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The Geography of Family Privacy

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THE GEOGRAPHY OF FAMILY PRIVACY

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In response to Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

Scholars are accustomed to thinking about family privacy in terms of geometry. The allocation of public and private power in domestic life is classically diagrammed as a triangle, representing the separate interests of parent, child, and the state. Parental prerogative in raising children, on one leg of the triangle, is offset by another leg representing the state's *parens patriae* power to ensure the basic welfare of children and their development into productive citizens.

In *Between Home and School*, Laura Rosenbury intriguingly contends that this geometry obscures a broader and important *geography* of family privacy.¹ Family law, she argues, tends to relate questions of authority over childrearing to the locations in which it occurs. At home, parents rule the roost; their authority within the sanctity of the home is protected by a robust constitutional doctrine of parental rights that gives way to state control only in cases of abuse or neglect. At school, by contrast, state officials call the shots and parents have no real grounds to object.² A fundamental shortcoming of this binary doctrine, she contends, is that it makes no provision for a great deal of childrearing that takes place in locations other than home and school—in summer camps, church groups, social organizations, day care centers, and so on.³ Professor Rosenbury points out that the socialization of children that occurs in these “between” locations is significant, both for children and for society, and she calls for a clearer articulation of the legal principles respecting childrearing authority in these spaces.⁴

If Professor Rosenbury's article went no further than this, it would have made a distinctly valuable contribution by calling attention to the

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¹ 155 U. PA. L. REV. 833, 834-35 (2007).

² *Id.* at 840.

³ *Id.* at 834.

⁴ *Id.* at 836-37.

lack of scholarship addressing the childrearing that takes place in these often-influential spaces. Other scholars have begun to address this shortcoming, importantly taking account of the socializing impact of mass media and similar “environmental” influences on children,⁵ but Professor Rosenbury makes a strong case that a more comprehensive understanding of the distinctive role of “in between” childrearing is needed.

Professor Rosenbury’s article then goes on to lay the foundation for such an understanding by suggesting the outlines of a distinctive normative approach for addressing the socialization of children between home and school. In exploring the appropriate governing principles, Professor Rosenbury first considers whether the “between” spaces might be analogized to either home or school, such that the model of preeminent parental or state authority in those respective spheres might simply be extended to cover the gaps. She acknowledges, for example, that “[f]amily law’s current silence about . . . childrearing [between home and school] could reflect, by default, a normative view of parental control over children in all spaces but school.”⁶ Alternatively, “[a]nother approach is to view childrearing between home and school as an extension of school, confining parental prerogatives (and those of their surrogates) to the privacy of the home.”⁷

She concludes, however, that neither analogy is quite right. The childrearing that occurs in “between” spaces, often under the direction of actors who are neither parents nor teachers, is different from in-home care in that it may expose children to values distinct from those inculcated by their parents. Moreover, because of the diverse nature of the childrearing influences in these spaces, it is also valuably different from the more standardized tutelage children are likely to receive at school.⁸ Accordingly, “the spaces between home and school may be distinct from both home and school,”⁹ occupying a sort of no man’s land in which neither parental nor state control should totally dominate. Parents may rule the home and the state may rule the

⁵ For an insightful exploration, see Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85.

⁶ Rosenbury, *supra* note 1, at 837.

⁷ *Id.* at 869.

⁸ *See id.* at 845, 892-94 (noting in particular that the ambiguous boundaries of the between-home-and-school space may set the best conditions for fostering pluralism).

⁹ *Id.* at 875.

school; in between, however, childrearing authority should be shared by parents, the state, and third parties (e.g., camps, youth groups, and other entities) that undertake to influence the upbringing of children in their care. Under this schema, third-party childcare operators would be largely free to follow their own methods of raising children; parents would be free to enroll or withdraw their children from these programs as they saw fit; and the state would be permitted to intervene (apart from cases of abuse or neglect) for one purpose only: to ensure that third-party actors respect broad values of diversity and pluralism in raising children.¹⁰

Professor Rosenbury's exploration of the relevance of *place* in allocating public and private power over childrearing is both ambitious and important. She is undoubtedly correct that parental authority is maximal within the privacy of the home and that state educational interests generally overwhelm the preferences of individual parents at school. She is also right to call for greater attention to the principles that should govern childrearing outside of home and school, and to ask whether actors other than parents or guardians might be entitled to some measure of constitutional protection for their childrearing activities. In a world where children are spending more time in the care of out-of-home caregivers, and where third-party actors (especially through mass media) are displacing both parents and schools as the dominant socializing influence on children,¹¹ these are important matters.

Professor Rosenbury's analysis is insightful and entirely plausible, and provokes, for me, two overriding questions:

- (1) To what extent is the allocation of childrearing authority properly determined by the location in which it occurs?
- (2) To what extent, if any, should third parties—non-parent actors outside the family—be entitled to assert “privacy” rights to rear other people's children?

First, in assessing the significance of place in defining childrearing authority, it bears noting that the space between home and school is not entirely *terra nova* for family privacy. *Prince v. Massachusetts*, for one, involved a dispute over childrearing between home and school—specifically, whether a guardian was constitutionally entitled to enlist

¹⁰ See *id.* at 894-97 (contending that maintaining a proper balance between regulation and nonregulation would allow parents to feel comfortable allowing the “broader civil society” to share the responsibilities of childrearing).

¹¹ See Woodhouse, *supra* note 5, at 85 (“Mass-media marketing . . . has displaced parental authority as the primary force in socializing our children . . .”).

her nine-year-old niece in proselytizing on a public street corner.¹² The Supreme Court ultimately upheld the state's power to intervene, but in doing so plainly accepted that parents' rights under the Constitution extended to the street corner. Although Sarah Prince stood on a Brockton sidewalk and not in her living room, the Court did not doubt that she remained within the constitutionally protected "private realm of family life."¹³ She lost only because, under the circumstances of the case, her conceded parental rights were overcome by a more powerful state interest—protecting children from the potential detriments of child labor and "the diverse influences of the street."¹⁴ Even *Meyer v. Nebraska*¹⁵ and *Pierce v. Society of Sisters*,¹⁶ the foundational family privacy decisions upholding the right of parents to educate their children in private schools, can be seen as effectively recognizing that parents' childrearing rights extend beyond the home.

Prince saw the street corner dispute as involving a "clash" of parental and state powers which required a "delicate" accommodation in "the no man's land where this battle has gone on."¹⁷ But the "no man's land" that the Court had in mind was surely conceptual rather than physical or geographic. Indeed, the same clash of powerful parental and state interests occurs at home and at school, as well as the spaces in between. The state can sometimes reach inside the home to override parents' childrearing decisions, even in the absence of child abuse or neglect. *Troxel v. Granville*, for example, affirmed the power of courts, in properly limited cases, to compel parents to make their children available for visitation with persons outside the household.¹⁸ In doing so, the Court declined to limit the state's power to cases where the loss of contact would cause "serious harm" to a child (the standard used by the state court below), and instead directed only that courts should give "special weight" to parents' concerns in assessing whether nonparental visitation is in a child's best interest.¹⁹ In similar

¹² 321 U.S. 158, 159, 162 (1944).

¹³ *Id.* at 166.

¹⁴ *Id.* at 168.

¹⁵ 262 U.S. 390, 400 (1923) (finding that the right of a parent to hire a foreign language instructor for her child is guaranteed by the Fourteenth Amendment).

¹⁶ 268 U.S. 510, 534-35 (1925) (invoking *Meyer* and declaring unconstitutional a state law requiring parents to send their children to public schools).

¹⁷ 321 U.S. at 165.

¹⁸ 530 U.S. 57, 73 (2000) (indicating that reasonably limited state nonparental visitation statutes would likely pass constitutional muster).

¹⁹ *Id.* at 69-73; see Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 312 (noting that the *Troxel* plurality held unconstitu-

fashion, the state may reach inside the home to compel parents to vaccinate their children (even when the risks to children from forgoing the vaccination are not so great as to constitute medical neglect)²⁰ and, as Professor Rosenbury acknowledges, may superintend the pedagogical or curricular choices of a home-schooling parent.²¹

By the same token, the clash between parental prerogative and the state's interest in a child's well-being can be found at school as well. True, a number of state and lower federal court decisions have dodged parents' constitutional complaints about school policies on the ground that parents have no particularized right to control curricula or otherwise "micro-manage" the schools.²² Others, however, have recognized that parents' fundamental interest in the upbringing of their children does not vanish at the schoolhouse door, and have gone on to evaluate school policies on the merits—balancing parental objections against pedagogical or other interests asserted by the state.²³ *Runyon v. McCrary*,²⁴ which refused to exempt private, segregated schools from federal laws banning race discrimination, illustrates the second approach. The Court readily acknowledged that

tional only visitation decisions that give "no special weight at all" to parental judgment); David D. Meyer, Lochner *Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1149 n.128 (2001) (analyzing the significance of *Troxel's* "'special weight'" language).

²⁰ See *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905) (upholding mandatory vaccination law); *Spiering v. Heineman*, 448 F. Supp. 2d 1129, 1140-41 (D. Neb. 2006) (applying the rational-basis test to uphold a statute requiring parents to submit newborn infants for routine blood testing, regardless of whether birth occurs at home or in a hospital); Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1104-07 (2005) (detailing, in brief, the legal history of state-mandated vaccinations).

²¹ See, e.g., *Combs v. Homer Ctr. Sch. Dist.*, 468 F. Supp. 2d 738, 778-79 (W.D. Pa. 2006) (upholding a state's power to regulate the content and manner of home-school education); Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 75-78 (2005) (discussing the state's role in ensuring that each home-schooled child receives an adequate education).

²² See, e.g., *Crowley v. McKinney*, 400 F.3d 965, 969-71 (7th Cir. 2005) (noting that while parents have a constitutional right to choose between schools, they do not have a right to "participate in the school's management"), *cert. denied*, 546 U.S. 1033 (2005); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206-07 (9th Cir. 2005) (noting that parents have "no constitutional right . . . to prevent a public school from providing its students with whatever [appropriate] information it wishes to provide"), *cert. denied*, 127 S. Ct. 725 (2006).

²³ See, e.g., Miranda Perry, Comment, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727, 727 (1996) (arguing that school-sponsored condom-distribution programs can withstand constitutional scrutiny only if they require parental consent).

²⁴ 427 U.S. 160 (1976).

while state control of private school admissions “does not represent governmental intrusion into the privacy of the home or a similarly intimate setting, it does implicate parental interests” rooted in the constitutional right of privacy.²⁵ The state’s imposition was nevertheless justified because it was “reasonable.”²⁶

Professor Rosenbury surveys the landscape of family privacy and sees three distinct territories: home, school, and in between. She proposes to embrace the location of childrearing as a basic organizing principle for family privacy analysis, employing different legal standards to assess claims of childrearing autonomy in each of the three territories. Basically ceding the home to parents and schools to the state, she proposes a special rule for the distinctive space in between in order to balance the legitimate private and public interests at play there. My own inclination is to focus on the essential similarities connecting all three categories, and to emphasize that, in all locations, resolving family privacy disputes inevitably requires balancing the liberties of family members against the interests of the state in protecting children from harm and ensuring their healthy development. Rather than set out distinctive legal standards for each childrearing space, a single balancing framework might accomplish the same task with greater sensitivity to the endlessly variable exigencies that may arise.

Location clearly should matter to this balancing. The state might have stronger justifications for restricting certain childrearing practices in public places (say, family nudism, to borrow from one of Professor Rosenbury’s illustrative cases,²⁷ or the infliction of corporal punishment) than it would have if the practices were confined entirely within the home. Certainly, constitutional doctrine has long recognized an extra measure of privacy protection for the home. *Lawrence v. Texas*, for example, observed that constitutional privacy (or “liberty,” as *Lawrence* prefers) has both decisional and “spatial” dimensions, with added protection for the “dwelling or other private

²⁵ *Id.* at 178.

²⁶ *Runyon* reasoned:

The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

Id.

²⁷ See Rosenbury, *supra* note 1, at 885-88 (discussing *White Tail Park, Inc. v. Stroube*, 413 F.3d 451 (4th Cir. 2005)).

places.”²⁸ By the same token, *Prince* held that “[t]he state’s authority over children’s activities” is enlarged when the conduct occurs “in public places.”²⁹

Location is relevant to the measure of parental rights for several reasons. Professor Rosenbury cogently points out that location matters *to children* because the guidance they receive in “between” places from community members may be different from the tutelage they receive at home or school and is therefore uniquely beneficial. In addition, location surely matters *to parents* because the intrusion they feel will be far greater when they are told how to behave in their own home than elsewhere. And location matters *to the state* because the assertion of parental prerogative outside the home may impose significant externalities. This, in fact, seems to be the primary concern driving courts to reject parental attempts to control school curricula or other policies: accommodating the idiosyncratic preferences of individual parents may well diminish the educational experience of other children and financially burden school districts.³⁰

Each of these considerations counsels taking account of place—any assessment of the constitutionality of state regulation of childrearing must weigh the burden on parents and children against the public costs and benefits—but how exactly? Professor Rosenbury’s framework would fix the bar differently for home, school, and in between. She appears to accept that childrearing within the home should be subject to intervention only in cases of abuse or neglect,³¹ and that state control over childrearing in the public schools is essentially unfettered by parental rights.³² In between, Professor Rosenbury would permit the state to regulate childrearing only to enhance children’s exposure to diverse values and ways of life. Under this standard, the state could compel the Boy Scouts, for example, to admit gay scoutmasters (furthering pluralism), but could not require parents or guardians to accompany their children to nudist youth camps (since the requirement would do nothing to enhance pluralism).³³

²⁸ 539 U.S. 558, 562 (2003).

²⁹ *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

³⁰ As Judge Richard Posner observed in rejecting a parent’s claimed right of access to school grounds and records, “Imagine if a parent insisted on sitting in on each of her child’s classes in order to monitor the teacher’s performance or on vetoing curricular choices, texts, and assignments.” *Crowley v. McKinney*, 400 F.3d 965, 969 (7th Cir. 2005), *cert. denied*, 546 U.S. 1033 (2005).

³¹ See Rosenbury, *supra* note 1, at 833-34 (discussing the scope of parental rights within the home).

³² See *id.* at 869-71 (discussing parental rights at school).

³³ See *id.* at 895-97 (applying her proposed normative framework to the facts of *Boy*

This stratified approach could bring greater predictability to family privacy analysis, but would do so by limiting the considerations that otherwise might inform the necessary balancing. Whether the gain would be worth its costs is uncertain. It seems to me, for example, that enhancing children's exposure to diversity is not the only public interest that might properly justify state regulation of childrearing between home and school. I am not convinced, for example, that the state's ability to impose modest regulations intended to ensure the safety of children participating in a back-country wilderness program, or to reduce the danger of sexual imposition at a nudist camp for adolescents, should depend on proof that the hazards would otherwise constitute abuse or neglect. Likewise, regulatory burdens in the pursuit of pluralism should be justified by some demonstration that the benefits to children will in fact be substantial. If childrearing outside the home genuinely deserves significant constitutional protection, as it surely does, then we should insist on assurances that the public benefit truly outweighs the impositions on private choice. If applied rigidly, a categorical and exclusive allowance for state regulation mandating inclusiveness or pluralism in out-of-home childrearing might allow at once too little state intervention (barring safety-oriented regulations absent hazards amounting to neglect) and too much (permitting all inclusion-oriented regulation without a demonstration of its substantial benefits).

Alternatively, location could be used not as an organizing principle, but as a more indeterminate factor in calibrating the strength of justification required of the state for any intervention in childrearing. Courts might continue to demand more compelling justification for state supervision of childrearing in the home, while gradually relaxing their expectations as the location of the regulated activity shifts to ever-more public places.³⁴ In this way, location could take its place alongside other factors traditionally considered by the courts when determining the appropriate level of scrutiny in family-privacy controversies—such as the degree and quality of the state's imposition, the degree to which affected family members are united or divided in opposing the state's intervention, and the traditionality or novelty of

Scouts of America v. Dale, 530 U.S. 640 (2000), and *White Tail Park, Inc. v. Stroube*, 413 F.3d 451 (4th Cir. 2005)).

³⁴ Cf. Rosenbury, *supra* note 1, at 874 (acknowledging that “when the childrearing traditionally performed within the home moves to organizations outside of the home, it is conceivable that the privacy accorded to such childrearing should gradually give way to state interests”).

the regulation.³⁵

Those who are distrustful of the ability or willingness of courts to apply such balancing tests with sensitivity and restraint may well prefer Professor Rosenbury's proposed approach. One could reasonably fear that the indeterminacy of multi-factor balancing will lead too many judges to undervalue privacy, especially the privacy of families whose methods of childrearing do not conform to prevailing social conventions.³⁶ From that vantage point, cabinining the judicial role through the crisper lines suggested by Professor Rosenbury—including the privileged place given to the state's pursuit of pluralistic values in childrearing between home and school—may appear to strike exactly the right balance.

The second major question Professor Rosenbury's article raises concerns the rights-holding status given to third-party actors who engage in childrearing. Professor Rosenbury posits that third parties who socialize children (including entities such as the Boy Scouts and summer camps) should enjoy constitutionally protected autonomy "to engage in the childrearing of their choice, much as parents are permitted—and even encouraged—to do."³⁷ This seems to imply that these actors should be recognized as holding family privacy rights of their own, a proposition sure to be controversial and yet one that coincides with tentative and fledgling efforts to recognize privacy rights in persons other than parents. The Supreme Court in 1977 hesitated to recognize foster parents as holding family privacy rights in *Smith v. Organization of Foster Families for Equality & Reform*.³⁸ But more recently, in *Troxel v. Granville*, Justice Stevens was prepared to recognize that children could potentially hold privacy rights in maintaining "familial or family-like bonds" with non-parents;³⁹ and Justice Scalia agreed that a gradual extension of family-privacy rights to others outside the parent-child relationship was the inevitable implication of the Court's

³⁵ For a fuller defense of the relevance of these factors, see David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 579-94 (2000).

³⁶ Cf. Rosenbury, *supra* note 1, at 889-90 (suggesting that courts are sometimes more inclined to favor claims of "family privacy" when childrearing conforms to public norms); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 535 (2001) (suggesting that privacy protection is often dependent upon conformity with traditional norms of family organization).

³⁷ Rosenbury, *supra* note 1, at 895.

³⁸ 431 U.S. 816, 846-47 (1977) (declining to resolve the issue of foster parents' liberty interests, but suggesting that any such rights are attenuated in comparison with those of natural parents).

³⁹ 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

doctrine.⁴⁰ It is therefore possible to imagine that third parties who care for children might be accorded childrearing rights. Yet, the parties who have prevailed in the lower courts so far have all been intimately bound to the children in their care. The “de facto parent” who assumes a parenting partnership with a legal parent surely stands in a different position from the Boy Scouts or the neighborhood day care provider.

Could it be that private associations that engage in childrearing (as opposed to adult socializing or charity work, for example) are entitled to an extra measure of public deference under the Constitution? I think that is entirely plausible, and Professor Rosenbury makes a substantial case that such a principle would benefit children. At the same time, I think it likely that the deference would hinge ultimately on respect for *parental* preferences, not on any independent childrearing role of the association.

Several rationales undergird parental rights under the Constitution. Respecting the childrearing liberty of individual parents promotes, as Professor Rosenbury observes, pluralism in families and social values by preventing the state from seeking to “standardize” children according to a single ideal.⁴¹ But the task of pluralizing childrearing is entrusted to parents, as opposed to child-development professionals, neighbors, or other caring neutrals, for good reason. First, parents are presumed to be best situated to protect their children’s welfare because of “the emotional attachments that derive from the intimacy of daily association.”⁴² As Emily Buss has cogently put the point, “Parents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their chil-

⁴⁰ See *id.* at 92-93 (Scalia, J., dissenting) (criticizing judicial vindication of parental rights). For a full exploration, see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006) (analyzing children’s rights when the state makes decisions about their personal relationships).

⁴¹ Rosenbury, *supra* note 1, at 882; see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“[T]he means adopted [to foster a homogeneous people with American ideals] exceed the limitations upon the power of the State and conflict with rights assured to plaintiff . . .”); MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 24-33 (2005) (exploring the theoretical foundations of the Supreme Court’s protection of parental rights).

⁴² *Smith*, 431 U.S. at 844.

dren's best interests in most circumstances."⁴³ In addition, to the extent that substantive due process rights rest on social consensus about the limits of government power, social consensus has long looked to parents as the natural guardians of their children. Neither of these rationales would provide much support for recognizing free-standing childrearing rights in caregivers outside the family circle. Out-of-home caregivers or youth groups, lacking the "intimacy of daily association" shared within the family, are unlikely to share the exceptional knowledge and motivation of parents, and social consensus has clearly not regarded such parties as beyond the reach of government regulation.

Although I am doubtful that third-party actors such as the Boy Scouts or summer camps can qualify as holders of constitutional childrearing rights of their own, it strikes me as quite plausible that they might be given third-party standing to assert the constitutional rights of parents in some instances. Since Professor Rosenbury does not envision that third-party childrearing rights could operate to limit the prerogatives of parents, standing to assert the rights of parents to enroll their children would likely accomplish the same result in any event.

In summary, Professor Rosenbury makes a strong and thoughtful case that more systematic attention must be paid to the childrearing that takes place between home and school. She also makes an important start toward that goal by challenging family law and constitutional scholars to account for the relevance of place and third-party caregivers in the modern law of family privacy. The debate on these questions is likely to unfold for many years to come, but it has already been enriched by Professor Rosenbury's excellent and provocative article.

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⁴³ Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 647 (2002); see also Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940 (1996) ("[P]arents have better incentives to act in their children's perceived best interests than do the state and its delegates, and will consequently be, on average, more faithful educational guardians."); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2432-37 (1995) (discussing the "extralegal" influences that make parents uniquely committed to caring for their children's welfare).