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**Children and the Law:**  
Constitutional Decisionmaking and the  
“Peculiar Vulnerability of Children”

Lois A. Weithorn<sup>1</sup>

In 2016, in the juvenile sentencing case of *Montgomery v. Louisiana*,<sup>2</sup> the U.S. Supreme Court remarked that “children are constitutionally different from adults.” Few would disagree with the notion that children differ from adults in many ways. At times, courts have determined that those differences justify—indeed require—differential treatment of children and adults under the Constitution.

In its decisions, the Court has identified “three reasons” for treating children differently under the Constitution. It has cited “*the peculiar vulnerability of children*; [children’s] inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”<sup>3</sup> While much attention has been paid in recent decades to the latter two factors, there has been comparatively little analysis of how notions of children’s vulnerability relate to constitutional decisionmaking. Here, I focus attention on the concept of children’s vulnerability, examples of which abound in constitutional jurisprudence, despite the absence of substantial discussion of its meaning, parameters, and relevance to constitutional decisionmaking.

Characterizations of children as vulnerable (or not) are assertions about aspects of the psychological or physiological nature of children that are endorsed or rejected by judges. As such, they represent the judicial conclusions about certain *facts* relevant to constitutional cases. Because these vulnerability constructs concern *general* phenomena (that is, characteristics, needs, or responses to certain situations, stimuli, or influences of children generally) rather than information specific to the parties in the litigation, the constructs have been referred to as *legislative facts*<sup>4</sup> when judges offer them as reflecting the true state of the world.

What should be the source of the “facts” about children’s development (or any phenomenon relating to human behavior or

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1. Summarized and excerpted from Lois A. Weithorn, *A Constitutional Jurisprudence of Children’s Vulnerability*, 69 HASTINGS L.J. 179 (2017).

2. *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016); *Graham v. Florida*, 560 U.S. 48, 68 (2010).

3. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (emphasis added).

4. David L. Faigman, *Normative Constitutional Factfinding*, 139 U. PA. L. REV. 541, 552 (1991).

functioning) used by judges in resolving constitutional questions? Ideally, when assertions about children's functioning in the real world are employed in analyzing and deciding a case, courts' formulations about children's characteristics should be consistent with the state of knowledge in developmental psychology and other relevant health science fields. While constitutional cases must be resolved through application of constitutional principles, if a court integrates legislative "facts" relating to children's vulnerability into its analyses—as it often does when scrutinizing state purposes asserted to justify child-protective legislation—those facts must reflect the best available knowledge regarding children's functioning and development.

Here, I first set out what is meant by children's vulnerability and then offer a taxonomy of subtypes of vulnerability relevant to legal decisionmaking. In so doing, I provide a range of examples of how the courts have employed constructs of children's vulnerability in constitutional decisionmaking. Finally, I emphasize the importance of legal decisionmakers relying on empirically supported and evidence-based notions of children's vulnerability, where possible, rather than on assumptions about children's functioning drawn from everyday experiences.

#### *What is Meant by Children's Vulnerability?*

The Supreme Court has provided only limited explanation of the meanings it ascribes to the concept of vulnerability. For instance, it has never explained its choice of the modifier "peculiar" in describing children's vulnerability in *Bellotti v. Baird*, although we might assume the Court is suggesting distinctiveness and atypicality. Some features of children's vulnerability are indeed distinctive, such as those related to the natural patterns and pace of the physiological and psychological changes children undergo throughout their development, or to the unique role of parents in minor children's lives.

The terms "vulnerable" and "vulnerability" are used in everyday parlance as well as in jurisprudence and scholarship. Yet there is remarkably little written to elucidate the nature of the concept as it relates to human beings. One dictionary defines the term "vulnerable" as "capable of or susceptible to being wounded or hurt physically or emotionally" or "susceptible to temptation or corrupt influence."<sup>5</sup> These two threads—susceptibility to physical or emotional harm and

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5. *Vulnerable*, THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1997).

susceptibility to coercion or other external sources of influence—also sit at the core of many philosophical, scientific, and legal formulations. Other concepts of vulnerability, such as those relating to immature decisionmaking capacities, dependence on others, or socially imposed restrictions on freedom, also appear in scholarly literature and jurisprudence relating to childhood.

I developed the following five categories of vulnerability through review and analysis of constitutional decisions rendered by the federal courts and the relevant legal, scientific, and philosophical scholarship. Examples of how concepts within these categories influence constitutional decisions will be provided below.

- (1) *Harm-Based Vulnerability* (that is, vulnerability as greater susceptibility to physical or psychological harm from exposure to certain stimuli or situations);
- (2) *Influence-Based Vulnerability* (that is, vulnerability as greater susceptibility to influence, pressure, coercion by others);
- (3) *Capacity-Based Vulnerability* (that is, vulnerability arising from immature decisional and self-protective capacities);
- (4) *Status-Based Vulnerability* (that is, vulnerability arising from legal, social, and situational concomitants of minority status and subordination to the authority and control of others); and
- (5) *Dependency-Based Vulnerability* (that is, vulnerability arising from greater dependence or reliance on others to meet one's basic needs).

*Harm-based vulnerability* is one of the most common constructs invoked to support treating children differently from adults under the Constitution. Concerned about the “crippling” effects of child labor, the Supreme Court underscored that a state’s *parens patriae* and police power interests in children’s welfare can serve as the basis for restriction of others’ constitutional rights.<sup>6</sup> The dangers to the “physical and psychological well-being” of children, who are perceived as manifesting “particular” vulnerability, are cited to justify the criminalization of a

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6. Prince v. Massachusetts, 321 U.S. 158, 161 (1944).

range of activities related to child pornography.<sup>7</sup> Courts have relied on notions of children's vulnerability in determining the constitutionality of courtroom procedures that accommodate children as courtroom witnesses against alleged abusers and in considering the constitutionality of limiting children's access to reading matter, media, or games asserted to be sexually explicit or extremely violent and therefore inappropriate for children's consumption.

Harm-based vulnerability constructs also appear in the Supreme Court's adolescent abortion cases. The majority in *H.L. v. Matheson* asserted that the "emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults,"<sup>8</sup> while dissenters focused on the special risks to minors of being forced to continue with an unwanted pregnancy and childbirth.<sup>9</sup> Images of children as susceptible to harm have also been employed in equal-protection cases to emphasize the risks to children of unequal treatment. In *Brown v. Board of Education*, the Court stated that "[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority that may affect their hearts and minds in a way unlikely ever to be undone."<sup>10</sup> Race-based decisionmaking was rejected in *Palmore v. Sidoti*, where the Court determined that assertions about children's vulnerability to "social stigmatization" would *not* influence its decision, holding that race-based factors such as these were not constitutionally permissible considerations in determining custody of a child.<sup>11</sup> More recently, in expanding constitutional protections for the marital rights of same-sex couples, the Court cited the "harm and humiliat[ion]" experienced by the children of same-sex couples who do not understand why their families are treated as "less worthy" of formal recognition under the law.<sup>12</sup>

Concepts of children's *influence-based vulnerability* appeared in Supreme Court decisions as early as 1960s. The Court has relied on notions of children as susceptible to the influence of peers, teachers, and the government in cases involving Establishment Clause challenges to policies allowing school prayer. The Court has cited developmental

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7. *New York v. Ferber*, 458 U.S. 747, 756-57 & 776 (1982) (Brennan, J., concurring).

8. *H.L. v. Matheson*, 450 U.S. 398, 412-13 (1981).

9. *Id.* at 438-39 n.38, 444 (Marshall, J., dissenting).

10. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

11. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

12. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

research to support its conclusion that children could not be expected to flout social expectations and “peer-group norms” that favored participation in the religious exercises. Even minors on the verge of adulthood may be susceptible to pressures from peers and authority figures, according to a 1992 opinion by the Court,<sup>13</sup> although Justice Scalia rejected the assertion that older minors, such as graduating high school seniors, are susceptible to “psychological coercion” in such situations.<sup>14</sup> Concerns about children’s impressionability and susceptibility to peer pressure were also cited by the Court in striking down a Louisiana statute requiring the teaching of “creation science” whenever evolution is taught.<sup>15</sup>

In a series of decisions concerning the constitutionality of imposing the death penalty or life without parole on juvenile offenders, the Court has invoked a number of constructs relating to children’s vulnerability. In *Roper v. Simmons*, holding imposition of the death penalty to be categorically unconstitutional for persons who committed their crimes as minors, the Court concluded that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”<sup>16</sup> These assertions were employed again to extend *Roper*’s reasoning in subsequent sentencing cases.<sup>17</sup> The Court applied similar constructs in determining that children are more likely to feel pressured and to submit when adults “would feel free to go” in determining the standard for judging whether the interrogation of juveniles is custodial, triggering police obligation to provide *Miranda* warnings.<sup>18</sup>

The concept of *capacity-based vulnerability* focuses on the risks to one’s welfare that may accompany immature decisional capacities. Those with limited capacities may be less able to protect themselves from potential harms or dangers because they are less likely to perceive and understand relevant information, to weigh risks and benefits, to exercise planning, to employ forethought and deliberative decisionmaking, and to use self-restraint against impulsive action. Indeed, these are characteristics identified by the Supreme Court in the juvenile cases involving sentencing and police interrogation cited above. The Court observed that “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to

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13. *Lee v. Weisman*, 505 U.S. 577, 578 (1992).

14. *Id.* at 636-37 (Scalia, J., dissenting).

15. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

16. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

17. *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

18. *J.D.B. v. North Carolina*, 564 U.S. 261, 269-70 (2011).

understand the world around them.”<sup>19</sup>

In *Parham v. J.R.*, a case considering what due process protections are required before children are “voluntarily” admitted to psychiatric hospitals with parental consent, Justice Burger opined: “Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.”<sup>20</sup> In the context of abortion, the Supreme Court’s majority opined that minors “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>21</sup> Focusing on minors who engage in criminal offending, the Court in *Roper* asserted that minors lacked maturity and were more likely than adults to engage in “impetuous and ill-considered actions and decisions” and are “overrepresented statistically in virtually every category of reckless behavior.”<sup>22</sup> In *Miller*, relying on scientific research, the Court emphasized that “adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance” and concluded that “transient rashness, proclivity for risk, and inability to assess consequences” reduced minors’ moral culpability for the criminal acts in which they may engage, thus making the harshest punishments less appropriate.<sup>23</sup>

*Status-based vulnerability* arises from legal, social, and situational concomitants of minority status and subordination to the authority and control of others. This form of vulnerability therefore addresses the *structural* effects of being subject to the authority of others. Our society and the law governing family relations are structured so that parents are authorized to exercise substantial discretion in most areas of children’s upbringing—with some limited state involvement. Ideally, adults with such authority act to promote the child’s and society’s interests. Occasionally, however, the broad grant of parental authority, may be viewed as detrimental to children. For example, in *Troxel v. Granville*, Justice Stevens argued that the Court’s high level of deference to parental preferences in determining the parameters of court-ordered third-party visitation of children by grandparents disregarded the children’s liberty interest in maintaining family bonds.<sup>24</sup> As such, he

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19. *Id.* at 273.

20. *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

21. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

22. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

23. *Miller v. Alabama*, 567 U.S. 460, 470-72 (2012).

24. 530 U.S. 57, 88-90 (2000) (Stevens, J., dissenting).

recognized the vulnerability of children to emotional losses from the severing of such bonds. In a dissent in *Wisconsin v. Yoder*, a case in which the Court recognized the First and Fourteenth Amendment rights of Amish parents to remove their teenaged children from public school earlier than the statutorily determined age of school exit, Justice Douglas bemoaned the losses to the children of irreplaceable educational opportunities resulting from their lack of freedom to choose whether to remain in school.<sup>25</sup>

In *Roper*, the Court characterized minors as more vulnerable than adults “in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.”<sup>26</sup> In *Miller*, the Court highlighted the powerlessness of the offenders to escape the violent home situations in which they were living, acknowledging that children are less able to extricate themselves from home and community situations that promote and reinforce criminal conduct.<sup>27</sup> In *Schall v. Martin*, Justice Burger analogized minors’ lack of day-to-day control over their lives to institutional detention in defending less stringent due-process protections in the context of pretrial preventive detention for minors versus adults, in stating that “juveniles, unlike adults, are always in some form of custody.”<sup>28</sup>

Finally, the concept of *dependency-based vulnerability* recognizes the implicit reliance of children upon others to meet their most basic needs. Minors of different ages manifest varying levels of capacity to meet their own basic needs. While an infant is incapable of even the most basic self-care, teens can feed, clothe, and bathe themselves, even if some may be thought not to make the best choices in executing those tasks. Needs for material sustenance are, of course, fundamental to survival. Needs for protection from dangers—such as knives, poisons, traffic, loaded firearms—are also fundamental to survival. Yet as decades of developmental research confirms, children also have psychological needs to be nurtured and loved, to be educated and intellectually stimulated, and to be protected from a range of abusive or brutal practices detrimental to adaptive human development. In contrast to status-based vulnerability, which focuses on vulnerabilities due primarily to the *structural* status relationships, dependency-based analyses focus on children’s needs and vulnerabilities arising out of their *functional* biological and psychological reliance on others to meet those needs.

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25. 406 U.S. 205, 245-46 (1972) (Douglas, J., dissenting).

26. *Roper*, 543 U.S. at 569.

27. *Miller v. Alabama*, 567 U.S. 477 (2012).

28. *Schall v. Martin*, 467 U.S. 253, 163 (1984).

An illustration can be found in *DeShaney v. Winnebago County Department of Social Services*.<sup>29</sup> Joshua DeShaney suffered permanent brain damage as a result of brutal abuse by his father. Concerned parties reported suspicions of abuse to the Department of Social Service (“DSS”), which repeatedly failed to protect Joshua. The Court did not dispute the general premise that a young child is totally dependent upon the quality of care provided by those entrusted with protecting his welfare. However, the majority and dissent diverged on the question of who owed Joshua a duty of care in light of his total dependence on adults. The majority concluded that, at least under the federal Constitution, no duty of care obliged the state to intercede to protect Joshua; duties of care and protection are born solely by the family as a private entity. The dissent characterized Joshua as a dependent of the state, once the state had begun to rescue, consistent with the policies and procedures of its child-protection apparatus. Dependency-based vulnerability constructs do not appear frequently in the Supreme Court’s constitutional cases. The majority’s analysis and resolution of *DeShaney* may explain why. Our Constitution is generally viewed as protecting individuals *from* government action, rather than bestowing positive rights to governmental assistance or services. Constitutional challenges, particularly after *DeShaney*, are less likely to characterize matters addressing government’s role in meeting the needs of dependent persons as falling within the purview of the Constitution.

*Children’s Vulnerability, the Courts, and the  
Current State of Knowledge*

One need not resort to scientific sources to observe that most children have not yet reached typical adult levels of physiological and psychological development on most dimensions relevant to the vulnerability typology proposed above. Although age eighteen is a relatively crude and often inaccurate point of demarcation for the acquisition of the legal and social status of adulthood, general differences between children and adults exist. And the Court’s conclusions in the cases described indicate just how challenging it can be to try to apply the general concept of “children are different” to the *specific* questions about children’s development and functioning relevant to the cases. The questions are complicated further in the context of constitutional decisionmaking by the need to determine whether identified differences

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29. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

are sufficiently trustworthy, consistent, or meaningful to justify the differential treatment required by state or federal legislation or regulation, or by those who petition the Court claiming that the Constitution requires such differential treatment where the law fails to provide it.

As noted above, constitutional cases must be resolved through application of constitutional principles. Yet if the doctrine requires courts to integrate legislative “facts” relating to children’s vulnerability into its analyses—as it often does when scrutinizing state purposes asserted to justify child protective legislation—those facts must come from somewhere. One approach by courts is to rely on ordinary human experience and to assume that the phenomena of interest are easily discerned by all. And where there is a dearth of empirical research addressing a question about children’s vulnerability, or any other aspect of children’s functioning relevant to a court’s decision, a court may have no choice but to fall back on “common sense” and the life experiences of the decisionmakers. Yet because the specific nature and degree of the differences between adults and children on constitutionally relevant questions raise empirical questions, just resolutions will be promoted where decisionmaking is informed by the best available developmental research.

In the context of constitutional decisionmaking about children’s vulnerability, there exist some excellent examples of courts’ consumption of relevant developmental science. In a Confrontation Clause case, *Maryland v. Craig*, the Supreme Court relied heavily on a strong body of psychological evidence in determining the constitutionality of allowing child abuse victims to testify via one-way closed-circuit television rather than in the presence of the defendant, pursuant to a Maryland statute. The statute required individualized determinations by the trial court judge as to whether requiring in-courtroom testimony by the child would cause “serious emotional distress such that the child cannot reasonably communicate.”<sup>30</sup> The Court held that the modifications permitted by the statute were necessary to further an important state interest, that is, the protection of the physical and psychological well-being of child abuse victims. It relied both on its prior decisions and additional scientific authority on the “psychological trauma suffered by child abuse victims who must testify in court” to uphold the Maryland statute. Furthermore, the scientific database identified by Justice O’Connor cited in *Craig* as a “growing body of

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30. 497 U.S. 836, 840-41 (1990).

academic literature” also supports the *procedures* upheld by the Court.<sup>31</sup> There exist a range of situation-specific and child-specific variables affecting the psychological impact of participation in criminal courtroom proceedings on children. The constitutional requirement of individualized findings of necessity by the trial court are consistent with the variations among children and situations that result in variabilities in the need for these modifications. Along similar lines, the Supreme Court has incorporated up-to-date neuroscientific information about children’s development into its most recent juvenile justice cases addressing sentencing and custodial interrogation.

Children are engaged in a biologically driven and exceedingly rapid *process* of maturation that is highly responsive to environmental inputs. The experiences that occur throughout this process can have significant and potentially lifelong effects on their functioning. These factors may render children more vulnerable to potential harm, while also presenting them with substantial opportunities for positive growth. Developmental science, which includes psychological research, neuroscientific evidence, and the findings of a range of health science disciplines, while unable to answer many empirical questions, can inform others. To the extent that the available data elucidate questions about children’s vulnerability that must be addressed in a constitutional dispute, familiarity with such findings by constitutional decisionmakers is likely to promote a resolution more faithful to the underlying constitutional principles.

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31. *Id.* at 852-57.