

The (Not So) New Law of the Child

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INTRODUCTION

Children's rights are considerably more complicated than most nonexperts appreciate. In one highly touted 2017 children's rights victory, for example, New York eliminated the right of minors between fourteen and eighteen to marry, a right they had enjoyed since 1929.¹ I hope it sounds slightly askew to celebrate a new right that restricts a person's freedom. Yet children's rights advocates considered this legislation a victory because they largely desire a better world for children above all else, even if at the cost of restricting children's freedom or even forcing them to do things against their will.

If the children's rights movement embraces this position, then children's rights will never closely resemble the rights of abled adults. Adult rights are organized around the principle, recently celebrated by the Supreme Court and, especially, Justice Kennedy, of "liberty," a term that "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."² Children's rights start from the opposite perspective, mostly presuming children ought to be denied autonomy. One of the great children's rights victories in the twentieth century in the United States, for example, was

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1. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Legislation Ending Child Marriage in New York (June 20, 2017), <http://www.governor.ny.gov/news/governor-cuomo-signs-legislation-ending-child-marriage-new-york> [<http://perma.cc/HKP2-48TQ>]; Jonathan Black, *Advocates Are Fighting To Outlaw Adult Marriages to Minors*, ABA J. (Jan. 2018), http://www.abajournal.com/magazine/article/adult_marriages_minors_law [<http://perma.cc/VUG9-LW8Z>].
 2. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

Congress's broad restriction of the right of children to be gainfully employed by enacting the Fair Labor Standards Act of 1938, which the Supreme Court upheld in 1941.³

With this in mind, American legal scholars have been searching for a coherent vision of children's rights for more than fifty years, since the Supreme Court's landmark decision in *In re Gault*⁴ launched the children's rights movement. In that spirit, I welcome the effort by Anne Dailey and Laura Rosenbury to provide one.⁵ Unfortunately, I do not believe their new law of the child sets forth a sufficiently coherent vision, nor is it nearly bold or visionary enough to justify being called a "new law of the child."

This Response proceeds in two Parts. Part I summarizes the principal claims and my perception of the flaws of the authors' article. Part II points to the need for a new law of the child that has the potential to meaningfully improve the lives of children in the United States by dismantling structural inequality.

I. PROBLEMS WITH THE PROPOSALS IN THE NEW LAW OF THE CHILD

A. A Defense of the Authorities Framework

The *New Law of the Child* purports to be an ambitious critique of the existing laws regulating children as well as promotes a new law of the child in its place. The authors correctly identify the preeminent organizing principle of current law as the "authorities framework,"⁶ by which they mean that most decisions made concerning individual children are allocated by American law to their parents. For the most part, they object to this framework. I write as a defender of that framework.

Indeed, I believe the most important way to protect children's individual interests is to maximize the authority of parents to make individualized decisions for and about them. American constitutional law sensibly treats children the way parents and adults who care about and love children do outside the law:

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3. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941), *overruling* *Hammer v. Dagenhart*, 247 U.S. 241 (1918). Similarly, Americans rightly celebrate compulsory education laws that oblige children to spend a certain number of hours each year receiving an education.
 4. *In re Gault*, 387 U.S. 1, 33, 36, 47, & 55 (1967) (holding that children accused of being delinquent have the constitutional rights to notice of charges, counsel, remain silent, and confront witnesses against them).
 5. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448 (2018).
 6. *Id.* at 1451

we restrain their activities; we do not allow them to do things simply because they want to do them; and we make decisions for them based on our sense of what is good for them. Moreover, we serve children best when we allow parents, above all other possible candidates, including state officials or judges, decision-making power for children when children are denied the power to make decisions for themselves.

The authors are not entirely hostile towards parental rights, as they recognize that allowing parents to make important decisions regarding a child's upbringing fosters pluralism and diversity, protects children from state standardization, and allows parents to advance their own interests in raising their children free from governmental control.⁷ Their objection is to its "outsized influence, overshadowing conflicts within the family as well as alternative ways of supporting children's interests."⁸

Others who criticize parents' power to make decisions for their children occasionally propose liberating children to make decisions for themselves as a substitute.⁹ Happily, that is not where the *New Law of the Child* takes us. Dailey and Rosenbury reject any call for liberating children under the law by treating them as "autonomous, freely acting adult individual[s]."¹⁰ Instead, they object that "parental rights are doctrinally rooted in parents' own autonomy interests, not in their responsibility for furthering children's interests."¹¹ Their new law seeks to ensure that greater weight is given to the unique capacities of children.¹²

I have to confess that it is not precisely clear to me what bothers Dailey and Rosenbury most about the authorities framework. They perceive the framework as involving a "dependency-autonomy polarity,"¹³ clarifying "that children experience agency within dependency, while acknowledging that chil-

7. *Id.* at 1471.

8. *Id.* at 1472.

9. See, e.g., RICHARD FARSON, *BIRTHRIGHTS* (1974); JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974).

10. Another confusing claim is the authors' complaint that *Brown v. Board of Education* failed to "transform children's equality rights more broadly," by treating children as "similarly situated to adults." Dailey & Rosenbury, *supra* note 5, at 1535. But these are the same writers who reject basing the law of the child on the principle of individual autonomy, the animating characteristic of an adult's freedom. *Id.* at 1483. I cannot tell from their article whether the authors are merely being descriptive or critical when they write that "[c]hildren 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." *Id.* at 1535.

11. *Id.* at 1470.

12. *Id.* at 1524.

13. *Id.* at 1480-81.

dren's present interests are always filtered through the lens of their future lives as adults."¹⁴ I am not surprised that even the authors "acknowledge the difficulty of labeling the interests we wish to promote."¹⁵

In addition, I believe they overstate the significance of their contribution. According to Dailey and Rosenbury, their new law of the child would also result in different outcomes in Supreme Court cases like *Prince v. Massachusetts*¹⁶ and *DeShaney v. Winnebago County Department of Social Services*,¹⁷ among very few others. But these cases are low-hanging fruit. Many, for example, have argued that *Prince* was wrongly decided, at least on the facts of the case.¹⁸ *DeShaney* was loudly condemned when it was written.¹⁹ Both could easily be

14. *Id.* at 1480.

15. *Id.* They also make some random, odd criticisms of extant law. For example, they complain that children's rights are "limited and qualified," using as an example that "children have free speech rights in school only so long as that speech does not disrupt the learning environment." *Id.* at 1463-64. One is left to wonder if they prefer that students have the right to disrupt the learning environment. Perhaps only a law professor who tends to see the world through court decisions could say with a straight face that a criticism of Supreme Court doctrine with regards to children's rights is that children's "peer relationships" are treated "as sources of dangerous influence and pressure." *Id.* at 1490 & n.158 (citing *Roper v. Simmons*, 543 U.S. 551 (2005); and *Lee v. Weisman*, 505 U.S. 577 (1992)). Complaining that the Court has tended to stress the negative influences peers may have on children is hardly fair when the Court made the case for leniently treating youth when they committed a crime as part of a group.

16. 321 U.S. 158 (1944).

17. 489 U.S. 189 (1989).

18. See, e.g., Arnold H. Loewy, *Rethinking Free Exercise of Religion After Smith and Boerne: Charting A Middle Course*, 68 MISS. L.J. 105 (1998) (describing *Prince* as "wrongly uph[olding]" the petitioner's conviction); Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 235 (2017) ("*Prince* has been criticized as overly intrusive in parental authority to make decisions regarding their children's welfare more generally, and about religious matters specifically."). *Prince* is best read as upholding the facial validity of a law regulating child labor. Asking the Court to strike down a child labor law so soon after the end of the *Lochner* era was never going to be easy. To accomplish that would have required arguing that, as applied to the particular facts in the case, the law went too far, since the child was never in any kind of risk; was not engaged in a hazardous enterprise; and was accompanied by her aunt at all times. Further, the law was never intended to regulate religious activity in the first place. But *Prince*'s lawyer, the redoubtable Hayden C. Covington, who argued dozens of cases in the Supreme Court advancing the rights of Jehovah's Witnesses, deliberately eschewed all efforts to make an as-applied argument, insisting that petitioner's right to practice her religion outweighed the state's otherwise-legitimate interest in preventing her from engaging in unsafe labor practices. Instead, as the Court explained, Covington "nowhere conceded in the briefs that the statute could be applied, consistently with the guaranty of religious freedom, if the facts had been altered only by the guardian's absence." *Prince*, 321 U.S. at 169 n.18.

19. See, e.g., Laura Oren, *The State's Failure To Protect Children and Substantive Due Process: Deshaney in Context*, 68 N.C. L. REV. 659 (1990); ("[T]he Court was wrong[.]"); Patricia

reversed without the benefit of a new law for children, and without dismantling the authorities framework.

Further, their assertion that their new law “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” is an exaggeration.²⁰ Children’s rights scholars have wondered about this even before Hillary Rodham and Martha Minow did, forty-five years and more than twenty years ago, respectively.²¹

Although the authors discuss at length the importance of children’s relationships with other children, I cannot quite figure out how we should tackle that issue.²² Nor is it clear that enriching these relationships must come at the cost of replacing the authorities framework. No one doubts that children’s peer relationships “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.”²³ But even the authors appear willing to deny children “the right to intimate association currently enjoyed by adults.”²⁴

Dailey and Rosenbury believe that current law pays too much attention to the developmental interests of children and too little to their present interests;²⁵ they object to the “dependency-autonomy binary,” by which they mean that children are either treated as dependent or autonomous.²⁶ They want American law to apply the “central value of intimate relationships in human affairs” to children.²⁷

M. Wald, *Government Benefits: A New Look at an Old Gifhorse*, 65 N.Y.U. L. REV. 247, 262 (1990) (stating that the Court in *DeShaney* “gave the wrong answer”); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 12 (1989) (discussing the Court’s failure to recognize the state’s role in influencing the plaintiff’s social vulnerability).

20. Dailey & Rosenbury, *supra* note 5, at 1483.

21. Martha Minow, *Whatever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 287 (1995) (noting that by the start of the 1980s, “[i]t remained possible to argue that young people deserve the same legal treatment as adults, that young people deserve special legal protections differing from the law for adults, and that law should refrain from intruding on the ordinary practices of adults responsible for children”); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 487 (1973) (“The phrase ‘children’s rights’ is a slogan in search of a definition.”).

22. Dailey & Rosenbury, *supra* note 5, at 1487-89.

23. *Id.* at 1511.

24. *Id.*

25. *Id.* at 1480-81.

26. *Id.* at 1481.

27. *Id.* at 1482.

Given that Dailey and Rosenbury support a legal regime that empowers adults to make decisions concerning children, we need to examine the substitute for the prevailing framework before we judge that framework too harshly. Regrettably, in too many places, their fix for current failings in the law is to shift ultimate decision-making authority from parents to judges. In my view, this shift is deeply flawed, if for no other reason than there is insufficient correspondence between giving judges authority over children's lives and making good decisions for the individual children affected by the court order.

The authors assert their new law "reimagines the traditional 'best interests of the child' standard,"²⁸ but they fail to offer a better replacement. Dailey and Rosenbury want courts to employ guidelines that consider children's peer relationships when a noncustodial parent objects to an effort by the custodial parent to move out of town.²⁹ The authors complain that current law has judges only considering "the potential benefits of the move for the custodial family and the child's ability to maintain ties with the nonrelocating parent."³⁰ They want judges also to consider that children "will also be moving away from other important individuals in their lives"; and they object that, too often, children are not even asked for their views.³¹ Their bold call for the new law of the child? "[J]udges 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."³²

By any measure, this tweak in the law does not deserve much trumpet-blowing. But the article's contribution is even smaller than that, given their expressed interest in having the law pay greater attention to children's lives as they actually experience them. The authors are entirely content to permit parents, when the adults do not disagree, to relocate the family without giving children any legal standing to object. I would be opposed to giving them such standing, for many reasons, not least that I oppose placing intimate familial decisions in the hands of judges. But a new law of the child that aims to make children's interests more prominent would surely be interested in protecting children's interests even when an adult does not also oppose the move.

28. *Id.* at 1452.

29. *Id.* at 1512.

30. *Id.*

31. *Id.* at 1513.

32. *Id.*

B. The New Law of the Child's Overreliance on Courts

I fear the article contains an even deeper flaw, beyond the unambitious or confusing nature of Dailey and Rosenbury's proposal and its opposition to the authorities framework. When its point is to promulgate a "new law," what ought to matter is how the new law works. Sadly, I am left adrift. On this point, their discussion of *Troxel v. Granville*³³ is particularly illuminating. In that case, a mother of two children was sued by the children's deceased father's parents, who sought more frequent visitation with the grandchildren than the mother thought appropriate.³⁴ The authors complain that the *Troxel* Court "did not take children's interests into account in any meaningful way,"³⁵ but I have no sense how *Troxel* would have come out differently if the authors' new law had been in effect.

I come out very differently than their celebration of reliance on courts to mediate intrafamilial matters involving children. Instead of criticizing a legal regime that requires parents to spend hard-earned money defending their parental decision making before a judge, or being upset that grandparents believe they somehow have the right to disrupt and intrude in their grandchildren's family's life by securing a court order for sixty-eight days of exclusive time with their grandchildren, as I would have preferred, Dailey and Rosenbury take issue with the Supreme Court's siding with the mother. In their words, Justice O'Connor's plurality opinion held that "the mother's rights prevailed over any consideration of the children's interests in maintaining contact with their grandparents—the primary link to their deceased father and important figures in the children's lives."³⁶

But is that really what happened? In my view, it is more accurate to conclude that the mother's sense of her children's interests prevailed over that of the trial judge presiding over the case, who never met the children.³⁷ The judge ordered the children to spend a week with their grandparents each summer, for no better reason than he remembered fondly similarly spending time with his grandparents as a child.³⁸ The plurality simply determined there was no basis to contravene the mother's assessment of what was best for the children. With

33. 530 U.S. 57 (2000).

34. The grandparents wanted overnight visits to occur every other weekend throughout the year plus two weeks of visitation each summer. The mother believed that one visit each month was sufficient. *Id.* at 61.

35. Dailey & Rosenbury, *supra* note 5, at 1471.

36. *Id.*

37. *Troxel*, 530 U.S. at 61.

38. *Id.* at 72.

these facts, the authors could more accurately describe the result in *Troxel* as “the Court upheld the interests of the children over the rights of the grandparents.”

This is more than a quibble over how to characterize the Court’s decision. In two ways, it goes to the heart of my disagreement with Dailey and Rosenbury’s proposals. First, and most importantly, they are content replacing the authorities framework with judicial review of parental decision making. Consider their reasoning. The authors object to the authorities framework because “[p]arental 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.”³⁹ But for this to make sense, the authors must be worried that *parents* construct their children as objects of control since the authorities framework merely allocates to parents primary decision-making authority in matters concerning their children. Perhaps they know people I do not, but I have never met a parent who constructs his or her child predominately as an object of control.

But set that aside for a moment. Dailey and Rosenbury face the following dilemma: as they diminish parental authority to make decisions for their children, they seek to strengthen the authority of someone else to do the same thing. Dailey and Rosenbury prefer that a randomly assigned official, who will have only very briefly met the child, possess the enormous power to make decisions affecting the child’s lives. Remarkably, they advocate this policy to avoid treating children “as objects of control.”⁴⁰

This gets it backwards. It is one thing to argue for children’s liberation. It is another to object to the authorities framework as privileging parental power over children’s lives and then assign that power to strangers. Is this because of a natural fear of parents? Because they are biased against their children? Or is it because we are so uncomfortable with assigning power over another person’s lives that we strive to mitigate the power by subjecting it to review?

To clarify how much we disagree, I prefer a regime that denies to grandparents the power to use courts to decide familial disputes over how much visitation a grandparent may have with a child. Without that powerful club to wield, grandparents would be obliged to find other, more gentle ways to try to persuade a parent to let them see their grandchildren. Perhaps they could give the parent the \$50,000 many of these lawsuits cost in exchange for a few visits a year. I recognize that lawyers would lose in such an arrangement. But in no sense do I believe that children would. Still, if these cases are allowed to get to court, I agree with *Troxel’s* holding that the trial judge erred when he failed

39. Dailey & Rosenbury, *supra* note 5, at 1471.

40. *Id.*

both to presume the correctness of the parent's position and place the burden on the grandparents to demonstrate why the court should supervene her choice.⁴¹ In the end, I champion the authorities framework not because I am entirely against giving children more autonomy but rather because, in a world of constrained children's autonomy, I prefer having parents possess the power to make decisions for children over anyone else, most especially a judge.

There are still other proposals in the article that are important and worthy of careful consideration. One, in particular, deserves attention. Perhaps the most radical proposal Dailey and Rosenbury make is to prohibit parents from homeschooling their children beyond the primary grades.⁴² This proposal deserves thoughtful attention. The number of children being homeschooled in the United States over the past generation has soared. Even more, states have deregulated homeschooling requirements to an extent that, in eleven states today, no one even bothers to verify that parents who claim to be educating their children at home are actually doing so.⁴³ This is a serious matter, and I applaud Dailey and Rosenbury for proposing that we do something about it.

But no one should doubt just how bold this proposal is. No state has ever enacted a law requiring that children spend some portion of their education in a communal setting. Nor is such a law likely to be enacted in most states.⁴⁴ Dailey and Rosenbury seek a national law *forbidding* an exclusive homeschooling education.⁴⁵ Since Congress lacks the power to enact such a law, the only way to achieve this is through a constitutional pronouncement by the Supreme Court that the *failure* to provide such an education is unconstitutional. It would

41. 530 U.S. at 70 (“[I]f a fit parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination.”).

42. Dailey & Rosenbury, *supra* note 5, at 1453, 1522.

43. According to the Home School Legal Defense Association (HSLDA), sixteen additional states have “low regulation.” *Homeschooling in Your State*, HSLDA (2018), <http://hsllda.org/hs/state> [<http://perma.cc/2L9S-RSX2>].

44. Organizations such as the HSLDA fiercely defend parents’ constitutional rights to home school their children. *About HSLDA*, HSLDA (2018), <http://hsllda.org/about> [<http://perma.cc/ENA8-AM39>]. The organization has had astonishing success: the number of households homeschooling in the United States doubled between 1999 and 2012, growing from 850,000 (covering 1.7% of the school-age population) to 1.8 million (3.4%). Jeremy Redford et al., *Homeschooling in the United States 2012*, NAT’L CTR. EDUC. STAT. ii (Apr. 2017), <http://nces.ed.gov/pubs2016/2016096rev.pdf> [<http://perma.cc/D2T8-F5DV>]. See Martha Fineman and George B. Shepard, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57, 65 (2016) (“This change in policy was brought about largely through the activities of two major advocacy groups: the [HSLDA], which is a Christian-based group, and the National Home Education Network, which is more secular in its orientation.”)

45. Dailey & Rosenbury, *supra* note 5, at 1522.

be difficult to overstate how far such a ruling is from current doctrine. Most students of the Court would be far more likely to conclude that a law *requiring* students to participate in a communal educational environment would be an unconstitutional infringement on parental liberty.⁴⁶ But these authors are so visionary on this particular proposal to suggest that it should be *unconstitutional not* to have such a requirement. I mention this not to object to the proposal, but to contrast it with the authors' unwillingness to propose more ways to reimagine the rights of children, as will be discussed in more detail in Part II.

C. Children's Capacity To Shape Parents' Choices

The article also disappoints in the authors' focus on the degree to which they see the world through the formal operation of law. The new law of the child underappreciates how the real world works by ignoring children's capacity to influence their parents' choices. Children, like all humans, live far more outside the law than within it. Our daily lives are not defined by laws written on the books. Many children have far more power than adults in all kinds of relationships, including the parent-child relationship. Even when the law declares it a parent's right to determine the thousands of elements shaping their children's lives, from where they will live, with whom they will associate, the activities in which they may engage, the books they may read, the friends and lovers they may take, the schools they will attend, their religion, to name only a few, the children may end up doing what their parents oppose. Children may do them secretly. Or they may prove to be more powerful in the relationship by threatening their parents, refusing to cooperate, or by some other effort. Seen from this real-world perspective, current law frees individuals within the family to work things out as they may. When, for example, children believe they would be devastated by a proposed relocation, they are more than capable of noisily communicating their concerns to their parent(s) who, in turn, will give their child's concern as much weight as they choose (just as the authors want judges to do). The authors ignore how many parents have chosen not to make a particular decision impacting the entire family because their children let them realize the impact the decision would have on them. In this outside-the-law real world, children's interests are considered every day.

Thus far, I have only examined a small (if important) focus of the article. But the article means to disrupt the law concerning children across a wide path. The authors make a modest contribution when they focus on adolescents, calling for them to secure greater privacy rights, including the right to engage in

46. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

sex with their peers.⁴⁷ Though, again, too often I cannot tell how the authors imagine the world to look differently under their proposal. They recognize, for example, that current law allows parents to search their children's bedrooms, but it entirely unclear what they recommend as a change.⁴⁸

Among the authors' complaints is that "[t]he United States, in contrast to almost every other country in the world, continues to overprioritize parental rights at the expense of children's interests."⁴⁹ I am more than happy to critically compare U.S. treatment of children with other international approaches. But the extent of the U.S. prioritization of parental rights would not be a flaw in that comparison. I might bemoan the excessive rate at which we imprison children as compared to the rest of the world;⁵⁰ or the frequency with which we place children in foster care;⁵¹ or permanently destroy families through involuntary court orders terminating parental rights.⁵² But perhaps most of all, I would say a country that refuses to recognize a child's right to the basic necessities of life—food, clothing, shelter and health care—unlike every other country

47. Dailey & Rosenbury, *supra* note 5, at 1502.

48. *Id.*

49. *Id.* at 1472 (footnote omitted). I confess that I react very poorly to scholars who choose, as Dailey and Rosenbury have done, to characterize the law of the child in the United States as assigning children to their biological parents' custody. *Id.* at 33. How does it help to speak this way? Where in a nondystopian world are children assigned to their parents? Who imagines the state playing a role in determining who gets to procreate? And is procreation not for the very purpose of *having* children (as opposed to creating a life)? Where, one wonders, did the state get the child in the first place to be able to assign him or her to one's parents? Certainly, John Locke would be astonished to read such an idea since it gets the relationship between individuals and the state precisely backwards. I believe this is more than a quibble. It suggests something is deeply awry in the writer's conception of the relationship of citizens to the state. Children are no more assigned to their birth parents' custody than people are given permission by state officials to be born. It does not work that way and, I believe it is dangerous even to misspeak about the matter.

50. Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, NEW THINKING COMMUNITY CORRECTIONS, Oct. 2016, at 1, 15, <http://www.ncjrs.gov/pdffiles1/nij/250142.pdf> [<http://perma.cc/XDD3-V65K>] ("By all measures available, the United States incarcerates youth at a substantially higher rate than does any other country.").

51. Children's Bureau, *Trends in Foster Care and Adoption*, U.S. DEP'T HEALTH & HUM. SERVICES (Oct. 20, 2017), <http://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption> [<http://perma.cc/6TMU-B4GM>] (stating that 687,000 children were in foster care in the United States in 2016 alone).

52. *Id.* (stating that 65,300 children were in foster care at the end of 2016 because parental rights had been terminated).

in the world, should be considerably more unacceptable than the extent to which parents' views on child-rearing will be honored by state officials.⁵³

II. WHAT A VISIONARY NEW LAW OF THE CHILD OUGHT TO INCLUDE

Thus far, I have suggested that the proposed new law of the child, assuming I understand all of its dimensions, will not result in much practical difference for many U.S. children. In this Part, I will describe just how far short the authors' ambitions really are. Their new law of the child gives excessive attention to privileged children and too little to the millions of American children desperately in need of a new law of the child.

The United States is currently arranged to ensure inequality for children upon birth. American children, depending on the wealth of their families, will face very different futures. The fortunate ones will be entitled to state sponsored public education that provides them with well-paid teachers, excellent facilities, clean campuses, safe streets, after-school programs, a rich and diverse curriculum, opportunities for college-level courses, and the great likelihood of securing no less than a college education.⁵⁴ The unlucky ones will be relegated to a very poorly financed system of public education that is inadequate on its own terms and grossly unequal compared with children born into wealthy homes.⁵⁵ Children living on the disadvantaged side of town are exponentially more likely to be placed in foster care by state officials,⁵⁶ stopped and frisked by

53. Each of these rights is recognized by the Convention on the Rights of the Child, which has been ratified by every United Nations member state except for the United States. Amy Rothchild, *Is America Holding Out on Protecting Children's Rights?*, ATLANTIC (May 2, 2017), <http://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652> [https://perma.cc/RT46-DKM9].

54. C. Garrison Lepow, *Teenager, Twenty Somethings, and Tax Inequality: A Proposal to Simplify the Age Requirements of the Dependency Exemption*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 797, 821-22 (2016) (“[I]n 2013 children from the highest-income families were eight times more likely than children from low-income families to obtain a bachelor’s degree by age twenty-four.”).

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

56. Racial disparity and disproportionality in removals is well documented, and analogous disparities in removals by neighborhood have also been demonstrated. See, e.g., William Sabol et al., *Measuring Child Maltreatment Risk in Communities: A Life Table Approach*, 28 CHILD ABUSE & NEGLECT 967, 974 (2004) (finding that children living in inner-city Cleveland neighborhoods are 2.5 times as likely as suburban children to be investigated for child maltreatment at least once before their tenth birthday); Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, U.S. DEP’T HEALTH & HUM. SERVICES 2 (NOV. 2016), http://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf (“A significant amount of research has documented the overrepresentation of certain racial and ethnic populations—including African-Americans and Native Americans—in the child wel-

local police,⁵⁷ arrested,⁵⁸ earn a lower salary,⁵⁹ suffer from environmental hazards including lead poisoning and asthma,⁶⁰ and live fewer years than privileged children.⁶¹ This truism about American life deeply involves the law.

fare system when compared with their representation in the general population.” (footnote omitted)). Moreover, children in foster care face a grim set of statistics. One multistate survey found that approximately one in three foster youth became homeless between the time they aged out of foster care and the time they reached age twenty-six, and over twenty percent reported being incarcerated within one year of aging out of foster care. Mark E. Courtney & Amy Dworsky, *Early Outcomes for Young Adults Transitioning from Out-of-Home Care in the USA*, 11 CHILD & FAM. SOC. WORK 209, 216 (2006); Amy Dworsky et al., *Homelessness During the Transition from Foster Care to Adulthood*, 103 AM. J. PUB. HEALTH (SUPPLEMENT 2) S318, S319 (2013). Foster care youth also lag their peers in educational attainment: in the same survey, more than one-third of foster care children had not graduated from high school by age nineteen, and fewer than ten percent earned a bachelor’s degree before age twenty-six. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26*, CHAPIN HALL U. CHI. 105-06 (2011), http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf [<http://perma.cc/366C-2XCU>].

57. See, e.g., PETER L. ZIMROTH, FIFTH REPORT OF THE INDEPENDENT MONITOR: ANALYSIS OF NYPD STOPS REPORTED, 2013-2015, at 49, 14-15 (2017), <http://nypdmonitor.org/wp-content/uploads/2017/06/2017-05-30-MonitorsFifthReport-AnalysisofNYPDStopsReported2013-2015-Asfiled.pdf> [<http://perma.cc/UT6Q-RXT9>] (noting that the rate of stops remains higher in majority-Black and majority-Hispanic neighborhoods than in majority-white neighborhoods, even when controlling for crime rates, and that “the share of stops reported for Black, Hispanic, Asian, and Other youth, ages 16-19, appears to be higher than that of White youth”).
58. See, e.g., Robert D. Crutchfield et al., *Racial Disparities in Early Criminal Justice Involvement*, 1 RACE & SOC. PROBS. 218, 228 (2009) (finding, based on data collected in Seattle, that “youth from poorer families are more likely to be arrested”); David S. Kirk, *Unraveling the Contextual Effects on Student Suspension and Juvenile Arrest: The Independent and Interdependent Influences of School, Neighborhood, and Family Social Controls*, 47 CRIMINOLOGY 479, 508 (2009) (“A lack of neighborhood collective efficacy and a lack of school-based social controls combine to exert a substantial increase in the likelihood of arrest.”).
59. See, e.g., Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. ECON. 1553, 1620 (2014) (finding that the area in which one grows up is predictive of upward social mobility).
60. See, e.g., Diane Alexander & Janet Currie, *Is It Who You Are or Where You Live? Residential Segregation and Racial Gaps in Childhood Asthma*, 55 J. HEALTH ECON. 186, 197 (2017) (finding that the gap in asthma rates between African American and other children in New Jersey is largely attributable to their place of residence); Abraham Epton, Alex Bordens & Geoff Hing, *Chicago Lead Poisoning Rates Vary by Location, Time*, CHI. TRIB. (May 1, 2015), <http://apps.chicagotribune.com/news/watchdog/chicago-lead-poisoning/index.html> [<http://perma.cc/4EK5-F444>] (explaining that certain poor, predominantly African American neighborhoods in Chicago face lead poisoning rates up to six times the city average).
61. See, e.g., VCU Ctr. on Soc’y & Health, *Mapping Life Expectancy*, VA. COMMONWEALTH U. (Sept. 26, 2016), <http://societyhealth.vcu.edu/work/the-projects/mapping-life-expectancy.html> [<http://perma.cc/966L-SMRQ>] (“[L]ife expectancy can differ by as much as 20 years in neighborhoods only about five miles apart from one another.”).

The authors indicate they are not entirely unaware of these structural inequalities. When they focus on children living in poorer homes, they acknowledge that “[s]chooling that begins at age five . . . sets in place an invisible barrier to equality in education that contributes to a life-long achievement gap between the rich and poor.”⁶² But their call for action merely recommends “more fully funding high-quality daycare and preschool.”⁶³

Nothing should have stopped the authors from proposing legislation to ensure that all children, even those living in the poorest communities, receive equal distribution of tax dollars to support public institutions for children. But they have a limited vision for legislative fixes. Instead of equal tax expenditures, the authors suggest that “states could adopt educational curricula that emphasize the benefits of peer learning” or “require public schools to open their doors for after-school youth activities, including those run largely by other children”, that “[s]chools could begin peer mediation programs”, or that [l]ocal governments could also create more playgrounds and other recreational spaces for children and ensure their security and safety.”⁶⁴ Once we move to the realm of recommending legislative fixes for children growing up unequally in the United States, as Dailey and Rosenbury have done, why not call for a child allowance? Such an allowance would guarantee income to parents when children are born, a policy which has been “common in many European countries for more than half a century.”⁶⁵

It would not have been overly ambitious had Dailey and Rosenbury opted to propose a series of laws guaranteeing children health care, food, clothing, shelter, free child care, and other benefits designed to minimize the disadvantages many children currently endure because of their bad luck of having been born poor. Those proposals would have been easy. But a new law of the child, to really deserve the title, would strive to imagine a new constitutional right of children to equality. Here, again, Dailey and Rosenbury display insufficient ambition.

What about developing a new law of the child that would overturn *Dandridge v. Williams*⁶⁶ or *San Antonio Independent School District v. Rodriguez*?⁶⁷

62. Dailey & Rosenbury, *supra* note 5, at 1522.

63. *Id.*

64. *Id.* at 1513.

65. Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 305 (2018) (citing DUNCAN LINDSAY, *THE WELFARE OF CHILDREN* 319-20 (2d ed. 2004)).

66. 397 U.S. 471 (1970) (rejecting a Fourteenth Amendment Equal Protection challenge to a state law that capped the amount of money a family may receive through the Aid to Families with Dependent Children Program, even though the capped amount reduces the per capita amount of money for the largest families).

Dandridge upheld the constitutionality of a Maryland statute which placed a maximum limit on the amount of aid a family could collect, regardless of the number of children in the family. It upheld the law against an Equal Protection challenge on behalf of children deprived of an equal grant from the government, compared with children residing in homes with fewer children. Importantly, the Court declined to apply heightened scrutiny to the statute because it involved economic rights. *Rodriguez* refused to apply strict scrutiny to a school financing system that created wealth-based educational inequality, holding that education is not a fundamental right.⁶⁸ A new law of the child that took aim at these obstacles to equality for children would be worthy of celebration. Why not propose, for example, that children ought to possess the constitutional right to secure identical government benefits given to wealthy children, at least when those benefits are highly correlated with a child's future opportunity for equality?

To be sure, the constitutional case against structural inequality is challenging given current doctrine, which fails to focus on children's rights but instead regards these matters as within a state's prerogative to choose how to raise and disburse state and local tax revenues.⁶⁹ But the article's failure even to try is difficult to understand given that Dailey thoughtfully explored the subject in 2011.⁷⁰ Even if we recognize that no overwhelming case can be made for a child's constitutional rights to goods and services under the Constitution, Dailey explained only a few years ago that proposing a new vision for children's rights, even if not politically feasible, is justified for no other reason than "a

67. 411 U.S. 1 (1973) (rejecting a claim that funding public elementary and secondary schools based on local property taxes, thereby ensuring unequal amounts of money per capita for children living in low income communities, violated the Equal Protection Clause of the Fourteenth Amendment).

68. *Id.* at 35.

69. Nancy Dowd has recently offered a way of using constitutional law to advance children's rights by revisiting *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), from the perspective of seven-year-old John Moore, Jr. In *Moore*, a plurality of the Court held that a zoning ordinance violated the petitioner's constitutional right to family integrity when applied to prevent John's grandmother from raising him in her home, as she was also raising another grandchild who was John's cousin. Nancy E. Dowd, *John Moore Jr.: Moore v. City of East Cleveland and Children's Constitutional Arguments*, 85 *FORDHAM. L. REV.* 2603 (1917). Observing that John's life had already been deeply influenced by income inequality, employment discrimination, housing discrimination, and school segregation, *id.* at 2607-08, Dowd proposed that "children's rights not be conceptualized neutrally, without gender, race, or class, as those identity characteristics are strong developmental factors as well as equality factors." *Id.* at 2612.

70. See Anne C. Dailey, *Children's Constitutional Rights*, 95 *MINN. L. REV.* 2099, 2168-78 (2011) (suggesting ways to establish children's affirmative rights to a minimum level of caregiving services from the state, including the right to high quality child care).

theory which reimagines the relationship of the state to children—particularly children living in poverty—is itself worthwhile to the extent it helps to draw attention to children’s right to (and need for) caregiving services.”⁷¹ Great legal scholarship should do more than offer tweaks to an established regime. Offering the reader an ambitious vision of reform is not too much to ask from scholars whose stated intention is “to transform law’s treatment of children and . . . reimagine[] how law might best govern, protect, and enrich the lives of children both in the present and over time.”⁷²

With this in mind, it is worth reminding the reader, as Goodwin Liu has done,⁷³ that there was a brief moment when such an argument was being developed, providing hope that constitutional law could be harnessed to guarantee children true equality under the law. In 1969, for example, John Coons, William Clune, and Stephen Sugarman proposed a “new equal protection” principle by which children are identified as belonging to a class of “preferred people” so that strict scrutiny would have to be employed when federal courts reviewed laws or state practices that treated children differentially, such as when state or local school districts spend differential money on public schools.⁷⁴ In the same year, Frank Michelman, writing in the *Harvard Law Review*, imagined a constitutional right that guaranteed each child “the means of developing his competence, self-knowledge, and tastes for living” because “a just society cannot tolerate the risk that a child’s educational needs will be severely disserved by accident of poverty.”⁷⁵ Those imaginative days seem considerably more than a generation ago when compared with the lack of ambition that is at the heart of Dailey and Rosenbury’s new law of the child.

As a final reminder of what might have been, in the 1960s, the Supreme Court appeared to offer hope for reorganizing American law around the Rawlsian idea that government should not treat children differently based on the behavior of their parents when they decided a series of cases challenging laws that treated children born out of wedlock differently from children born to

71. *Id.* at 2178.

72. Dailey & Rosenbury, *supra* note 5, at 1537.

73. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205–06 (2008); see also William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001) (tracing governmental obligations to secure certain material conditions).

74. John E. Coons, William H. Clune, III, & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 389–90 (1969).

75. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 16, 52 (1969); see also Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (exploring how Rawls’ theory contributes to a legal conception of justiciable welfare rights).

a marriage.⁷⁶ In *Weber v. Aetna Casualty & Surety Co.*,⁷⁷ for example, the Court struck down a law treating children born out of wedlock less well than children born of a marriage, explaining that “visiting . . . condemnation on the head of an infant” for the actions of their parents “is illogical . . . unjust,” and “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”⁷⁸ These sentiments were last expressed by the Court in 1982, in *Plyler v. Doe*,⁷⁹ when the Court held that undocumented immigrant children could not be denied a free, public education, reasoning that children should not suffer due to their parents’ conduct since the children can “affect neither their parents’ conduct nor their own status.”⁸⁰

A new vision of constitutional rights for children that guarantees them true equality of opportunity may not be on the horizon. But I remind the reader of this short-lived, hopeful period to emphasize how unambitious the new law of the child really is.

CONCLUSION

The authors and I agree that the field of children’s rights is complicated and important, and the field would benefit from a coherent vision proposing changes in the law that would materially advance the lives of children living in the United States. But I do not believe, as the authors do, that the biggest problem facing children in the United States is that their parents have too much power to make decisions for them. I also disagree that a sensible fix is to shift ever more power to courts to make decisions concerning children. Most of all, a call for more children’s rights would have to take aim at the countless ways law disadvantages poor children. It should also condemn the status quo and include proposed legislation that would help ensure a fairer and just society for children. Sadly, these are lacking in the new law of the child.

76. *Trimble v. Gordon*, 430 U.S. 762 (1977); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Glon v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

77. 406 U.S. 164 (1972).

78. *Id.* at 175.

79. 457 U.S. 202 (1982).

80. *Id.* at 220 (quoting *Trimble*, 430 U.S. at 770).

THE (NOT SO) NEW LAW OF THE CHILD

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