

2008

Rights and Realities

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Recommended Citation

Laura A. Rosenbury, *Rights and Realities*, 94 Va. L. Rev. Brief 39 (2008), available at <http://scholarship.law.ufl.edu/facultypub/724>

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VIRGINIA LAW REVIEW

IN BRIEF

VOLUME 94

SEPTEMBER 1, 2008

PAGES 39–44

RESPONSE

RIGHTS AND REALITIES

*Laura A. Rosenbury**

MELISSA Murray’s thought-provoking article *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers* provides a compelling analysis of the limits of functional approaches to the family. Although these approaches have been among the most important concepts motivating family law reforms and scholarship over the past thirty years, Murray illustrates the many ways in which they have both overlooked the complexities of childrearing and positioned caregiving as the sole domain of parents and their functional equivalents. Murray then begins a process of deconstructing legal notions of caregiving in order to expose and challenge the choices made by states and scholars when they assign the rights and responsibilities of caregiving solely to parents, even broadly defined. Murray concludes by urging scholars and reformers to spend more time considering “the question of *how* families perform their caregiving work” in order to begin to address the gaps created by a family law regime that recognizes only parents and strangers in children’s lives.¹

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¹ Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va. L. Rev. 385, 454 (2008).

Taking up Murray's call for "others to join this important conversation,"² I enthusiastically support Murray's project. Her article is outstanding, and I hope it will spur a fundamental shift in family law scholarship. Indeed, despite her modesty, Murray has proposed several alternatives that could radically alter the law's current view of the parent-child relationship and of family relationships in general.³ I support these proposals to the extent that they force reformers and scholars to confront who benefits and who is harmed by legal conceptions of the family, even ones that have been expanded to reflect functional approaches to the family. I fear, however, that Murray's analysis may be held back by an assumption about the appropriate relationship between rights and reality often embraced by family law scholars including, at times, by Murray herself.

I. THE FOCUS ON REALITY

Throughout her article, Murray emphasizes that parents "rely on a broad network of caregivers—extended family members, friends, neighbors, and paid caregivers—who assist with caregiving," and convincingly illustrates the ways that many parents so rely.⁴ She simultaneously argues—both explicitly and implicitly—that family law is defective because it fails to reflect this caregiving continuum, instead recognizing only legal parents and strangers.⁵ Murray's identification and assessment of family law's silence about this caregiving continuum is new and exciting, but not necessarily surprising. As Murray points out, scholars have long assumed that an ideal conception of family law should "reflect the reality of family life."⁶ I have also embraced that assumption in past work,⁷

² *Id.* at 455.

³ In particular, see *id.* at 447–54 (discussing the possibilities of "alternative statuses" and "[d]ismantling the [s]tatus of [p]arent").

⁴ *Id.* at 387; see also, e.g., *id.* at 390–94, 415–32.

⁵ See, e.g., *id.* at 388 (stating that family law should "better support caregiving as it is practiced" and calling for "a broader legal understanding of caregiving that would acknowledge a wider range of caregiving efforts, not simply those performed by parents or those who function as parents").

⁶ Murray uses this phrase, or versions of it, several times. See, e.g., *id.* at 389; *id.* at 394; *id.* at 438. For examples of other scholars who have embraced the assumption that family law should reflect the reality of family law, see *id.* at 435–37 (discussing the work of scholars who "[t]ak[e] seriously the notion that family law should support the

but I have recently come to question its usefulness. Murray's article only reinforces my suspicion.

A focus on reforming family law to "reflect the reality of family life" assumes there is a reality, or truth,⁸ existing outside of the law that can be reflected within family law. That assumption embraces enlightenment thinking, makes family law scholarship interdisciplinary by legitimizing the use of social science to discover the "reality" of family life, and permits family law scholars to employ a straightforward conception of the interplay between law and society, all of which can be useful. Yet the assumption also risks oversimplifying family life by focusing on one reality, or several realities, to the exclusion of other realities or lived experiences. More importantly, it risks obscuring the many factors that shape and influence the so-called realities of family life, including the law. Accordingly, a focus on the "realities" of family life can quickly naturalize family life, making it appear as if family life is indeed some identifiable truth existing outside of the law.

Murray implicitly recognizes these risks when she presents the ways that family law constructs caregiving as parenting for purposes of legal analysis⁹ and criticizes the effect of that construction on areas of life outside of the courtroom and statehouse. For example, Murray argues that scholars must move away from their focus on parenthood because the law's "inability to recognize more broadly networks of care is costly for parents, families, and the nonparental caregivers on whom they rely."¹⁰ That

ways in which families operate"); Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 *W. Va. L. Rev.* 275, 287–88 (1992–93); 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.

⁷ Laura A. Rosenbury, *Between Home and School*, 155 *U. Pa. L. Rev.* 833, 875–78 (2007) [hereinafter Rosenbury, *Between Home and School*]; Laura A. Rosenbury, *Friends with Benefits?*, 106 *Mich. L. Rev.* 189, 208–11 (2007) [hereinafter Rosenbury, *Friends with Benefits?*].

⁸ Murray, *supra* note 1, at 410 ("The law's failure to acknowledge this truth about family life creates a disjunction between family law and policy and the reality of family life on the ground."); see also *id.* at 438 (calling for "progress towards a more accurate account of family life").

⁹ Murray, *supra* note 1, at 394–409.

¹⁰ *Id.* at 387–88.

statement, and others like it,¹¹ reveal that Murray believes that family law does more than reflect the reality of family life. Instead, family law can also shape family life, and Murray takes issue with the costs imposed by the ways family law currently does so. Murray's argument therefore reveals that caregiving is constructed—not just for purposes of legal analysis but also more broadly—as various factors influence the choices and actions of the parties engaged in care.

Given that caregiving is always a construction, I am highly skeptical that family law can ever merely reflect reality. I therefore question the usefulness of Murray's argument that “[a]s a descriptive matter, expanding our understanding of caregiving would reconcile family law with the reality of family experience.”¹² But Murray's arguments are not just, or even primarily, descriptive. Rather, she also makes normative arguments about why family law should affirmatively address the caregiving continuum.¹³ It is to those arguments that I now turn.

II. THE FOCUS ON RIGHTS

Murray argues that family law should “acknowledge” or “recognize” networks of care because such state action would lessen “guilt and anxiety about [parents'] use of nonparental caregiving,” “facilitate and enable parents in providing care,” clarify understandings of the role of caregiving in society, and “give dignity to [nonparental] caregivers and their efforts.”¹⁴ Interestingly, Murray does not invoke legal rights in this discussion, instead focusing on legal recognition or acknowledgement without defining those terms. Such terms could be a vestige of Murray's descriptive project of conforming family law to family life, but I read them to mean more. By invoking the language of recognition and acknowledgment, Murray is emphasizing the signaling or expressive function of law, once again challenging the notion that the law can ever merely reflect family life.

¹¹ See, e.g., *id.* at 405; *id.* at 434 (emphasizing that recognition or nonrecognition of caregiving networks is “a choice that affects the ways in which families operate in providing care”).

¹² *Id.* at 409.

¹³ *Id.* at 410–15.

¹⁴ *Id.* at 411–13.

I suspect, however, that Murray also has another reason for focusing on legal acknowledgment and recognition rather than rights. Legal recognition is a tempting middle ground between the law's conveyance of rights and the law's silence, a middle ground that I too have embraced.¹⁵ This middle ground is particularly attractive in the context of the parent-child relationship because, as Murray highlights, it can constitute a moderate response to the question, often posed in shocked outrage, of whether nannies should receive rights to the children under their care.¹⁶ Questions like this reveal the blunt nature of rights discourse and the need to develop more nuanced approaches. Yet Murray's article ultimately reveals that we cannot avoid discussions of rights in this context, even if we may want to.

Rights must be on "the table"¹⁷ at least initially, because legal parenthood is currently defined as the ability to exercise certain rights. Murray does not explicitly delineate those rights, but she highlights the most important one, the right to make decisions on behalf of the child free from state interference.¹⁸ As before, that legal construction does not merely reflect the parental role but also reinforces and, in part, creates it. Indeed, it is difficult to imagine a non-legal conception of parent entirely divorced from the legal conception of a parent as an individual vested with decisionmaking authority over a child. Parenthood, like caregiving, is a construction both within the law and without, and rights currently play a crucial role in that construction.

Murray insightfully analyzes the ways this rights-based construction of parent not only benefits legal parents at the potential expense of nonparental caregivers, but also can harm legal parents who feel overwhelmed with the demands of expansive childrearing authority. I hope those of us continuing the conversation will also examine why legal parents can simultaneously feel threatened by the thought of extending rights to the members of the caregiving networks that help them meet those demands. I suspect the threat centers around a desire to

¹⁵ Rosenbury, *Between Home and School*, supra note 7, at 891–93; Rosenbury, *Friends with Benefits?*, supra note 7, at 226–29.

¹⁶ Murray, supra note 1, at 439.

¹⁷ Cf. *id.* at 450 (suggesting taking "the issue of parental rights . . . off the table").

¹⁸ See *id.* at 395, 450.

maintain the hierarchy between parents and nonparents that Murray critiques. In fact, parents may rely on caregiving networks in part because they know such reliance will not threaten the rights bestowed on them as legal parents, providing another example of the ways that family law does not merely reflect family life but also shapes it.

As such, of the three approaches Murray considers, only the last one—“dismantling the legal understanding of parenthood entirely”¹⁹—seems to begin to address and challenge the privileging of parental care over all other forms of care. The other two approaches create bigger caregiving in-groups, but such expansion further obscures the care provided by caregiving out-groups.²⁰ Accordingly, if Murray wants to achieve her normative goals, she must first take on the issue of parental rights and the reasons for conferring those rights. As Murray acknowledges, those reasons go well beyond a desire to reflect the reality of family life, instead encompassing various attempts to privatize dependency.²¹ I do not know the best way to dismantle the current legal understanding of parenthood or the best construct to replace it. But I look forward to ongoing conversations about what parenthood could mean in a legal regime that revolves less around private decisionmaking authority and more around children and the ways their needs and desires can be met along various caregiving continuums.

¹⁹ *Id.* at 453.

²⁰ Murray acknowledges this dynamic when discussing the first two approaches, although she uses different terminology. See *id.* at 446–47, 450.

²¹ See *id.* at 394–98, 433.