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THE ENDURING IMPORTANCE OF PARENTAL RIGHTS

Clare Huntington* & Elizabeth Scott**

INTRODUCTION

Parental rights are—and should remain—the backbone of family law. State deference to parents is warranted not because parents are infallible, nor because parents own their children, but rather because parental rights, properly understood and limited, promote child wellbeing.¹ This is true for several reasons, but two stand out. First, parental rights promote the stability of the parent-child relationship by restricting the state’s authority to intervene in families. This protection promotes healthy child development for all children, and it is especially important for low-income families and families of color, who are subject to intensive state scrutiny.² Second, parental rights ensure that parents, rather than a private third party or state actor such as a judge or social worker, make decisions about what advances a child’s interests. The legal system defers to parents’ decisions both because parents are well positioned to know what an individual child needs, and because state intervention to vindicate the decision-making power of a nonparent would expose the child to significant risks of family disruption and contentious litigation.³

There are clear limits to parental rights, however, and the child-wellbeing rationale for these rights, which we describe in this Essay, provides a self-limiting principle. Unlike the traditional libertarian justification for parental rights,⁴ the child-wellbeing rationale centers the interests of

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1. This Essay draws on a previous article: Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020). As we note in that article, numerous scholars have advanced a child-wellbeing rationale for parental rights. For an early formulation of this argument, see generally JOSEPH GOLDSTEIN ET AL., *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); Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v Granville*, 2000 SUP. CT. REV. 279, 285–90.

2. See *infra* notes 30, 34–36 and accompanying text.

3. See *infra* notes 28, 33 and accompanying text.

4. See *infra* notes 14–16.

children. When a parent's conduct poses a significant risk to a child, the state may intervene, even when the parent's actions are based on religious beliefs.⁵ And when there is broad societal consensus about what children need—such as education and health care—the state properly preempts parental authority, requiring all parents to send their children to school and to obtain necessary medical care.⁶ But in many other instances, especially where there is no societal consensus, the law properly defers to parental judgments, at least for young children.⁷ (As we explain in this Essay, adolescents do and should have more autonomy over some matters.)⁸ This deference to parents is especially important for marginalized families because the judgments of other parties may reflect bias and dominant parenting norms.⁹

Some scholars contend that to promote children's interests, the legal system should limit—rather than reinforce—parental rights.¹⁰ We share these scholars' commitment to the goal of promoting child and family wellbeing, but we are concerned about their proposed means. Perhaps most critically, these scholars underestimate the risk of displacing parental judgment. Given the inability of young children to make consequential decisions for themselves, the law can either defer to a parent's decision or substitute parental judgment with that of judges, social workers, and other government actors who are strangers to the child.¹¹ There is no reason to believe these actors are better positioned to make decisions, and the process of supplanting the parent can inflict harm on the parent-child relationship. Alternatively, these scholars argue, the state could expand the role of third parties in some circumstances. Third parties may know the child better than government actors, but the process of enforcing third parties' judgments over the decisions of parents can also inflict harm on the child and still requires government actors, such as judges, to determine who is better positioned to make decisions for the child. In short, in our view, weakening parental rights would create substantial disruption in families and harm children, especially children in communities of color, who already experience heavy-handed intrusion by the state.¹²

In this Essay, we demonstrate the enduring importance of parental rights, building on previous scholarship as well as our work drafting the American Law Institute's *Restatement of the Law, Children and the Law*.¹³ In Part I, we explain why parental rights promote child wellbeing and thus should

5. See *infra* note 46.

6. See *infra* note 64.

7. See generally Huntington & Scott, *supra* note 1.

8. See *infra* note 55.

9. See *infra* notes 34–37.

10. See *infra* Part II.

11. See *infra* note 65.

12. See *infra* notes 72–74.

13. See *supra* note 1; *Children and the Law*, ALI ADVISER, <http://www.thealiadviser.org/children-law/> [https://perma.cc/SV8F-BZBN] (last visited Apr. 2, 2022) (describing the Restatement and listing the Associate Reporters, including Elizabeth Scott, Chief Reporter, and Richard Bonnie, Emily Buss, Clare Huntington, and Solangel Maldonado).

remain at the core of the legal regulation of families. In Part II, we describe and critique the proposals to de-center parental rights, arguing that the proposed alternatives to parental rights will not further the interests of children. We also provide examples that illustrate the importance—and self-limiting nature—of parental rights.

I. THE AFFIRMATIVE CASE FOR PARENTAL RIGHTS

The doctrine of parental rights is rooted in two iconic cases from the 1920s in which the U.S. Supreme Court held that the Fourteenth Amendment protects parents' authority to make decisions about their children's education.¹⁴ The Court rationalized this right in terms of individual liberty: citizens' freedom from excessive state intrusion in their private lives.¹⁵ The Court reasoned that this state deference to parental decision-making safeguards pluralism because numerous and competing visions of appropriate child-rearing coexist in our diverse society and many approaches are rooted in religious beliefs and cultural, social, and political values.¹⁶ The Court did not explicitly endorse the position that parents "owned" their children, but scholars have offered substantial evidence that this assumption shaped the justices' views.¹⁷ But parental rights were not absolute; the Court noted that parents also had the responsibility to care for their children and raise them to adulthood,¹⁸ and the Court later clarified that the state could intervene in families if parents failed to fulfill their obligations or if their conduct seriously harmed children.¹⁹

Modern regulation of families reflects a new justification for strong parental rights: they promote child wellbeing. This rationale for parental rights is reflected in the American Law Institute's *Restatement of the Law, Children and the Law*.²⁰ This project, started in 2015 and still ongoing, has uncovered an emerging but coherent framework that shapes and integrates doctrine across the broad domain of legal regulation of children: in families, in the juvenile justice system, in schools, and as emerging adults. The

14. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

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

16. *Pierce*, 268 U.S. at 535 (stating that it is not for "the State to standardize its children" because "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").

17. See, e.g., Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1041–50 (1992).

18. *Pierce*, 268 U.S. at 535.

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

20. See *supra* note 13.

Restatement clarifies that the core principle and goal of modern regulation is the promotion of child wellbeing.²¹

Several features distinguish what we call the “Child Wellbeing framework” of legal regulation.²² To begin, legal rules and policies are increasingly informed by psychological and biological research on child and adolescent development, as well as growing empirical evidence about the effectiveness of policy interventions.²³ This broad body of knowledge makes it possible to advance child wellbeing with greater confidence, sophistication, and effect than in the past. Further, lawmakers and the public increasingly recognize that advancing child wellbeing benefits society, leading to greater support for contemporary policies.²⁴ Although the United States trails far behind other wealthy countries in assisting families,²⁵ there is a growing understanding that investments in children and families can be cost-effective and are necessary.²⁶ And finally, the relatively recent acknowledgment of structural inequality has led to tentative steps toward addressing these inequities, even if these efforts are still at an early stage.²⁷

These elements of the child-wellbeing framework—reliance on science, recognition of social welfare benefits, and a commitment to addressing structural inequality—help explain and justify the continued vitality of parental rights, pointing to three important reasons why parental rights usually promote child wellbeing.

First, deference to parental authority protects the stability of the parent-child relationship. A large body of research demonstrates that a strong, stable parent-child relationship is critical for healthy child development, and the disruption and destabilization of this relationship threatens serious harm to the child.²⁸ A regime of robust parental rights restricts state intervention in the family and thus reduces the child’s exposure to the accompanying risks of such intervention—particularly removal of the

21. See Huntington & Scott, *supra* note 1, at 1374–79.

22. See *id.* at 1374. These dimensions of the child-wellbeing framework are most evident in the broad reforms of juvenile justice regulation. See *id.* at 1386–406. But they are also apparent in the allocation of parental rights and the recognition of children’s rights. See *id.* at 1413–18, 1431–39.

23. See *id.* at 1374–76.

24. See *id.*

25. See generally MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2020).

26. For a discussion of Medicaid expansion, see Huntington & Scott, *supra* note 1, at 1408–09. For a discussion of the widespread adoption of universal prekindergarten, including in red states, see Clare Huntington, *Early Childhood Development and the Replication of Poverty*, in *HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY* 130 (Ezra Rosser ed., 2019).

27. This is the most underrealized element of the child-wellbeing framework. We do not want to overstate the progress, but there is at least growing recognition of the problem. See Huntington & Scott, *supra* note 1, at 1404–06, 1411 (discussing this acknowledgement in the juvenile justice and child welfare systems).

28. For several of the foundational texts, see ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 219–34 (rev. ed. 1993) (1950); 1 JOHN BOWLBY, *ATTACHMENT AND LOSS: ATTACHMENT* 265–349 (2d ed. 1982); URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 3–4, 21–22 (1979).

child from the home.²⁹ Protection from state intervention is especially important for children of color in light of racial disproportionality and disparities in the child welfare system.³⁰

Second, deference to parental decision-making promotes child wellbeing because, as compared with state actors or third parties granted decision-making authority by the state, parents are generally better positioned to understand a child's needs and make decisions that will further that child's interests.³¹ (Older children and especially older adolescents can begin to make decisions for themselves, but younger children cannot, and thus a surrogate decision-maker will be required.)³² This advantage is rooted in the parent's superior knowledge of, and association with, the child as compared with outsiders to the family. And even if parents and nonparents were equally proficient at decision-making, state intervention to vindicate the decision-making authority of nonparents can be harmful to children, undermining family stability and exposing children to litigation.³³

This leads to the third important reason that parental rights remain critical in the twenty-first century: robust parental rights are necessary to protect low-income families of color against an intrusive state.³⁴ To be sure, the protection offered is modest. Families of color and low-income families tend to be subject to far more state intervention today than other families,³⁵ and state actors are more likely to override these parents' child-rearing decisions, often based on views of child wellbeing infused with middle-class biases.³⁶ In response, critics may argue that parental rights do little to protect these families from an aggressive state. But it is important to recognize that any weakening of parental rights would necessarily expand state authority to intervene disruptively, undermining the stability of these families and threatening substantial harm to the wellbeing of children.³⁷

The child-wellbeing framework is not premised on the assumption that parents always, or even usually, make optimal decisions for their children.³⁸ Indeed, the framework acknowledges that often it is difficult or impossible to determine which decision among competing options will promote child

29. See generally Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061 (2015).

30. See CHILD WELFARE INFO. GATEWAY, U.S. CHILD'S BUREAU, BULLETINS FOR PROFESSIONALS: CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [<https://perma.cc/9ASV-SJS7>].

31. See, e.g., Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 947 (2018); Buss, *supra* note 1, at 285–90.

32. See Huntington & Scott, *supra* note 1, at 1415.

33. See *id.* at 1415–17.

34. See Bach, *supra* note 29, at 1072–76.

35. See ROBERTS, *supra* note 1; see, e.g., Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEM. 317, 340–66 (2014) (discussing drug testing of pregnant women and the disproportionate impact of such testing on Black women).

36. See Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. BALT. L. REV. 371, 376–87 (2010).

37. See Huntington & Scott, *supra* note 1, at 1415–16.

38. See *id.* at 1415–17.

wellbeing.³⁹ In part, this is because in many contexts, the choice that promotes child wellbeing will be contested or uncertain, with different views based on divergent values and underlying biases.⁴⁰ And developmental science often will not provide clear answers. For example, some parents and experts advocate so-called “free-range parenting,” in which a child is given considerable independence in daily activities, such as walking to school on their own from a young age.⁴¹ By contrast, other parents keep a close watch on their children, and “intensive parenting” is common in many communities today.⁴² Neither position is obviously correct as a developmental matter, and the approach will depend on the context of the individual child and the setting, as well as the preferences of individual parents. With parenting methods and so many other decisions about child-rearing, there often is no “right” decision. Parental rights thus reflect the law’s humility about child-rearing. Absent a clear, evidence-based consensus on children’s needs, the law allows parents to determine how to raise a child. And this deference promotes child wellbeing by shielding the family from the intrusive and disruptive state intervention that would accompany an effort to override parental judgment.

A final point supporting parental rights in the modern era is critically important. Unlike the libertarian justification for parental rights, the child-wellbeing rationale provides a self-limiting mechanism.⁴³ When clear societal consensus exists, based on sound evidence about children’s needs (basic education and health care, for example), the state can override the wishes of individual parents.⁴⁴ Similarly, when a parent’s conduct threatens serious harm to a child, as with child abuse or neglect, the state can intervene in the family.⁴⁵ This state authority exists even if the parent’s decision is motivated by deeply held values or religious beliefs.⁴⁶ The child-wellbeing rationale thus provides a built-in mechanism for limiting parental authority.

39. *See id.* at 1415, 1453–54.

40. *See id.* at 1453–54.

41. *See* Emine Saner, ‘Let Them Be Kids!’ Is ‘Free-Range’ Parenting the Key to Healthier, Happier Children?, *GUARDIAN* (Aug. 16, 2021, 5:00 AM), <https://www.theguardian.com/lifeandstyle/2021/aug/16/let-them-be-kids-is-free-range-parenting-the-key-to-healthier-happier-children> [https://perma.cc/7K7T-VGB8].

42. For a discussion of the dominance of intensive parenting today, in contrast to earlier generations, and the growing pushback by supporters of free-range parenting, see Claire Cain Miller, *The Relentlessness of Modern Parenting*, *N.Y. TIMES* (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/upshot/the-relentlessness-of-modern-parenting.html> [https://perma.cc/NHV5-V33K]. Some parents who favor giving their children more freedom by allowing them to walk home alone from the park have even been investigated by child protective services. *See* Donna St. George, *Parents Investigated for Neglect After Letting Kids Walk Home Alone*, *WASH. POST* (Jan. 14, 2015), https://www.washingtonpost.com/local/education/maryland-couple-want-free-range-kids-but-not-all-do/2015/01/14/d406c0be-9c0f-11e4-bcfb-059ec7a93ddc_story.html [https://perma.cc/C3HR-RTZG].

43. *See* Huntington & Scott, *supra* note 1, at 1414.

44. *See id.* at 1453–54.

45. *See id.*

46. *See id.* at 1418, 1422, 1427–30.

II. THE RISKS OF WEAKENING PARENTAL RIGHTS

Children's rights advocates have long argued against strong parental rights.⁴⁷ A recent, sustained version of this argument comes from Professors Anne Dailey and Laura Rosenbury, who have made important contributions to the debate about parental rights and children's interests, challenging the law's assumption that children's interests are aligned with those of their parents.⁴⁸ Dailey and Rosenbury contend both that parents often make decisions for reasons that are not beneficial to their children and that the parent-child relationship should be de-centered so that children's independent interests can be recognized fully.⁴⁹ In their view, the law's deference to family privacy and parental control harms children, allowing parents to restrict relationships with peers and other adults, as well as engagement with the broader community.⁵⁰

This Essay challenges Dailey and Rosenbury's proposal to limit parental rights, but before turning to our concerns, we emphasize our numerous points of agreement. Most fundamentally, we share their aim of promoting the wellbeing of children and are grateful for their careful consideration of how to achieve this goal, even though we disagree about effective means. We agree with these scholars that it is beneficial for children to have a broad range of experiences and relationships.⁵¹ We thus are fully supportive of state efforts and policies that offer expanded opportunities for children to engage with their communities.⁵² We also applaud their advocacy for policies that increase state support for low-income families. Indeed, we believe that the most effective means by which the government can promote

47. See, e.g., James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1426–39 (1994).

48. See generally Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75 (2021) [hereinafter Dailey & Rosenbury, *New Parental Rights*]; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018) [hereinafter Dailey & Rosenbury, *New Law of the Child*].

49. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 110 (explaining how their “model . . . brings children out from under the cover of parent-child unity in order to reveal children's agency within dependency, their diverse interests, and their ties to broader communities”); Dailey & Rosenbury, *New Law of the Child*, *supra* note 48, at 1451–53, 1470–72.

50. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 78–80, 96–101, 106–110 (describing how parental rights impede children's other relationships and confine them to the private sphere, impeding community engagement); Dailey & Rosenbury, *New Law of the Child*, *supra* note 48, at 1470–72.

51. See *id.* at 80; Dailey & Rosenbury, *New Law of the Child*, *supra* note 48, at 1470–72, 1484–96.

52. Through spending and other forms of regulation, the state can accomplish much of what Dailey and Rosenbury seek. See, e.g., CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW THE LAW UNDERMINES FAMILY RELATIONSHIPS* (2014). For example, to help communities play a larger role in family life, the state can and should invest in community building with parks, government-funded activities, and so on. This would help expose a child to different worlds. And there are many ways the state can encourage certain kinds of parenting, again often through funding. The “Triple P” parenting program has a strong evidentiary basis and accomplishes much of what Dailey and Rosenbury seek. For a discussion of this program and its many documented benefits, see Ronald J. Prinz, *A Population Approach to Parenting Support and Prevention: The Triple P System*, FUTURE CHILDREN, Spring 2019, at 123.

child wellbeing is to devote substantial resources to assisting low-income parents in fulfilling their child-rearing role.⁵³ Further, we agree that it is especially important to defer to parents of young children, who cannot make decisions on their own,⁵⁴ but also that adolescents should have increased decision-making autonomy.⁵⁵ Finally, we agree that it is critical to apply a strict standard of review when the state aims to separate children from parents.⁵⁶

Where we part company with Dailey and Rosenbury is in the choice of means employed to achieve these shared goals. Our central concern about their model is the prominent role of coercive state intervention. To promote a child's relationships with others and exposure to a broad range of ideas, Dailey and Rosenbury's model gives the state and third parties broad authority to intervene in the family, making decisions that override the judgment of parents when a government actor or third party determines that such intervention is necessary to promote children's independent best interest.⁵⁷ They contend that when separation is not the purpose of state

53. See generally HUNTINGTON, *supra* note 52; EICHNER, *supra* note 25.

54. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 111 (“[D]eference to parents is often the best way to help children, particularly young children, flourish . . .”).

55. As we have elaborated elsewhere, the law properly allows adolescents to have increasing authority over their lives as they get older. See Huntington & Scott, *supra* note 1, at 1439–48. This is reflected in rules governing access to reproductive health care, including abortion, as well as the mature minor doctrine regulating consent to other medical decisions. See RESTATEMENT OF CHILD. & THE L. § 19.01 (AM. L. INST., Tentative Draft No. 2, 2019); *id.* § 19.02. It is also embodied in the expanding protection of free speech rights as minors mature. See Huntington & Scott, *supra* note 1, at 1444. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Tinker children asserting their First Amendment rights to protest the Vietnam War were aged thirteen, fifteen, and sixteen. *Id.* at 504. Younger Tinker children, aged eight and eleven, participated in the protest, but they were not petitioners. Huntington & Scott, *supra* note 1, at 1444 n.398. The critical difference for adolescent decision-making is that shifting decision-making authority from parents to adolescents does not present the same concerns as shifting this authority from parents to the state. See *id.* at 1415.

56. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 111 (“Our model thus clarifies that any governmental action that threatens to separate parents and children must be subject to the strictest judicial scrutiny given children’s overriding interest in maintaining the parent-child relationship.”). This is an important change to Dailey and Rosenbury’s earlier article. Dailey and Rosenbury now unequivocally state their support for a strict standard of review governing state intervention that would separate parents from children, and they have developed a sliding scale for deferring to parents based on the child’s age. See *id.* This begins to address the criticism that we and others raised against their initial model: that it did not sufficiently protect against the separation of parents and children, nor did it account for the limited decision-making capacity of very young children. See Huntington & Scott, *supra* note 1, at 1415; Guggenheim, *supra* note 31, at 947–51.

57. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 111–15 (advocating lowering the standard of review for intervention unless separation of children from family is the purpose); *id.* at 115 (“When state involvement does not aim at family separation but rather seeks to support the interests of children or families, then courts and legislatures should allow more room for fostering children’s independent interests. In these contexts, the state should be required to show that its intervention substantially furthers children’s interests.”); see also Dailey & Rosenbury, *New Law of the Child*, *supra* note 48, at 1471–72, 1510 (proposing to limit parental rights for all but very young children by “situating the parent-child relationship within a larger web of children’s relationships and interests” and weighing more heavily

intervention, parental rights generally should not function to limit state authority to intervene to further an independent interest of children.⁵⁸ Their proposal thus embraces a regime in which state decision-makers and third parties can contest and override parents' decisions on a broad range of issues, mandating participation in activities or association with particular peers or adults deemed beneficial and in the child's best interest.⁵⁹ In contrast, our view is that the effort to expand opportunities for children should not take the form of coercive state intervention in the lives of individual families, absent clear harm to the child. And for this reason, we resist the proposed limitation of parental rights.

To advance scholarly debate about this important issue, we offer four reasons why we disagree with Dailey and Rosenbury's proposal to limit parental rights.

First, children will not benefit from a diminution of parental rights because overriding parental judgment through coercive state intervention poses serious risks to children, threatening to disrupt the stability of the parent-child relationship and to create family stress. Such disruption is justified when the wellbeing of a child is gravely implicated, but otherwise, the costs of intervention seem likely to far outweigh the benefits, even in those cases in which the nonparent's judgment may be correct.⁶⁰

To illustrate this point, imagine a parent deciding that a child should not participate in an after-school LGBTQIA+ club. A relative, say an uncle, believes the after-school activity would broaden the horizons of the child. The uncle may well be correct that the child would benefit from participation in the club, but the law cannot vindicate the uncle's view without inviting costly confrontation and ultimately disruptive litigation. Such disruption is justified when a parent's decision poses a substantial risk of serious harm to a child,⁶¹ but empowering the state to enforce exposure to other ideas through coercive intervention is deeply troubling.

Similarly, when a child has a significant relationship with a third party, it may well be beneficial to the child to continue that relationship. But if a

"children's interests in maintaining close ties to other children and adults, in being exposed to new ideas, in expressing their identity, in protecting their personal integrity and privacy, and in participating in civic life").

58. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 112–15; discussion *infra* note 57.

59. In their most recent article, Dailey and Rosenbury contend that decisions about children will not necessarily be made by the state, Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 80, but ultimately, this is the only way to implement their model. If a parent resists the influence of a third party, then legal enforcement is the only means for vindicating the third party's preferences.

60. See Huntington & Scott, *supra* note 1, at 1415.

61. If the minor were seeking medical treatment for a sexually transmitted disease under a state minor consent statute, for example, and the parent tried to interfere, state intervention would be justified. See RESTATEMENT OF CHILD. & THE L. § 19.02 cmt. b (AM. L. INST., Tentative Draft No. 2, 2019) (describing minor's authority to consent to treatment for sexually transmitted diseases); RESTATEMENT OF CHILD. & THE L. § 2.30(2)(a) (AM. L. INST., Tentative Draft No. 1, 2018) (providing that a parent has the responsibility to provide necessary medical care).

parent objects, many states impose a high threshold for imposing third-party contact over a parent's wishes, requiring the third party to show that depriving the child of the relationship poses serious harm.⁶² This rule offers the best balance between shielding the family from intrusive and harmful intervention and protecting a relationship that is truly important to the child's wellbeing. If it is not clear that the parent's decision will cause serious harm to the child, then the harm of state intervention trumps any rationale for intervention. This deference to parental decision-making reflects the limited capacity of a court—as compared to the capacity of a parent—to evaluate the benefit of a continued relationship.

Second, it is often not clear what constitutes and promotes children's welfare, interests, and agency, and the law is thus properly agnostic about many parenting decisions. On some issues, there is an evidence-based consensus, and on these issues, the law authorizes state preemption of parental authority. Abuse and neglect harm children, which is the legal justification for the child welfare system.⁶³ Children need education, hence compulsory education laws and bans on child labor.⁶⁴ But for many child-rearing issues—male circumcision, participation in youth sports that pose a risk of significant injury, and part-time employment during the school year, for example—there is considerable debate, and parents make varying decisions. Moreover, there is no consensus among experts in child development about what advances children's interests.⁶⁵ Almost inevitably, views about optimal practices will represent the values and biases of decision-makers, which in turn are often shaped by life experience and

62. See RESTATEMENT OF CHILD. & THE L. § 1.80(b) (AM. L. INST., Tentative Draft No. 2, 2019).

63. See GUGGENHEIM, *supra* note 1, at 181–85 (describing the roots of the modern child welfare system but also describing significant problems with the system); *Preventing Child Abuse & Neglect*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html> [<https://perma.cc/SJH7-VC7Q>] (Mar. 15, 2021) (describing the impact of child abuse and neglect).

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

65. See, e.g., Laurence Steinberg et al., *Negative Impact of Part-Time Work on Adolescent Adjustment: Evidence from a Longitudinal Study*, 29 DEVELOPMENTAL PSYCH. 171 (1993) (describing harm to educational engagement of after-school work); *Teens Work to Balance School and Jobs*, CQ RESEARCHER, <https://library.cqpress.com/cqresearcher/document.php?id=cqresre1990083100> [<https://perma.cc/6T8C-WWYR>] (last visited Apr. 2, 2022) (describing debate among scientists on this question). Steinberg and colleagues later altered their views. In a reanalysis of the original data in 2011, they found that 20 hours or less of work was not harmful to educational engagement or adolescent adjustment. Kathryn C. Monahan, Joanna M. Lee & Laurence Steinberg, *Revisiting the Impact of Part-Time Work on Adolescent Adjustment: Distinguishing Between Selection and Socialization Using Propensity Score Matching*, 82 CHILD DEV. 96 (2011). As Professor Robert H. Mnookin explains in his famous 1975 critique of the “best-interests-of-the-child standard,” the determination of the child's best interest is vastly indeterminate, and experts on child development are not in agreement. See generally Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226.

socioeconomic status.⁶⁶ And conventions can change dramatically over time, driven by new empirical knowledge but also by changes in values and norms.⁶⁷ What is deemed good parenting in one decade may be viewed with disapproval in the next. For all these reasons, the law properly allows parents to make myriad decisions about child-rearing.

Third, parents can act illiberally but so, too, can the state and third parties. Recent actions by some state and local legislatures make us concerned about what the government could do if parental rights are diminished. Dailey and Rosenbury write about the importance of access to identity-affirming medical treatment and information for trans children, even when parents object.⁶⁸ We, too, are concerned about parents denying their children important medical care and information, and it is true that parental rights can embolden parents in this regard. But *diminishing* parental rights can also harm trans children and their families. In a disturbing trend, some states have determined that a parent helping a trans child obtain gender-affirming medical treatment is child abuse.⁶⁹ Similarly, empowering private third parties can further illiberalism. Returning to the hypothetical of the child wanting to join the LGBTQIA+ club, imagine it is the *parents* who want the child to participate in the after-school club but the uncle who is opposed. Parental rights would protect this family against the uncle's illiberal views. In short, there is no reason to think that only parents, and not government actors or third parties, will seek to limit a child's horizons and opportunities.⁷⁰

Finally, Dailey and Rosenbury argue that their approach will serve the interests of children in low-income and marginalized families, for whom parental rights offer weak protection. They argue that substantial state support will benefit these families far more than the current regime of parental rights, which provides little assistance to these parents in raising their children.⁷¹ We agree that parental rights provide inadequate protection to these families under contemporary law.⁷² But it does not follow that

66. For the classic account of bias in decision-making, see Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995). For a discussion of the role of socioeconomic status in parenting decisions, see ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2d ed. 2011).

67. For a discussion of the historically contingent nature of parenting advice, see ANN HULBERT, *RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN* 360–70 (2003).

68. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 135–42.

69. See, e.g., Letter from Greg Abbott, Governor, State of Texas, to Hon. Jamie Masters, Comm'r, Texas Dep't of Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/Z7ZB-WJ5M>].

70. Like Dailey and Rosenbury, we distinguish adolescents from younger children. If an adolescent wishes to join the after-school LGBTQIA+ club, in our view, the law can and should take greater account of the adolescent's preferences. Our argument is that the law should not prioritize the judgment of a nonparent over that of a parent.

71. See Dailey & Rosenbury, *New Parental Rights*, *supra* note 48, at 155–62.

72. See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 655–72 (2006).

expanding state authority on a broad range of issues will serve the interests of these families. A powerful criticism of state intervention in low-income families today is that the decisions of courts and social workers are driven by middle-class parenting norms that may differ from those of parents in low-income communities;⁷³ as a consequence, intervention sometimes occurs in situations that involve no serious threat of harm to the child but that are troubling to state actors.⁷⁴ Increasing state authority to supervise parenting can lead to a more intrusive state presence in communities of color to the detriment of the children affected. Moreover, robust parental rights present no obstacle to policies of financial and programmatic support that provide low-income families with the services they need to raise healthy children.

In sum, although we share with Dailey and Rosenbury a common goal of promoting children's interests, we are concerned that some of the means they advocate for attaining this goal will be counterproductive. We question whether children's interests can best be recognized and protected by limiting parental rights. Without a clear consensus about what will benefit a child, the legal system should continue to be modest about the issues that nonparents can decide. To be sure, this may not always expand a child's opportunities and horizons, but it is not clear that empowering the state and third parties will do so either. And it *is* clear that coercive intervention will impose considerable costs on the child and family. Diminishing parental rights empowers parties other than parents—without good reason to think that nonparents will make better decisions, without justifying the costs of intervention, and without regard for the political variation we have in this country.

CONCLUSION

We are not parental-rights Pollyannas. We recognize that parents can make decisions for a host of ill-advised reasons. And parents should not have unfettered control of their children's lives. But absent a clear risk of harm to the child or a strong consensus on children's needs, coercive state intervention—supplanting parental decision-making with a state actor or vindicating the decision-making power of a third party—is not the answer. Instead, the legal system can best promote child wellbeing by enforcing a strong, but self-limiting, regime of parental rights. And to provide opportunities for children, a goal we share with those scholars who seek to limit parental rights, the state can use funding mechanisms and other noncoercive methods. A regime that marries strong investments in families with robust parental rights will truly benefit children.

73. See, e.g., Gottlieb, *supra* note 36, at 376–87.

74. Corporal punishment, for example, is ripe for this kind of judgment.