Michigan Law Review

Volume 118 | Issue 7

2020

Conceptualizing Legal Childhood in the Twenty-First Century

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https://doi.org/10.36644/mlr.118.7.conceptualization

CONCEPTUALIZING LEGAL CHILDHOOD IN THE TWENTY-FIRST CENTURY

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The law governing children is complex, sometimes appearing almost incoherent. The relatively simple framework established in the Progressive Era, in which parents had primary authority over children, subject to limited state oversight, has broken down over the past few decades. Lawmakers started granting children some adult rights and privileges, raising questions about their traditional status as vulnerable, dependent, and legally incompetent beings. As children emerged as legal persons, children's rights advocates challenged the rationale for parental authority, contending that robust parental rights often harm children. And a wave of punitive reforms in response to juvenile crime in the 1990s undermined the state's long-standing role as the protector of children.

We address this seeming incoherence by identifying a deep structure and logic in the regulation of children that is becoming clear in the twenty-first century. In our conceptual framework, the law's central goal, across multiple legal domains, is to promote child wellbeing. This unifying purpose has roots in the Progressive Era, but three distinct characteristics distinguish the modern approach. Today, lawmakers advance child wellbeing with greater confidence and success by drawing on a wide body of research on child and adolescent development and the efficacy of related policies. This is bolstered by the clear understanding that promoting child wellbeing generally furthers social welfare, leading to a broader base of support for state policies and legal doctrines. Finally, there is a growing recognition that the regulation of children and families has long been tainted by racial and class bias and that a new commitment to minimizing these pernicious influences is essential to both the legitimacy and fairness of the regime. In combination, these features make the contemporary regulatory framework superior to earlier approaches.

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Rather than pitting the state, parents, and child in competition for control over children's lives—the conception of family regulation since the 1960s—our Child Wellbeing framework offers a surprisingly integrated regulatory approach. Properly understood, parental rights and children's rights, as well as the direct role of the state in children's lives, are increasingly defined and unified by a research-driven, social-welfare-regarding effort to promote child wellbeing. This normatively attractive conceptualization of legal childhood does not define every area of legal regulation, but it is a strong through line and should be elevated and embraced more broadly. In short, our framework brings coherence to the complex legal developments of the past half century and provides guidance moving forward for this critical area of the law.

TABLE OF CONTENTS

INTRODUCTION

Over the past several decades, the law's treatment of children has become increasingly complex and uncertain in ways that can seem to verge on incoherence. The problem stems from a breakdown of the Progressive Era approach that governed for much of the twentieth century: in that framework, parents had authority to make most decisions about their children, subject to state regulation of issues such as education and child labor. The state also intervened directly with families to protect children from parental abuse and neglect and to rehabilitate children engaged in wayward or criminal conduct.[1] Children in this regime were largely invisible as legal persons, presumed to be vulnerable, dependent, and incapable of making self-regarding decisions.[2]

Several developments in the second half of the twentieth century complicated this approach. Beginning in the 1960s, courts and legislatures started treating children as rights-bearing legal persons for some purposes.[3] This

1. *See infra* Section I.A (detailing this approach and emphasizing that state intervention focused primarily on low-income, immigrant families).

2. *See infra* Section I.A (describing this legal framework and noting that to an extent, it persisted for decades: parents continued to enjoy substantial control over their children, subject to state intervention or preemption when child welfare and social welfare demanded, and for many purposes, children continued to be deemed dependent, vulnerable, and incapable of self-determination).

3. *See infra* Sections I.B.1, I.B.2 (explaining how the children's rights movement gained momentum in a series of Supreme Court decisions that granted children a range of constitu-

challenged the traditional view of children as lacking the legal capacity for self-determination, while providing little clarity about the conditions under which the law should confer rights and privileges. With the recognition of children's rights, legal questions increasingly were framed as a zero-sum contest in which parents, children, and the state competed for control over children's lives.[4] Moreover, children's rights scholars and advocates contested the parental authority prong of the Progressive Era approach as obsolete, contending that parental rights were rooted in traditional notions of children as property and threatened harm to children.[5]

The overriding Progressive conception of the state as the defender of vulnerable children also lost its way. In the 1980s and 1990s, the rehabilitative model of juvenile justice virtually collapsed under a wave of punitive law reforms that abandoned the long-standing goal of promoting the wellbeing of young offenders.[6] In the twenty-first century, lawmakers retreated from this punitive approach, and a new wave of more benevolent reforms is now underway, but these pendulum swings have undermined the stability of the state's regulatory role.[7] In the child welfare system, scholars and advocates challenged the myopic and ineffective focus on family crises rather than on child abuse prevention and family support.[8] And critics argued convincingly that both the juvenile justice and child welfare systems were highly racialized and skewed against families in poverty.[9] Taken together, these disruptions to the Progressive Era framework fundamentally challenge the rationality and stability of the law's conception of childhood.

In this Article, we show that the legal regulation of children is not incoherent. Indeed, in what we call the Child Wellbeing framework, there is a

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tional protections, including procedural rights in delinquency proceedings, speech rights in school, and the right of mature minors to consent to abortion).

4. *See infra* Sections I.B.2, I.B.3. The regulatory framework was often depicted schematically as a triangle. *See* Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 412 (2005).

5. *See infra* Sections I.B.2, I.B.3.

6. *See infra* Section I.B.1. As we detail, many youths were transferred to the adult justice system, and the use of incarceration increased for children who remained in the juvenile system. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 94–102 (2008). This trend toward criminalization was described by some lawmakers, including Justice Scalia, as wholly consistent with the recognition of youths as rights-bearing persons. *See* Roper v. Simmons, 543 U.S. 551, 615–19 (2005) (Scalia, J., dissenting) (criticizing the Court for inconsistency in minors'-abortion and juvenile-sentencing opinions).

7. *See infra* Section II.A (describing the emergence of the Child Wellbeing framework). There have been similar swings in the status-offense system, which addresses noncriminal misconduct by children. *See infra* notes 44, 164.

8. *See infra* text accompanying notes 85–99 (demonstrating that, despite policy swings, family intervention and assistance has largely been limited to crisis situations; lawmakers have eschewed an active state role in supporting families by promoting healthy child development, with unsatisfactory results).

9. *See infra* text accompanying notes 182–183 (describing racial disproportionality at every stage of the juvenile justice system); *infra* note 41 and accompanying text; *infra* text accompanying notes 88–91 (describing racial disproportionality in the child welfare system).

deep unifying structure and logic to the regulation of children that is emerging across multiple domains, including systems of state intervention, parental rights, and children's rights, as well as, to a much lesser degree, policies of state support for families. The core principle and goal of the legal regulation of children is the promotion of child wellbeing. Three features distinguish the contemporary approach from that of the Progressive era. First, twenty-first-century regulation is increasingly based on psychological and biological research on child and adolescent development, as well as growing evidence about the effectiveness of policy interventions. This broad body of knowledge makes it possible to advance child wellbeing with much greater confidence, sophistication, and effect.[10] Second, lawmakers and the public increasingly appear to recognize the social welfare advantages of promoting child wellbeing, thereby broadening support for contemporary policies.[11] And third, a growing acknowledgment of embedded racial and class bias in state regulation of children has led to tentative steps toward reducing these pernicious influences, even if these efforts are at an early stage.

The goal of promoting child wellbeing shapes regulation and policy ex ante and should not be confused with the best interest of the child standard, applied in individual cases in some legal settings.[12] Indeed, in some contexts, a rule of general applicability defined in accord with the Child Wellbeing

10. Emily Buss has argued that the law should function as a developmental agent with the aim to promote healthy development in children. *See* Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 751–52 (2016). In many regards, her argument is compatible with our framework. For cautionary notes about the use of social science evidence, see *infra* Part V.

11. In the juvenile justice system, for example, recent developmentally based reforms have effectively reduced recidivism and are cost-effective. *See infra* Section II.A. *See generally* SCOTT & STEINBERG, *supra* note 6, at 181–222. Traditional Progressives often ignored the public interest in crime protection, with devastating consequences when apparent conflicts arose. *See* SCOTT & STEINBERG, *supra* note 6, at 84–88; *infra* Section I.B.1. As we discuss throughout the Article, sometimes social welfare concerns drive legal reform and other times a concern for social welfare is implicit in the reasoning.

Social welfare in this article is calculated by weighing the costs of a policy or doctrine to society against its benefits to society. This article describes doctrines and policies as advancing social welfare when the benefits to society of a given doctrine or policy exceed the costs. Benefits vary in different contexts. In justice policy, for example, social welfare is advanced when recidivism is reduced through cost-effective programs. *See infra* text accompanying notes 149–150. In family intervention, social welfare is advanced when children develop healthily and become productive adults through cost-effective interventions. *See infra* text accompanying notes 256–260. Costs generally include financial costs and other harms incurred by the regulation. *See infra* note 387 and accompanying text (describing the social costs of withholding contraception from sexually active teens).

12. The best-interest standard is applied, inter alia, in child custody disputes. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226 (describing the best-interest standard and its indeterminacy).

framework may result in a decision in an individual case that is contrary to the child's interest.[13]

The elements of the Child Wellbeing framework—reliance on research, recognition of social welfare benefits, and acknowledgment of systemic racism—are clearest in sweeping twenty-first-century juvenile justice reforms.[14] Rejecting the punitive reforms of the 1990s, which largely targeted youth of color, lawmakers have acted to promote adolescent wellbeing, drawing on developmental knowledge and focusing on the social welfare benefits of reducing recidivism and helping delinquent teenagers transition to productive adulthood. With these goals in mind, lawmakers have closed institutional facilities and expanded community-based programs tailored to the needs of young offenders. Across the political spectrum, supporters have endorsed these changes as cost-effective policies that serve the interests of both young offenders and society.[15] The reforms are far from complete and have not eradicated racial disparities, to be sure, but lawmakers have begun to recognize the harms of the system and the ways in which it disproportionately impacts youth of color.[16]

Identifying and crystallizing the core components of this framework makes clear that it also undergirds other aspects of the regulation of children;[17] indeed, the central aim of this Article is to identify these common themes across domains of legal regulation. The Child Wellbeing framework is apparent, for example, in more nascent systemic reforms that expand the obligation of the state to support parents in raising children to productive adulthood.[18] These reforms reflect an understanding that research-driven policies, such as universal prekindergarten, not only benefit children but also promote social welfare.[19] And the framework is evident in a growing awareness that decisions about state intervention in families often are tainted by

13. *See, e.g.*, *infra* Section III.B.2 (discussing the rules governing third-party contact with children and explaining that a legal rule deferring to parental decisionmaking advances child wellbeing in the typical case and thus is consistent with the Child Wellbeing framework even though this rule may, in some instances, result in a parental decision that is not in a particular child's best interest).

14. *See infra* Section II.A.

15. *See infra* text accompanying notes 183–184.

16. *See infra* Section II.A.2.

17. This Article focuses primarily on the traditional components of the legal regulation of children: juvenile justice and child welfare regulation, parents' rights, and children's rights; it also touches on policies of state support for families. Legal regulation of children could be defined far more broadly to include almost every aspect of law and policy that has any impact on children. *See* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 58–68 (2014) (defining family law broadly to include not only the traditional areas but also criminal law, housing law, employment law, zoning law, etc.). In light of the ambitious scope of this Article, we cabin our analysis to the identified topics.

18. *See infra* Section II.B.1.

19. *See infra* Section II.B.1.

racial and other biases.[20] The framework thus provides a contemporary rationale for state action under its *parens patriae* and police power authority.

At a structural level, the Child Wellbeing framework sheds light on the current allocation of decisionmaking authority over children. Instead of a zero-sum conception, with state authority, parents' rights, and children's rights pitted against one another, the legal regulation of children is grounded in the overarching goal of promoting child wellbeing, which knits together the interests of parents, children, and the state. Understood this way, the regime of strong parental rights and the opaque pattern of children's rights can be unified and rationalized. In both domains, the law generally promotes child wellbeing, is increasingly informed by developmental research, and usually enhances social welfare.[21] Parental rights also serve a particularly important protective function for families of color and low-income families, who have been the focus of zealous state intervention.[22]

The approach we offer thus elevates the promotion of child wellbeing as the key justification for parental rights—a rationale that is too often ignored by children's rights advocates.[23] Extensive research establishes that the stability of the parent-child relationship is essential to healthy child development, and restricting the state's authority to intervene in families promotes the constancy of this core relationship. Parental authority is not absolute, however, and the modern rationale for parental rights is self-limiting, providing a sounder basis for restricting parental authority than the Progressive Era approach: in a regime in which parental rights are justified as protecting child wellbeing, parents are not free to inflict serious harm on their children, even on the basis of religious beliefs.[24]

The Child Wellbeing framework also provides a logic for laws granting some rights to young persons and withholding other rights.[25] Children, and particularly adolescents, have an emerging interest in exercising agency as they prepare for adult roles, so long as their choices do not threaten harm to themselves or others.[26] First Amendment speech rights in school, for example, allow students to prepare for citizenship.[27] More urgently, withholding rights sometimes threatens serious harm as individuals mature. For example, denying young people the right to make decisions about contraception and

20. *See infra* Section II.B.2.

21. *See infra* Section III.A.

22. *See infra* text accompanying notes 88–91.

23. *See infra* Section III.A; *see also infra* notes 236–237, 241–242 and accompanying text (explaining that advocates and scholars have long argued that parental rights can promote child wellbeing, but further showing that children's rights advocates often dismiss this rationale).

24. *See infra* Section III.B (discussing corporal punishment, third-party contact with children, medical decisionmaking, and homeschooling).

25. *See infra* Part IV.

26. FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 89–90 (1982) (describing adolescence as a "learner's permit").

27. *See infra* Section IV.B.1.b.

substance abuse treatment can directly harm minors' wellbeing; conferring these rights allays these harms.[28] Consistent with the logic of the Child Wellbeing framework, lawmakers increasingly rely on developmental and other research when deciding which rights and privileges to extend or withhold, distinctions that often serve to promote social welfare.[29] The recognition of the potential for racial bias generally plays a muted role in the pattern of granting and withholding of rights, but some rights, such as procedural protections in the justice system, are understood to particularly benefit youth of color, who are disproportionately represented in the system.[30]

In addition to elucidating current legal regulation,[31] our framework is more normatively appealing than either the dyadic approach of the Progressive Era or the approach growing out of the 1960s, which tended to place parents, children, and the state in competition. The framework clarifies the core principle of legal regulation—promoting child wellbeing. The framework reflects the essential components of child and adolescent development, such as the importance of a strong, stable relationship between a parent and child.[32] The framework is sturdier and more comprehensive than the alternatives because it relies on a clear evidence base and accounts for social welfare interests. And the framework elevates the goal of promoting racial justice as essential to a legitimate and just scheme of regulation.

Further, the Child Wellbeing framework guides law reform by highlighting areas that have yet to conform to this contemporary approach and offering direction for change. In particular, we are far from realizing the goal of eradicating racial disparities in the juvenile justice and child welfare systems, and lawmakers have focused little on how to address the structural inequalities that influence child outcomes.[33] Our framework recognizes that these aspirations must be front and center. The child welfare system remains stubbornly problematic in other ways, continuing to focus on crisis intervention, with little benefit for either children or society.[34] Our approach underscores these deficiencies and identifies a path forward. The framework also points

28. Access to particular medical treatments under minors' consent statutes and to procedural protections in delinquency proceedings are in this category. *See infra* Sections IV.A.1, IV.B.1.a.ii, IV.B.1.a.iii, IV.B.1.c.

29. *See infra* Section IV.A.3.

30. *See infra* Section IV.A.4.

31. As we elaborate throughout the Article, in the domains of parental rights and children's rights, lawmakers often do not explicitly invoke the rationales we articulate. Rather, our claim is that the framework is implicit in modern doctrine and policy and that it provides a more normatively appealing explanation for the current allocation of authority.

32. As we elaborate in Part V, we recognize that contested values underlie many aspects of the legal regulation of children. In general, however, the values on which the framework rests are widely endorsed and uncontroversial, such as the reduction of juvenile recidivism and promotion of children's physical health. See *infra* text accompanying notes 433–440.

33. *See* NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 9–50 (2018) (describing this failure).

34. *See infra* text accompanying notes 85–99.

to areas of doctrine that potentially thwart child wellbeing, such as the limited regulation of homeschooling in many states.[35] The framework by no means defines or informs all legal doctrines affecting children,[36] but it rationalizes much of contemporary law, identifies those areas in need of reform, and offers a blueprint for change.

The framework we propose grows out of the American Law Institute's new *Restatement of Children and the Law*, on which we are Reporters,[37] but it does not simply recapitulate that project. Like a good Restatement, this Article clarifies an evolving area of law.[38] But, as we have emphasized, this Article also has normative ambition; and this ambition is beyond the appropriate aims of a Restatement.

The Article proceeds as follows. Part I sets the stage by sketching key developments that have complicated and destabilized the Progressive Era framework of legal regulation of children. Part II describes the Child Wellbeing framework—a research-grounded understanding of child wellbeing motivated by the insight that advancing child wellbeing generally promotes social welfare and that a just system of legal regulation must address racial and class bias. This Part shows how the framework is embodied in recent reforms to the juvenile justice system and nascent efforts to support families; it also contends that the child welfare system largely has not embraced the framework. Parts III and IV demonstrate that the framework has both explanatory and normative power in the domains of parental rights and children's rights. Taken together, then, Parts II, III, and IV establish that the Child Wellbeing framework is reflected across multiple domains of legal regulation of children. In Part V we anticipate and address several criticisms.

I. THE RISE AND FALL OF THE PROGRESSIVE ERA FRAMEWORK

In a departure from the common law rule of near complete parental authority, the state began to play a more active role during the Progressive Era,

35. *Infra* text accompanying note 325.

36. *See infra* Sections III.B.2, III.B.4 (describing exceptions to the framework: some state rules governing third-party contacts with children and homeschooling regulation in many states); *infra* Part V (describing the limits of the framework).

37. *Children and the Law,* ALI ADVISER, http://www.thealiadviser.org/children-law/ [https://perma.cc/K473-P9L8] (describing the Restatement and listing the reporters, who include Elizabeth Scott, Chief Reporter, and Richard Bonnie, Emily Buss, Clare Huntington, Solangel Maldonado, and David Meyer, Associate Reporters). This Article particularly has drawn on the Restatement work of Solangel Maldonado, who drafted the sections on children's contact with third parties, including de facto parents, and medical decisionmaking, *see infra* text accompanying notes 288–289, 292, 300, 306, 311–312, 314, and Emily Buss, who drafted the sections on students' free speech rights, *see infra* Section IV.B.1.b.

38. The goal of a Restatement, in part, is to provide coherence both by "restating" the law with clarity and by identifying and amplifying underlying themes and emerging reform trends. *See How ALI Works*, ALI ADVISER, http://www.thealiadviser.org/how-ali-works/ [https://perma.cc/C8F9-XKQL]. In contrast to some legal scholarship, Restatements aim to guide judges on the state and direction of legal doctrine; they are not intended to represent the aspirations of legal scholars. *See id.*

intervening in family life to promote children's welfare. This led to a dyadic model of regulation, under which parents retained much of their traditional authority but the state stepped in when perceived parental failures threatened harm to children. The Progressive state also preempted parental authority generally through statutes mandating school attendance and otherwise limiting parental authority.

This dyadic framework persisted until the second half of the twentieth century, when several developments significantly complicated and destabilized the approach. First, the rehabilitative model of juvenile justice came close to collapse. Young offenders, usually youth of color, were condemned as "superpredators" in the 1980s and 1990s and were subject to harsh punishment. Second, lawmakers began to recognize children as legal persons and rights-holders, at least in some circumstances, transforming a dyadic model of regulation into one in which the parents, children, and the state competed for control over children's lives. Finally, scholars and advocates launched a broad attack on parental rights as inconsistent with child wellbeing. This Part traces this historical arc, demonstrating that the legal regulation of children has become extremely complex and seemingly less compre-comprehensible.

A. *The Rise of Progressive Paternalism*

Before the Progressive Era, the state's involvement in family life was limited.[39] The rights of nineteenth-century parents, particularly fathers, over their children were often described as property-like,[40] and for most white families, the description was apt.[41] Parental authority was not absolute, but parents determined almost every aspect of their children's lives. Parents decided whether and to what extent their children were educated and when children should begin to contribute to family income.[42] They also had broad

39. For a description of the state's limited role, which dates to the colonial period, as well as a description of the few exceptions, see 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 27–29 (Robert H. Bremner ed., 1970). *See also* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1036–37 (1992). *But see* The Etna, 8 F. Cas. 803, 804 (D. Me. 1838) (No. 4542) (removing child from parental custody and noting "[if the child] cannot be safely left in [the father's] custody . . . the protecting justice of the county will interpose and deprive" the father of custody).

40. *See* Woodhouse, *supra* note 39, at 1041–50.

41. Not all parents received robust protection. Enslaved parents had no parental rights, and in the first half of the nineteenth century, the state occasionally removed poor white children and freed Black children from their homes and either auctioned them off as involuntary apprentices or placed them in children's institutions. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 263–68 (1985); Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, *in* A CENTURY OF JUVENILE JUSTICE 3, 6–19 (Margaret K. Rosenheim et al. eds., 2002).

42. Further, children's income belonged to parents. *E.g.*, Woodhouse, *supra* note 39, at 1063–65.

authority to discipline their children and to guide their religious upbringing.[43]

Progressive reformers aimed to change this state of affairs and, in the late nineteenth and early twentieth centuries, achieved a remarkable transformation in the state's relationship to children and families. In a brief twenty-year period beginning in 1899, almost every state established a juvenile court with jurisdiction over maltreatment of children, status offenses, and juvenile delinquency cases.[44] Reformers zealously invoked the state's authority as *parens patriae* to fashion a new government role as protector of children from parental abuse and neglect and from the consequences of their own wayward behavior.[45] Most youths charged with crimes were removed from the criminal justice system and dealt with in this new court with the goal of rehabilitation rather than punishment. Juvenile court judges, popularizers of the movement, cast themselves as benign parents whose only concern was to ensure that children received the care and guidance they needed.[46] On the legislative front, states across the country enacted compulsory school attendance and child labor laws, which, in tandem, went far to guarantee that children received a basic education, while preempting parents' authority to send them to work in factories.[47]

Beginning in the mid-nineteenth century, states also began to pass laws prohibiting child abuse, and by the end of that century, reformers founded private child-protection societies that began to work in tandem with the newly created juvenile courts.[48] By the early decades of the twentieth centu-

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43. *See, e.g.*, *id.* at 1014; Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2153–55 (1996) (describing the "rule of thumb," under which a man might discipline his wife and children with a switch as long as it was no thicker than his thumb).

44. *See, e.g.*, David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 41, at 42, 67. Historically, juvenile courts did not differentiate among types of cases and instead the state invoked its *parens patriae* authority to exercise jurisdiction over children who had been abused and neglected, who had committed crimes, and who engaged in noncriminal but undesirable behavior, such as running away from home or drinking alcohol. This latter group of cases came to be known as status offenses—conduct that was unlawful only because of the child's age. *See, e.g.*, *id.* at 42, 46–50.

45. As one Progressive reformer put it, "the child of proper age to be under jurisdiction of the juvenile court is encircled by the arm of the state, which, as a sheltering, wise parent, assumes guardianship and has power to shield the child from the rigors of common law and from . . . [the] depravity of adults." MIRIAM VAN WATERS, YOUTH IN CONFLICT 9 (1925).

46. *See* BEN B. LINDSEY & RUBE BOROUGH, THE DANGEROUS LIFE (photo. reprt. 1974) (1931); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909) (arguing that when a child has committed the crime, the question is not guilt or innocence but rather "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career").

47. *See* SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 17, 32–37 (5th ed. 2014).

48. For a description of this nineteenth-century approach to child welfare and its extensive reach into the lives of low-income and particularly immigrant families, see LINDA

ry, a child-protection network had been constructed that included public and private agencies, juvenile courts, and government probation officers.[49]

In truth, although the Progressive reformers accomplished important institutional changes, their goals for protecting children were limited. Reformers aimed their reforms primarily at poor and immigrant children, whose behavior, or that of their parents, the reformers perceived as evidence that parents were failing to raise their children to be law-abiding American citizens.[50] To be sure, any child could be charged with an offense in juvenile court, and abusive middle-class parents could be subject to juvenile court supervision. Further, school attendance and child labor laws categorically preempted parental authority. But supervision of middle-class families and restriction of parental rights generally were not key to the Progressive agenda, and the impact of school attendance and child labor laws fell largely on working-class families.[51]

The upshot is that although Progressive Era reforms resulted in expanded state authority over families, parental rights continued to be robust in the twentieth century.[52] In the 1920s, the Supreme Court issued two iconic opinions clarifying that parents' authority to make decisions about their chil-

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GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960, at 8, 14–15 (1988), and ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 69–87 (Univ. of Ill. Press 2004) (1987). For a description emphasizing the complexities of the child-protection movement, explaining that it cannot be told as a simple story of either benevolence or social control, and neither is it a uniform story of external control of families (because family members sometimes sought out state intervention), see Michael Grossberg, *"A Protected Childhood": The Emergence of Child Protection in America*, *in* AMERICAN PUBLIC LIFE AND THE HISTORICAL IMAGINATION 213 (Wendy Gamber et al. eds., 2003).

49. *See* Tanenhaus, *supra* note 44, at 46–50 (describing the blurred lines between delinquency, status-offense, and child abuse and neglect cases in the juvenile court).

50. Historians propose that although Progressives generally acted on benign motivations, the movement was in part an effort to retain social control over working-class and immigrant families, whose numbers were rapidly expanding. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY xx–xxii, xxxi (Rutgers Univ. Press, Expanded 40th Anniversary ed., 2009) (1969). Progressives did not focus their efforts on Black families, *see* ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 34–38, 76–80 (1972), at least in part because during the early Progressive Era, reformers were predominantly in the North and the migration of Blacks from the South to the cities of the North did not begin until the late 1910s, *see* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS 8–15 (2010). A more complex account of the role of class is presented by Mary Odem. *See infra* note 52.

51. DAVIS ET AL., *supra* note 47, at 32. Middle-class children were already attending school and not working in factories. For more information on this Common School Movement, see *id.* at 32–37; Woodhouse, *supra* note 39, at 1062–63.

52. Indeed, some Progressive reforms actually aimed to reinforce parental control over their children. Mary Odem has argued that Progressive reformers had parental support in seeking to control teenage girls' sexual activity by bringing it within the juvenile court's delinquency jurisdiction. MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920 (1995).

dren's education was constitutionally protected under the Fourteenth Amendment; the opinions underscored that the new muscular role of the state in children's lives had not greatly diminished parental authority, at least for most parents.[53] The Court rationalized the right of parents to raise their children in terms of individual liberty—the freedom of citizens (i.e., parents) from excessive state intrusion in their private lives.[54] Although the opinions did not explicitly endorse the position that parents "owned" their children, scholars have offered substantial evidence that this assumption shaped the justices' views.[55] The Court did not consider the implication for children's welfare of strong parental rights protection. Parental rights were not absolute, of course, and as the Court noted, these rights were joined with the responsibility of parents to care for their children and to raise them to adulthood.[56] State authority to intervene in families was legitimately invoked if and when parents failed to fulfill their obligations or their conduct harmed children.[57]

In the wake of the newly active role of the state in family life in the late nineteenth and early twentieth centuries, a framework of regulation was established that persisted for decades. In this framework, authority over children resided either in their parents, grounded in parents' constitutionally protected liberty interest, or in the state, acting as *parens patriae* to protect individual children or under its police power authority to promote children's (and society's) interest generally.[58] The interests of parents and the state were understood to conflict; disputes were zero-sum, centering on whether the state, in seeking to override parental authority on a particular issue, exces-

53. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923). Not surprisingly, the Court's announcement that parental rights deserve special protection came in response to Progressive reforms; it would have been unnecessary in an earlier era. The Oregon and Nebraska statutes challenged in *Pierce*, 268 U.S. 510, and *Meyer*, 262 U.S. 390, expanded state authority to require compulsory school attendance—which the plaintiffs did not challenge.

54. *Pierce*, 268 U.S. at 534–35 (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399 ("Without doubt, [the liberty interest guaranteed under the Fourteenth Amendment] denotes . . . the right of the individual to . . . establish a home and bring up children . . . .").

55. *See, e.g.*, Woodhouse, *supra* note 39, at 1041–50.

56. *Pierce*, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

57. *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (holding that parents' authority to choose their child's religious upbringing does not include the "liberty to expose the community or the child to communicable disease or the latter to ill health or death").

58. *See id.*; Woodhouse, *supra* note 39, at 1038 ("Influential courts in the mid-1800's, however, began to articulate a theory that parental control was not an absolute power conferred by God, but a civic duty conferred and regulated by the state, in the interests of children and of the public.").

sively burdened parental authority in light of the state's purpose.[59] In making this determination, courts balanced the importance of the state's interest in protecting children from harm and promoting child wellbeing against the extent of the intrusion on parental rights.[60]

In this dyadic framework of regulation, the interests of children were assumed to be furthered either by parents or the state; children themselves were not thought to have independent interests. This assumption, which was relatively uncontroversial for decades, reflected a conventional understanding of childhood as a period of innocence, vulnerability, and dependence, in which immature individuals are incapable of making self-interested decisions.[61] This conception applied to toddlers and teenagers alike, and parental or state control was presumed appropriate for all legal minors. The Progressives insisted that older youths, like young children, deserved the state's benign concern.[62] In this scheme, it followed that children were entitled to parental care and support and were not held to adult standards of accountability—and also were not granted adult rights and privileges.[63]

This conception of childhood fit comfortably for younger children, and, in some legal contexts, for adolescents as well. Many legal protections and restrictions directed at minors continued to be uncontroversial—the right to parents' financial support, protection from abuse and neglect, and restrictions on child labor, for example. But in some areas, the fit was awkward. Progressive reformers insisted that youths charged with criminal violations were innocent children who bore no responsibility for their offenses and that the state's only interest in a delinquency proceeding was to further the youth's best interests by providing rehabilitation. Judge Ben Lindsay, an early leader of the juvenile court movement, made the point in language jarring to modern ears: "[O]ur laws against crime were as inapplicable to children as they would be to idiots."[64] This characterization of delinquent teenagers as children served the political purposes of juvenile-court proponents aiming for transformative institutional change in the sanctioning of young offenders,[65] but ultimately, as we discuss in the next section, it

59. *Prince*, 321 U.S. at 165–66 (describing the state as competing with parental authority).

60. *See id.*

61. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550–51 (2000).

62. This approach advanced the Progressive objective of expanding the age boundary of childhood. Thus, reformers evoked images of children working under horrendous conditions in factories to generate support for child labor and school attendance laws. SCOTT & STEINBERG, *supra* note 6, at 62–65.

63. *Id.* at 64–65. An exception to this was criminal responsibility; juveniles could be punished as adults for serious crimes in every state. *See id.* at 84–85.

64. BEN B. LINDSEY & HARVEY J. O'HIGGINS, THE BEAST 133 (Doubleday, Page & Co. 1910) (1909).

65. *See* VAN WATERS, *supra* note 45; SCOTT & STEINBERG, *supra* note 6, at 85.

contributed to the near collapse of the rehabilitative framework of juvenile justice.

B. *The Framework Under Pressure*

The Progressive project made far-reaching changes to the regulation of children. By the 1920s, the reformers firmly established an institutional model that assured an active role for the state in family life that endures to this day. But despite laudable ambitions, this approach ultimately was not successful. Reformers lacked an understanding of how to achieve the goal of promoting child wellbeing, and both the rehabilitative model of juvenile justice and the "child saving" approach that motivated the child welfare system were ultimately revealed to be deeply flawed.

Beginning in the 1960s, the Progressive era's simple dyadic framework of regulation was challenged from several directions. First, the well-defined role for the state proposed by the Progressives functioned far less successfully than the optimistic early reformers envisioned. Critics on the left and right assailed the juvenile justice system. This led to fundamental reforms, including procedural due process rights for juveniles in delinquency proceedings, but also, subsequently, to sweeping punitive changes in the 1980s and 1990s. In both the juvenile justice and child welfare systems, critics challenged the harmful impact of state intervention on families and children of color. Second, courts began recognizing children as rights-bearing persons with autonomy interests independent of their parents and the state. Finally, advocates and scholars challenged parental authority, arguing that strong parental rights are inimical to the emerging personhood of children and to child wellbeing. In combination, these legal developments have undermined the relatively simple Progressive Era framework of family regulation.

1. Challenging the Progressive Era Model of Juvenile Justice

The Progressive Era model of juvenile justice began to decline in the mid-twentieth century, and beginning in 1967, the Supreme Court responded by extending procedural protections to youths facing delinquency adjudication. In several opinions, the Court identified and sought to remedy what it deemed a serious defect in the rehabilitative model of juvenile justice.[66] The Progressive reformers who established the juvenile court system had insisted that delinquency proceedings were not adversarial in nature because the state's only purpose in responding to youth crime was to act in the child's interest; therefore, young offenders had no need for defense counsel or for other protections enjoyed by criminal defendants.[67] This was always a shaky premise. Young offenders cause social harm through their conduct;

66. Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

67. *See generally* LINDSEY & O'HIGGINS, *supra* note 64 (articulating the rehabilitative model of juvenile justice).

thus, the state's interest is not always aligned with that of delinquent youths. Instead, the state's interest inherently includes public safety—a reality that is well understood in the adult criminal justice system.[68] By the 1960s, liberal activists vigorously challenged the fairness of informal juvenile delinquency proceedings, arguing that the interests of many youths, and particularly youth of color, were harmed by a system purportedly committed to their welfare.[69] Despite the insistence that the only purpose of delinquency proceedings was rehabilitation, many youths were sent to secure facilities more like prisons than treatment programs.[70]

In *In re Gault* in 1967, the Court acknowledged that youths in delinquency proceedings had "the worst of both worlds," receiving neither the treatment promised under the rehabilitative model, nor the procedural protections that adult defendants enjoy. [71] In *Gault* and subsequent opinions, juveniles were accorded the right to counsel, the right to confront witnesses, the right to receive notice of charges, the privilege against self-incrimination, and other due process protections.[72] The Court insisted that the juvenile court could continue in its purpose of serving the interests of delinquent youths but must provide them with procedural rights as defensive tools against a state that, at best, had mixed goals in responding to youth crime.

The challenge from the right, which reached full force in the late 1980s and 1990s, posed a far more serious threat to the rehabilitative model than did the earlier wave of procedural reforms. Conservatives attacked the rehabilitative model itself and its core premise that promoting the interests of delinquent youths was the juvenile court's sole aim. These critics argued that the system coddled young offenders, failing in its only legitimate goals of punishing criminals and protecting the public.[73] An increase in violent youth crime triggered a wave of public fear and hostility toward young offenders.

What ensued can fairly be described as a moral panic, in which politicians, the media, and the public joined in attacking a system that was perceived to be far too lenient and insufficiently concerned about public safety.[74] A new group of reformers, eager for radical change, embraced the

68. *See* SCOTT & STEINBERG, *supra* note 6, at 91–92.

69. *See id.* at 89–91; Kristen Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 530 (2004).

70. *See* SCOTT & STEINBERG, *supra* note 6, at 89–91.

71. 387 U.S. at 18 n.23 (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).

72. *See* Breed v. Jones, 421 U.S. 519, 541 (1975); *In re* Winship, 397 U.S. 358, 368 (1970).

73. *See* Alfred S. Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul*, POL'Y REV., Fall 1985, at 65; Laura Sessions Stepp, *The Crackdown on Juvenile Crime: Do Stricter Laws Deter Youths?*, WASH. POST, Oct. 15, 1994, at A12 (quoting a Maryland legislator to have said that, "[i]f they want to do adult-type crimes, we're going to treat them like adults"); *see also* SCOTT & STEINBERG, *supra* note 6, at 94–95 & nn. 26–27 (describing this view).

74. One 1989 study found that 70 percent of those questioned believed leniency in the juvenile system was a contributing factor to violent youth crime. U.S. DEP'T OF JUSTICE,

mantra "adult time for adult crime."[75] In response, many state legislatures enacted laws expanding the category of youths eligible for adult prosecution and punishment.[76] In the juvenile system, the use of institutional placement increased dramatically.[77] The core premise of the Progressive era system—that young offenders were children and not criminals, and that they should be treated in a separate justice system tailored to their needs—seemed to be forgotten.

Many factors contributed to this punitive legal response. Juvenile recidivism rates generally were high,[78] providing strong evidence that the system was failing in its promise of rehabilitation. This opened the door to critics who argued that the naïve premise at the heart of the rehabilitative model had resulted in a system that failed to recognize or accommodate society's interest in public safety and crime prevention.[79] Moreover, when these youths (especially older teens) caused serious harm, the narrative of wayward children in need of guidance rang hollow, contributing to widespread disparagement of the system. To be sure, the state's interest included reforming young offenders so that they might become productive adults, and if correctional interventions had been effective, dissatisfaction likely would have been muted. But because the lenient approach often was *not* effective, the failure to acknowledge society's interest in public safety corroded confidence.[80]

SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1990, at 157 (Kathleen Maguire & Timothy J. Flanagan eds., 1991); *see also* Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 537–41 (2013) (discussing moral panic surrounding juvenile crime).

75. *See* SCOTT & STEINBERG, *supra* note 6, at 9.

76. During the three-year period between 1992 and 1995, eleven states lowered the age for transfer, and ten states added crimes to judicial waiver statutes. PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3–8 (1996); *see also* SCOTT & STEINBERG, *supra* note 6, at 96–99 & nn.33–50.

77. *See* Bradford Smith, *Children in Custody: 20-Year Trends in Juvenile Detention, Correctional, and Shelter Facilities*, 44 CRIME & DELINQ. 526, 533 (1998) (documenting a 45 percent increase in juvenile detention from 1975 to 1995).

78. *See* VERA INST. OF JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 10–13 (2009), https://storage.googleapis.com/vera-web-assets/downloads/Publications/charting-a-new-course-a-blueprint-for-transforming-juvenile-justice-in-new-york-state/legacy_downloads/Charting-a-new-course-A-blueprint-for-transforming-juvenile-justice-in-New-York-State.pdf [https://perma.cc/Z62G-DXFD] (describing the high recidivism rate in New York as one of the factors influencing the decision to move away from juvenile detention and instead invest in more effective and cost-efficient community-based programs).

79. *See, e.g.*, *New Juvenile Code Would Come Down Hard on Teens*, LUDINGTON DAILY NEWS, Jan. 13, 1995, at 1 (quoting Thomas Ginster, Michigan Governor John Engler's criminal justice advisor, suggesting that the current juvenile justice system was designed "for kids stealing hubcaps in the '50s, not for some of the things we see today").

80. *See In re Gault,* 387 U.S. 1, 17–23 (1967).

Racial bias and fears also played a key role in the moral panic surrounding youth crime—and in the legal reforms. By the 1990s, the image of wayward children had been supplanted by frightening depictions of young "superpredators" prowling inner-city streets in gangs, bent on murder and mayhem.[81] These racialized images suggest a particularly ugly aspect of the attitudes fueling the moral panic surrounding youth crime. The push for punitive reforms was infused with racist assumptions about the identity of the youths threatening society.[82] Research indicated that the public and legal actors perceived youth of color as more mature, threatening, and deserving of harsh punishment than their white counterparts.[83] In this racialized environment, politicians and the public viewed teenagers involved in crime not as children but as criminals, who should be punished as such.[84]

The second challenge to the Progressive rationale for state intervention arose in the child welfare system. In that context, the goal of protecting children from harm has been constant since the Progressive Era, but the state generally has been ineffective in attaining this goal, and intervention has focused disproportionately on low-income families of color. Parental abuse and neglect pose significant dangers to children,[85] but it is far from clear that the child welfare system has improved outcomes,[86] particularly for the 437,000 children in foster care.[87] Consistent with its historic practice of fo-

81. *See* John DiLulio, *The Coming of the Super—Predators*, WASH. EXAMINER (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/MW2D-PHSR].

82. *See id.* (describing inner-city youth in threatening terms); *see also* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 410 (2017) (describing the extent to which imagery and fear of youth crime were racialized). Ads aimed at generating public support for a California referendum to increase the category of youths eligible for transfer to criminal court were criticized as racist. SCOTT & STEINBERG, *supra* note 6, at 102–108.

83. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 491–502 (2004).

84. The status-offense system faced similar pressures to the juvenile justice system in the 1980s and 1990s. *See* Lee Teitelbaum, *Status Offenses and Status Offenders*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 41, at 159, 159–72.

85. *Preventing Child Abuse & Neglect*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/consequences.html [https://perma.cc/BRU7-A63L].

86. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES i–iii (2015), https://www.acf.hhs.gov/sites/default/files/cb/cwo2015.pdf [https://perma.cc/T899-UA26]; Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERVS. REV. 1143 (2013). A recent case underscores this ongoing problem. *See* M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 243, 271–88 (5th Cir. 2018) (upholding much of trial court's determination that Texas had violated the constitutional rights of the approximately 12,000 children in foster care, including by exposing them to abuse and neglect while in care; further, upholding much of a sweeping remedial order to address the systemic problems).

87. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. 26, THE AFCARS REPORT 1 (2019), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf

cusing on low-income immigrant families,[88] Black, Native American, and Native Alaskan families are overrepresented in the child welfare system today, and these children have worse outcomes once they are removed from their homes.[89] The causes of the disproportionality and disparate outcomes are disputed,[90] and numerous factors likely play a role,[91] but this concern has led critics to challenge the legitimacy and fairness of state regulation in this realm.[92]

The child welfare system thus remains stubbornly problematic and, as detailed in Part II, currently does not embody the Child Wellbeing framework. An emerging consensus holds that the failures are due in large part to the system's focus on crisis intervention rather than on broad-based prevention and family support.[93] This reactive approach has marked the modern

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[https://perma.cc/B89K-VCEJ]; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 18 (2016), https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf [https://perma.cc/CZ6T-XC3A].

88. *See supra* text accompanying notes 48–51.

89. For an overview of the racial disproportionalities in the child welfare system, see CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 3–5 (2016), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [https://perma.cc/HZ3U-28K4], which documents the racial disproportionality index (RDI) for Black children as 1.8 and Native American and Native Alaskan children as 2.8, as compared with 0.9 for Latino children, 0.8 for white children, and 0.1 for Asian children, and describes a reduction in the RDI for Black children, "from 2.5 in 2000 to 1.8 in 2014," but an increase for Native American and Native Alaskan children, "from 1.5 in 2000 to 2.7 in 2014." For an overview of the racial disparities in the child welfare system, see *id.*, which shows that Native American and Native Alaskan children, as well as Black children, exit foster care and are adopted at lower rates than other racial and ethnic groups but further shows that this RDI is somewhat lower than the foster-care-entry RDI.

90. *See id.* at 5–6 (describing the competing accounts and the evidence for each).

91. *See* CTR. FOR THE STUDY OF SOC. POLICY & THE ANNIE E. CASEY FOUND., DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH (2011), http://www.aecf.org/m/resourcedoc/AECF-DisparitiesAndDisproportionalityInChildWelfare-2011.pdf [https://perma.cc/3M89-3U7L]; ANDREA J. SEDLAK ET AL., SUPPLEMENTARY ANALYSES OF RACE DIFFERENCES IN CHILD MALTREATMENT RATES IN THE NIS-4 (2010).

Although most low-income parents do not abuse or neglect their children, there is substantial evidence that abuse and, especially, neglect are strongly correlated with poverty. ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 12 (2010) (reporting that "[c]hildren in low socioeconomic status households . . . [are] more than 3 times as likely to be abused and about 7 times as likely to be neglected" as children in other socioeconomic brackets).

92. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 267–76 (2002). *But see* Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 899–923 (2009) (arguing that racial disproportionality for Black children reflects the underlying rate of child maltreatment of Black children, not racial bias, and thus the solution is to address the risk factors present in Black families rather than the child welfare system).

93. *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 185 (2005); Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1489–505 (2007).

child welfare system since Congress first considered federal funding in the early 1970s.[94] Cognizant of the growing unpopularity of anti-poverty programs, Congressional supporters of a strong federal role strategically and effectively framed child maltreatment as a problem of bad parenting, obscuring the strong correlation between poverty and child maltreatment.[95] Substantial federal funding followed,[96] but the problematic framing became embedded and is still firmly in place.[97] Instead of preventive efforts to address poverty and promote family functioning, most state intervention occurs only when maltreatment is suspected—responding with either late-in-the-day family preservation services or the removal of children, at substantial cost to taxpayers, child wellbeing, and family autonomy.[98] This orientation has persisted across multiple policy swings; in each iteration, federal and state policies dealing with child maltreatment have emphasized crisis intervention, while subordinating proactive strategies aimed at supporting families in need.[99] In short, the Progressivist rationale for state intervention—protecting children from harm—has led to policies that most observers agree have not promoted child wellbeing.

2. Children's Rights: Conceiving of Children as Legal Persons

In the 1960s and 1970s, a children's rights movement emerged, inspired in part by the civil rights movement.[100] Advocates began to argue for recognition of children as rights-bearing persons, with independent legal interests not represented by their parents or the state.[101] *In re Gault*, the landmark

94. This approach has even deeper roots, beginning with the Progressive Era child-savers. *See supra* note 48.

95. *See supra* note 91 (describing the correlation between socioeconomic status and child maltreatment); *see also* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15 (1984).

96. *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93–247, § 5, 88 Stat. 4, 7 (1974) (codified as amended at 42 U.S.C. § 5104 (2012)).

97. *See* GUGGENHEIM, *supra* note 93, at 184–85.

98. *See* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 440 (1996); Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 LAW & CONTEMP. PROBS., no.1, 2014, at 221, 231–48.

99. *See* Huntington, *supra* note 98, at 226–29, 231–34 (describing these swings, from the 1970s to the mid-1990s, with some statutory schemes prioritizing family preservation and others child permanency, but arguing that neither approach is a meaningful attempt to prevent child abuse and neglect and both reflect a crisis orientation). Most recently, as the opioid crisis created another influx of foster children, Congress adopted legislation again prioritizing family preservation and the provision of mental health and drug treatment services for parents. *See* Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018).

100. *See* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 606–07.

101. *E.g.*, Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 356 (1972). This Article focuses on children's rights under American law, but the movement has been global, with many other countries embracing children's rights—both autonomy rights and affirmative rights to state support—to a far greater degree than the United

1967 Supreme Court opinion granting procedural rights to youths in delinquency proceedings,[102] heralded the movement. After *Gault*, the Court issued a series of opinions granting constitutional rights to public school students. In *Tinker v. Des Moines Independent Community School District*, the Court proclaimed that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate," in upholding the right of students to engage in silent, symbolic protest against the Vietnam War as an exercise of free expression.[103] Although the Court qualified this pronouncement in later opinions, restricting certain forms of student speech in some contexts where the speech is found to undermine important educational purposes,[104] pure political expression in public schools continues to receive substantial protection.[105] Students also enjoy a right of religious exercise in school, generally protected to the extent that other expression is protected, and modest due process protection when facing school discipline.[106]

Mature minors today also have the right to consent independently to a range of medical treatments. The mature minor doctrine authorizes minors

States, which is the only country not to ratify the United Nations Convention on the Rights of the Child. *See* G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

102. 387 U.S. 1, 30–31, 41 (1967).

103. 393 U.S. 503, 506, 514 (1969).

104. Morse v. Frederick, 551 U.S. 393, 408 (2007) ("[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (holding that educators may exercise editorial control over the style and content of a student newspaper "so long as their actions are reasonably related to legitimate pedagogical concerns"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission" and distinguishing *Tinker* because the penalties were unrelated to a political viewpoint).

105. *See, e.g.*, Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322, 330 (2d Cir. 2006) (holding that the First Amendment protected a student wearing a shirt that mocked President George W. Bush and contained images of cocaine); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992) (holding that students wearing "scab" buttons to support a teachers' strike were engaging in protected speech). Some courts have allowed schools to regulate speech if it is deemed offensive. *See In re* Douglas D., 626 N.W.2d 725, 731–33 (Wis. 2001) (holding that the content of a student's story about the murder of their English teacher gave the school sufficient reason to discipline the student).

106. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001); Bd. of Educ. v. Mergens, 496 U.S. 226, 235 (1990). The Court granted other constitutional rights to students, although in a limited form. Thus, in *New Jersey v. T.L.O.*, the Court held that public school students have a legitimate expectation of privacy against unreasonable searches by school officials but concluded that this interest is more limited than that of citizens outside of the school context. *See* 469 U.S. 325, 340–41 (1985) (justifying school search based on reasonable suspicion that it would produce evidence of an infraction or crime by the student). The Court also held that a student facing a suspension from school of ten or fewer days is entitled to limited procedural due process protection, an easily satisfied requirement. *See* Goss v. Lopez, 419 U.S. 565, 581 (1975). As a matter of statutory law and school district policy, some states and localities provide for more substantial procedural protections in the school disciplinary context than are required by *Goss*. *See, e.g,* RESTATEMENT OF CHILDREN AND THE LAW § 8.20 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2019).

to consent to routine, beneficial treatment, and under Minors' Consent Statutes, teenagers have access to treatment for substance abuse, sexually transmitted diseases, and some reproductive health treatments.[107] But the most radical departure from the law's conventional view of childhood and of parental authority was the recognition by the Supreme Court that a mature minor has a right of access to abortion without parental involvement or state interference.[108] To be sure, minors' reproductive rights are qualified as compared to those of adults. The state can require parental consent, but it must provide an alternative means of access: a minor who chooses not to involve her parents can demonstrate her maturity in a legal proceeding and can thus legally consent to the procedure.[109] But as a consequence of the Supreme Court's abortion decisions, parents are disqualified from participating in, or even knowing about, this decision unless their mature child chooses to inform them.[110]

The granting of rights to children over the past half century has unsettled the early Progressive framework and raised many questions. First, it made children more visible as legal persons, with interests not necessarily aligned with those of their parents or served by the state's paternalistic oversight. This complicated the dyadic framework of family regulation, introducing the child herself as a party whose autonomy interest and authority to make some decisions was acknowledged. Indeed, children's rights were understood conventionally as liberty interests that inevitably compete with parental and state authority.[111] On this view, children, like other groups who have struggled for civil rights, represent a disadvantaged class of persons that has been subject to wrongful subordination.[112] Some advocates and scholars embrace this characterization and view the trend toward recognition of children's rights as a battle against the authority of traditional entities with power over children's lives.[113] To an extent, of course, this view of children's rights is correct. When the law recognizes a minor's liberty interest—the

107. *See infra* Section IV.B.1.a.

108. *See* Bellotti v. Baird, 443 U.S. 622, 643–44 (1979); *see also infra* Section IV.B.1.a.

109. *Baird*, 443 U.S. at 643.

110. *Id.*

111. *See* Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 460 (1982) ("The claimed right of a child to privacy in individual matters inevitably clashes with the longstanding parental right of authority in directing the child's life.")

112. *See* Foster & Freed, *supra* note 101, at 343, 356–57 (arguing that the rights of children are subject to "the same arguments that were advanced over the issues of slavery and the emancipation of married women").

113. *See, e.g.*, Christopher D. Berk, *Children, Development, and the Troubled Foundations of* Miller v. Alabama, 44 LAW & SOC. INQUIRY 752 (2019); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1456–57 (2018); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1426–39 (1994); Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421 (2000); Keiter, *supra* note 111.

right to make a reproductive health decision or engage in political speech, for example—the control of her parents or the state over this decision is diminished.

Second, the logic by which lawmakers extend some rights and privileges to minors and withhold others until adulthood seems quite opaque. Minors enjoy the right to consent to some medical decisions, but other healthcare decisions require parental consent.[114] Public school students are granted the First Amendment right of free expression, but this right often is restricted when school officials suggest the state's educational purposes might be undermined.[115] And youths enjoy many procedural rights in the justice system but sometimes are restricted in exercising those rights.[116] Also, adult privileges are extended to minors with minimum age requirements that sometimes seem puzzling.[117] Further, many adult rights and privileges are simply off the table. Minors cannot execute a contract, lease an apartment, sign a will, vote, or (in many states) marry.[118] Why are some rights conferred on minors and others withheld? The law has not yet articulated a rationale to guide the determination of when children will be recognized as rights-bearers and when they will continue to be subject to parental and state authority.

Third, granting legal rights eroded the conception of childhood as a nearly monolithic category. Legal regulation is now tailored based on age and maturity for some purposes, while for others, all minors continue to be subject to uniform treatment. This points to a more complex understanding of childhood itself as a legal construct, suggesting that the interests and status of adolescents sometimes differs from those of younger children. Rights and privileges implicating an individual's interest in self-determination usually apply formally or functionally only to adolescents,[119] but what determines when, during children's minority, particular rights are conferred? And even adolescents depend on their parents for support and care, require special state protections, and are not fully independent, responsible citizens. Thus, although some advocates have favored categorical recognition of children as citizens entitled to the rights enjoyed by adults,[120] this move strikes most observers as impractical. In short, there is considerable uncertainty about the contours of legal childhood.

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114. *See infra* Section IV.B.1.a.

115. *See supra* note 104 and accompanying text.

116. *See infra* Section IV.B.1.c.

117. *See infra* Section IV.A.3.

118. *See infra* Section IV.B.2.

119. This is true of reproductive rights and rights to make other medical decisions, and, in practice, it is also true of procedural rights in delinquency proceedings and even of free speech rights in school, where litigation has involved almost exclusively middle- and high-school students. *See infra* text accompanying notes 381–383, 397.

120. *E.g.*, JOHN HOLT, ESCAPE FROM CHILDHOOD 18–19 (1974) (advocating for equal legal treatment for children in all areas); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585, 1593–99 (1995).

Finally, the absence of a clear principle for extending and withholding rights opened the door to criticism. Conservative detractors of children's rights have disparaged the notion that the law deems minors to be mature enough to make independent abortion decisions without informing their parents while coddling them as children when they commit crimes.[121] These critics, including Justice Scalia, have dismissed the law's stance as illogical and chastised child advocates as hypocrites, whose depiction of the attributes of legal minors shifts to suit their political purposes.[122] To Scalia and others, it made no sense to treat minors as adults in one context and as children in need of protection in another.

3. Parental Rights Under Siege

The recognition of children as legal persons has been an important catalyst for critical scrutiny of parental rights, adding further instability to the regulatory framework of the late twentieth century. Some critics have argued that the law's excessive deference to parental authority is an outdated vestige of an era when parents effectively owned their children.[123] On this view, strong parental rights give parents a license to act in ways that further their own interests and not those of their children.[124] Moreover, parental rights continue to be grounded primarily in biology, adoption, or marriage, often affording little protection to the relationships between children and adults who do not fall into these categories but who nonetheless have a parent-child relationship with the child.[125]

A modern understanding of the family rejects the view of the legal family as a social entity in which members' interests are aligned and represented by parents. Instead, scholars often depict the contemporary family as a loose association of self-interested individuals.[126] When the family is constructed in this way, parental control and authority over children become problemat-

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121. *See, e.g.*, Brief Amici Curiae of the United States Conference of Catholic Bishops and Roman Catholic Bishop of Manchester in Support of Petitioner at 15, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (No. 04-1144) (arguing that parental involvement in decisionmaking on abortion is critical due, in part, to the Court's comments as to the susceptibility and impetuousness of adolescents in *Roper*). *See generally* Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop*,*"* 64 AM. PSYCHOLOGIST 583 (2009).

122. *See* Roper v. Simmons, 543 U.S. 551, 617–21 (2005) (Scalia, J., dissenting) (criticizing fellow justices and the American Psychological Association for selective use of research in opinions holding that minors were as capable as adults to make abortion decisions, but too immature to be held fully responsible for a capital crime).

123. *See, e.g.*, Dailey & Rosenbury, *supra* note 113, at 1457–58; Dwyer, *supra* note 113, at 1373; Woodhouse, *supra* note 39, at 1113–17.

124. Woodhouse, *supra* note 39, at 1114–15.

125. *See infra* text accompanying notes 139–141.

126. *See, e.g.*, JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 22 (2011); William A. Galston, *Liberal Virtues*, 82 AM. POL. SCI. REV. 1277, 1282 (1988).

ic. James Dwyer, a particularly vocal critic of parental rights, has questioned why the subjugated legal status of children continues to be acceptable in a country in which the idea of one person's ownership of another should be highly offensive.[127] Dwyer observes that outside of the parent-child relationship an individual is seldom subject categorically to the control of another person;[128] for example, he notes that legal guardianship of an incapacitated person is highly regulated and only permissible under narrow circumstances.[129]

A recent critique by Anne Dailey and Laura Rosenbury also targets parental rights as a core element of legal regulation that privileges state and parental control over children.[130] On their view, this "authorities framework" reduces the question of legal regulation to a battle between parents and the state, with children's interests portrayed simply as dependency and the attainment of autonomy.[131] Dailey and Rosenbury expand the range of children's interests and propose a tripartite framework for legal regulation focusing on relationships (between the child and a range of other persons), responsibilities (of adults to provide for children and satisfy their needs), and rights (of both children and parents, but mostly affirmative rights of children to relationships, goods, and services).[132] Their approach de-emphasizes parental rights, except for very young children, and elevates children's interests.[133]

Some legal contexts have generated particular concern about parental authority over their children's lives. For example, parents have broad authority to make medical decisions for their children and the obligation to provide necessary treatment.[134] But parents are protected when they decline to seek medical treatment for religious reasons: in the 1970s, in response to a lobbying campaign by Christian Science groups, most states enacted religious accommodation statutes that protect parents from findings of medical neglect when they decline medical treatment for their children on religious

127. *See* Dwyer, *supra* note 113, at 1373.

128. *Id.* at 1406.

129. *Id.* at 1416–17.

130. *See* Dailey & Rosenbury, *supra* note 113, at 1470, 1506–07.

131. *See id.* at 1467–77.

132. *See id.* at 1506–36.

133. *See id.* at 1471–72, 1508–11 (arguing that parental rights are an important protection for the stability of the parent-child relationship during a child's "early years," but more generally contending that parental rights "are a circuitous and unreliable means" of furthering children's interests). As we show in Part III, critics, including Dailey and Rosenbury, fail to acknowledge that restricting parental rights means that the state will have an expanded role as decision maker when a surrogate is required, a move that we argue is unlikely to promote child wellbeing.

134. *See infra* Section III.B.3.

grounds.[135] These laws were enacted with little opposition, a testament to the lack of controversy surrounding parental rights when asserted by parents with social and political clout.[136] Controversy arose only when children with treatable medical conditions died due to lack of treatment, and some courts held that these civil statutes protected parents from criminal liability for the deaths.[137] These cases and others in which children suffered harm due to their parents' failure to provide necessary treatment became a catalyst for intense criticism of the law's protection of broad parental authority.[138]

A different critique of parental rights flows from the significant changes in family form over the last several decades, particularly the growing number of families with same-sex parents. Strong parental rights protect a parent who has either a biological or legal relationship to the child, but these rights have also allowed that parent to exclude a coparent who is not biologically or legally related to the child but who functions as a parent.[139] Thus, scholars have contended that the traditional legal definition of parent grounded in biology, marriage, or adoption is unduly restrictive, excluding relationships in families headed by same-sex parents from full legal protection and thereby sacrificing child wellbeing.[140] Scholars have also criticized legal rules that treat unmarried fathers differently from married fathers.[141]

Despite these challenges, parental rights continue to receive substantial deference in American law. In 2000, the Supreme Court in *Troxel v. Granville* affirmed the constitutional status of parental rights, citing the founda-

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135. Allison Ciullo, *Prosecution Without Persecution: The Inability of Courts to Recognize Christian Science Spiritual Healing and a Shift Towards Legislative Action*, 42 NEW ENG. L. REV. 155, 169–174 (2007).

136. *See* Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269, 278 (2003); Scott St. Amand, *Protecting Neglect: The Constitutionality of Spiritual Healing Exemptions to Child Protection Statutes*, 12 RICH. J.L. & PUB. INT. 139, 147–48 (2009).

137. *See, e.g.*, Hermanson v. State, 604 So. 2d 775, 782–83 (Fla. 1992) (holding that allowing prosecution was a violation of due process).

138. *See* Dwyer, *supra* note 113, at 1399–1400; Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 352 (1991). For a discussion of compulsory vaccination laws and the criticism that religious and philosophical exemptions endanger public health, see *infra* notes 312–315 and accompanying text.

139. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1212–29 (2016). As we explain below, *see infra* Section III.B.2, many states have addressed this through the recognition of de facto parents, but this is a relatively recent development.

140. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394–409 (2008); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264 (2017); Nancy D. Polikoff, Essay, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. PA. L. REV. ONLINE 99, 101 (2016).

141. *See, e.g.*, Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 224–31 (2015) (arguing that unmarried fathers should have similar default rules for both parentage and custody as married fathers).

tional opinions from the 1920s.[142] Moreover, many scholars and advocates defend parental rights as a shield against excessive state intervention based on racial and cultural biases against parenting practices that offend middle-class sensibilities but do not threaten serious harm to children.[143] And proponents who seek the protection of the relationship between de facto parents and their children challenge only the definition of "parent," not parental rights per se.[144] But advocates of parental rights today do not justify those rights by arguing parents own their children; and the libertarian rationale, while valid, does not adequately account for children's interests or establish a limit on parental authority. The legitimacy of robust parental rights depends on a comprehensive rationale that is compatible with contemporary values.

* * *

Legal developments in the late twentieth century have destabilized the Progressive Era dyadic framework governing legal regulation of children and families and generated uncertainty about assumptions and principles that at one time were seldom challenged. First, although the state's role of promoting child wellbeing continues to have strong intuitive appeal, the failures of both the juvenile justice and child welfare systems have made clear that benign intentions can falter and are inadequate as the foundation for law and policy. Moreover, in both systems, racial and class bias have infected policies and practices and undermined the legitimacy of the state's role. Parental authority, the other pole supporting the framework, is under attack and appears to stand on weaker ground than in earlier times. Finally, the children's rights movement has complicated the law's conception of childhood, and no clear principles have guided the process of extending some rights and privileges to children while withholding others until adulthood. In sum, by the dawn of the twenty-first century, the regulation of children since the Progressive Era had become more complex, less stable, and in need of comprehensive revision.

II. AN EMERGING FRAMEWORK: REVIVING CHILD WELLBEING

In this Part, we demonstrate that a new legal framework governing the regulation of children and families has begun to emerge—what we call the Child Wellbeing framework. We identify and explicate the core elements of this framework in twenty-first-century juvenile justice reforms, and we note that it has also begun to influence family-support policies. Ultimately, however, the importance of this framework is far broader. As we show in Parts III and IV, it brings a measure of coherence to the complex legal develop-

142. 530 U.S. 57, 65–67 (2000).

143. *See* GUGGENHEIM, *supra* note 93, at 175–212; ROBERTS, *supra* note 92, at 51–67; Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1073–76 (2015) (book review).

144. *See supra* note 140.

ments of the past half century, uncovering a deep structure and logic of modern regulation of children across multiple domains.

The animating principle of the framework is that the goal of legal regulation is to promote child wellbeing. This may seem unpromising as a starting point—a naïve and nostalgic revival of the Progressive Era ideal that continues to be widely endorsed but has proved to be fragile as a governing principle for regulation. But three features of the contemporary framework distindistinguish it from its predecessor and reinforce its stability. First, modern child-centered attitudes do not rest on the simplistic view of childhood that shaped, and ultimately undermined, the Progressive Era's goals.[145] Instead, twenty-first-century regulation increasingly is based on a large body of psychological and biological research on child and adolescent development, as well as research on effective policies. This empirical knowledge makes it possible to further child wellbeing with much greater sophistication and effect than was possible during the Progressive Era. Second, lawmakers and the public increasingly have embraced laws and policies that promote child wellbeing on the ground that these policies also promote social welfare. This recognition that effective policies not only promote children's interests but also advance social welfare seems unremarkable, but historically, society's interests received surprisingly little attention. Early Progressives focused optimistically on children's welfare in advocating for reform, often ignoring the public interest, with devastating consequences when apparent conflicts arose. Today it seems clear that a foundation reinforced by collective self-interest is more solid than one based on benign paternalism alone. Third, the Child Wellbeing framework recognizes the serious threat of racial and class bias to the fairness and legitimacy of state regulation of children. Although we are far from eradicating these insidious influences, there is a growing awareness of the ways that the law has failed children and families of color. The Child Wellbeing framework thus underscores the need to address systemic bias and structural inequality.

A. *Juvenile Justice Reform: The Embodiment of the New Framework*

This section sketches the emergence of the Child Wellbeing framework in juvenile justice reforms in the early twenty-first century. We first describe the now-familiar factors that contributed to the dramatic legal changes in the juvenile justice system during this period and then elaborate on how the reforms embody the elements of the Child Wellbeing framework: incorporation of developmental knowledge, convergence of adolescent wellbeing and social welfare, and recognition of the pernicious role of racial bias.

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145. The Progressives embraced the new science of adolescence, but the state of knowledge was rudimentary and speculative a century ago. *See* G. STANLEY HALL, 1 ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION (1916). Progressives also lumped adolescents with younger children for strategic purposes in furtherance of their goal of expanding the boundary of childhood. *See* VAN WATERS, *supra* note 45, at 4; Mack, *supra* note 46, at 107.

1. Catalysts for Reform

The moral panic surrounding juvenile crime in the 1990s began to subside in the early years of the twenty-first century, as juvenile crime rates declined steadily.[146] This calmer climate, in turn, made possible the reemergence of more benign attitudes toward youth and an openness to reform of punitive policies. Observers pointed to the offensive racist underpinnings of the response to youth crime in the 1990s, when the *youth* of juvenile offenders was largely ignored in a climate of fear and outrage.[147] Other factors also contributed to the trend away from punitive policies. First, economic developments played a key role; as the recession of 2008 strained state budgets, lawmakers were forced to confront the high cost of incarceration-based policies, which diverted funds from education and other critical state services.[148] Second, evidence mounted that costly punitive policies were ineffective at reducing recidivism in juvenile offenders, one of their primary objectives. Many studies showed that youths sent to institutions were more likely to reoffend than those who remained in their communities.[149] Moreover, a substantial body of research showed that not only were some community-based correctional programs for juveniles very effective at reducing recidivism, but they did so at a fraction of the cost of incarceration.[150]

Another important catalyst for reform was the Supreme Court, which signaled powerfully in a series of opinions that lawmakers should attend to differences between youths and their adult counterparts. Most important were four Eighth Amendment opinions, beginning in 2005, dealing with challenges to harsh adult sentences (the death penalty and life without pa-

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146. The decline in juvenile crime began in the mid-1990s but was acknowledged only after the trend was well established for several years. In 2000, for example, California voters approved a referendum facilitating prosecution of juveniles as adults, despite the fact that crime rates in the state had been declining for several years. *See* SCOTT & STEINBERG, *supra* note 6, at 105–06, 109–12.

147. *See generally* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

148. Secure placement in juvenile institutions was expensive; in some states upward of $215,000 a year for each youth subject to placement, while community-based programs were far less expensive, often $5,000 per youth. *See* Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 45, 77 (2010).

149. *See* COMM. ON ASSESSING JUVENILE JUSTICE REFORM ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 414–29 (Richard J. Bonnie et al. eds., 2013); Jeffrey Fagan et al., *Be Careful What You Wish for: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court* (Columbia Law Sch. Pub. Law Research, Working Paper No. 03-61, 2004), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2304&context=faculty_scholarship [https://perma.cc/WT79-QP6Z].

150. *See* PETER W. GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY (2006); SCOTT & STEINBERG, *supra* note 6, at 183; *see also supra* note 148.

role) imposed on juvenile offenders under state laws.[151] The Court held that these laws violated the Constitution as applied to juveniles, finding that a sentence that might be appropriate for an adult criminal was disproportionate for a juvenile, due to the youthful immaturity of young offenders.[152]

These opinions directly affected only a small category of young offenders convicted of the most serious crimes, but their impact on justice system reform has been far broader. Our nation's highest court announced that "children are different" from adults,[153] signaling a changed view of teenagers involved in crime than the dominant trope a decade before; under "evolving standards of decency,"[154] young offenders are not incorrigible criminals but immature and reckless adolescents.[155] Moreover, the Court increasingly drew on scientific research to explicate how developmental factors influence teenage offending and explained that *because* of these differences children in the justice system should be subject to more lenient sanctions than adults.[156]

Courts and legislatures across the country have cited the sentencing opinions and the underlying developmental research in support of a broad range of reforms that recognize the special status of young offenders: these include general restrictions on sentences imposed on juveniles,[157] reforms of

151. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016); Miller v. Alabama, 567 U.S. 460, 472 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 573 (2005). The Court also recognized the immaturity of youth in a different justice system context. In *J.D.B. v. North Carolina*, the Court held that the age of a youth questioned by police must be considered to determine whether he or she is in custody, requiring *Miranda* warnings. 564 U.S. 261, 265 (2011).

152. *See Montgomery*, 136 S. Ct. at 736–37; *Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 74; *Roper*, 543 U.S. at 575. On the basis of this proportionality analysis, the Court identified three differences between juvenile and adult offenders: First, the criminal choices of juveniles are less culpable than those of adult counterparts because they are driven by developmental influences associated with adolescence. Second, because much adolescent crime is a product of youthful immaturity, juvenile offenders have a greater potential for reform than do adults, and they should be given the opportunity to do so. Sentences of death or life without parole foreclose any such opportunity. Third, the Court observed that the harsh sentences received by the petitioners might be due to juveniles' more limited ability to navigate the justice process, as compared to adults. *See Miller*, 567 U.S. at 473, 477; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 573.

153. *Miller*, 567 U.S. at 480.

154. *Id.* at 469 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976) (plurality opinion)) (applying the Eighth Amendment test).

155. *Id.* at 471. For an in-depth analysis, see ELIZABETH SCOTT ET AL., JOHN D. & CATHERINE T. MACARTHUR FOUND., MODELS FOR CHANGE, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING (2015), http://www.modelsforchange.net/publications/778/The_Supreme_Court_and_the_Transformation_of_Juvenile_Sentencing.pdf [https://perma.cc/LC24-DFSL].

156. *Miller*, 567 U.S. at 471–76; *Roper*, 543 U.S. at 616–19.

157. *See, e.g.*, State v. Lyle, 854 N.W.2d 378 (Iowa 2014).

conditions in correctional facilities,[158] protections for youths in police interrogation,[159] and exclusion of juveniles from sex-offender registries.[160]

Fortuitously, the Supreme Court's use of developmental research in the Eighth Amendment opinions directed lawmakers' attention to empirical studies on adolescence at a time when the research was expanding dramatically. This growing body of behavioral and biological research on adolescence has profoundly influenced the direction and shape of justice system reforms in the early twenty-first century.[161] Developmental brain research seems to be more compelling to regulators and the public than behavioral research, perhaps because differences between adult and adolescent brain functioning and structure can be observed physically.[162] In any event, neuroscience research is often invoked by politicians and courts in support of differential treatment of juvenile offenders.[163]

2. Modern Juvenile Justice Policy

In the twenty-first century, a new conceptual framework has begun to define juvenile crime regulation. Youth justice policy today embraces adolescent wellbeing as a central goal, but with particular attention to the relationship between youth welfare and social welfare, a commitment to reducing racial bias, and with an insistence that these objectives will be promoted most effectively by grounding regulation in developmental knowledge. This Section shows how the contemporary framework has shaped the legal response to youth crime, reducing institutional placement and tailoring programs to the needs of adolescents.[164]

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158. *See* V.W. v. Conway, 236 F. Supp. 3d 554 (N.D.N.Y. 2017) (citing sentencing opinions in granting preliminary injunction against use of solitary confinement with juveniles).

159. *See* J.D.B. v. North Carolina, 564 U.S. 261, 265 (2011).

160. *In re* C.P., 967 N.E.2d 729, 732 (Ohio 2012).

161. The MacArthur Foundation was an important catalyst for the developmental juvenile justice reforms, sponsoring the influential Research Network on Adolescent Development and Juvenile Justice from 1995 to 2005, followed by its Models for Change program, initiating reforms in several states. *See Models for Change: Systems Reform in Juvenile Justice*, MODELS FOR CHANGE, http://www.modelsforchange.net/about/index.html [https://perma.cc/SJT9-Q86D]; *Research Network on Adolescent Development & Juvenile Justice*, MACARTHUR FOUND., https://www.macfound.org/networks/research-network-on-adolescent-development-juvenil/ [https://perma.cc/M22V-82GR]. The Foundation later supported developmental brain research through its Research Network on Law and Neuroscience. *Research Network on Law and Neuroscience*, MACARTHUR FOUND., https://www.macfound.org/networks/research-network-on-law-and-neuroscience/ [https://perma.cc/JD53-ZN45].

162. *See* Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549, 550, 559–60 (2016).

163. *See* Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 158, 160 (2013); Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 514 (2013).

164. Significant shifts in the status-offense system also reflect the Child Wellbeing framework. States reformed the system based on research demonstrating the effectiveness of

To begin, developmental brain research has played a pivotal role in justice policy in several ways. First, the research has reinforced the premise that juveniles are less culpable than their adult counterparts because much teenage offending is influenced by developmental factors beyond the control of the individual youth.[165] Courts and other regulators have pointed to several mitigating influences on adolescent criminal choices linked to interrelated features of brain development. Adolescents are more inclined toward sensation seeking and have a reduced capacity to control impulses or to regulate emotions as compared to adults.[166] They also are far more susceptible to the influence of peers than are either children or adults.[167] These tendencies are strongly correlated with the inclination to engage in crime (and other risky activities).[168]

Second, developmental research confirms that typical adolescent offenders have the potential to reform.[169] *Because* juvenile crime is usually a product of immaturity, most young offenders are likely to desist as they mature to adulthood. In fact, the age-crime curve consistently shows that crime rates peak at age seventeen and sharply decline thereafter,[170] debunking the 1990s

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offering services to adolescents rather than bringing youth into the court system, an understanding that promoting adolescent wellbeing furthers social welfare, and a concern about racial disproportionality. MICHAEL P. BOGGS & CAREY A. MILLER, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM (2018), https://dcs.georgia.gov/document/publication/2017-2018-criminal-justice-reform-council-report/download [https://perma.cc/XF6S-UKB7]; *see also* J. Russell Jackson & John Sumner, *C.H.I.N.S. Status Offender Reform in Georgia*, EMORY U. BARTON CTR. (Jan. 20, 2017), https://www.slideshare.net/bartoncenter/children-in-need-of-services (on file with the *Michigan Law Review*). States regularly use diversion programs to keep potential status-offense petitions out of court and provide the services needed to address the issues underlying the behavior. *See, e.g.*, GA. CODE ANN. § 15-11-380 (2015); MASS. GEN. LAWS ANN. ch. 119, § 39E (West 2018). Another change reflecting the Child Wellbeing framework is the federal reform in 2018 that sought to limit detention of status offenders. *See* Juvenile Justice Reform Act of 2018, Pub. L. No. 115–385, § 205(1)(H), 132 Stat. 5123 (2018) (codified at 34 U.S.C. § 11133(a)(11)(A) (2018)). The new approach has led to a sharp decrease in the population of status offenders over the past decade. *See Statistical Briefing Book*, OJJDP, https://www.ojjdp.gov/ojstatbb/court/qa06701.asp?qaDate=2017 [https://perma.cc/ZU94-EFH8].

165. *See* Steinberg, *supra* note 163, at 516.

166. *See* Cohen et al., *supra* note 162, at 550, 559–60.

167. *See id.*; Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, DEV. SCI., March 2011, at F1–F2 (describing developments in the social brain).

168. Elizabeth Scott et al., *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J.L. & POL'Y 13, 16–17 (2018); Steinberg, *supra* note 163, at 516–16. Neuroscientists also have found an imbalance between changes in brain development in early adolescence that encourage impulsivity and the slower development of the parts of the brain that govern executive functions, such as emotional regulation, which mature into early adulthood. Cohen et al., *supra* note 162, at 559–60.

169. *See* LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 18–45 (2014).

170. Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 370 (2003).

assumption that a large percentage of delinquents are incipient career criminals. Modern lawmakers have recognized that most delinquent youths have reasonable prospects of becoming productive adults.[171] This realization has focused attention on the importance of correctional responses that facilitate the transition to noncriminal adulthood.

Reinforcing this response is another body of developmental research that confirms (unsurprisingly) that biology alone does not determine the course of adolescent development. Social development is a process of reciprocal interaction between the individual and her social context.[172] A healthy social context provides the conditions for attaining skills and capacities that are important to successful adult functioning, in relationship and employment roles and generally as an independent responsible individual.[173] Of course, social context can also impede healthy maturation. The teen whose social context consists of neglectful or abusive parents, antisocial peers, and a lack of engaging educational or extracurricular activities is far less likely to make a successful transition to adulthood.[174]

For young offenders, correctional programs and facilities constitute their social context, and modern justice system regulators increasingly have embraced the lessons offered by this research. One key lesson is that prison-like institutional settings constitute toxic developmental contexts; and in most states, policymakers have reduced incarceration of juvenile offenders dramatically.[175] The combination of hostile adult custodians, antisocial peer and adult role models, limited educational and other programs, and a highly restrictive setting together undermine healthy maturation.[176] Instead, lawmakers across the country have shifted resources to localities to support community-based programs that seek to provide the conditions and inter-

171. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 479–48 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010).

172. *See* Leah H. Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124, 130–31 (2010).

173. *See* Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21, 23–26 (2004). These conditions include an authoritative parent figure, contact with prosocial peers, and opportunities for autonomous decisionmaking and critical thinking. *See* Urie Bronfenbrenner & Pamela A. Morris, *The Bioecological Model of Human Development*, *in* 1 HANDBOOK OF CHILD PSYCHOLOGY: THEORETICAL MODELS OF HUMAN DEVELOPMENT 793, 822 (Richard M. Lerner ed., 2006); B. Bradford Brown & James Larson, *Peer Relationships in Adolescence*, *in* 2 HANDBOOK OF ADOLESCENT PSYCHOLOGY: CONTEXTUAL INFLUENCES ON ADOLESCENT DEVELOPMENT 74, 95 (Richard M. Lerner & Laurence Steinberg eds., 3d ed. 2009); Laurence Steinberg, *We Know Some Things: Parent–Adolescent Relationships in Retrospect and Prospect*, 11 J. RES. ON ADOLESCENCE 1, 13 (2001).

174. SCOTT & STEINBERG, *supra* note 6, at 58.

175. *See* COMM. ON ASSESSING JUVENILE JUSTICE REFORM ET AL., *supra* note 149, at 134, 235, 242.

176. *Id.* at 134–35.

ventions that support healthy development.[177] These programs allow young offenders to remain in or close to home and, thus, are far more humane than placement in institutions far from young offenders' communities.[178] In short, modern correctional programs are tailored to provide what has been missing from many delinquent youths' lives—a social context that can assist them in attaining maturity and pursuing prosocial goals.

Social welfare is also advanced by the recent justice system reforms. Contemporary juvenile correctional programs have been shown to be more effective in reducing recidivism at a lower cost than other interventions in the 1990s, which often involved incarceration and did little to reduce offending.[179] Several evidence-based programs have repeatedly been found to reduce recidivism when compared to both incarceration and traditional probation programs.[180] Further, cost-benefit analyses of the most popular programs have shown that investments produce a substantial return in dollars saved through crime reduction.[181] The success of these programs confirms that justice policies aimed at furthering the wellbeing of teenage offenders also promote the interests of society in reducing crime and conserving public resources.

Finally, the intersection of race and juvenile justice policy has become a more salient focus of policy concern in the twenty-first century than it was in earlier times. Research has found disproportionate treatment of youth of color at every stage of the justice system process. They are more likely than their white counterparts to have police contact and to be arrested, charged, and subject to delinquency proceedings; once formally adjudicated, they are more likely to be confined and removed from their communities.[182] Moreover, youth of color disproportionately enter the justice system from school under tough school discipline policies, sometimes mandated under state

177. The most effective programs seek to empower parents to fulfill their role more effectively and when that is not possible to substitute other adult parent figures who can provide structure and support to delinquent youths. *See* Steinberg, *supra* note 173, at 15–16. These programs facilitate prosocial peer interactions as well, providing youths with the tools to avoid the influence of antisocial peers in school and in the community setting. *See, e.g.*, VERA INST. OF JUSTICE, *supra* note 78, at 49–51.They also provide a range of other interventions that support youths, respond to their needs, and assist them in acquiring the skills they need to make the transition to adulthood.

178. *See, e.g.*, VERA INST. OF JUSTICE, *supra* note 78, at 49–51.

179. *See* STEVE AOS ET AL., THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME 8 (2001).

180. *See id.*

181. Studies of Multisystemic Therapy, one of the most established and successful correctional programs for youth, have found savings of six dollars for each dollar invested. *See id.*

182. *See* JOSHUA ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS (2016), https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests [https://perma.cc/QJA9-PCRM]; *see also* J.L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending*, *in* OUR CHILDREN, THEIR CHILDREN, *supra* note 147, at 83.

law.[183] In recent years, lawmakers and advocates have sought to reduce racial and ethnic disparities through training and the use of decision models that expose and reduce racial biases in deliberations and choices by system actors and school officials.[184]

At this point, progress has been limited. The modern period has seen dramatic reductions in the numbers of youth who are subject to justice system intervention and less punitive treatment of most youth in that system.[185] These trends have benefited youth of color, who were disproportionately represented in the justice system of the 1990s.[186] But patterns of racial disproportionality continue to exist, despite the reforms.[187] The aspiration to reduce racial disparity and the commitment to finding the means to attain this goal define a critical challenge that lies ahead. For now, the problem is increasingly front and center, amplified by advocates and demanding the attention of lawmakers, system actors, and the public.[188]

In these ways, youth justice policy today increasingly embodies the essential elements of the Child Wellbeing framework, promoting the interests of youths in the justice system more effectively than the Progressive Era ap-

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183. *See, e.g.*, Allison R. Brown, *Federal Spotlight on School-to-Prison Pipeline*, 32 CHILD L. PRAC. 31, 31 (2013) ("The school-to-prison pipeline is a cacophonous mash-up of numerous factors, including zero-tolerance student-discipline policies, that contribute to (1) in the short term, the exclusion of children, disproportionately children of color, from the regular classroom environment as a means of punishment; and (2) in the long term, the entanglement of children, disproportionately children of color, in the criminal-justice system."); Danielle Dankner, *No Child Left Behind Bars: Suspending Willful Defiance to Disassemble the School-to-Prison Pipeline*, 51 LOY. L.A. L. REV. 577, 577 (2018) (similarly describing impact of harsh school discipline policies); Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 959–60 (2016) (describing how school disciplinary policies push youth of color into justice system and out of public school).

184. To reduce racial bias in decisions about preadjudication detention, for example, some states have adopted protocols aimed to reduce detention, with particular impact on youth of color. *See* THE ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE: INSIGHTS FROM THE ANNUAL RESULTS REPORT (2017) [hereinafter JDAI]; *see also* NAT'L JUVENILE JUSTICE NETWORK, REDUCING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE SYSTEMS (2014), http://www.njjn.org/uploads/digital-library/RED-Policy-Update-0914-FINAL.pdf [https://perma.cc/4LCJ-4ACG]. The Obama administration issued a directive that schools monitor and record the race of youths subject to discipline. This directive was reversed by the Trump administration. *See infra* note 366.

185. *See* JDAI, *supra* note 184, at 3.

186. *See id.* at 1.

187. *See id.* at 6–7; *see also* COMM. ON ASSESSING JUVENILE JUSTICE REFORM ET AL., *supra* note 149, at 211–40.

188. *See, e.g.*, *Youth in the Justice System*, JUV. L. CTR., https://jlc.org/youth-justice [https://perma.cc/MZ45-M3NK] ("Racism pervades our justice system, leading to the arrest, prosecution, adjudication and incarceration of disproportionately greater numbers of youth of color than white youth, even while youth offending patterns are relatively similar. Moreover, fines and fees imposed on youth create an unfair system of 'justice by income,' where children in poverty face an increased risk of incarceration, while more affluent youth receive effective community-based treatment. Justice should not be based on the color of a child's skin, where a child lives, or the family's income.").

proach or the punitive response of the 1990s. Current law and policy also offer the promise of greater stability than earlier regimes because they achieve two social welfare goals essential to long-term viability—crime reduction and cost-effectiveness. It is not surprising that the Koch brothers and groups such as Right on Crime have lined up in support of developmentally-based policies.[189] Responses to youth crime that attend to the realities of adolescence offer the best prospect of attaining social goals that have broad appeal across the political spectrum—reducing crime and facilitating the transition of delinquent teenagers to productive adulthood. Finally, the reality that racial disproportionality in the justice system exists and must be addressed is no longer obscured. In the current climate, the message that racial justice is an essential component to a fair and legitimate response to juvenile crime is being heard, even if it has not yet been successfully effectuated.[190]

The upshot is that reforms have resulted in substantial improvements and in a shrinking of the justice system, but some sobering notes must be sounded. Youths continue to receive harsh sentences in the adult system in some jurisdictions, and, in the juvenile system, many states have undertaken only modest reforms.[191] Finally, the racialized character of the modern justice system represents the most intractable failure of reform efforts and its greatest challenge.[192]

B. *Direct Regulation of Families: Nascent Glimmers of the Child Wellbeing Framework*

Although most evident in reforms to the juvenile justice system, the Child Wellbeing framework is also embodied in other areas of regulation in which the state plays a direct role in the lives of children: state policies supporting families and child welfare regulation. As this section describes, recent investments in children and families are consistent with the Child

189. *See Juvenile Justice*, RIGHT ON CRIME, http://rightoncrime.com/category/priority-issues/juvenile-justice/ [https://perma.cc/SYX4-YEBS]. Koch Industries is a member of the Coalition for Public Safety. Alex Altman, *Criminal Justice Reform is Becoming Washington's Bipartisan Cause*, TIME (Feb. 19, 2015), https://time.com/3714876/criminal-justice-reform-is-becoming-washingtons-bipartisan-cause/ [https://perma.cc/8G5W-DHY5]. The Coalition's Policy Priorities include alternatives to incarceration and increased focus on community supervision. *Policy Priorities*, COALITION FOR PUB. SAFETY, https://www.coalitionforpublicsafety.org/policies [https://perma.cc/9F8Y-GJNK].

190. *See Future Interrupted: How Juvenile Records Disproportionately Affect Youth of Color*, JUV. L. CTR., https://jlc.org/sites/default/files/attachments/2018-04/FutureInterruped-YouthofColor.pdf [https://perma.cc/98SQ-QWQB].

191. *See, e.g.*, *Failed Policies, Forfeited Futures: A Nationwide Scorecard on Juvenile Records*, JUV. L. CTR., https://juvenilerecords.jlc.org/juvenilerecords/#!/map [https://perma.cc/9EX2-ZCN8] (showing disparities across states in protection of juvenile records).

192. *See* ROVNER, *supra* note 182; *see also* JDAI, *supra* note 184, at 6–10. Similarly, CHINS petitions for Black children have declined at a slower rate than other groups. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. JUVENILE JUSTICE, JUVENILE COURT STATISTICS: 2015, at 72–75 (2018).

Wellbeing framework, as are a few modest reforms to the child welfare system. As with juvenile justice, ample research points to the individual and societal benefits of supporting families and preventing child abuse and neglect, but in contrast to juvenile justice regulation, the state has done little to fundamentally alter its approach. Formidable obstacles have impeded beneficial legal changes, creating greater challenges to reform than exist in the juvenile justice system. In these areas, then, much work remains to be done, and the Child Wellbeing framework offers normative guidance more than explanatory power.

1. Policies of State Support

Despite an overall lack of state support for families,[193] a few promising—albeit modest—recent investments show the influence of the Child Wellbeing framework. The clearest example is the dramatic increase in funding for early childhood education.[194] States across the political spectrum—from Oklahoma to Vermont—have embraced prekindergarten as an effective and efficient strategy for boosting academic achievement and addressing inequality.[195] States and the federal government have thus increased spending substantially,[196] significantly boosting preschool enrollment rates.[197]

193. *See* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 220–48 (2017) (describing how the United States assumes a limited role in supporting families, unlike other wealthy nations, which use public funds to invest in universal programs such as lengthy paid parental leave, no-cost or low-cost childcare, healthcare, child allowances, and much more); *see also* DOWD, *supra* note 33, at 9–50 (arguing that the lack of state support particularly disadvantages low-income children and children of color). There are some exceptions, of course, notably public education and basic safety-net programs, but overall state spending on family support lags far behind other countries. *See* Eichner, *supra*, at 221–26.

194. The federal government has funded preschool through the Head Start program since 1965, *see Head Start Timeline*, HEAD START: ECLKC (last updated Feb. 16, 2019), https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-timeline, but this funding has not come close to meeting the need for subsidized early childhood education, *see* ALLISON H. FREIDMAN-KRAUSS ET AL., NAT'L INST. FOR EARLY EDUC. RESEARCH, THE STATE OF PRESCHOOL 2017, at 14 (2018), http://nieer.org/wp-content/uploads/2018/05/State-of-Preschool-2017-Full.5.15.pdf [https://perma.cc/5V6H-VVYL]. For other examples of state investments in family support, see *Paid Family Leave Resources*, NAT'L CONF. ST. LEGISLATURES (Jan. 10, 2018), http://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx [https://perma.cc/S6EY-QJ4A] (describing paid parental leave legislation in California, New Jersey, New York, and Rhode Island).

195. For a description, see Clare Huntington, *Early Childhood Development and the Replication of Poverty*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 130 (Ezra Rosser ed., 2019).

196. *See* LOUISA DIFFEY ET AL., EDUC. COMM'N OF THE STATES, STATE PRE-K FUNDING 2016-17 FISCAL YEAR: TRENDS AND OPPORTUNITIES 1 (2017) (reporting that, in 2017, states spent $7.5 billion a year, a 47 percent increase from 2012). Congress appropriated $9.8 billion for Head Start in 2018, *Head Start Program Facts: Fiscal Year 2018*, HEAD START: ECLKC (last updated Oct. 1, 2019), https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-program-facts-fiscal-year-2018 [https://perma.cc/JQL9-Z8KT], which was a significant increase from the $6.2

These investments were the result of abundant research demonstrating the effectiveness and economic efficiency of preschool, which in turn generated widespread and bipartisan support for preschool spending.[198]

Also compatible with the Child Wellbeing framework is Medicaid expansion under the Patient Protection and Affordable Care Act.[199] The expansion does not dramatically increase the number of children receiving healthcare because most low-income children were already covered,[200] but it benefits children and promotes their wellbeing by supporting parents. Research demonstrates that Medicaid expansion improves parental access to mental health services and substance abuse treatment, two conditions linked to child abuse and neglect as well as poor family functioning generally.[201] Further, Medicaid expansion has improved the finances of low-income families,[202] increased employment rates,[203] and promoted housing stability,[204] all of which benefit children. Like investments in preschool, Medicaid expansion has been shown to be cost-effective.[205] Despite initial resistance in polit-

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billion appropriated in 2001, CONG. RESEARCH SERV., RL30952, HEAD START: BACKGROUND AND FUNDING 21–22 (2014).

197. *See* FREIDMAN-KRAUSS ET AL., *supra* note 194, at 25–26 (reporting that 44 percent of four-year-olds were enrolled in publicly funded preschool in 2016–2017 school year, a significant increase from previous years).

198. *See* DAVID L. KIRP, THE SANDBOX INVESTMENT 76–92 (2007) (describing the numerous forces leading to the state-level investments, including empirical research, foundation funding for pilot programs and evaluation, and state-level political leadership); Charles Joughin, *See Just How Much Congress Increased Funding for Early Childhood Education*, FIRST FIVE YEARS FUND (Mar. 23, 2018), https://www.ffyf.org/see-just-much-congress-increased-funding-early-childhood-education/ [https://perma.cc/36R7-VWEZ] (describing the bipartisan support for the 2018 increase in Head Start spending).

199. Pub. L. No. 111–148, 124 Stat. 119 (2010).

200. *See Health Insurance Coverage of Children 0-18*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/children-0-18 [https://perma.cc/H7P6-NLEM].

201. *See supra* note 99 and accompanying text.

202. *See* Jesse Cross-Call, *Medicaid Expansion Continues to Benefit State Budgets, Contrary to Critics' Claims*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 9, 2018), https://www.cbpp.org/health/medicaid-expansion-continues-to-benefit-state-budgets-contrary-to-critics-claims [https://perma.cc/S2DB-CRJB].

203. *See* OHIO DEP'T OF MEDICAID, 2018 OHIO MEDICAID GROUP VIII ASSESSMENT: A FOLLOW-UP TO THE 2016 OHIO MEDICAID GROUP VIII ASSESSMENT (2018), http://medicaid.ohio.gov/Portals/0/Resources/Reports/Annual/Group-VIII-Final-Report.pdf [https://perma.cc/Q2QA-ATZ4]; Kara Gavin, *Medicaid Expansion Helped Enrollees Do Better at Work or in Job Searches*, MHEALTH LAB (June 27, 2017, 10:20 AM), https://labblog.uofmhealth.org/industry-dx/medicaid-expansion-helped-enrollees-do-better-at-work-or-job-searches [https://perma.cc/4KFZ-REX3].

204. *See* Emily A. Gallagher et al., *The Effect of Health Insurance on Home Payment Delinquency: Evidence from ACA Marketplace Subsidies*, 172 J. PUB. ECON. 67 (2019).

205. *See* Cross-Call, *supra* note 202; *see also* Hefei Wen et al., *The Effect of Medicaid Expansion on Crime Reduction: Evidence from HIFA-Waiver Expansions*, 154 J. PUB. ECON. 67 (2017); Jacob Vogler, Access to Health Care and Criminal Behavior: Short-Run Evidence from the ACA Medicaid Expansions (unpublished manuscript) (Nov. 1, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042267 [https://perma.cc/BJ9E-PZ3Q].

ically conservative states, all but fourteen states have now expanded Medicaid, including several states adopting the expansion through ballot initiatives.[206]

These are promising investments, but there are significant obstacles to further reform. Entrenched libertarian values define the relationship of the state to the family in the United States, valorizing family privacy and placing on parents the weighty responsibility of rearing children.[207] Reforms to the juvenile justice system do not implicate these values; a social and political consensus exists that children's criminal conduct necessitates a state response. Further, the social welfare benefits of family support are both subtler and more remote than those of effective justice policies. The average citizen is likely attuned to the costs of juvenile crime but not the costs of kindergarten unpreparedness. Finally, the public understands that state resources will be devoted to youth crime policy and thus is readily persuaded that these investments should be economically efficient. By contrast, investments in children are politically vulnerable.[208]

Notwithstanding these challenges, the reforms described in this section are some evidence that lawmakers are beginning to redefine the state's role, reflecting a nascent understanding that promoting child wellbeing furthers social welfare and equality and that research on effectiveness and cost efficiency can help drive reform. The Child Wellbeing framework thus is embedded in these emerging reforms and provides a solid blueprint for future efforts.

2. The Child Welfare System

In contrast to the significant reforms to the juvenile justice system and the modest investments in family support, the child welfare system largely does not embody the Child Wellbeing framework. Population-based prevention efforts, such as Medicaid expansion, can help prevent child abuse and neglect, but the child welfare system itself continues to focus primarily on crisis management rather than preventing abuse and neglect.[209]

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206. *See Status of State Action on the Medicaid Expansion Decision*, KAISER FAM. FOUND., https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act [https://perma.cc/6PCC-CJTE]. *But see* Letter from Brian Neale, Dir., Ctrs. for Medicare & Medicaid Servs., to State Medicaid Dirs. (Jan. 11, 2018), https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf [https://perma.cc/BC5Q-PX3V] (allowing states to impose work requirements on some recipients).

207. *See* Eichner, *supra* note 193, at 220–48.

208. *See* NICHOLAS JOHNSON ET AL., AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS (2011), https://www.cbpp.org/sites/default/files/atoms/files/3-13-08sfp.pdf [https://perma.cc/VA7L-DZ6D] (documenting the state-level budget cuts following the 2008 recession, including cuts to health insurance for low-income children and K-12 educational spending).

209. *See* Clare Huntington, *The Child Welfare System and the Limits of Determinacy*, LAW & CONTEMP. PROBS., 2014, at 221 (describing the durability of the crisis orientation across multiple policy swings); *Funding Child Abuse and Neglect Prevention Programs*, CHILD

The negative consequences for children that follow state intrusion can be acute. Most concerning, state intervention can lead to the placement of the child in foster care, temporarily or permanently disrupting the parent-child relationship.[210] Substantial evidence demonstrates that state custody does not generally improve child wellbeing,[211] yet many children are currently in foster care,[212] and the number is growing rapidly, largely as a result of the opioid epidemic.[213] Given their overrepresentation in the child welfare system,[214] Black and Native American children are disproportionately affected by the failures of the system.

Despite the wide gap between the Child Wellbeing framework and the child welfare system, two counterexamples should be noted. First, some child welfare funding is dedicated to family-support programs, intended to serve the wider community in an effort to strengthen families.[215] These programs offer parenting education, social support, case management and referral services, healthcare, adult education, and so on.[216] Research shows that these efforts improve children's cognitive development and social and emotional wellbeing, and they improve parenting, although the impact on child maltreatment is not clear.[217] Second, the Affordable Care Act authorized federal funds for home-visiting programs, to supplement existing state funding.[218] These programs improve outcomes for both children and mothers, and there is some evidence that they help reduce child maltreatment.[219]

WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/management/funding/program-areas/prevention/ [https://perma.cc/E9B3-SAVW] (describing the limited available funding for prevention efforts).

210. *See supra* text accompanying notes 86–99.

211. *See supra* note 86 and accompanying text.

212. *See supra* note 87.

213. *See Child Welfare and Substance Use*, OFF. ASSISTANT SEC'Y FOR PLANNING & EVALUATION, https://aspe.hhs.gov/child-welfare-and-substance-use [https://perma.cc/59U2-765Z].

214. *See supra* note 89 and accompanying text.

215. *See* Promoting Safe and Stable Families Amendments of 2001, 42 U.S.C. § 629 (2012).

216. JEAN I. LAYZER ET AL., ABT ASSOCS. INC., NATIONAL EVALUATION OF FAMILY SUPPORT PROGRAMS: FINAL REPORT VOLUME A: THE META-ANALYSIS, at A3–9 (2001), https://www.acf.hhs.gov/sites/default/files/opre/fam_sup_vol_a.pdf [https://perma.cc/43DZ-GBN2].

217. *See id.* at A5–2, A5–8.

218. CONG. RESEARCH SERV., R43930, MATERNAL, INFANT, AND EARLY CHILDHOOD HOME VISITING (MIECHV) PROGRAM: BACKGROUND AND FUNDING 3 (2018). For a description of the original model, see *About Us*, NURSE-FAM. PARTNERSHIP, https://www.nursefamilypartnership.org/about/ [https://perma.cc/2XRM-BJD7].

219. *See Home Visiting Evidence of Effectiveness*, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. CHILD. & FAMS., https://homvee.acf.hhs.gov/effectiveness [https://perma.cc/L3WY-LNQA].

The child welfare system has also taken some small steps towards reducing racial disproportionality and disparities.[220] Given their disproportionate representation in the system, children of color benefit from overall prevention programs, as from other reforms such as more effective models of legal representation for parents.[221] More specifically, child welfare system reforms, such as alternative decisionmaking processes to counteract potential bias, have targeted each stage in the process.[222] For Native American and Native Alaskan children, the Indian Child Welfare Act (ICWA) provides statutory protections for families, including a higher bar for the removal of children and procedural protections to promote tribal decisionmaking,[223] but the foster care–entry rate of these children remains troublingly high.[224]

Taken together, these minimal reforms fit within the modern Child Wellbeing framework: they improve child wellbeing, they are based in research, they have clear social welfare benefits, including cost efficiency, and they attempt to address racial and economic inequality. But at this point, the investments reach a small fraction of those families who would benefit,[225] and the reforms have had only a marginal impact on racial disproportionality.[226] In sum, there has been little fundamental change in the child welfare system. It continues to operate largely as a regime of crisis intervention, and racial disproportionality is still a hallmark of the system.

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220. *See supra* note 89 (describing the reduction in the racial disproportionality index (RDI) for Black children entering foster care but not for Native American or Native Alaskan children, and further noting that the RDI is lower for outcomes in care than for entry into care).

221. *See* Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 50 tbl.4, 51, 53 (2019) (studying the effect of providing parents with representation through an interdisciplinary law office, which includes social workers, parent advocates, and attorneys, and finding that such representation significantly reduced the amount of time a child spent in foster care without compromising safety).

222. *See* CHILDREN'S BUREAU, *supra* note 89, at 7–17.

223. For a description of ICWA, including the historical injustices towards Native American families that led to the law, the current constitutional challenges to it, and an explanation of the legal principles establishing that "Native American" is not considered a racial category, see Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 501–17 (2017).

224. *See supra* note 89.

225. *See* NAT'L HOME VISITING RES. CTR., 2018 HOME VISITING YEARBOOK 20–24 (2018), https://www.nhvrc.org/wp-content/uploads/NHVRC_Yearbook_2018_FINAL.pdf [https://perma.cc/U262-ZN9X]; *Maternal, Infant, and Early Childhood Home Visiting Program FY 2017 Formula Funding Awards*, U.S. HEALTH RES. & SERVS. ADMIN.: MATERNAL & CHILD HEALTH, https://mchb.hrsa.gov/maternal-child-health-initiatives/home-visiting/fy17-home-visiting-awards [https://perma.cc/4U3L-TQV2] (showing that less than $342 million was allocated for home visiting in 2017).

226. *See supra* note 89 (describing the modest improvement in racial disproportionality for Black children but worsening disproportionality for Native American and Native Alaskan children).

3. A Blueprint for Reform

If the state fully embraced the Child Wellbeing framework, it would do far more to support families and to prevent child abuse and neglect. The starting point is research. Scholars in multiple fields, from psychology[227] and neuroscience[228] to economics[229] and education,[230] have established that early childhood development lays an essential foundation for future learning and growth and that a child's development during this period turns on the interaction between the child and a parent or other caregiver.[231] Extensive research also shows that supportive programs during this period—such as home visiting for young, low-income, first-time mothers and early childhood education for children—improve children's long-term outcomes, including better academic achievement, higher adult earnings, and lower rates of criminal justice involvement.[232] These programs are also are economically efficient.[233]

Drawing on this research, the Child Wellbeing framework encourages the state to invest in family support generally and especially during early childhood. The framework supports paid parental leave, subsidized childcare, and child allowances, and it emphasizes evidence-based programs that are cost-effective. In the child welfare system, the framework favors evidence-based policies that protect children from maltreatment, with the understanding that these policies also further social welfare and address racial disproportionality. Any strategy to prevent child abuse and neglect must be multifaceted, and substantial available research can guide investments in prevention. Broad-based efforts to address the risk factors for child abuse and neglect—including poverty, parental youth, single parenthood, domestic

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227. For several of the foundational texts, see ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 219–34 (reissued 1993); 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 265–349 (2d ed. 1982); URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN 3–4, 21–22 (1979).

228. For a summary of the neuroscientific literature, see NAT'L RESEARCH COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) [hereinafter FROM NEURONS TO NEIGHBORHOODS]; *Resource Library*, CTR. ON DEVELOPING CHILD HARV. U., https://developingchild.harvard.edu/resources/ [https://perma.cc/92LY-A4TM].

229. *See, e.g.*, Raj Chetty et al., *Childhood Environment and Gender Gaps in Adulthood*, AM. ECON. REV., May 2016, at 282.

230. *See* Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, *in* WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91, 92, 104–05 (Greg J. Duncan & Richard J. Murnane eds., 2011).

231. For a summary, see FROM NEURONS TO NEIGHBORHOODS, *supra* note 228 *passim*.

232. *See* LYNN A. KAROLY ET AL., EARLY CHILDHOOD INTERVENTIONS: PROVEN RESULTS, FUTURE PROMISE 55–78, 128–29 (2005); *Home Visiting Evidence of Effectiveness*, *supra* note 219.

233. *See* JAMES J. HECKMAN, GIVING KIDS A FAIR CHANCE 3–43 (2013); KIRP, *supra* note 198, at 76–92.

violence, substance abuse, and mental health—are effective at reducing the rate of maltreatment;[234] and more targeted programs that teach parenting skills and provide support for parents also have some success.[235]

This is the vision. But the reality is far from this ideal, and thus the Child Wellbeing framework remains largely a guide for future reform.

* * *

This Part has identified and explicated a framework of state regulation of children taking shape in the twenty-first century, a framework based on a revitalized commitment to child wellbeing. The framework incorporates the sophisticated use of empirical evidence, recognizes that promoting child wellbeing also promotes social welfare, and is committed to eliminating racial bias. The framework is most evident in reforms in the juvenile justice system and is also reflected in a few recent investments in family support and marginal changes to the child welfare system.

Our analysis in this Part demonstrates how the framework is defining and clarifying the state's role in directly regulating children and families. As we show in Parts III and IV, the framework also extends to the domains of parental rights and children's rights. The framework thus reveals the logic of the regulation of children across the legal landscape, illuminating developments over the past half century and integrating legal regulation into a more coherent and comprehensive body of law.

III. CHILD WELLBEING AND PARENTAL RIGHTS

Beyond the realm of direct regulation, the Child Wellbeing framework also has explanatory heft in the domain of parental rights. The framework elevates a rationale for parental authority that some scholars and lawmakers have endorsed[236] but that has been discounted by child advocates challeng-

234. *See* CHILD WELFARE INFO. GATEWAY, CHILD MALTREATMENT PREVENTION: PAST, PRESENT, AND FUTURE 5–11 (2017), https://www.childwelfare.gov/pubPDFs/cm_prevention.pdf [https://perma.cc/96JZ-WST6].

235. *See id.* at 6–8; *see also* Michael S. Wald, *Beyond Child Protection: Helping All Families Provide Adequate Parenting*, *in* IMPROVING THE ODDS FOR AMERICA'S CHILDREN: FUTURE DIRECTIONS IN POLICY AND PRACTICE 135, 138–46 (Kathleen McCartney et al. eds., 2014) (describing the importance—and challenges—of improving parenting as a strategy to prevent child abuse and particularly neglect).

236. For an early formulation of the argument that parental rights promote child wellbeing, see JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979). For more recent articulations, see, for example, GUGGENHEIM, *supra* note 93, at 35–39; ROBERTS, *supra* note 92, at 16–25; Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v Granville, 2000 SUP. CT. REV. 279, 285–90; Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). These scholars have not, however, integrated parental rights into a larger framework reaching across multiple domains of legal regulation.

ing parental rights.[237] Analyzed in the framework, it is clear that the continued robustness of parental authority in the twenty-first century is justified on child-wellbeing grounds. As we show, modern doctrine reflects an understanding—sometimes explicit, but more often implicit—that deference to parental decisionmaking typically furthers child wellbeing, serves society's interests, and provides an important shield against state intervention for low-income families and families of color. This rationale for strong parental rights, which rests on considerable empirical evidence about the importance of stability in the parent-child relationship, reinforces the traditional libertarian justification for parental rights, but it also supplies a self-limiting principle for parental rights that is missing in the libertarian justification. Moreover, in contrast to that justification, which assumes that parents and the state compete for authority over children, the modern rationale clarifies that parental rights are compatible with the state's interest in child wellbeing. As we demonstrate in this Part, the framework elucidates recent developments in the law of parental rights, and it offers guidance to lawmakers aiming to calibrate doctrine and policy to further child wellbeing.

A. *Interpreting Parental Rights in the Child Wellbeing Framework*

In recognizing that parental rights enjoy constitutional protection, the Supreme Court in the 1920s grounded the doctrine in the rights of citizens in a liberal society to privacy and freedom from undue state interference.[238] The Court reasoned that state deference to parental decisionmaking safeguards pluralism, because numerous and competing visions of appropriate childrearing coexist in our diverse society, and many approaches are rooted in religious beliefs and cultural, social, and political values. As the Court stated, it is not for "the State to standardize its children" because "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[239] The Court's commitment to liberal principles thus supported constitutional protection of parental decisionmaking.

These principles continue to support parental rights. Protection of family privacy and of parental freedom to make childrearing choices is as important today as it was a century ago. But these traditional justifications cannot fully explain the continued robustness of these rights, nor do they supply a limit to parental authority, giving weight to the claim that parental rights can threaten child wellbeing.[240]

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237. *See supra* text accompanying notes 123–136.

238. *See supra* text accompanying notes 53–56.

239. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

240. In *Prince v. Massachusetts*, the Supreme Court recognized a limit to parental rights based on harm to a child, *see* 321 U.S. 158, 166–67 (1944), but the Court did not articulate a principle for drawing this line, *id.* at 171. Indeed, the intervention upheld in *Prince* (against a Jehovah's Witness guardian distributing religious literature with her child), *id.* at 160–63, 170,

The Child Wellbeing framework fills this gap. Analysis of modern parental rights doctrine in our framework underscores the importance of child wellbeing as a reinforcing rationale for the law's continued deference to parental authority as well as a self-limiting mechanism for these rights. Courts in affirming parental rights are sometimes explicit about the values underlying the framework, but these values are often implicit.

As a preliminary matter, it is important to recognize a point that is sometimes obscured in children's rights discourse and seldom acknowledged by advocates such as Dwyer, Dailey, and Rosenbury[241]: children, particularly younger children, are often incapable of making decisions on their own behalf about healthcare, education, and other critical matters. Thus, a surrogate decisionmaker will be required—and that surrogate will be either the child's parents or a state actor. If parents' authority is withdrawn or seriously restricted, the state necessarily will have a larger role regulating families than under current law.[242] To be sure, in some contexts, as we discuss in Part IV, adolescents have the right to make their own decisions. But in those situations, which are relatively limited, the *minor* makes the decision, and thus the state's role is not expanded. Appreciating that children typically need a surrogate decisionmaker, the question facing lawmakers becomes whether the promotion of child wellbeing is better served by deferring to parental decisionmaking or expanding the state's role by restricting parental rights.[243]

The contemporary framework emphasizes two important reasons parental rights usually promote child wellbeing and expanding state authority

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supports the concern that *Prince*'s broad articulation of the principle fails to restrict biased decisionmaking by state actors.

241. *See* JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE 194 (2019) (dismissing the argument that parental rights further children's interests because "[i]f the ultimate justification for a right is the welfare of a child, then logically the right should belong to the child" but not addressing the problem of vindicating these rights through a nonparental surrogate); *see also* Dailey & Rosenbury, *supra* note 113, at 1471–72, 1510 (arguing that parental rights play an important protective role for very young children but, beyond this period, proposing to limit parental rights by "situating the parent-child relationship within a larger web of children's relationships and interests" and weighing more heavily "children's interests in maintaining close ties to other children and adults, in being exposed to new ideas, in expressing their identity, in protecting their personal integrity and privacy, and in participating in civic life," but not specifying who will vindicate these interests in court-based disputes and not addressing the concern about an expanded state role).

242. *See* Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 947 (2018) (critiquing Dailey and Rosenbury because "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").

243. *See id.*; Emily Buss, *Children's Associational Rights?: Why Less is More*, 11 WM. & MARY BILL RTS. J. 1101, 1104–14 (2003).

does not.[244] First, deference to parental authority protects the stability of the parent-child relationship.[245] To be sure, some indeterminacy exists about how to define and promote child wellbeing, given the complexity of children's lives and empirical uncertainty about the impact of different child-drearing approaches.[246] But there is no controversy about the importance of the child's relationship with her parent. Based on a large body of research, it is clear that a strong, stable parent-child relationship is critical for healthy child development,[247] and the disruption and destabilization of this relationship threatens serious harm to the child.[248] A regime of robust parental rights is likely the best means of satisfying this fundamental need of children because it restricts state intervention in the family and thus reduces the child's exposure to the accompanying risks,[249] particularly removal of the child from the home.[250] Protection from state intervention is especially important for children of color and low-income families in light of racial disproportionality and disparities in the child welfare system.[251] Parental rights provide an essential shield against excessive state intrusion driven by bias.[252]

Second, deference to parental decisionmaking also promotes child wellbeing because parents are generally better positioned than state actors, such as judges, social workers, or other third parties, to understand their child's needs and make decisions that will further that child's interests.[253] This advantage is rooted in the parent's superior knowledge of and association with the child as compared with outsiders to the family. Moreover, the legal system is not well equipped to determine what will promote the wellbeing of a

244. *See infra* note 253 and accompanying text (discussing the work of other scholars who have made this argument).

245. Goldstein, Freud, and Solnit developed this rationale. *See supra* note 236. For an extended discussion of this justification for parental rights, see GUGGENHEIM, *supra* note 93, at 174–212.

246. For a detailed discussion, see *infra* Part V.

247. As this research demonstrates, nearly every important aspect of child development turns on a consistent and caring relationship between a parent and child. 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT (1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION (1973); 3 JOHN BOWLBY, ATTACHMENT AND LOSS: LOSS (1980).

248. For the foundational work on the importance of attachment and the harms from disruption, see 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 27–30, 209, 326, 330 (1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION 4–16, 245–57 (1973); 3 JOHN BOWLBY, ATTACHMENT AND LOSS: LOSS 7–14, 397–411 (1980).

249. *See* GOLDSTEIN ET AL., *supra* note 236, at 10–28.

250. *See supra* text accompanying notes 210–211.

251. *See supra* text accompanying notes 88–91.

252. *See* Bach, *supra* note 143, at 1073–76.

253. This argument has been well developed by scholars. *See, e.g.*, GUGGENHEIM, *supra* note 93, at 35–39; Buss, *supra* note 236, at 284–90; Emily Buss, Essay, *"Parental" Rights*, 88 VA. L. REV. 635, 647–50 (2002) [hereinafter *"Parental" Rights*]; Scott & Scott, *supra* note 236, at 2430–52.

particular child.[254] Deference is further justified by the well-founded assumption that parents are intrinsically motivated to care for their children due to powerful affective bonds.[255] The child-serving benefits of parental decisionmaking has been recognized on occasion by the Supreme Court[256] and by scholars.[257]

In addition to promoting child wellbeing, robust protection of parental rights also advances society's interests. In a country in which family-state relations are governed by libertarian principles, parents are burdened with the weighty responsibility of raising the next generation of citizens.[258] Having placed this burden on parents, with only limited support from the state, society has an interest in ensuring that parents discharge their obligations adequately. Strong protection of parental rights shows respect for and deference to parents for the important job they undertake. This deference reinforces parental commitment to undertake the duties of parenthood and facilitates their ability to do so without excessive interference.[259] Society then benefits when parents perform their duties satisfactorily and children mature to healthy adulthood; otherwise the state itself must assume responsibility at substantial cost. Even in a society in which the state provided greater support for families,[260] respect for parental authority would further social welfare because parents would be even better equipped to provide for their children's needs. Given the current allocation of responsibility, enhancing parents' role satisfaction and facilitating adequate performance of their child-rearing duties takes on a special urgency.

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254. For the classic account, see Mnookin, *supra* note 12. State decisionmaking that preempts parental authority across all families, such as school attendance and child labor laws, DAVIS ET AL., *supra* note 47, can be more easily rationalized than individualized intervention. Widely applicable preemption of parental authority imposes costs on parental decisionmaking, but broad-based rules are typically grounded in social consensus and, increasingly, in research on child development. Further, these generally applicable rules are less susceptible to the concerns of bias and indeterminacy that accompany individual intervention. *See* Mnookin, *supra* note 12, at 268–70.

255. The altruistic conception of a parent's love for a child is at least as old as Aristotle. ARISTOTLE, THE NICOMACHEAN ETHICS 290 (J. E. C. Welldon trans., MacMillan & Co. 1892) (describing that a mother "wishes and does what is good, or what seems to be good" for her child's sake); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *435 ("The municipal laws of all well-regulated states have taken care to enforce [parental duties]: though providence has done it more effectually than any laws, by implanting in the breast of every parent that natural . . . or insuperable degree of affection . . . .").

256. Parham v. J.R., 442 U.S. 584, 602–03 (1979) (upholding a presumption that parents make medical decisions to further their children's welfare because "natural bonds of affection lead parents to act in the best interests of their children" and that "pages of human experience . . . teach that parents generally do act in the child's best interests").

257. *See supra* note 253.

258. *See supra* Sections II.B.1, II.B.3 (describing and critiquing this approach).

259. *See* Buss, *supra* note 236, at 290–94; Scott & Scott, *supra* note 236, at 2430–52.

260. This is the position we argue in Section II.B.3.

Analysis in the framework justifies strong protection of parental rights, but the framework also provides a more compelling rationale for restricting parental authority than the traditional justification. The constitutional grounding of parental rights in liberal principles, supporting family privacy and parental freedom, provides no defined boundaries. With child wellbeing as the polestar, our framework clarifies that parents are not free to inflict serious harm on their children or to create a serious risk of such harm. Such actions do not further child wellbeing and thus are not protected under this rationale for parental authority. This is true even if the parent's decision is motivated by deeply held values or religious beliefs. When a parent's action seriously threatens the child's welfare, state intervention overriding parental authority is justified.[261] In this way, the child-wellbeing justification for parental rights is self-limiting.[262]

In sum, the Child Wellbeing framework rationalizes a regime of strong parental rights, emphasizing a legal justification for these rights. This approach recognizes that sometimes a parent may not act in the child's interest, but only if serious harm is threatened can we be confident that state intervention is warranted. This rationale for parental rights is largely compatible with the liberal justification that undergirds constitutional doctrine but also ensures that children's wellbeing is at the center of the analysis.

B. *The Framework in Practice*

Four doctrinal examples illustrate the descriptive and normative power of the framework we identify. Although lawmakers may not explicitly invoke a child-wellbeing rationale for parental rights, current doctrine is compatible with the framework, providing a normatively appealing contemporary justification. Of course, the goal of promoting child wellbeing does not inform contemporary parental rights doctrine in every context or in every jurisdiction. In some states, lawmakers discount children's interest in defining doctrine on issues such as homeschooling, while other lawmakers fail to recog- recognize that diluting parental authority undermines child wellbeing.[263] But overall, as the examples demonstrate, parental rights can be justified on child-wellbeing grounds, as well as on the basis of more abstract liberal principles.

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261. The Child Wellbeing framework thus supplies a rule of decision for state intervention—no intervention unless there is serious harm—which courts then apply in individual cases.

262. *See supra* note 240 (arguing that although the Supreme Court recognized harm to the child as a limit on parental rights in *Prince v. Massachusetts*, that decision did not establish a line for determining when the harm would be sufficient to overcome parental rights and in practice did not provide meaningful protection for vulnerable families).

263. *See infra* Section III.B.4 (contending that homeschooling regulation in some states fails to ensure that children receive an adequate education); *infra* Section III.B.2 (arguing that the use of a best-interest standard to determine whether a court can order contact between a third-party and a child is potentially harmful to children).

1. Corporal Punishment

We begin with an example that is perhaps counterintuitive, showing that the modern privilege to use reasonable corporal punishment is consistent with the Child Wellbeing framework. The law has long recognized a parental privilege to use reasonable corporal punishment, but the justification rested on deference to parental rights, together with the notion that physical punishment benefitted the child.[264] By contrast, the modern privilege, which applies in both criminal and civil proceedings,[265] does not endorse corporal punishment as beneficial to children and instead is justified as a limit on state power in light of the dangers that accompany state intervention.[266] Further, the modern privilege restricts the understanding of reasonable corporal punishment: a parent's use of corporal punishment is not privileged if, in the criminal context, the punishment inflicts serious harm or grossly degrades the child, or, in the child-protection context, the punishment inflicts physical harm beyond minor pain or transient marks.[267]

Although it may seem counterintuitive, we contend that the Child Wellbeing framework supports the privilege, primarily because the privilege places a critical constraint on state intervention. Without the privilege, the state could initiate either a criminal prosecution or a child-protection petition whenever a parent used physical punishment, bringing the full force of the state to bear on the family and potentially resulting in the incarceration of a parent or the placement of the child in foster care—both serious disruptions to the core parent-child relationship. By maintaining the privilege and tailoring the reasonableness requirement to the form of state action, the privilege recognizes the trade-off between protecting children from harm inflicted by

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264. *See* 1 BLACKSTONE, *supra* note 255, at *440 ("[A parent] may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education." (footnote omitted)).

265. For sample criminal statutes, see ARIZ. REV. STAT. ANN. § 13-403(1) (2010); COLO. REV. STAT. § 18-1-703(1)(a) (2019); and MICH. COMP. LAWS SERV. § 750.136b(9) (LexisNexis 2014), and for sample civil statutes see ARK. CODE ANN. § 9-27-303(3)(C)(i) (2015) and 325 ILL. COMP. STAT. ANN. 5 / 3(e) (West 2018).

266. In retaining the privilege, lawmakers weigh potential harm to a child from a parent's use of corporal punishment against the significant risks that accompany state intervention. *See, e.g.*, Commonwealth v. Dorvil, 32 N.E.3d 861, 868 (Mass. 2015) ("[T]he parental privilege defense must strike a balance between protecting children from punishment that is excessive in nature, while at the same time permitting parents to use limited physical force in disciplining their children without incurring criminal sanction."); *In re* J.A.J., 225 S.W.3d 621, 629–31 (Tex. App. 2006) (noting that the court should not hold parents to an ideal standard, and instead should focus on the child's welfare).

267. RESTATEMENT OF CHILDREN AND THE LAW § 3.24(b) (AM. LAW INST., Tentative Draft No. 1, 2018) (stating that in a civil child-protection proceeding, reasonableness is "determined in part by whether the corporal punishment caused, or created a substantial risk of causing, physical harm beyond minor pain or transient marks"); *id.* § 3.24(a) (stating that in a criminal proceeding, reasonableness is "determined in part by whether the corporal punishment caused, or created a substantial risk of causing, serious physical harm or gross degradation").

parents and protecting children from harm inflicted by state intervention. The privilege thus promotes the child's interest in the stability of the parent-child relationship and shields the child from the risks that accompany state intervention by limiting it to truly necessary circumstances.

Abolishing the privilege would greatly expand state power, posing a threat to all families but particularly those who are already subject to excessive state intervention. Parental use of physical discipline is declining, but many parents, particularly in low-income families and families of color, still turn to corporal punishment to discipline children.[268] In light of this disproportionate use of corporal punishment, particularly by Black parents,[269] the danger of intervention is particularly acute for families at already serious risk of family disruption through both the criminal justice and child welfare systems.

The privilege thus integrates the interests of parents, children, and the state in avoiding unnecessary state intervention and unwarranted removal of a child from the home. The child also has an interest in not being struck, but the state can further this interest through less intrusive means, as discussed below. By clarifying that the privilege does not give parents a license to use harsh physical punishment but also restricts the state from intervening when parenting may be suboptimal but not seriously harmful, the privilege exemplifies the self-limiting constraint on parental rights in the Child Wellbeing framework.[270]

The framework also provides a response to the claims of children's rights advocates who seek to outlaw corporal punishment, citing evidence that it is harmful to children.[271] To be sure, there is considerable evidence

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268. *See* PEW RESEARCH CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 45–48 (2015), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [https://perma.cc/V7AJ-BYY2]; Regina A. Corso, *Four in Five Americans Believe Parents Spanking Their Children Is Sometimes Appropriate*, HARRIS POLL (Sept. 26, 2013), https://theharrispoll.com/new-york-n-y-september-26-2013 [https://perma.cc/8JWV-VK6P].

269. PEW RESEARCH CTR., *supra* note 268, at 12 (stating that in a survey of 1,807 parents, 55% of white parents reported never spanking a child, 28% reported rarely spanking a child, and 14% reported often or sometimes spanking a child; of the Black parents, 31% reported never spanking a child, 32% reported rarely spanking a child, and 32% reported often or sometimes spanking a child).

270. This justification explains why the Child Wellbeing framework supports the parental privilege but condemns corporal punishment in schools. Most (but not enough) states ban corporal punishment in the educational setting. *See* RESTATEMENT OF CHILDREN AND THE LAW § 8.10 Reporters' Note cmt. a (AM. LAW INST., Tentative Draft No. 2, 2019) (listing statutes). In the school context, there are no family integrity concerns, and instead the child's interests in dignity and bodily integrity are paramount and support a complete ban on corporal punishment.

271. *See, e.g.*, Dailey & Rosenbury, *supra* note 113, at 1523–24; Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 CONST. COMMENT. 281, 284 (2017); *see also* Comm. on the Rights of the Child, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, U.N.

that harsh forms of corporal punishment harm children.[272] The law thus properly treats this conduct as child abuse, and it is the basis for state intervention through a child-protection proceeding or criminal prosecution.[273] By contrast, there is not clear evidence that spanking is harmful to children,[274] and thus any potential benefit to children from withdrawing the privilege must be weighed against the dangers associated with state intervention. The privilege does protect some corporal punishment beyond spanking,[275] but by drawing the line at reasonableness, the privilege protects children from harsh forms of corporal punishment *and* the harms of unnecessary state intervention. Scholars who endorse the abolition of the privilege typically do not account for this latter harm.[276]

Maintaining the privilege on child-wellbeing grounds does not represent an endorsement of corporal punishment.[277] To promote a no-hitting norm, the state can use noncoercive methods such as public education programs and parenting programs that teach parents alternative methods of discipline.[278] But the new framework highlights the risks of prohibiting corporal punishment through coercive intervention.

Doc. CRC/G/GC/8 (Mar. 2, 2007) (interpreting the U.N. Convention on the Rights of the Child to prohibit all forms of corporal punishment, partly due to the potential harm to the child but primarily because of the child's dignitary interest).

272. *See* Diana Baumrind et al., *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCHOL. BULL. 580, 581 (2002) (describing the consensus among social scientists that harsh forms of corporal punishment that amount to abuse are detrimental to children).

273. *See, e.g.*, FLA. STAT. ANN. § 39.001(2) (West 2019) (distinguishing civil child abuse from reasonable corporal punishment); MICH. COMP. LAWS SERV. § 750.136b(9) (2019) (distinguishing criminal child abuse from reasonable corporal punishment).

274. *Compare* Elizabeth T. Gershoff & Andrew Grogan-Kaylor, *Spanking and Child Outcomes: Old Controversies and New Meta-Analyses*, 30 J. FAM. PSYCHOL. 453, 457 (2016) (analyzing prior research studies to show that spanking is associated with a greater likelihood of detrimental child outcomes), *with* Baumrind et al., *supra* note 272, at 586 (criticizing the underlying studies supporting Gershoff's conclusions for failing to distinguish between instances of extreme and excessive punishment and normative spanking that did not cause injury beyond mild pain), *and* Robert E. Larzelere et al., *The Intervention Selection Bias: An Underrecognized Confound in Intervention Research*, 130 PSYCHOL. BULL. 289, 290 (2004) (discussing how selection bias can affect the outcome of studies analyzing the effects of spanking).

275. *See* RESTATEMENT OF CHILDREN AND THE LAW § 3.24 cmts. e & g (AM. LAW INST., Tentative Draft No. 1, 2018).

276. *See, e.g.*, Dailey & Rosenbury, *supra* note 113, at 1523–24; Godsoe, *supra* note 271, at 284.

277. *See, e.g.*, Commonwealth v. Laskey, 15 Pa. D. & C.4th 416, 420–21 (Ct. Com. Pl. 1992) (explaining that "[w]hile the court frowns upon the use of corporal punishment upon any child" the court also recognizes that "the Pennsylvania Legislature clearly intended to permit parents to use corporal punishment in disciplining their children for misconduct without putting them in jeopardy of having criminal charges filed against them").

278. Private parties can also play a role in promoting this norm. *See* Robert D. Sege & Benjamin S. Siegel, *Effective Discipline to Raise Healthy Children*, AM. ACAD. PEDIATRICS, Dec. 2018, at 5, https://pediatrics.aappublications.org/content/pediatrics/142/6/e20183112.full.pdf

Traditional constitutional values and principles also support the privilege.[279] Many families who use corporal punishment do so because it comports with religious or cultural beliefs.[280] The privilege thus protects family privacy and religious views by restraining courts and other legal actors from imposing their own values and judgments about appropriate childrearing, while simultaneously protecting children from serious harm.[281] This constraint on state intervention in the lives of citizens embodies a respect for liberal values and promotes pluralism, also a core commitment in liberal society. Unlike the traditional rationales, however, the child-wellbeing rationale supplies a critical self-limiting mechanism to parental authority.

2. Third-Party Contact and De Facto Parents

The law governing third-party contact and de facto parents provides another example of the explanatory power of the Child Wellbeing framework. Most parents reach informal agreements with other individuals about contact with children, but when a parent refuses to allow contact, two kinds of plaintiffs may seek court orders overriding a parent's decision. The first is a third party, such as a grandparent or sibling, and the second is an individual who has functioned as a parent to the child, often called a de facto parent. The law has developed in seemingly divergent ways to address claims by third parties and de facto parents, affording considerable deference to parents in third-party cases, and much less deference in de-facto-parent cases. The Child Wellbeing framework clarifies that although lawmakers' responses appear inconsistent, they are coherent and justified as promoting child wellbeing.

We start with third-party contact. Beginning in the 1960s, state legislatures enacted statutes authorizing third parties to seek contact with children over parents' objections,[282] diluting parents' absolute right at common law to

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[https://perma.cc/MKB4-M8DN] (advising pediatricians to help parents use noncorporal methods of discipline).

279. *See supra* text accompanying notes 53–58 (describing libertarian and family privacy justifications for parental rights).

280. *See* Robin Fretwell Wilson & Shaakirrah R. Sanders, *By Faith Alone: When Religious Beliefs and Child Welfare Collide*, *in* THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 308, 318–20 (Robin Fretwell Wilson ed., 2018).

281. *See, e.g.*, United States v. Rivera, 54 M.J. 489, 491 (C.A.A.F. 2001) ("In this area of law there is an inherent tension between the privacy and sanctity of the family . . . and the interest of the state in the safety and well-being of children. The affirmative defense of parental discipline resides at the crossroad of these two significant interests."); Paida v. Leach, 917 P.2d 1342, 1349 (Kan. 1996) ("[I]t would be undesirable to have each judge freely imposing his or her own morality, own concept of what is acceptable, own notions of child rearing . . . on the circumstances of the litigants.").

282. *See, e.g.*, ALA. CODE § 30-3-4.2 (LexisNexis 2016); FLA. STAT. ANN. § 752.011 (West 2016); IND. CODE § 31-17-5-1 (Supp. 1997). For an overview, see Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2–3, 3 n.11 (2013).

control a child's associations.[283] Every state now grants standing to grandparents to make these claims,[284] and some states give standing to other third parties, including non–family members.[285] Although these statutes implicate a parent's right to make decisions about a child's upbringing, the U.S. Supreme Court, in reviewing a broadly worded statute, has held only that courts must accord "at least some special weight" to the parent's decision.[286]

Despite the absence of clear guidance from the Court, lawmakers increasingly have adopted a standard that is highly deferential to parents, identifying only limited circumstances in which a court is authorized to override a parent's decision about a child's contact with third parties.[287] Under the deferential standard, a court can order contact only if it finds by clear and convincing evidence that denying the contact would pose a substantial risk of serious harm to the child.[288] By contrast, some states have adopted a less deferential standard, authorizing courts to override the parent's decision if the court determines contact is in the child's best interest.[289]

Analysis in the Child Wellbeing framework demonstrates that the deferential standard promotes child wellbeing more effectively than the best-interest standard.[290] First, court-ordered contact with a third party overrides

283. *See, e.g.*, *Ex parte* E.R.G., 73 So. 3d 634, 645–46 (Ala. 2011).

284. *See, e.g.*, ALA. CODE § 30-3-4.2; FLA. STAT. ANN. § 752.011; KAN. STAT. ANN. § 23-3301 (Supp. 2018); TEX FAM. CODE ANN. § 153.433 (West 2006); *see also* Atkinson, *supra* note 282 at 20–23 app. 1.

285. These include siblings, former stepparents, and other persons. *See, e.g.*, GA. CODE ANN. § 19-7-3 (2018); NEV. REV. STAT. ANN. § 125C.050 (LexisNexis 2018); N.J. STAT. ANN. § 9:2-7.1 (West 2013 & Supp. 2019).

286. Troxel v. Granville, 530 U.S. 57, 70 (2000) (plurality opinion); *id.* at 76–77 (Souter, J., concurring) (finding the statute sweeps too broadly because it authorizes a suit by any person at any time). The case generated multiple opinions, and most justices did find that the Constitution protects the right of a parent to make associational decisions for a child, but the plurality and concurring opinions did not determine the extent of this protection and did not find that the Constitution requires a state to adopt the more demanding harm standard. *See* Buss, *supra* note 236, at 282–84 (describing the multiple opinions). As Emily Buss has argued, the Court's decision is deeply problematic because it invites courts to second-guess parental decisions without any evidence that this will benefit children or families. *See id.* at 284–87, 302–16.

287. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25–409 (2017 & Supp. 2018); CAL. FAM. CODE § 3104 (West Supp. 2019); Walker v. Blair, 382 S.W.3d 862, 870–71, 874 (Ky. 2012); Roth v. Weston, 789 A.2d 431, 450 (Conn. 2002).

288. *See* RESTATEMENT OF CHILDREN AND THE LAW § 1.80(b) (AM. LAW INST., Tentative Draft No. 2, 2019) (listing other elements). A court cannot override a parent's objection simply because contact with the third party would benefit the child or because the child might experience some distress at the loss of the contact. *See id.* § 1.80(b) cmt. g. Twenty-one states have adopted this highly deferential standard. *See id.* § 1.80(b) Reporters' Note cmt. g.

289. *See id.* § 1.80(b) Reporters' Note cmt. g. These states do, however, require that the third party rebut the presumption that the parent's decision is in the child's best interest. *See id.*

290. This discussion relies on the work of Emily Buss, who has set forth in detail the reasons favoring the highly deferential standard. *See* Buss, *supra* note 236, at 287–98; *see also* Buss, *"Parental" Rights*, *supra* note 253, at 647–50.

the decision of the adult who bears full child-rearing responsibility, with little reason to believe that the court will make a better decision. A parent is better positioned than a judge to assess what third-party contact, if any, is best for the child. In the typical case, a parent's knowledge of the child and affective bonds of attachment will lead to a decision in the child's interest.[291] Further, allowing ongoing contact over the parent's objection likely will strain the parent-child relationship, the stability of which is central to healthy child development.[292] Separate from the substantive outcome, the deferential standard protects the child from the predictable stress of a protracted and high-conflict legal dispute.[293] Finally, if the intrusion allows contact with a third party (who lacks any responsibility for the child's care) over the parent's objections, the parent may understandably feel resentment, potentially affecting the parent's enthusiasm for fulfilling those obligations that society has imposed on her; in this way, the social welfare benefits of encouraging parents to fulfill their obligations is compromised.[294]

This analysis makes clear that child wellbeing is served by the deferential standard, which overrides the parent's objection only when the decision threatens serious harm to the child. Of course, parents are not always correct in their decisions, and in some situations the deferential standard may deprive the child of the benefits of contact. But the standard's self-limiting mechanism provides protection if the child will be seriously harmed by the lack of contact; then the court can override the parent's judgment. In granting standing to third parties, lawmakers generally aim to promote the child's wellbeing, but the contemporary framework clarifies that paradoxically this goal is far more likely to be attained under a standard that is deferential to parents than under the permissive alternative that purports to further the child's best interest.

The traditional liberal justifications for parental rights also support deference to parents in these contests. A deferential standard reinforces the principle of family privacy and promotes the value of pluralism in our society. Many parents choose to shield their children from certain influences and values or to expose their children only to those views that are consistent with

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291. *See* Buss, *"Parental" Rights*, *supra* note 253, at 647; Scott & Scott, *supra* note 236, at 2433–35.

292. When a third party petitions for contact, the parent has already decided that the child should *not* have contact with the third party. Overriding this decision empowers a third party to insert him or herself into the family. *See* Major v. Maguire, 128 A.3d 675, 687 (N.J. 2016); *see also* Troxel v. Granville, 530 U.S. 57, 75 (2000) (noting that "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated'" (quoting 530 U.S. at 101 (Kennedy, J., dissenting))).

293. Litigation may include interviews by mental health professionals, judges, and other experts, and the proceeding can create a loyalty conflict for the child, who may be asked to choose whether to side with the parent or the third party. RESTATEMENT OF CHILDREN AND THE LAW § 1.80 cmt. g (AM. LAW INST., Tentative Draft No. 2, 2019).

294. *See* Buss, *supra* 236, at 293–94; Scott & Scott, *supra* note 236, at 2414–15.

the parents' values. A pluralist society respects such decisions. And again, the self-limiting principle ensures that if the parent's decision poses a substantial risk of serious harm to the child, then the court can override the parent.

In responding to claims by de facto parents, in contrast, lawmakers have typically *not* deferred to the objections of legal parents—and, perhaps counterintuitively, this response also fits comfortably in the Child Wellbeing framework. The common law did not distinguish among third parties and instead treated all nonparents as legal strangers to the child.[295] Beginning in the 1980s, however, as same-sex couples began to have and raise children together, advocates sought legal recognition for nonbiological, nonmarital adults acting as parents in these relationships.[296] Courts began to adopt equitable and common-law remedies to recognize individuals who were parents in all but name, concluding that they were de facto parents.[297] Legislatures recently followed suit, enacting statutes to protect the relationships between children and adults who live with the child and assume substantial responsibility with the consent of the legal parent.[298]

This trend toward widespread recognition of de facto parents promotes child wellbeing, despite the costs imposed on legal parents. From the child's perspective, the adult who has been acting as a parent *is* a parent.[299] Allowing

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295. *See, e.g.*, *In re* C.T.G., 179 P.3d 213, 216 (Colo. App. 2007); *In re* Ash, 507 N.W.2d 400, 404–05 (Iowa 1993). Legal parents included biological and adoptive parents and parents pursuant to the marital presumption.

296. For a history of these efforts, see NeJaime, *supra* note 139, at 1193–230.

297. *See id.* at 1222–29 (describing this judicial recognition and noting the other names courts used, such as functional parent and psychological parent).

298. Today, approximately half of the states treat de facto parents the same as legal parents. *See, e.g.*, DEL. CODE ANN. tit. 13, §§ 8-201, 1101 (1974 & Supp. 2017); KY. REV. STAT. ANN. § 403.270 (LexisNexis 2018); S.C. CODE ANN. § 63-15-60 (2008); VT. STAT. ANN. tit. 15C, § 501 (LexisNexis 2018); NeJaime, *supra* note 140, at app. C at 2370–72; *see also* UNIF. PARENTAGE ACT 2017 § 609 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017). Individuals claiming this status must satisfy a demanding standard. *See, e.g.*, *In re* Custody of B.M.H., 315 P.3d 470, 478 (Wash. 2013).

299. Courts recognize this difference and thus distinguish the concerns set forth in *Troxel*. *See, e.g.*, Smith v. Guest, 16 A.3d 920, 931 (Del. 2011) (noting that "[t]his is not a case, like *Troxel*, where a third party having no claim to a parent-child relationship (*e.g.*, the child's grandparents) seeks visitation rights" and that petitioner who sought contact with her former partner's adopted child was "not 'any third party.' Rather, she is a . . . *de facto* parent" (footnote omitted) (quoting Troxel v. Granville, 530 U.S. 57, 67 (2000) (plurality opinion))); McDermott v. Dougherty, 869 A.2d 751, 772 (Md. 2005) (distinguishing "pure third parties" from psychological parents and defining "psychological parents" as "third parties who have, in effect, become parents"). For a discussion of the constitutional dimensions of recognizing de facto parparents, see Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020), for an argument that the protection of parents under the Due Process Clause should not turn solely on biology (or adoption) and that nonbiological parents also have a constitutionally protected liberty interest; Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909 (2019) for an argument that the de facto parent doctrine may be constitutionally defensible as applied to adults who have truly acted as functional parents but the doctrine allows for a broader application, which raises serious constitutional concerns; and Buss, *"Parental" Rights*, *supra* note 253, at 654–68 for an argument that the Constitution does and should

a legal parent to exclude a de facto parent would disrupt one of a child's central relationships, which robust research shows would create a risk of serious harm to the child.[300] Thus, the de facto parenthood doctrine is supported by the same evidence that supports strong parental rights generally.[301] Unlike a third party seeking contact with the child over a parent's objection, the de facto parent has fulfilled parental responsibilities and will do so in the future.[302] Further, the recognition of de facto parents encourages individuals living with partner-parents to assume the significant responsibilities of raising a child, benefitting both children and society. Finally, the recognition of de facto parents is particularly important for children in families that do not fall into the traditional norm of two married parents.[303] For all these reasons, it follows that a de facto parent need not show serious harm to the child if their relationship is severed: the test presumes that disruption of a child's relationship with a person acting as a parent will harm the child.[304]

In short, the interpretive and normative framework we offer clarifies that child wellbeing is furthered by strong protection of parental rights in the third-party-contact context but by less deference to legal parents in the de-facto-parent context. These outcomes are wholly consistent: both rules draw on substantial research demonstrating the harm to children of disrupting core family relationships, and both allow state intervention only when the legal parent's decision poses a substantial risk of serious harm to the child.

3. Decisions About Medical Care

Contemporary doctrine regulating parental authority to make medical decisions for children provides a third example of the explanatory power of the Child Wellbeing framework. Here again, contemporary law defers to parental authority but limits that authority if the parent's decision poses a risk of serious harm to the child or, in some instances, to public health. This ap-

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protect parental authority when the identity of a parent is clear but that the state has a proper role to play in deciding among claims to legal parenthood.

300. The stringent test for recognizing an individual as a de facto parent, *see supra* note 298, ensures that only those individuals who have truly functioned as parents will be placed on a similar plane as legal parents. RESTATEMENT OF CHILDREN AND THE LAW § 1.82(d) cmt. k (AM. LAW INST., Tentative Draft No. 2, 2019).

301. *See supra* notes 247–248 and accompanying text.

302. A court may require a de facto parent to pay child support. RESTATEMENT OF CHILDREN AND THE LAW § 1.82 cmt. k (AM. LAW INST., Tentative Draft No. 2, 2019).

303. Marriage rates differ by both race and income. *See* PEW RESEARCH CTR., ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART 28–29 (2016), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf [https://perma.cc/8UZT-SZCA] (describing marriage rates by race and education and noting that Blacks are the least likely to marry, even after controlling for education).

304. There are costs to the de facto parent doctrine, such as the potential for litigation to determine whether an adult satisfies the standard, but the Child Wellbeing framework tolerates these possible costs considering the importance of the relationship to the child.

proach represents a recent reform of common-law doctrine, under which parents had near-complete authority to make medical decisions for children, including the right to decline medical treatment.[305] Today, a parent is not free to make decisions that seriously threaten the child's health,[306] and social welfare considerations are also at play. As with the earlier examples, the Child Wellbeing framework illuminates the current approach of the law and provides a guide to courts deciding these cases in the future.

Parental authority to make medical decisions is justified largely for the same reasons that parental authority generally is justified.[307] Restricting the ability of the state to second-guess parents in this context protects children from the disruption of state intervention and allows parents, with their greater knowledge of their children's needs, to make these decisions.[308] Absent evidence to the contrary, a parent's decision can be assumed to further the child's wellbeing because parents are motivated by love and concern for their children. And the parent will often play a central role in ensuring the child follows the treatment, and thus the parent's agreement is critical. Deference to parental authority to make healthcare decisions supports parents and may enhance role satisfaction as they undertake the substantial responsibilities of raising a child. Finally, this protection from state intervention is particularly important for low-income families and families of color, who are at a heightened risk for state scrutiny and oversight. Thus, legal doctrine on this issue demonstrates the convergence of the interests of parents, children, and the state because, in the typical case, parental authority promotes the interests of both the child and the state.

As in other decisionmaking contexts, parents do not have absolute authority to make these decisions. Parental authority grounded in the principle of child wellbeing is self-limited; parents do not receive deference if their decision to pursue or refuse treatment poses a substantial risk of serious harm to the child. For example, courts will order a blood transfusion over the parent's objection when the treatment is necessary to prevent serious harm to the child, even though the parent's decision is based on religious belief.[309]

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305. *See* Newmark v. Williams, 588 A.2d 1108, 1115–16 (Del. 1991) (describing the common law rule).

306. *See* RESTATEMENT OF CHILDREN AND THE LAW § 2.30(b) (AM. LAW INST., Tentative Draft No. 1, 2018) ("A parent does not have authority to consent to medical procedures or treatments that provide no health benefit to the child and pose a substantial risk of serious harm to the child's physical or mental health."); Parham v. J.R., 442 U.S. 584, 602–03 (1979) (recognizing parents' broad authority over medical decisionmaking for children but also noting that the "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized").

307. *See supra* Section III.A.

308. *See supra* Section III.A; *see also* Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse*," 50 U.C. DAVIS L. REV. 205, 228–39 (2016) (describing the significant risks involved with allowing state intervention in parents' medical decisionmaking).

309. *See, e.g.*, *In re* McCauley, 565 N.E.2d 411 (Mass. 1991); *In re* Guardianship of L.S. & H.S., 87 P.3d 521 (Nev. 2004).

While the law is solicitous of medical decisions based on parents' religious beliefs,[310] the state can intervene if the parent's refusal to provide medical treatment poses a threat of serious harm to the child's health.[311]

Similarly, concerns about public heath can limit a parent's medical decisionmaking authority, particularly the decision whether to vaccinate a child against communicable diseases. Every state has adopted compulsory vaccination laws,[312] which the Supreme Court has long upheld.[313] Although nearly every state has enacted a religious exemption to these requirements, and a significant minority has enacted philosophical exemptions, these exemptions do not apply if there is an epidemic and the refusal to vaccinate the child creates a substantial risk of serious harm to the public health.[314] Moreover, in light of recent outbreaks of communicable diseases, particularly measles, some states have repealed their religious or philosophical exemptions—further evidence of the adoption of the Child Wellbeing framework.[315]

Other justifications reinforce the child-wellbeing rationale for parental authority to make healthcare decisions. Deference to parental authority promotes pluralism and family privacy by respecting parents' choices that are rooted in religious or spiritual beliefs or cultural practices. But unlike traditional rationales for parental rights, the contemporary framework con-

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310. Most states have enacted spiritual treatment exemptions from the obligation of a parent to seek medical care for a child. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-201.01(A)(1) (2016); CAL. WELF. & INST. CODE § 300.5 (West 2016); N.J. STAT. ANN. § 9:6-1.1 (West 2016).

311. *See* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944). Pursuant to these exemptions, the state cannot initiate a child-protection proceeding for the sole reason that the parent is treating the child with prayer alone. *See, e.g.*, VA. CODE ANN. §§ 16.1-228, 63.2-100(2) (West 2017). But if the parent's decision to use only spiritual healing results in or threatens harm to the child that satisfies the harm threshold, the state can intervene and order medical treatment against parental wishes. *See* RESTATEMENT OF CHILDREN AND THE LAW § 3.26 cmt. i (AM. LAW INST., Tentative Draft No. 1, 2018).

312. *See* RESTATEMENT OF CHILDREN AND THE LAW § 2.30 Statutory Note on Compulsory Vaccination (AM. LAW INST., Tentative Draft No. 1, 2018).

313. *See* Zucht v. King, 260 U.S. 174 (1922) (rejecting equal protection and due process challenge to ordinance that prohibited a child from attending school without proof of vaccination even though there was no threat of an epidemic); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (rejecting constitutional challenge to Massachusetts's compulsory vaccination law and holding that such laws are within the state's police power to enact legislation "as will protect the public health and the public safety").

314. *See* RESTATEMENT OF CHILDREN AND THE LAW § 2.30 cmt. d, Statutory Note on Compulsory Vaccination (AM. LAW INST., Tentative Draft No. 1, 2018).

315. *See* Act of June 30, 2015, ch. 35, 2015 Cal. Stat. 1438 (repealing religious and philosophical exemptions); An Act Relating to Reportable Disease Registries and Data, 2015 Vt. Acts & Resolves 341 (repealing philosophical exemption); Soumya Karlamangla & Rong-Gong Lin II, *Vaccination Rate Jumps in California After Tougher Inoculation Law*, L.A. TIMES (Apr. 13, 2017, 4:15 AM), https://www.latimes.com/local/lanow/la-me-ln-california-vaccination-20170412-story.html [https://perma.cc/GGV7-U7UU] (describing a measles outbreak as the impetus for California's repeal); Michael Specter, *Vermont Says No to the Anti-Vaccine Movement*, NEW YORKER (May 29, 2015), https://www.newyorker.com/news/news-desk/vermont-says-no-to-the-anti-vaccine-movement [https://perma.cc/33N4-B7DX].

strains parental authority and provides a workable limit, prohibiting healthcare decisions that risk serious harm to the child or public.

4. Homeschooling

The legal regulation of homeschooling[316]—a widespread practice in the United States—provides a final example for analysis in the Child Wellbeing framework.[317] In this context, however, the framework provides more normative guidance than interpretive clarity. In every state, parents may educate their children at home,[318] but the law's general endorsement of homeschooling is controversial. While it has many passionate advocates,[319] homeschooling also has many critics, with some opponents arguing that it should be prohibited or significantly restricted.[320]

States differ greatly in the extent to which homeschooling is regulated to ensure that the child receives an adequate education. The new framework rationalizes and supports the approach of the small minority of states that authorize homeschooling subject to substantial regulation, including curricular requirements, teacher qualifications, and regular evaluation and report-

316. This section addresses homeschooling, but a similar analysis applies to state regulation of nonpublic schools, supporting substantial regulation of these schools. In New York, for example, an ongoing controversy centers on state regulation of yeshivas. *See* Eliza Shapiro, *Do Students in Yeshivas Learn Secular Subjects? Inquiry May Settle Issue*, N.Y. TIMES, Dec. 4, 2018, at A22. In response to concerns about inadequate secular education, New York issued a guidance document in 2018 imposing far greater oversight on all nonpublic schools, including yeshivas. *See* N.Y. EDUC. DEP'T, SUBSTANTIAL EQUIVALENCY REVIEW AND DETERMINATION PROCESS (2018), https://www.courthousenews.com/wp-content/uploads/2019/03/ny-guidance.pdf [https://perma.cc/PP4N-Tb7U].

317. Approximately 1.7 million children learn primarily at home—3.3 percent of all school-age children. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl. 206.10, https://nces.ed.gov/programs/digest/d17/tables/dt17_206.10.asp [https://perma.cc/LN7Z-9PLV]; *Fast Facts: Homeschooling*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=91 [https://perma.cc/UUM5-GFPY] (defining homeschooled students as "school-age children (ages 5–17) in a grade equivalent to at least kindergarten and not higher than 12th grade who receive instruction at home instead of at a public or private school either all or most of the time").

318. *See, e.g.*, FLA. STAT. ANN. § 1002.41 (West 2016 & Supp. 2019); DEL. CODE ANN. tit. 14, § 2703 (2015); NEV. REV. STAT. ANN. § 388D.020 (LexisNexis 2016); *Current Homeschool Law*, COALITION FOR RESPONSIBLE HOME EDUC., https://www.responsiblehomeschooling.org/policy-issues/current-policy/ [https://perma.cc/5PCE-BKC6].

319. *See, e.g.*, *About HSLDA*, HOME SCH. LEGAL DEF. FUND, https://hslda.org/content/about/ [https://perma.cc/6VAW-D7VZ].

320. *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 136–37 (2010) (arguing that if homeschooling means children "do not have adequate opportunity to develop liberal democratic dispositions," then the state should begin with a minimal intervention, such as requiring children to attend afterschool programs, and then, if this is ineffective, the state could prohibit homeschooling completely); Robin L. West, *The Harms of Homeschooling*, PHIL. & PUB. POL'Y Q., Summer/Fall 2009, at 7, 9–12 (describing the potential benefits of homeschooling but arguing that it should be regulated to ensure the education is adequate, children are safe, and a broad range of subjects are taught).

ing.[321] Allowing parents to choose to homeschool their children promotes child wellbeing because parents are well positioned to determine the educational setting that best meets the needs of a particular child. Motivations to homeschool are varied and include a desire to provide religious or moral instruction as well as concerns that available schools provide a substandard education or that a child faces significant social challenges or physical danger.[322] Absent evidence to the contrary, a parent's decision should be trusted because of the parent's intrinsic motivation to make decisions that promote the child's wellbeing. And deference to parental decisionmaking encourages parents to assume the significant responsibilities that accompany childrearing by allowing parents to inculcate their values into the child's education.

In the Child Wellbeing framework, the right to homeschool, like other aspects of parental authority, is subject to a self-limiting mechanism. Thus, parents are free to choose homeschooling only if the decision does not inflict serious harm on children by providing them with an inadequate education. This condition is satisfied in states with rigorous oversight of homeschooling, ensuring that predetermined educational standards are met by placing obligations on both parents and the state. The cost imposed on parental decisionmaking is justified by the serious harms to both the child and society that accompany a lack of education.[323]

Homeschooling presents a harder case for deference to parental authority than the other examples. Even in states with rigorous oversight, homeschooling may pose a risk to children as future citizens. Forgoing the diverse social influences that school attendance often provides allows parents to inculcate illiberal values more effectively than if the child were in school.[324] A state can take some regulatory steps to mitigate this harm, such as imposing

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321. These states are in the distinct minority. The Home School Legal Defense Fund identifies only five states that it categorizes as having "high regulation"—Massachusetts, New York, Pennsylvania, Rhode Island, and Vermont. *See Homeschool Laws in Your State*, HOME SCH. LEGAL DEF. ASS'N, https://hslda.org/content/laws/ [https://perma.cc/6H9C-RCTA]. For one example of this regulatory approach, see N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2019) (setting forth the requirements for "home instruction," including the submission of an individualized homeschooling plan that details the syllabi, course materials, and more; required review of the plan by the superintendent; required courses for each grade level; teaching of certain subjects including citizenship and alcohol and drug education; and regular submission of progress reports and standardized testing). For a defense of state oversight and regulation, framed from the perspective of children's rights, see DWYER & PETERS, *supra* note 241, at 197–99.

322. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., THE CONDITION OF EDUCATION 2005, at 110 (2005) (reporting results of survey of parents and finding these as the top three reasons for homeschooling).

323. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., ANNUAL EARNINGS OF YOUNG ADULTS (2016) ("In 2014, the median earnings of young adults with a bachelor's degree ($49,900) were 66 percent higher than the median earnings of young adult high school completers ($30,000). The median earnings of young adult high school completers were 20 percent higher than the median earnings of those without a high school credential ($25,000).").

324. *See* EICHNER, *supra* note 320, at 136–37; West, *supra* note 320, at 10. To be sure, not all schools provide diverse social influences.

curricular requirements. But ultimately the framework tolerates this cost to child wellbeing and social welfare because of the intrusiveness of the state evaluating parents' worldviews to decide which are sufficiently illiberal to justify greater state intrusion than, say, broad-based curricular requirements.

In contrast to the states that rigorously regulate homeschooling, many states have limited or rarely enforced regulation.[325] These states can be charged with grounding legal policy in a discredited conception of parental rights—the notion that family privacy and pluralism justify parental decisions that seriously harm children. To be sure, some homeschooling in these states may meet or exceed educational standards, but no regulatory oversight ensures that it does. This highly deferential regulatory stance is not compatible with the child-wellbeing rationale for parental rights. It sacrifices a core need of children, compromises the future lives of homeschooled children, and imposes substantial costs on society, which has an important interest in educated citizens. In these states, the interests of parents, children, and the state do not converge. The framework clarifies these deficiencies and provides guidance to lawmakers formulating homeschooling regulation that is compatible with the child-wellbeing rationale for parental rights.

* * *

Applying the Child Wellbeing framework to the domain of parental rights strengthens the rationale for these rights, while integrating parental rights into the larger regulatory framework governing children's lives. Parental rights continue to be robust under contemporary law, for good reason. Today, parental authority can be justified on the ground that it promotes child wellbeing, which in turn promotes social welfare. In this way, the framework demonstrates that strong parental rights are consistent with—indeed, integral to—the state's overriding purpose in regulating children and families. Largely integrating the interests of parents, children, and the state resolves important challenges confronting regulation in this area and provides a normative basis for deciding future questions.

IV. CHILD WELLBEING AND CHILDREN'S RIGHTS

Children's autonomy rights are understood conventionally to compete with the state's and parental authority.[326] In this Part, we challenge this con-

325. *See, e.g.*, UTAH CODE ANN. § 53G-6-204(2) (LexisNexis Supp. 2019) (granting parents complete control of curricular choices, evaluation, and "the time, place, and method of instruction"; prohibiting education officials from requiring parents to maintain records, obtain credentials, and give standardized tests). The Home School Legal Defense Association identifies sixteen states as "low regulation." *See Homeschool Laws in Your State*, *supra* note 321.

326. *See supra* Section I.B.2. The rights and privileges discussed in this Part do not include rights that inhere in children's dependency, such as a right to financial support, or entitlements such as the right to education. Instead, this Part focuses on rights and privileges that involve choices by minors.

ventional wisdom, analyzing in the Child Wellbeing framework the pattern of granting and withholding autonomy rights that has emerged over the past half century. More specifically, we demonstrate that the view of children's rights as liberty interests that are inherently in competition with parental and state authority is incomplete, in that it fails to recognize the importance of child wellbeing in the selective conferral of particular legal rights and privileges on children (and withholding of others). Autonomy rights are conferred on minors, we argue, either when granting the right directly enhances the young person's wellbeing, or when the law's restrictive stance toward children threatens the child with serious harm as she matures. The framework also clarifies that the granting and withholding of rights often aims to promote social welfare as well. Moreover, judgments about children's maturity (important in many contexts to the decision of whether and when conferring the right will benefit minors) are increasingly informed by developmental and other research. Finally, although concern about racial fairness has not been front and center in this legal context, it has become an important subtext, particularly in juvenile justice, where the granting and withholding of rights functions to protect youth of color from state power.[327] Although the modern framework crystalized in twenty-first-century juvenile justice reforms, we show that many late twentieth-century children's rights doctrines embody features of the framework that more recently has become prominent.

Of course, decisions about granting and withholding rights are not always optimal and not all rights and privileges can be neatly analyzed in the framework. Rights that might benefit minors are seldom conferred when lawmakers and the public assume social welfare costs will follow.[328] But to a far greater extent than has been generally recognized, the implicit, and sometimes explicit, basis for conferring particular rights and privileges on minors, and the "schedule" on which rights are conferred, is to promote child wellbeing and, often, to benefit society as well.

A. *Interpreting Children's Rights in the Child Wellbeing Framework*

As this Section demonstrates, the core elements of the Child Wellbeing framework are at work in modern children's rights doctrine.

1. Child Wellbeing

Although advocates have challenged the withholding of rights and privileges from minors, it seems uncontroversial that children (particularly younger children) may sometimes be incapable of self-interested exercise of

327. *See infra* text accompanying notes 412–416.

328. Restriction of the right to vote to citizens age eighteen and older may reflect a view that younger teenagers will make immature choices, although many teenagers are likely as capable of exercising the right of political participation as are adults and could benefit from enfranchisement.

particular rights—and granting these rights would threaten harm to the child or to others. Some level of maturity is required to drive a motor vehicle safely or make a medical decision, for example, and it is assumed that both children and society benefit from the law's protective stance. Thus, the withholding of a right or privilege until an age at which the child is presumed sufficiently mature can reflect the assumption that the restriction promotes his or her wellbeing. Of course, many adult rights and privileges are not granted until children reach the age of majority and sometimes beyond.[329] But some of these restrictions are also justified on the ground that child wellbeing is advanced.[330] Restrictions on the right to marry and on access to alcohol belong in this category.

When rights are granted to minors in contemporary law, one of two interwoven rationales, both implicating child wellbeing, appears to be salient. First, some rights directly enhance child wellbeing. The benefits to minors in holding rights, exercising voice, and enjoying adult privileges increase as they mature; not surprisingly, most rights and privileges conferred on minors are limited to adolescents, either expressly or functionally.[331] The wellbeing of older minors is enhanced, for example, by having the privilege to operate motor vehicles, the right of political expression, the presumption favoring their preferences in child custody disputes,[332] and the ability to make routine medical decisions when parents are unavailable. These rights and privileges would have little meaning for young children. Second, in some contexts, lawmakers recognize that the law's paternalistic rights-withholding approach itself inflicts harms on children as they mature.[333] For example, the Supreme Court in granting procedural rights to youths in delinquency proceedings acknowledged that the law's traditional approach failed in its prom-

329. Two examples include access to alcohol, *see, e.g.*, CAL. PENAL CODE § 307 (West 2014) (criminalizing the sale of alcohol to anyone below the age of 21), and the right to consent to sterilization, *see, e.g.*, MD. CODE ANN., HEALTH-GEN § 20-102(c)(5) (LexisNexis 2015) ("A minor has the same capacity as an adult to consent to . . . [t]reatment for or advice about contraception other than sterilization . . . .").

330. *See infra* Section IV.B.2.

331. As we show in Section IV.B, many examples support this rationale for granting rights and privileges. Only mature minors are authorized to make medical decisions independently, for example, and often the right applies to decisions that involve conditions for which only adolescents need treatment (the decision to terminate pregnancy, for example). Assumptions about maturity and judgment also guide minimum-age requirements for various privileges, such as those regulating motor vehicle operation and access to alcohol.

332. In custody disputes, little or no weight is assigned to the views of very young children, but adolescents' preferences are virtually dispositive under normal circumstances and are subject to a legal presumption in some states. Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1037 (1988). *See also* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: State Courts React to* Troxel, 35 FAM. L.Q. 577, 618 chart 2 (2002) (describing the role of the child's preferences in custody disputes between parents).

333. The two rationales often are different only in emphasis. A teenager benefits when her preferences for custody are given substantial weight and may be harmed if they are ignored.

ise to serve their interests.[334] Further, rights granted to minors—such as the right to consent to treatment for substance abuse and to obtain contraceptives—can mitigate the harms of risky adolescent behaviors and thereby promote minors' wellbeing.[335]

Sometimes, when rights are granted to minors, they are defined and limited in ways that promote minors' wellbeing, because it is assumed that immaturity may lead to impetuous choices in the exercise of an otherwise beneficial right. For example, restrictions on minors' driving privileges represent efforts to define the privilege in a way that maximizes child wellbeing and minimizes harms associated with immaturity.[336]

2. Social Welfare

Our interpretive framework similarly invites inquiry into whether promotion of social welfare has supported the granting and withholding of rights to legal minors, reinforcing the goal of promoting child wellbeing. The answer is yes, but to a lesser extent than in the realm of juvenile justice reform. To be sure, social welfare concerns are at work in rationalizing the *withholding* of many rights until the age of majority; rights are not granted to minors if substantial societal costs are anticipated.[337] Social costs may be minimized by conferring rights as a package with other markers of adult status, such as withdrawal of parents' support responsibility.[338] This approach has societal benefits as it is administratively convenient and signals clearly to those who deal with young people that their legal status has changed. Withholding some rights until the age of majority ostensibly serves society's interest in other ways. Conferring the right to vote at age eighteen, for example, arguably promotes society's interest in a mature electorate more effectively than would a younger voting age.[339] But these restrictions are justified largely on social welfare grounds with little attention to child wellbeing.[340] Many rights that are restricted to legal adults, however, arguably do fit within the framework. The infancy doctrine in contract law[341] and the min-

334. *See* discussion *infra* Section IV.B.1.c.

335. *See* discussion *infra* Sections IV.B.1.a.ii, IV.B.1.a.iii.

336. *See, e.g.*, Anne T. McCartt et al., *Graduated Licensing Laws and Fatal Crashes of Teenage Drivers: A National Study*, 11 TRAFFIC INJ. PREVENTION 240, 246 (2010); *Teenagers*, IIHS-HLDI (last updated Mar. 2020), https://www.iihs.org/topics/teenagers [https://perma.cc/UNT4-22MD].

337. *See infra* Section IV.B.2.

338. See Scott, *supra* note 61, at 576–77.

339. *See* S. REP. NO. 92-26, at 5–6 (1971) (justifying eighteen-year-old voting on the bases of maturity and adult treatment under the law).

340. *Id.*

341. *See infra* Section IV.B.2; *see also* Scott, *supra* note 61, at 553.

imum age of marriage,[342] described below, can be defended on both child-wellbeing and social-welfare grounds.[343]

Social welfare can also figure in the calculus of whether children *should* be granted adult rights. A brief description of two examples highlights the convergence of child wellbeing and social welfare. Minors' Consent statutes target conditions for which effective treatment benefits not only the minor but the larger community as well. Many statutes aim to facilitate treatment for substance abuse and STDs and to provide sexually active teens with the means to prevent pregnancy, thereby promoting their wellbeing.[344] Lawmakers also recognize that serious social costs are incurred if a minor fails to obtain treatment for these conditions.[345] A second example involves the minimum-age requirements for obtaining a driver's license (younger than age eighteen in all states) and for obtaining alcohol (age twenty-one). This combination creates a policy that aims to benefit adolescents, while minimizing the costs to society of granting them the right to engage in a valued, but risky, activity. By separating the minimum ages for driving and drinking, lawmakers recognize that young drivers are more inclined toward risk-taking than older adults and will pose an even greater threat to society if they have ready access to alcohol.[346]

Finally, some rights benefit minors substantially with modest social cost. For example, free speech rights benefit students and create a social benefit in encouraging future citizens to engage in political discourse. As defined by the Supreme Court, this right has minimal social costs, because student speech that threatens the state's ability to fulfill its educational function is not protected. In general, both child wellbeing and social welfare likely play a significant role in defining and limiting children's rights.[347]

3. Developmental Research

Because the maturity of minors constitutes a key consideration in granting, withholding, and defining children's rights, it is not surprising that lawmakers in recent decades have turned increasingly to developmental science to inform their decisions in this domain. Scientific knowledge provides a more sophisticated understanding of minors' capacities and vulnerabilities than was available in earlier times, when these judgments were based on common sense and intuition. Developmental research has enhanced understanding of maturation in adolescence, allowing for more informed judg-

342. *See infra* Section IV.B.2.

343. *See infra* Section IV.B.2.

344. For further discussion, see *infra* Section IV.B.

345. *See* RESTATEMENT OF CHILDREN AND THE LAW § 19.02 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2019).

346. *See* ZIMRING, *supra* note 26, at 108–10.

347. *See generally* Emily Buss, *Developing the Free Mind*, *in* THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (Kristine L. Bowman ed., 2020) (describing how according rights to students in school can contribute to healthy development).

ments about when rights can promote minors' wellbeing, when paternalistic restrictions inflict harm, and when restrictions actually offer protection to minors and are justified in a system that aims to further child wellbeing. Research can also clarify when doctrines withholding rights from minors are *not* justified on this ground, and thus can only be supported, if at all, on the ground that they serve some societal interest and not the interests of children subject to the restrictions. Lawmakers' inclination to draw on empirical knowledge suggests that children's rights doctrine increasingly is integrated into the contemporary framework.

Several examples evidence the growing importance of scientific knowledge in this area. Research on adolescent brain development and on decisionmaking in children and adults has been invoked to demonstrate that adolescents are capable of making informed medical decisions.[348] These studies have played a key role in abortion-rights discourse and other reforms authorizing minors to consent to healthcare treatment.[349] Lawmakers have also turned to research that sheds light on the link between developmental immaturity and children's functioning in the justice system. For example, analysis of juveniles' competence to assist their attorneys and to participate in legal proceedings has been influenced by developmental and other social science research. Important studies have found that younger juveniles are far less able to understand criminal proceedings or make competent decisions as defendants than are their adult counterparts.[350] This research has influenced courts and legislatures to recognize the importance of developmental maturity as a key factor in evaluating the competence of minors to participate in delinquency and criminal proceedings.[351] Other key studies have found that juveniles have a poorer understanding of their rights in interrogation and are more vulnerable to coercive police tactics than adults.[352] Growing evidence indicates that minors, under the pressure of interrogation, are far more likely

348. *See, e.g.*, Brief for Amicus Curiae Am. Psychological Ass'n in Support of Appellees, Hartigan v. Zbaraz, 484 U.S. 171 (1987) (No. 85-673); Brief for Amici Curiae Am. Psychological Ass'n et al. in Support of Petitioners/Cross-Respondents, Hodgson v. Minnesota, 497 U.S. 417 (1990) (No. 88-1125); *see also* Laurence Steinberg et al., *supra* note 121, at 584.

349. *See supra* note 348; *see also* Roper v. Simmons, 543 U.S. 551, 617–18 (2005) (Scalia, J., dissenting) (discussing the role of research showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement).

350. *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356–57 (2003).

351. Questions of competence in a criminal court have traditionally focused on mental illness and disability. *See id.* at 334.

352. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1153–55 (1980) (finding that deficiencies in comprehending *Miranda* rights are significantly related to age and intelligence and are substantial in youths under age sixteen and severely deficient under age fourteen); Scott et. al, *supra* note 167, at 36.

than adults to give false confessions.[353] Courts have cited this research in cases holding that juveniles failed to make knowing, intelligent, and voluntary *Miranda* waivers.[354] Some states and the *Restatement of Children and the Law* have relied on this research to create categorical restrictions on rights' waivers by juveniles.[355]

Empirical research supports other restrictions on minors' privileges, even when it has not played a direct role in their enactment. Motor vehicle accidents cause many deaths each year, and a high percentage of accidents involve young and intoxicated drivers.[356] Statistics on the correlation between motor vehicle accidents, alcohol, and drivers' ages were invoked in the debate surrounding the National Minimum Drinking Age Act, leading Congress to set the minimum age for access to alcohol at twenty-one.[357] Although child-development research did not play a prominent role in the debates, the regulation receives strong support from research showing that risk-taking behavior, including fast driving and excessive drinking, peaks in late adolescence, and also from more recent developmental brain research indicating that teenagers are more inclined toward sensation seeking and impulsivity than are adults.[358] Some states have restricted the driving privilege for minors to minimize these risks: common restrictions include limits on the number of nonadult passengers and on nighttime driving.[359] Limits on minors' ability to drive while accompanied by peers are supported by

353. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) (discussing the risk of false confession and citing amicus curiae brief submitted by Center on Wrongful Convictions of Youth).

354. *See, e.g.*, *id.* at 269, 277.

355. *See, e.g.*, IOWA CODE ANN. § 232.11 (West 2014) (requiring consent of parent, custodian, or guardian for *Miranda* waiver of juveniles under age sixteen; notice required to parents of older juveniles); N.C. GEN. STAT. ANN. § 7B-2101 (LexisNexis 2017) (requiring presence and advice of parent, guardian, custodian, or attorney of juvenile under age sixteen for custodial admission or confession to be admissible); N.D. CENT. CODE ANN. § 27-20-26 (LexisNexis 2016) (requiring provision of counsel to child not represented by parent, guardian, or custodian at custodial interrogation); *In re* B.M.B., 955 P.2d 1302, 1312–13 (Kan. 1998) (requiring that parents, guardian, or attorney be given opportunity to consult with juvenile under age 14 before interrogation); State v. Presha, 748 A.2d 1108, 1114–15 (N.J. 2000) (statement taken during custodial interrogation of juvenile under age fourteen is inadmissible in the absence of a legal guardian or parent, unless the adult was unwilling to be present or truly unavailable; for older juveniles, officers must use their best efforts to locate a parent or legal guardian before beginning the interrogation); *see also* RESTATEMENT OF CHILDREN AND THE LAW § 14.22 cmt. b, Reporters' Note cmt. b (AM. LAW INST., Tentative Draft No. 1, 2018) (requiring consultation with counsel for juveniles ages fourteen and under).

356. *Teen Drivers: Get the Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/motorvehiclesafety/teen_drivers/teendrivers_factsheet.html [https://perma.cc/4PPG-6PNP].

357. *See* PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 10 (1983) (citing statistics about the "direct correlation between the minimum drinking age and alcohol-related crashes" for drivers ages eighteen to twenty-one).

358. *See* Scott et al., *supra* note 168.

359. *See Teenagers*, *supra* note 336; McCartt et al., *supra* note 336.

many studies showing that teenagers are more likely to engage in risk taking in the presence of peers.[360] Although this regulatory scheme emerged in the late twentieth century, it is reinforced by recent research and likely will gain even greater traction.

To be sure, developmental research has only begun to play a role in shaping children's rights doctrine, and other factors often are, and will be, more important. Congress, in debating the proposed Twenty-Sixth Amendment lowering the voting age in federal elections from twenty-one to eighteen, emphasized the maturity of young adults.[361] But if developmental research were dispositive, lawmakers would likely confer voting rights on sixteen-year-old citizens. By this age, adolescents are as capable as are adults of understanding and processing information and of making rational decisions in neutral settings, like a voting booth.[362] At this point, research is unlikely to result in reform on this issue.[363] However, to the extent that judgments about the link between child wellbeing and maturity play a role in the granting and withholding of rights to minors, research will likely be of growing importance.[364]

4. Racial Equality and Children's Rights

Concerns about racial fairness have played a less explicit role in the conferral of children's rights than in other domains.[365] Thus, this feature of the Child Wellbeing framework is less prominent here than in other domains. And yet, in some contexts, the granting of rights to minors can be understood as serving a function similar to that of parental rights—protecting children of color against overreaching by biased state actors. Due process and Fourth Amendment protections in public school, if sufficiently robust, could serve this protective role. Recent evidence indicates that students of color are more likely to be subject to harsh discipline than other students; this inequity has raised policy concerns and supports meaningful protection against corporal punishment in schools.[366] It also has elevated concern about

360. *See Teenagers*, *supra* note 336; Scott et al., *supra* note 168.

361. S. REP. NO. 92-26, at 5 (1971).

362. *See* Steinberg et al., *supra* note 121, at 586.

363. *See infra* Part IV.B.2. Lawmakers may also anticipate high administrative costs in evaluating readiness for political participation.

364. *But see* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009) (cautioning against the use of research on children's capacities as locking in legal responses).

365. One reader, Susan Appleton, pointed out that *Brown v. Board of Education*, 347 U.S. 483 (1954), could be understood as a children's rights case grounded in racial fairness.

366. *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (2014) [hereinafter Obama Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html [https://perma.cc/KP8R-32J2] (directing the tracking of disproportionality in use of school discipline under the Obama administration and using corporal punishment policies, which allow schools to physically punish students, as an example of a school policy that can

the school-to-prison pipeline. Also, procedural rights conferred in police interrogation and in delinquency proceedings have special value to youth of color who are likely more vulnerable to coercion[367] and more subject to bias by justice system actors.[368] Some reforms have been undertaken to identify contexts in which rights could provide special benefits to youth of color,[369] but commitment is tentative and progress is limited to date.[370] Nonetheless, although race consciousness is muted in the context of children's rights, some rights accorded to minors can function to promote racial fairness.

B. *The Framework in Practice*

In this Section we examine several rights and privileges held by minors and argue that the interpretive framework we offer provides a logic and structure to both the conferral and withholding of rights. As explained above, some rights directly advance the wellbeing of affected minors, and (sometimes) social welfare; and some rights indirectly advance wellbeing because the paternalistic approach toward minors inflicted harms. We provide examples of both categories. We then look at rights withheld from minors and analyze specific legal restrictions on children, showing that these, too, often fit within the framework.

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raise disparate racial impact concerns). *But see* KENNETH L. MARCUS, U.S. DEP'T OF EDUC. & ERIC S. DREIBAND, U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER (2018) [hereinafter Trump Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf [https://perma.cc/GH6P-85TB] *(*withdrawing Obama-era tracking directive by Trump Administration).

367. *See* RESTATEMENT OF CHILDREN AND THE LAW § 14.20 cmt. b (AM. LAW INST., Tentative Draft No. 1, 2018) ("A minority youth particularly may be instructed by parents to show deference to law-enforcement officers for the youth's personal safety, and may be especially unlikely to feel free to terminate an interview.").

368. In the case of the so-called Central Park Five, for example, law enforcement used coercive and deceptive interrogation tactics against five youths of color to coerce them into falsely confessing to an attack on a woman in Central Park in 1989. *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 792 (2006); *see also* Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, VILLAGE VOICE (Nov. 19, 2002), https://www.villagevoice.com/2002/11/19/a-journey-through-the-tangled-case-of-the-central-park-jogger/ [https://perma.cc/VW4D-4UXV].

369. *See* Obama Dear Colleague Letter, *supra* note 366. Corporal punishment has been abolished in school districts in large cities. *See* RESTATEMENT OF CHILDREN AND THE LAW § 8.10 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2019).

370. *See* Trump Dear Colleague Letter, *supra* note 366 (withdrawing the Obama Dear Colleague letter on tracking racial disproportionality in school discipline).

1. Rights Granted to Minors

a. Healthcare Decisionmaking

In general, parents have the authority to consent to medical treatment for their children until age eighteen, and minors lack the authority to make their own healthcare decisions. In most medical treatment situations, it is assumed that the interests of parents and children are aligned—that parents will seek treatment needed by their children, and that children will share their healthcare needs with their parents. But in some situations, the requirement of parental consent creates obstacles to treatment. Lawmakers have recognized three exceptions to the general requirement of parental consent, all directed at adolescents.[371] For each exception, the right granted promotes the minor's wellbeing and social welfare as well. For most, parental authority is not undermined because parents likely would approve of the welfare-promoting treatment.

Mature Minor Doctrine. Under the common-law mature minor doctrine, a minor capable of making an informed medical decision can give valid consent to routine, beneficial treatment if no parent is available to give parental consent.[372] The treatment ordinarily cannot be one that carries serious health risks, except in an emergency, and it must offer potential health benefits for the minor herself.[373] In other words, the treatment cannot be cosmetic, and it cannot be for the purpose of benefiting another person.[374]

Scrutiny of mature minor doctrine indicates that the authority of minors to consent to treatment functions primarily to promote child wellbeing. Without the mature minor doctrine, physician liability could arise on the basis of treating a patient without valid (parental) consent, deterring physicians from providing treatment to minors.[375] By removing this obstacle, the doctrine facilitates beneficial treatment of the minor. That minors lack authority to consent to cosmetic treatment and treatment that benefits another person reinforces the doctrine's underlying purpose of promoting child wellbeing. Although advocates have heralded the mature minor doctrine as a victory for children's rights,[376] it does not apply if a parent is available, and it seems un-

371. These are embodied in the mature minor doctrine, minor consent statutes, and the right to make reproductive health decisions.

372. *See, e.g.*, Rowine Hayes Brown & Richard B. Truitt, *The Right of Minors to Medical Treatment*, 28 DEPAUL L. REV. 289, 294 (1979).

373. *Id.*; *see also* RESTATEMENT OF CHILDREN AND THE LAW § 19.01 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2019).

374. *See, e.g.*, Bonner v. Moran, 126 F.2d 121, 123 (D.C. Cir. 1941) (holding that a fifteen-year-old could not consent to a skin graft for the benefit of his cousin who had suffered severe burns).

375. RESTATEMENT OF CHILDREN AND THE LAW § 19.01 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2019) (discussing rationale for mature minor doctrine).

376. This is particularly true when it served to underpin minors' reproductive privacy rights. *See* Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adoles-*

likely that courts developing the doctrine were concerned with advancing minors' interest in self-determination. Moreover, courts seldom recognize a right of mature minors to *refuse* beneficial medical treatment, although adults have this right.[377] In general, the mature minor doctrine fits comfortably in the framework as a doctrine primarily directed at serving the wellbeing of minors that does not conflict with parental authority or the state's interest.

The mature minor doctrine is supported by contemporary research, another convergence with the Child Wellbeing framework. The cases involve minors age fifteen or older, an age at which research indicates that adolescents are capable of making basic medical decisions independently.[378] The requirement that the minor herself must be able to consent to treatment precludes application to younger children.[379] Moreover, the requirement that the treatment be routine and involve minimal risk limits the application to situations in which the mature minor will understand the treatment choices and the consequences.[380] The doctrine assumes that parents should be involved in more consequential medical decisions for their children.

Minors' Consent Statutes. A substantial majority of states in the late twentieth century enacted statutes under which minors are deemed adults for the purpose of consenting to treatment for substance abuse and sexually transmitted diseases, contraceptive services,[381] and outpatient mental health services.[382] Typically the statutes designate no minimum age of consent, but given the nature of the targeted conditions, only adolescents are likely to be afflicted or to desire treatment without involving parents. The conditions are the product of risky adolescent behavior or of emotional issues that may arise in this turbulent developmental stage. Moreover, statutes typically presume that minors seeking treatment are competent to give valid consent, a

cents to Make Informed Treatment Decisions, 53 CHILD DEV. 1589, 1590 (1982); *see also* Bellotti v. Baird, 443 U.S. 622, 647–48 (1979) (rejecting the lower court's determination that the common-law mature minor doctrine had been legislatively overruled as to abortions and holding that the instant statute was unduly burdensome on the exercise of a minor to seek an abortion since it did not permit even a mature minor to obtain an abortion without parental consent).

377. RESTATEMENT OF CHILDREN AND THE LAW § 19.01, Reporters' Note (AM. LAW INST., Tentative Draft No. 2, 2019) (citing cases).

378. *See id.*; *see also* Weithorn & Campbell, *supra* note 376, at 1595.

379. *Cf.* RESTATEMENT (SECOND) OF TORTS § 892A cmt. b. (AM. LAW INST. 1979) (providing that a minor's consent can be effective if the minor is "capable of appreciating the nature, extent, and probable consequences of the conduct consented to").

380. *See* RESTATEMENT OF CHILDREN AND THE LAW § 19.01(a), cmt. d (AM. LAW INST., Tentative Draft No. 2, 2019).

381. For a discussion of contraception, see *infra* text accompanying notes 385–387.

382. *See, e.g.*, ALASKA STAT. § 25.20.025 (2018); GA. CODE ANN. § 37-7-8 (2012); MO. REV. STAT. § 431.061(4) (2016); TEX. FAM. CODE ANN. §§ 32.003, 32.004 (West 2013); VA. CODE ANN. § 54.1-2969 (2013). In both cases, some states place limitations on age or type of care that may be provided to minors.

presumption supported by developmental research when applied to adolescents.[383]

Minors' Consent statutes respond to contexts in which the law's paternalistic approach requiring parental consent was harmful to minors' wellbeing. There is no evidence that legislatures gave much attention to minors' autonomy interests in enacting Minors' Consent statutes. Instead, the statutes aimed to facilitate beneficial treatment that minors might otherwise not seek if parental consent were required, due to the sensitivity of the covered conditions.[384] Moreover, the conditions targeted pose risks to public health as well as to the child's wellbeing, and facilitating treatment offers societal benefits. Analyzed in the framework, it is clear that Minors' Consent statutes give minors the right to make medical decisions to promote their wellbeing and to promote social welfare. Moreover, while some parents might object to their child having the right to seek treatment independently (as well as to the behavior that led to the need for treatment), few would want their child to forgo treatment.

Reproductive Health Treatments. The right to obtain contraceptive and prenatal services is often part of Minors' Consent statutes and is justified on both child-wellbeing and social-welfare grounds. Minors have a right to obtain contraceptive services in almost all states as part of public health initiatives to prevent teenage pregnancy.[385] These statutes are not motivated by a concern that minors enjoy a right of reproductive privacy, the foundation of adults' right to obtain contraceptives.[386] Instead, lawmakers recognize (grudgingly) that many teenagers are sexually active and that ready access to contraception can avoid the harms of unprotected sex. The research shows clearly that the personal and social costs of teen pregnancy are substantial.[387]

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383. *See, e.g.*, Paul S. Appelbaum, *Assessment of Patients' Competence to Consent to Treatment*, 357 NEW ENG. J. MED. 1834, 1838 (2007) (concluding that "[t]o the extent that the patient . . . can clearly communicate her decisions, understands the information about her condition, appreciates the consequences of her choices . . . and can weigh the relative risks and benefits of the options, she should be considered competent").

384. For example, statutes in all fifty states and the District of Columbia expressly authorize minors to consent to STD or venereal disease treatment. *See, e.g.*, ALASKA STAT. § 25.20.025; D.C. MUN. REGS. tit. 22, § 600.7 (1995); FLA. STAT. ANN. § 384.30 (2014); TENN. CODE ANN. § 68-10-104 (2018); UTAH CODE ANN. § 26-6-18 (LexisNexis 2019).

385. *See* RESTATEMENT OF CHILDREN AND THE LAW § 19.02 Statutory Note (AM. LAW INST., Tentative Draft No. 2, 2019); *Minors' Access to Contraceptive Services*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services [https://perma.cc/4G6F-RW6R].

386. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (explicitly extending this right to reproductive privacy beyond marriage); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (recognizing a constitutionally protected zone of reproductive privacy for adults).

387. *See* Saul D. Hoffman & Rebecca A. Maynard, *The Study, the Context, and the Findings in Brief*, *in* KIDS HAVING KIDS: ECONOMIC COSTS & SOCIAL CONSEQUENCES OF TEEN PREGNANCY 1 (Saul D. Hoffman & Rebecca A. Maynard eds., 2008) (documenting health and social risks for both adolescent parents and their children more onerous than those experienced by their adult counterparts: teenage mothers are more likely to drop out of school and be relegated to low-paying jobs than other adolescents, and teenage fathers also experience finan-

The state thus has an important interest in protecting both sexually active minors and society from these costs. To be sure, while some parents likely support these laws, others may object to their children's ability to access contraceptives, and the parental rights of these parents are correspondingly diminished. But lawmakers have concluded that the benefits for teens and for society of pregnancy prevention trump the objection of these parents, whose stance threatens harm to their sexually active children.

The Child Wellbeing framework enriches our understanding of a minor's right to terminate a pregnancy as well, although this right does not fit as neatly in the Child Wellbeing framework as do other rights of access to treatment.[388] In *Bellotti v. Baird*, the Supreme Court held that a mature minor has a right to make an abortion decision without involving a parent.[389] However, the Court also directed that a state could require the minor to demonstrate her maturity and ability to make the decision.[390] The minor's right to abortion implicates a liberty interest in reproductive privacy that is analogous to that of a pregnant adult. The decision to continue or terminate a pregnancy is both urgent and peculiarly adult in nature, in that the minor who carries the child to term will bear the responsibilities of parenthood. But the child-wellbeing principle lends particular weight to minors' interest in access to abortion.[391] The obstacle of a parental consent requirement likely would lead some teenagers to delay abortion, increasing personal and public health costs.[392] Courts also note that pregnancy and childbirth are riskier for

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cial and educational costs; children of teenage mothers also do more poorly than other children on many measures of child wellbeing).

388. Minors' right of access to abortion fits more squarely in the realm of constitutional liberty interests held by citizens against the state (and in the case of minors, against parents), but, as explained in the text, this right also is justified in part on the ground that it serves the wellbeing of pregnant minors. *See infra* text accompanying notes 391–395.

389. 443 U.S. 622, 650 (1979).

390. For a minor not mature enough to make her own decision, the Court indicated that a determination should be made of whether the abortion without parental consent or involvement is in the minor's best interest. *See Bellotti*, 443 U.S. at 643–44. In response, many states have created judicial bypass proceedings to determine the pregnant minor's maturity. *See, e.g.*, ALA. CODE § 26-21-4 (LexisNexis 2016); ARIZ. REV. STAT. ANN. § 36-2152 (2018); MICH. COMP. LAWS ANN. § 722.904 (LexisNexis 2019); MISS. CODE ANN. § 41-41-55 (2018); N.C. GEN. STAT. § 90-21.8 (2000); 18 PA. STAT. AND CONS. STAT. ANN. § 3206 (West 2015); WIS. STAT. ANN. § 48.375 (West 2009). Other jurisdictions authorize minors, like adult women, to consent to abortion without state-imposed restrictions. These include Connecticut, Maine, and Washington D.C. *See An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law [https://perma.cc/G35N-BA94].

391. Emily Buss makes a similar argument. *See* Buss, *supra* note 10, at 762 (arguing that allowing adolescents access to abortion "allow[s] them to continue to grow up without taking on the massive financial, emotional, and social burdens of teen parenting").

392. *See* Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 641 (2002).

teenagers than for adults,[393] and, as suggested above, the consequences of having an unwanted child are particularly costly in adolescence.[394] Teenage parenthood is virtually never beneficial, and the harm seems particularly acute if the minor objects.[395] Although this justification is seldom front and center, the minor's wellbeing and liberty interests merge in the context of abortion rights. Thus, concern for the welfare of the pregnant minor and recognition that deference to parental authority may generate serious harm are embedded in the *Bellotti* framework.

b. First Amendment Rights in School

The free expression and free exercise rights of public-school students also exemplify rights that benefit minors and promote social welfare.[396] Allowing students to express their political views as maturing individuals in the school setting offers substantial benefits both to students and society because it prepares youths for political participation and other activities associated with citizenship. Providing a context for expression in which students can learn lessons about civility and tolerance when their ideas are tested serves students' interests. Further, lessons learned in an educational setting could improve political discourse generally, a benefit to society. Arguably, many teenagers are beginning to engage with and comprehend larger political and social issues and are motivated to explore and debate with peers and teachers. Thus, although speech rights are not formally limited on the basis of age, it is not surprising that claims are brought almost always by middle- and high-school students.[397] Courts might be less likely to view the interest of younger children as substantial.[398]

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393. *See* Michael M. v. Superior Court, 450 U.S. 464, 470–71 (1981) (acknowledging risks of teenage pregnancy in upholding statutory rape statute).

394. *See, e.g.*, *Bellotti*, 443 U.S. at 642; *see also* Hoffman & Maynard, *supra* note 387.

395. In many jurisdictions, judges typically order an abortion even when a minor is found to be too immature to make her own decision, reasoning that the best interest of an immature minor cannot be served by forcing her to bring the pregnancy to term. *E.g.*, Robert H. Mnookin, Bellotti v. Baird*: A Hard Case*, *in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149, 239 (Robert H. Mnookin ed., 1985).

396. *See supra* text accompanying notes 103–106 (describing these rights); Buss, *supra* note 364, at 57–61.

397. *E.g.*, Morse v. Frederick, 551 U.S. 393, 409–10 (2007) (upholding suspension of high school student for displaying pro-marijuana banner); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273–74 (1988) (upholding censorship of material in high school newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684–85 (1986) (upholding suspension of high school student for assembly speech with lewd innuendo); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d. Cir. 2011) (rejecting authority of school officials to punish eighth-grade student for off-campus web posting).

398. For example, in *Tinker*, the younger Tinker siblings, who, at age eight and eleven, participated in the same anti-War demonstration at issue in the case as their fifteen- and thirteen-year-old siblings, were not petitioners. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969) (Black, J., dissenting) (describing the protesting students); *id.* at 504 (describing the petitioners); DAVIS ET AL., *supra* note 47, at 166; *see also* Muller v. Jefferson

Another dimension of both free expression and free exercise rights is compatible with our framework: children's rights in this setting are usually convergent with those of parents, belying the account of inherent competition. Recognition of students' First Amendment rights often supports parents' interest in inculcating their children in their own political values and religious beliefs; the cases suggest that the views of students who have successfully challenged school restrictions on speech align with those of their parents.[399] Conversely, when parents have favored restrictions imposed by the school, courts have been less protective of student speech.[400] Also, parents have often joined students in curricular and other challenges on the basis of shared religious beliefs.[401] These constitutional challenges have had mixed success, but many school systems accommodate parents' and students' religious beliefs in various ways.[402]

As this doctrinal description illustrates, the Child Wellbeing framework aids interpretation of constitutional jurisprudence in this area. First Amendment rights are generally conferred on students in contexts in which exercise of those rights might be deemed beneficial to their development as citizens, but rights are defined with limits that courts find appropriate to protect society's interest in education. Applying a cost-benefit calculus, the benefits to students of free speech rights are substantial and the social costs are minimal. Usually parents support and sometimes advocate for these rights as well.

We end this discussion on a critical note: If, as we argue, recognition of free expression rights is justified on the ground that it promotes the interests of both students and society in citizenship development so long as the state's

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Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996) (questioning whether *Tinker* extends to elementary school students).

399. *See, e.g.*, John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 785 (1978) (arguing that *Tinker* was really about "family rights"); Hafen, *supra* note 100, at 646 (arguing (before *Bellotti*) that "none of the Supreme Court's children's rights cases provide authority for upholding the exercise of minors' choice rights—particularly against contrary parental claims").

400. *Compare Hazelwood*, 484 U.S. at 275 (upholding censorship, citing principal's concern about offending parents), *with Tinker*, 393 U.S. at 504, 514 (permitting student speech, noting in facts that parents held the same views).

401. *See e.g.*, Brown v. Hot, Sexy, & Safer Prods., 68 F.3d 525, 538 (1st Cir. 1995) (rejecting First Amendment claim by high school students and their parents against compelled attendance at anti-AIDS assembly); Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (rejecting objection of parents and children to textbook series).

402. *See e.g.*, TEX. EDUC. CODE ANN. §§ 26.003–26.010 (West 2006) (authorizing parents to petition on behalf of their children to add or change a course, graduate early, or to withdraw from a class or other school activity that conflicts with religious beliefs); Bd. of Educ. v. Mergens, 496 U.S. 226, 246–47 (1990) (applying state law to require high school to provide student Christian club equal access to school facilities); Koenick v. Felton, 190 F.3d 259, 266 (4th Cir. 1999) (upholding state law authorizing a four-day Easter holiday against Establishment Clause challenge and finding that "[t]he Board's desire to economize scarce educational resources that are wasted when classes are held on days with a high rate of absenteeism provides a plausible secular purpose" for the schedule).

educational function is not sacrificed, courts have been excessively restrictive in deferring to school authority, often exaggerating the cost to the educational process of student speech. For example, some courts have allowed punishment of students for expressions on private social media not intended for school dissemination,[403] while others, including the Supreme Court, have authorized censorship by school authorities of innocuous student material in school publications, where little burden on education is implicated.[404] Allowing students freedom to express their opinions in venues such as school publications can provide opportunities for experimentation in a setting in which instructive guidance and feedback are possible. While some courts have been quite supportive of student speech,[405] the Supreme Court often has been willing to authorize the stifling of expression offensive to school authorities.[406] These policies may result in undesirable lessons about government repression of speech and do little to offer positive citizenship lessons. Our framework thus offers normative guidance for reforms in this area.

c. Procedural Rights in Delinquency Proceedings

Courts granting procedural rights to youths in the justice system have emphasized concern for their wellbeing, sometimes recognizing that the paternalistic approach threatened harm to those it ostensibly aimed to protect. In granting procedural rights to youths in delinquency proceedings, the Supreme Court recognized that the rehabilitative model of the traditional juvenile court inflicted harm on youths and that procedural rights provided protection from those harms.[407] In *Gault*, the Court observed that adjudicated delinquents seldom received the promised services to support rehabilitation and often were confined in institutions that functioned like prisons.[408] At the same time, youths faced adjudication without the tools that could aid them in defending against the state's charges.[409] Thus, the aim of the court in

403. *E.g.*, Doninger v. Niehoff, 527 F.3d 41, 50–53 (2d Cir. 2008) (upholding suspension for off-campus posting targeting school principal as offensive and potentially disruptive). *But see* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 925 (3d Cir. 2011) (rejecting school officials' authority to punish student).

404. For example, *Hazelwood*, 484 U.S. at 275, can be criticized as heavy-handed, authorizing censorship of innocuous material, foregoing instructional potential in official response.

405. *See supra* text accompanying note 103.

406. *See* Morse v. Frederick, 551 U.S. 393, 409–10 (2007) (speech advocating legalization of marijuana); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684–85 (1986) (sexual innuendo).

407. *See supra* Section I.B.1 (discussing *In re Gault*). To be sure, a juvenile court adjudication implicates the youth's liberty interest much like the adjudication of guilt in a criminal trial, indicating the need for protections under the Due Process Clause of the Fourteenth Amendment. But the Court was moved to grant juveniles rights in part because of the harms inflicted by the paternalistic regime. *See supra* text accompanying note 71.

408. *In re* Gault, 387 U.S. 1, 22 n.30, 27 (1967).

409. *Id.* at 29.

granting procedural rights was to promote the wellbeing of youth in the adjudicative process.[410]

Concern for the wellbeing of youths in the justice system also has influenced the way in which procedural rights are defined and applied. Some children's rights advocates hold that the rights of youths, such as the right to waive counsel, should be similar to those of adult defendants.[411] But lawmakers increasingly have realized that youths may have limited capacity to exercise their rights, and that their immature choices can have harmful consequences. This concern, well supported by developmental research, has led to reforms that protect juveniles through restrictions limiting their freedom to exercise and waive procedural rights. For example, adults can freely waive their *Miranda* rights in police interrogation, but some states have imposed restrictions on minors' freedom to waive these rights, either altogether or by requiring consultation with counsel.[412] This constraint is justified on the ground that minors, particularly youth of color,[413] are particularly vulnerable to coercive police tactics and that younger teenagers often lack comprehension of the meaning of *Miranda* warnings. In general, youths are far more

410. *See generally* Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV 39 (2003) (arguing that the Court's attempt in *Gault* to reform the juvenile justice system because it was unfair for children was a "botched rescue").

411. *See e.g.*, Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1490–92 (2009) (contending that arguments against waiver of the right to counsel are not supported by empirical evidence); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum,* 51 HASTINGS L.J. 1265, 1282 (2000) (arguing that right to waive is implicit in *Gault*). The National Juvenile Defender Center, for example, assumes that juveniles have the right to waive counsel in delinquency proceedings but advocates that waiver must follow consultation with counsel. *See* NAT'L JUVENILE DEF. CTR., ENSURING ACCESS: A POLICY ADVOCACY TOOLKIT 41–42 (2018), https://njdc.info/wp-content/uploads/2018/05/Ensuring-Access.pdf [https://perma.cc/X5GL-VBR6]. Other scholars contend that youth need a completely different process. *E.g.*, Buss, *supra* note 410.

412. The Restatement of Children and the Law requires consultation with counsel as a condition of waiver for younger juveniles. RESTATEMENT OF CHILDREN AND THE LAW § 14.22 (AM. LAW INST., Tentative Draft No. 1, 2018) (section entitled "Consultation with Counsel for Younger Juveniles"). A few courts have prohibited waiver altogether for younger juveniles or unless advised by counsel. *See, e.g.*, *In re* D.S.S., 506 N.W.2d 650, 654 (Minn. Ct. App. 1993) (stating that a juvenile may only validly waive her right to counsel after that right is satisfactorily explained to her by a non-adversarial attorney or judge); State v. Doe, 621 P.2d 519, 521 (N.M. Ct. App. 1980) (holding that a juvenile facing a delinquency petition cannot waive the initial appointment of counsel to defend her); State *ex. rel.* J.M. v. Taylor, 276 S.E.2d 199, 204 (W. Va. 1981) (holding that a juvenile's waiver of right to counsel cannot be knowing and voluntarily waived unless the waiver is made on the advice of counsel). For more examples, see George L. Blum, Annotation, *Validity and Efficacy of Minor's Waiver of Right to Counsel—Cases Decided Since Application of Gault*, 101 A.L.R. 5th 351 (2002).

413. *See supra* text accompanying note 367 (describing how youths of color are taught compliance with authority, particularly law enforcement). *See also* RESTATEMENT OF CHILDREN AND THE LAW § 14.21 Reporters' Note cmt. h (AM. LAW INST., Tentative Draft No. 1, 2018); TA-NEHISI COATES, BETWEEN THE WORLD AND ME 14–20 (2015).

likely than are adults to waive their *Miranda* rights in interrogation[414] and to confess to crimes, sometimes falsely.[415] Also, in delinquency proceedings, juveniles in most states do not have the right of self-representation, although adult defendants have a constitutional right to waive counsel and represent themselves.[416] Moreover, some jurisdictions go further and strictly limit or prohibit self-representation by juveniles, acknowledging that immaturity precludes competent waiver of counsel.[417]

In general, procedural rights in the justice system aim to protect juveniles, like adults, from the power of state prosecution and from wrongful deprivation of liberty. But lawmakers confer these rights on minors and define them with an aim to promote their wellbeing. This protection is particularly critical for youth of color, who disproportionately interact with the justice system. In recent years, reforms have been guided by developmental research showing that youths are more vulnerable than their adult counterparts and less capable of exercising their rights in a self-interested way. In this domain as in others, the new framework provides an interpretive guide that clarifies the rationale of children's rights.

2. Rights Withheld from Minors

The Child Wellbeing framework provides interpretive tools that clarify why other rights, outside the justice system, are withheld from minors as well. As we have shown, the conferral of rights in recent decades has enhanced minors' wellbeing in many settings. But paternalism continues in many modern laws, and sometimes the underlying premise is that children's interests are well served by restrictive regulations or surrogate decisionmakers. Moreover, restrictions can also promote social welfare. Two examples—restriction on the right to marry and the infancy doctrine in contract law—demonstrate that often the withholding, as well as the granting, of rights fits within the framework.

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414. Grisso et al., *supra* note 350, at 353–56 (finding in laboratory study that children fifteen years or younger are more likely than older teenagers to comply with authority and confess to an offense); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 LAW & HUM. BEHAV. 253, 261 (2005) (finding of defendants questioned by the police, only 7.96 percent of those aged fourteen and under remained silent).

415. RESTATEMENT OF CHILDREN AND THE LAW § 14.21 Reporters' Note cmt. h (AM. LAW INST., Tentative Draft No. 1, 2018); Viljoen et al., *supra* note 414, at 263.

416. Faretta v. California, 422 U.S. 806 (1975) (recognizing criminal defendants' right to waive counsel); RESTATEMENT OF CHILDREN AND THE LAW § 15.21 Reporters' Note cmt. a & b (AM. LAW INST., Council Draft No. 3, 2019).

417. *See, e.g.*, MISS. CODE ANN. § 43-21-201(1) (2018) ("[T]he child shall be represented by counsel at all critical stages: detention, adjudicatory and disposition hearings; parole or probation revocation proceedings; and post-disposition matters."); N.M. STAT. ANN. § 32A-2-14(H) (2009) ("[T]he child shall be represented by counsel at all stages of the proceedings on a delinquency petition," and if counsel is not retained, "counsel shall be appointed for the child.").

Restrictions on minors' right to marry provide an interesting example of a right withheld from minors out of concern for their wellbeing—a concern that is informed by ample research.[418] Under common law, relatively young minors were permitted to marry, primarily to avoid their children's illegitimacy.[419] But, although the right to marry is a fundamental constitutional right for adults, the law has become more, not less, restrictive in the era of children's rights.[420] In recent decades, the minimum age of marriage has increased in many states,[421] a trend that is best justified on the ground of child wellbeing. Developmentalists concur that most adolescents lack the maturity to establish a stable marriage or raise children competently, and other research finds many harmful consequences associated with teenage marriage, including disruption of education and social development, and high divorce rates.[422] Thus, it is apparent that deterring teenage marriage furthers social welfare as well as that of minors themselves. Lawmakers have responded by restricting a right that minors once held and also by limiting the parents' authority to consent to their minor children's marriages.

The infancy doctrine in contract also restricts minors' freedom with the purpose of serving their wellbeing. Under the doctrine, minors can renounce most contracts, giving them limited ability to enter enforceable agreements.[423] This restriction limits minors' freedom of contract, but it is under-

418. *See* Guggenheim, *supra* note 242, at 942 (noting that New York's raising of the age of lawful marriage from fourteen to eighteen was touted as a children's rights victory, even though the legal change actually further restricted those rights, as, while "[a]dult rights are organized around the principle . . . of 'liberty' . . . . Children's rights . . . mostly presum[e] children ought to be denied autonomy"); Jonathan Black, *Advocates Are Fighting to Outlaw Adult Marriages to Minors*, A.B.A. J. (Jan. 1, 2018, 3:25 AM), http://www.abajournal.com/magazine/article/adult_marriages_minors_law [https://perma.cc/SG7V-B7S8].

419. *See, e.g.*, State v. Ward, 28 S.E.2d 785, 786 (S.C. 1944) ("The common law establishes the age of consent to the marriage contract at fourteen years for males and twelve years for females . . . .").

420. *Compare* Ragan v. Cox, 194 S.W.2d 681, 684–85 (Ark. 1946) (describing recent Arkansas law raising marriage to eighteen for males and sixteen for females from the common law fourteen and twelve), *with* Encinas v. Lowthian Freight Lines, 158 P.2d 575, 575 (Cal. App. 1945) (noting that in California, males can legally enter into a contract of marriage at twenty-one, and with parental consent at eighteen, versus eighteen and sixteen respectively for females); *see also* Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1830–31 (2012).

421. *See* TAHIRIH JUSTICE CTR., UNDERSTANDING STATE STATUTES ON MINIMUM MARRIAGE AGE AND EXCEPTIONS (2018), https://www.tahirih.org/wp-content/uploads/2016/11/FINAL-Oct-2018-State-Statutory-Compilation.pdf [https://perma.cc/8VLV-T34W] (indicating that most states now require that both parties be at least eighteen to marry without parental consent or judicial approval, though many have statutory exceptions which can lower that age, sometimes including in cases where the minor female becomes pregnant).

422. *See* Hamilton, *supra* note 420; Gordon B. Dahl, *Early Teen Marriage and Future Poverty*, 47 DEMOGRAPHY 689, 691 (2010) (describing substantially higher divorce rate, younger age of childbirth, and lower educational attainment of women who marry before age nineteen).

423. This doctrine has its roots in English common law. DAVIS ET AL., *supra* note 47, at 115–17.

stood to serve their interests by protecting them from entering ill-considered agreements.[424] In this context, children are presumed to be vulnerable to overreaching adults and to their own poor judgment. The infancy doctrine serves as a deterrent, signaling to adults who might be tempted to deal with minors in a commercial setting that the contract cannot be enforced against the minor. The doctrine also reinforces parental authority in a context in which the risk of parent-child conflict of interest appears to be minimal.

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In this Part, we have shown that the rationale for granting and withholding of rights often fits comfortably in the Child Wellbeing framework. This analysis brings greater coherence to the doctrine and clarifies the underlying logic of dispersed legal reforms often adopted in a piecemeal fashion. Children's rights are sometimes understood primarily as expressions of the legal personhood of children as individuals with liberty interests that trump the authority of parents and the state over their lives.[425] This Part has shown that this understanding is incomplete. This is not to say that lawmakers make optimal judgments about rights granted and withheld. It seems probable that rights will not be granted to minors if doing so seems likely to incur any substantial social costs, even if the benefits to minors would exceed those costs. Moreover, lawmakers likely sometimes resort to paternalistic views about minors, declining to extend beneficial rights and privileges, even though the social costs are minimal. Finally, other political and social attitudes likely often shape legislative and judicial judgments about granting or applying children's rights.[426] But our analysis has shown that, in a way insufficiently understood, the conferral and withholding of rights to minors can be rationalized on the basis of child wellbeing.

Children's rights doctrine is thus consistent with the legal regulation of children and families discussed in Parts II and III. Taken together, these

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424. *See, e.g.*, Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968) ("The underpinnings of the general rule allowing the minor to disaffirm his contracts were undoubtedly the protection of the minor. It was thought that the minor was immature in both mind and experience and that, therefore, he should be protected from his own bad judgements as well as from adults who would take advantage of him."); DAVIS ET AL., *supra* note 47, at 115–17.

425. *See supra* note 111 and accompanying text.

426. There is evidence, for example, that judges' anti-abortion attitudes may distort their determinations of minors' maturity to make abortion decisions. *See, e.g.*, *Ex parte* Anonymous, 803 So. 2d 542, 547 (Ala. 2001) (upholding denial of an abortion without parental consent for a seventeen-year-old student who worked part-time to save for college, and who had considered alternatives to abortion and researched the procedure); *In re* Jane Doe, 566 N.E.2d 1181, 1184–85 (Ohio 1990) (upholding denial of an abortion without parental consent for a seventeen-year-old student who worked and planned to go to college, even though a physician testified that she understood the risks, because she had had a prior abortion as a result of pregnancy with a different man and had discontinued her birth control). Traditional views about parental authority could also lead courts and legislatures to reject beneficial children's rights.

Parts support our claim that the competitive triadic framework of state, parents, and children is outmoded and that the Child Wellbeing framework better describes the current state of the law. Concern for child wellbeing inincreasingly defines the state's role in regulating youth crime, and is reflected in recent investments in family support and marginal efforts to reorient the child welfare system away from its crisis orientation; but it also goes far to justify parental authority and illuminate the patterns by which children's rights are granted and withheld. Further, we have shown that the advancement of society's interests, a goal that has been obscured historically in the regulation of children, has often converged with and strengthened child wellbeing. In each domain, to varying degrees, observers and (sometimes) lawmakers have identified racial bias and inequity in the law's relationship with children and families of color as a threat to the legitimacy of the regime and have elevated this concern as a policy goal. Finally, developmental science, which shapes the state's role in contemporary juvenile justice and, increasingly, investments in family support, is likely to become more important in rationalizing parental rights and children's rights doctrine.

V. ANTICIPATING CRITICISM

In this Part, we address potential criticism of the Child Wellbeing framework. We remind the reader that the framework is largely interpretive, describing the reasoning and goals that animate recent reforms to the juvenile justice system and arguing that the conceptual framework that has shaped these reforms can inform our understanding of the structure and logic underlying parental rights and children's rights. We anticipate two types of criticism: arguments that the framework is descriptively inaccurate and arguments that, even if it is accurate, the framework is normatively problematic and should be challenged rather than embraced.

Some readers may challenge the descriptive accuracy of the framework, contending that we are too quick to find coherence across areas of legal regulation and are imposing order where none exists. On this view, the legal regulation of children is extraordinarily complex, and we have sacrificed accuracy to find common themes linking the three domains. Relatedly, readers may argue that we overstate the integration of the interests of parents, children, and the state, and that in some contexts there is an inherent conflict. Homeschooling, for example, may be acceptable educationally, but allows parents to inculcate illiberal values, making deference to parental authority a greater threat to social welfare and child wellbeing than we acknowledge. In this account, protecting the stability of the parent-child relationship sacrifices the child's need to develop autonomy and society's interest in ensuring children are exposed to a range of ideas. Similarly, minors' right to access abortion necessarily conflicts with parental authority.

These are valid concerns, but they misapprehend the aim of our project. As we note at several points, the framework does not explain and resolve

every question about the legal regulation of children.[427] It emphasizes unifying themes across many domains, but it is not a topographical map incorporating all laws and policies. It is in the nature of a project like this to be categorical, and some nuance is surely lost when painting with a broad brush. One value of the new framework, however, is that it identifies these common themes—themes that are clearly driving regulation in some areas and are embedded but only faintly visible in others. In so doing, we provide a blueprint to guide reform-minded lawmakers. And although the depiction of integrated interests does not describe every issue or case, the framework provides the tools to identify and narrow the set of hard cases in which tension among parents, children, and the state is likely to persist. There is value in understanding that, more often than is commonly acknowledged, there is an integration of interests.

A second descriptive criticism is that we present our framework in a vacuum, without accounting for the political context of lawmaking and enforcement, which may trump or at least complicate considerations of child wellbeing. The sweeping, punitive juvenile justice reforms in the 1990s are but one example of politics subverting a concern for the wellbeing of youth in the justice system.[428] And access to abortion and contraception are persistent political flashpoints, often distracting from considerations of child and adolescent wellbeing.[429]

To be sure, our framework does not account fully for political and social forces that shape lawmaking. But while some issues, such as abortion, involve deep value clashes, many others do not. And the approach, with its dual focus on child wellbeing and social welfare, and its incorporation of child development knowledge, accommodates political differences quite well. This is evident in bipartisan support for recent juvenile justice reforms and for investments in prekindergarten.[430] Even the politically sensitive issue of Medicaid expansion has gained support across the political spectrum, at least in part due to the evidence about its effectiveness and efficiency.[431] Finally, as we explain above, even minors' access to abortion, while controversial, is at least partly justified in terms of minors' wellbeing and social welfare.[432] In the absence of these interests, it is possible that the *Bellotti* Court might have ruled differently. In short, while a concern for child wellbeing will succumb to political forces at times, attention to social welfare and developmental science can help steer the debate towards child wellbeing.

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427. *See supra* text accompanying notes 36, 263.

428. *See supra* text accompanying notes 73–77.

429. *Cf.* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—And Why It Matters in Law and Politics*, 93 IND. L.J. 207, 210–21 (2018) (contending that many supposedly pro-life states do not adopt policies that would clearly promote life, including healthcare, income assistance, and workplace accommodations for pregnancy and caregiving).

430. *See supra* Sections II.A.2, II.B.1.

431. *See supra* text accompanying notes 202–203.

432. *See supra* text accompanying notes 394–395.

On a related issue, critics may be skeptical generally of the upbeat account of the Child Wellbeing framework, and particularly unconvinced that racial fairness is becoming a key policy concern. On this view, the article minimizes the pernicious influence of racial inequity in contemporary regulation or exaggerates the extent to which lawmakers recognize and aim to ameliorate this injustice.

As we have acknowledged, progress is at an early stage. In the juvenile justice system, youth of color have benefited together with their white peers from developmentally based reforms that have minimized institutional confinement and shifted resources to community programs that support healthy maturation. But racial disparities in the justice system have not changed. The system remains racialized and lawmakers have only begun to seriously confront these pernicious problems. Progress in the child welfare system is limited as well. Thus, we acknowledge that while our framework identifies the reduction of racial inequity as a key policy goal, we are far from attaining that goal. This reality enhances the importance of the contemporary rationale for strong parental rights to shield families of color from intrusive state intervention and of procedural protections in the justice system and in schools.

Readers may also question whether lawmakers *should* embrace our framework. One concern is that defining and promoting child wellbeing can be an uncertain and complex business, given the indeterminacy and capaciousness of the construct.[433] To a considerable extent, child wellbeing is grounded in values about which there may not be consensus; it is also culturally contingent. Thus, policies and doctrines justified on this basis may reflect lawmakers' personal biases and political preferences. Although some areas of state regulation have clear, largely uncontested goals,[434] others predictably will involve value contests or disagreements about priorities. Is it better for a child to remain with a parent who sometimes strikes the child or for the child to live apart from the parent and never be hit? Is it more beneficial for a child to experience a sense of belonging in a family or to grow up with egalitarian values? And so on. Further, even when the objective is uncontested, it is not always clear how to achieve the goal. Many approaches to parenting can be effective, and social science research does not—and perhaps cannot—determine the "best" approach to raising a child. Views about what children need, beyond the basics, have shifted over time, and often there is little consensus among experts or parents.[435]

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433. For a classic analysis of the indeterminacy of children's best interest, see Mnookin, *supra* note 12, at 226, 229–30.

434. These include the reduction of juvenile recidivism and promotion of children's physical health. *See, e.g.*, *supra* notes 164, 206 and accompanying text.

435. *See* EMILY OSTER, CRIBSHEET: A DATA-DRIVEN GUIDE TO BETTER, MORE RELAXED PARENTING, FROM BIRTH TO PRESCHOOL 171–87 (2019) (describing the conflicting and often limited evidence for numerous parenting choices, such as whether to sleep train an infant). For a discussion of the historically contingent nature of parenting advice, see generally ANN

These concerns are legitimate but exaggerate the challenge posed by the indeterminacy of legal regulation aimed at promoting child wellbeing. Solid and uncontested scientific research has established several key lessons about child development. We know that a strong, stable relationship between a child and caregiver—often, but not always, a parent—is essential to child development, especially in the first several years of life.[436] We know that ongoing brain development in adolescents can lead teenagers to make impulsive, risky decisions, heavily influenced by peers, and that most youths outgrow these tendencies.[437] We know that teenage pregnancy and substance abuse undermine prospects for healthy adulthood.[438] We know that families need economic resources to enable the healthy development of children.[439] And we know that early intervention and access to treatment for a broad range of conditions are both more effective and cost-efficient than ex post crisis intervention.[440] Regulation in the framework is built on these well-supported, foundational insights.[441]

Relatedly, a reader might question our confidence in the use of science in the Child Wellbeing framework. It is sobering to consider that Progressives also professed confidence in science. To be sure, scientific evidence is not always reliable. Biases can distort even the most scrupulous research, and findings often are not replicable.[442] Even if the studies are reliable and neutral, moreover, they often cannot be translated readily into legal policy, because scientific findings, while informative, are usually narrow and seldom apply directly and comprehensively to complex legal issues.[443] Finally, knowledge based on research is not static; it will evolve and our understanding of child development and other relevant issues will evolve.[444]

These concerns about the state of scientific knowledge and the challenges of translating this evidence into legal rules argue for caution in applying research to legal questions. Incorporation of scientific research should be

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HULBERT, RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN 360–70 (2003).

436. *See supra* text accompanying notes 247–248.

437. *See supra* text accompanying notes 166–168.

438. *See supra* text accompanying notes 28, 344, and 387.

439. *See supra* note 268; *see also supra* note 90 and accompanying text.

440. *See supra* text accompanying note 93.

441. When a legal question relates to an issue on which there is not clear evidence that rests on foundational principles of child and adolescent development, the Child Wellbeing framework does not support state intervention. *See, e.g.*, text accompanying notes 322–323 (noting that the Child Wellbeing framework does not condone state intervention for illiberal but academically sufficient homeschooling); text accompanying note 275 (noting that the Child Wellbeing framework does not condone state intervention for spanking).

442. *See* Clare Huntington, Essay, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 272–81 (2018).

443. *See* Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation*, 70 RUTGERS U. L. REV. 115, 117–19 (2017).

444. *See* Buss, *supra* note 364.

limited to well-established and broadly accepted bodies of research in social and biological science. Moreover, as the body of scientific knowledge that informs the law grows, legal policy should reform accordingly. And the question is, "Compared to what?" Grounding regulation in scientific knowledge is likely to be superior in many contexts to relying on unsupported common sense and intuition, which is at least as likely to be distorted by lawmakers' biases.

A final and serious criticism is that the framework we offer facilitates intrusion by the state in the lives of vulnerable families, despite its contrary normative commitment. Our argument in Part II—that the framework points to a more active state role in supporting families—has potential risks. A lesson of the Progressive Era is that the state, when justified by the goal of promoting child wellbeing, can impose an overarching view of acceptable parenting on all families. For example, potentially beneficial state programs designed to promote children's health in low-income families often involve significant intrusions on family privacy.[445] More generally, a system of state support increases the contact between families and the government, raising the chance that, in engaging with families, state actors will look for and find problems.[446]

These risks are serious, but not fatal. In the new framework, judges and state legislators do not have free rein to intervene in the lives of children and families in the name of child wellbeing, because robust parental rights continue to protect families from even a seemingly well-intentioned state. The contemporary rationale for parental rights, described in Part III, together with the constitutional justification based on liberal principles, provides a bulwark against intrusive state intervention. This check, combined with heightened concern about racial and class biases, supports voluntary programs that empower parents rather than coercive interventions that require adherence to any one set of parenting practices. Some of the most successful programs bear these characteristics,[447] and a strong regime of parental rights and vigilance about implicit biases should encourage the state to pursue similar efforts.

In short, the framework carries risks, but it seems more promising than alternative models of regulation. Again, the question is, "Compared to what?" In the early Progressive Era, law and policy embodied a naïve view of childhood, combining robust protection of parental rights that lacked inher-

445. *See* KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 41–74 (2011) (describing a prenatal program for low-income women that requires participants to divulge an extensive amount of information, including immigration status, interactions with the child welfare system, any violent relationships, and much more); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 331–40 (2014).

446. *See* ROBERTS, *supra* note 92, at 32–33.

447. *See supra* text accompanying notes 217–218 (describing home-visiting programs, which are voluntary and seek to empower, not direct, parents; further describing the extensive and strong evidence for these programs).

ent constraints. Some more recent proposals by scholars would strictly limit parental rights, thereby ceding substantially broader authority over families to the state,[448] a questionable move for the reasons we have articulated. The framework we identify benefits from the growing body of scientific knowledge about children and families and recognizes that child wellbeing and social welfare are interwoven, thus providing a more stable basis for regulation than the earlier Progressive model.

Notwithstanding the understandable concerns discussed in this Section, we endorse the new approach, while also arguing for care and caution as the framework continues to shape the direction of legal regulation of children and families.

CONCLUSION

To address the complexity, seeming incoherence, and instability in the legal regulation of children, we have proposed a conceptual framework that makes sense of this area of the law and unites various strands of legal regulation. Our approach embraces and reimagines the state interest in child wellbeing first articulated in the Progressive Era. We have shown that child wellbeing continues to be the core animating principle of legal regulation. But our framework also strengthens this principle in three important ways: in modern regulation, lawmakers draw on a wide body of scientific knowledge about child and adolescent development as well as considerable empirical studies about effective policies. This makes it possible to advance child wellbeing with greater sophistication, nuance, and confidence than during the earlier period, when lawmakers relied largely on intuition and observation. Further, legal regulation is bolstered by a clear understanding that promoting child wellbeing generally furthers social welfare. Finally, lawmakers are beginning to appreciate the importance of addressing the multiple ways that racial bias and inequality permeate the legal regulation of children.

This framework is clearest in the early twenty-first-century sweeping reforms of juvenile justice, but it also offers interpretive power and normative guidance for a broad swath of regulation. The framework highlights and encourages nascent reforms to family support policies. It elevates a robust contemporary justification for parental rights. And it provides a logic and consistency to children's rights doctrine. It thus offers an integrative regulatory scheme, clarifying that not only the role of the state, but also parental rights and children's rights, are defined and shaped by a unifying interest in child wellbeing. This underlying coherence contrasts with earlier regulatory models that pitted the state, parents, and the child in competition for control over children's lives. The framework also identifies areas of regulation that do not promote child wellbeing, supplying a guide for future law reform. In short, as we have shown, the Child Wellbeing framework both explains the

448. *See supra* notes 241–242 and accompanying text.

law's approach to the legal regulation of children and provides normative guidance for the future.