are designed to free young children from the ideal of the autonomous, freely acting adult individual and to embrace the breadth of young children's lives. The exact application of these principles remains subject to much study, debate, and even contestation. Young children's interests will not be furthered by mere refinements to existing law, however. Instead, we must develop a new legal regime that values young children as full persons with broad interests and rights in the here and now.