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SPECIAL ISSUE ARTICLE

The Restatement of the Law, Children and the Law: A blueprint for reforming the child welfare system

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Abstract

As part of the special issue on the foster care system, this essay challenges the assumption that all the children who are in foster care should be in foster care. The essay first describes the familiar—and still persuasive—argument that foster care does not serve the interests of most children and families. It then brings a new lens to bear on this argument by describing the work of the American Law Institute's *Restatement of the Law, Children and the Law*, which provides a blueprint for shrinking the child welfare system and promoting child well-being.

KEYWORDS

child welfare, child well-being, foster care

Key points for the family court community

- Challenges the assumption that the children who *are* in foster care *should* be in foster care.
- Contends that the American Law Institute's new *Restatement of the Law, Children and the Law* offers a blueprint for shrinking the child welfare system and promoting child well-being.
- Describes the *Restatement's* effort to show that most—but not all—legal regulation of children reflects “the child well-being framework,” in which lawmakers seek to promote child well-being by (1) relying on scientific research about child development and effective policy interventions, (2) recognizing that furthering child well-being usually furthers social welfare, and (3) addressing racial and economic bias and inequality. The child welfare system remains stubbornly out of step with this framework.

- Argues that bringing this child well-being framework to the child welfare system would lead to greater state investments in the family and the more widespread adoption of legal doctrines that would limit state intervention.

INTRODUCTION

In any discussion of the foster care system, it is critical to challenge the assumption that the children who *are* in foster care *should* be in foster care. Scholars and advocates have argued for decades that most children in foster care would be better off at home and that we should redirect foster care funding towards broad-based efforts to reduce child poverty.¹ And yet, despite some tinkering at the margins, we have not achieved this kind of systemic reform.²

This essay offers a new tool for shrinking the child welfare system and promoting child well-being: the American Law Institute's *Restatement of the Law, Children and the Law*.³ As I demonstrate in this essay, the child welfare system is an outlier in the regulation of children and families. Increasingly, lawmakers are adopting a modern approach to regulation that reflects what Elizabeth Scott and I have termed “the child well-being framework.”⁴ In this framework, lawmakers seek to promote child well-being by (1) relying on scientific research about child development and effective policy interventions, (2) recognizing that furthering child well-being usually furthers social welfare, and (3) addressing racial and economic bias and inequality. As the *Restatement* makes clear, much of the legal regulation of children—from policies in the juvenile justice system to doctrinal rules such as those governing contact with third parties—reflects and embraces the child well-being framework. But not all legal regulation does. The child welfare system remains seriously out of step with other reforms to the legal regulation of children, too often compromising the well-being of children. As this essay argues, although the child well-being framework may not describe the current child welfare system, it does provide a path forward.

A FAMILIAR (AND STILL PERSUASIVE) ARGUMENT

Abuse and neglect pose significant dangers to children, but the question for the child welfare system—and especially the 424,000 children in foster care and their families⁵—is whether the current approach improves child outcomes. Many scholars and advocates contend that the answer to this question is a resounding no.⁶ Meanwhile, the shift from an ongoing decline to a rapid increase of children in state care, largely because of the opioid epidemic, has made the need for reform all the more pressing.⁷

¹For two foundational examples, see MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002). For my own discussion of this issue, see Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485 (2007).

²Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 L. & CONTEMP. PROBS., 221, 226-41 (2014).

³*Children and the Law*, ALI ADVISER, <http://www.thealiadviser.org/children-law/> (describing the *Restatement* and listing the reporters, including Elizabeth Scott, Chief Reporter, and Richard Bonnie, Emily Buss, Clare Huntington, and Solangel Maldonado, Associate Reporters). This essay uses the section numbering that was in effect at the time the ALI membership approved the sections. The final version of the *Restatement* will reflect updated numbering.

⁴See Clare Huntington & Elizabeth Scott, *Conceptualizing Legal Childhood in the Twenty-first Century*, 118 MICH. L. REV. 1371 (2020).

⁵See Children's Bureau, U.S. Dept of Health & Human Servs., No. 27, *The AFCARS Report* (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>.

⁶See, e.g., Guggenheim, *supra* note 1.

⁷See *Child Welfare and Substance Use*, Office of the Assistant Sec'y for Planning & Evaluation, <https://aspe.hhs.gov/child-welfare-and-substance-use>.

There are two central concerns with the child welfare system. First, many families face significant challenges, but the child welfare system does little to address these problems proactively. Rather than supporting families before problems arise, the system prioritizes crisis-intervention.⁸ This reactive approach has deep roots: when Congress first authorized significant federal funding for the child welfare system in the early 1970s, it framed child maltreatment as a problem of bad parenting rather than acknowledging its strong correlation to poverty.⁹ This problematic framing is still firmly in place. Thus, instead of preventive efforts to address poverty and promote family functioning, most state intervention occurs only when maltreatment is suspected—responding with either late-in-the-day family preservation services or the removal of children, at substantial cost to taxpayers, child well-being, and family autonomy.¹⁰ Moreover, once children are in care, substantial evidence demonstrates that state custody does not generally improve their well-being.¹¹

The second significant problem is that Black, Native American, and Native Alaskan families are overrepresented in the child welfare system, and these children have worse outcomes once they are removed from their homes.¹² The causes of the disproportionality and disparate outcomes are disputed,¹³ and numerous factors likely play a role,¹⁴ but this reality undermines the legitimacy and fairness of state regulation in this realm.¹⁵

Over the years, advocates have achieved some positive reforms,¹⁶ but there has been little fundamental change. The child welfare system continues to operate largely as a regime of crisis intervention, and racial disproportionality and disparities are still a hallmark of the system, reflecting and reinforcing inequality for Black, Native American, and Native Alaskan families.

⁸See GUGGENHEIM, *supra* note 1, at 185; Huntington, *supra* note 1, at 1489–1505.

⁹See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15 (1984). Most low-income parents do not abuse or neglect their children, but there is substantial evidence that abuse and, especially, neglect are strongly correlated with poverty. See Andrea J. Sedlak et al., U.S. Dep't of Health & Human Servs., Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress 12 (2010) (reporting that “[c]hildren in low socioeconomic status households ... [are] more than 3 times as likely to be abused and about 7 times as likely to be neglected” as children in other socioeconomic brackets).

¹⁰See Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 440 (1996); Huntington, *supra* note 2, at 231–48.

¹¹See Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERVS. REV. 1143 (2013) (finding a higher rate of delinquency and health emergencies for children placed in foster care as compared with similarly situated children not in foster care). Class-action litigation underscores this ongoing problem. See M.D. ex rel. Stukenberg v. Abbott, 907 F.3d 237, 243, 271–88 (5th Cir. 2018) (upholding much of trial court's determination that Texas had violated the constitutional rights of the approximately 12,000 children in foster care, including by exposing them to abuse and neglect while in care; further, upholding much of a sweeping remedial order to address the systemic problems).

¹²For an overview of the racial disproportionalities in the child welfare system, see Children's Bureau, U.S. Dep't of Health & Human Servs., *Racial Disproportionality and Disparity in Child Welfare 3–5* (2016), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf, which documents the racial disproportionality index (RDI) for Black children as 1.8 and Native American and Native Alaskan children as 2.8, as compared with 0.9 for Latino children, 0.8 for white children, and 0.1 for Asian children, and describes a reduction in the RDI for Black children, “from 2.5 in 2000 to 1.8 in 2014,” but an increase for Native American and Native Alaskan children, “from 1.5 in 2000 to 2.7 in 2014.” For an overview of the racial disparities in the child welfare system, see *id.*, which shows that Native American and Native Alaskan children, as well as Black children, exit foster care and are adopted at lower rates than other racial and ethnic groups but further shows that this RDI is somewhat lower than the foster-care-entry RDI.

¹³*Id.* at 5–6 (describing the competing accounts and the evidence for each).

¹⁴See Ctr. for the Study of Soc. Policy & Annie E. Casey Found., *Disparities and Disproportionality in Child Welfare: Analysis of the Research* (2011), <http://www.aecf.org/m/resource/doc/AECF-DisparitiesAndDisproportionalityInChildWelfare-2011.pdf>; Andrea J. Sedlak et al., *Supplementary Analyses of Race Differences in Child Maltreatment Rates in the NIS-4* (2010).

¹⁵See Roberts, *supra* note 1, at 267–76. But see Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 899–923 (2009) (arguing that racial disproportionality for Black children reflects the underlying rate of child maltreatment of Black children, not racial bias, and thus the solution is to address the risk factors present in Black families rather than the child welfare system).

¹⁶For example, some child welfare funding is dedicated to family-support programs, intended to serve the wider community in an effort to strengthen families. See Promoting Safe and Stable Families Amendments of 2001, 42 U.S.C. § 629 (2018). Research shows that these efforts improve children's cognitive development and social and emotional wellbeing, and they improve parenting, although the impact on child maltreatment is not clear. See Jean I. Layzer et al., Abt Assocs. Inc., *National Evaluation of Family Support Programs: Final Report Volume A: The Meta-Analysis A3–9, A5–2, A5–8* (2001), https://www.acf.hhs.gov/sites/default/files/opro/fam_sup_vol_a.pdf. The child welfare system has also taken some small steps towards reducing racial disproportionality and disparities. See Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Maltreatment 18* (2016), <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>. For Native American and Native Alaskan children, the Indian Child Welfare Act (ICWA) provides statutory protections for families, including a higher bar for the removal of children and procedural protections to promote tribal decision making, see Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 501–17 (2017) (describing ICWA, including the historical injustices towards Native American families that led to the law, the current constitutional challenges to it, and an explanation of the legal principles establishing that “Native American” is not considered a racial category) but the foster-care entry rate of these children remains troublingly high.

A BLUEPRINT FOR ACTION: THE RESTATEMENT OF THE LAW, CHILDREN AND THE LAW

To bring clarity and coherence to the legal regulation of children, the American Law Institute launched a new project in 2015: writing the *Restatement of the Law, Children and the Law*. Still ongoing, the *Restatement* offers comprehensive coverage of the legal regulation of children, addressing legal issues facing children in families, schools, the justice system, and society.

By studying the legal regulation of children across these domains and by focusing on beneficial trends, the *Restatement* has uncovered what Elizabeth Scott and I call the child well-being framework. In this framework, the goal of legal regulation is the promotion of child well-being.¹⁷ In most areas of legal regulation, although largely not in the child welfare system, lawmakers seek to further children's well-being by paying attention to three factors. First, lawmakers increasingly rely on research about child and adolescent development as well as empirical evidence documenting the effectiveness of policy interventions. This body of knowledge makes it possible to advance child well-being with sophistication and effect. Second, lawmakers and the public have begun to recognize that policies promoting child well-being also promote social welfare, which strengthens and broadens support for contemporary regulation. Finally, lawmakers increasingly recognize the imperative of addressing racial and class inequality in the regulation of children and families.¹⁸

Identifying the core elements of the child well-being framework—reliance on scientific research, recognition of social welfare benefits, and acknowledgment of systemic racism—provides a roadmap for reforming those areas of regulation that do not conform to the framework. As the remainder of this section describes, applying the framework to reform the child welfare system requires changes to state support of families and legal doctrine.

State support to strengthen families

Beginning with the first element of the child well-being framework (reliance on research), reform efforts must focus on evidence-based policies that protect children from maltreatment. Scholars in multiple fields have established that early childhood development plays an essential foundation for future learning and growth and that a child's development during this period turns on the interaction between the child and a parent or other caregiver.¹⁹ Broad-based efforts that strengthen the parent-child relationship and address the risk factors for child abuse and neglect—including poverty, parental youth, single parenthood, domestic violence, substance abuse, and mental health—are effective at reducing the rate of maltreatment;²⁰ and more targeted programs that teach parenting skills and provide support for parents also have some success.²¹ Any strategy to prevent child abuse and neglect must be multi-faceted and draw on substantial research to guide investments.

Turning to the second element of the framework (recognition of social welfare benefits), Medicaid expansion under the Patient Protection and Affordable Care Act²² is a good example of a social welfare program that enjoys widespread support from the public, strengthens families, and can help prevent abuse and neglect. Medicaid expansion did not dramatically increase the number of children receiving healthcare because most low-income children

¹⁷See Huntington & Scott, *supra* note 4, at 1397–06.

¹⁸This framework is clearest in the broad reforms of juvenile justice regulation, which emphasizes the developmental differences of adolescents, the individual and societal benefits of rehabilitative efforts, and the importance of addressing racial bias. See *id.*

¹⁹For examples of the literature in psychology, see ERIC H. ERIKSON, *CHILDHOOD AND SOCIETY* 219–34 (reissued 1993); 1 John Bowlby, *ATTACHMENT AND LOSS* 265–349 (2d ed. 1982); URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 3–4, 21–22 (1979). For a summary of the neuroscientific literature, see Nat'l Research Council & Inst. of Med., *From Neurons to Neighborhoods: The Science of Early Childhood Development* (Jack P. Shonkoff & Deborah A. Phillips eds., 2000). For an example of the literature in economics, see Raj Chetty et al., *Childhood Environment and Gender Gaps in Adulthood*, *AM. ECON. REV.*, May 2016, at 282. And for an example of the literature in education, see Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 92, 104–05 (Greg J. Duncan & Richard J. Murnane eds., 2011).

²⁰See Child Welfare Info. Gateway, *Child Maltreatment Prevention: Past, Present, and Future* 5–11 (2017), https://www.childwelfare.gov/pubPDFs/cm_prevention.pdf.

²¹*Id.* at 6–8; see also Michael S. Wald, *Beyond Child Protection: Helping All Families Provide Adequate Parenting*, in *IMPROVING THE ODDS FOR AMERICA'S CHILDREN: FUTURE DIRECTIONS IN POLICY AND PRACTICE* 138–46 (Kathleen McCartney et al. eds., 2014) (describing the importance—and challenges—of improving parenting as a strategy to prevent child abuse and particularly neglect).

²²Pub. L. No. 111–148, 124 Stat. 119 (2010).

were already covered.²³ But the expansion does benefit children and promote their well-being by supporting parents. Research demonstrates that Medicaid expansion improves parental access to mental health services and substance abuse treatment, two conditions linked to child abuse and neglect as well as poor family functioning generally.²⁴ Further, Medicaid expansion has improved the finances of low-income families,²⁵ increased employment rates,²⁶ and promoted housing stability,²⁷ all of which benefit children. Medicaid expansion has been shown to be cost-effective, increasing public support.²⁸ Despite initial resistance in politically conservative states, all but 12 states have now expanded Medicaid, including several states adopting the expansion through ballot initiatives.²⁹

The final prong of the child well-being framework (racial and economic inequality) is the most unrealized. Lawmakers largely are not combatting the structural inequalities that influence child outcomes,³⁰ and yet doing so is critical for reducing racial disproportionality and disparities in the child welfare system. This is an area where much work remains to be done.

Legal doctrine

The *Restatement* captures and explains doctrinal trends that can help keep children out of foster care. Most fundamentally, the *Restatement* recognizes the pivotal role of parental rights, which are rooted in the Constitution and form a bulwark against unnecessary state intervention.³¹ As the *Restatement* clarifies, parental rights limit state involvement to circumstances where parents pose a serious threat to a child's physical or mental health. State intervention is not authorized absent this heightened level of harm. This relatively high threshold recognizes that although abuse and neglect clearly harm children, state intervention can also harm families and children. Further, the *Restatement* is built on the understanding that the state's goal is to assist parents to provide adequate care to their children, not to remove children from their homes if other assistance suffices. Keeping families together is usually in a child's best interests, and the means of state intervention should safeguard family integrity when possible.

The *Restatement* furthers these goals in numerous ways. Most fundamentally, it adopts black-letter rules that limit state intervention and safeguard family integrity, as illustrated by two examples.

Physical neglect

Physical neglect is the most common basis for state intervention through the child welfare system,³² and thus its legal definition can have far-reaching consequences. The *Restatement's* definition clarifies that state intervention is

²³See Health Insurance Coverage of Children 0-18, Kaiser Fam. <https://www.kff.org/other/state-indicator/children-0-18>.

²⁴See Child Welfare Info. Gateway, *supra* note 22, at 5-11.

²⁵See Jesse Cross-Call, Medicaid Expansion Continues to Benefit State Budgets, Contrary to Critics' Claims, Ctr. on Budget & Pol'y Priorities (Oct. 9, 2018), <https://www.cbpp.org/health/medicaid-expansion-continues-to-benefit-state-budgets-contrary-to-critics-claims>.

²⁶See Ohio Dep't of Medicaid, 2018 Ohio Medicaid Group VIII Assessment: A Follow-Up to the 2016 Ohio Medicaid Group VIII Assessment (2018), <http://medicaid.ohio.gov/Portals/0/Resources/Reports/Annual/Group-VIII-Final-Report.pdf>; Kara Gavin, Medicaid Expansion Helped Enrollees Do Better at Work or in Job Searches, MHealth Lab (June 27, 2017, 10:20 AM), <https://lablog.uofmhealth.org/industry-dx/medicaid-expansion-helped-enrollees-do-better-at-work-or-job-searches>.

²⁷See Emily A. Gallagher et al., The Effect of Health Insurance on Home Payment Delinquency: Evidence from ACA Marketplace Subsidies, 172 J. Pub. Econ. 67 (2019).

²⁸See Cross-Call, *supra* note 25; see also Hefei Wen et al., The Effect of Medicaid Expansion on Crime Reduction: Evidence from HIFA-Waiver Expansions, 154 J. Pub. Econ. 67 (2017); Jacob Vogler, Access to Health Care and Criminal Behavior: Short-Run Evidence from the ACA Medicaid Expansions (unpublished manuscript) (Nov. 14, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042267.

²⁹See Status of State Action on the Medicaid Expansion Decision, Kaiser Fam. <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicicaid-under-the-affordable-care-act>.

³⁰See NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 9–50 (2018) (describing this failure).

³¹See RESTATEMENT OF THE LAW – CHILDREN AND THE LAW part I, ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018).

³²See Children's Bureau, U.S. Dep't of Health & Human Servs., No. 27, The AFCARS Report 2 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> (noting that of the children currently in foster care, physical neglect was a reason for removal for 63% of the children, as compared with physical abuse, which was a reason for 13% of the children).

not authorized if a parent is minimally competent, meaning the parent is able to meet the basic health and safety needs of the child.³³ As the *Restatement* commentary explains,³⁴ the definition of physical neglect balances the twin goals of protecting children from harm while respecting family integrity. The state can intervene only when a parent's conduct results in serious harm or a substantial risk of serious harm to the child. State intervention is not warranted when a parent's care is merely suboptimal or does not conform to mainstream parenting practices. The definition thus recognizes that state intervention imposes its own costs on children and families. The definition also respects diverse parenting choices and practices, which is particularly important because of the history of discrimination against racial, ethnic, and religious minority parents in the United States. And by limiting state intervention to a relatively narrow set of cases, the definition reinforces the goal of keeping children in their homes, if this can be accomplished without substantial risk to the child.

The *Restatement* also recognizes the danger of a far-reaching definition of physical neglect. Unlike the category of physical abuse, which addresses a relatively circumscribed set of parental behaviors, the category of physical neglect potentially covers a wide range of parental behavior. The *Restatement* thus limits the definition to those children who have suffered serious physical harm or are at substantial risk of serious physical harm because of a parent's failure to exercise a minimum degree of care.

Finally, the *Restatement's* definition recognizes that when a parent lacks financial means, it is difficult to provide adequately for the basic needs of a child. One goal of the definition of neglect is to differentiate a parent who, with social-welfare support from the state, would exercise a minimum degree of care, from a parent who, even with financial support, fails to meet the minimum standard of care. Accordingly, the definition notes that courts should consider a parent's conduct but also a parent's financial resources, defining physical neglect to include:

- (1) [the] failure to provide adequate food, clothing, or shelter, taking into consideration the financial resources of the parent, guardian, or custodian;
- (2) [the] failure to provide adequate supervision, taking into consideration relevant factors, including, but not limited to, the child's age, maturity, and physical condition, the length of the caregiver's absence, and the location and potential dangers where the child is left unsupervised; *further taking into consideration the financial resources of the parent, guardian, or custodian.*³⁵

In all these ways, the *Restatement's* definition of physical neglect helps further child well-being and shrink the footprint of the child welfare system. To the extent states have not adopted or are not applying this narrow and demanding definition of physical neglect, the *Restatement* shows the importance of doing so.

Corporal punishment

Corporal punishment—which is one way that families become involved in the child welfare system—is another example of how the *Restatement* can help steer the child welfare system in a more beneficial direction. The law has long recognized a parental privilege to use reasonable corporal punishment as a form of discipline.³⁶ Eschewing the historical justification for the privilege (that it benefits children to be “corrected”³⁷), the *Restatement* instead justifies

³³See RESTATEMENT OF THE LAW – CHILDREN AND THE LAW, § 2.24(b) (“In a civil child-protection proceeding, a child is physically neglected when the child suffers serious physical harm or is exposed to a substantial risk of serious physical harm as a result of the failure of a parent, guardian, or custodian to exercise a minimum degree of care in providing for the physical needs of a child.”).

³⁴*Id.* § 2.24, cmt. a.

³⁵*Id.* § 2.24(b) (emphases added).

³⁶See 1 WILLIAM BLACKSTONE, COMMENTARIES *440 (“[A parent] may lawfully correct his child, being underage, in a reasonable manner; for this is for the benefit of his education.” (footnote omitted)).

³⁷*Id.*

the privilege as a critical constraint on state intervention.³⁸ Without the privilege, the state could initiate either a criminal prosecution or a child protection petition whenever a parent used physical punishment, bringing the full force of the state to bear on the family and potentially resulting in the incarceration of the parent or the placement of the child in foster care—both serious disruptions to the core parent–child relationship. The privilege thus promotes the child’s interest in the stability of the parent–child relationship and shields the child from the risks that accompany unnecessary state intervention. By contrast, abolishing the privilege would greatly expand state power, posing a threat to all families but particularly those who are already subject to excessive state intervention.³⁹

Further, the Restatement privileges only “reasonable” corporal punishment. By drawing the line at reasonableness, the privilege protects children from harsh forms of corporal punishment that constitute physical abuse *as well as* the harms of unnecessary state intervention. This definition also allows the law to evolve, likely privileging less and less conduct over time.

Finally, maintaining the privilege does not represent an endorsement of corporal punishment. The state can deploy non-coercive methods to promote a no-hitting norm, such as public education programs and parenting programs that teach parents alternative methods of discipline. The definition simply highlights the risks of prohibiting corporal punishment through coercive intervention.

CONCLUSION

The new *Restatement of the Law, Children and the Law* demonstrates that a child well-being framework guides much—although not all—legal regulation of children. The framework, with its reliance on scientific research, social welfare benefits, and a commitment to addressing racial and economic inequality, is a useful tool for assessing and reforming the child welfare system. Drawing on the framework can help bring the child welfare system in line with other areas of legal regulation and better serve the interests of children and families.

ACKNOWLEDGMENTS

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³⁸The *Restatement* sets forth the modern privilege: In the criminal context, a parent’s use of corporal punishment is not privileged if the punishment inflicts (or creates a substantial risk of inflicting) “serious physical harm or gross degradation” for the child. See RESTATEMENT OF THE LAW – CHILDREN AND THE LAW § 3.24(a) (AM. L. INST. Tentative Draft No. 1, 2018). In the child-protection context, a parent’s use of corporal punishment is not privileged if the punishment inflicts (or creates a substantial risk of inflicting) “physical harm beyond minor pain or transient marks.” See *Id.* § 3.24(b); § 3.24 cmt. c.

³⁹Parental use of physical discipline is declining, but some parents, particularly in low-income families and families of color, still turn to some forms of corporal punishment to discipline children. See PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 12, 45–46 (2015), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf (discussing parent survey responses on using spanking). In light of this disproportionate use of corporal punishment, particularly by Black parents, the danger of intervention is particularly acute for families already at greater risk of family disruption through both the criminal justice and child welfare systems.

Court of the United States, Judge Merrick B. Garland of the United States Court of Appeals for the District of Columbia Circuit, and Judge Denise Cote of the United States District Court of the Southern District of New York. Prior to joining the Fordham faculty in 2011, Professor Huntington was an Associate Professor at the University of Colorado Law School. Professor Huntington earned her JD from Columbia Law School and her BA from Oberlin College.

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