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# The New Law of the Child

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# THE YALE LAW JOURNAL

ANNE C. DAILEY & LAURA A. ROSENBURY

## The New Law of the Child

**ABSTRACT.** This Article sets forth a new paradigm for describing, understanding, and shaping children's relationship to law. The existing legal regime, which we term the "authorities framework," focuses too narrowly on state and parental control over children, reducing children's interests to those of dependency and the attainment of autonomy. In place of this limited focus, we envision a "new law of the child" that promotes a broader range of children's present and future interests, including children's interests in parental relationships and nonparental relationships with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life. Once articulated, these broader interests lay the foundation for a radical reconceptualization of the field of children and law. We propose a new tripartite framework of relationships, responsibilities, and rights that aims to transform how law treats children and their interactions with others. The framework addresses children's needs for state and parental control in many instances while also moving beyond those concerns to foster children's interests in the here and now.

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## INTRODUCTION

This Article sets forth a new paradigm for describing, understanding, and shaping children's relationship to law. The existing regime of laws relating to children hinges on the fundamental question of adult control over children and their development. We name and critique this prevailing approach the "authorities framework" and set forth the normative justifications and parameters for a new paradigm. We envision a "new law of the child" that promotes a wide range of children's present and future interests in addition to assigning adult authority over children's dependency and development.

Our new paradigm is rooted in a broad understanding of children's interests as children in the here and now, encompassing but moving beyond a developmental focus on children's dependency or their attainment of autonomy. Drawing from the social science literature, scholarship on children and law, and judicial decisions, we identify five broader interests that law should recognize and promote: children's interests in parental and nonparental relationships, including relationships with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life.

This new law of the child situates children's interests within a normative universe that values the extraordinary richness and variety of children's lives. Although our approach would impose greater restrictions on adult authority in some circumstances, it also calls on law to be more attuned to children's diverse interests within the family, school, and other arenas. We believe law should recognize, maintain, and promote a broader range of children's relationships, including relationships with nonparental adults and with other children. Relatedly, law should advance children's exposure to new ideas in ways that will spur their curiosity, learning, and exploration of their own identities as they grow. Law should also ensure that children have opportunities to express themselves in school and elsewhere, while at the same time protecting children from intrusions on their bodily integrity and personal privacy. And, finally, law should seek to further children's participation in civic life as a central component of their engagement in the world.

In bringing to light this broader range of children's interests in the here and now, our approach highlights that children's lives are more than lesser versions of adult lives or way stations on the road to autonomous adulthood. Our focus on children's interests beyond dependency and autonomy takes account of the unique strengths and capacities of children, as well as the special vulnerabilities that distinguish human experience in this early stage of life. By focusing on children's lives in the here and now, we aim to free the field of children and law from the ideal of the autonomous, freely acting adult individual. Our approach takes

seriously the idea of children as individuals in their own right, worthy of respect, even as they are dependent in varying ways upon the adults in their lives.

By shifting the focus from adult authority to children's broader interests, our framework opens up the possibility for a new conceptual ordering of the laws governing children. The field of children and law is currently organized by location: primarily home, school, and the juvenile justice system. The five interests we identify lead us to radically restructure the field around a tripartite framework of relationships, responsibilities, and rights. We begin with relationships because children's custodial status defines their first and primary relationship to law. Yet our approach goes beyond acknowledging relationships of authority to encompass children's nonhierarchical relationships with siblings, other children, and nonparental adults. These relationships in turn inform the second prong of the tripartite framework: adult responsibilities for children. While custodial caregivers have important responsibilities, we identify a broader set of actors who should carry legally recognized and shared responsibilities toward children, including state actors and adults outside the family. These adult responsibilities encompass duties related to caregiving and protection, education, rehabilitation, and fostering of civic engagement. The third and final prong of the tripartite framework addresses the full range of rights that should be enjoyed by parents and children – not simply rights of authority – most importantly children's affirmative rights to certain relationships, goods, and services.

By restructuring the field around relationships, responsibilities, and rights, we hope to identify and promote children's broader interests in an integrated and consistent way. To this end, our approach reimagines the traditional "best interests of the child" standard, which until now has largely operated as a cover for the exercise of unprincipled judicial discretion based on poorly thought-out factors focused on children's dependency. Our approach instead redefines the best interests standard in light of five broad interests – generous in scope and rich in content – that serve as fundamental, practical guides for judicial, administrative, and legislative decision-making across all domains of children's lives. Under a best interests standard explicitly oriented around children's broader interests, decisionmakers will be equipped to weigh children's interests in a transparent, coherent, and consistent way in the domains of family, school, juvenile justice, immigration, and other arenas, always with an eye toward maximizing their present and future well-being.

Relatedly, the new law of the child loosens the grip of parental rights on American law. Under our approach, the law's existing deference to parental rights in both statutes and legal decisions would give way to a more child-centered analysis that elevates children's broader interests over parents' individual liberty claims. Parental rights have a role to play under the new law of the child, but only to the extent they further children's broader interests, which include

children's interest in developing and maintaining relationships with their parents free from state control. Parental rights should never automatically trump the interests of all others – most importantly, those of children themselves. For example, our approach would eliminate parental freedom to inflict corporal punishment on children on the ground that this type of punishment violates a child's interests in bodily integrity and rehabilitation. Our framework would also limit parents' rights to homeschool their children in most circumstances, requiring more intensive state oversight of homeschooling for children in the early years and prohibiting it altogether for most children past the primary grades, based primarily on children's interest in exposure to ideas. We reject the classic defense of parental rights – that they are necessary to limit state intervention in the family – by emphasizing the state's existing presence in the lives of all children and the role parental rights may play in suppressing children's diverse values and experiences. Instead of ignoring conflicts within the family and between the family and the state over children's present and future well-being, we accept such conflicts as necessary for understanding and furthering the broad range of children's interests as children.

Moreover, our approach supports the recognition and enforcement of children's affirmative rights rooted in their broader interests in the here and now. The new law of the child rejects the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, which held that children have no affirmative right to safety within the home, thereby ignoring the shared responsibilities of both parents and the state to further children's interest in protection from harm at the hands of custodial caregivers.<sup>1</sup> In a direct departure from existing constitutional law, the new law of the child would recognize children's affirmative rights as children to certain goods and services essential to furthering their broader interests. In some cases, affirmative rights would entitle children to initiate court actions to enforce these rights, although these rights would primarily be enforced in custody, visitation, school, immigration, and other proceedings.

Our approach also reconceives children's interests in exercising control over their own lives as “agency” rights rather than “autonomy” rights. We do so in order to emphasize that children often have the capacity to make decisions for themselves at the same time that they are dependent upon adults. For example, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court upheld the right of children to wear black armbands at school in protest of the Vietnam War.<sup>2</sup> Although we support the Court's holding that children possess free speech rights while in school, we do so not because children possess adult-

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1. 489 U.S. 189 (1989).

2. 393 U.S. 503 (1969).

like autonomy rights, as the Court concluded, but rather because children have their own interests in exposure to the world of ideas and to expression of their developing views and identities. These rights are necessarily tailored to fit children's broader interests, including their interests in safety and learning in school. Our conception of children's agency rights reflects a richer, more nuanced conception of children's capacity to direct their own lives even while dependent upon a wide range of adults.

Finally, the new law of the child attempts to put an end to seemingly futile debates over children's "maturity." The concept of maturity has emerged in recent years as a focal point of legal decision making about children. Children who are deemed mature have access to adult rights and responsibilities, while those who are deemed immature remain subject to more paternalistic regulations. Yet focusing exclusively on maturity risks masking the real interests at stake in any given situation. For example, scholars and legal decision-makers struggle to reconcile two well-accepted cases: *Roper v. Simmons*, holding that adolescents are not as responsible as adults and, hence, should not be subject to the death penalty,<sup>3</sup> and *Bellotti v. Baird*, holding that adolescents are often responsible enough to decide whether to terminate a pregnancy.<sup>4</sup> By focusing on children's broader interests—rather than on "maturity" or "responsibility"—our approach illuminates what is really at stake in these cases: in *Roper*, children's interests in criminal rehabilitation and bodily integrity, and in *Bellotti*, children's interests in sexuality, reproductive agency, expression of identity, and civic engagement. While maturity is not irrelevant to identifying and weighing these interests, it should not be the endpoint of the analysis.

The new law of the child thus lays the foundation for revising or overruling many foundational Supreme Court decisions in addition to those already discussed. In *Prince v. Massachusetts*, for example, the Court upheld a Massachusetts child labor statute that prevented an eight-year-old girl from distributing religious literature on the street at night accompanied by her guardian, on the ground that the state's *parens patriae* power justified the protection of the child from harm.<sup>5</sup> By contrast, our approach would consider the child's broad interests in her relationship with her guardian, in expressing her religious identity, and in engaging in the world beyond home and school. Similarly, the Supreme Court's decision in *Wisconsin v. Yoder*, which granted Amish parents the right to withdraw their children from secondary school,<sup>6</sup> failed to take account of children's

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3. 543 U.S. 551 (2005).

4. 443 U.S. 622 (1979) (plurality opinion).

5. 321 U.S. 158, 166 (1944).

6. 406 U.S. 205 (1972).



interest in exposure to new ideas through educational opportunities outside the home. As already noted, our framework likely justifies limits on homeschooling for older children and increased regulation of homeschooling for younger children. The new law of the child would also take an entirely different approach to the Supreme Court's decision in *Troxel v. Granville*.<sup>7</sup> Instead of relying on the primacy of parental rights to reject grandparents' claims to maintain relationships with their grandchildren, our framework would make children's interests in maintaining relationships with nonparental figures the centerpiece of the analysis.

Our reformulation of the field of children and law permits a clearer examination of the ways law currently shapes children's lives through its treatment of the parent-child relationship and through its construction of children's dependency. Because the existing authorities framework is presumed to reflect children's lives as they are, its true expressive effects have remained unexamined. Looking closely, however, we see that the state intervenes in the parent-child relationship not simply at the back-end when disputes arise, but also at the front-end when conferring parental rights and family privacy. Legal scholars have generally failed to explore these expressive effects.<sup>8</sup> This silence risks naturalizing a particular model of childhood, unnecessarily limiting the scope of reform by placing certain aspects of children's lives beyond the reach of law.

Law has the power to reflect and shape multiple aspects of children's lives. The new law of the child seeks to recognize and promote facets of children's lives beyond dependency and autonomy, thereby expanding and altering the law's current focus. This new paradigm offers a more nuanced and comprehensive formulation of the ways in which law does, and does not, govern children's lives. At the same time, our approach does more than reflect existing reality; it also signals that certain, presently unrecognized aspects of children's lives should be valued by society. Our approach therefore aims to transform existing understandings of children and their interactions with each other and with adults. In this way, the new law of the child both uncovers aspects of children's lives obscured by existing law and draws upon these broader aspects to encourage new ways of living for both children and adults.

This Article proceeds as follows. Part I sets out the history and current configuration of the prevailing approach to children and law—which we term the “authorities framework.” After describing the authorities framework, this Part

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7. 530 U.S. 57 (2000).

8. For general discussions of the interplay between legal narratives and cultural narratives, see Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); and Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 121 (Keith O. Boyum & Lynn Mather eds., 2015).

goes on to enumerate its four major shortcomings: it fails to acknowledge and promote the well-being of children in the here and now; it unduly prioritizes parental rights over children's interests; it perpetuates a myth of nonintervention in the family; and it relies on limited conceptions of both dependency and autonomy. In Part II, we begin the task of identifying and elaborating children's interests beyond autonomy and dependency that better take account of children's lives in the here and now. These interests include children's interests in relationships with parents as well as with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life. These five broader interests in turn lead us in Part III to reconceptualize the field of children and law around a new tripartite framework of relationships, responsibilities, and rights, opening the door for legal decision makers to further children's broader interests in a transparent, coherent, and consistent way across a myriad of legal domains. In so doing, this new law of the child seeks to better capture and promote the diversity and richness of children's lives in the here and now.

#### I. THE AUTHORITIES FRAMEWORK AND ITS FAILINGS

The field of children and law currently rests on the foundational question of who has authority over children's lives — parents, the state, or (less frequently) children themselves.<sup>9</sup> In addressing this question, courts and legislatures focus on identifying when children are dependent on adults and when they are capable of making independent decisions about their own lives. Analysis may be best conceptualized as an inverted triangle, with parents and the state occupying the top points and children the bottom.<sup>10</sup> Lines of authority connect the three points, as courts and legislatures specify when parental authority over children trumps state interests, when state interests trump parental authority, and the rare instances when children's desires trump both.<sup>11</sup>

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9. Throughout this Article, we use the term "child" to mean a person younger than the governing age of majority and not fully emancipated under law. In all states, the presumptive age of majority is eighteen, although for some purposes the age is either higher (alcohol consumption) or lower (consensual sexual relations). See Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525, 526-27 (2014).

10. See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833-34 (2007); see also Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29 ("The competition for developmental control of a child is classically framed as a competition between parent and state.").

11. Rosenbury, *supra* note 10, at 833-34.

This emphasis on children’s dependency and eventual capacity underlies the entire field of children and law, in large part because adult authority over children derives its primary legal justification from children’s dependent status. As the Supreme Court has explained, “The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>12</sup> This legal conception of childhood is so widely accepted by U.S. courts, policymakers, and scholars that it has no name; it is simply the way things are.<sup>13</sup>

We coin the term “authorities framework” to describe this current state of the field. Doing so allows us both to better analyze the existing law governing children and to emphasize that the current organization of the field is neither natural nor inevitable. Rather, this organization is rooted in a control-based conception of parental rights that perpetuates the myth that the state does not intervene in most families. Once we reveal this existing framework, we analyze how it leads to an unjustifiably narrow focus on dependency and autonomy to the exclusion of children’s other interests.

#### A. *The Authorities Framework*

The authorities framework is rooted in the early common-law property-based theory of exclusive parental ownership of children. This theory located absolute control over children in parents – primarily fathers – based on actual or presumed biological ties.<sup>14</sup> As Barbara Bennett Woodhouse describes, well into

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12. Parham v. J.R., 442 U.S. 584, 602 (1979).

13. For representative samples of work in the field of children and law, see MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* (2005); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001); BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008); Appleton, *supra* note 9; Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Emily Buss, “Parental” Rights, 88 VA. L. REV. 635 (2002); Anne C. Dailey, *Children’s Constitutional Rights*, 96 MINN. L. REV. 2099 (2011); Martha Minow, *Whatever Happened to Children’s Rights?*, 80 MINN. L. REV. 267 (1995); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973); Rosenbury, *supra* note 10; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Lee E. Teitelbaum, *Children’s Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799 (1999); and Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979).

14. This common-law regime addressed itself primarily to white children; slave children, for example, were governed by a different set of laws. The legacy of this two-tier system is found in the child welfare system, which disproportionately involves African American families. See ROBERTS, *supra* note 13; Dorothy Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426 (2014). Relatedly, after a period of widespread

the nineteenth century, a father could force his children to work and collect the wages for himself; he could marry off his female children to persons of his choosing; and he determined where and with whom his children would reside, whether with himself, the mother, or some third party.<sup>15</sup> In addition, fathers had the right to physically control and punish their children, in some states up to the point of death.<sup>16</sup> This absolute control was often framed as an arrangement whereby fathers were obligated to provide for children in exchange for “labour and services,” although children were required to submit to that exchange.<sup>17</sup> Somewhat paradoxically, law prior to the late nineteenth century viewed children as autonomous beings, still under the control of their parents but not significantly different from adults.<sup>18</sup> Accordingly, this early regime did not condition parental control on children’s dependency or incapacity.

This regime changed by the late nineteenth century, as the state assumed greater decision-making power and control over children. Parental control was no longer an absolute God-given right, but instead became a more limited, state-conferred entitlement grounded in public concerns and children’s “best interests.”<sup>19</sup> Although the state had long possessed a common-law duty toward “infants, idiots, and lunatics,” the ascendant doctrine of *parens patriae* came to justify

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removal of children from reservations, custodial placements concerning American Indian children are now governed by the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2012).

15. See WOODHOUSE, *supra* note 13; Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998) [hereinafter Woodhouse, *From Property to Personhood*]; see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 5 (1985) (noting that colonial American communities charged the father with the “duty of maintaining a well-governed home and sustained his authority by granting him control of its inhabitants as well as of family property and other resources”); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 1-17 (1988) (describing the patriarchal structure of Puritan families); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1139-40 (arguing that “the authority of colonial fathers over children clearly reflected the authoritarian views of sovereignty held by the likes of Hobbes and the Puritan Robert Bolton”).
16. See Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1044-46 (1992).
17. *Id.* at 1038 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 163 (1827)).
18. See John Demos, *The American Family in Past Time*, 43 AM. SCHOLAR, Summer 1974, at 422, 428.
19. See Woodhouse, *supra* note 16, at 1037-40.

the state's power to override parental authority in the name of children's welfare,<sup>20</sup> sometimes with the goal of expanding state control over families of color, immigrant families, and other marginalized groups.<sup>21</sup> At the same time, late nineteenth-century thinkers introduced the idea of children as innocent, dependent beings different from adults and in need of special protection and care, thus strengthening the justification for state intervention in children's lives.<sup>22</sup> The emerging view of children as dependent, along with increasing state involvement, ultimately dislodged traditional notions of children as property, bringing about the development of more humane labor, juvenile justice, and child welfare laws, as well as compulsory education laws.<sup>23</sup>

Although the doctrine of absolute parental power has now been abandoned,<sup>24</sup> the law nevertheless retains a strong commitment to parental rights. In case after case, the Supreme Court has affirmed the constitutional rights of parents "to direct the upbringing and education of children under their control."<sup>25</sup> Indeed, as the Court has observed, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>26</sup> Of course, when parents fail to fulfill their

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20. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*47; see also Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344 (1999) (tracing the term *parens patriae* through early English custody law).
21. Cf. Woodhouse, *supra* note 16, at 1017-21 (describing the history of Oregon's compulsory public education law as an exercise of *parens patriae* authority reflecting both anti-Catholic assimilationist goals as well as more egalitarian, progressive ideas for reform).
22. See ROSALIND EKMAN LADD, CHILDREN'S RIGHTS RE-VISIONED: PHILOSOPHICAL READINGS 2 (1996).
23. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994) (recounting the long arc of the history of children's status in the United States).
24. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . .").
25. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (stressing the importance of parents' interest in the care and control of their children); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (referring to the right to raise one's children as "essential"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (same). This authority flows in part from constitutional and common-law notions of family privacy. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (recognizing, in a case litigated under the Fourteenth Amendment Due Process Clause, that the family is "a unit with broad parental authority over minor children"); see also Buss, *supra* note 10, at 29 (discussing the traditional "exclusion of other private parties competing with parents for some or all control over a child's upbringing").
26. *Troxel*, 530 U.S. at 65.

caregiving duties, they may forfeit their rights: the state may subject parents to criminal prosecution for neglect or abandonment, or it may subject them to civil child welfare proceedings that can lead to the termination of parental rights altogether.<sup>27</sup> But if parents minimally fulfill their duties, the state protects their relationships with their children and their childrearing choices.<sup>28</sup> Contemporary judges, policymakers, and scholars therefore generally embrace parental rights as the appropriate starting point for protecting children's interests.<sup>29</sup> Children are no longer considered property, but they remain under the direction and control of parents in the first instance.

The authorities framework has evolved somewhat in recent decades as modern courts and legislatures have begun to recognize children's rights and autonomy interests in some contexts. Of course, children have long enjoyed certain constitutional liberties, such as the right not to be enslaved under the Thirteenth Amendment and the right not to be arbitrarily deprived of life or liberty under the Due Process Clause.<sup>30</sup> Nevertheless, well into the twentieth century, children

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27. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (holding that the Due Process Clause requires that the state support its allegations of unfitness with clear and convincing evidence).

28. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (finding that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody").

29. A few legal scholars, most notably Barbara Bennett Woodhouse, have critiqued the continuing coercion inherent in this conception of parental rights, in which power flows in only one, top-down direction. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747 (1993); Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 *VA. L. REV.* 2493, 2520 (1995); Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 *B.Y.U. J. PUB. L.* 321 (1994); Woodhouse, *supra* note 16, at 999-1002 (arguing that *Meyer* and *Pierce* view children as parents' private property). Nevertheless, most scholars justify law's commitment to parental rights on the ground that parental rights are in fact the best way to further children's interests. See, e.g., Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 *OHIO ST. L.J.* 1523, 1543-45 (1998) (emphasizing that parental decision-making is necessary because children are "emotionally dependent," and they need the parental relationship in order to acquire "the ability to learn and reason and develop"); Buss, *supra* note 13, at 656 ("[T]he benefits to children, first acknowledged when parental rights were conceived in proprietary terms, now stand as an independent justification for continuing to afford parents a tremendous degree of control."); see also Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v. Granville*, 2000 *SUP. CT. REV.* 279, 284-90; John E. Coons, *Intellectual Liberty and the Schools*, 1 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 495, 506-10 (1985); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 *U. CHI. L. REV.* 937, 940-41 (1996); Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 *ETHICS* 6, 17 (1980); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 *WM. & MARY BILL RTS. J.* 1071, 1077-79 (2003); Scott & Scott, *supra* note 13, at 2415.

30. See Dailey, *supra* note 13, at 2100.

enjoyed—at best—only a minimal set of entitlements associated with basic liberties. Beginning in the 1960s, courts and legislatures independently acknowledged children’s developing capacities and, in some contexts, concluded that older children have sufficient cognitive and emotional skills to entitle them to certain negative rights similar to those enjoyed by adults.<sup>31</sup> In 1967, the Supreme Court expressly confirmed that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” finding that older children have constitutional rights for purposes of juvenile delinquency proceedings.<sup>32</sup> Since *In re Gault*, the Court has issued a series of decisions recognizing autonomy rights for children, including *Tinker v. Des Moines Independent Community School District*, which held that older children have adult constitutional rights for purposes of school speech.<sup>33</sup>

This recognition of children’s autonomy comes into play most often with respect to adolescent decision making outside of the home, particularly at school and in the labor market.<sup>34</sup> Occasionally, however, judges may take older children’s views into account even when addressing family disputes, such as in the areas of custody<sup>35</sup> and healthcare decision-making.<sup>36</sup> Criminal law often treats children as autonomous legal actors, with states enacting laws that permit, and

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31. See, e.g., GUGGENHEIM, *supra* note 13, at 1-16 (providing a “brief history” of arguments in favor of children’s rights beginning in the 1960s).

32. *In re Gault*, 387 U.S. 1, 13 (1967); see also *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 794 (2011) (“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” (internal citations omitted)); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (plurality opinion) (finding that a law requiring parental consent to obtain an abortion violated minors’ due process rights).

33. 393 U.S. 503, 514 (1969).

34. See, e.g., CAL. LAB. CODE § 1294.3 (West 2011) (permitting employment of minors for certain occupations); *Tinker*, 393 U.S. at 506 (declaring that students have free speech rights in school).

35. In New York custody disputes, for instance, courts must weigh the child’s wishes, but must also “consider the age and maturity of the child and the potential for influence having been exerted on the child.” *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1263-64 (N.Y. 1982). When a judge believes that the child’s feelings may be “transient,” the judge may give no weight to the child’s wishes. *Lincoln v. Lincoln*, 247 N.E.2d 659, 661 (N.Y. 1969).

36. See *Bellotti*, 443 U.S. at 647 (“[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.”); *Smith v. Seibly*, 431 P.2d 719, 723 (Wash. 1967) (“A married minor, 18 years of age, who has successfully completed high school and is the head of his own family, who earns his own living and maintains his own home, is emancipated for the purpose of giving a valid consent to surgery . . .”).

in some circumstances require, juvenile offenders to be tried in adult criminal court.<sup>37</sup> Respecting children's autonomy interests sometimes calls for an individualized examination of a child's maturity, as in emancipation hearings and judicial bypass hearings in the abortion context.<sup>38</sup> At other times, respecting children's autonomy interests entails a categorical drop in the age at which children may be treated like adults, as may be the case with driving,<sup>39</sup> sexual activity,<sup>40</sup> and the prosecution of some crimes.<sup>41</sup>

The modern trend toward recognizing children's autonomy in certain contexts has nevertheless failed to alter law's view of children as fundamentally dependent beings in need of adult supervision and control.<sup>42</sup> One need not master the field of children and law to recognize that our legal system denies children basic personal, social, and political rights. Most children do not have state or

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37. Forty-five states allow juvenile cases to be transferred to adult court at the judge's discretion; in fifteen of those states, transfer is mandatory for some offenses. Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP'T JUST., OFF. JUV. JUST. & DELINQ. PREVENTION 3 (Sept. 2011), <http://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf> [<http://perma.cc/GUY3-JE7S>]; see also Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 33-39 (2013) (providing background on juvenile transfer laws). In other states, prosecutors have the discretion to file charges for certain crimes in adult or juvenile court. See, e.g., FLA. STAT. ANN. § 985.557(1)(a), (b) (West 2008).
38. See, e.g., CONN. GEN. STAT. ANN. § 46b-150 (West 2009) (emancipation); *Bellotti*, 443 U.S. at 643-44 (judicial bypass).
39. The age at which minors may drive is as low as fourteen in South Dakota, S.D. CODIFIED LAWS § 32-12-11 (2011), and as high as seventeen in New Jersey, N.J. STAT. ANN. § 39:3-13.4 (West 2012).
40. For discussions of variable ages of sexual consent, see Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH L. REV. 5 (2013); Anna High, *Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class*, 69 ARK. L. REV. 787 (2016); and Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000).
41. See, e.g., Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 83, 127-28 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).
42. Indeed, by the mid-1990s, most scholars in the United States had abandoned their children's rights projects. See GUGGENHEIM, *supra* note 13, at 42 ("The immutable truth of childrearing is that someone has to be in charge."); Minow, *supra* note 13.



federal rights to vote,<sup>43</sup> marry,<sup>44</sup> work for wages,<sup>45</sup> make healthcare decisions,<sup>46</sup> have sex,<sup>47</sup> travel,<sup>48</sup> refuse an education,<sup>49</sup> be on the streets at night,<sup>50</sup> purchase pornography,<sup>51</sup> attend (or not attend) religious services against parental wishes,<sup>52</sup> or enjoy most other freedoms enjoyed by adults. Justice Powell stated that these differences “abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.”<sup>53</sup> Far from being left alone to make their own choices, children are directed by their parents and the state into relationships, activities, educational instruction, and ways of life not of their own choosing.<sup>54</sup>

Children’s rights therefore remain relatively limited and qualified despite language in Supreme Court decisions suggesting that children broadly enjoy

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43. See U.S. CONST. amend. XXVI, § 1.
  44. See, e.g., OKLA. STAT. ANN. tit. 43, § 3(A) (West 2016). However, a child may marry with parental permission. See, e.g., *id.* § 3(B).
  45. See 29 C.F.R. § 570.2 (2017) (setting a “general 16-year minimum age which applies to all employment” other than agriculture and with other limited exceptions).
  46. Traditionally, children under eighteen cannot consent to medical treatment; doctrines like the mature minor doctrine make an exception for children of sufficient maturity. See Shawna Benston, *Not of Minor Consequence?: Medical Decision-Making Autonomy and the Mature Minor Doctrine*, 13 IND. HEALTH L. REV. 1, 1-2 (2016).
  47. In Georgia, for instance, two fifteen-year-olds who engage in sex are guilty of a misdemeanor. GA. CODE ANN. § 16-6-3 (2016). In Michigan, two fifteen-year-olds who engage in sex are guilty of a felony. MICH. COMP. LAWS ANN. § 750.520d (West 2004).
  48. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting that, at common law, parents or guardians control the physical freedom of unemancipated minors).
  49. All states require parents to send their children to public school or otherwise provide them an education. See, e.g., ARIZ. REV. STAT. ANN. § 15-802 (2014); GA. CODE ANN. § 20-2-690.1 (2016); KAN. STAT. ANN. § 72-1111 (2016); N.C. GEN. STAT. § 115C-378 (2015); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1327 (West 2016); WASH. REV. CODE ANN. § 28A.225.010 (West 2011).
  50. See *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998); *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004). *But see Ramos v. Town of Vernon*, 353 F.3d 171, 187 (2d Cir. 2003) (applying intermediate scrutiny to a town curfew and striking it down based on the town’s failure to tie the policy to the “special traits, vulnerabilities, and needs of minors”).
  51. See *Ginsberg v. New York*, 390 U.S. 629 (1968).
  52. In Vermont, for instance, parents have the statutory right to control a child’s religion. VT. STAT. ANN. tit. 15, § 664(1)(A) (2010). This right is so critical that the Vermont Supreme Court has stricken portions of a family court order prohibiting both parents from requiring children “to attend religious services against their will.” *Jakab v. Jakab*, 664 A.2d 261, 266 (Vt. 1995).
  53. *Goss v. Lopez*, 419 U.S. 565, 591 (1975) (Powell, J., dissenting).
  54. See, e.g., Buss, *supra* note 10, at 29-31; Rosenbury, *supra* note 10, at 857-58.

constitutional rights.<sup>55</sup> For example, children have free speech rights in school only so long as that speech does not disrupt the learning environment.<sup>56</sup> Adolescent girls have substantive due process rights to choose to terminate a pregnancy, but states may condition girls' access to abortion on parental consent or judicial determinations of maturity or best interests.<sup>57</sup> Rather than bestowing broad autonomy rights on children, the Court regularly reiterates the view of children as dependent beings with lesser rights than adults. As the Court has explained, "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves."<sup>58</sup> Rather, it remains the case that, under the law, "[t]hey are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."<sup>59</sup>

Moreover, courts, policymakers, and scholars increasingly draw on empirical studies to argue that children are *less* mature than the law has generally presumed.<sup>60</sup> In a series of juvenile sentencing decisions involving older adolescents,

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55. See Dailey, *supra* note 13.

56. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403 (2007); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969); cf. *Cohen v. California*, 403 U.S. 15 (1971) (granting broader free speech rights to adults).

57. See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality opinion) (upholding parental consent requirements as long as the state also "provide[s] an alternative procedure [such as a judicial determination of maturity or best interests] whereby authorization for the abortion can be obtained").

58. *Schall v. Martin*, 467 U.S. 253, 265 (1984).

59. *Id.* A decade and a half earlier, the Supreme Court upheld a state law prohibiting the sale of pornography to minors. The Court, paraphrasing a member of the Columbia University Psychoanalytic Clinic, noted that "a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read." *Ginsberg v. New York*, 390 U.S. 629, 642 n.10 (1968). In Justice Stewart's words, the child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring).

60. For examples of recent case law, see *Miller v. Alabama*, 567 U.S. 460, 471-72 & 472 n.5 (2012), which held that mandatory life imprisonment without parole for individuals under eighteen years old at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments; *J.D.B. v. North Carolina*, 564 U.S. 261, 273 nn.5-6 (2011), which held that a child's age should inform the *Miranda* analysis; *Graham v. Florida*, 560 U.S. 48, 68, 74-75 (2010), which held that the Eighth Amendment prohibits the imposition of life without parole sentences on juvenile offenders who did not commit homicide and that the state must give convicted juvenile nonhomicide offenders a meaningful opportunity to obtain release from incarceration; and *Roper v. Simmons*, 543 U.S. 551, 572-74 (2005), which held that the Eighth and Fourteenth Amendments prohibit the execution of individuals who were under eighteen years old at the time of their capital crime. For an example of scholarship, see Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22

the Supreme Court recognized children’s “inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives.”<sup>61</sup> In *Roper v. Simmons*, the Court ruled that a state law permitting the execution of defendants who committed their crimes as juveniles was unconstitutional.<sup>62</sup> Even seventeen-year-olds, the *Roper* Court explained, are often more immature, irresponsible, impetuous, and reckless than adults and therefore less culpable for their crimes and less deserving of severe punishment.<sup>63</sup> This assessment relied, in part, on empirical studies indicating that adolescent brains are not fully formed and that the prefrontal cortex, which is responsible for strategizing, setting priorities, and controlling impulses, is particularly underdeveloped in adolescence.<sup>64</sup> Subsequent decisions in the criminal justice context continue to describe minors as inherently less capable – and thus less culpable – than adults.<sup>65</sup>

The authorities framework’s recognition of adolescents’ autonomy thus remains muddled, leading to contradictory conclusions about children’s capacity but not much else. Federal and state laws now specify differing bright-line ages for when children become legal adults for purposes of marriage, sexual activity, employment, driving, drinking, voting, and criminal prosecution.<sup>66</sup> Similarly, courts have determined that children enjoy adult-like rights of speech, privacy, and association for some purposes, but must wait until adulthood before they may exercise these rights fully.<sup>67</sup> The diverse and shifting nature of these age cut-offs speaks volumes about the difficulty – and, in some cases, the futility – of attempting to justify laws by reference to children’s decision-making abilities. In-

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CURRENT DIRECTIONS PSYCHOL. SCI. 158, 158-61 (2013), which discusses how an understanding of teenagers’ higher likelihood of risk taking should inform law but notes that current knowledge is not yet adequate for legal purposes.

61. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988); see also Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 742-46 (2016) (discussing the Court’s acceptance of developmental science).
62. *Roper*, 543 U.S. at 578-79.
63. *Id.* at 569-71.
64. *Id.*; see also Kevin W. Saunders, *The Role of Science in the Supreme Court’s Limitations on Juvenile Punishment*, 46 TEX. TECH L. REV. 339, 349 (2013) (“More complex ‘executive’ functions of [the] prefrontal cortex such as reasoning, motivation, and judgment appear to develop gradually during childhood and adolescence, perhaps continuing during the adult years.” (quoting Peter R. Huttenlocher & Arun S. Dabholkar, *Regional Differences in Synaptogenesis in Human Cerebral Cortex*, 387 J. COMP. NEUROLOGY 167, 178 (1997))).
65. See *Miller*, 567 U.S. at 471-73; *Graham*, 560 U.S. at 68.
66. See Appleton, *supra* note 9, at 526-27. For an example of a bright-line statute, see OKLA. STAT. ANN. tit. 43, § 3(A) (West 2016).
67. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

deed, the authorities framework provides no tools other than vague tests of “maturity” for deciding when children will be subject to adult control and when they will be allowed to make their own decisions.

In fact, the variable age of adulthood often reflects social and political considerations other than, or in addition to, assumptions about children’s capacity for autonomous decision making.<sup>68</sup> This was evident when the voting age was reduced to the draft age during the Vietnam War era,<sup>69</sup> and it is evident now when some states prosecute children as adults while other states do not.<sup>70</sup> In addition, in the context of delinquency and abortion, in particular, judicial and prosecutorial understandings of capacity and maturity may differ depending on the race, class, or gender of the children in question in ways that may reflect bias more than differing rates of development. One recent study found that adults view girls of color as less innocent and more adult-like than white girls, especially when they are between the ages of five and fourteen.<sup>71</sup> Children of color are also transferred from juvenile to adult criminal court at higher rates than white children.<sup>72</sup> And, in addition to biases based on the identity of the children before them, it appears that judges sometimes invoke maturity to justify decisions rooted in impermissible value judgments. That is, children who make choices

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68. See LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 494 (2002) (“The age of majority is arbitrary not in the sense that it is unreasonable but in that it is variable from time to time and is often established to reflect some, but not all, levels of maturity and capacity.”); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 639-45 (2002) (comparing *Bellotti* and *Parham* and concluding that the “cases, and the broader category of children’s constitutional rights, become coherent when considered in terms of public health and sound social policy”); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1, 5 (1986) (“[I]t is more honest to disclose that competence and incompetence are used here as proxies for a variety of concerns about what societal decision-makers think children may need, and about what they simultaneously think allows adults to choose for themselves.”).

69. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 n.152 (1991) (stating that the Twenty-Sixth Amendment’s extension of “the franchise to eighteen-year-olds grew out of the perceived unfairness of any gap between the Vietnam draft age and the voting age”).

70. See, e.g., BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE (2017).

71. See Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, CTR. ON POVERTY & INEQ. 7-8 (2017), <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf> [<http://perma.cc/8DGY-LBXG>].

72. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 102 (2000); see also Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 393-94 (2017).

with which judges disagree – choices to have sex, to drink, or to obtain an abortion – may be more likely to be found “immature.”<sup>73</sup>

The authorities framework therefore continues to focus largely on children’s dependency, with only a small and contradictory patchwork of laws extending negative liberties to older children. The framework legitimates and fortifies the governing legal principles of parental rights and state *parens patriae* power. American courts, policymakers, and scholars accept this schema when determining how law governs or should govern children’s lives. Although often assumed to reflect the preexisting reality of children’s lives, the authorities framework is in fact a choice that shapes the lives of children and their parents. And, as set forth below, it does so in problematic ways.

### B. *Why the Authorities Framework Fails*

Although many scholars have critiqued the public/private distinction that colors disputes between parents and the state,<sup>74</sup> none have questioned whether authority is the proper lens through which to conceptualize the field of children and law in the first place. The narrow focus on children’s dependency under a regime of parental and state authority has multiple shortcomings. We focus on the four we believe to be most problematic: the failure to acknowledge and promote the richness of children’s lives in the here and now; an undue prioritization of parental rights over children’s interests; the ongoing perpetuation of the myth of nonintervention in the family; and a persistent reliance by legal actors on limited conceptions of both dependency and autonomy.

#### 1. *Failure To Promote Children’s Interests in the Here and Now*

The authorities framework focuses on the developmental arc from dependency to autonomy to the exclusion of other meaningful aspects of children’s lives. Under this narrow view, children as a class are always dependent on either parents or the state, with courts and legislatures determining when some older adolescents should be treated as rights-bearing autonomous adults. By focusing

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73. For example, the Connecticut Supreme Court, in determining whether a seventeen-year-old girl was sufficiently mature to refuse potentially life-saving cancer treatment, appears to have emphasized the girl’s lack of autonomous decision-making skills as a proxy for social disapproval of her desire to refuse treatment. *In re Cassandra C.*, 112 A.3d 158, 171-72 (Conn. 2015).

74. See, e.g., Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REFORM 933 (1985); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

solely on this trajectory from dependency to autonomy,<sup>75</sup> the authorities framework overlooks the fact that children enjoy active lives in the here and now, experiencing a wide range of emotions and pursuing a variety of aims apart from their long-term investment in becoming adults.

Although children are dependent on adults in many contexts and developmental research is vital to any consideration of children and law, dependency and autonomy are not the only defining facets of children's lives – nor should they be. There is nothing innate or essential about children's lives. Indeed, childhood itself is a social construction.<sup>76</sup> It may be defined in relation to development, other aspects of children's experiences, or a combination thereof.<sup>77</sup> Moreover, children's experiences vary from child to child, are deeply situational, and change over time. The authorities framework fails to recognize this rich diversity because it ties children's needs and interests to a baseline of adulthood, regarding

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75. Even scholars who seek to challenge the developmental focus of the authorities framework ultimately argue that children should have more autonomy within hierarchical relationships with parents, teachers, and state actors. See, e.g., Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715 (2013) (arguing that law should recognize children's interests in self-government within such relationships, including within the privacy of the family).
76. See, e.g., Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547 (2000) ("American lawmakers have had relatively clear images of childhood and adulthood – images that fit with our conventional notions. Children are innocent beings, who are dependent, vulnerable and incapable of making competent decisions."); Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 113 ("Modern scholars recognize that childhood is a culturally constructed idea, rather than a universal fact."). For literature outside of law, see PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 15-33 (Robert Baldick trans., 1962); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 3-12 (1985); Allison James, *Understanding Childhood from an Interdisciplinary Perspective*, in RETHINKING CHILDHOOD 25, 28-29 (Peter B. Pufall & Richard P. Unsworth eds., 2004); Alan Prout & Allison James, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD 7, 8 (Allison James & Alan Prout eds., 1997); and Martin Woodhead, *Psychology and the Cultural Construction of Children's Needs*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD, *supra*, at 63, 63-68.
77. In fact, the meaning of "childhood" shifts over time as it is constructed both structurally and through daily practice. For discussions of the shifting meanings of childhood over time in the United States, see CHILDHOOD IN AMERICA (Paula S. Fass & Mary Ann Mason eds., 2000); and HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 347-67 (2005).

children as pre-adults, always in the act of becoming full persons but not necessarily full persons in their own right.<sup>78</sup> The authorities framework therefore perpetuates a particular construction of childhood in which children may only escape their dependency on adults by successfully developing into adults themselves.

The ubiquitous “best interests of the child” standard, in its current configuration,<sup>79</sup> deepens rather than resolves these concerns about the authorities framework’s narrow view of children’s interests. Although the term “best interests” could encompass children’s interests broadly, the standard in practice has been coopted by the authorities framework’s developmental bent and has been frequently leveraged to protect parents’ ability to exercise proper authority over children. Further, the best interests standard often masks significant judicial discretion.<sup>80</sup> Legislatures and courts define a child’s best interests by the simple attributes of age, gender, and other demographic factors or, in contrast, by reference to parents’ emotional health or wishes.<sup>81</sup> The preference of the child is sometimes included as a factor in the determination, but this narrow focus on preference often elevates children’s stated desires over their other interests,

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78. This construction is pervasive in family law doctrine, *see Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion); *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979), and scholarship, *see, e.g.*, Buss, *supra* note 10, at 32; Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 482-88 (2006); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CALIF. L. REV. 967, 1002-11 (2003); Scott, *supra* note 76, at 550-51, 589-98. This focus is present even in the work of scholars who are sympathetic to notions of children’s rights. *See, e.g.*, John Eekelaar, *The Importance of Thinking that Children Have Rights*, in CHILDREN, RIGHTS AND THE LAW 221, 229-34 (Philip Alston et al. eds., 1992); Woodhouse, *supra* note 76, at 97-119.

79. This standard appears in almost every area of law relating to children, but it surfaces most often in the areas of child custody and child welfare. For a thoughtful development of the “best interests of the child” standard in child protective proceedings, *see* Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996).

80. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 479 (1984).

81. For example, some custody statutes specify that the psychological state of the parents, the relative capacity of the parents and their interest in the child, the permanence of the home, and the presence of domestic violence are factors to be weighed in the decision-making process. Connecticut lists a total of sixteen factors. CONN. GEN. STAT. ANN. § 46b-54(f) (West 2009). Other states with delineated factors include Kentucky, KY. REV. STAT. ANN. § 403.270(2) (West 2017); Michigan, MICH. COMP. LAWS ANN. § 722.23 (West 2002); and Oregon, OR. REV. STAT. § 107.137 (2015).

which remain largely unarticulated and unexamined. Moreover, the child's preference is considered as a single factor, which is often trumped by the recognition of parental rights.<sup>82</sup>

The traditional best interests standard therefore does not address children's interests as persons in their own right. The standard has little discernible content and often operates as a mask for judicial discretion. To the extent it does have substance, the standard's conception of "best interests" tends to be defined in relation to children's developmental needs and parental rights. Children's interests beyond dependency and autonomy remain largely unarticulated and unexamined.

## 2. *Undue Prioritization of Parental Rights*

A foundational commitment to parental rights undergirds the authorities framework, limiting law's ability to recognize and further children's interests beyond dependency and autonomy. Under the authorities framework, parents enjoy rights over their children as part of the fundamental due process right to choose how to live their lives free from governmental control.<sup>83</sup> Notably, parental rights are doctrinally rooted in parents' own autonomy interests, not in their responsibility for furthering children's interests, broadly construed. Although some contemporary scholars argue that strong enforcement of parental rights is the best way to serve children's interests,<sup>84</sup> the interests served are narrowly defined and typically not at the forefront of the decision-making process.

Indeed, when parental rights come into play, children's interests generally drop out of the equation altogether. In *Michael H. v. Gerald D.*, for example, a biological father claimed that California's presumption of paternity – which assigned paternal rights to the husband of a married woman over the biological father – was unconstitutional.<sup>85</sup> The Supreme Court held that a biological father does not have constitutionally-recognized parental rights to a relationship with a child when the mother is married to another man. More importantly, the Court rejected the child's claim to a relationship with her biological father, viewing the biological father's right and the child's interests as two sides of the same coin.<sup>86</sup> If the biological father could not assert a right to maintain a relationship with his

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82. For other critiques of the best interests standard, see Chambers, *supra* note 80; and Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

83. See *Troxel*, 530 U.S. at 66.

84. See, e.g., Buss, *supra* note 13, at 636.

85. 491 U.S. 110, 113 (1988).

86. *Id.* at 130-31.



child, the Court reasoned, then the child had no parallel cognizable interest in a relationship with him.<sup>87</sup>

Parental rights often receive controlling weight, decentering and devaluing children in legal analyses. For example, in *Troxel v. Granville*, the Supreme Court rejected a Washington State statute that allowed courts to grant visitation rights to third parties over the objection of custodial parents if that “visitation may serve the best interests of the child.”<sup>88</sup> At the center of the dispute in *Troxel* were two young girls whose father had committed suicide. The paternal grandparents, who had a close relationship with the girls, sought visitation rights beyond the monthly visits the mother was willing to allow. The plurality opinion written by Justice O’Connor held that the statute violated parents’ rights to “the care, custody, and control of their children.”<sup>89</sup> In this context, O’Connor concluded, the mother’s rights prevailed over any consideration of the children’s interests in maintaining closer contact with their grandparents – the primary link to their deceased father and important figures in the children’s lives.

Although parental rights may indirectly further children’s interests, they are a circuitous and unreliable means of doing so. Parental rights construct children predominantly as objects of control, rather than as people with values and interests of their own. Indeed, in face-offs between parental rights and children’s rights, parents almost always win. In both *Michael H.* and *Troxel*, for example, the Supreme Court majorities did not take children’s interests into account in any meaningful way. Parental rights maintain their hold on the American legal imagination, even as many parents are overwhelmed by the demands of an expansive and exclusive notion of parental childrearing authority and rely on others to help perform childrearing duties.<sup>90</sup>

All this is not to say that parental rights should play no role in children’s lives. Parental rights may foster pluralism and diversity among families, protecting children from state standardization and indoctrination.<sup>91</sup> They also clearly further parents’ own interests in raising their children free from governmental control. They promote children’s interests in developing and maintaining close, stable attachment relationships with caregivers, particularly in the early years. And

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87. *Id.*

88. 530 U.S. at 60.

89. *Id.* at 65.

90. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390 (2008).

91. See, e.g., Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 958–59 (1993); Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994).

finally, parental rights serve children's interests because parents often know what is best for their children. Yet under the authorities framework, parental rights have had an outsized influence, overshadowing conflicts within the family as well as alternative ways of supporting children's interests. Indeed, many U.S. policymakers have opposed ratification of the U.N. Convention on the Rights of the Child specifically on the ground that the treaty would undermine parental authority.<sup>92</sup> The United States, in contrast to almost every other country in the world,<sup>93</sup> continues to overprioritize parental rights at the expense of children's interests.

### 3. *Perpetuation of the Myth of Nonintervention in the Family*

The authorities framework's strong emphasis on parental rights also perpetuates a myth of nonintervention in the family and particularly in children's lives—a myth that does not accurately describe family life and that stands in the way of developing a robust regime of parental responsibilities to children.<sup>94</sup> Under the authorities framework, common-law and constitutional notions of family privacy assign parents control over their children unless and until the state

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92. See, e.g., Shulamit Almog & Ariel L. Bendor, *The UN Convention on the Rights of the Child Meets the American Constitution: Towards a Supreme Law of the World*, 11 INT'L J. CHILD. RTS. 273, 277 (2004).

93. The United States is currently the only U.N. member state that has not ratified the Convention, as South Sudan and Somalia ratified the Convention in recent years. See *Hailing Somalia's Ratification, UN Renews Call for Universalization of Child Rights Treaty*, UN NEWS CTR. (Oct. 2, 2015), <http://news.un.org/en/story/2015/10/511312-hailing-somalias-ratification-un-renews-call-universalization-child-rights> [<http://perma.cc/ZRJ8-RJJ5>]; *UN Lauds South Sudan as Country Ratifies Landmark Child Rights Treaty*, UN NEWS CTR. (May 4, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50759#.WcewrkyZNE4> [<http://perma.cc/EBB7-NDK5>].

94. Some scholars rightly focus less on parental rights and more on parental and state duties to care for children. See, e.g., Scott & Scott, *supra* note 13, at 2415; Soo Jee Lee, Note, *A Child's Voice vs. a Parent's Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 690 (2017). These scholars argue for the importance of recognizing and developing law's treatment of children—particularly young children—as vulnerable individuals in need of support, care, and protection. 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). Although framed in terms of children's welfare and adult duties to children, the attention to hierarchical relationships of control continues unabated, as does the question of which adults—parents or the state—carry responsibilities for children.

intervenes.<sup>95</sup> Such privacy is commonly understood to place families – and children – beyond the reach of law.<sup>96</sup> In fact, it is conventional wisdom to assume that law is irrelevant to children unless they are subject to a state’s abuse and neglect jurisdiction, have been adjudicated delinquent, or are involved in custody proceedings.

Despite this narrative of nonintervention, law in fact regulates children’s lives on a daily basis. The authorities framework generally renders this regulation invisible, but two modes of analysis bring it to light: first, an examination of the law affecting children’s lives outside of the traditional domain of the authorities framework; and second, an examination of the ways in which decisions *not* to regulate do in fact have regulatory effects.

First, the field of children and law currently considers only some of the laws affecting children’s lives. For example, a leading casebook organizes law’s regulation of children by type of authority and location, with parental authority governing in the home and state *parens patriae* authority governing in schools and in the juvenile justice system.<sup>97</sup> But law mediates children’s interactions with multiple actors in multiple spheres across public and private divides. For example, law often dictates when children may work for wages, when they may enter into enforceable contracts, how they may access social media, to which advertisements they may be subject, how they may manage property, when they must be vaccinated, what they must waive to participate in sports and other activities,

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95. These notions of privacy go beyond individual parental rights to encompass the family as a whole. See, e.g., Dailey, *supra* note 91, at 963 (“[S]ince the early part of this century, the family has been accorded independent constitutional protection independent of the liberties enjoyed by its individual members.”); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 966 (1991) (“The common law privacy doctrine is not an individualized concept . . . : it attaches to the entity of the family, not to the individuals that compose it.”). For further discussion of the interplay between constitutional and common-law notions of family privacy, see Rosenbury, *supra* note 10, at 864–67.

96. Indeed, Bruce Hafen has described such privacy as “plenary,” meaning parental power “prevail[s] over the claims of the state, other outsiders, and the children themselves unless there is some compelling justification for interference.” Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights,”* 1976 BYU L. REV. 605, 617. Of course, such privacy is not enjoyed by all families equally. See, e.g., Dorothy Roberts, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. C.R. & C.L. 191, 200 (2009); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1580–81 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); and JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994)).

97. HARRIS & TEITELBAUM, *supra* note 68, at 3–4. For another leading casebook, see DOUGLAS E. ABRAMS ET AL., *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* (6th ed. 2017).

and how daycares and summer camps must be structured.<sup>98</sup> When these broader forms of regulation are taken into account, we see that law mediates children's experiences on a daily and ongoing basis, even if most children and their families never end up in court. By failing to offer a satisfying account of the legal regulation of children's lives apart from their involvement in hierarchical relationships of control with parents and state actors, the authorities framework obscures these other forms of regulation. In doing so, it perpetuates the myth that law generally does not affect children's lives and that, when it does, it is largely a subset of family law.

Second, the authorities framework fails to fully examine the effects of its myopic focus on the hierarchical parent-child relationship. The authorities framework posits the parent-child relationship and parental authority as natural and preexisting, with law entering the relationship only when courts or government agencies explicitly intervene. Yet both the recognition of the parent-child relationship and the grant of parental rights are state decisions.<sup>99</sup> Parental authority also flows from laws specifying that children lack the legal capacity to make most decisions on their own.<sup>100</sup> Parental rights and family privacy are therefore always already "constituted and regulated by law, even if what is constituted includes a domain of autonomous judgment that can come into conflict with law."<sup>101</sup> In other words, a state's decision not to regulate most parent-child relationships is itself a form of regulation. By respecting parental rights and family privacy, law touches every child's life. This involvement constructs children as objects of parental control. By failing to recognize such regulation, the authorities framework perpetuates the myth that the law does not intervene in children's lives, both inaccurately describing family life and limiting the potential of law to better serve children's interests.

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98. See, e.g., Appleton, *supra* note 9, at 526-28; Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 287 (2006); Rosenbury, *supra* note 10, at 833-34; Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1109-10 (2012).

99. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 276 (1990) ("Rather than marking a boundary limiting state intervention in the family, laws governing the family define the kinds of families the state approves."); Dailey, *supra* note 91, at 1000.

100. See Minow, *supra* note 68, at 4.

101. JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 352 (1994).

4. *Reliance on Limited Conceptions of Dependency and Autonomy*

Finally, the authorities framework fails on its own terms to the extent it embraces limited conceptions of dependency and autonomy. Its consistent focus on children as developing persons produces a system premised on a greater degree of dependency than children may actually experience.<sup>102</sup> Moreover, some forms of children's dependency are direct consequences of the law, forcing children to rely on their parents when they otherwise might not. For example, because children generally are not permitted to engage in wage labor<sup>103</sup> or to consent to medical care,<sup>104</sup> they are dependent on adults to perform those functions for them. In this respect, a child's legal status as a "child" overrides all other potentially relevant individualized factors, like the actual age, maturity, or dependency of the particular child.<sup>105</sup>

Here it may be useful to consider how law has both addressed and constructed dependency in other contexts. Disability, for example, is an apparently objective condition that nonetheless has been shaped by the law's ability-disability binary in profound ways.<sup>106</sup> An impairment is constructed as a disability only against law's assessment of what it means to be "able-bodied." Marital status, too, once constructed dependency by conferring virtually all legal rights on husbands, purportedly for the benefit and protection of wives.<sup>107</sup> Although this legal regime was, in part, a response to dependencies arising from childbearing and childrearing, that response also shaped perceptions of women's abilities both

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102. See BARRIE THORNE, *GENDER PLAY: GIRLS AND BOYS IN SCHOOL* 3 (1993) ("[T]he concept of 'socialization' moves mostly in one direction. Adults are said to socialize children, teachers socialize students, the more powerful socialize, and the less powerful get socialized. Power, indeed, is central to all these relationships, but children, students, the less powerful are by no means passive or without agency.").

103. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

104. Children generally need their parents' consent for medical care, although exceptions have been made in the context of "mature minors," as well as the treatment of alcoholism, drug addiction, sexually transmitted diseases, and other similar contexts. See, e.g., Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right To Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1 (1996); Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311.

105. See Minow, *supra* note 68; Minow, *supra* note 13.

106. See generally Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347 (2011).

107. See Note, *To Have and To Hold: The Marital Rape Exception and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 n.11 (1986) ("Before the passage of the Married Women's Property Acts, a married woman was unable to sue or be sued, enter into contracts, make wills, retain her own earnings, or manage her own property.").

in and out of the home. By virtue of law, women were thought to lack the constitution to work long hours in factories and the capacity to vote. It took centuries for courts and legislatures to reject these limitations as legal and social constructs not reflective of real differences between men and women.<sup>108</sup> Today, the law of marriage and divorce continues to respond to the dependencies of childbearing and childrearing, but in a way that better reflects the coexistence of dependence and autonomy with respect to both spouses.<sup>109</sup>

Children's dependencies, of course, are much more a function of biological age or maturity than are the dependencies of spouses or people with disabilities. At birth, children are completely dependent on adults, and only over time do they acquire the mental and physical capabilities to pursue more independent courses of action. Yet the dependency of infants and young children masks important aspects of children's experiences that are not controlled by their developmental status. And by relying on a one-dimensional understanding of children as either dependent or autonomous beings, the authorities framework fails to recognize and value children's capacities as agents of their own lives even at relatively young ages.<sup>110</sup>

The authorities framework also offers an impoverished conception of autonomy. Under that framework, autonomy acts as an on-off switch, obscuring the fact that certain capacities for independent thought and action – what we might call “agency” – often exist alongside dependency.<sup>111</sup> Consider an especially stark example: the case of a young adolescent girl who herself becomes a mother. In most states, she will be considered a dependent vis-à-vis her own parents – without power, for example, to make educational decisions for herself. But she will nevertheless likely have parental control over healthcare decisions for her baby. Similarly, children might have strongly held views about bodily privacy or about their choice of friends in school, despite being dependent on their parents in other ways. The authorities framework leaves little room for law to develop a

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108. See Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 2.

109. See, e.g., Laura A. Rosenbury, *Two Ways To End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (discussing the partnership theory of marriage).

110. See THORNE, *supra* note 102, at 3; Prout & James, *supra* note 76, at 8; Buss, *supra* note 10, at 34.

111. Scott, *supra* note 76, at 547; see also Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1627 (1992) (discussing the scientific evidence on adolescent decision-making competence).

vision of children's agency within multidimensional relationships of which their dependency is only one small part.<sup>112</sup>

Moreover, autonomy as a basis for children's rights goes only so far. The authorities framework presumes that autonomous decision making is the precondition for children's rights. In this way, the framework defines children's rights just as constitutional law defines adult rights – as negative liberties protecting a sphere of autonomous decision-making.<sup>113</sup> So long as children are treated as dependents, they are presumptively excluded from the class of rights-holders.<sup>114</sup> The authorities framework thus fails to acknowledge an alternative, positive conception of rights better suited to furthering children's unique interests as children. This exclusive focus on negative liberty provides yet another reason why the United States remains the only member nation not to ratify the U.N. Convention on the Rights of the Child,<sup>115</sup> a treaty granting children affirmative rights to certain fundamental goods such as healthcare, education, and housing.

Notably missing from the authorities framework, then, is any robust, comprehensive vision of children's affirmative rights. At the state level, children may claim the right to education, but not much else.<sup>116</sup> Almost all governmental goods and services are governmental benefits – as opposed to entitlements – extended at the discretion of the state.<sup>117</sup> The authorities framework's equation of rights with autonomy excludes children's affirmative claims to maintain certain relationships or to receive certain services and goods to secure their present and future well-being. In fact, the Supreme Court has made it exceedingly clear that the U.S. Constitution confers no affirmative entitlements on children,<sup>118</sup> a position directly at odds with the broader interests of children set forth in Part II and the new framework we propose in Part III.

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112. At the same time, the authorities framework also fails to recognize the dependency of adults. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2182 (1995).

113. American constitutional law remains strongly wedded to the view that the Constitution is a charter of negative liberties, bestowing few positive rights on anyone – adults or children. As Anne Alstott writes, “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.” Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 25 (2014).

114. See DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 54 (2d ed. 2004); JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 291-92 (2006); *THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984).

115. See *supra* note 93.

116. See *infra* text accompanying notes 172-174.

117. See, e.g., Alstott, *supra* note 113, at 41-42.

118. *Id.*; see also *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

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The authorities framework does more than fail to reflect certain features of children's lives; it also shapes children's lives by signaling that aspects of their lives beyond dependency and autonomy are, or should be, unimportant to children, parents, and the state. The authorities framework therefore constitutes children as lesser adults, leading to a legal regime grounded in a distorted vision of children's lives, parental rights, and the potential for state support of families.

As we explain in the next Part, law can and should expand its conception of children's interests beyond dependency and autonomy. While children are diverse in many ways, they share relational interests beyond hierarchical relationships of control. All children have present, noninstrumental interests, desires, experiences, and needs. By moving beyond the authorities framework's shortcomings, a broader conception of children's lives in the here and now comes into view.

## II. CHILDREN'S INTERESTS IN THE HERE AND NOW

The new law of the child set forth in the rest of this Article demonstrates why law should, as a prescriptive matter, regulate children's lives based on a clearly articulated, broad range of children's interests. Our analysis is powered by a vision of children living meaningful lives in the here and now—a vision drawn from developmental literature, scholarship on children and law, and what we take to be the best of judicial decision making. Children's lives encompass an array of experiences outside the developmental trajectory that moves children from dependency to autonomy. This Part identifies these broader, more inclusive interests, specifying the nuanced ways in which they intersect with—but often transcend—dependency and autonomy concerns.

This Part identifies five fundamental interests that we believe best capture children's experience in the here and now. These are children's interests in: (1) parental and nonparental relationships; (2) exposure to new ideas; (3) expressions of identity; (4) personal integrity and privacy; and (5) participation in civic life. These five interests are not meant to be exhaustive, but rather to serve as a starting point for further inquiry by courts, legislatures, and scholars. We are cognizant of the fact that any compilation of children's interests cannot be definitive or absolute. What we present here is a provisional account, open to debate and revision. By setting forth our best rendering of children's broader interests, we hope to stimulate that debate.

The discussion that follows acknowledges and embraces diversity among children. Children's interests vary from child to child, are deeply situational, and change with the passage of time. The authorities framework's narrow focus on



parental rights and children's dependency has prevented law from more fully attending to children's differences. Parental rights in particular, while justified in part on the ground that freedom from governmental control will promote family diversity and social pluralism,<sup>119</sup> reinforce a norm of governmental nonintervention that prevents law from recognizing differing needs and privileges among children. Children's economic, racial, religious, gender, and other differences are lost under a legal framework designed to promote adult authority over all else. Our approach, in contrast, resists the impulse to essentialize children or parents, instead acknowledging the diverse ways children experience the interests we identify.

In articulating children's broader interests in the here and now, this Part lays the foundation for a radical reworking of the field of children and law while also reinvigorating existing standards. As explained in Part I, the authorities framework's narrow conception of children's interests has produced a weak and largely ineffectual "best interests of the child" standard that typically gives way in the face of parental rights. Our approach aims to transform the best interests standard into a robust mechanism for evaluating and weighing children's broader interests in legislative, administrative, and judicial decision making, with parental rights coming into play only to the extent that they advance those interests in a particular case.<sup>120</sup> Thus we retain the phrase "best interests standard" as a useful legal term that allows for balancing children's broad interests in the context of legislative, administrative, and judicial decision making.

Our account of children's lives resonates to some extent with the work of Joseph Goldstein, Anna Freud, and Albert Solnit in their path-breaking 1973 book, *Beyond the Best Interests of the Child*.<sup>121</sup> Like their approach to child custody "from the child's vantage point,"<sup>122</sup> our new law of the child seeks to go "beyond" the existing categories of autonomy and dependency to capture the richness, diversity, and uniqueness of children's experience as children. Although Goldstein, Freud, and Solnit importantly focused on children's emotional connections to

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119. See *supra* note 91.

120. Our approach shares certain attributes with the U.N. Convention on the Rights of the Child. However, the Convention – while focused on children's broad interests – makes no attempt to reconcile competing concerns, to organize children's interests into a coherent framework, or to explain how the application of the rights it conveys would be operationalized. Moreover, the Convention stays exclusively within a rights framework, whereas our approach promotes children's interests more broadly. Nevertheless, the new law of the child is in harmony with the U.N. Convention, and we would support ratification of the treaty by the United States.

121. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

122. *Id.* at 49.

others in light of children's sense of time and perspective on the world, they remained tied to a theory of development that emphasized children's relationship with their "psychological parent" above all others.<sup>123</sup> The new law of the child aims to revive Goldstein, Freud, and Solnit's child-centered, psychologically attuned perspective while at the same time recognizing the value of children's varying relationships and experiences. Ultimately, Goldstein, Freud, and Solnit did not break free of the authorities framework's emphasis on parents' rights as the touchstone for children and the law. It is precisely this paradigmatic centering of parental control that our new law of the child leaves behind.

We thus seek to directly promote the diversity of children's broader interests without sacrificing core legal protections for parental rights and family privacy. This Part first sets out the normative foundation for the recognition of these broader interests and then examines each of the five interests in turn.

#### *A. Normative Foundations*

Our vision of children's broader interests embodies prescriptive goals for children's lives under the law. We seek to better capture who children are in an empirical sense, but we also aim to build a normative account of children under the law. The new law of the child is attentive to parental rights and the developmental needs of children, while also focusing on children's distinct abilities, needs, and experiences as children. In particular, our approach recognizes and promotes children's capacities to develop relationships; explore the world of ideas; express their identities; feel secure in their bodily integrity and personal privacy; and be fulfilled through work and political engagement.

This elaboration of broader interests breaks free from the limitations of the authorities framework we identified in Part I. In addition to promoting children's broader interests, we draw attention to law's involvement in all dimensions of family life, beginning with legal definitions of childhood and the assignment of children to their biological parents' custody. The elaboration of children's broader interests also eschews easy binaries such as the dependency-autonomy polarity that currently structures the authorities framework. We emphasize that children experience agency within dependency, while acknowledging that children's present interests are always filtered through the lens of their future lives as adults.

To that end, we acknowledge the difficulty of labeling the interests we wish to promote. In many ways, they may be described as children's *present interests* in contrast to the developmental interests at the core of the authorities framework.

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123. *See id.* at 17-20.

Children have interests as children, separate from and in addition to their interest in developing into autonomous adults.<sup>124</sup> At the same time, describing these interests as present interests risks setting up a false binary between present and future interests. Children, like adults, experience the present while looking toward the future.<sup>125</sup> They experience a range of emotions and pursue a range of purposes, some of which are related to the concerns and aspirations of their future selves as they are imagined in the present. By emphasizing that children's present and future interests are inextricably linked, the new law of the child helps to unseat the prevailing dependency-autonomy binary, whereby children are viewed either as dependent on adults or as autonomous individuals nearing adulthood.

We thus refer to the broad range of children's interests presented in this Part as children's "broader interests" or "interests in the here and now." Of course, children's developmental needs and experiences – their interest in becoming future adults – are not excluded from our analysis. But, while developmental concerns are relevant and should be taken into account, adult autonomy is not the endpoint of the analysis nor the only foundation for children's rights. We therefore distinguish our analysis from that of commentators emphasizing children's right to an "open future."<sup>126</sup> These commentators focus on eliminating barriers to children's future choices as adults, but they fail to recognize that children also have robust interests in the here and now, well before those futures are realized.

Our account of children's broader interests aligns with fundamental commitments and aspirations already embedded in American law and legal discourse.

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124. See, e.g., CHRIS JENKS, *CHILDHOOD* 32-51 (1996).

125. In fact, given existing social and legal conceptions of childhood, it would be impossible for children to experience the present without regard to their future as adults because their very classification as children is defined against that eventual status. See, e.g., Leena Alanen, *Generational Order*, in *THE PALGRAVE HANDBOOK OF CHILDHOOD STUDIES* 159 (Jens Qvortrup, William A. Corsaro & Michael-Sebastian Honig eds., 2009); Maria Grahn-Farley, *A Theory of Child Rights*, 57 *U. MIAMI L. REV.* 867, 871-74 (2003).

126. See, e.g., Dena S. Davis, *The Child's Right to an Open Future: Yoder and Beyond*, 26 *CAP. U. L. REV.* 93 (1997); John Eekelaar, *The Emergence of Children's Rights*, 6 *OXFORD J. LEGAL STUD.* 161, 170 (1986) (arguing that children's rights should reflect the idea that children's "capacities are to be developed to their best advantage"); Joel Feinberg, *The Child's Right to an Open Future*, in *WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124, 125-26 (William Aiken & Hugh LaFollette eds., 1980) (identifying children's "rights-in-trust" or "anticipatory autonomy rights," defined as a child's right "to have . . . future options kept open until he is a fully formed self-determining adult capable of deciding among them"). Justice Douglas, in his famous dissent in *Yoder*, foreshadowed these "future rights" theories when he proclaimed that "the future of the student" was imperiled by the majority's decision to allow the Amish to keep their children out of school beyond the sixth grade. *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting).

Recognition of the central value of intimate relationships in human affairs has a long history in constitutional law and commentary.<sup>127</sup> Law has come to define the sphere of adult intimate relationships in terms of parenting, sexuality, and marriage; this normative understanding of relationships as central to human flourishing applies equally if not more so to children. Similarly, children's interest in exposure to new ideas resonates with many of the same values underlying adults' rights to free expression and access to ideas.<sup>128</sup> Adult interests in bodily integrity and personal privacy – interests that children share – are also an established fixture of American law.<sup>129</sup> And the right to participate in civic life, most notably through voting, has a long, albeit contested, history in which children can and should be recognized.<sup>130</sup>

To be clear, we do not simply seek to transfer a regime of adult liberal values to children. Our normative account of children's interests goes well beyond an understanding of the core values that animate law's regulation of persons more generally. The governing liberal ideal for adults – the principle of individual autonomy – plays a lesser role in our scheme of children's interests. In contrast to

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127. Beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court has focused on the realm of intimate relationships as a core protected sphere under the Due Process Clause. Commentators, too, have offered a normative defense of a right of intimate association under the First Amendment. See, e.g., Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 629-37 (1980). More recently, the Court has recognized the right of same-sex couples to engage in sexual activity, see *Lawrence v. Texas*, 539 U.S. 558 (2003), and to marry, see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). And parental rights, while protecting a realm of adult authority, also reflect the value of intimate relationships in adult life. See Buss, *supra* note 13, at 655-56.
128. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers."); Thomas I. Emerson, *Legal Foundations of the Right To Know*, 1976 WASH. U. L.Q. 1, 4; William E. Lee, *The Supreme Court and the Right To Receive Expression*, 1987 SUP. CT. REV. 303, 323-26.
129. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. 479 (1965); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-99 (1989); see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (upholding a state law requiring clear and convincing evidence of a patient's wishes for removal of life support).
130. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (invalidating a statute that limited voting rights based on taxable real property owners and parents or guardians of children enrolled in public schools); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (finding a state poll tax unconstitutional); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that two proposals to apportion seats in the state legislature violated the Fourteenth Amendment's Equal Protection Clause); see also ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (describing the role of shifting ideologies in contestations over the right to vote in the United States).

the authorities framework's focus on children's attainment of autonomy, we envision children's lives freed from the ideal of the autonomous, freely acting adult individual. We elaborate a new law of the child that better reflects the full breadth of children's experiences in the here and now, as children and not simply as future autonomous adults. Some of these interests resonate with the interests of adults, but some are distinct to children's interests.

The new law of the child thus exposes an unresolved conundrum within traditional liberal theory: how to account for the interests of children under a legal regime organized around the fundamental principle of individual autonomy.<sup>131</sup> Our approach pushes the liberal legal framework to its limits – or even beyond – by insisting that children's interests be given priority over adult autonomy rights.<sup>132</sup> We also break free from a single-minded devotion to a choice framework of rights rooted in the liberal legal ideal of individual autonomy. Older adolescents may lay claim to modified autonomy rights – what we call agency rights – but autonomy is not the central concern under our new law of the child. Instead, we aim to tie children's rights to adult responsibilities, opening up avenues for recognizing children's affirmative entitlements to certain goods, services, and access to ideas and people in their lives.

Our new framework thus seeks to build a different normative account of children's lives that gives rise to new ways of imagining the law's regulation of children. This normative account will be contested; we aim here only to open a dialogue rather than to impose a final, authoritative statement of children's treatment in law. Nevertheless, the framework we offer is more than simply one alternative among many for promoting the interests of children. The new law of the child represents our best attempt to engender a legal regime that values children as full persons with broad interests and rights of their own.

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131. Rawlsian liberal theorists might argue that the parties in the original position were all once children themselves, and therefore children's interests are taken into account vicariously. But these parties were children *in the past*; the theory does not explain why they would take children's interests into account *in the here and now*. Rawls himself appears to have excluded children from the original position. See JOHN RAWLS, *A THEORY OF JUSTICE* 183 (rev. ed. 1999) (describing paternalism as the responsibility to “[c]hoose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally”).

132. Our new law of the child might be understood as a reform of classic liberalism or a rejection altogether – an issue we do not resolve here. For an effort to reform classic liberal theory, see ANNE ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* 75-100, 141-52 (2004); and Dailey, *supra* note 13. Cf. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 805 (1999) (“It remains an open question whether the feminist influences I describe will, in fact, ‘reconstruct’ liberal autonomy, or transform it into something else altogether.”).

### B. Children's Five Broader Interests

The new law of the child expands law's reach to incorporate a broader range of interests in the here and now beyond the dependency and autonomy interests already recognized by law. As already explained, these broader interests encompass developmental needs and goals, as children's present well-being cannot be neatly separated from their future aims. We identify and discuss five interests: (1) parental and nonparental relationships; (2) exposure to new ideas; (3) expressions of identity; (4) personal integrity and privacy; and (5) participation in civic life. These five broader interests are offered here in the spirit of opening a more focused and sustained dialogue over the present and future well-being of children.

#### 1. Parental and Nonparental Relationships

Our approach recognizes the importance of children developing a primary attachment relationship with at least one adult committed to their care over time.<sup>133</sup> Young children need emotional security and care to ensure their well-being and development, and the parent-child relationship is the first and primary attachment relationship in most children's lives. Ideally, parental or other custodial caregivers provide the conditions most likely to produce basic loving environments for children.<sup>134</sup> These attachment relationships have the potential to foster children's pleasure and propel their development in physical, emotional, and cognitive ways.

Law already vigorously protects the parent-child relationship,<sup>135</sup> yet it does so by consistently placing children at the bottom of the vertical parent-child re-

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133. See, e.g., ATTACHMENT THEORY AND RESEARCH: NEW DIRECTIONS AND EMERGING THEMES (Jeffrey A. Simpson & W. Stephen Rholes eds., 2015); GOLDSTEIN, FREUD & SOLNIT, *supra* note 121 (developing "psychological parent" theory based on attachment theory).

134. Some argue that parents and the state together have the responsibility to ensure that every child be loved. See, e.g., Luara Ferracioli, *The State's Duty To Ensure Children Are Loved*, 8 J. ETHICS & SOC. PHIL. 1, 15-18 (2014); see also Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 795-801 (2016) (arguing that the state should recognize a variety of caregiver-child relationships).

135. See *supra* Part I (critiquing family law's orientation towards authority over the child).

lationship, thus focusing primarily on children's developmental needs and interests.<sup>136</sup> This emphasis on hierarchical relationships undervalues the relationships children form with other children, including siblings and peers, as well as with noncustodial adults in their lives.

We value the parent-child relationship while also emphasizing that parents are not the only important persons in children's lives. Developmental researchers study the ways in which "[y]oung children experience their world as an environment of relationships, and these relationships affect virtually all aspects of their development."<sup>137</sup> Many relationships in children's lives are not defined by a legal right to control, as the parent-child relationship is, yet these diverse relationships are important to children's development. Other relationships are not necessarily tied to children's dependency or developmental needs, but they nonetheless play important roles in children's lives.

With a focus on children's broader range of relationships, the new law of the child positions children as more than passive recipients of adult childrearing. Rather than placing children at the bottom of hierarchical relationships of control, the new law of the child positions children as active participants at the center of a web of multiple relationships, including those with other adults, siblings, and peers.

*a. Relationships with Other Adults*

Many children live with adults who are not their legal parents, and all children interact with a diverse group of adults. Law currently recognizes the value of these relationships with other adults only to the extent that the adults are fulfilling a caregiving role similar to parents.<sup>138</sup> Stepparents, unmarried partners of

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136. See Rosenbury, *supra* note 10, at 833-34 (observing the "general principle" in family law that "absent abuse or other forms of perceived family default, parents enjoy almost complete authority over their children at home, whereas the state may exercise authority over children at school," and thus "[w]ith limited exceptions, children have few rights in either realm").

137. Nat'l Sci. Council on the Developing Child, *Young Children Develop in an Environment of Relationships* 1 (Harvard Ctr. on the Developing Child, Working Paper 1, 2004).

138. Beginning in the 1980s, family law scholars embarked on a law reform project designed to expand legal notions of the family to include all groups functioning as families even if they did not enjoy family status. For examples, see Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 287-88 (1992); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270-72 (1991); Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": *Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 576-84; and Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 279-80 (1990). Accordingly, states have increasingly recognized "de facto" parents as family members. See, e.g.,

legal parents, and a limited number of other adults playing caregiving roles in children's lives may therefore enjoy parent-like rights so long as they continue to function like parents.<sup>139</sup>

These relationships, while meaningful to many families, reinforce the importance of parental bonds to the exclusion of children's other relationships with adults.<sup>140</sup> Under the authorities framework, children's relationships with individuals other than their parents are fully within their parents' control. Because children are always within the custody of parents or the state, their relationships are always controlled by their custodians. Parents largely determine children's access to grandparents, former foster parents, paid caregivers, and even some noncustodial biological parents.<sup>141</sup>

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*Developments in the Law—The Law of Marriage and Family: Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2054-64 (2003); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2002) (defining a de facto parent as a parent who lived with the child and regularly performed a majority or a share of the care-taking functions "for reasons primarily other than financial compensation"). A few states also have permitted children to have three legal parents in limited situations. See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 16-22 (2008).

139. See, e.g., Doug NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017). Not all states have robustly recognized de facto parents, however. See Michelle E. Kelly, *De Facto Parents in Maryland: When Will the Law Recognize Their Rights?*, 46 U. BALT. L.F. 116 (2016); Emily R. Lipps, *Janice M. v. Margaret K.: Eliminating Same-Sex Parents' Rights To Raise Their Children by Eliminating the De Facto Parent Doctrine*, 68 MD. L. REV. 691 (2009). For unmarried same-sex couples as well as some unmarried different-sex couples using assisted reproductive technologies, only one individual will be genetically related to the child; an approach to parenthood that respects children's interests in these families will treat both individuals as parents from the moment of birth. Our primary concern here is with the legal treatment of children's relationships with adults who are not their intended parents.
140. The authorities framework also limits recognition of a child's parents to two persons. Our approach, which is focused on furthering children's interests, supports broadening children's legally recognized parental relationships beyond the traditional number of two.
141. See *Troxel v. Granville*, 530 U.S. 57 (2000) (denying grandparents access to children beyond that allowed by custodial mother); *id.* at 78 (Souter, J., concurring) (stating that parents have an interest in choosing their child's social companions, and therefore have a right to be free of "judicially compelled visitation" of grandparents over their objections); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (denying a biological father rights to a relationship with a child born to a mother married to another man); *Lehr v. Robertson*, 463 U.S. 248 (1983) (denying a biological father the right to veto an adoption when he lacked a developed relationship with the child); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (denying foster parents an adversarial hearing before children could be removed to another foster family); Hafen, *supra* note 96, at 617 (noting that, legally, parental power "prevail[s] over the claims of the state, other outsiders, and the children themselves unless there is some compelling justification for interference").



The new law of the child, in contrast, recognizes that relationships with other adults are central to children's lives and provide the opportunity for children to experience more egalitarian, non-instrumental interactions. Parental relationships, while crucial to a child's well-being and development, are in large part defined by children's needs and incapacities. Children's relationships with non-parental adults, in contrast, may instead center around play, activities, friendship, and other present-oriented aims. For example, children's lives may be greatly enriched by relationships with former foster parents and, for adopted children, by relationships with their biological parents. Children may also benefit from relationships with adults in mentoring roles such as teachers, counselors, and coaches; from relationships with professionals such as social workers, therapists, and doctors; and from relationships with noncustodial kin such as grandparents, aunts, and uncles. While many of these adults, such as grandparents, teachers, and therapists, do engage in caregiving activities, caregiving is not always the primary aim of these relationships. Instead these relationships often center around more egalitarian, noninstrumental interactions and shared activities like play.

Children's interests in forming and maintaining nonparental relationships may sometimes conflict with parents' interests in controlling the upbringing of their children. The authorities framework largely resolves this conflict by protecting parental rights to the exclusion of children's divergent interests. Concern for children's well-being underlies this robust protection of parental rights, as the state traditionally assumes children's interests coincide with those of their parents.<sup>142</sup> This may often be the case, but children may also have interests outside that zone of alignment. By taking children's broader interests seriously, the new law of the child supports giving children greater access to important adults in their lives, as set forth in more detail in Part III.

*b. Relationships with Other Children*

Children's relationships with other children also serve multiple purposes beyond developmental needs. From a very early age, children possess capacities that help them build relationships with siblings and peers. Children may create

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142. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *see also Troxel*, 530 U.S. at 67 (plurality opinion) (assuming that the children's interests coincided with the mother's interests in limiting paternal grandparent visitation); *Michael H.*, 491 U.S. at 131 (assuming that the daughter's interests coincided with the interests of the legally presumed father to the exclusion of the biological father); *Wisconsin v. Yoder*, 406 U.S. 205, 230-32 (1972) (assuming that children agreed with their parents' opposition to mandatory secondary education).

rich social worlds with other children both inside and outside the home and other parent-created spaces.<sup>143</sup>

Sibling relationships in particular are among children's most emotionally powerful and intimate relationships.<sup>144</sup> Siblings are a "fixture" in the family lives of children, and research demonstrates the important role that siblings play "as companions, confidantes, combatants, and as the focus of social comparisons."<sup>145</sup> Although sibling relationships are multifaceted and vary across cultures, "[t]hese relationships offer their own psychological benefits, including the potential for ameliorating the deficiencies and disturbances in the child-parent relationship."<sup>146</sup> Siblings engage in "pretend play," "shar[e] an imaginative world," and conjecture about the motivations of others, all of which are both developmentally laden and pleasure-seeking activities.<sup>147</sup>

Like sibling relationships, children's peer relationships can play a vital, positive role in their lives, fostering creative play, emotional attachment, and personal experimentation.<sup>148</sup> Peer relationships often expand and enhance children's present experiences while simultaneously stimulating their intellectual and emotional growth.<sup>149</sup> Over time, peer relationships also provide positive opportunities for group projects, sexual exploration, and other identity-forming activities.

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143. See THORNE, *supra* note 102, at 20.

144. See STEPHEN P. BANK & MICHAEL D. KAHN, *THE SIBLING BOND*, at xvii (2d ed. 1997); JUDY DUNN, *SISTERS AND BROTHERS* (1985); *SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN* (Michael E. Lamb & Brian Sutton-Smith eds., 1982); Jill Elaine Hasday, *Siblings in Law*, 65 *VAND. L. REV.* 897, 903-05 (2012) (discussing cases of siblings separated by adoption).

145. See Susan M. McHale et al., *Sibling Relationships and Influences in Childhood and Adolescence*, 74 *J. MARRIAGE & FAM.* 913, 913 (2012).

146. SALMAN AKHTAR, *THE DAMAGED CORE: ORIGINS, DYNAMICS, MANIFESTATIONS, AND TREATMENT* 28 (2009); see also Salman Akhtar, *Early Relationships and Their Internalization*, in *THE AMERICAN PSYCHIATRIC PUBLISHING TEXTBOOK OF PSYCHOANALYSIS* 39, 46 (Ethel S. Person et al. eds., 2005) (arguing that sibling bonds can influence "evolving character traits" and exert lifelong impact on the choice of relationships).

147. See Judy Dunn, *Siblings*, in *THE CHILD: AN ENCYCLOPEDIA COMPANION* 902, 905 (Richard A. Shweder et al. eds., 2009).

148. Some researchers suggest that children's environments, including their peer relationships, play a much larger role in their personality development than does parental influence. See JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* 147-71 (1998); Judith Rich Harris, *Where Is the Child's Environment? A Group Socialization Theory of Development*, 102 *PSYCHOL. REV.* 458, 483 (1995).

149. See MARY GAUVAIN, *THE SOCIAL CONTEXT OF COGNITIVE DEVELOPMENT* 59-61 (2001). Research about children's learning styles increasingly emphasizes the ways that children may learn more from their classmates than from their teachers. See, e.g., *HOW PEOPLE LEARN*:

These relationships remind us that “adults are not the sole or even the primary influence on the lives of most children.”<sup>150</sup> Children’s sibling and peer relationships often enable them to experience unique pleasures and purposes outside of hierarchical relationships, even while they are simultaneously subject to parental or other adult control.<sup>151</sup> Children may play a role in the lives of other children in a way that does not depend on adult or state power, yet which is also made possible – or impossible – by that power.<sup>152</sup> For example, children are dependent on the state or private adults for structuring the social contexts of schools and other youth organizations and for providing the material conditions (such as transportation, clothing, and food) that enable them to take advantage of those relationship-forming opportunities. Furthermore, children’s peer relationships are often segregated along class, gender, racial, and other identity lines, and parents, teachers, and other adults are in a position to encourage acceptance and integration.<sup>153</sup>

The authorities framework generally overlooks children’s interests in relationships with other children, even sibling relationships,<sup>154</sup> instead focusing on them only when they are derivative of the parent-child relationship. For example, if the parent-child relationship falls apart due to abuse or neglect, existing law focuses on repairing that relationship or finding a new parental relationship for the child.<sup>155</sup> Children’s interests in their sibling relationships are often secondary, valued only to the extent that they do not interfere with reunification or termination and adoption. Many states do not guarantee that siblings will live

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BRAIN, MIND, EXPERIENCE, AND SCHOOL (John D. Bransford et al. eds., 1999); Roger Passman, *Experiences with Student-Centered Teaching and Learning in High-Stakes Assessment Environments*, 122 EDUC. 189, 196 (2001).

150. Donna Elder, *Peers*, in THE CHILD: AN ENCYCLOPEDIA COMPANION, *supra* note 147, at 716.
151. Cf. Minow, *supra* note 13, at 297 (noting that the law could easily acknowledge that children need some forms of freedom but also need “guidance, involvement, support, and even control to protect them from harms against which they cannot protect themselves”).
152. Cf. Leena Alanen, *Rethinking Childhood*, 31 ACTA SOCIOLOGICA 53, 58 (1988) (criticizing how the “intentions and interests of children as participants in their own socialization are effectively excluded” in much sociological discourse about children).
153. See BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?”: AND OTHER CONVERSATIONS ABOUT RACE 52-74 (1997); DANIEL YON, ELUSIVE CULTURE: SCHOOLING, RACE, AND IDENTITY IN GLOBAL TIMES 29-31 (2000).
154. See Hasday, *supra* note 144, at 902 (noting that “legal interest in sibling relationships is radically underdeveloped”). Inheritance law is an exception, although it tends to focus on adult siblings. See Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 369 (2012) (advocating for a legal regime that allows the children of donor parents to connect with one another); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 241-42 (2001).
155. See, e.g., 42 U.S.C. § 675(5)(E) (2012).

with one another once removed from the home, or that they will even be able to visit one another if they are adopted into different homes.<sup>156</sup> Rather than recognizing the intrinsic importance of sibling relationships, the law largely views them as a collateral consequence of the parent-child relationship.<sup>157</sup>

The authorities framework also largely renders invisible children's positive relationships with non-sibling peers, tending to treat peer relationships as sources of dangerous influence and pressure.<sup>158</sup> Of course, the law rightly authorizes state intervention designed to end harmful peer relationships. For example, the Supreme Court has interpreted Title IX to impose tort liability on schools that fail to protect students from harassment by other students on school grounds.<sup>159</sup> Many states and school districts also have adopted anti-bullying

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156. See DWYER, *supra* note 114, at 903, 983 (emphasizing that most states give “children no right to maintain a relationship with siblings who live in a different household”); Mary Anne Herick & Wendy Piccus, *Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System*, 27 CHILD. & YOUTH SERVS. REV. 845, 856 (2005). This contrasts with children's (albeit limited) rights to maintain relationships with parents. David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1119 & n.10 (2003).

157. A few state legislatures have given more attention to prioritizing the preservation of sibling relationships when the state assumes physical custody over children upon a finding of abuse or neglect. See CAL. WELF. & INST. CODE § 16501.1(g) (West 2011); CONN. GEN. STAT. ANN. § 46b-129(j) (West 2009); MISS. CODE ANN. § 43-15-13(8)(h) (2015); N.H. REV. STAT. ANN. § 169-C:19-d (LexisNexis 2017); N.J. STAT. ANN. § 9:6B-4(f) (West 2013). And the federal government has attempted to promote sibling visitation during and after foster care. *Fostering Connections to Success and Increasing Adoptions Act of October 2008*, § 206, Pub. L. No. 110-351, 122 Stat. 3949, 3962 (codified at 42 U.S.C. § 671 (2012)). But these efforts are limited. See Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care To Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 10-20 (2011); Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 324, 333; Ellen Marrus, “Where Have You Been, Fran?": *The Right of Siblings to Seek Court Access To Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 995 (1999).

158. For example, this characterization is emphasized in juvenile sentencing decisions like *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (stating that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressures” in part because they “have less control, or less experience with control, over their own environment”), and in the First Amendment case, *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992) (“The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”).

159. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

statutes or policies<sup>160</sup> and have passed various forms of anti-gang legislation.<sup>161</sup> These laws are vitally important for children's safety and overall well-being. But they should not eclipse the ways in which children's positive peer relationships enrich their lives.

Other forms of state intervention target less obvious harms presumed to flow from children's interactions with other children outside of adult supervision. By passing curfew ordinances that limit the hours in which minors may congregate outside the home, states aim to prevent potential harm by controlling children's interactions with each other.<sup>162</sup> These regulations reinforce the primacy of the parent-child relationship while simultaneously positing children's relationships with other children as threatening and unsafe. Similar concerns may be found in generalized fears about peer pressure.<sup>163</sup>

Sexual relationships between children are often viewed as particularly threatening. Some states criminalize teen sexual behavior in the hope that potential sanctions will deter some children (generally boys) from pursuing sex, and will

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160. See, e.g., CONN. GEN. STAT. ANN. § 10-222d (West 2012). For an overview of state approaches, see DENA T. SACCO, AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS 11 (2012), [http://cyber.harvard.edu/sites/cyber.harvard.edu/files/State\\_Anti\\_bullying\\_Legislation\\_Overview.pdf](http://cyber.harvard.edu/sites/cyber.harvard.edu/files/State_Anti_bullying_Legislation_Overview.pdf) [<http://perma.cc/B9YE-X6VE>]. Such legislation generally responds to the ways bullying may threaten the state's ability to control children's learning environments, thus reinforcing the authorities framework. See, e.g., *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

161. See, e.g., CAL. PENAL CODE § 186.22 (West 2018); see also Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 32-33 (1998) (identifying other state anti-gang statutes). Such legislation is often motivated by fears that gangs will displace parental or state control over children. In Oklahoma, for instance, it is a misdemeanor to cause, aid, abet, or encourage a child to become a "runaway child," defined in reference to a parent or custodian's consent and knowledge. OKLA. STAT. ANN. tit. 21, § 856 (West 2015).

162. See Gregory Z. Chen, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 132 (1997). Children are generally permitted in public after curfew hours only when accompanied by a parent, when engaging in an organized activity approved of by a parent, or when running an errand for a parent. See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 540-41 (D.C. Cir. 1999) (en banc) (plurality); *Qutb v. Strauss*, 11 F.3d 488, 493-95 (5th Cir. 1993); *City of Panora v. Simmons*, 445 N.W.2d 363, 370 (Iowa 1989).

163. See, e.g., HARRIS, *supra* note 148, at 147-71. Many legal commentators are concerned with the dynamics of peer pressure. See, e.g., Karst, *supra* note 78, at 1002-11. But other commentators overlook it given their focus on parents and the state. See, e.g., Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 327 (2007) (emphasizing that "[t]wo major sources of assimilation demands on children are their parents and the state" without acknowledging that children can also assert assimilation demands on one another).

encourage other children (generally girls) to resist.<sup>164</sup> State laws also often stigmatize teenage reproduction while simultaneously denying adolescents the means to manage the reproductive and health consequences of sexual relationships. Some states, for example, pursue policies designed to isolate teenage mothers from other children by encouraging them to attend alternative educational programs,<sup>165</sup> or by segregating them from other children when they are in state custody.<sup>166</sup> Yet many states offer only limited sex education in public schools, and no state mandates that schools provide children with condoms or other forms of contraception.<sup>167</sup> Even when states acknowledge that adolescents are unlikely to defer sex, they focus on preventing this perceived harm rather than acknowledging the present positive experiences of sex for most adolescents. In contrast, the new law of the child takes account of children's broader interests in maintaining positive relationships with other children throughout childhood.

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164. See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 142-46 (2d ed. 2004) (detailing state "age of consent" laws); see also Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29 (1988) (arguing that the anti-sex rhetoric surrounding sex education does little to enhance the development of sexual responsibility and subjectivity in adolescents). The Bush Administration made the gendered assumptions beyond these laws explicit in both its marriage-promotion policies and its restrictions on federal sex education funding. See LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 135-38, 256-89 (2006). But children are often not prosecuted under such statutes. The few prosecutions that occur may be motivated by concerns about particular sexual practices, including those between same-sex partners and partners of different races and those that result in pregnancy. See, e.g., *Parents United for Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 978 F. Supp. 197 (E.D. Pa. 1997), *aff'd*, 148 F.3d 260 (3d Cir. 1998).
165. See Amber Hausenfluck, *A Pregnant Teenager's Right to Education in Texas*, 9 SCHOLAR 151, 169-83 (2006); Kate Giammarise, *Alternative-School Leader Helps Girls To Develop Life Skills*, BLADE (Sept. 18, 2008), <http://www.toledoblade.com/Education/2008/09/18/Alternative-school-leader-helps-girls-to-develop-life-skills.html> [<http://perma.cc/4HMC-LCYB>]. Some public school districts even operated separate schools for pregnant girls until relatively recently. See, e.g., Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES (May 24, 2007), <http://www.nytimes.com/2007/05/24/education/24educ.html> [<http://perma.cc/9ZWB-GJWS>].
166. See Lauren Silver, *Minding the Gap: Adolescent Mothers Navigate Child Welfare*, 82 SOC. SERV. REV. 615 (2008).
167. Some states have also charged children with violations of child pornography laws when they send sexually explicit texts to one another, even when they are sending their own images to their peers. See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505 (2008).

## 2. *Exposure to New Ideas*

Children also flourish emotionally and intellectually when they are exposed to new ideas. Of course, *all* ideas are new to an infant; we are focused primarily on children's access to ideas as they age. By "new ideas," we mean ideas different from those that a child encounters in the home; depending on the family, new ideas might, in fact, be socially traditional ideas. At times, these new ideas flow from the relationships described above, for it is through individuals outside the home that children discover new ideas. At other times, children are exposed to new ideas through group activities and other social settings beyond the family. For many children, teachers, mentors, peers, and extra-curricular activities may be the primary source of exposure to new ideas.

Exposure to new ideas furthers a range of children's interests, including intellectual learning, creative explorations, social pleasures, and new ways of viewing the world. The authorities framework recognizes some of these interests but generally values children's exposure to new ideas only to the extent it helps prepare children for future lives as autonomous adult citizens. As the Supreme Court noted in *Board of Education v. Pico*, "access [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."<sup>168</sup> As such, school officials may not impede children's access to library books simply because those officials believe such exposure would be harmful or foster discord.<sup>169</sup> In a similar vein, the Third Circuit has held that schools may not limit student speech on social networking sites if students did not intend for the speech to reach the school and there is no reasonable forecast that the speech would cause substantial disruption at school.<sup>170</sup>

The authorities framework thus protects children's exposure to new ideas if that exposure prepares children to become autonomous, mature, economically self-reliant members of a liberal democratic society. Children's interest in education therefore has been a bedrock of the field of children and law for close to a

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<sup>168</sup>. 457 U.S. 853, 868 (1982).

<sup>169</sup>. *See id.*; *see also* Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kans. 1995); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996 (W.D. Ark. 2003).

<sup>170</sup>. *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); *see also* Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842 (D. Minn. 2015) (holding that the school district could not expel a student for an online post about a teacher); T.V. *ex rel.* B.V. v. Smith-Green Community Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011) (holding that the defendant could not suspend students from extracurricular activities for posting provocative photographs on the internet).

century. Although the Supreme Court has held that education is not a fundamental interest protected by the U.S. Constitution,<sup>171</sup> every state guarantees a free public education,<sup>172</sup> and the Supreme Court in *Plyler v. Doe* held that this right must extend to undocumented immigrant children on the same terms as other children.<sup>173</sup> In reaching this conclusion, the Court relied on past decisions recognizing “public schools as a most vital civic institution for the preservation of a democratic system of government,”<sup>174</sup> and “as the primary vehicle for transmitting ‘the values on which our society rests.’”<sup>175</sup> The Court also relied on *Wisconsin v. Yoder* to emphasize that “education prepares individuals to be self-reliant and self-sufficient participants in society.”<sup>176</sup> Lower courts have addressed the states’ interest in exposing children to new ideas as conducive to “teaching fundamental values ‘essential to a democratic society,’” including tolerance.<sup>177</sup>

These developmental concerns are vitally important to children and their well-being, but they reflect only one dimension of the value of exposure to new ideas for children. The new law of the child emphasizes that exposure also broadens and enriches children’s experiences in the here and now. Children are stimulated by new ideas: they enjoy humor, learning, experimenting, and exploring. Even at very young ages, children possess a capacity for initiating rela-

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171. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

172. See, e.g., CONN. CONST., art. VIII, § 1. The Supreme Court has held that the Constitution does not impose obligations on states to fund public schools equally, see *Rodriguez*, 411 U.S. 1, but state constitutions often require more in the way of funding than the federal Constitution, see, e.g., CONN. CONST., art. VIII, § 4. Many state legislatures also have adopted public school funding formulas that require some degree of wealth-equalization across school districts. See Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1971-72 (2008).

173. See *Plyler v. Doe*, 457 U.S. 202 (1982); see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (offering a constitutional theory for educational adequacy).

174. *Plyler*, 457 U.S. at 221 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

175. *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)); see also *Rodriguez*, 411 U.S. at 37 (emphasizing that public schools “provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process” once they become adults).

176. *Plyler*, 457 U.S. at 222 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

177. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987).



tionships and activities and for choosing how to live their lives within the parameters given to them. They are young scientists as well as philosophers, investigating the world around them.<sup>178</sup>

Children's abilities to respond to new ideas may be different from those of adults, but they are no less important. Children's abilities are perhaps most clearly illustrated in the context of their pretend play, where children deploy heightened powers of imagination to create new worlds, to connect with and control other people, to learn that other people have minds, and to consider choices among varying alternatives.<sup>179</sup> Exposure to new ideas enriches this play, as children are given the tools to imagine new possibilities for their lives both in the present and for the future.

Of course, children's present interests in exposure to new ideas do not eclipse their developmental interests as future citizens. To the contrary, the two are intimately connected. Children's exposure to new ideas enriches the present in part because of its developmental thrust. Children's exploration of the world of ideas both nurtures their present needs and desires as children and helps prepare them to become adult members of a liberal polity that values individual autonomy, tolerance, and pluralism.<sup>180</sup> Acknowledging this interplay and fluidity between children's present and developmental interests strengthens the importance of children's exposure to new ideas.

Schools are crucial to the task of exposing children to new ideas, for as the Supreme Court has stated, the classroom is "peculiarly the 'marketplace of ideas.'"<sup>181</sup> Although public school children cannot be forced to recite the Pledge of Allegiance, or actively affirm any allegiance at all,<sup>182</sup> children may be required

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178. See ALLISON GOPNIK, *THE SCIENTIST IN THE CRIB: WHAT EARLY LEARNING TELLS US ABOUT THE MIND* (2000); Allison James, Andrew N. Meltzoff & Patricia K. Kuhl, *Children as Philosophers*, in *RETHINKING CHILDHOOD*, *supra* note 76.

179. See JANET W. ASTINGTON, PAUL L. HARRIS & DAVID R. OLSON, *DEVELOPING THEORIES OF MIND* (1988); PETER FONAGY ET AL., *AFFECT REGULATION, MENTALIZATION, AND THE DEVELOPMENT OF THE SELF* (2002). Play is not merely developmental but is also a part of children's current well-being and can help them process past experiences and traumas: "In metaphorically representing events that were originally threatening, children are able to take an active stance to control events in the reenactment, contributing a sense of empowerment or mastery over what was once unresolved and unsettling." Cindy Dell Clark, *Play Therapy*, *ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT* (2013), <http://www.child-encyclopedia.com/play/according-experts/play-therapy> [<http://perma.cc/VGZ6-JVB8>].

180. See *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir. 1987).

181. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 512 (1969).

182. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

to listen to or read material at odds with their (or their parents') beliefs.<sup>183</sup> Yet under the authorities framework, parents generally control the extent of children's access to ideas outside the home. For example, thirty-five states allow parents to withdraw their children from sex education classes.<sup>184</sup> Children are not even required to attend school: homeschooling is allowed in every state, and regulations are relatively minimal.<sup>185</sup>

How to strike the appropriate balance between fostering children's interests in the parent-child relationship and their interests in exposure to new ideas is not clear-cut, but such balance will never be achieved if children's broader interests are ignored. Children have developmental interests in becoming adult members of society while also having present interests in exposure to new ideas that foster their engagement in the world around them. Once these multiple interests are acknowledged, we then have the opportunity to better promote them, as set forth in more detail in Part III.

### 3. *Expressions of Identity*

A child's sense of self and belonging emerges early on and both strengthens and changes with age.<sup>186</sup> This evolving sense of identity is first and continuously forged through children's relationships with their parents, but children's identities are also always to some degree independent of parental influence.<sup>187</sup> Children, like adults, learn about themselves and others as they discover that people

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183. See Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 582 (1993).

184. See, e.g., ALASKA STAT. § 14.03.016 (2016).

185. See *Homeschooling Regulations by State*, PROPUBLICA (2015), <http://projects.propublica.org/graphics/homeschool> [<http://perma.cc/N8JV-SAJV>]; see also Timothy Brandon Waddell, Note, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Regulation of Homeschooling*, 63 VAND. L. REV. 541, 596-97 (2010) (discussing the relaxed regulation of homeschooling in many states).

186. See ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968). See generally Catherine R. Cooper, Rachel Behrens & Nancy M. Trinh, *Identity*, in *THE CHILD: AN ENCYCLOPEDIA COMPANION*, *supra* note 147, at 474-77; Elaine Reese et al., *Emerging Identities: Narrative and Self from Early Childhood to Early Adolescence*, in *NARRATIVE DEVELOPMENT IN ADOLESCENCE: CREATING THE STORIED SELF* 23 (Kate C. McLean & Monisha Pasupathi eds., 2009).

187. Psychoanalysts traditionally describe this process of identity formation in Oedipal terms. See, e.g., ANNE C. DAILEY, *LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE* 212-15 (2017); Hans W. Loewald, *The Waning of the Oedipus Complex*, 27 J. AM. PSYCHOANALYTIC ASS'N 751, 757 (1979) ("[I]t is no exaggeration to say that the assumption of responsibility for one's own life and its conduct is in psychic reality tantamount to the murder of the parents, to the crime of parricide.").

in their lives possess diverse beliefs, affiliations, and lifestyles. Children also experience a range of emotions as they explore how they belong, or might belong, to various groups around them.<sup>188</sup> This exploration affects children's daily lives as much as it affects their futures, if not more.<sup>189</sup>

The authorities framework does not acknowledge that children have present interests in developing and expressing identities, commitments, and values. Instead, the authorities framework focuses on children's future identities as adults, suggesting that children's identities are on hold until they reach the age of majority,<sup>190</sup> and emphasizing concerns about parental indoctrination. In this view, parental indoctrination works because children lack the capacity to develop their own values and commitments.<sup>191</sup> To set limits on parental indoctrination, the authorities framework aims to keep aspects of children's character unformed until the age of majority, when young adults are able to choose who they are for themselves. Under the prevailing view, then, law often affirmatively denies children's interests in expressing their identities in favor of children's ultimate interests in becoming autonomous adult citizens.

Yet the idea that children's identity formation is on hold is obviously a fiction. Children from the earliest age have an evolving sense of identity that they express across multiple forums, including home, school, and the many spaces in between.<sup>192</sup> These expressions of identity implicate multiple intersecting traits,

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188. Catherine R. Cooper et al., *Beyond Demographic Categories: How Immigration, Ethnicity, and "Race" Matter for Children's Identities and Pathways Through School*, in DEVELOPMENTAL PATHWAYS THROUGH MIDDLE CHILDHOOD: RETHINKING CONTEXTS AND DIVERSITY AS RESOURCES 181, 200 (Catherine R. Cooper et al. eds., 2005).

189. See, e.g., THORNE, *supra* note 102, at 11-28; Anca Gheaus, *Unfinished Adults and Defective Children: On the Nature and Value of Childhood*, 9 J. ETHICS & SOC. PHIL. 1, 5-6, 8-14 (2015).

190. See, e.g., Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 363 (2007) ("The law presumes that parents will act in the best interest of their minor children, so that parents' decisions about whether a transgender adolescent will receive sex reassignment treatment can effectively act as 'an absolute, and possibly arbitrary, veto' over the adolescent's identity and physical self-determination until the adolescent turns eighteen."). The Supreme Court embraced this view in *Prince v. Massachusetts*, when it declared: "Parents may be free to become martyrs themselves. But they are not free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." 321 U.S. 158, 170 (1944).

191. Relatedly, philosopher Tamar Schapiro argues that children lack the capacity for moral agency, which justifies paternalistic behavior toward them. Tamar Schapiro, *What Is a Child?*, 109 ETHICS 715, 729-37 (1999).

192. See Rosenbury, *supra* note 10, at 841-46.

such as race, gender, class, religion, ethics, cultural affiliations, and sexual orientation, as well as political and social beliefs.<sup>193</sup> They also pervade children's daily lives, as debates about the right of transgender children to use the bathroom of their chosen gender at school reveal.<sup>194</sup>

The Supreme Court and social scientists have recognized that children's identities are more fluid than adults' identities, changing rapidly over time.<sup>195</sup> The Court's recent decisions on juvenile sentencing rely in part on developmental literature showing that "[t]he personality traits of juveniles are more transitory, less fixed."<sup>196</sup> As the Court stated in *Roper v. Simmons*, "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."<sup>197</sup> But this fluidity need not diminish children's present interests. Although children's characters undoubtedly evolve, the fact that they are transitory need not imply that they are not deserving of recognition or respect. Instead, space exists between formed and unformed characters, and children possess strong values and commitments in this liminal space.

Children have often asked courts to respect these present values and commitments, only to be rebuffed. For example, in *Prince*, nine-year old Betty Simmons sought to defend her right to distribute religious materials on the streets of Brockton, Massachusetts as an ordained minister of the Jehovah's Witness faith. The Supreme Court recognized "[t]he rights of children to exercise their religion."<sup>198</sup> Nevertheless, it held that Simmons had no right to express her religious identity in this manner because she had not "reached the age of full and legal discretion."<sup>199</sup> The Court at no point considered whether Simmons' religious beliefs were sincere or genuine despite her age. Although *Prince* is a relatively old case, courts continue to follow its lead. In 1972, the Court of Appeals of New York affirmed a finding of neglect where a Jehovah's Witness refused to

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193. See, e.g., Cooper et al., *supra* note 188; Diane N. Ruble et al., *The Development of a Sense of "We": The Emergence and Implications of Children's Collective Identity*, in *THE DEVELOPMENT OF THE SOCIAL SELF* (M. Bennet & F. Sani eds., 2004).

194. See, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017). Controversies over medical treatment for transgender children also implicate debates over gender identity in young children. See *supra* note 190.

195. See Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 361-62.

196. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)).

197. *Id.*

198. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

199. *Id.* at 170.

consent to a blood transfusion for her 15-year-old son.<sup>200</sup> The trial court did not consider the child's wishes in its opinion and explicitly declined to wait until the child could legally decide for himself.<sup>201</sup> In 2012, the Eastern District of California cited *Prince* when it dismissed children's claims that a statute barring conversion therapy (or "sexual orientation change efforts") violated their constitutional rights.<sup>202</sup>

At other times, courts have respected children's interests in expressing their identities and political views, but only to the extent those interests supported children's future development. In *Tinker*, for example, the Supreme Court upheld children's right to wear black armbands to school in protest of the Vietnam War.<sup>203</sup> A plurality of the Court justified its holding in part on the ground that recognizing children's free speech rights in school would help prepare them for adult citizenship: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ."<sup>204</sup> The Court thus recognized children's interests, but as citizens-in-waiting as opposed to full citizens in the present.

Some courts, however, have questioned the value of self-expression even in relation to children's development. For example, courts have permitted censorship in schools even when children are expressing political views, such as when Hispanic students in Texas were suspended for wearing "We Are Not Criminals" t-shirts and walking out of class in protest.<sup>205</sup> Courts are even more likely to permit censorship in schools when children are expressing identities that are not overtly political in nature. The Ninth Circuit held that a school could prohibit a student from wearing Marilyn Manson t-shirts,<sup>206</sup> for example, and some courts have upheld prohibitions on long<sup>207</sup> or braided<sup>208</sup> hair. Courts have generally dismissed children's interests in such expressions as frivolous or otherwise unimportant. Many children, however, are *most* concerned about visible aspects of

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200. *In re Sampson*, 278 N.E.2d 918 (N.Y. 1972).

201. *In re Sampson*, 317 N.Y.S.2d 641, 655-57 (Fam. Ct. 1970) (finding that the court cannot "shift the responsibility for the ultimate decision onto [the child's] shoulders").

202. *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1371-73 (E.D. Cal. 2012).

203. 393 U.S. 503 (1969).

204. *Id.* at 512.

205. *Madrid v. Anthony*, 510 F. Supp. 2d 425 (S.D. Tex. 2007).

206. *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000).

207. *See, e.g., Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972). *But see, e.g., Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970).

208. *See, e.g., Fenceroy v. Morehouse Par. Sch. Bd.*, No. Civ. A. 05-0480, 2006 WL 39255 (W.D. La. Jan. 6, 2006).

their identities, such as race, gender, and their emerging sexual identities, and they use hair styles, clothing, and choice of music to explore and express those aspects.<sup>209</sup> Law should better recognize and support children's expressions of all aspects of their identities. These expressions give voice to who children are as individuals at a particular time, enriching both their self-awareness and their acceptance of others who may differ.

#### 4. *Personal Integrity and Privacy*

Children also have interests in maintaining their bodily and emotional integrity and in shielding certain aspects of their bodies and lives from others.<sup>210</sup> These interests include safety from harm and freedom from unwanted intrusions. The authorities framework, through the current child welfare system, strives to protect some of these interests, specifically children's interests in being protected from unreasonable abuse and neglect and other acts of family violence.<sup>211</sup> The new law of the child supports those efforts but seeks both to focus them and move beyond them in order to promote children's broader interests in exercising control over their bodies and minds more generally.

From very early ages, children's evolving understandings of themselves are informed by changing bodily traits and capacities, such as height, weight, race, sex, disability, and physical prowess. As they undergo rapid physical changes, children's bodies play an important role in children's evolving identities and experience of the world. Children's bodies often represent milestones and otherwise mark time and development in ways that adult bodies do not.<sup>212</sup> Because of such differences, the new law of the child posits that children's bodies are worthy of protection above and beyond that provided to adult bodies.

The authorities framework often views children's bodily differences through the lens of disability, in keeping with its general view of children as lesser adults.<sup>213</sup> This view is grounded in physical reality to some extent, as most pre-adolescent children are physically smaller and weaker than most adults and their

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209. See, e.g., Clifford J. Rosky, *No Promo Hetero: Children's Right To Be Queer*, 35 CARDOZO L. REV. 425, 502, 510 (2013) (concluding that "[t]he Constitution protects every child's right to an open future in sexual and gender development—an equal liberty to be straight or queer").

210. See B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295 (2015).

211. See, e.g., JOHN E.B. MYERS, *A HISTORY OF CHILD PROTECTION IN AMERICA* (2004).

212. Adult bodies also change over time, albeit—with the exception of pregnancy—at a slower rate.

213. The invocation of disability—in contrast to a mythical concept of “normality”—has also been used to justify racial and gender inequality, as well as the systemic marginalization of children and adults with disabilities. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 36 (Paul K.

brains do not fully mature until around the age of twenty-five.<sup>214</sup> Yet children's bodies are not necessarily less capable than the bodies of adults. Children heal more quickly; they outperform adults in many athletic activities; their capacity for physical play is almost unmatched in adult life; and their bodies have the capacity to change dramatically through growth spurts, neuroplasticity, and hormonal surges.<sup>215</sup> Children's vulnerabilities therefore exist alongside unique physical and mental capacities. Viewing children as lesser adults narrowly construes children's interests in their bodies as largely limited to protection from harm.

The focus on preventing child maltreatment overshadows the many ways children's interests in personal integrity and privacy might be better promoted and protected. Indeed, by prioritizing parental rights and narrowly defining maltreatment, the authorities framework permits parental behavior that would otherwise violate the bodily integrity of adults. Children come into the world completely dependent on their caregivers, meaning that caregivers must have full and unfettered access to and control over children's bodies from birth. Some bodily "intrusions" are therefore initially acceptable and even necessary, such as holding, soothing, caressing, feeding, and bathing infants and young children. But the intrusiveness of bodily ministrations becomes more troublesome as a child grows older. Activities that are acceptable for an infant, such as bathings, feedings, or physical restraints, would raise serious concerns for a ten- or fifteen-year old. Although the authorities framework does take account of children's changing interests in bodily integrity and privacy, its deference to parental rights may leave children unprotected against harmful parental intrusions.

The new law of the child therefore recognizes a broader range of interests in personal integrity and privacy within the home. Aside from physical or sexual abuse, the authorities framework does not recognize such interests unless and until parental intrusions become a matter of public concern (for example, if parents start posting nude photographs of children online). Parents may consent to

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Longmore & Lauri Umansky eds., 2001). Challenging and dismantling these constructions is a project that spans more than one field of study.

214. See *State v. Sweet*, 879 N.W.2d 811, 815-16 (Iowa 2016).

215. See generally THE HANDBOOK OF CHILD PSYCHOLOGY (Richard M. Lerner ed., 6th ed. 2006) (detailing the various stages of children's psychological development); PETER R. HUTTENLOCHER, NEURAL PLASTICITY: THE EFFECTS OF ENVIRONMENT ON THE DEVELOPMENT OF THE CEREBRAL CORTEX (2002) (describing neural plasticity—the brain's ability to change in response to normal developmental processes, experience, and injury—in children and adults); CYNTHIA LIGHTFOOT & SHEILA R. COLE, THE DEVELOPMENT OF CHILDREN (7th ed. 2012) (examining child development as a process involving the whole child within multiple, mutually influencing contexts); LAURENCE STEINBERG, ADOLESCENCE (9th ed. 2010) (discussing biological, cognitive, and relationship changes during adolescence).

governmental searches of their children's bedrooms, and they may certainly search those bedrooms themselves.<sup>216</sup> Parental dissemination of private information about children's bodies – or children's lives more generally – also largely goes unchallenged.<sup>217</sup> In fact, it has become common practice for parents to detail children's lives on social media and in the mainstream press, often to further parents' own interests instead of those of their children.<sup>218</sup>

The new law of the child seeks to provide a framework for better balancing children's distinct interests in personal integrity and privacy against these parental interests. Potential conflicts are most likely to arise around issues relating to sexuality, reproductive healthcare, and abortion. For example, as discussed above, older children have interests in experimenting with sex, both to experience physical pleasure and to expand their understanding of connection and intimacy. Although statutory rape laws and sexting prohibitions make sense for young children, laws that prohibit teenagers from engaging in consensual sexual interactions with each other may interfere with their interests in learning about the sexual dimensions of their lives.<sup>219</sup>

Children also have interests in controlling the flow of information to their parents, especially when their actions and decisions may conflict with their parents' wishes. For example, children's chosen gender identities or sexual orientations might be known at school but not at home, and children have an interest in keeping it this way. Children may also seek to access certain types of healthcare on their own. Most states allow children to access mental health or drug counseling services without notifying their parents. In contrast, the state is free to

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216. See Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 70 (2011) (“[A] child obviously has no protection against the intrusion of his parents into his bedroom because the provision is meant only to protect the privacy of the individual against state actors.”).

217. See Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 847-54 (2017). Some parents' publicity has been extreme enough to attract widespread attention. Sally Mann, whose photography collection *Immediate Family* features portraits of her children nude and injured, is one example. Sally Mann, *Sally Mann's Exposure*, N.Y. TIMES MAG. (Apr. 16, 2015), <http://www.nytimes.com/2015/04/19/magazine/the-cost-of-sally-manns-exposure.html> [<http://perma.cc/G7DK-WRYB>]; Richard B. Woodward, *The Disturbing Photography of Sally Mann*, N.Y. TIMES MAG. (Sept. 27, 1992), <http://www.nytimes.com/1992/09/27/magazine/the-disturbing-photography-of-sally-mann.html> [<http://perma.cc/DAN7-3U3X>].

218. See Steinberg, *supra* note 217, at 847-54.

219. See, e.g., JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951 (2011); Lawrence G. Walters, *How To Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98 (2010).



impose parental notification or consent requirements on children seeking to terminate a pregnancy, so long as it provides a process for judicial bypass.<sup>220</sup> Thus, in states with notification or consent statutes, a child will be forced to disclose her pregnancy to either her parents or a judge.

Our approach questions how these practices affect children's broader interests in personal integrity and privacy, thereby attempting to bring those interests to center stage. Children currently enjoy almost no privacy rights vis-à-vis their parents, and instead must rely on parental decisions to respect their privacy interests.<sup>221</sup> More fully recognizing children's interests in personal integrity and privacy does not mean that all parental or state intrusions should be prohibited, but it will mandate different ways of balancing children's present and future interests against parental prerogatives, as set forth in Part III.

### 5. *Participation in Civic Life*

Finally, children have interests in interacting with society beyond the confines of family or school. Children's nonparental relationships further some of these interests, but children also have interests in participating in larger societal structures, including in the economy and in politics. The authorities framework almost entirely overlooks these interests when it assumes that children are largely confined to home, school, or rehabilitative settings until they become adults.<sup>222</sup> The traditional infancy defense is illustrative: pursuant to this defense, children are permitted to void contracts into which they otherwise validly entered before reaching the age of majority,<sup>223</sup> thus limiting a child's engagement in the world of commerce.

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220. *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion).

221. Emily Gold Waldman, *Show and Tell?: Students' Personal Lives, Schools, and Parents*, 47 CONN. L. REV. 699, 728-30 (2015) (summarizing case law establishing that children do not have privacy rights in relation to their parents).

222. See *supra* text accompanying note 97.

223. See RESTATEMENT (SECOND) OF CONTRACTS §§ 12(2)(b), 14 (AM. LAW INST. 1981). This doctrine has shifted to some extent as the authorities framework has come to recognize older children's autonomy in certain contexts. See Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1304 (2000) ("A clear, straightforward rule recognizing adolescent decisional ability to contract would be commensurate with the diligence, efficiency, and economic hallmarks of contract law and, perhaps more potently, cultivate its mainstream moral component—that promises ought to be kept."). For example, the *Restatement (Third) of Restitution and Unjust Enrichment* recently adopted a minority rule that requires contracting children to make restitution "as necessary to avoid unjust enrichment." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16(1), 33(1) (AM. LAW INST. 2011). This emerging view better recognizes and facilitates children's participation in

Yet almost all children attending school are exposed to aspects of civil society and politics and may seek to participate in them. Children's opportunities to engage in civic life are of utmost importance and often differ vastly for children based on their race, ethnicity, class, gender, sexual orientation, religion, and many other dimensions of children's lives. At least one recent case successfully grappled with this reality. In *Dancy v. McGinley*, the Second Circuit affirmed an award of emotional damages to Elting, a seventeen-year-old African American boy who was beaten by a police officer in the course of an arrest for a crime he did not commit.<sup>224</sup> Reflecting many of the concerns raised by the Black Lives Matter movement, the Second Circuit held that the award of \$115,000 in emotional damages was not excessive. The court noted that Elting's age was "of particular significance," since the event would have "a deeper and [more] lasting impact on a seventeen-year old than an adult."<sup>225</sup> More specifically, the court emphasized that the event had led Elting to lose "trust in the police," quoting Justice Sotomayor's description of "the talk" that "black and brown parents" must give their children to keep them safe from police violence.<sup>226</sup>

Children's broader interests as political actors, workers, consumers, and, more generally, agents in the world are varied and diverse across multiple dimensions.<sup>227</sup> For example, many children desire to engage in paid work, whether to enable consumption or to support their families. And almost all children seek to purchase goods or to influence the purchases of others. Nurturing and legitimizing these interests can lead to radical policy shifts.

Despite children's interests in participating in civic life, existing law excludes children from the quintessential means of doing so: they are denied the right to vote before they reach the age of eighteen.<sup>228</sup> Some believe that children's political interests are represented by their parents,<sup>229</sup> but parents neither receive more

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the market. Such reform is not motivated by children's present interests, however. Instead, it seeks to protect adult parties from the harsh consequences of the traditional infancy doctrine.

224. *Dancy v. McGinley*, 843 F.3d 93 (2d Cir. 2016).

225. *Id.* at 115.

226. *Id.* (quoting *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting)).

227. See, e.g., Aoife Daly, *Demonstrating Positive Obligations: Children's Rights and Peaceful Protest in International Law*, 45 GEO. WASH. INT'L L. REV. 763, 770 (2013) ("Children consistently express that they wish to have greater participation in political matters.").

228. See, e.g., Joshua A. Douglas, *The Right To Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1062-63 (2017). For an argument that children's criminal responsibility should be linked to their ability to vote, see GIDEON YAFFE, *THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY* (forthcoming 2018).

229. See, e.g., *Barnett v. Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("Children cannot vote, but their parents can."); *Barnett v. Daley*, 32 F.3d 1196, 1200 (7th Cir. 1994) ("Children are citi-

votes than other adults, nor are they permitted to vote by proxy on behalf of their children.<sup>230</sup> The conception of childhood citizenship is greatly constrained. To the extent that citizenship is intimately tied to the franchise, children may appropriately be viewed as citizens in waiting – or minor citizens – until the age of eighteen.

Recognizing children's present interests does not mean that children must be given full voting rights. Indeed, many children have no conception of voting and some would become the puppets of their parents or other adults in their lives. But our approach does make some proposals to extend voting rights to children less unrealistic. Andrew Rehfeld argues in favor of "fractional votes" for children beginning at age twelve. Like learners' permits for the franchise, such "[f]ractional shares would allow adolescents to internalize civic engagement at a time that their habits are forming and developing."<sup>231</sup> More than a dozen nations have lowered the voting age to sixteen for purposes of at least some elections, although no jurisdiction has permitted children under sixteen to vote.<sup>232</sup> Because the new law of the child acknowledges children's interests in civic participation, especially as they age, it opens the door to some, perhaps modified, voting rights for children.

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The foregoing discussion of children's five broader interests is meant to be neither definitive nor exhaustive. We invite further examination of children's interests in the here and now that more fully explicates children's experiences at multiple stages in their lives. Our assessment indicates, however, that children's broader interests will not be furthered by mere refinements to the authorities framework. A total restructuring of the field of children and law is required. In

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zens; their interests are entitled to be considered by politicians, and this is more likely to happen if total rather than voting-age population is used in determining compliance with the equal protection clause, as it is in taking the census. For then the voting power of parents of minor children is amplified, giving such children a modest measure of representation in the political process." (citations omitted)); Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children? Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 505 (2000) ("It is widely assumed that voters who are parents cast the single votes they now receive in part at least in pursuit of the interests of their children.").

230. For one proposal to institute such proxy voting, see Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463 (1998). For what such proxy voting may mean for American democracy, see Bennett, *supra* note 229, at 536-40.

231. Andrew Rehfeld, *The Child as Democratic Citizen*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 158-59 (2011); see also ARCHARD, *supra* note 114, at 70-74 (arguing that children should not be denied the right to vote); Paul E. Peterson, *An Immodest Proposal*, 121 DAEDALUS 151 (1992) (comparing the extent of social welfare programs and expenditures for children and the elderly, while noting that only the latter have the right to vote).

232. See Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1473-74 (2012).

the next Part, we elaborate a new tripartite framework that we believe offers the best opportunity for advancing children's broader interests.

### III. RELATIONSHIPS, RESPONSIBILITIES, RIGHTS: A NEW TRIPARTITE FRAMEWORK

The articulation of children's broader interests enables us to reimagine the field of children and law, recentring it around a tripartite framework of relationships, responsibilities, and rights. This restructuring rejects the authorities framework's preoccupation with assigning control over children to parents or the state. We aim to free the field from its current reliance on hierarchical relationships of control and the developmental concerns that drive them. Instead, our more coherent, integrated, and conceptually grounded structure is informed by the relationships that support children's broader interests, adult responsibilities to further those interests, and affirmative rights that best protect them.

By shifting the focal point from adult authority to children's interests, a more normatively compelling way to organize the field emerges, one that brings conceptual ordering to the legal rules that can and should further children's interests. We open with children's relationships because children's custodial status is the first and primary defining feature of children's relationship to the law. Yet we go beyond custodial relationships of authority to address the full range of children's relationships that should be recognized and protected by law. Next, we highlight the responsibilities that adults do and should have to children—not simply as a by-product of adult authority, but independent of and prior to claims of authority. And finally, we articulate the range of rights furthering children's interests, that is, not just rights of authority (parental rights; children's agency rights) but most importantly children's affirmative rights to goods and services.

This tripartite scheme, we believe, most clearly structures the law to advance the broader interests of children we identified in Part II. Our framework, however, is not the only way to organize the field of children and the law. This initial elaboration will benefit from debate and development by courts, legislators, agencies, and commentators moving forward.<sup>233</sup> For now, we emphasize that the new framework liberates the field from its traditional focus on allocating authority by location: home, school, and the juvenile justice system. Location still matters in our framework, but only as it informs legal rules relating to relationships, responsibilities, and rights. This new approach therefore moves toward the integration and consistency of legal rules across both place and time. The three

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233. Further refinement might especially address the differing stages of children's lives. For example, one might imagine sub-categories of doctrine based on infancy, early childhood, and adolescence.

organizing categories of relationships, responsibilities, and rights are neither fixed nor independent. Most legal issues affecting children implicate all three areas.

A rereading of the iconic case of *Parham v. J.R.*<sup>234</sup> highlights how our new framework differs from the authorities framework. In this case, children who had been committed to state-run psychiatric hospitals argued that the laws allowing parents to consent to their commitment violated their procedural due process rights. In place of parental consent, the children sought formal, adversarial hearings to determine whether they met the criteria for commitment. The Supreme Court assumed that the children had important interests at stake, including freedom from bodily restraint and avoidance of the stigma that might follow from commitment. The Court ultimately concluded, however, that an informal review by a “neutral factfinder” at the admitting institution was all that the Constitution required.<sup>235</sup> In reaching this conclusion, the Court invoked “Western civilization concepts of the family as a unit with broad parental authority over minor children,”<sup>236</sup> emphasizing that the law “historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children.”<sup>237</sup> The Court also noted that “[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.”<sup>238</sup> The Court’s analysis therefore embodied the authorities framework’s primary concern with assigning control over children to parents or the state. Accordingly, the Court’s limited consideration of children’s interests simply gave way to parental rights.

Our tripartite framework, in contrast, emphasizes many factors left unaddressed by the *Parham* Court: the responsibility of parents to make every effort to provide for noninstitutional care; the effect that commitment might have on a child’s sense of being loved and wanted; children’s interests in relationships with people other than their parents, including siblings and peers; the duty of mental health professionals to keep children out of institutional care unless necessary; and children’s interest in engaging with others in the world. When viewed in this way, *Parham* becomes less about authority over children and more about children’s relationships (with parents, doctors, siblings, and peers) intersecting with adult responsibilities to provide services to children, and the affirmative rights children may have to claim those services. A court applying our

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<sup>234.</sup> 442 U.S. 584 (1979).

<sup>235.</sup> *Id.* at 606-07.

<sup>236.</sup> *Id.* at 602.

<sup>237.</sup> *Id.*

<sup>238.</sup> *Id.* at 603.

framework would therefore likely conclude that children's broader interests justify both some kind of formal hearing as well as the provision of outpatient mental health services before commitment.

### A. Relationships

A broad range of relationships beyond parent-child relationships are deserving of the law's support because they are often essential to children's well-being, both in the present and over time. Support of such relationships will necessarily affect the current doctrine of parental rights, and we thus begin by analyzing how our framework would support children's relationships with their parents and then move to children's relationships more broadly. This Section draws heavily on children's broader interests in relationships as set out in Part II above, but also from the full array of children's interests to the extent nonparental relationships often further children's exposure to new ideas, development of identity, protection from harm, and participation in civic life.

#### 1. With Parents

The parent-child relationship is most children's first and primary relationship, often serving as a model for future relationships in their lives. Because of children's need for attachment and care, this early relationship is vital to children's present well-being as well as to their future development.<sup>239</sup> Our framework therefore seeks to foster healthy and ongoing relationships between children and their parents. To this extent, we embrace the authorities framework's assumption that children's interests are best served when their parental relationships are not disrupted by the state.<sup>240</sup>

At the same time, our framework also encompasses a more expansive conception of the parent-child relationship that goes beyond parental control of children's upbringing. Aspects of family law doctrine have suggested that parent-child interactions encompass more than parental authority,<sup>241</sup> but legal scholars

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239. See GOLDSTEIN, FREUD & SOLNIT, *supra* note 121, at 22 (offering a "psychological parent" theory).

240. See, e.g., Buss, *supra* note 13 (arguing that parental authority has strong constitutional protections).

241. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972) (Douglas, J., concurring in part and dissenting in part) (suggesting that Amish children might be able to veto their parents' educational decisions).

for the most part have not explored alternative conceptions of this relationship.<sup>242</sup> Even scholars who promote children's rights tend to focus on ways to reduce parental control rather than exploring conceptualizations of the parent-child relationship that go beyond control.<sup>243</sup> Our framework, in contrast, values parent-child relationships for how they enrich children's present lives as well as meet their developmental needs for care and guidance.

Our focus on the diverse ways parents enrich children's lives has several implications for the legal regulation of the parent-child relationship. In some instances, promoting children's broader interests in the parent-child relationship will better insulate parent-child relationships from disruption by the state. Existing laws in many states, for example, subsume parental failure to protect children from third-party harm into definitions of parental abuse or neglect.<sup>244</sup> Such conflation overly intrudes on the parent-child relationship by unduly extending the consequences of an abuse or neglect finding, including removal from the home on a finding of failure to protect.<sup>245</sup> We recognize concerns surrounding parental failure to protect children from third-party harm, but we distinguish that harm from direct parental harm. Most importantly, because the parent-child relationship is important to children's interests in the here and now, failure to protect a child from third-party harm should never be the sole basis for removing a child from the custody of a parent who is not directly harming the child. State intervention in this context should be geared toward alleviating the harm caused by the third party while preserving the parent-child relationship.<sup>246</sup>

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242. In contrast to the parent-child context, in the marriage context legal scholars *have* engaged in spirited theoretical discussions about the nature of marriage, playing a role in changing traditional conceptions of marriage within both scholarly discourse and how family law is practiced on the ground. See Rosenbury, *supra* note 109.

243. For one example, see Woodhouse, *From Property to Personhood*, *supra* note 15.

244. See, e.g., OKLA. STAT. ANN. tit. 10A, § 1-4-904(B)(9)-(10) (West 2009).

245. Existing law authorizes such removal in an effort to punish parents or to send a message that parents (often mothers) must take greater care in supervising their children. See Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure To Protect*, 50 LOY. L. REV. 565 (2004); Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 402-10 (2017) (discussing the "rule of motherhood" that "mothers must always protect"); Rebecca Ann Schernitzki, *What Kind of Mother Are You? The Relationship Between Motherhood, Battered Woman Syndrome and Missouri Law*, 56 J. MO. B. 50, 52 (2000) ("By strategically placing women into the categories of 'good mother' and 'bad mother,' society can easily advocate the position that bad mothers deserve to be punished when they 'allow their children to be abused' at the hands of another.").

246. Such intervention might include separating the child from the third party, providing counseling for both the parent and the child, or even some limited supervision of the home. If a parent fails to prevent or end the harm caused by the third party after this intervention, additional state intervention may be warranted under statutes and doctrine governing direct parental

At other times, situating the parent-child relationship within a larger web of children's relationships and interests will limit existing parental rights. Our framework weighs children's interests in having parents exercise exclusive control over their upbringing against children's interests in maintaining close ties to other children and adults, in being exposed to new ideas, in expressing their identity, in protecting their personal integrity and privacy, and in participating in civic life. This balancing of children's broader interests may limit some of the prerogatives that parents currently enjoy under the authorities framework.

For example, under the existing doctrine of parental rights, parents may control their children's social relationships, including by denying the visitation needed to maintain existing relationships. Our framework suggests that this prerogative should not be so absolute. Parents and other caregivers should have the right to exclude other adults from access to their children in their earliest months and years because children flourish when early attachment relationships are stable, secure, and long-term.<sup>247</sup> Yet as children grow, so too does their interest in life beyond the family. Children have independent interests—not derivative of third-party interests or rights—in developing and maintaining relationships with nonparental figures, such as other relatives, foster parents, stepparents, siblings, and other children.<sup>248</sup> Children's interests in maintaining such relationships may thus justify access to these third parties over the objection of custodial parents in proceedings brought by either adults or the state, such as divorce, immigration, visitation, or delinquency hearings.<sup>249</sup>

In these ways and more, our tripartite framework posits a more expansive conception of the parent-child relationship that goes beyond parental control of children's upbringing. By situating children's interests in maintaining the parent-child relationship within a larger web of relationships and interests, we value

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neglect. Until such direct maltreatment is established, however, children's interests in maintaining their relationships with parents should be paramount.

247. See 1-3 JOHN BOWLBY, ATTACHMENT AND LOSS (1997-98); GOLDSTEIN, FREUD & SOLNIT, *supra* 121.

248. AM. LAW INST., *supra* note 138, at 203.

249. See Buss, *supra* note 13. In such cases, judges should weigh the impact of recognizing these third-party relationships on the child's relationship with her parents. Such consideration may very well dictate different outcomes in cases like *Troxel* and *Michael H.* In *Troxel*, 530 U.S. 57 (2000), a court utilizing our framework might very well have found that the children's best interests lay with seeing the grandparents more often than the mother wanted, thus overriding her parental rights. Certainly, in *Michael H.*, 492 U.S. 937 (1989), where the biological father was denied any right to see his daughter, a court under our framework would carefully weigh the child's interest in maintaining a relationship she had already developed with her biological father along with her interest in her relationship with her mother.



parent-child relationships not in service to parental autonomy or control but because of the multiple ways these relationships further children's broader interests.

## 2. *With Children and Other Adults*

A focus on children's broader interests also opens the door to describing and reforming law's regulation of children's relationships with a range of other actors in children's lives. Our framework seeks to acknowledge and further children's interests in a range of relationships with siblings; peers; grandparents and other kin; former foster care parents; biological parents post-adoption; teachers, counselors, mentors, and coaches; and even certain professionals, including doctors, therapists, social workers, and lawyers.

To begin, recognizing and promoting children's relationships with other children is a core concern of our new framework. Part II describes how the authorities framework generally overlooks sibling relationships, although there are promising developments in this area. State legislatures and the federal government have begun efforts to preserve the sibling relationship when children are removed from the home.<sup>250</sup> While these developments should be applauded, our approach calls for an even more full-bodied recognition of the positive dimension of sibling relationships in the context of custody, foster care, removal, adoption, and immigration proceedings.

Our new framework also recognizes the importance of children's relationships with children who are not their siblings. Positive peer relationships are vital aspects of children's lives in the here and now.<sup>251</sup> They enrich and diversify children's experiences of forming and navigating relationships, help expose children to new ideas, and further children's exploration of their identities.<sup>252</sup> Past attempts to recognize these peer relationships have focused on children's autonomous desires to the exclusion of their other interests. For example, some scholars have suggested that at least older children should be extended the right to intimate association currently enjoyed by adults.<sup>253</sup> Scholars thus have urged that children should be permitted to maintain peer relationships even in the face

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250. See *supra* note 157.

251. See *supra* discussion in Part II.

252. See *supra* discussion in Part II.

253. Not all horizontal relationships between adults are affirmatively recognized by the state, but all are protected against undue state interference through the right to intimate association. This protection extends to non-sexual associations, including friendship. See Karst, *supra* note 127, at 629-37 & n.26; Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 202-03 (2007).

of parental disapproval.<sup>254</sup> Such rights-based proposals recognize children's interest in relationships with other children only when they are old enough to be sufficiently like adults, reinforcing most children's dependency to the exclusion of their present interests. Moreover, children's peer relationships generally require some assistance from parents, even if solely in the form of providing background conditions such as transportation and permission to leave the home.<sup>255</sup> Proposals to extend older children relationship rights ignore this critical difference when they ask the state to protect children's relationship choices against the wishes of their parents.<sup>256</sup> A relationship between two children that is against the will of the parents and is "left alone" by the state will often be impossible for the children to maintain.

Our framework therefore calls for new ways of recognizing and protecting children's peer relationships in some contexts. With respect to custody proceedings, for example, states could develop guidelines for considering children's peer relationships when a parent with primary custody of a child attempts to relocate against the wishes of the noncustodial parent.<sup>257</sup> Currently, judges in these cases typically evaluate children's best interests by considering what amounts to two factors: the potential benefits of the move for the custodial family and the child's ability to maintain ties with the nonrelocating parent.<sup>258</sup> Although children in

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254. As such, children would be able to appeal to a judge if their parents failed to respect those rights. See, e.g., DWYER, *supra* note 114, at 16-17; Meyer, *supra* note 156, at 1127-29.

255. Adult relationships, in contrast, generally require no assistance from third parties other than limited enablement from the state in the form of being left alone.

256. See, e.g., DWYER, *supra* note 114, at 94 (putting forward one version of children's relationship rights, modeled after those of incompetent adults, in which "the child would have a presumptive right to choose with which third parties he or she would associate, a right that a guardian could overcome only by showing that the child's choice would likely result in harm").

257. As in the abuse and neglect context, a consideration of children's horizontal relationships would rarely be dispositive of the issue at hand. Judges would still evaluate multiple factors beyond children's peer relationships to reach their relocation decisions, much like judges in abuse and neglect cases primarily focus on children's general safety and welfare when determining whether the state should remove a child from the home or terminate parental rights. But by addressing the ways such determinations affect children's peer relationships, judges would also recognize the ways children interact outside of parent-child relationships even as those vertical relationships govern large aspects of children's lives.

258. For a summary of these approaches, see generally *Ciesluk v. Ciesluk*, 113 P.3d 135 (Colo. 2005). This focus is generally true of the scholarly literature on relocation as well. Compare Judith S. Wallerstein & Tony J. Tanke, *To Move or Not To Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996) (arguing for a presumption in favor of relocation), with Joan B. Kelly & Michael E. Lamb, *Using Child Development Research To Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297 (2000) (reviewing research on the attachment processes, separation

these situations will also be moving away from other important individuals in their lives – including other children – judges generally do not take those potential losses into account when making relocation decisions.<sup>259</sup> Older children are often not even asked for their views about the move.<sup>260</sup> Under the new framework, judges might take into account children’s interests in maintaining such peer relationships as one factor in their relocation analysis. Such interests will rarely be dispositive, but they should be considered and protected when possible.

Our focus on a broader range of children’s relationships with other children is a clear departure from the authorities framework, but this focus does not necessitate significantly expanded state intervention in family life. There are multiple routes short of direct intervention that states might take to better facilitate children’s interactions with other children. For example, states could adopt educational curricula that emphasize the benefits of peer learning. States could also require public schools to open their doors for after-school youth activities, including those run largely by other children. Schools could begin peer mediation programs. Local governments could also create more playgrounds and other recreational spaces for children and ensure their security and safety.

The new law of the child also supports more fundamental shifts with respect to children’s relationships with adults other than their parents. Children’s relationships with paid caregivers might be recognized in certain contexts, for example. The authorities framework treats such relationships as mere employment relationships, ignoring the close bonds that children may form with their caregivers.<sup>261</sup> Our framework instead seeks to foster those bonds, although not necessarily by bestowing legally enforceable rights on paid caregivers. Instead,

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from attachment figures, and the roles of mothers and fathers in promoting psychosocial adjustment in children) and Richard A. Warshak, *Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited*, 34 *FAM. L.Q.* 83 (2000) (supporting a policy of encouraging both parents to remain in close proximity to their children, in opposition to Wallerstein). For an important exception, see Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 *U.C. DAVIS L. REV.* 1747 (2007), which details the relevance of the noncustodial parent’s mobility.

259. Other scholars have emphasized that these approaches to relocation do not adequately address children’s interests. See generally Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing To Do*, 27 *PACE L. REV.* 869, 902-04 (2007); Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 *FAM. L.Q.* 237, 262 (2006); Edwin J. Terry et al., *Relocation: Moving Forward or Moving Backward?*, 31 *TEX. TECH. L. REV.* 983, 1023-25 (2000); Weiner, *supra* note 258, at 1749-60. But these scholars have not acknowledged the potential harm to children’s relationships with other children.

260. See Elrod, *supra* note 259, at 902-04.

261. See Murray, *supra* note 90, at 387-94; Tali Schaefer, *Disposable Mothers: Paid In-Home Caretaking and the Regulation of Parenthood*, 19 *YALE J.L. & FEMINISM* 305, 322 (2008) (“[P]aid caretakers are excluded from challenging parental authority and control over their children and

courts might take into account children's interests in continued access to former caregivers when making custody and visitation decisions.

Our approach also better promotes children's interests in their relationships with foster parents. Under current law, foster parents – even where there are kinship ties or placement has been since infancy – have few rights.<sup>262</sup> The Supreme Court has indicated that any interest a foster parent might have is inferior to the interests of biological parents.<sup>263</sup> Yet these relationships are quite important from the perspective of the child.<sup>264</sup> When a child is placed in foster care at birth, or has resided with foster care parents for an extended period of time, the attachment to a foster parent from the child's point of view may be indistinguishable from the attachment to any other parental figure.<sup>265</sup> In such circumstances, efforts can and should be made to maintain a child's primary attachment, while at the same time recognizing the child's interest in maintaining ties to his or her biological parents. Foster parents are not a homogenous group; each case will present different issues depending on the type of proceeding, the kinship relationship, the duration of the foster care, and other factors. Our framework's child-centric approach does not guarantee that a child will always have access to a former foster parent, but rather that children's broader interests in these relationships will be taken into account when a court is determining custody or visitation issues.

The tripartite framework thereby situates children within a web of diverse relationships, each with the potential to further their well-being. These relationships go well beyond the parent-child relationship but by no means displace it. Unlike the authorities framework, the new law of the child aims to balance children's interests in maintaining close parental ties within a web of broader relationships.

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therefore pose no threat.”). For one exception, see Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed To Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 31 (2009), which argues that paid childcare providers should not be automatically excluded from petitioning for de facto legal status.

262. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846-47 (1977) (assuming but not holding that foster parents have a constitutionally protected interest in maintaining a relationship with their foster children).

263. *Id.*

264. See, e.g., Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 384 (1994) (“[C]ourts have neglected to examine the possibility and reality of a loving and caring relationship between a child and a legally unrelated adult and to preserve that relationship by employing a child-centered approach.”).

265. *Id.* at 383.

*B. Responsibilities*

Our framework next focuses on adult responsibilities for children, including the responsibilities of the state, parents, and other adults in children's lives. Under the authorities framework, the issue of adult responsibilities for children is left largely unexamined.<sup>266</sup> The state confers a range of benefits on children, but these are generally considered a matter of discretion rather than duty. To the extent the authorities framework addresses parental responsibilities, these duties are usually understood to be derivative of parental rights of control.<sup>267</sup> Indeed, parental rights often operate so as to prevent the articulation of adult duties to children. Parents are not tasked with specific responsibilities to their children—beyond providing basic necessities—in large part because spelling out parental duties is at odds with the freedom from governmental control that defines parental rights in the first place.<sup>268</sup>

The new tripartite framework, in contrast, addresses the multiple ways adult responsibilities for children can and should foster a collaborative relationship between parents and the state.<sup>269</sup> The authorities framework rests on the premise that parents have the fundamental due process right to direct their children's upbringing free from governmental control.<sup>270</sup> This underlying entitlement casts the relationship between parents and the state as predominately one of conflict.<sup>271</sup> Parents and the state become locked in battle for control over children, obscuring the possibility that parents and the state are and should be engaged in a joint enterprise of caregiving for children.

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266. Dailey, *supra* note 13, at 2169 (“The Supreme Court has recognized some affirmative constitutional rights . . . but for the most part the Constitution is treated as a charter of negative liberties.”).

267. The Supreme Court has recognized “[t]he linkage between parental duty and parental right,” quite clearly stating that “the rights of the parents are a counterpart of the responsibilities they have assumed.” *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). Parents carry the affirmative obligation to raise their children and are protected while doing so by the doctrine of parental rights. If parents lose their rights, they generally are relieved of the duty to support their children. For instance, the parent of an emancipated minor loses any duty to support the child at the same time that they lose their parental rights. *Emancipation*, BLACK’S LAW DICTIONARY (9th ed. 2009); see also Maria Roumiantseva, Note, *Because Parents Owe It to Them: Unaccompanied LGBTQ Youth Enforcing the Parental Duty of Support*, 16 CUNY L. REV. 363, 373-75 (2013).

268. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 100 (2014).

269. *Cf. id.* at 152.

270. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

271. See *infra* Section III.B.1.

Our emphasis on adult responsibilities shares some characteristics with scholarly approaches that analogize parents to trustees or otherwise reconceptualize the parent-child relationship as a fiduciary relationship.<sup>272</sup> Like our framework, a theory of parents as trustees or fiduciaries elevates children's interests over parental rights and focuses on parental duties. Yet trustee and fiduciary models have their limitations. Although the concept of trusteeship may be deployed to establish a legal obligation to put children's financial interests first, it does not address the totality of children's experiences. Similarly, a fiduciary model emphasizes parental responsibilities but does not specify the content of those responsibilities. More fundamentally, theories of trusteeship and fiduciary relationships function on a much smaller scale. While these theories remain narrowly focused on the parent-child relationship, our approach calls for a new way of thinking about adult responsibilities as part of a broader framework encompassing the relationships, responsibilities, and rights of children and the adults in their lives.

Other scholars focus on parental and state duties to care for children.<sup>273</sup> Yet these scholars argue for the importance of recognizing and developing law's treatment of children—particularly young children—as vulnerable individuals in need of support, care, and protection.<sup>274</sup> Although framed in terms of children's welfare or adult duties to children, the attention to hierarchical relationships of control continues unabated, as does the question of which adults—parents or state—carry responsibilities for children. These scholars do focus a certain amount of attention on children's needs rather than adult authority, but the prevailing emphasis on children's dependency is essentially unchallenged, pitting parents against the state in addressing children's needs.

Drawing on children's broader interests, our framework instead focuses on the shared responsibilities of parents and the state to (1) nurture healthy and safe relationships with parents and others; (2) educate children; (3) rehabilitate children who engage in misconduct; and (4) foster children's participation in the wider world. Of course, these areas of responsibility will often overlap. For example, caregiving also encompasses responses to children's misconduct, juvenile justice frequently intersects with education, and children's market participation

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272. See, e.g., Connie K. Beck et. al., *The Rights of Children: A Trust Model*, 46 *FORDHAM L. REV.* 669, (1978); Scott & Scott, *supra* note 13.

273. See, e.g., Buss, *supra* note 13.

274. WOODHOUSE, *supra* note 13.

implicates protection of their welfare. Taken together, these four spheres of responsibility highlight the many ways our framework seeks to promote shared parental-state duties toward children.<sup>275</sup>

### 1. *Caregiving and Protection*

Like the authorities framework, our framework assigns responsibility for children’s caregiving and protection to parents because the parental relationship, whether actual or inchoate, is vital to children’s present well-being and development.<sup>276</sup> Our approach emphasizes, however, that other adults, such as unmarried partners of legal parents, guardians, and stepparents, may also willingly take on responsibilities for children by developing actual caregiving relationships with them, either alongside parents or to fill gaps in the parent-child relationship. We also maintain the prevailing legal presumption that parents and these other custodial caregivers – rather than other adults or the state<sup>277</sup> – are strongly motivated to carry out primary caretaking duties and should provide physical, emotional, financial, and other support for children.

Additionally, our framework highlights that parents and custodial caregivers have a responsibility to allow and encourage children to develop relationships with peers and other adults, as identified in the previous Section. Although custodial relationships are crucial to children’s well-being and future development, custodians are unable to provide certain emotional, intellectual, and social benefits that children derive from relationships with adults and peers outside the family. The new framework therefore encourages parents and other custodians

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275. Most of these duties would fall to state and local governments. Federalism serves to protect against the risks of totalitarian authority that arise when a single government assumes exclusive control over children’s upbringing. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (rejecting the “power of the state to standardize its children”); see also Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1858 (1995) (defending state sovereignty over children’s rights). The federal government also has duties that specifically arise under the federal Constitution or statutes. Immigration, for example, is an area almost exclusively governed by federal law, although some immigration statutes look to state law. See *Special Immigrant Juvenile*, 8 C.F.R. § 204.11 (2016). But in almost all cases, the responsibilities for children’s caregiving, education, protection, and rehabilitation will be shared by federal and state governments. When we refer to “the state,” therefore, we mean to invoke all levels of governmental authority.

276. Cf. Buss, *supra* note 13, at 651 (arguing that “parental identity derives not from any set of individual characteristics, but rather from the parent-child relationship itself and, more particularly, the centrality of the relationship in the child’s life”).

277. See *id.* at 647 (noting that “the state’s knowledge of and commitment to any particular child is relatively thin”).

to loosen the reins of their authority as children grow, allowing children to expand their relationships in the broader world.

For example, parents have duties to protect children from harm. Our approach would raise questions about religious exemption laws that allow parents to deny medical care to children on the ground that it violates parents' religious beliefs.<sup>278</sup> Indeed, under the new tripartite framework, states might impose a duty on parents to certify that their children are seen by a medical professional at least once a year. Our approach would also interrogate more closely parental bodily intrusions, such as circumcision,<sup>279</sup> cosmetic surgery and hormone therapy,<sup>280</sup> and so-called normalization surgery for intersex infants,<sup>281</sup> each of which affect children's broader interests in personal integrity and the ways they experience their bodies.

The state also shares responsibility for ensuring that children are protected from harm in ways that do not unduly disrupt children's relationships with their primary caregivers and others.<sup>282</sup> Although state involvement in a child's custodial care is usually triggered by a breakdown in custodial care, and is perhaps rarely welcomed, our framework emphasizes that state intervention need not always be adversarial. State intervention can be – and often is – supportive of custodial relationships.<sup>283</sup> When primary caregivers struggle, state services should

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278. For an overview of religious exemption laws, see Aleksandra Sandstrom, *Most States Allow Religious Exemptions from Child Abuse and Neglect Laws*, PEW RESEARCH CTR. (Aug. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws> [<http://perma.cc/464C-Q5DX>].

279. See Peter W. Adler, *Is Circumcision Legal?*, 16 RICH. J.L. & PUB. INT. 439, 451-65 (2013); William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 340-43 (1984).

280. See Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 IND. L.J. 955, 959-65 (2010).

281. See *M.C. ex rel. Crawford v. Amrhein*, 598 Fed. App'x 143 (4th Cir. 2015) (dismissing an intersex plaintiff's complaint after normalization surgery because the child's rights were not clearly established); Robert Hupf, *Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital "Normalizing" Surgery*, 22 WM. & MARY J. WOMEN & L. 73 (2015).

282. Cf. *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982) ("[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds.").

283. Under existing child welfare laws, the state is required to make reasonable efforts to keep families together and bring about a rapid reunification where possible. Federal law also requires the state to take steps toward terminating parental rights after children have been in foster care for fifteen of the prior twenty-two months. After twenty-two months, a child's attachment might well develop with a new caretaker. See, e.g., Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (requiring that the state make



be provided to help parents improve their caregiving skills, rather than removing children from the home.<sup>284</sup> Although the risks of keeping children with abusive custodians are great, removal from nonabusive custodians also has potentially grave consequences,<sup>285</sup> particularly since children are often consequently removed from their network of siblings, relatives, friends, and peers. It is only when there is no real prospect of maintaining children's custodial attachments, or when their safety is clearly at risk, that removal from primary caregivers is warranted.<sup>286</sup> If the state must remove children, it should take steps to maintain children's ties to siblings, other relatives, stepparents, friends, and teachers.<sup>287</sup>

For the same reason, the state has a duty to take children's caregiving interests into account in other contexts as well. Criminal sentencing, for example, may seriously strain children's relationships with incarcerated caregivers,<sup>288</sup> as

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reasonable efforts to reunite families); Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L. Q. 393, 397-98 (2007); Lois A Weithorn, *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1512 (2012).

284. See HUNTINGTON, *supra* note 268, at 224 (“[T]he state needs to adopt a fundamentally different approach to family law that carefully targets intervention at the most critical junctures where families need support.”); ROBERTS, *supra* note 13, at 267-68 (“The very structure of child welfare is fundamentally flawed . . . . Instead of supporting families, it punishes them by taking children from their homes for placement in foster care. Redressing this racial harm requires placing greater control over child welfare services in Black communities, addressing the deprivation of poor and minority families, and eliminating the coercive function of a system that is supposed to serve them.”).
285. See Robert H. Mnookin, *Foster Care — In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).
286. See *Santosky*, 455 U.S. at 767 n.17 (“Any *parens patriae* interest in terminating the natural parents’ rights arises only at the dispositional phase, after the parents have been found unfit.” (emphasis omitted)). As emphasized in the previous Section, children should be removed from the home only when parents or custodians are directly harming children, rather than when they are failing to protect them from third-party harm. See *supra* text accompanying notes 244-246.
287. For example, foster care that emphasizes kinship placement may reflect, reinforce, and further children's basic attachment ties with their family of origin. See Megan M. O’Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key To Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427, 1451-52 (1998).
288. Incarceration separates the parent and child during the time of incarceration and, in many states, may be cause to terminate parental rights. See Deseriee A. Kennedy, “The Good Mother”: *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161 (2012).

may the deportation of parents under the federal immigration laws.<sup>289</sup> And treaties like the Hague Convention, which governs international custody disputes, may be applied in ways that disrupt custodial ties.<sup>290</sup>

Finally, our framework also affirms that many adults in the community other than caregivers or state actors have, or should have, legal obligations to protect children from harm. Existing law imposes affirmative duties to report child abuse and neglect on teachers, doctors, nurses, therapists, and other professionals.<sup>291</sup> Lawyers for minor children have special duties, as do guardians *ad litem*.<sup>292</sup> Psychiatrists must make an independent assessment before parents can commit a child to a public psychiatric hospital.<sup>293</sup> Employers have duties not to employ minors under certain circumstances.<sup>294</sup> Shopkeepers have duties not to sell alcohol, cigarettes, or pornography to minors, and any adult can be criminally liable for providing a child with alcohol or drugs.<sup>295</sup> Sellers must adhere to special rules when advertising to children<sup>296</sup> and collecting personal information online about children,<sup>297</sup> and banks and other financial actors must know when they are dealing with minors.<sup>298</sup> All adults also have the duty not to engage in sexual relations

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289. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006).

290. See, e.g., Janet Chiancone, Linda Girdner & Patricia Hoff, *Issues in Resolving Cases of International Child Abduction by Parents*, *Juvenile Justice Bulletin* (Dec. 2001).

291. See Children's Bureau, *Mandatory Reporters of Child Abuse and Neglect*, U.S. DEP'T HEALTH & HUMAN SERVS. 1-2 (2016), <http://www.childwelfare.gov/pubPDFs/manda.pdf> [<http://perma.cc/2C8Y-X5W9>] (summarizing state laws on professionals required to report).

292. See JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (2d ed. 2001); Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63 (2008).

293. See *Parham v. J.R.*, 442 U.S. 584, 606-08 (1979).

294. See, e.g., 29 U.S.C. § 212 (2012) (prohibiting oppressive child labor). In some employment contexts, such as the entertainment industry, a child may work only under strict regulations, and employers are responsible for following these laws. See, e.g., ARK. CODE ANN. § 11-12-104 (West 2017); 820 ILL. COMP. STAT. ANN. 205/8.1 (West 2018).

295. See, e.g., 18 U.S.C. § 1470 (2012) (providing that knowing transfers of obscene material to a minor below the age of sixteen may result in imprisonment for up to ten years).

296. See, e.g., *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 330 (4th Cir. 1996) (upholding a city ordinance that regulated alcohol advertisements in areas minor children were likely to frequent). The federal Children's Television Act of 1990 also imposes requirements for advertising appearing during programming targeting children. Children's Television Act of 1990 § 102, 47 U.S.C. § 303a (2012).

297. See Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-06 (2012).

298. See, e.g., FDIC Rules, § 1020.100(c)(1)(2)(A).

with a minor; because statutory rape is a strict liability crime, it imposes a responsibility on adults to verify their partner's age. Our new framework incorporates these responsibilities of noncaregiving adults into a cohesive structure consistent with the custodial and state responsibilities discussed above and lays the groundwork for articulating and expanding these adult duties to children.

## 2. Education

The tripartite framework imposes responsibilities on both caregivers and the state to ensure that children are afforded a meaningful educational experience, one that fosters children's present well-being as well as their development over time.<sup>299</sup> As traditionally understood, school provides children with a place for intellectual study, social engagement, and democratic socialization.<sup>300</sup> Schools teach children to express their ideas and beliefs and to think critically. Courts have readily recognized these traditional educational goals as legitimate and desirable.<sup>301</sup> Less considered are the ways in which schools provide children with opportunities to develop relationships with adults and children outside their families, as well as expose children to ideas outside the home. Schools also provide spaces for play, mentorship, and peer friendships.

Our framework views children's education as a sphere of shared responsibilities rather than a contest between parents and the state for control over children's upbringing. Parents and other custodial caregivers generally provide foundational learning experiences for children prior to formal education, but the state can better support parents in this task. Our framework's reinforcement of adult responsibilities to children opens up space to advocate for state funding of early educational interventions in the form of high-quality daycare and preschool.<sup>302</sup>

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299. See *Plyler v. Doe*, 457 U.S. 202, 222 (1982) ("Today, education is perhaps the most important function of state and local governments." (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

300. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969); *Brown*, 347 U.S. 483; see also Dailey, *supra* note 78, at 458 (explaining that social and legal commentators "identify schools as the place where the reasoning skills of democratic citizenship are cultivated").

301. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.").

302. See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49 (2006). Studies have also shown that early investment may yield substantial long-term savings for the state. See James Heckman et al., *Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes*, 103 AM. ECON. REV. 2052 (2013); Katherine A. Magnuson et al., *Inequality in Preschool Education and School Readiness*, 41 AM. EDUC. RES. J. 115, 144 (2004).

Most states start their public educational programs with part-day kindergarten classes for children when they reach the age of five, but this entry into formal schooling comes too late for many children.<sup>303</sup> Although the most privileged children do not suffer from delayed school, presumably because their parents have the resources to provide them with private daycare, other children suffer because most parents struggle to find affordable preschool programs.<sup>304</sup> Schooling that begins at age five thus sets in place an invisible barrier to equality in education that contributes to a life-long achievement gap between the rich and poor.<sup>305</sup> By more fully funding high-quality daycare and preschool, states may better support caregivers while also accepting more direct responsibility for providing meaningful education experiences for all children.

Our approach also imposes responsibilities on caregivers and the state to ensure that children are exposed to new ideas and ways of life when they are at school. The Supreme Court has not overlooked the value of exposing children to a diversity of viewpoints in school. In *Tinker*, for example, the Court observed that free speech is not enjoyed in isolation, but through communication with other students “in the cafeteria, or on the playing field, or on the campus during the authorized hours.”<sup>306</sup> Our framework builds on the Supreme Court’s recognition that children benefit from a broad range of experiences in school tied to their intellectual learning, their relationships with others, and their exposure to new ideas.

There are multiple ways of exposing children to diverse viewpoints at school, but children must first be at school to benefit from that exposure. In contrast to the authorities framework, which gives wide latitude to parents seeking to homeschool their children, our new framework—with its attention to children’s broader interests—would support the general prohibition of homeschooling for children beyond the primary grades.<sup>307</sup> Some allowance should of course be made for children with special needs, for example, elite athletes or children with

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303. See, e.g., HANDBOOK OF EARLY CHILDHOOD INTERVENTION (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 2000).

304. Currently, states that fund such programs cannot guarantee children spots if they are eligible, with most states serving less than half of the intended population. See Magnuson et al., *supra* note 302, at 119.

305. The federal Head Start Program is designed in part to address this educational disparity, but the program has suffered from inadequate funding and resources and there seems to be a lack of consistent research gauging the program’s effectiveness. See *id.* at 123-24. For more discussion of these issues, see Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017).

306. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

307. Cf. Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57 (2016) (arguing that homeschooling should be prohibited).

severe developmental disabilities. But homeschooling should not be allowed as a matter of right for families that wish to shield their children from outside influences. Custodians and the state under our framework have a shared responsibility to afford children some opportunity to engage in the broader world as they grow, and schools outside of the home are vital to that effort. Even though homeschooling may be appropriate for younger children, increased regulation of the curriculum of such homeschools will ensure that these children benefit from experiences outside the home.

### 3. *Rehabilitation*

Custodial caregivers and the state should also share responsibility for addressing children's misconduct, both inside and outside the home. Our framework posits rehabilitation as the primary justification for the punishment of children. Given children's capacity for change and their predisposition to cognitive, emotional, and moral learning, rehabilitation should guide adult response to children's misconduct.<sup>308</sup> While deterrence and retributive goals have a role to play in children's punishment, they should be secondary to rehabilitative aims. As we have already stressed, children are developing individuals with a unique capacity for change—flexibility, plasticity, regenerativity of mind—that distinguishes them from the adults they will someday become.<sup>309</sup> What might be settled character in an adult is likely a transient behavioral stage for a child.<sup>310</sup>

Our framework thus imposes on custodial caregivers a duty to direct their discipline of children toward rehabilitative aims consistent with children's broader interests. Punishment in the home must respect children's interests in bodily integrity and personal safety. Although over thirty countries ban corporal punishment of children, prevailing law in the United States permits "reasonable" corporal punishment in the service of parental discipline.<sup>311</sup> Parental and other

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308. Cf. Anca Gheaus, *The 'Intrinsic Goods of Childhood' and the Just Society*, in *THE NATURE OF CHILDREN'S WELL-BEING: THEORY AND PRACTICE* 35, 41 (Alexander Bagattini & Colin Macleod eds., 2015) ("So children, like adults, are rational beings; the difference between them is that children are better at imagining things while adults—who have the benefit of experience and enhanced self-control—are better at turning imagination into reality.").

309. *Id.*

310. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

311. See *Newby v. United States*, 797 A.2d 1233 (D.C. Cir. 2002); *RESTATEMENT (SECOND) OF TORTS* § 147 (AM. LAW INST. 1965); see also *State v. Lefevre*, 117 P.3d 980 (N.M. Ct. App. 2005). The parental discipline defense is available in abuse cases even where the defendant is not the legal parent of the child. See *State v. Roman*, 199 P.3d 57 (Haw. 2008). Corporal punishment is also allowed in school. See *Ingraham v. Wright*, 430 U.S. 651 (1977) (upholding the practice of corporal punishment in public schools against Eighth Amendment challenges).

adult authority appear to be the primary justification for this practice, for it is clear that corporal punishment has few beneficial developmental effects.<sup>312</sup> Instead, research strongly suggests that corporal punishment generally does not further children's interests and may in fact thwart them.<sup>313</sup> Corporal punishment thus should be prohibited in most, if not all, circumstances. Instead, caregivers under our framework have a responsibility to discipline their children in ways that foster children's capacity for learning and growth, as well as respect their bodily integrity and personal safety. States may support caregivers in these efforts by offering information about disciplinary techniques more consistent with children's broader interests.

Rehabilitative aims should also inform state actors' responses to children's misconduct outside of the home. Our framework provides justifications for re-orienting the juvenile justice system to harness children's heightened capacity for change through rehabilitation<sup>314</sup> while at the same time ensuring children are protected by basic procedural rights. Accordingly, our framework imposes responsibilities on judges, prosecutors, and legislators to address children's delinquent activities in a juvenile justice system oriented toward rehabilitation and the provision of services. These responsibilities would also generally prohibit the transfer of most children to the adult criminal justice system, which is often primarily retributive in nature. Indeed, transfer to adult court fails to take account of empirical evidence showing children's unique capacity for brain development and change,<sup>315</sup> and the harsh sentencing that often results ignores the psychological vulnerability of adolescents to stressful environmental factors, such as peer violence, poverty, and parental abuse or neglect.<sup>316</sup> The jurisdiction of the

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312. See 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 (2010).

313. See *id.* at 43-47; Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 *PSYCHOL. PUB. POL'Y & L.* 231, 238-240 (2007).

314. The system was originally designed to serve rehabilitative goals, but the system has become increasingly punitive in nature. See, e.g., Neelum Arya, *Using Graham v. Florida To Challenge Juvenile Transfer Laws*, 71 *LA. L. REV.* 99, 107 (2010) (noting that "many of the juvenile transfer laws were significantly expanded during the 1990s as part of a 'moral panic' that seemed to take over the country"); Alison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 *RUTGERS L. REV.* 241, 249 (2009).

315. See *supra* text accompanying notes 309-310.

316. Kimberly S. May, *Shifting Away from Rehabilitation: State v. Ladd's Equal Protection Challenge to Alaska's Automatic Waiver Law*, 15 *ALASKA L. REV.* 367, 384-85 (1998) ("The real harshness in treating youthful offenders as adults lies in the impact of adult sentences on a minor's development. . . . Juveniles incarcerated in prison are especially vulnerable to inmate violence

juvenile court might be extended past the age of majority in cases where older children commit serious crimes, but, under our approach, the primary goal of rehabilitation should still govern.

Likewise, when a child is accused of a “status offense” – engaging in behavior that is unlawful only for children, such as disobeying parents, running away, truancy, violating a curfew, or drinking alcohol – the state should not automatically punish or criminalize the offense.<sup>317</sup> Instead, the state should work with parents or others in the community to help bring their child’s behavior under control through, for example, substance abuse programs, counseling, and after-school activities.

#### 4. Civic Engagement

Our framework also recognizes adult responsibilities to further children’s engagement as members of society. The Supreme Court has long validated the idea that adults have the responsibility to foster children’s growth as future citizens.<sup>318</sup> In one of its earliest decisions on education, for example, the Court wrote: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>319</sup> And in one of its most significant First Amendment cases, *West Virginia State Board of Education v. Barnette*, the Court held that students could not be compelled to pledge allegiance to the flag.<sup>320</sup> In his opinion for the Court, Justice Jackson appealed to the state’s role in educating children for civic participation: “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>321</sup> Nine years later, the decision in *Brown v. Board of Education* hinged on the importance of an equal education to children’s future well-being as workers and citizens.<sup>322</sup>

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and sexual assault, and have a high risk of contracting AIDS. The isolation associated with incarceration may breed mental illness or reinforce existing feelings of anger and alienation, and adult prisons lack treatment facilities that juvenile centers may be able to provide. Imprisoned juveniles also have a high risk of suicide.”).

317. Cf., Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091 (2014).

318. See Dailey, *supra* note 13.

319. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

320. 319 U.S. 624 (1943).

321. *Id.* at 637.

322. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

And perhaps the Supreme Court's most sustained analysis of adults' duty to raise future members of society came in *Wisconsin v. Yoder*, where the Court elaborated on the qualities children need to participate as full adults in the life of the nation.<sup>323</sup>

Although the prevailing focus on developing children's capacities as future civic participants is important, it does not go far enough. Our framework emphasizes children's status as full members of society as well as adults' responsibilities to support that status. The responsibility to foster children's present engagement as members of the broader society encompasses not only participation in school but also engagement in the world through part-time paid work, volunteer activities, community sports, or political activism.

Parents carry the primary responsibility for furthering children's interests in engaging in the world through such civic opportunities. Moreover, because children do not now have the right to vote, their parents have the obligation to represent children's interests in the political process. But parents are not the only adults with responsibilities to further children's civic participation interests. The state also has a responsibility to recognize and facilitate these interests. In particular, the state has a responsibility to help children overcome concrete barriers to participation through the provision of transportation, afterschool activities, and opportunities to work and engage in the political process.

This conception of the state's role in facilitating children's broader engagement also offers a new way of thinking about the state's responsibility to provide children with access to reproductive healthcare, including contraception and abortion. Older children's ability to attend school, to work, and to participate in political activities often turns on meaningful access to such care. Although the Supreme Court has held that states do not have a constitutional duty to provide abortion services to adults,<sup>324</sup> our framework suggests that children's status as children should yield a different constitutional standard. As explained below,<sup>325</sup> because children are always in the custody of someone — whether parents or the state — these custodians have affirmative obligations to children that go well beyond the state duties owed to adults. These obligations include an affirmative duty on the part of the state to ensure that children have access to reproductive healthcare free from parental vetoes, as well as duties to disseminate information about such services and cover their costs.

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323. 406 U.S. 205, 233 (1972). *Plyler v. Doe*, which extended education rights to undocumented immigrant children, also rested in part on the importance of education to these children's potential for becoming future citizens. 457 U.S. 202, 230 (1982).

324. See *Harris v. McRae*, 448 U.S. 297, 316 (1980).

325. See *infra* Section III.C.1.



In some ways, all adult responsibilities for children may be categorized as duties to ensure children's full civic membership. What we mean to emphasize here are the specific duties arising out of children's broader interests in education and in social and political engagement. As we will discuss in Section III.C, the tripartite framework guarantees that some adult responsibilities give rise to corresponding affirmative rights for children.

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While we have focused here on state and parental responsibilities, our new law of the child also opens the door to articulating and developing children's responsibilities as children. The authorities framework risks treating children's responsibilities as an on/off switch: either children are dependent and not responsible for their behavior, or they are autonomous, responsible individuals. In contrast, the new law of the child brings out the ways in which children are responsible *as children*. Children have responsibilities to obey their parents, to attend school, to refrain from tortious and criminal conduct, and to treat other children with respect. While there are synergies between our approach and the current regime of status offenses, the latter remains firmly wedded to enforcing parental control over children. In contrast, we aim to develop rules and institutions to govern children's status as dependent, yet responsible, individuals.

In opening up avenues for children to engage in the broader society through school, work, and community and political activities, the new law of the child highlights children's responsibilities to take advantage of these opportunities. Children's own responsibilities would be fostered, for example, through school policies requiring participation in activities, juvenile justice dispositions mandating community service, and education programs for substance abuse, driving, and voting.

### C. *Rights*

Our tripartite framework opens up new ways of thinking about children's rights rooted in children's broader interests as children. Under our framework, rights do not operate solely to protect older children against coercive state action or overbearing parents. While our approach posits that children's rights encompass some adult autonomy rights – such as the right to freedom of speech, to free exercise of religion, or to privacy, as well as some important criminal procedure rights – our approach tailors almost all of these agency rights to fit children's unique status as children. We also underscore the role of affirmative constitutional rights in recognizing and protecting children's interests in certain relationships, services, opportunities, and experiences in the here and now. Children's rights therefore reflect the many ways in which children are not merely lesser

adults, but rather are full members of society deserving of rights derived from their special status as children.

Our approach to children's rights therefore brings new conceptual clarity to the constitutional rights children currently enjoy and lays out new rights that children should enjoy. Under our framework, children's rights have certain distinguishing features: they are rooted in children's broader interests; they are dynamic, adapting across time to children's evolving capacities and circumstances; they include affirmative entitlements to relationships, goods, and services; and they terminate upon reaching the relevant age of majority. Unlike children's interests, which generally come in as factors to be weighed in designing and applying legal rules, children's rights are forceful claims either for or against state action.

We divide children's rights into three categories: affirmative rights to certain resources; agency rights specially crafted to meet children's autonomy interests as they evolve over time; and rights to equality and procedural justice. Some of these rights exist under current constitutional doctrine, but many do not. We begin with the category of affirmative constitutional rights because this concept of rights is inextricably tied to adult responsibilities for children and most clearly implements children's broader interests in the here and now. Children's affirmative claims on the state also depart most dramatically from the authorities framework's exclusive reliance on negative rights.

### 1. *Affirmative Rights*

Under the tripartite framework, some limited, but not insignificant, number of adult duties will give rise to affirmative rights enforceable in court. In this regard, our approach challenges existing assumptions about the Constitution as a charter of negative liberties. The Supreme Court has stated outright that children have no affirmative rights, including no right to physical safety in the home,<sup>326</sup> but that analysis ignores children's special custodial status.<sup>327</sup> We reject the classic liberal view that the federal Constitution is exclusively a charter of

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326. *DeShaney v. Winnebago Cty. Dep't. of Soc. Servs.*, 489 U.S. 189, 196-97 (1989).

327. As the Supreme Court stated in *Schall v. Martin*, "juveniles, unlike adults, are always in some form of custody." 467 U.S. 253, 265 (1984).

negative liberties.<sup>328</sup> A constitutional regime of negative liberties for adults does not necessarily preclude recognition of affirmative rights for children.<sup>329</sup>

The Court's clearest pronouncement of the classic liberal view came in *DeShaney v. Winnebago County Department of Social Services*.<sup>330</sup> In this case, Joshua DeShaney and his mother brought suit against the local department of social services arguing that Joshua had been denied his constitutional right to protection from abuse at the hands of his father.<sup>331</sup> In rejecting the claim, the Supreme Court observed that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."<sup>332</sup> The Court recognized an exception to this general rule where "the State takes a person into custody and holds him there against his will,"<sup>333</sup> but considered Joshua to be in the private custody of his father.<sup>334</sup>

Under our framework, *DeShaney* was wrongly decided. By focusing on earlier cases rejecting adults' affirmative rights to housing, food, and medical care,<sup>335</sup> the Supreme Court failed to consider the existence of children's affirmative rights grounded in their special status as children. Children are always in the custody of others, whether their parents or the state; they are also legally disabled from taking steps to protect themselves. Based on these conditions, children have special claims to state protection in the home. In some cases, the Court has already come close to recognizing these entitlements, gesturing in the direction

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328. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278-97 (1990); Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1907 (2001).

329. See Dailey, *supra* note 13, at 2169.

330. 489 U.S. 189.

331. *Id.* at 193. The facts, as Chief Justice Rehnquist conceded, were "undeniably tragic." *Id.* at 191. Joshua DeShaney's father beat the four-year-old boy so severely that he suffered permanent brain damage. *Id.* at 193; see also Linda Greenhouse, *The Supreme Court and a Life Barely Lived*, N.Y. TIMES (Jan. 7, 2016), <http://www.nytimes.com/2016/01/07/opinion/the-supreme-court-and-a-life-barely-lived.html> [<http://perma.cc/9YEF-S98J>] (describing the case's legacy).

332. *DeShaney*, 489 U.S. at 196.

333. *Id.* at 199-200.

334. *Id.* at 201. The two dissenting opinions critiqued the decision on the ground that the state was deeply implicated in the violence against Joshua, having removed the boy from the father's care originally and then having returned him despite being aware of the risks of doing so. *Id.* at 210 (Brennan, J., dissenting).

335. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *James v. Valtierra*, 402 U.S. 137, 142-43 (1971); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970).

of granting children minimal entitlements to education<sup>336</sup> and custody,<sup>337</sup> although never explicitly recognizing these as rights. Our framework would take the next step, unambiguously articulating that adult responsibilities for children's education and custody create corresponding rights to those services.

Not all adult responsibilities will give rise to affirmative rights enforceable by children. But many will. Under our framework, children at a minimum have affirmative rights to custodial care, education, safety inside and outside the home, and rehabilitation in the juvenile justice system. But children's affirmative rights might also be enforced in custody, delinquency, immigration, and other proceedings. In these contexts, where the state is already involved, children's affirmative rights might extend to rights to relationships with siblings and peers; rights to be exposed to ideas and people outside the home; and rights of access to play, creative arts, sports, and other activities. Importantly, the existence of such broad affirmative rights does not mean that children will in all instances have the right to initiate judicial proceedings against the state. Rather, children's affirmative rights may be satisfied by agency and other action.

Children's affirmative constitutional rights grant children access to certain goods and services not provided to adults. For example, under the authorities

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336. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (observing that public education “[is not] some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation”). The Individuals with Disabilities in Education Act (IDEA) is an important step in the direction of recognizing an entitlement to education. In *Andrew F. v. Douglas County School District*, for example, the Supreme Court held under IDEA schools must offer an individualized educational program that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” which means more than “de minimis” progress. No. 15-827, slip op. at 11, 14 (U.S. Mar. 22, 2017), [http://www.supremecourt.gov/opinions/16pdf/15-827\\_opm1.pdf](http://www.supremecourt.gov/opinions/16pdf/15-827_opm1.pdf) [<http://perma.cc/PDE8-EY4Q>]. Along the same lines, our proposed tripartite framework imposes a responsibility on states to aim to provide an equal educational environment for all children. We acknowledge, however, that courts and lawmakers have difficulty complying with constitutional demands. In Connecticut, a desegregation lawsuit filed in 1989 is still being litigated as the parties seek to implement the state Supreme Court’s ruling. See *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996); Jacqueline Rabe Thomas & Jake Kara, *Judge: Magnet Schools Cannot Be Made More Segregated*, THE CONN. MIRROR (June 16, 2017), <http://ctmirror.org/2017/06/16/judge-magnet-schools-cannot-be-made-more-segregated> [<http://perma.cc/YNB6-PSQ9>]; Vanessa de la Torre, *Left Behind: 20 Years After Sheff v. O’Neill, Students Struggle in Hartford’s Segregated Neighborhood Schools*, HARTFORD COURANT (Mar. 12, 2017), <http://www.courant.com/education/hc-sheff-left-behind-day-1-20170319-story.html> [<http://perma.cc/3VC6-76DJ>].

337. See *In re Gault*, 387 U.S. 1, 17 (1967) (“The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, *has a right ‘not to liberty but to custody.’*”) (emphasis added); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (“Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State *must play its part . . .*”) (emphasis added).

approach, poverty is a primary risk factor for a finding of neglect and the removal of children from the home, particularly for families of color.<sup>338</sup> In contrast, our new framework sees family poverty as a trigger for the state's obligation to provide material support so that children's interests in remaining with parents might be met. Younger children also might have affirmative rights to preschool as part of their educational rights,<sup>339</sup> and older children might have affirmative rights to certain health-care services such as contraceptives and abortion, drug and alcohol counseling, and residential care for mental health issues. By reorienting our focus towards family poverty, cases like *Harris v. McRae*, the Supreme Court decision holding that the federal Constitution does not guarantee women access to funding for an abortion,<sup>340</sup> would come out differently for children.

Our framework thus draws upon current federal and state statutory law to develop a model of children's affirmative rights under the Constitution. Federal and state statutes currently provide families with a range of entitlements to food, housing, healthcare, and other basic goods. For example, the child welfare system entails multiple services from the state, including the federal requirement that states provide "reasonable efforts" to reunify removed children with their parents before terminating parental rights.<sup>341</sup> Although these are all statutory entitlements, they provide a blueprint for what a full-bodied scheme of affirmative constitutional rights might look like. Similarly, the U.N. Convention on the Rights of the Child offers helpful guidance to the development of a scheme of affirmative constitutional rights specifically geared toward children in the United States.<sup>342</sup>

Under our framework, affirmative rights enrich children's experiences as children: they aim to constitute civic participants, not control them; they reha-

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338. See Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 764-65 (2001); Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1150-1156 (2005).

339. See Ryan, *supra* note 302.

340. 448 U.S. 297, 317-18 (1980).

341. See *supra* note 283 and accompanying text (discussing the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

342. G.A. Res. 44/25, United Nations Convention on the Rights of the Child (Nov. 20, 1989), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [<http://perma.cc/65MD-M4Y6>].

bilitate and protect rather than punish; and they operationalize adult responsibilities for children. In this sense, we envision a more transformative, affirmative role for children's rights in American law.<sup>343</sup>

## 2. Agency Rights

Our framework also takes a fresh look at autonomy rights for children. Rather than simply extending some adult autonomy rights to children,<sup>344</sup> as the authorities framework does, we develop the concept of "agency rights" as a way of emphasizing that children are active participants in shaping their own lives while simultaneously dependent on adults. Agency rights thus differ from classic autonomy interests because they encompass children's interests *as children* in directing their lives. Our concept of agency rights conceptualizes children not in relation to adults but instead as persons with the capacity to play active roles in shaping their present lives.<sup>345</sup> Children's agency rights therefore serve much more than children's interests in exercising adult-like autonomy.

The Supreme Court's decision in *Tinker* illustrates the descriptive and normative value of viewing children's agency rights as rooted in children's broader interests, rather than in their capacity to make autonomous decisions.<sup>346</sup> *Tinker* in part recognized children's autonomy interests in political expression, but the Court also justified its holding on the ground that the classroom trains future leaders.<sup>347</sup> The Court expanded on this theme thirteen years later in *Board of Education v. Pico*, with the plurality emphasizing that children's First Amendment rights "prepare[] students for active and effective participation in the pluralistic,

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343. For similar efforts relating to adult affirmative rights, see Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006). See also Frank I. Michelman, *The Supreme Court 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

344. As described in Part I, children historically were denied adult autonomy rights. See *supra* Section I.A. Beginning in the 1960s, advocates for "children's liberation" argued that children should be given the full range of rights enjoyed by adults. See, e.g., HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* (1980); RICHARD EVANS FARSON, *BIRTHRIGHTS* (1974). While these liberationist arguments did not fully succeed, over the next few decades the Supreme Court began to recognize a limited number of adult rights for children, primarily in the areas of free speech, reproductive freedom, and juvenile justice. See, e.g., Minow, *supra* note 13, at 277; Wald, *supra* note 13, at 268.

345. See generally Abrams, *supra* note 132 (examining features of "agency" in feminist accounts).

346. 393 U.S. 503 (1969).

347. *Id.* at 512 (elaborating that such training occurs "through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection'" (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

often contentious society in which they will soon be adult members.”<sup>348</sup> The new framework would analyze the issues raised in *Tinker* and *Pico* differently, focusing instead on the multiple ways the right to free speech facilitates children’s present interests in expressing their own views, furthering their access to new ideas, and playing an active role in the world around them.

Our approach would therefore dictate a different outcome in cases like *Morse v. Frederick*, in which the Supreme Court undervalued the importance of children’s speech interests by permitting a school to suspend a student for holding up a banner at a school event with the phrase “BONG HiTS 4 JESUS.”<sup>349</sup> Although state attempts to reduce drug use are clearly important, the Court in *Morse* failed to recognize the other interests at play, including the way in which the speech furthered the child’s relationships with peers and his expression of resistance to school authority.

Under our framework, courts would determine the scope of children’s agency rights by weighing children’s broader interests in the context of a particular claim. For example, in *Brown v. Entertainment Merchants Association*,<sup>350</sup> the Supreme Court held that California could not limit the sale or rental of violent video games to children. In reaching that holding, the Court emphasized that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”<sup>351</sup> The Court emphasized that although “a State possesses legitimate power to protect children from harm,” that power “does not include a free-floating power to restrict the ideas to which children may be exposed.”<sup>352</sup>

The Supreme Court’s decision in *Brown* took some tentative steps in the direction of recognizing and weighing children’s broader interests. The Court rightly respected children’s interests as consumers, as well as their interests in exposure to ideas, but the Court’s analysis did not seriously consider the subjective effects of playing violent video games on children.<sup>353</sup> Instead, the Court

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348. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867, 868 (1982).

349. 551 U.S. 393 (2007).

350. 564 U.S. 786 (2011).

351. *Id.* at 794 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975)).

352. *Id.* at 794-95.

353. For a critique of *Brown* that emphasizes the role of government in supporting parents’ efforts to protect children from the harmful effects of video games, see Martin Guggenheim, *Violent Video Games and the Rights of Children: A Critique of Brown v. Entertainment Merchants Association*, 41 HASTINGS CONST. L. Q. 707 (2014).

largely extended free speech rights to children on the same terms as adults.<sup>354</sup> As Justice Breyer noted in dissent, the decision was tone deaf to the adverse psychological effects these games might have on children's present and future lives, as this "play" might be frightening, overwhelming, or otherwise harmful to younger children.<sup>355</sup> This oversight is not surprising given the authorities framework's focus on children as either fully dependent or fully autonomous beings. The *Brown* Court chose to view children as autonomous, respecting some children's present interests as consumers while ignoring other children's present interests in protection from harm.

Our framework rejects *Brown*'s all-or-nothing approach. Instead, a focus on children's broader interests calls for a consideration of multiple factors, including children's interests in acquiring and playing violent video games; the adverse impact of violent video games on some children's subjective experience in the here and now; and children's interests as consumers and intellectually curious civic participants. The inquiry should focus on weighing adult responsibilities to protect children from harm — which the Court rightly recognized in *Brown* — against children's interests in being engaged as consumers. In ruling for the children, the *Brown* Court may have arrived at the right result, but for the wrong reasons. The Court's analysis privileged a conception of children's autonomy that displaced a more rigorous weighing of children's competing interests in playing and avoiding violent video games.

The existence of children's agency rights will sometimes mean children have the entitlement to go to court to have the right enforced, as *Brown* suggests. But agency rights might also arise in many ongoing proceedings, such as school suspension hearings, custody hearings, parental termination proceedings, immigration hearings, judicial bypass proceedings, and juvenile justice and criminal proceedings. Rights in these contexts might range from full-blown entitlements, such as the right to be represented by an attorney, to less robust entitlements, such as the right to be heard in custody proceedings.

Whatever the context, recognition of children's agency rights will sometimes raise direct conflicts between parents and children seeking control over decisions affecting their own lives. Under our framework, for example, a transgender child seeking transition-related healthcare against her parents' wishes might have the right to go to court to seek judicial approval for the treatment, and courts might grant such permission based on the child's broader interests in bodily integrity

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354. 564 U.S. at 795 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." (quoting *Erznozik*, 422 U.S. at 213-214)).

355. See *id.* at 851-55 (Breyer, J., dissenting).



and expression of identity. Irrevocable procedures might still be denied, but our framework would open the door to allowing some children, with medical support, to begin transitioning before the age of sixteen. Such an outcome is at direct odds with existing law, which generally requires parental consent before health care professionals may administer medical treatment to a minor.<sup>356</sup> The recognition of children's agency rights therefore may break new ground, expanding children's abilities to direct the arcs of their lives even as they remain dependent on adults for care and support.

### 3. *Equality and Other Rights*

Finally, our framework also embraces rights to equality and procedural justice, reconceiving important Supreme Court decisions. *Brown v. Board of Education*, for example, is the seminal case in the history of children's equality rights.<sup>357</sup> As discussed earlier, the case supports our view that the Constitution confers on children the affirmative right to a meaningful education, but *Brown* is better known for its principle of equality. At the same time, although *Brown* was a path-breaking holding for race relations, transforming the everyday lives of many children, it did not transform children's equality rights more broadly. Even after *Brown*, children by definition are not considered similarly situated to adults and therefore have few claims to equal treatment. Children may be denied the wide range of rights enjoyed by adults, including the fundamental rights to vote, to marry, to work, and to travel freely.<sup>358</sup>

While our framework agrees that the state has a basis for treating children differently than adults given children's unique status as children, we argue that this fact actually heightens equality concerns. The state should be particularly sensitive to equality when children are involved because so much is at stake for children in terms of both their present well-being and their future lives. The Supreme Court gestured in this direction in *Plyler v. Doe*, which recognized the right of undocumented immigrant children to attend public school.<sup>359</sup> Together,

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356. See Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769, 770 (2002). The statutory age of majority for health care decisions varies by state. See, e.g., S.C. CODE ANN. § 63-5-340 (2008) (providing that individuals age sixteen and older may consent).

357. 349 U.S. 294 (1955).

358. See *supra* Part I.

359. 457 U.S. 202, 230 (1982).

*Plyler* and *Brown* should be read to stand for the proposition that children's special status as children, particularly when it comes to education, brings with it heightened protection against state discrimination.

The new law of the child also builds upon existing laws emphasizing the importance of expansive procedural rights for children as a means of protecting their privacy and reputations and facilitating their rehabilitation. In *J.D.B. v. North Carolina*, for example, the Supreme Court held that age must be taken into account for purposes of establishing whether a child is "in custody" and therefore must be given *Miranda* warnings.<sup>360</sup> School suspensions also call for heightened procedural protections.<sup>361</sup> And in *Parham v. J.R.*, the Court recognized the need to establish greater procedural safeguards for the review of children's admission to psychiatric hospitals given children's special interests in personal integrity, privacy, and reputation.<sup>362</sup>

Other rights for children remain to be explored, including political rights. Some political rights, such as the right to freedom of expression, may be addressed as agency rights. The right to vote is among the agency rights most universally denied under the authorities framework.<sup>363</sup> Children simply are not considered eligible for the franchise until they reach the age of eighteen. Under our framework, this legal presumption is up for reconsideration.<sup>364</sup> There might be some contexts, particularly at the local level, where older children should be given full or fractional rights to vote. Expanding the category of children's rights to include political rights would imply a correlative responsibility on the part of children to participate in civic life.

## CONCLUSION

This Article has set forth a new paradigm for describing, understanding, and shaping the field of children and law, one that is oriented around children's interests in the here and now rather than adult control. We aim to purge the law of traditional assumptions about children's status as lesser adults in need of adult authority above all else. Our new paradigm therefore sets aside longstanding debates over dependency and autonomy in order to further children's broader interests as children. We do so by offering a new conceptual framework for policymakers, advocates, and judges that focuses on children's broad interests in the here and now.

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360. 564 U.S. 261, 265 (2011).

361. See *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

362. 442 U.S. 584, 600 (1979).

363. See Dailey, *supra* note 13, at 2107.

364. See *supra* text accompanying notes 228-235.

This new framework seeks to facilitate children's relationships through law, including children's relationships with their parents as well as their nonhierarchical relationships with siblings, peers, and adults who are not their parents. The framework also articulates a broader set of actors, including family members and state officials, who carry legally recognized and shared responsibilities toward children, including responsibilities for caregiving and protection, education, rehabilitation, and fostering civic engagement. Finally, our framework offers a robust theory of children's affirmative rights to certain relationships, goods, and services, as well as a new conceptual understanding of children's agency and equality rights.

The new law of the child rooted in this framework aims to transform law's treatment of children and their interactions with others, thus encouraging new ways of living for children and adults. Our analysis does more than describe the world as it is; it also uncovers aspects of children's lives currently obscured by law and, in turn, reimagines how law might best govern, protect, and enrich the lives of children both in the present and over time. Of course, this normative account will be contested, and we welcome dialogue and debate about how law might best be reimagined to promote children's broader interests. For now, this Article offers our best attempt to establish the basic framework for a legal regime that values children as full persons with broad interests and rights of their own.