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# Restating the Law in a Child Wellbeing Framework

Elizabeth S. Scott<sup>†</sup>

## INTRODUCTION

When the American Law Institute (ALI) began discussions of whether the organization should undertake a Restatement dealing with children and the law,<sup>1</sup> the idea was met with considerable skepticism.<sup>2</sup> One objection was that “Children and the Law” was not a coherent field of law, but rather the stepchild of several fields, with no common foundation or theoretical framework. In family law, the treatment of children is overshadowed by the regulation of family formation and dissolution, with the interests of children relegated to doctrines regarding their custody and support. In many law schools, broader treatment of doctrines and regulation affecting children is not addressed in the basic family law course, but in a supplemental course or in poverty law.<sup>3</sup> Similarly, the regulation of youth in the justice system is an afterthought, not part of the mainstream curriculum [or doctrine] in criminal

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<sup>†</sup> R. Medina Professor of Law, Emerita. For helpful comments, thanks to Clare Huntington and to participants in the symposium conference at the University of Chicago. Thanks also to the *University of Chicago Law Review* editors and staff, and to Dan Cobourn for research assistance.

<sup>1</sup> Note the essays in this Symposium were completed before the final adoption of the Restatement. At the time of the final adoption of the Restatement, the table of contents with the final Restatement section numbers will be adopted. The Restatement section numbers referenced in this Essay are those in the Tentative Draft at the time the specific sections were approved by the ALI membership between 2018 and 2024. Some of these section numbers differ from the final Restatement numbers. Where the subject matter of a section is unclear from the text, an explanatory note has been added.

<sup>2</sup> The discussions followed the completion of the Principles of the Law of Family Dissolution and were initiated by members who were family law experts. *See, e.g.*, Susan Appleton, *Restating Childhood*, 79 BROOKLYN L. REV. 525, 548–49 (2014) (anticipating objections to a restatement focused on children).

<sup>3</sup> *See generally* SAMUEL DAVIS, ELIZABETH S. SCOTT, LOIS WEITHORN & WALTER WADLINGTON, *CHILDREN IN THE LEGAL SYSTEM* (6th ed. 2020). This casebook is an example of a casebook for a specialized course.

law or procedure.<sup>4</sup> Torts and contract law include isolated doctrines that affect children, but they are not central to these fields. Finally, although family law is primarily state law, federal constitutional doctrine occasionally deals with children, but in a piecemeal way. In short, skeptics of the Restatement viewed Children and the Law as a prime example of “The Law of the Horse,”<sup>5</sup> a patchwork of unrelated doctrines united only by the common focus on children.

Beyond the seemingly random dispersal of doctrine affecting children across the legal landscape, other daunting challenges faced any effort to “restate the law” of children in the twenty-first century. Progressive reformers in the early twentieth century aimed to better the lives of wayward children, and to assimilate immigrant families into mainstream American life.<sup>6</sup> Toward this end, they created a relatively simple legal framework in which authority over children was divided between parents and the state, while children themselves were presumed to lack legal capacity. But that framework became increasingly complex and unsettled in the second half of the twentieth century. Beginning in the 1960s, lawmakers began to treat children as rights-bearing legal persons for some purposes, but not others, complicating the straightforward conception of children as vulnerable, dependent, and incapable of self-determination.<sup>7</sup> Meanwhile, parental rights, which were property-like before the Progressive era, continued to be robust, but were increasingly subject to criticism by scholars and advocates as obsolete in a regime that recognized the personhood of children.<sup>8</sup> Finally, the role of the state, established in the Progressive era as the protector of children, became increasingly punitive in the late twentieth century, as youth in the justice system were subject to ever harsher treatment. Juvenile justice policy in the twenty-first century has seen retrenchment from this approach

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<sup>4</sup> Juvenile Justice is sometimes offered as a separate law school course. *See generally* BARRY C. FELD & PERRY L. MORIARTY, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION (6th ed. 2022).

<sup>5</sup> This term was popularized by Judge Frank Easterbrook. Frank Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; *see also* Appleton, *supra* note 2, at 548–49 (rejecting this characterization as applied to Children and the Law).

<sup>6</sup> *See* BEN B. LINDSEY & RUBE BOROUGH, THE DANGEROUS LIFE 99–109 (1931) (describing the goals of reformers in establishing the juvenile court); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909).

<sup>7</sup> *See infra* Section III.A.

<sup>8</sup> *See infra* Section II.A.

with a new wave of more benevolent reforms grounded in developmental science, but the pendulum swings have undermined the stability of the state's regulatory role.<sup>9</sup> Observers might well have concluded that achieving the goal of ALI restatements—bringing clarity and coherence to a field of law—was out of reach.

Despite some reservations, the ALI launched the Restatement of Children and the Law in 2015,<sup>10</sup> and the project is nearing completion. In eight years of work on this Restatement, the reporters<sup>11</sup> have produced a comprehensive account of the law's treatment of children and clarified that it is, indeed, an integrated and coherent area of law. Our work has uncovered a deep structure and logic that shapes the legal regulation of children in the family, in school, in the justice system, and in the larger society.<sup>12</sup> And it has clarified that the core principle and goal of the law affecting children across these domains is to promote their well-being. This foundation, which Professor Clare Huntington and I have called the Child Wellbeing framework, is embodied in the Restatement.<sup>13</sup> It can be discerned most clearly in youth crime regulation, but it also shapes state intervention in families and parental rights, as well as children's rights in school and in society.

The Child Wellbeing framework bears some similarity to the principles driving the Progressive era reforms, which also elevated the welfare of children—and which ultimately fell short of attaining the reformers' goals. But the Restatement's contemporary approach embodies three features that distinguish it from that of the earlier period. First, regulation today increasingly is based on research on child and adolescent development, as well

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<sup>9</sup> See Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1386–97 (2020) [hereinafter Huntington & Scott, *Conceptualizing Childhood*].

<sup>10</sup> For a description of the Restatement and list of reporters, see Children and the Law, ALI ADVISER, <https://perma.cc/49TZ-7DZF>.

<sup>11</sup> See generally RESTATEMENT OF THE LAW, CHILDREN AND THE LAW (AM. L. INST., Tentative Draft No. 4 2022) [hereinafter RESTATEMENT Draft No. 4]. The associate reporters on the Restatement are Richard Bonnie, Emily Buss, Clare Huntington, and Solangel Maldonado; David Meyer served as a reporter until 2020.

<sup>12</sup> See generally *id.* The Restatement is organized in four parts. *Id.* The first three parts—“Children in the Family,” “Children in Schools,” and “Children in the Justice System”—recognize that the regulation of children is mediated through these institutions. *Id.* The last Part, “Children in Society,” deals with direct regulation not mediated through these institutions. *Id.*

<sup>13</sup> See Huntington & Scott, *Conceptualizing Childhood*, *supra* note 9, at 1371, 1375 (showing that the regulation of children across the legal landscape converges in the Child Wellbeing framework). This Essay borrows from the earlier article, clarifying how the Restatement embodies the Child Wellbeing framework.

as studies on the effectiveness of policy interventions. This empirical evidence provides a sturdier basis for doctrine and policy than the naive, intuitive approach of Progressive lawmakers, and a growing number of courts and legislatures rely on this research. Second, today's lawmakers increasingly recognize the broader social welfare benefits of regulation that promotes the well-being of children, boosting the political viability of modern reforms. And third, acknowledgement by courts of the ways in which embedded racial and class bias has affected the law's relationship to children and families has led to tentative steps to ameliorate these pernicious influences.<sup>14</sup>

The three dimensions of the Child Wellbeing framework are most evident in the twenty-first century reforms of the justice system's response to youth crime; these dimensions have shaped the Restatement sections dealing with children in the justice system. Lawmakers have rejected the punitive approach of the 1990s, which targeted youth of color, and increasingly embrace a developmental model of youth crime regulation. Both state and federal courts have relied on developmental science, emphasizing that the immaturity and vulnerability of adolescents require that they receive a broad range of special protections in the justice system.<sup>15</sup> The Restatement has adopted this developmental model, which aims to enhance the well-being of youth in the justice system and to facilitate their transition to productive, noncriminal adulthood, objectives wholly compatible with the core social welfare goal of reducing crime in a cost-effective way.<sup>16</sup> This science-based approach also indirectly (and sometimes directly) benefits youth of color. However, despite the reforms, Black youth continue to be disproportionately represented in the justice system.<sup>17</sup>

The core elements of the Child Wellbeing framework shape other areas of regulation affecting children as well, creating unifying themes across legal domains. The framework clarifies that the allocation of legal authority over children is not a zero-sum competition among the state, the parents, and the child, as it is conventionally understood. Instead, it is a regime in which the goal of advancing child well-being melds the interests of the state,

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<sup>14</sup> *Id.* at 1375 (describing these three features of the Child Wellbeing framework).

<sup>15</sup> *See infra* Section I.A.

<sup>16</sup> *Id.*

<sup>17</sup> While the number of youth, including youth of color, in the justice system has declined substantially, youth of color continue to constitute a far higher percentage (compared to their percentage in the population) than white youth. *See infra* note 45.

parent, and child. The Restatement highlights that, under contemporary law, an essential rationale for robust parental rights is that strong protection of parental authority promotes the well-being of children. This rationale is grounded in substantial research emphasizing the importance of stable and secure parent-child bonds to healthy child development. Just as important, parental rights protect low-income families and families of color from excessive and harmful intrusion by the state.<sup>18</sup> And unlike the traditional libertarian justification for parental rights, the modern rationale is self-limiting.

The Child Wellbeing principle also makes sense of the opaque pattern of children's rights, under which some autonomy-enhancing rights are extended to children and others are withheld. For example, children do not have a right to execute enforceable contracts,<sup>19</sup> but children in public school have a First Amendment right of free expression.<sup>20</sup> Both legal responses enhance children's well-being. In general, the Restatement embraces the approach of courts and legislatures in giving to children rights that promote their well-being and withholding those that do not.<sup>21</sup>

This Essay proceeds as follows: Part I elaborates on the Child Wellbeing framework adopted by the Restatement, focusing on the regulation of children in the justice system as the prime example. Part II discusses the regulation of the parent-child relationship, explaining that the Restatement's strong protection of parental rights is solidly grounded in the Child Wellbeing principle. Part III deals with children's rights, clarifying that the Child Wellbeing principle is at work in lawmakers' decisions to extend or withhold autonomy-based rights, or to maintain or create paternalistic protections.

## I. CHILDREN IN THE JUSTICE SYSTEM: EMBRACING THE CHILD WELLBEING FRAMEWORK

In the early 2000s, lawmakers and the public began to turn away from the punitive approach to youth crime that had characterized the 1980s and 1990s, and to adopt a regulatory model

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<sup>18</sup> See *infra* text accompanying notes 101–03.

<sup>19</sup> See *infra* text accompanying notes 167–70.

<sup>20</sup> See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044 (2021) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>21</sup> See *infra* Part III.

grounded in the science of adolescent development.<sup>22</sup> The developmentally based reforms recognized that teenagers differ from adult criminals in several ways relevant to the culpability of their offending, their potential for reform, and their ability to navigate the law enforcement and justice systems. Reforms of doctrine and policy acknowledged these differences, with the goals of treating youth fairly and maximizing their prospects for maturing into productive adulthood. These reforms have been embraced by liberals and conservatives alike, as it has been broadly acknowledged that they not only promote the well-being of youth in the justice system but also reduce the social cost of youth crime.<sup>23</sup>

This Part recounts the emergence of the Child Wellbeing framework and its role in shaping twenty-first century youth justice reforms. It then examines ways in which the Restatement embodies this approach.

#### A. The Emerging Framework

Of course, special treatment of youth in the justice system long predates the recent legal reforms. The foundational move was the establishment of a separate juvenile court in the late 1890s, creating an institution dedicated to children and youth that recognized important differences between adolescent and adult offenders.<sup>24</sup> But that system, together with the rehabilitative model of juvenile justice at its core, was built on the naive insistence that delinquent youth were innocent children, and it nearly collapsed in the 1980s and 1990s, as youth crime spiked and a wave of punitive reforms swept the country.<sup>25</sup> The modern developmental approach emerged in the early 2000s as lawmakers recognized the injustice and harm to youth of the punitive response to their offenses, as well as the high financial cost of incarceration

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<sup>22</sup> See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 265–70 (2008) [hereinafter SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*].

<sup>23</sup> The conservative justice system reform organization Right on Crime advocates for evidence-based juvenile justice programs in the community and for shifting funds from “lockups” to far less costly community programs. *Juvenile Justice*, RIGHT ON CRIME, <https://perma.cc/D5PX-R36X>.

<sup>24</sup> See *supra* note 6.

<sup>25</sup> See PATRICIA TORBET, RICHARD GABLE, HUNTER HURST IV, IMOGENE MONTGOMERY, LINDA SZYMANSKI & DOUGLAS THOMAS, OFFICE OF JUV. JUST. & DELINQ. PROGRAMS, U.S. DEP’T OF JUST., *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* 6 (1996) (describing a lowered age of transfer in eleven states between 1992 and 1995); see also Scott & Steinberg, *supra* note 22, at 96–99 & n.33–50 (discussing same).

and its failure to realize the goal of reducing recidivism.<sup>26</sup> At the same time, as youth crime rates declined, there was a growing awareness that the harsh response of the 1990s, in which young offenders were labeled “superpredators,” was a moral panic driven by racial animus.<sup>27</sup>

Several catalysts contributed to developmentally based youth justice reforms in the early decades of the twenty-first century.<sup>28</sup> Among the most important was the attention of scholars, courts, and policymakers to a growing body of research on adolescence, together with many studies shedding light on youth offending, and on the impact of incarceration and other correctional programs on recidivism.<sup>29</sup> This research presented a compelling challenge to the assumption underlying the harsh reforms—that any

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<sup>26</sup> Many studies have found that evidence-based juvenile justice programs are a highly cost-effective means to reduce crime. See STEVE AOS, POLLY PHIPPS, ROBERT BARNOSKI & ROXANNE LIEB, *THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME* 5–23 (2001); NAT’L RSCH. COUNCIL, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 393–407 (Richard J. Bonnie et al. eds., 2013); see also Elizabeth Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 45, 77 (2010) [hereinafter Scott & Steinberg, *Social Welfare*] (citing reports that the cost of incarceration in some states is \$215,000 per youth per year, compared to \$5,000 per youth for community-based programs).

<sup>27</sup> See John DiLulio, *The Coming of the Superpredators*, WASH. EXAM’R (Nov. 27, 1995), <https://perma.cc/X6MH-2WDK> (coining the term “superpredators”); see also Tamar R. Birkhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 388 (2017) (describing the extent to which image and fear of youth crime were racialized); SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 22 at 109–15.

<sup>28</sup> See SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 22, at 265–70 (describing catalysts for reform). Two other important factors influencing lawmakers’ receptivity to reform were the decline in youth crime beginning in the mid-1990s and the recognition that incarceration-based policies were a serious burden on state budgets. *Id.* at 266.

<sup>29</sup> In the 1990s and 2000s, the MacArthur Foundation took the lead, first with the Research Network on Adolescent Development and Juvenile Justice (1995–2005), which brought scientists, legal scholars, and advocates together to design and conduct developmental research that shed light on the capacities and experiences of youth in the justice system. This was followed by its Models for Change program, initiating reforms in several states. Finally, the foundation supported developmental brain research through its Research Network on Law and Neuroscience. See *About, MODELS FOR CHANGE*, <https://perma.cc/DH7H-SNWA>. Professor Thomas Grisso led a major study sponsored by the Foundation on adjudicative competence, as well as an earlier study of youths’ comprehension of *Miranda* rights. See generally Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003); Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980). For a general discussion of relevant developmental research, see SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 22, at 28–60.



differences between juvenile and adult offenders were not relevant to society's response to teenage crimes. A growing body of empirical work in the late twentieth and early twenty-first century focusing on psychological and biological development in adolescence sheds light on how factors associated with brain development during this stage contributed to teenagers' decisions to offend.<sup>30</sup> This research clarified that most adolescents would mature out of their inclination to get involved in criminal activity, unless the justice system's response to their offending undermined that trajectory. Further, programmatic research consistently found that evidence-based programs in the community, tailored to adolescent needs, were far more effective at reducing recidivism than incarceration, and at a fraction of the cost.<sup>31</sup> Research also showed that youth are disadvantaged in dealing with law enforcement and in participating in the adjudication process.<sup>32</sup> For example, adolescents, especially youth of color, are particularly vulnerable to coercive tactics employed by police, and are far more likely than adults to waive rights and confess to crimes, even when they are innocent.<sup>33</sup> Together, this research provided powerful evidence that important features of adolescence were indeed relevant to teenage offending and to their treatment in the justice system. The research laid the foundation for important reforms in recent decades that have repudiated the harsh policies of the 1990s and embraced a developmental model of youth justice, a model committed to child well-being.

The importance of this research was amplified by the Supreme Court, which in a series of opinions beginning with *Roper v. Simmons*<sup>34</sup> in 2005, rejected as unconstitutional under the

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<sup>30</sup> See Alexandra O. Cohen, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCH. SCI. 549, 550, 559–60 (2016) (reporting research showing differences between adolescents and adults in impulsivity, peer influence, and other factors relevant to offending); Elizabeth Scott, Natasha Duell, & Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J.L. & POL'Y 13, 16–17 (2018).

<sup>31</sup> See Aos et al., *supra* note 26, at 5–23 (discussing cost-effectiveness of juvenile correctional programs measured by crime reduction).

<sup>32</sup> See Grisso et al., *supra* note 29, at 356–58 (finding that teens under age 16 showed deficits in adjudicative competence measures).

<sup>33</sup> Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson & Nicholas Montgomery, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005) (finding that youth under age 18 were three times as likely to confess falsely as adults).

<sup>34</sup> 543 U.S. 551 (2005).

Eighth Amendment state laws that imposed harsh criminal sentences on juvenile offenders.<sup>35</sup> Drawing on a large body of behavioral and biological research, as well as literature arguing for its relevance to youthful offending,<sup>36</sup> these opinions announced emphatically that juvenile offenders, due to their immaturity, differ from their adult counterparts in ways that are important to sentencing and, implicitly, to their treatment in the justice system. First, adolescents generally are less culpable than adult offenders due to aspects of brain development that contributed to their offending.<sup>37</sup> Second, because much teenage offending is driven by developmental influences, juvenile offenders maturing into adulthood have a greater potential to reform than adult counterparts.<sup>38</sup> And third, the Court suggested that many young offenders may have received the harsh sentences that were being challenged due to their poor ability to navigate the law enforcement and justice systems.<sup>39</sup>

While only a relatively small group of young offenders convicted of the most serious crimes have been affected directly by the Supreme Court opinions, the impact of these rulings on youth justice reform has been far broader. Our nation's highest court announced emphatically that "children are different,"<sup>40</sup> and other lawmakers took the pronouncement very seriously. State and federal courts across the country have cited the Supreme Court's juvenile sentencing opinions and embraced its developmental framework in opinions dealing with a broad range of issues. These cases include prescriptions requiring mitigation in the sentencing of young offenders that extend far beyond the requirements of the *Roper* line of cases. But they also include requirements of special

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<sup>35</sup> See *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller v. Alabama*, 567 U.S. 460, 479 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016).

<sup>36</sup> The Court based its analysis of juveniles' reduced culpability on the model offered by Professors Laurence Steinberg and Elizabeth Scott. See *Roper*, 543 U.S. at 569–70 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009 (2003)).

<sup>37</sup> See discussion in opinions cited in note 34. These factors include impulsivity, sensation seeking, lack of foresight, and susceptibility to peer influence. See Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NATURE REV. NEUROSCIENCE 513, 514 (2013); Scott et al., *supra* note 30, at 46–48 (explaining the interaction between these factors and social context in contributing to criminal activity).

<sup>38</sup> See discussion in opinions cited in note 34. See also *infra* note 42.

<sup>39</sup> See *Miller*, 567 U.S. at 477–78 (describing the ability to navigate the law enforcement and justice systems as a reason a juvenile might have been subject to harsh sentence).

<sup>40</sup> *Id.* at 480.

protections in the interrogation of minors and scrutiny of their waiver of *Miranda* rights, recognition that adjudicative competence can be based solely on developmental immaturity, prohibitions of waiver of counsel in delinquency proceedings, and mandates that services be provided and harmful disciplinary practices restricted in juvenile detention and correctional facilities.<sup>41</sup>

The justice system reforms based on developmental and programmatic research are firmly grounded in the Child Wellbeing framework. This trend, evident in special protections for youth at each stage of the delinquency and criminal process, promises to substantially benefit both young offenders and society. The wellbeing of youth is promoted by protective reforms that reduce the likelihood of wrongful apprehension, prosecution, adjudication, and findings of delinquency. Young offenders also benefit from developmentally sensitive dispositions that increase the likelihood that they will desist from criminal activity and mature into productive adults.<sup>42</sup> The reforms promote social welfare by reducing the social cost of crime, both by reducing recidivism and by lowering its financial cost through emphasis on noncarceral dispositions for most youth.<sup>43</sup> Due to these social welfare benefits, reforms that attend to the needs and capacities of adolescents have gained broad acceptance across the political spectrum.<sup>44</sup> Finally, while the goal of reducing racial disproportionality has not been achieved, the salience of this inequity is front and center.<sup>45</sup> Moreover, due to the beneficial impact of the reforms, fewer youth of color enter the system than in the 1990s, and the treatment of those who do is less harsh than in the earlier period.

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<sup>41</sup> See Huntington & Scott, *Conceptualizing Childhood*, *supra* note 9, at 1400–01.

<sup>42</sup> See Aos et al., *supra* note 26, at 6–24 (describing and evaluating the success of developmentally based programs). Regulators also began to attend to studies on adolescent social development clarifying that, if interventions were to succeed at reducing recidivism, regulators must incorporate the elements of a healthy social context in correctional facilities. See Laurence Steinberg, He Len Chung & Michelle Little, *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21, 23–26 (2004); SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 22, at 55–62.

<sup>43</sup> See Aos et al., *supra* note 26, at 6–24 (describing the cost-effectiveness of developmental reforms).

<sup>44</sup> See *supra* note 23.

<sup>45</sup> See generally JOSHUA ROVNER, *THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS* (2016); Janet L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending*, in *OUR CHILDREN, THEIR CHILDREN* 83 (D. Hawkins ed., 2005).

## B. The Restatement Approach

The Restatement of Children and the Law embraces the developmental model of youth justice embodied in the emerging reform trend described above. In doing so, the Restatement follows a growing number of courts and other lawmakers that have adopted doctrine and policy informed by the science of adolescence. Aligning with this reform trend, the Restatement offers special protections to youths in the justice system and responds to their crimes with delinquency dispositions and criminal sentences that recognize the mitigating importance of adolescent immaturity and the individual and social benefits of correctional interventions that attend to their developmental needs. The promotion of child well-being is at the heart of this model.

The Restatement approach to youth justice regulation beginning with law enforcement, and continuing through the delinquency, and criminal process, is informed by developmental science.<sup>46</sup> At each stage, the ultimate goal is to promote child well-being by minimizing harm created by involvement in the justice system, deterring reoffending, and promoting healthy development to adulthood. This Section describes three categories of Restatement rules: rules involving protections in the law enforcement process, rules protecting youth in adjudication hearings, and rules creating standards for dispositional decisions. It then provides a rule in each category. In each of these examples, Restatement rules are rationalized and supported by developmental science, following the approach of modern courts.<sup>47</sup>

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<sup>46</sup> Courts have incorporated developmental knowledge into legal doctrine on issues ranging from police interrogation to searches of youth, the competence of youth to participate in proceedings, delinquency dispositions, and transfer to adult court, to treatment of youth in juvenile detention and correctional facilities, and criminal sentencing. On all of these issues, the Restatement follows the developmental approach. *See, e.g.*, RESTATEMENT Draft No. 4 *id.* §§ 12.10–12.11 (search); *id.* §§ 12.20–12.23 (interrogation); *id.* §§ 12.30–12.31 (rights in detention); *id.* § 13.30–13.31 (representation by counsel and waiver of counsel); RESTATEMENT Draft No. 4 § 13.40; *id.* § 15.20 (adjudicative competence); *id.* § 14.10 (2022) (dispositions).

<sup>47</sup> In many sections, the Comments describe the developmental basis for a black-letter rule and the Reporters' Notes elaborate by both citing judicial authority and describing the research studies on which courts and other lawmakers rely. For example, see RESTATEMENT Draft No. 4 § 12.21(interrogation) cmts. d, g, h, reporters' notes.

### 1. Protections in interrogation.

The Restatement provides procedural protections to minors engaging with law enforcement, recognizing that these encounters pose unique challenges for immature youth and can cause substantial harm. This Section focuses on protections during interrogation as an example of this special protection.<sup>48</sup>

Under *Miranda v. Arizona*,<sup>49</sup> minors, like adults, have the right to remain silent and to have counsel present during interrogation, but many youth do not understand these rights. Just as important, minors are far more susceptible than adults to coercive police tactics aimed at encouraging suspects to confess, and youth of color are particularly vulnerable to these tactics.<sup>50</sup> Not surprisingly, it is well established that minors waive their *Miranda* rights and confess far more than adults and also *falsely* confess at much higher rates.<sup>51</sup>

The Restatement Sections regulating interrogation seek to reduce the risk that youth will be coerced to waive their rights and make statements (that are almost always against their interest) without the guidance of counsel. The Restatement follows courts that recognize that the immaturity of youth creates a severe disadvantage in dealing with the police, whose only goal is to induce the youth suspected of a crime to waive *Miranda* rights and confess. Unless the youth has the assistance of counsel, this outcome is likely; indeed, it is almost certain for younger teens.<sup>52</sup>

The Restatement offers several protections to youth facing questioning by law enforcement. First, a court determining whether questioning of a youth is custodial (and therefore requires the police to give *Miranda* rights) must evaluate whether a reasonable youth of the youth's age would feel free to leave.<sup>53</sup>

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<sup>48</sup> See, e.g., *id.* §§ 12.20–12.23 (interrogation).

<sup>49</sup> 384 U.S. 436 (1966).

<sup>50</sup> See, e.g., RESTATEMENT Draft No. 4, § 12.21 (interrogation) cmt. h. Youth questioned by police may be disadvantaged in several ways. First a youth subject to noncustodial questioning may not understand that the youth is free to leave. See *id.* § 12.20 (requiring that the youth's age be taken into account in making this determination). Second, the youth may not understand the meaning of *Miranda* rights as an absolute right to remain silent and have an attorney. See *id.* § 12.21, cmt. c and reporters note (describing research showing that younger teens have a poor understanding of *Miranda* rights). Finally, police employ effective tactics to induce waiver and confessions and teenagers are more susceptible than adults. *Id.* § 12.21, cmts. g–h.

<sup>51</sup> See *supra* note 33; see also RESTATEMENT Draft No. 4, § 12.21 cmts. g, h.

<sup>52</sup> Studies have found that 90% or more of younger teens waive their *Miranda* rights in interrogation. See RESTATEMENT Draft No. 4 § 12.21, reporters' note h.

<sup>53</sup> *Id.* § 12.20(b)(1).

The Restatement adopts this standard, announced by the Supreme Court in *J.D.B v. North Carolina*,<sup>54</sup> with substantial evidence that most younger teens, especially teens of color, would not feel free to terminate questioning.<sup>55</sup>

Second, the Restatement elaborates on the meaning of the requirement that the youth's waiver of rights be "knowing, voluntary, and intelligent,"<sup>56</sup> describing studies finding that younger teenagers are deficient in understanding their rights,<sup>57</sup> and that waiver by even older minors is often induced involuntarily by coercive police tactics.<sup>58</sup> Moreover, youth are often unable to resist compliance under the conditions of typically lengthy interrogations. These problems are particularly acute for younger minors, leading the Restatement to offer an additional protection by following a minority of states that require consultation with and the presence of counsel as a predicate for a valid confession by a minor aged 14 or younger.<sup>59</sup> In taking this position, the Restatement points to compelling research that the presence of parents, required under some statutes, offers little protection to their children in this setting, as parents often urge compliance with officers' requests.<sup>60</sup>

Finally, the Restatement follows jurisdictions that require that custodial interrogation of a youth must be video recorded to allow the reviewing court to better evaluate police conduct and the youth's response in determining whether the waiver of rights was informed and voluntary.<sup>61</sup> Recorded interrogation—using body cams, for example—offer more accurate evidence of events *ex post* than is possible through assessment of the credibility of police or defendants.

The Restatement approach to the interrogation of minors is firmly grounded in the Child Wellbeing framework. The confessions of youth are notoriously unreliable; ultimately minors are very likely to succumb to police pressure to waive their rights,

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<sup>54</sup> 564 U.S. 261 (2011).

<sup>55</sup> *Id.* at 265; RESTATEMENT Draft No. 4 § 12.20, cmt. b (explaining that minority youth may be instructed by their parents to be deferential to police).

<sup>56</sup> Courts are directed to consider the age, education, experience, and intelligence of the youth and the conduct of police and conditions of interrogation. *See* RESTATEMENT Draft No. 4 § 12.21(b).

<sup>57</sup> *Id.* § 12.21 cmt. c.

<sup>58</sup> *Id.* § 12.21 cmts. f, g. Indeed, even the authors of the standard interrogation manuals warn of the extreme susceptibility of youth to deception and other tactics. For more, see the discussion of warning in *id.* reporters' note h.

<sup>59</sup> *Id.* § 12.22 (interrogation).

<sup>60</sup> For more, see the studies discussed in *id.* reporters' note b.

<sup>61</sup> *See* RESTATEMENT § 12.23(a).

often providing false confessions to escape the interrogation.<sup>62</sup> Confession will lead to charges and prosecution, and involvement in the justice system, disrupting the youth's life and often causing substantial harm. The hallmarks of the modern Child Wellbeing framework inhere in the Restatement's approach; the rules are solidly grounded in developmental science and other research<sup>63</sup> and promote social welfare as well as the interest of minors questioned by police. Society has an interest in avoiding erroneous prosecutions and interactions with police that are likely to have a destructive impact on the youth's prospects for a productive future. Moreover, unfair interrogation undermines the legitimacy of the law enforcement system. Finally, while the treatment of youth of color by law enforcement continues to raise serious concern,<sup>64</sup> the interrogation rules seek to offer some protection. These youth are more likely to become the target of suspicion by law enforcement and may be even more susceptible to coercive tactics due to fear of the police.<sup>65</sup>

## 2. Protections in adjudication.

The Restatement's recognition of the particular importance of counsel for youth in the justice system continues through the adjudication stage. Like adult criminal defendants, youth facing delinquency charges have a right to counsel in adjudication, as established by the Supreme Court in *In re Gault*,<sup>66</sup> one of the Court's earliest opinions affording protections to youth in juvenile court. But youth are more vulnerable than are adults in this setting.<sup>67</sup> Thus, the Restatement adopts protections to assure that the right to counsel will be meaningfully exercised.

First, although adult defendants have a right of self-representation,<sup>68</sup> the Restatement follows the majority of courts in

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<sup>62</sup> The confessions of five youths of color to raping a woman jogger in Central Park is a notorious case of coerced false confessions by youth. *See id.* § 12.21 reporters' note h.

<sup>63</sup> *See id.* § 12.21, cmts. c, h, reporters' notes c, h (discussing studies showing the impact of developmental immaturity on the understanding of *Miranda* rights and vulnerability to coercion by police). Other research shows that parents do not function to protect children's rights in interrogation. *Id.* § 12.22cmt. b, reporters' note b.

<sup>64</sup> The treatment of youth of color by police is described compellingly by Professor Kristin Henning. *See generally* KRISTIN HENNING, *THE RAGE OF INNOCENCE* (2021).

<sup>65</sup> RESTATEMENT Draft No. 4 § 12.21, reporters' note h.

<sup>66</sup> 387 U.S. 1, 41 (1967).

<sup>67</sup> *See* RESTATEMENT Draft No. 4 § 13.31 (restrictions on waiver of counsel) cmts. a, b, reporters' notes a, b.

<sup>68</sup> *Faretta v. California*, 422 U.S. 806, 818 (1975) (finding that criminal defendants have a right to waive counsel and undertake self-representation under the Sixth Amendment).

providing that youth in delinquency proceedings have no such right.<sup>69</sup> The Restatement restricts waiver of counsel by requiring not only that the waiver be knowing and intelligent, but also that the youth demonstrate competence for self-representation.<sup>70</sup> This very high standard, which few adolescents will meet, is reinforced by a strong presumption against waiver.<sup>71</sup> These restrictions are necessary to assure that the youth facing adjudication enjoy the critically important right to counsel. While this constraint is paternalistic, it is justified on the basis of substantial evidence that waiver of counsel in adjudication almost always harms the youth's interest.<sup>72</sup>

That most youths are unable to represent themselves competently in delinquency proceedings is powerfully reinforced by research showing that many younger adolescents lack the capacity even to assist their attorneys in these proceedings.<sup>73</sup> The Constitution requires that both criminal defendants and youth facing delinquency charges must be competent to participate in the proceedings to adjudicate the charges, by showing a basic comprehension of the proceedings and ability to assist counsel.<sup>74</sup> For adult defendants, the sources of adjudicative incompetence are limited to either mental illness or cognitive disability.<sup>75</sup> But the Restatement follows a growing number of courts in recognizing that youth in both delinquency and criminal proceedings may lack adjudicative competence simply due to developmental immaturity, without other impairment.<sup>76</sup> If found incompetent, the youth cannot be adjudicated unless and until later found competent.<sup>77</sup>

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<sup>69</sup> See RESTATEMENT Draft No. 4 § 13.31 cmt. a, b.

<sup>70</sup> *Id.* § 13.31(b) & cmt. f.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* § 13.31(b) & cmt. a.

<sup>73</sup> See Grisso et al., *supra* note 29, at 356 (finding a large percentage of younger teens incompetent by measures applied to evaluate adult criminal defendants).

<sup>74</sup> See RESTATEMENT Draft No. 4 § 13.40, cmt. a, reporters' note a (discussing the history and rationale of the constitutional requirement of adjudicative competence).

<sup>75</sup> See generally *Dusky v. United States*, 362 U.S. 402 (1959); RESTATEMENT Draft No. 4 § 13.40 cmt. b.

<sup>76</sup> See, e.g., RESTATEMENT Draft No. 4 § 13.40 cmt. b (explaining the basis of developmental incompetence based on immaturity).

<sup>77</sup> *Id.*; cf. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (finding that incompetent defendants must be restored to competence or released in a reasonable time). See generally Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005) (discussing developmental incompetence, and proposing policy responses).



The special protections of the right to counsel under the Restatement further child well-being by assuring that children facing delinquency charges will benefit from the right to counsel. The ability to fully utilize the right to counsel is essential to avoid erroneous findings of delinquency, an outcome that is invariably harmful and unfair to adjudicated youth.<sup>78</sup> The youth who faces adjudication without counsel or who is unable to assist counsel competently may be unable to present relevant evidence, raise defenses, challenge witnesses, or otherwise mount a defense. In adopting these protections, the Restatement responds to research confirming the vulnerability and incapacity of youth in adjudication hearings.<sup>79</sup> The protections promote social welfare as well, as they reduce error that leads to costly interventions and undermines the legitimacy of the system. Both the youth and society benefit from fair and accurate proceedings in which the youth is represented by counsel.

### 3. Delinquency dispositions.

Under the Restatement (and most state statutes), rehabilitation is the primary purpose guiding a court in ordering a delinquency disposition.<sup>80</sup> The Restatement expressly holds that punishment (or retribution) is not a permissible purpose of a delinquency disposition order.<sup>81</sup> The rule directs the juvenile court judge to order an individualized disposition that should be no more restrictive than necessary to protect public safety, hold the youth accountable in a fair and developmentally appropriate way, and serve the needs of the youth for safe and healthy development.<sup>82</sup> The least restrictive alternative (LRA) principle effectively establishes a strong preference for community-based dispositions.<sup>83</sup> Under the LRA, most youths will receive services and programs tailored to their needs while remaining in their home or community, minimizing the disruption of the delinquency adjudication. The Restatement requires that a determination that

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<sup>78</sup> RESTATEMENT Draft No. 4 § 13.40 cmts. a, c, d.

<sup>79</sup> *Id.* cmt. b.

<sup>80</sup> *Id.* § 14.10(b).

<sup>81</sup> *Id.* § 14.10; *see also id.* § 14.10 cmt. a.

<sup>82</sup> RESTATEMENT Draft No. 4 § 14.10(b); *see also id.* § 14.10(a) (explaining the bases of the disposition order).

<sup>83</sup> *Id.* § 14.10 cmts. d, e (noting that most states apply the LRA to delinquency dispositions).

public safety or the youth's needs require a more restrictive environment must be based on a scientifically validated risk and needs assessment.<sup>84</sup> Finally, the Restatement restricts the use of a delinquency finding as a predicate for a later criminal penalty.<sup>85</sup>

This standard for deciding delinquency dispositions exemplifies the embodiment of the Child Wellbeing framework in modern youth justice regulation. In contrast to the incarceration-based policies of the 1990s, the Restatement rule emphasizes that the disposition decision should focus on the individual needs of the adjudicated youth with the goal of “promot[ing] healthy development and law-abiding behavior.”<sup>86</sup> The court is directed to order a disposition that will include services that maximize the likelihood of achieving these dual goals. By requiring that dispositions conform to the LRA principle, the Restatement aims to protect youth from the harms of confinement and to minimize disruption in their lives. Even when confinement is deemed necessary to provide services or protect public safety, the goal of rehabilitation is paramount.<sup>87</sup>

The features of the modern Child Wellbeing framework are evident in the Restatement approach to dispositions. First, the rules guiding these decisions are solidly grounded in developmental science, emphasizing that the Restatement's rehabilitative approach and preference for community-based dispositions offer the best prospect of reducing recidivism and promoting the youth's healthy development to adulthood.<sup>88</sup> Second, the Restatement approach to delinquency dispositions underscores the convergence of child well-being and social welfare goals. By mandating the least restrictive disposition consistent with the youth's needs and with public safety, the Restatement emphasizes that public protection cannot be sacrificed.<sup>89</sup> But the Comments emphasize that secure confinement is a last resort and is usually not necessary to achieve this goal.<sup>90</sup> Individually tailored dispositions ordering evidence-based community programs are far more likely to reduce

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<sup>84</sup> *Id.* § 14.10 cmt. i.

<sup>85</sup> *Id.* § 14.11.

<sup>86</sup> RESTATEMENT Draft No. 4 § 14.10 cmt. a.

<sup>87</sup> *See id.* § 14.10 cmt. i (“The least restrictive disposition must accommodate the goal of protecting public safety *within the rehabilitative frame* of the juvenile system.” (emphasis added)).

<sup>88</sup> *See id.* § 14.10 reporters' note a.

<sup>89</sup> *Id.* § 14.10 cmt. i.

<sup>90</sup> *See id.*

reoffending in most cases than confinement in a correctional facility, and do so at a fraction of the cost.<sup>91</sup> Finally, although youth of color continue to be disproportionately represented among adjudicated youth, these youth benefit from the Restatement goal of avoiding harsh carceral placements.<sup>92</sup>

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The developmentally based justice system reforms of the past generation exemplify the modern Child Wellbeing framework. Lawmakers have accepted the importance of grounding youth justice policy in the science of adolescence, a change that benefits youth both in the system and the larger society. This is not to say that this model is either fully realized or completely secure. Youth of color continue to be disproportionately represented among system-involved youth. And future social forces could trigger challenges to a regime that aims to advance the well-being of young offenders. But the solid empirical basis of these policies and their cost effectiveness create a sturdier foundation for a modern youth justice system than the earlier efforts to create a humane system.

## II. REGULATING THE PARENT-CHILD RELATIONSHIP: A CONVERGENCE OF INTERESTS

### A. Parental Rights and Child Well-Being

Conventional wisdom holds that parents' authority to make decisions about their children's upbringing competes with the state's interest in promoting children's welfare. This view has led to growing scholarly criticism of parental rights in recent years.<sup>93</sup> But parental rights continue to be robust, and lawmakers increasingly have recognized that giving parents broad authority in this realm not only protects parents' liberty interest but is also compatible with the state's interest in advancing children's welfare.

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<sup>91</sup> See Aas et al., *supra* note 26, at 5–23; Scott & Steinberg, *Social Welfare*, *supra* note 26, at 45, 77–78.

<sup>92</sup> See generally ROVNER, *supra* note 45.

<sup>93</sup> Strong parental rights have been criticized by children's rights advocates as a vestige of an era when parental rights were property-like. These critics view parental rights as contrary to children's interest. See Anne Dailey & Laura Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1470–72 (2018); Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 426–27 (2000); James Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1426–39 (1994).

This modern rationale, grounded in the Child Wellbeing principle, recognizes that children, particularly younger children, are not capable of making critical decisions regarding health, education, and other important matters, and that generally their well-being is advanced if their parents, and not the state, have primary decision-making authority.<sup>94</sup> Deference to parental decision-making also promotes society's interest in children's health and welfare, and provides a shield protecting low-income families and families of color against excessive state intervention.<sup>95</sup> Further, unlike the traditional justification for parental rights, the modern rationale is self-limiting: under the Child Wellbeing principle, parents do not have the authority to act in ways that substantially harm their children's well-being, even if they are guided by strong religious or moral beliefs.

This modern rationale, which undergirds the Restatement's approach to the parent-child relationship, is based on substantial empirical evidence showing that a strong, stable parent-child relationship is critically important for healthy child development, and that serious harm to the child can follow from disruption and destabilization of that relationship.<sup>96</sup> Strong parental rights

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<sup>94</sup> For an early formulation of the argument that parental rights promote child well-being, see generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979). For more recent articulations, see, for example, MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 35–39 (2005); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 16–25 (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v Granville*, [FLIP: there is no “v.” in the title, so this is right. JM] 2000 SUP. CT. REV. 279, 285–90; Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 482–95 (2006); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2439–41 (1995). For a recent defense, see Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2531–34 (2022).

<sup>95</sup> For an overview of existing racial disproportionalities in the child welfare system, see CHILD WELFARE INFO. GATEWAY, *RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE* 3–5 (2016) (available at <https://perma.cc/7F2D-XZL6>) (documenting racial disproportionality for Black and Native American children, using an established index).

<sup>96</sup> 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 (2d. ed. 1969); 2 JOHN BOWLBY, *ATTACHMENT AND LOSS: SEPARATION: ANXIETY AND ANGER* 4–16, 245–257 (1973); 3 JOHN BOWLBY, *LOSS: SADNESS AND DEPRESSION* 7–14, 397–411 (1980). Serious harm can follow disruption of the parent-child relationship even when parental care is suboptimal. ROBERTS, *supra* note 94, at 16–19. Because attachment to parents is so important to children's well-being, most children will benefit from state programs and interventions that support families when parents struggle to provide adequate care, rather than removing children in response to crisis and placing them in foster care. See *id.*; see also CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 81–112 (2012) (criticizing family law for intervening during crises but offering little support). See generally DOROTHY ROBERTS, *TORN APART: HOW THE CHILD*

offer the best means to fulfill this essential developmental need by restricting state intervention in the family, and particularly the removal of children from their homes and families.<sup>97</sup> Further, parents, for the most part, are better situated than state actors, such as social workers and judges, to make decisions that promote their children's interest because they know their children's needs far better than outsiders and most are motivated to care for them by strong affective bonds.<sup>98</sup>

Strong protection of parental rights advances social welfare as well as children's well-being. Under our libertarian regime, parents bear the substantial burden of providing care for their children and raising the next generation of citizens, with limited support from the government. It is in society's interest that parents perform their assigned role satisfactorily, both to promote children's healthy development to adulthood and to avoid the high social cost of parental failure.<sup>99</sup> Deference to parental decision-making recognizes and respects parents' critically important social role, reinforcing their commitment and facilitating their ability to perform without excessive state interference.<sup>100</sup>

Finally, strong parental rights fit comfortably in the modern Child Wellbeing framework by serving as a shield against excessive state intervention and offering protection to those families most vulnerable to disruption by an intrusive state.<sup>101</sup> When low-income families and families of color depart from middle class parenting norms, they often become the target of intervention by social workers and other state actors simply on that basis. But substantial evidence supports that removal of children from their families often causes great harm to the children, both because of the disruption of family bonds and the dysfunction of the foster

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WELFARE SYSTEM DESTROYS BLACK FAMILIES (2022) (describing the harms of the removal of Black children from their families and placement in foster care).

<sup>97</sup> For an extended discussion of this justification for parental rights, see GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 94, at 175–212.

<sup>98</sup> See Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 647–50 (2002); Scott & Scott, *supra* note 94, at 2431–37.

<sup>99</sup> These costs include the financial costs of foster care and the costs inflicted by the harm of abuse and neglect. See ROBERTS, *supra* note 94, at 267–71 (explaining the destructive impact on children of the child welfare system and its high financial cost). If parents are truly inadequate, the state will be required to step in and society will bear the full cost of raising the child.

<sup>100</sup> See Scott & Scott, *supra* note 94, at 2417–18 (arguing that society has an interest in supporting parental satisfaction in their role).

<sup>101</sup> See *supra* note 95 (describing racial disproportionality in the child welfare system); ROBERTS, SHATTERED BONDS, *supra* note 94, at 16–25.

care system.<sup>102</sup> Even when parents provide suboptimal care, children are usually better off if they remain in their families and receive supportive services.<sup>103</sup>

## B. Parental Rights in the Restatement

### 1. The general approach.

The Restatement endorses the continued robust protection of parental rights, grounded in the modern Child Wellbeing rationale. Although some child advocates have argued against the strong protection of parental rights,<sup>104</sup> the Restatement follows the modern trend, emphasizing that substantial deference to parental authority is supported not only by the traditional rationale of family liberty, but also by “the goal of promoting child welfare, the limited ability of the state to intervene effectively, and the value of pluralism in our society.”<sup>105</sup> The Restatement emphasizes that deference to parental authority is justified as an important means of preserving the parent-child relationship, which is essential to protecting children’s welfare in most families.<sup>106</sup> This deference does not conflict with the state’s interest in child welfare because children are usually better off if parents have the ability to make most child-rearing decisions according to their own values and preferences. Apart from core aspects of child well-being, there is no clear consensus about what children need, and a range of diverse parenting choices likely will serve children’s interests. Further, because the costs of state intervention are so high, state preemption of parental decision-making is only justified when clearly essential needs of children, such as medical care or education, are at stake, or when the parent otherwise threatens substantial harm to the child.<sup>107</sup>

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<sup>102</sup> See ROBERTS, *supra* note 94, at 267–76 (explaining the destructive impact on children in the child welfare system).

<sup>103</sup> See *id.* For an early criticism of state removal of children, see generally Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

<sup>104</sup> See *supra* note 93.

<sup>105</sup> See generally RESTATEMENT OF THE LAW, CHILDREN AND THE LAW ch. 1 intro. note (AM. L. INST., Tentative Draft No. 1 2018) [hereinafter RESTATEMENT Draft No. 1].

<sup>106</sup> See *id.* (summarizing developmental research).

<sup>107</sup> See *id.* Moreover, the Restatement emphasizes that because the modern rationale for parental rights is based on child well-being, unlike the traditional justification, it is self-limiting; parents do not have the right to inflict harm on their children. See *id.*

In general, the Restatement implements the modern Child Wellbeing principle by restricting parental authority to make decisions regarding care, discipline, medical treatment, education, association with third parties, and other matters *only* in circumstances in which parents' decisions pose a risk of serious harm to the child.<sup>108</sup> It follows that state intervention in response to child abuse and neglect is only warranted when there is evidence that parental behavior or care poses a serious threat to the child's physical or mental health.<sup>109</sup> The Restatement's high standard incorporates the lessons of developmental science in weighing not only deficits in parental care and behavior, but also the demonstrated harm of state intervention that disrupts the parent-child relationship. It also underscores the importance of allowing diverse parenting practices, recognizing the long history of discrimination against low-income families and families of color and noting that Black families have long been overrepresented in the family regulation system.<sup>110</sup> Under the Restatement, the state's goal is to keep children in their home, assisting their parents to provide adequate care, and to avoid removal for maltreatment unless it is the only means of protecting a child from a substantial risk of serious harm.<sup>111</sup>

## 2. The Child Wellbeing framework in practice.

Two issues exemplify the Child Wellbeing framework at work in the Restatement's approach to the parent-child relationship: the parental privilege to use reasonable corporal punishment (a defense to an allegation of physical abuse) and parents' authority to make medical decisions for their children.

The Restatement's retention of the parental privilege to use reasonable corporal punishment in disciplining their children<sup>112</sup>

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<sup>108</sup> For example, parents have a duty to "ensure that their children receive a sound, basic education." RESTATEMENT Draft No. 4 § 1.20(a). Within that constraint, parents have broad authority. *See id.* § 1.20(b); *see also* RESTATEMENT Draft No. 1 § 2.30 (giving parents broad authority to make medical decisions but not to consent to treatments that pose a substantial risk of harm, and further providing that parents have the duty to provide necessary medical care).

<sup>109</sup> RESTATEMENT Draft No. 1 ch. 3 intro. note (state intervention for abuse and neglect).

<sup>110</sup> *See supra* note 95 (describing the disproportionate representation of Black and Native American families in the family regulation system).

<sup>111</sup> *See* RESTATEMENT Draft No. 4 § 2.30 (creating a state obligation to make reasonable efforts to keep a child in the care of a parent); *id.* §§ 2.40–2.44 (articulating the standards for removal).

<sup>112</sup> RESTATEMENT Draft No. 1 § 3.24. The privilege can be raised as a defense against child abuse allegations in both civil and criminal proceedings. *Id.*

may seem counterintuitive under the Child Wellbeing principle. Many child development experts point to studies showing the harm to children of harsh physical punishment and disapprove of its use altogether as a means of disciplining children.<sup>113</sup> Many parents have internalized this lesson, such that the use of corporal punishment has declined substantially in recent decades.<sup>114</sup> But although some children's rights advocates have argued for banning this form of discipline, every state retains a parental privilege to use physical punishment.<sup>115</sup>

While this alone would argue against prohibition of corporal punishment, it is not the Restatement's primary rationale for retaining the common law privilege under the Child Wellbeing principle. Instead, the Restatement's justification rests on concern that prohibiting parents from using corporal punishment would result in significantly expanded opportunities for state intervention in families in circumstances in which serious harm to children is not demonstrated.<sup>116</sup> If the privilege were abolished, the use of physical discipline by parents would constitute child abuse, and parents who use corporal punishment would be open to civil or criminal liability, and to the removal of their children to state custody. Today, corporal punishment continues to be used in some locales and by many parents in low-income families, and particularly Black families.<sup>117</sup> Thus a ban on its use would subject vulnerable families who are already the target of excessive state intervention to further intrusion and disruption.<sup>118</sup>

The privilege to use reasonable corporal punishment under the Restatement is self-limiting. It does not protect parents from state intervention or criminal punishment for inflicting harsh

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<sup>113</sup> See Diana Baumrind, Robert E. Larzelere & Philip A. Cowan, *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCH. BULL. 580, 580–82 (2002) (describing the consensus among social scientists that harsh forms of corporal punishment are detrimental to children while acknowledging a debate about “the more moderate application of normative spanking within a generally supportive parent-child relationship”).

<sup>114</sup> Rob Stein, *Spanking Young Children Declines Overall but Persists in Poorer Households*, NPR (Nov. 14, 2016), <https://perma.cc/X7MV-VA8B>.

<sup>115</sup> RESTATEMENT Draft No. 4 § 3.24 cmt. a.

<sup>116</sup> *Id.* § 3.24 cmt. c (describing the modern rationales for retaining privilege).

<sup>117</sup> PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION (2015) (available at <https://perma.cc/PY47-AVAT>) In this 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. *Id.* at 12. 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. *Id.*

<sup>118</sup> See ROBERTS, *supra* note 94, at 16–25.



punishment on their children.<sup>119</sup> But studies have not found that spanking inflicts substantial harm, and thus it can constitute reasonable corporal punishment under the Restatement rule.<sup>120</sup>

Moreover, as the comments make clear, the Restatement's position does not represent an endorsement of physical punishment of children as a form of parental discipline; instead, the Restatement favors education and other means to reduce its use.<sup>121</sup> In retaining the parental privilege, the Restatement recognizes that while limited (or "reasonable") corporal punishment may be suboptimal, any harm is far outweighed by the demonstrated harm of intrusive state intervention.<sup>122</sup>

Medical decision-making is a second example of the Child Wellbeing principle at work in regulating parental authority. Under the modern approach adopted by the Restatement, the state generally shows deference to parents' authority to make most medical decisions for their children, a position that is compatible with the Child Wellbeing framework.<sup>123</sup> However, parents are not free to make medical decisions (either to obtain or decline treatment) that pose a serious risk of harm to their children's health or, sometimes to public health.<sup>124</sup>

The rationale for broad parental authority in this context tracks the general justification for parental rights. As in other areas, parental authority to make medical decisions protects the family from disruption by an intrusive state.<sup>125</sup> The child's interest is furthered as well because parents understand their children's healthcare needs better than outsiders and most parents are motivated by love and affection to further their child's health and well-being. Further, parental cooperation is often essential to implementing medical decisions successfully; thus, overriding parental authority can be justified only if the parents' decision threatens substantial harm to the child. Finally, parental rights protect low-income families and families of color from excessive

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<sup>119</sup> RESTATEMENT Draft No. 1 § 3.24, cmts. e, g.

<sup>120</sup> See Baumrind, *supra* note 113, at 581 (detailing the scientific consensus of "spanking" as "physically non-injurious" punishment applied sparingly and only to children of an appropriate age).

<sup>121</sup> RESTATEMENT Draft No. 1 § 3.24 cmt. c ("The American Academy of Pediatrics (AAP) has concluded that 'spanking is a less effective strategy than time-out or removal of privileges for reducing undesired behavior in children.'").

<sup>122</sup> See *id.*

<sup>123</sup> RESTATEMENT Draft No. 1 § 2.30(a) cmt. a (authority to make medical decisions).

<sup>124</sup> See *id.* § 2.30(b).

<sup>125</sup> See *id.* § 2.30 cmt. a.

state intervention in this context. Thus, under the Restatement rule, the interests of the parents, the child, and the state converge because in most situations the common interest in the child's well-being will be advanced by state deference to parental authority.

But, as is true in other contexts, parental authority to make healthcare decisions under the Child Wellbeing principle is self-limited. The Restatement prohibits parents from pursuing or refusing treatment that poses a substantial risk of serious harm to their child, even when their decisions are motivated by strong religious or cultural beliefs.<sup>126</sup> And parents may be required to comply with public health regulations, for example, by vaccinating their child against communicable diseases.<sup>127</sup> Finally, in situations in which their well-being would otherwise be harmed, children are authorized to make some medical decisions without parental involvement.<sup>128</sup> Thus, in contrast to the traditional libertarian rationale, the broad authority that parents enjoy to make medical decisions today is clearly restricted to choices that do not threaten serious harm to their child.

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The Restatement's protection of strong parental rights is compatible with the traditional constitutional rationale grounded in family privacy, but also rests on a stronger modern foundation—the promotion of child well-being. It follows that robust protection of parental rights does not inherently compete with the state's interest in promoting children's welfare. Instead, by limiting state intervention in families to situations in which the child is at substantial risk of serious harm, the Restatement's approach represents a convergence of the interests of the parents, the child, and the state.

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<sup>126</sup> See RESTATEMENT Draft No. 1 § 2.30 cmt. e (discussing the restriction on parents' authority to make decisions based on religious belief). For example, a Jehovah's Witness parent lacks the authority to refuse a necessary blood transfusion.

<sup>127</sup> See *id.* § 2.30 cmt. d; see also *id.* § 2.30 stat. note. Although most states have religious exemptions from vaccination requirements, these exemptions do not apply if the refusal to vaccinate creates a serious risk to public health. *Id.* § 2.30 cmt. d.

<sup>128</sup> See *infra* text accompanying notes 158–66.

## III. CHILDREN'S RIGHTS IN A CHILD WELLBEING FRAMEWORK

## A. The Convergence of Children's Rights and Child Well-Being

In the past half century, lawmakers have conferred some autonomy rights on children, often in a seemingly piecemeal fashion.<sup>129</sup> Conventional wisdom holds that children's rights represent expressions of children's legal personhood that trump the authority of parents and the state. But this view is incomplete. The pattern of conferring some rights on minors and withholding others gains coherence when analyzed in the Child Wellbeing framework, which undergirds the Restatement's approach to children's rights.

The three features of the modern Child Wellbeing interpretive framework are evident in the granting and withholding of rights to children under modern law. First, judgments about the appropriateness of conferring or restricting rights are often based on assumptions about minors' maturity; today these judgments are informed by developmental science.<sup>130</sup> Courts increasingly draw on a substantial body of research supporting that minors can competently exercise and benefit from some rights, and also clarifying that vulnerabilities associated with youthful immaturity sometimes justify restrictions and special protections.<sup>131</sup> Second, the goal of promoting social welfare is at work in the dispersal of rights. Lawmakers likely are more inclined to grant minors a particular right if doing so enhances social welfare. For example, allowing minors to consent independently to treatment for sexually transmitted infections, substance use disorder, pregnancy prevention, and mental health services has both personal value for the minor and public health benefits.<sup>132</sup> Lawmakers recognize that minors might not pursue these treatments if they

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<sup>129</sup> Huntington & Scott, *Conceptualizing Childhood*, *supra* note 9, at 1390–94.

<sup>130</sup> For example, advocates for extending access to reproductive health and other medical treatment to minors drew on research showing minors' competence to make medical decisions. See Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595–96 (1982) (finding 14-year-olds competent to make informed medical decisions); Brief for Amicus Curiae American Psychological Association in Support of Appellees [FLIP: this title is intentional, matching source title. JM] at 36 & nn.26–27, *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (No. 85-673) (citing research in support of allowing minors to consent to abortion independently).

<sup>131</sup> Thomas Grisso's research on younger minors' poor comprehension of *Miranda* rights is often cited by courts. See RESTATEMENT Draft No. 4 § 12.21 reporters' note c (interrogation).

<sup>132</sup> See Huntington & Scott, *Conceptualizing Childhood*, *supra* note 9, at 1441–44.

were required to involve their parents, and that the failure to secure treatment can result in both personal and social costs.<sup>133</sup> Finally, although concern about racial justice has not been emphasized explicitly in the granting of rights, many rights and protections accorded to minors, particularly in the justice system context, offer particular benefits to minority youth who are disproportionately represented in this system.<sup>134</sup>

It seems uncontroversial that some legal restrictions on children can be justified on child well-being grounds. For example, younger children are not capable of driving motor vehicles or making competent medical decisions and likely would suffer harm if they were free to do so. Thus, withholding a right or privilege until an age when the child can be presumed to have the maturity to exercise it competently is assumed to promote children's welfare. Indeed, the presumed importance of maturity in the exercise of rights clarifies why autonomy rights are generally granted, either expressly or implicitly, to adolescents and not to young children.<sup>135</sup> But while this implicit ground for restriction may often promote child well-being, it does not resolve fully the question of why some rights are granted to minors and others are withheld until the minor reaches the age of majority and beyond.<sup>136</sup>

Interpretive analysis of the seemingly piecemeal pattern of rights granted to minors supports that autonomy rights are conferred in two situations. First, a right may directly enhance minors' well-being. As minors mature, they benefit from having greater autonomy, voice, freedom, and privacy than younger children enjoy. Thus, the well-being of older minors is enhanced by having the privilege to drive motor vehicles, the right of political expression in school, and the ability to make routine medical decisions when parents are absent. Second, in some settings, lawmakers have conferred rights because the traditional rights-withholding approach inflicts harm on minors as they mature.

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<sup>133</sup> See *id.*

<sup>134</sup> For example, youth of color are more vulnerable to coercion by law enforcement in interrogation, and benefit from special protections in that context. See RESTATEMENT Draft No. 4 § 12.21 cmt. b (discussing cases and research).

<sup>135</sup> Only mature minors can consent to medical decisions. See *infra* text accompanying notes 159–63. Motor vehicle licenses are granted at age 16 or 17. Minors' right to consent to reproductive health services carry an implicit minimum age as the services would seldom be needed by pre-pubescent youth.

<sup>136</sup> Compare, e.g., CAL. PENAL CODE § 307 (2021) (criminalizing the sale of alcohol to anyone below the age of 21), with MD. CODE, HEALTH–GEN § 20-102(5) (2023) (“A minor has the same capacity as an adult to consent to . . . treatment for or advice about contraception other than sterilization.”).

For example, the Supreme Court, by granting to youth in delinquency proceedings the right to an attorney and other procedural rights, recognized that the paternalistic approach of the traditional juvenile court harmed the youth it claimed to benefit.<sup>137</sup> And requiring parental consent to some sensitive healthcare services is likely to deter teenagers from getting needed treatment.<sup>138</sup>

The pattern of granting and withholding minors' rights often promotes social welfare as well as child well-being. At the start, it must be acknowledged that lawmakers are likely to withhold a right from minors if conferral carries substantial social welfare costs, even if the right might benefit minors.<sup>139</sup> But withholding some rights can be defended on both child well-being and social welfare grounds. The right to marry, for example, is fundamental for adults, but withholding this right from minors may deter unstable family formation that ultimately generates substantial social costs as well as harm to the individual young spouses.<sup>140</sup> Also, the gap between the minimum age at which a minor can get a driver's license (under age 18) and the minimum age for purchasing alcohol (age 21) reflects a policy aimed at reducing the personal and social costs of giving minors the freedom to engage in driving motor vehicles, an activity that enhances their well-being but carries substantial risks.<sup>141</sup>

## B. The Restatement's Approach to Children's Rights

The Restatement adopts the interpretive framework described above, emphasizing in comments and reporters' notes how both the rights and restrictions embodied in its rules promote child well-being. The Restatement grants rights to minors in

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<sup>137</sup> See *In re Gault*, 387 U.S. 1, 22, nn.30, 27, 29 (1967) (pointing out the harms to youth from a system ostensibly based on rehabilitation).

<sup>138</sup> For example, all fifty states allow minors to consent to treatment for venereal diseases. See, e.g., ALASKA STAT. § 25.20.025 (2022); D.C. MUN. REGS. tit. 22, § 600.7 (2021); FLA. STAT. § 384.30 (2000); TENN. CODE § 68-10-104 (2017); UTAH CODE. § 26B-7-214 (2022).

<sup>139</sup> Voting may be in this category. A minimum voting age of 16 might benefit many minors but is likely viewed as costly from a societal perspective. Katherine Silbaugh, *More Than the Vote: 16-Year-Old Voting and the Risks of Legal Adulthood*, 100 B.U. L. REV. 1689 (2020).

<sup>140</sup> The minimum age of marriage has increased in recent years. Tellingly, children's rights proponents do not advocate for this fundamental right for adults. See, e.g., Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. F. 942, 942 (2018) (making this point about the response to New York increasing the minimum age of marriage from 14 to 18).

<sup>141</sup> For a discussion of the policy of this age gap, see FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 89–96 (1981).

several contexts, both enhancing child well-being directly and responding to perceived harms inflicted on minors by the traditional paternalistic approach. Throughout, the Restatement draws on research showing that minors are able to exercise some rights competently, while in other contexts, restrictions and special protections are needed, even in adolescence, to shield minors against harms that could follow from conferring on minors some of the liberties adults enjoy.<sup>142</sup> Social welfare concerns are also at work in this pattern of rights and restrictions.

This Section focuses on students' rights in school and minors' right to make certain medical decisions. It concludes with a discussion of the infancy doctrine, which restricts minors to protect them from improvident contracting. Both rights and restrictions under the Restatement fit coherently in the Child Wellbeing framework.

1. Student rights in public schools.

This Section describes two rights of students in public schools. First, the right of free expression is an affirmative right that benefits young persons by preparing them for citizenship, and also benefits society by enhancing public discourse.<sup>143</sup> Second, the Restatement follows states that have abolished the common law privilege to use corporal punishment on children in school, thereby protecting children's right to be free of physical discipline by state actors.

The Restatement formulation of constitutional doctrine holds that public school students have a right of free expression and cannot be disciplined for the content of their speech.<sup>144</sup> However, this First Amendment right is regulated in the school context to protect the educational process in ways that would not be permitted outside of school. Thus, the Restatement provides that student speech is not protected if it causes serious disruption that undermines the operation of the school, interferes with the legal rights of others, or promotes illegal conduct that threatens the school's educational mission.<sup>145</sup> Further, curricular expression can

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<sup>142</sup> The restrictions on waiver of counsel in interrogation and in delinquency proceedings are in this category. See *supra* text accompanying notes 49–58; *supra* text accompanying notes 66–72.

<sup>143</sup> This right was first recognized in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–12 (1969).

<sup>144</sup> RESTATEMENT Draft No. 4 § 8.10(a)(1).

<sup>145</sup> *Id.* § 8.10(a)(2)–(4).

be evaluated as to whether it meets academic requirements, but it also cannot subject the student speaker to discipline.<sup>146</sup>

The right of personal expression in school exemplifies a right that offers direct benefits to children and also promotes social welfare. The Restatement formulation confers on students an essential freedom that will prepare them to participate in the political process and engage in other acts associated with citizenship. In the educational context, students can learn lessons in civility and tolerance in the exchange of ideas that will serve them well as they mature into adulthood. The benefits associated with the exercise of this right increase with maturity, and thus the scope of the right increases; thus perhaps it is not surprising that although speech rights are not formally limited by age, claims have been brought exclusively by middle school and high school students.<sup>147</sup> Finally, society potentially will also benefit from improvement in political discourse if students learn to express their ideas in the relatively sheltered school context, so long as student speech does not substantially disrupt the educational process.

Students' right of free expression is compatible with the Child Wellbeing framework in another way. Students' free expression (and Free Exercise<sup>148</sup>) rights often converge with those of parents, supporting parents' interest in inculcating their children in their political values and religious beliefs.

The Restatement in this area is constrained by constitutional doctrine developed by the Supreme Court; for this reason students' speech rights are less robust than they might be in a pure Child Wellbeing framework.<sup>149</sup> The Court has been quite (arguably, excessively) deferential to school authority, sometimes seeming to exaggerate the cost to the educational process of innocuous

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<sup>146</sup> *Id.* § 8.10(b).

<sup>147</sup> For example, in *Tinker*, the younger Tinker siblings, age 8 and 11, participated in the same anti-war demonstration at issue in the case as their 15 and 13-year-old siblings, but were not petitioners. *See Tinker*, 393 U.S. at 516 (White, J., concurring).

<sup>148</sup> There is little distinction between students' Free Exercise and free expression rights. *See* RESTATEMENT Draft No. 4 § 9.10 cmt. a (describing Free Exercise rights as largely coterminous with free expression rights).

<sup>149</sup> *See, e.g., Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (upholding the suspension of a high school student for displaying a pro-marijuana banner); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684–85 (1986) (upholding the suspension of a high school student for a speech with lewd innuendos given at an assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (upholding the censorship of material in a high school newspaper).

student speech.<sup>150</sup> Thus, the Court has occasionally authorized the stifling of student speech despite the relatively modest social benefit of doing so. In this realm, both the well-being of students and society's interest in developing citizenship skills would argue for greater speech rights than the Restatement endorses.

A very different right that public school students enjoy under the Restatement inheres in the rule prohibiting the use of force by school authorities for disciplinary purposes. Under the Restatement, the use of force by a teacher or other school official is privileged only if it is based on a reasonable belief that it is necessary to maintain order and safety; the use of force is otherwise prohibited.<sup>151</sup> This rule is a partial rejection of the common law privilege of both parents and teachers to use corporal punishment to discipline children. As discussed earlier, the Restatement does not endorse corporal punishment, but it retains a limited privilege for parents to use reasonable physical punishment. This rule protects family privacy and deters excessive state intervention, particularly in low-income families and families of color.<sup>152</sup> But no such justifications exist for the use of physical punishment by a state actor in a public school.<sup>153</sup> In this context, the potentially harmful impact of corporal punishment supports excluding this form of discipline.

The Restatement rule protecting students against the use of corporal punishment aims to promote their well-being by removing the threat of painful discipline from the educational setting. It thus fits comfortably in the Child Wellbeing framework. This protection is grounded in a body of research finding that harsh physical punishment can inflict harm on children; further, most child development experts oppose this form of punishment altogether.<sup>154</sup> No educational goals are advanced through the use of corporal punishment, and removing a source of student fear and resentment likely has educational benefits of value to both the students and society.<sup>155</sup> Moreover, the authority of school officials

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<sup>150</sup> See *Hazelwood*, 484 U.S. at 272 (suggesting that a diminished capacity for schools to foster students' moral and cultural development is the cost of unfettered student speech in publications).

<sup>151</sup> See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW (AM. L. INST., Tentative Draft No. 2 2019) [hereinafter RESTATEMENT Draft No. 2] § 8.10.

<sup>152</sup> See RESTATEMENT Draft No. 4 § 2.23.

<sup>153</sup> See RESTATEMENT Draft No. 2 § 8.10 cmt. c (distinguishing the rationales for privilege for parents from privilege for educators).

<sup>154</sup> See *id.* § 8.10 cmt. c, reporters' note c.

<sup>155</sup> See *id.*



is not undermined because they retain the privilege to use reasonable force based on the reasonable belief that it is necessary to maintain order and discipline.<sup>156</sup> Finally, the rule reduces a source of racial discrimination, as children of color have been disproportionately subject to corporal punishment in school.<sup>157</sup>

## 2. The right to make certain healthcare decisions.

The Restatement's embrace of the Child Wellbeing framework in the context of children's rights perhaps is most evident in the realm of medical decision-making. Parents have general authority to consent to medical treatment for their minor children and, for most treatments, this approach serves children's interests.<sup>158</sup> But in some situations, the requirement of parental consent threatens harm to children if, example, parents are unavailable or if needed treatment is of a sensitive nature such that the minor is deterred from disclosing it to their parents.

The Restatement adopts the common law mature minor rule, under which adolescents can give consent to routine medical treatment if their parents are unavailable.<sup>159</sup> The rule benefits mature minors by giving them access to treatment under circumstances in which physicians might otherwise be reluctant to provide the treatment, out of concern for liability in the absence of valid consent (by the parents).<sup>160</sup> Although some child advocates herald the mature minor rule as a recognition of minors' liberty interest, the child well-being rationale fits more comfortably with the rule's purpose and limits. For example, the mature minor rule does not apply to cosmetic treatments, but only to those with health benefits.<sup>161</sup> Further, minors do not have a right to refuse beneficial treatment, suggesting that its purpose is to promote beneficial treatment and not to advance the minor's liberty interest.<sup>162</sup>

Elements of the Child Wellbeing framework are evident in other features of the Restatement rule. First, contemporary research supports the assumption that adolescents are competent

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<sup>156</sup> *Id.* § 8.10.

<sup>157</sup> *Id.* § 8.10 cmt. c, reporters' note c (discussing the disproportionate use of corporal punishment on Black students).

<sup>158</sup> See *supra* text accompanying notes 123–28.

<sup>159</sup> See RESTATEMENT Draft No. 2 § 19.01.

<sup>160</sup> Medical treatment without consent is a battery. See *id.* § 19.01 reporters' note a.

<sup>161</sup> See *id.* § 19.01 cmt. c.

<sup>162</sup> *Id.* § 19.01(c) (providing that minors ordinarily lack authority to refuse beneficial treatment); see also *id.* § 19.01(c) cmt. e.

to give informed consent to basic medical decisions, thus confirming their ability to make these decisions independently.<sup>163</sup> Second, the social welfare purpose of the rule is evident in its extension to treatments that offer public health benefits, such as treatment for substance use and sexually transmitted infections. Although most states have Minors' Consent statutes authorizing minors to seek public health treatments without involving parents, the Restatement clarifies that the mature minor rule applies to these treatments if no statute exists.<sup>164</sup>

The Restatement follows states that authorize minors to make reproductive healthcare decisions regarding contraception and pregnancy care. Minors' right of access to contraceptive services, available in most states, is not justified on the basis of reproductive privacy, which is the rationale for this right in adults.<sup>165</sup> Rather, minors' right of access is justified on child well-being and social welfare grounds. Lawmakers recognize that many teens are sexually active and that avoiding both the substantial harm of pregnancy to the individual and the broader social costs of teenage pregnancy greatly benefits both minors and society.<sup>166</sup>

### 3. The infancy doctrine.

In another legal domain, the Restatement adopts the common law infancy doctrine in contract law, restricting the freedom of minors with the explicit purpose of promoting their well-being.<sup>167</sup> Allowing minors to disaffirm most contracts, this doctrine is based on the view of lawmakers that minors are vulnerable to adult overreaching and to their own poor judgment, and therefore will be tempted to enter contracts imprudently.<sup>168</sup> As the Restatement explains, research on adolescent decision-making and the response of teens to predatory commercial tactics supports both of these assumptions.<sup>169</sup> Although the rule limits minors' freedom

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<sup>163</sup> See generally Weithorn & Campbell, *supra* note 130.

<sup>164</sup> See RESTATEMENT Draft No. 2 § 19.01 cmt. g.

<sup>165</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>166</sup> See RESTATEMENT Draft No. 2 § 19.02 cmts. a, c, e, reporters' notes a, c, e (describing the physical educational, financial, and personal harms of teenage pregnancy; the importance to child well-being of avoiding pregnancy and childbirth; and the resulting harms to their children and society).

<sup>167</sup> See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 20.20 cmt. a (AM. L. INST., Tentative Draft No. 5, 2025) [hereinafter RESTATEMENT Draft No. 5].

<sup>168</sup> *Id.*

<sup>169</sup> See *id.* § 20.20 cmt. c; *id.* § 20.20 reporters' note c (discussing the developmental influences in adolescence that contribute to shortsighted decisions about contracting); *id.*

of contract by deterring adult parties from contracting with minors, its goal is to serve their interest in avoiding improvident contracts. Moreover, the interests of parents and children are generally aligned in this goal, as minors generally have no compelling need to execute most contracts without parental involvement.<sup>170</sup>

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Throughout the Restatement, the conferral and restriction of rights are explained and rationalized in developmental terms, reflecting the increased use of empirical research by courts to inform decisions on these issues.<sup>171</sup> This trend is not surprising, given that the maturity of minors is often an important consideration in the legal judgment of whether a right is likely to promote or undermine minors' well-being and whether special protections are needed. Today, the application of scientific knowledge informs a more sophisticated understanding of the capacities and vulnerabilities of children and adolescents than was available to common law courts in earlier times. Often, as in the infancy doctrine, the research reinforces the wisdom of these courts.

### CONCLUSION

The eight-year undertaking that has produced the Restatement of Children and the Law has uncovered a deep logic and coherence to legal doctrine and policy in this domain. Over more than a century, lawmakers have reimagined the benign goal of promoting the well-being of children, first enunciated in the Progressive era. The work of the Restatement demonstrates that this goal continues to be the core animating principle of legal regulation of children; but the Child Wellbeing framework strengthens the principle in three important ways: First, modern law is informed and supported by a large body of developmental science and programmatic research, which provides a sounder basis for regulation than the intuitions and assumptions of earlier lawmakers. Second, modern regulation is bolstered by an understanding that

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§ 20.20 reporters' note f (discussing the predatory practices of video game and social media companies to which minors are particularly vulnerable).

<sup>170</sup> Contracts for necessities are exempt from avoidance under the infancy doctrine, an exception that also furthers the well-being of minors. *Id.* § 20.20(e) cmt. h. This doctrine applies when minors contract for essential goods or services that parents are unwilling or unavailable to provide.

<sup>171</sup> See, e.g., *supra* notes 130–31.

the promotion of child well-being also advances social welfare. And finally, lawmakers are beginning to recognize and address the ways in which pervasive racial bias and inequality have shaped the law in this area. There is much work to be done in realizing the potential of the framework; indeed, the project of rooting out racial bias has only begun. But the Restatement itself may contribute to a sturdier foundation for regulation in the future. The Restatement offers an integrated regulatory regime in which the state, the parents, and the child share a unified interest in the child's well-being. The integration provided by the Child Wellbeing principle clarifies that Children and the Law is a coherent field of law; it is not the "law of the horse."