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## The New Parental Rights

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# THE NEW PARENTAL RIGHTS

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## ABSTRACT

*This Article sets forth a new model of parental rights designed to free children and families from the ideals of parent–child unity and family privacy that underlie the law’s expansive protection for parental rights. The law currently presumes that parents’ interests coincide with those of their children, creating an illusion of parent–child union that suppresses the very real ways in which children’s interests and identities, even at a young age, may depart from those of their parents. Expansive protection for parental rights also confines children to the private family, ignoring children’s broad range of interests beyond the family and thwarting calls for more robust state support of children subordinated by race and class.*

*The new model of parental rights presented here brings children out from under parental control and into public view. The model conceives of parental rights in relational terms, offering greater state support for the parent–child relationship, addressing the race and class biases underlying expansive parental rights, and highlighting children’s independent interests and agency. This new approach calls for the highest scrutiny of governmental action that threatens to separate parents and children, but a less strict level of scrutiny for governmental action that intrudes upon parental authority in ways that support children’s independent interests and agency. The model also*

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*strengthens the parent–child relationship by urging a radical increase in affirmative support for all children, but especially for low-income children and children of color who suffer the most under a legal regime that privatizes the costs of children’s upbringing.*

*This reenvisioning of parental rights has the potential to transform a broad range of laws affecting the lives of children and parents. The Article analyzes several issues of critical importance to children’s welfare: homeschooling; transgender youth medical decisionmaking; foster care; children’s peer relationships; and the forced separation of parents and children through immigration detention, child welfare removal, and parental incarceration. By calling for greater state support of both children and families, the “new parental rights” challenges the privatization of dependency; fosters diversity of family life; and respects the independent capacities, values, beliefs, and identities of all children.*

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## INTRODUCTION

This Article sets forth a new model of parental rights designed to free children and families from the ideals of parent–child unity and family privacy that underlie the law’s current protection of expansive parental rights. Parents today enjoy robust constitutional, statutory, and common law rights to raise children in the manner they see fit, with the state generally stepping in only to educate children or to protect children from serious harm.<sup>1</sup> This expansive protection for parental rights reflects the longstanding view that children’s interests generally coincide with those of their parents, in the same way wives’ interests were once assumed to coincide with those of their husbands.<sup>2</sup>

In this Article, we challenge the law’s assumption of parent–child unity, highlighting the many ways in which children’s interests may diverge from those of their parents and calling on courts and legislatures to recalibrate the scope of parental rights to better support and nurture the full range of children’s diverse capacities and interests. Although concerns about expansive parental rights and their detrimental effects on children’s interests have been voiced over the years,<sup>3</sup> courts and commentators largely remain staunchly committed

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1. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1, 7 (1986).

2. See *infra* notes 26–29 and accompanying text.

3. For other critiques of expansive parental rights, see Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education and Protection*, 62 ARIZ. L. REV. 1, 3 (2020); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294–95 (1988); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 887–90 (1984) [hereinafter Bartlett, *Rethinking Parenthood*]; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1470–72 (2018); James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CALIF. L. REV. 1371, 1413 (1994); Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57, 59 (2016); Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 23–34 (2015); Melissa Murray, *The*

to the protection of near-absolute parental rights of childrearing.<sup>4</sup> And that commitment has only solidified in recent years.<sup>5</sup>

Law has long romanticized the family as a place of unified interests and shared values. This romanticized vision of the family portrays children as innocent, dependent, and passive beings in need of adult care, supervision, and guidance. While clearly true to some extent, this portrait of the dependent child obscures the ways in which children actively engage as agents in the world and downplays the ways in which the parent–child relationship may be one of troubling domination and control. The end of marital coverture took a first step toward challenging law’s overly romantic view of the family by eliminating husbands’ right of control over their wives. This Article takes the second step by revealing law’s overly romantic vision of parent–child unity. We aim to bring children’s agency and other interests to light, thereby exposing the damaging effects of the law’s expansive conception of parental rights, particularly for children who are different from their parents or grow up in families that do not conform to the “private” nuclear family norm.

The law’s current protection of expansive parental rights has three especially pernicious effects. First, it merges children’s interests into those of their parents, thereby denying the reality of children’s independent selves. We recognize that children need parental guidance and caregiving; children’s primary attachment to their parents is the

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*Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 389 (2008); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 319 (1998) [hereinafter Woodhouse, *From Property to Personhood*]; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1809–12, 1828–29 (1993) [hereinafter Woodhouse, *Hatching the Egg*]; Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1041–50 (1992) [hereinafter Woodhouse, *Who Owns the Child*].

4. See Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 943–44 (2018); Emily Buss, “*Parental*” *Rights*, 88 VA. L. REV. 635, 636 (2002); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2417–18 (1995); *Troxel*, 530 U.S. at 66 (plurality opinion).

5. For example, the American Law Institute’s current attempt to restate the field of children and law doubles down on broad protection for parental rights. See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter A.L.I. Tentative Draft 1] (endorsing “strong parental rights” over education, discipline, medical treatment, and religious upbringing); see also Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1413–18 (2020) (arguing that the promotion of child wellbeing is a rationale for strong parental rights).

single most important factor in children's wellbeing and development.<sup>6</sup> Children's attachment to their parents justifies strong support for the parent-child relationship, particularly in the face of state removal or other efforts to separate children and parents. But unencumbered parental rights that suppress children's independent interests and agency may leave children isolated from broader communities and suffering from unreasonable parental control. For example, even well-intentioned parents may reject their child's chosen gender identity and deny needed medical care; they may unilaterally terminate children's relationships with important caregivers or nonfamily mentors; they may deny children access to ideas or information, including access to the internet; or they may refuse to allow children to participate in activities outside the home, including preventing them from attending public or private schools. The broad scope of parental rights hides parent-child differences and divisions behind a false front of family unity.

Second, expansive parental rights cloister children within a parent-dominated private sphere, especially harming racially and economically marginalized children. Although many assume that parental rights protect children from intervention by the state, this is true only with respect to well-resourced parents. Expansive parental rights relegate children to private family support unless the state determines that parents are failing to meet children's needs, in which case the state moves to intervene.<sup>7</sup> As the literature on racial disproportionality shows, the ideal of the private family especially burdens Black children, who removed from their parents at much higher rates than white children.<sup>8</sup> Unhoused youth, youth with disabilities, and transgender youth are also harmed when law leaves children's caregiving to the private realm of parental power. The all-or-nothing conception of parental rights ties children's life opportunities to their parents' resources, thereby reinforcing family inequality and absolving the state of more robust duties to support parents and children before problems arise.

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6. Anne Alstott, Anne C. Dailey & Douglas NeJaime, *Prioritizing Psychological Parenthood*, 106 MINN L. REV. (forthcoming Sep. 12, 2021) (manuscript at 8-10) (on file with the authors).

7. The state does have *parens patriae* powers to override parental authority in certain circumstances, such as child labor. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). However, these powers are very limited. Even in the area of education, parents have the right to homeschool their children in all states. *See infra* Part III.A.1.

8. *See infra* note 345-47 and accompanying text.

Third, law's relegation of children to the private sphere of parental control cuts children off from broader communities of support and connection. Advocates for expansive parental rights emphasize the dangers of state authority but fail to acknowledge the importance of community involvement in furthering children's welfare, affirming children's values and identity, and socializing children into the broader society.<sup>9</sup> These communities may include neighborhoods, sports teams, youth clubs, religious congregations, extended family, political groups, and professionals such as pediatricians, psychologists, counselors, lawyers, and social workers. These communities exist not fully within the family nor within the state but instead in a social realm that one of us has described as lying "between home and school."<sup>10</sup> The traditional model of expansive parental rights either subsumes these communities under the broad category of "the state," and then rejects this undifferentiated category as a threat to personal freedom, or treats these communities as under full parental control, which is simply not the case.<sup>11</sup> In these spaces children encounter diverse people and are exposed to a range of values and beliefs, often using these spaces to form their own identities and influence the identities of other children.<sup>12</sup> The model of expansive parental rights ignores the vital importance of these diverse communities to children's present welfare and upbringing.

This Article aims to reduce these harms by proposing a fundamental reworking of parental rights and the conception of children that underlies this area. We offer a model of parental rights that better recognizes the relational dimension to parental rights by respecting children's independent identities and the diversity of families and communities in which children actually live. To date, the United States Supreme Court has not established a clear standard of review for laws implicating parental authority over children.<sup>13</sup>

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9. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 843–50 (2007); see also Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1871–77 (1987) (emphasizing how children's rights are dependent upon an established community order).

10. Rosenbury, *supra* note 9 *passim*.

11. See *id.* at 856–75.

12. See *infra* Part III.B.2.

13. See Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 128 (2018) ("[T]he Court has not articulated a consistent level of scrutiny for judicial review of restrictions on the parental right."); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 529 (2000) (describing the "uncertainty and confusion" surrounding the family privacy doctrines).

Importantly, although our model will not wholly displace the longstanding presumption that parents act to further their children's interests, we recognize that some intrusions on parental authority are necessary to ensure that children's interests are understood and respected. Governmental actions that threaten the existence of the parent-child relationship must be carefully reviewed, but not all intrusions on parental authority are deserving of the highest scrutiny.

We thus adopt a two-tiered standard of review in order to better account for children's independent interests, particularly as children grow and their agency and interests expand beyond the family. Because maintaining the parent-child bond is so crucial to children's welfare, our model adopts the strictest level of judicial review for state action that threatens the physical separation of parents and children. But for laws or state conduct that seek to promote children's welfare with less intrusive effects on parental authority, a lower standard of review is appropriate, one that asks whether the government action substantially furthers children's independent interests and agency.<sup>14</sup> Importantly, we do not adopt a broad presumption that parents always act to further their children's interests. As Justice Stevens emphasized in *Troxel v. Granville*,<sup>15</sup> "even a fit parent is capable of treating a child like a mere possession."<sup>16</sup>

In implementing this two-tiered standard, our model posits an important role for persons other than the state in helping to identify and further children's independent interests. Pediatricians, teachers, coaches, youth counselors, psychologists, developmental scientists, and a host of persons and diverse communities with a stake in children's present and future welfare should be involved in the important process of articulating children's independent interests and in ensuring that these interests are fostered by parents, the broader community, and public actors. In earlier work, we drew on developmental psychology, social science, and legal scholarship to begin to articulate children's broader interests, including children's interests in relationships with parents as well as with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and

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14. While two commentators have expressly proposed an intermediate standard of review, see Ryznar, *supra* note 13, at 154 (proposing an intermediate standard of review for "health issues and visitation issues"); Meyer, *supra* note 13, at 571, these proposals fail to focus on children's independent interests as an inherent limiting principle for parental rights.

15. *Troxel v. Granville*, 530 U.S. 57 (2000).

16. *Id.* at 86 (Stevens, J., dissenting).



participation in civic life.<sup>17</sup> Even in infancy, children have interests that may conflict with their parents' wishes, such as interests in bodily safety and privacy from public view, and the law should take account of those interests and the people best situated to protect them.

Our new model of parental rights therefore expands state power to some extent but not in the wholesale manner some critics fear.<sup>18</sup> Under our model, courts will not be adjudicating minor disputes between parents and children. Parents will still enjoy rights to control their children's upbringing except when state involvement is warranted to further children's important interests in areas such as personal identity, relationships, or activities outside the home. Because children's interests and agency change over time, our model would extend broader parental rights to the parents of infants and narrow those rights as children pass through middle childhood and later adolescence when they are developing their own values and preferences.

In summary, the new parental rights aims to reconceive parental rights in relational terms, provide broad structural supports for the parent-child relationship, address the race and class biases underlying expansive parental rights, and further children's independent interests and agency, including their ties to broader communities. Although we style our model as "new," we build upon the work of earlier scholars who advocated for greater legal recognition of children's interests and agency,<sup>19</sup> but we incorporate and expand upon these earlier efforts in proposing a comprehensive shift away from parental rights of control toward greater public support for children and recognition of children's independent interests. The alternative to expansive parental rights is not unencumbered state control of children, but rather a legal system that recognizes the importance of parental care and guidance while setting limits on parental power in recognition of children's distinct identities.

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17. Dailey & Rosenbury, *supra* note 3, at 1451.

18. See, e.g., Huntington & Scott, *supra* note 5, at 1415 ("If parents' authority is withdrawn or seriously restricted, the state necessarily will have a larger role regulating families than under current law."); Guggenheim, *supra* note 4, at 947 (rejecting critiques of parental rights on the ground that they "shift ultimate decision-making authority from parents to judges").

19. See, e.g., Woodhouse, *Hatching the Egg*, *supra* note 3, at 1812-27; Minow, *supra* note 1, at 6-8; cf. Murray, *supra* note 3, at 396-99 ("Parental rights and authority . . . do more than obscure the fact that parents function as parts of caregiving networks. They obscure the nonparental caregivers within these networks as well."). We began this work in Dailey & Rosenbury, *supra* note 3, at 1478-1506.

At the outset, we note that advocates of expansive parental rights often argue that robust parental rights are necessary to protect racially and economically marginalized families from intrusive state intervention.<sup>20</sup> We share these vitally important equality concerns, which is why we posit strict judicial review of state action that threatens to physically separate parents and children. But advocates for expansive parental rights disregard the fact that protection for the private family sometimes comes at a high cost for those its advocates claim to protect.<sup>21</sup> Many families need intervention in the form of greater state support; low-income families do not currently receive the benefits of parental rights because they do not have the resources to meet family needs. Children in these families are the most susceptible to state removal arising from poverty or racial bias, a harm caused in large part by the current all-or-nothing conception of parental rights.<sup>22</sup> Tragically, the existing regime of parental rights ends up harming many children by requiring the state to wrest control away from parents before intervening to further children's interests, thereby privileging private ordering against a backdrop of stark racial, social, and economic inequality.

This privileging of the private family persists even as scholars have soundly discredited the idea of a private family set apart from the state.<sup>23</sup> Given that families are defined and regulated by the state in

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20. See, e.g., Huntington & Scott, *supra* note 5, at 1416 (“Parental rights provide an essential shield against excessive state intrusion driven by bias against ‘children of color and low-income families.’”).

21. Cf. Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 18 (1996) (emphasizing that “the common law notion that the family is a unitary entity” shields gender inequality within the family).

22. For more discussion of child welfare removal, see *infra* Part III.C.2.

23. For the groundbreaking critique of the idea of the “private family,” see generally Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985). See also Minow, *supra* note 1, at 7–8 n.15 (“From another vantage point . . . the state is always ‘intervening’ in the sense that its noninvolvement in family matters expresses its approval, or at least its lack of disapproval, of what goes on in the private realm.”). For additional reflections on the notion of family privacy, see Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1240–45 (1999); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 961–69 (1991); Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426, 429–35 (2014); Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 640–51 (1987). The notion of a private sphere of family life is belied by compulsory schooling, labor laws, marriage laws, parentage laws, child support, and child abuse laws, to name a few. The state also directly enforces parental authority by forcibly returning runaway children to the home, adjudicating noncompliant children as delinquent, respecting

myriad ways, the issue is not whether the state intervenes in the family but rather the kind of intervention that should occur.<sup>24</sup> Our reconceptualization of parental rights shifts law away from an approach that frequently yields disruptive all-or-nothing state interventions toward one that promotes children's interests, including their vital interests in an intact family. Our approach sets strict limits on the physical separation of parents and children as a way to prevent the state from coercing and sometimes terrorizing families of color with the threat of child removal. But our approach also imposes affirmative obligations on the state to intervene in children's lives in supportive ways. The goal is to radically redistribute social resources toward supporting families and to prevent the surveillance and disruptions experienced by low-income communities and families of color.<sup>25</sup> Shifting the law's focus from protecting parental prerogatives to furthering children's interests serves to strengthen the parent-child relationship at the same time that it recognizes children's independent identities and children's ties to people and communities outside the family.

This Article proceeds in three parts. Part I explains and critiques the existing regime of expansive parental rights. Starting from the traditional common law doctrine of coverture, we distinguish between the two distinct categories of marital coverture and child coverture and analyze how child coverture persists even as marital coverture has largely disappeared. This Part describes the continuing harms of expansive parental rights, which include the false reliance on family privacy, perpetuating systemic racial and class biases, and obscuring children's interests and agency.

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parental rights to discipline children, and generally deploying its coercive powers to support parental rights against dissenting children.

24. Several scholars have attempted to reimagine how the state interacts with families, moving away from the traditional "family privacy" paradigm to ones providing more and different supports to families and children. See ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 49-72 (2004); MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 117-40 (2010); MARTHA A. FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 17-49, 188-95 (2004); Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1510-24 (2007); Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation To Provide Assistance*, 57 OHIO ST. L.J. 519, 535-40 (1996); Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 892-900 (2007). See generally Khiara Bridges, *Poor Women and the Protective State*, 63 HASTINGS L.J. 1619 (2012) (arguing for a shift away from coercive state management of individual parental behaviors and towards macro regulations to support healthy child development).

25. See *infra* Part III.C.2.

Part II sets out our new model of parental rights. This model recognizes parental rights as relational and limited by children's independent interests and agency; it clarifies that parental rights should trigger the strictest judicial review when the physical separation of parent and child is threatened but an intermediate standard of review for lesser intrusions aimed at furthering children's independent interests and agency; it addresses the race and class biases perpetuated by a system of broad parental rights that privatizes children's support; and it emphasizes children's affirmative rights to state support.

Part III examines the implications of this new model of parental rights in several doctrinal areas of critical importance to children. This Part discusses legal regulations in the areas of homeschooling, transgender youth medical decisionmaking, foster care, children's friendships, and the forced separation of parents and children through immigration detention, child welfare removal, and parental incarceration.

### I. THE CURRENT REGIME OF EXPANSIVE PARENTAL RIGHTS

Expansive parental rights have their roots in the common law system of coverture. Deriving from English common law, the doctrine of coverture structured married family life in the United States well into the 1800s.<sup>26</sup> Coverture appointed one member of each legally recognized family—the husband—as the family's sole legal representative.<sup>27</sup> The husband spoke for the family in the public sphere, and the law respected only his decisions in the private sphere.<sup>28</sup> As Blackstone emphasized,

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the

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26. See Tim Stretton & Krista J. Kesselring, *Introduction* to *MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD* 3, 5 (Tim Stretton & Krista J. Kesselring eds., 2013) (“[A] typical wife in New England in 1750 had much in common with a typical wife in England in 1250.”).

27. *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015) (“Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.”); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11–12 (2000).

28. See Stretton & Kesselring, *supra* note 26, at 6 (“Again and again in Anglo-American history, extensions of citizenship or the expansion of its associated rights, entitlements, and obligations specifically excluded married women because they fell under the authority of their husbands.”).

husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert* . . . ; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.<sup>29</sup>

Relatedly, in a discussion of the father's control over children, Blackstone wrote,

The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason.<sup>30</sup>

Under the regime of coverture, the entire family was reduced to one person—the husband—in the eyes of the state.<sup>31</sup> Yet because coverture attached only to legally recognized marriages, not all husbands became their families' legal representatives. Most notably, enslaved couples could not legally marry, and masters could override slaves' informal marriage vows.<sup>32</sup>

29. 1 WILLIAM BLACKSTONE, COMMENTARIES \*442.

30. *Id.* at \*453.

31. COTT, *supra* note 27, at 12; TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURT OF CHANCERY 431 (3d ed. 1862).

32. COTT, *supra* note 27, at 32–34; MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 130–32 (G. Edward White ed., 1985); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 93 (2000); TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 32 (2017); *see also* JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT 32–33 (1985) (describing the barriers to marriage for enslaved people). Yet the doctrine of coverture still deeply affected the lives of enslaved families. Indeed, it was in part because of the obligations of coverture that enslaved persons could not legally marry; enslaved men were viewed as incapable of taking on these family obligations because a “master’s legal right of command” trumped the intentions and actions of the people that law considered to be his property. COTT, *supra* note 27, at 33; *see also* Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 204–05 (1987) (discussing status of family members under slavery); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMANS. 251, 252 (1999) (“[Enslaved people] were incapacitated from entering into civil contracts, of which marriage was one, and were regarded as lacking the moral fiber necessary to respect and honor the sanctity of the marital vows.”).

Legal historians have extensively explored and critiqued the evolution of coverture and its effects,<sup>33</sup> but the vast majority of that scholarship examines coverture's effects on wives, as opposed to children born within marriage.<sup>34</sup> Indeed, legal historians generally have not grappled with how coverture affected children within legally recognized families.<sup>35</sup> Historians have identified and critiqued the common law's failure to impose obligations on fathers who bore children outside of marriage, which was certainly a collateral effect of the doctrine of coverture.<sup>36</sup> Without marriage, unwed mothers and their children experienced neither the benefits nor burdens of coverture.<sup>37</sup> Scholars have not, however, delineated how the doctrine of coverture consolidated family power in the husband upon marriage, removing *all* other family members from the public sphere and limiting their influence in the private sphere.<sup>38</sup>

To emphasize and critique coverture's broader effects, this Article distinguishes between marital coverture and child coverture, coining

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33. The effects were diverse, as lived reality often differed from the law of coverture, yet “[i]n marking ownership coverture delineated inequality and confirmed the ultimate power of the husband.” Stretton & Kesselring, *supra* note 26, at 9; *cf.* Wright, *supra* note 26, at 240–42 (discussing legal and extralegal resistance to coverture); STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* 27–30, 57–80 (2019) (describing exceptions to and evasions of coverture for white wives who owned slaves).

34. *See, e.g.*, HARTOG, *supra* note 32, at 93–166; Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347–48 (1979).

35. For an important exception, see Martha Minow, “*Forming Underneath Everything That Grows:*” *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 827–28.

36. *See, e.g.*, Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 79–83 (2003). Similarly, the regime of slavery imposed no duties on fathers of enslaved children, whether those fathers were enslaved or were white slaveowners or other freed men. *Id.* at 82.

37. *See id.* at 80 (emphasizing that in the context of “inheritance, wrongful death, domicile, adoption, and citizenship, . . . law often continue[s] to assign the primary, and in some instances exclusive, responsibility for out-of-wedlock children to mothers”).

38. Martha Albertson Fineman and George Shepherd come closest to making this point. In their application of vulnerability theory to homeschooling, they write that they aim to “bring[] the child out from under the coverture of the family and prompt[] discussions about what should be the nature and extent of state responsibility for the vulnerable subject in childhood.” Fineman & Shepherd, *supra* note 3, at 60. Ruth Colker, Dara Purvis, and Marc Spindelman also each emphasize fathers' power under coverture, but they do not expand their analysis. *See* Ruth Colker, *The Freedom To Choose To Marry*, 30 COLUM. J. GENDER & L. 383, 409 (2015); Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541, 565 (2019); Marc Spindelman, *Obergefell's Dreams*, 77 OHIO ST. L.J. 1039, 1070 (2016). Finally, Melissa Murray emphasizes the similarities between spousal and parent-child relationships, but she does not associate the parent-child relationship with coverture. Murray, *supra* note 3, at 397 n.33.

these more specific terms in order to analyze coverture's far-reaching nature and its persistence to this day in the form of expansive parental rights.<sup>39</sup> There does not appear to be evidence that courts and lawmakers made this distinction historically, but that omission reinforces the extent to which children born within marriage were "covered" by husband-fathers and continue to be covered by parents to this day. Moreover, separate analyses of marital coverture and child coverture permit examinations of coverture's effects on children that are not bound by the justifications behind marital coverture and its demise.<sup>40</sup> Children continue to suffer many of the same disabilities that wives suffered under coverture, but as explained below the justifications for children's ongoing disabilities have long been different and continue to evolve.

### A. *The Presumption of Parent-Child Unity*

Prior to the seventeenth century, children were not subject to coverture or even to the custody of their fathers. As Professor Holly Brewer has written,

In sixteenth-century England, children over age seven were of "ripe age" to marry (under seven they could contract only "espousals," or betrothals). Four-year olds could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships. Eight-year-olds could be hanged for arson or any other felony. Teenagers were routinely elected to Parliament.

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39. A very small number of scholars have used the term "marital coverture," but not as a contrast to "child coverture." For example, Martha Davis uses "marital coverture" to distinguish the traditional doctrine of coverture from the "male coverture" she critiques. Davis, *supra* note 36, at 76–79. We have found two legal scholars who use the term "children's legal coverture," but they do not elucidate their use of the terms or otherwise explore the contours of child coverture today. Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 736–37 (2009) [hereinafter Appell, *The Pre-Political Child of Child-Centered Jurisprudence*]; Medha D. Makhoul, *Theorizing the Immigrant Child: The Case of Married Minors*, 82 BROOK. L. REV. 1603, 1624 (2017); see also Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 722–23 (2013) ("The legal child is disenfranchised under the coverture of her parents or guardians . . ."); Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1155 ("Children are, effectively, under coverture of their parents . . .").

40. Susan Appleton writes that "[t]he parent-child relationship, just like the marital relationship once did, subsumes the identity and autonomy of one member of the family in the authority of another." Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525, 543 (2014). We agree with Appleton that "we cannot seamlessly apply to children what we have learned about married women," *id.*, which is why we believe it is useful to delineate the separate category of child coverture.

Children who owned sufficient property could vote. And custody as we know it did not exist. These norms applied not only in England but in Virginia as it was founded during the seventeenth century.<sup>41</sup>

Children's legal capacity soon gave way to patriarchal control. Beginning in the mid-seventeenth century, English courts began to recognize the concept of parental custody.<sup>42</sup> Eventually, "[t]he assumption of the law had shifted to deny the identity of a child altogether, up to age twenty-one: society should see the child only as part of a family, with a father at its head."<sup>43</sup>

Children born within a marriage in the United States thereby became subject to their fathers' control in much the same way that wives were subject to their husbands' control.<sup>44</sup> A father could dictate almost every aspect of his children's lives: he could force children to work, marry off daughters to persons of his choosing, and physically punish children for failure to follow his dictates, in some states up to the point of death.<sup>45</sup> Fathers maintained this control even when marriages dissolved; women could not seek custody of their children upon divorce.<sup>46</sup> During marriage or afterwards, fathers could appoint

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41. HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 230 (2005). Writing about children in the United States during "the seventeenth and early eighteenth centur[ies]," Professor Mary Ann Mason emphasizes that "[c]hildren were critical to the colonial labor force; after the age of ten children were often employed like adult workers, and many, if not most, did not remain in the custody of either parent until adulthood." Mary Ann Mason, *Masters and Servants: The American Colonial Model of Child Custody and Control*, 2 INT'L J. CHILD.'S RTS. 317, 317 (1994).

42. BREWER, *supra* note 41, at 232. Custody as a legal concept was generally reserved for guardians to heirs, as opposed to parents, prior to this time. *Id.* at 232–37. Beginning in 1660, law made "all children potential wards, and gave fathers significant power over their children." *Id.* at 250. Equity courts in England did not recognize parental custody until 1690. *See id.* at 282 (detailing that Justice Story found no precedent in English equity courts for parental custody before 1690).

43. *Id.* at 266.

44. *See* Mason, *supra* note 41, at 319 ("Fathers, without dispute, had almost unlimited authority of custody and control over their natural, legitimate children, leaving almost no room for maternal authority, at least during the fathers' lifetime."); *cf.* Obergefell v. Hodges, 576 U.S. 644, 660 (2015) ("Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.").

45. BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 41, 62–63 (2008); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 310 (2002).

46. GROSSBERG, *supra* note 32, at 234–37. Coverture also meant that mothers had no financial obligations to their children from a dissolved marriage, even after mothers remarried. *See* Kim Kippen, *Poor Law, Coverture, and Relations in King's Bench, 1601–1834*, in *MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD*, *supra* note



guardians for their children without any input from the children's mothers.<sup>47</sup> Moreover, unlike children born into slavery, who assumed the legal status of their enslaved mothers, children born to noncitizen wives married to citizens assumed the status of the citizen father.<sup>48</sup>

In supporting male power, both marital and child coverture assumed that husbands represented the interests of their wives and children, yet law did nothing to mandate that husbands actually represented their wives' and children's interests. Instead, the regime of coverture respected a husband's authority so long as he provided minimal necessities for family members.<sup>49</sup> Wives and children could appeal to their husbands and fathers, but they could not appeal to the state.<sup>50</sup>

1. *The Persistence of Child Coverture.* Wives are no longer living under a regime of coverture, but the persistence of expansive parental rights means that children are.<sup>51</sup> With the enactment of the Married Women's Property Acts and Earning Statutes in the mid-nineteenth

26, at 64, 67–77 (examining the financial liability of mothers and married women from the seventeenth to eighteenth centuries).

47. See Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 *LAW & HIST. REV.* 247, 270 & n.74 (1999) (discussing the passage of the Abolition of Military Tenures Act and the implication that it elevated the father's will over the common law preference for mothers and kin).

48. See Todd, *supra* note 26, at 163, 168–81 (examining the development of law concerning children born abroad, to noncitizen parents, or to enslaved parents). Likewise, children born to a citizen wife married to a noncitizen did not assume their mother's citizenship. See *id.* at 180–81.

49. See BLACKSTONE, *supra* note 29, at \*430; see also *Earle v. Earle*, 43 N.W. 118, 119 (Neb. 1889) (“It is a well-established rule of law that it is the duty of the husband to provide his family with support and means of living . . . and for this purpose the wife has generally the right to use his credit for the purchase of necessaries.”); *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (“The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf.”).

50. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 8–9, 187 (1995). Fineman later explained:

[I]t is the family, not the state or the market, that assumes responsibility for both the inevitable dependent – the child or other biologically or developmentally dependent person – and the derivative dependent – the caretaker. The institution of the family operates structurally and ideologically to free markets from considering or accommodating dependency.

FINEMAN, *supra* note 24, at 228.

51. Cf. Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 *U. DET. MERCY L. REV.* 479, 483 (2001) (“Women may have escaped the separate spheres of *Bradwell v. Illinois*, but children remain trapped in the time warp of *Pierce*.”).

century, marital coverture was ultimately formally abolished.<sup>52</sup> Although marital coverture lingered as a cultural force,<sup>53</sup> its effects lessened as individual states granted women (including married women) the right to vote and the Nineteenth Amendment granted women in all states the right to vote in 1920.<sup>54</sup> Judges and lawmakers also began departing from the longstanding practice of granting husbands custody of children when marriages dissolved.<sup>55</sup> Families

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52. See JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 108–09 (2014). The abolition of marital coverture happened gradually, with no definitive end date. See *id.* at 99–101 (discussing the debate over when coverture was eradicated); HARTOG, *supra* note 32, at 110–11 (describing state laws delegating more rights to women in the mid-1800s); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1385–89 (1983) (detailing the erosion of coverture laws in England); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 *GEO. L.J.* 2127, 2132–40 (1994) (“It was by statutory codification of equitable principles that common law reform began in the first half of the nineteenth century, with the enactment of married women’s property acts that allowed wives to hold property in their own names.”); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 *YALE J.L. & FEMINISM* 165, 212–14 (2014) (discussing the evolution of women’s property rights).

53. See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1655 (2003) (“Even with coverture’s gradual demise . . . married women’s legal and political identities continued to be defined and limited by their marital status.”); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 *UCLA L. REV.* 405, 428 (2005) (“While beginning in the 1840s, ‘married women’s property acts’ allowing married women to control their own property were passed in virtually every state, the ideology of coverture and the importance of property ownership as signifying citizenship lingered well past that date.”).

54. HASDAY, *supra* note 52, at 99–101; see also, e.g., *Obergefell v. Hodges*, 56 U.S. 644, 659–60 (2015) (describing how the landscape of marriage has evolved, including the abandonment of coverture).

55. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 *S. CAL. REV. L. & WOMEN'S STUD.* 133, 167–68 (1992). Some wives are still subject to the vestiges of coverture, particularly in interspousal litigation. See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *OHIO ST. L.J.* 1, 23 (2000) (discussing the influence of coverture and family privacy on “interspousal tort immunity, parental tort immunity, and the marital rape exemption”). See generally HASDAY, *supra* note 52, at 108–18 (discussing legal prohibitions on interspousal litigation). Scholars have otherwise astutely analyzed coverture’s ongoing effects on marriage and divorce law. See, e.g., HASDAY, *supra* note 52, at 118–20 (discussing the domestic relations exception to federal diversity jurisdiction, which assumes that spouses cannot have separate legal residences and therefore cannot have diversity of citizenship, and the marital rape exemption, which historically assumed that husbands could not rape their wives); Colker, *supra* note 38, at 411–15 (discussing vestiges of coverture, such as women taking their husband’s last name); Siegel, *supra* note 52, at 2196–2210 (describing courts’ refusal to enforce interspousal contracts concerning labor and the wife’s “duty” of marital service); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227, 2236–39 (1994) (arguing that the family ecology is gendered). The principles of coverture also continue to influence law’s treatment of services performed by nonmarital partners. Albertina Antognini, *Nonmarital Coverture*, 99 *B.U. L. REV.* 2139 *passim* (2019).

went from having one legal representative to having two legal representatives—both recognized spouses or both legal parents.<sup>56</sup>

This evolution has greatly increased adult equality within families, but control continues to be the guiding principle of parental rights. It is no longer acceptable for husbands to imprison their wives, to beat them in the name of discipline, to isolate them from their friends and family, or to confiscate their money and squander it.<sup>57</sup> Yet most of these things are still permissible in the case of children.<sup>58</sup> Fathers no longer have exclusive control over their children, as their control must be shared by mothers or other legal parents, but the regime of parental control remains intact even when parental viewpoints may not be in the best interests of a child.<sup>59</sup> The idea of children being the exclusive property of their fathers has faded, but law still subjects children to the control of both their parents.<sup>60</sup>

Child coverture continues to confer on parents broad control over children's emotional, intellectual, moral, spiritual, and everyday lives. Moreover, many common law parental prerogatives have now become

56. Many commentators rightly observe that the law still privileges marital families over nonmarital families, a privilege that particularly harms low-income nonmarital families. *See, e.g.,* Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 377–78 (2017). Moreover, the Supreme Court's recent extension of legal marriage to same-sex couples relied on rhetoric that evoked many aspects of historical coverture. Allison Tait argues that

[*Obergefell*] invokes not only good governance but also gender hierarchy; not only social stability but also social prescription; not only enduring commitment but also inescapable burden. Consequently, instead of extinguishing dated concepts about the nature of marriage and replacing them with a more modern form of marriage, grounded in true gender equality and relationship equity, *Obergefell* signals a new life for coverture values.

Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 108–09 (2016).

57. COTT, *supra* note 27, at 52–55.

58. *See infra* notes 67–68 and accompanying text.

59. *See, e.g., In re Marriage of Mentry*, 190 CAL. RPTR. 843, 846–47 (Ct. App. 1983) (noting that the law encourages exposure to both parents' differing religious viewpoints even when stability or repose may be logically in the best interest of the child).

60. *See* Bartlett, *Rethinking Parenthood*, *supra* note 3, at 882 (emphasizing law's continuing focus on parental authority and its failure to support children's other relationships); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988) (“The modern, reformist discourse viewed children not so much as individual property to be divided between parents, but as a form of social investment in which custody produced concomitant social duties on the part of each parent . . . .”); Woodhouse, *Who Owns the Child*, *supra* note 3, at 1113–15 (discussing the focus on parental control in jurisprudence concerning parental rights).

constitutionalized.<sup>61</sup> Parents control where children go to school, dictating public school, private school, or home school.<sup>62</sup> Parents may prohibit their children from interacting with other adults or children, or force them to do so.<sup>63</sup> Parents may force their children to attend church,<sup>64</sup> or force or prevent them from engaging in other activities.<sup>65</sup> Parents may require children to work within the home for free.<sup>66</sup> If children work for wages outside of the home, parents may claim those wages for their own use.<sup>67</sup> Parents even control many of the damages awarded in personal injury suits seeking redress for their children's own injuries.<sup>68</sup>

In these ways, children continue to suffer many of the same disabilities that wives suffered under coverture, including having limited to no control over their associates, labor, or bodies. Children instead are represented (or covered) by their parents. The family is

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61. HASDAY, *supra* note 52, at 157 (“[C]ourts have frequently taken common law parental prerogatives to be so commonsensical and so foundational to American law and society that they have embedded many of these prerogatives in constitutional law.”).

62. See *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (noting that while the state has the responsibility to educate its citizens, that right yields “to the right of parents to provide an equivalent education in a privately operated system”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“[P]arents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places.”).

63. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (holding that parents have the right to make decisions about “the care, custody, and control of their children”).

64. In Vermont, for instance, parents have the statutory right to control a child’s religion. VT. STAT. ANN. tit. 15, § 664(1)(A) (2021). This right is so critical that the Vermont Supreme Court has stricken portions of a family court order prohibiting both parents “from requiring children ‘to attend religious services against their will.’” *Jakab v. Jakab*, 664 A.2d 261, 266 (Vt. 1995).

65. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (finding that parents have a right to control children’s access to information); *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1923) (suggesting that parents have control over their children’s education, including language instruction); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (noting that, at common law, parents or guardians control the physical freedom of unemancipated minors).

66. *United States v. Toviave*, 761 F.3d 623, 625 (6th Cir. 2014) (“An American parent has always had the right to make his child perform household chores.”).

67. *Constance v. Gosnell*, 62 F. Supp. 253, 254 (W.D.S.C. 1945) (“Under the *common law* the father is entitled to the earnings of his minor, unemancipated children during their minority. This right accrues to the father by way of compensation for the support, nurture, care, protection, maintenance and education actually afforded and furnished his children during their minority.”).

68. *Callies v. Reliance Laundry Co.*, 206 N.W. 198, 200 (Wis. 1925).

considered a unified entity with respect to children.<sup>69</sup> Under child coverture, parent and child are one—and the one is the parent.

2. *Ongoing Support for Child Coverture.* The persistence of child coverture is rarely acknowledged. Political theorist Elizabeth Cohen has made the connection between children's current reality and the regime of marital coverture, emphasizing that "[m]uch like women were under coverture, children are confined to the private sphere, removed from public life – ostensibly for the good of themselves and the polity in general."<sup>70</sup> Professor Jill Hasday also emphasizes: "When parental prerogatives and children's interests actually conflict, family law continues to adhere closely to common law patterns in repeatedly prioritizing parental prerogatives."<sup>71</sup> Yet most legal scholars have not explicitly made the link to coverture when examining the field of children and law.<sup>72</sup> In fact, legal scholars, judges, and lawmakers often assume that coverture was completely eliminated once wives emerged from its disabilities. The Supreme Court of Missouri, for example, wrote in 1949 that "[i]t is as repellent to our present-day thinking to regard a child as the chattel or servant of his parent as it is to regard a wife as the chattel of her husband."<sup>73</sup> This assumption ignores the many ways that children remain subject to the prerogatives of their parents. Even as coverture is no longer regarded as the reigning paradigm, parental control over children continues unabated in the form of expansive parental rights.

The American Law Institute ("ALI") recently embarked on a new and ambitious Restatement of Children and the Law, which—because the ALI has tasked itself with restating, rather than reforming,

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69. See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1215 (1999) ("The legal construct of the family is based upon the presumption that 'parents [make up for their children's lack of] maturity, experience and capacity . . . .'").

70. Elizabeth F. Cohen, *Neither Seen nor Heard: Children's Citizenship in Contemporary Democracies*, 9 CITIZENSHIP STUD. 221, 222 (2005); see also Ruth Lister, *Why Citizenship: Where, When and How Children?*, 8 THEORETICAL INQUIRIES L. 693, 714 (2007) (discussing Cohen's analogy between coverture and children).

71. HASDAY, *supra* note 52, at 142. Hasday also emphasizes that some parental prerogatives have expanded, most notably in the context of parental tort immunity. See *id.* at 154.

72. For two instances of the use of "children's legal coverture" without any further explanation, see Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, *supra* note 39, at 736–37 and Makhoul, *supra* note 39, at 1624.

73. *Mennemeyer v. Hart*, 221 S.W.2d 960, 962 (Mo. 1949).

common law in the United States<sup>74</sup>—retains the principles of expansive parental rights rooted in child coverture.<sup>75</sup> Yet the ALI does not acknowledge the history of coverture even as it reinforces its principles.<sup>76</sup> In taking a strong stand in favor of protecting expansive parental rights, the Restatement ensures that parents exercise nearly unfettered decision-making authority over children’s lives except in cases of serious harm.<sup>77</sup> The Restatement presumes this authority is in children’s best interests and thus protects parents’ choices in all but the most dire circumstances.

For example, the Restatement gives parents the power to deny their child access to third parties unless doing so would pose a “substantial risk of serious harm to the child’s health or well-being.”<sup>78</sup> In other words, parents may unilaterally cut off children’s relationships with siblings, grandparents, former stepparents, and former foster parents as long as there is no clear and convincing evidence of harm,<sup>79</sup> a standard unlikely to be met in most cases.<sup>80</sup> Moreover, even if a third party meets that standard, the third party must also establish “by clear and convincing evidence that continued contact with the third party will not substantially interfere with the parent–child relationship and such contact is in the child’s best interest.”<sup>81</sup>

The Restatement also protects parents’ right to engage in corporal punishment in the context of civil child protection proceedings so long as the punishment did not cause, or create “a substantial risk of causing, physical harm beyond minor pain or transient marks.”<sup>82</sup> The Restatement provides even more protection to parents in the context of criminal proceedings, permitting corporal punishment so long as it

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74. The Am. L. Inst., *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* (rev. ed. 2015), [https://www.ali.org/media/filer\\_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf](https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf) [<https://perma.cc/92BX-ALG4>].

75. See A.L.I. Tentative Draft 1, *supra* note 5.

76. See *id.* (failing to acknowledge the history of coverture but implicitly reinforcing coverture’s principles by emphasizing that “[p]arents have long enjoyed strong protection of the right to raise their children as they see fit without undue interference from the state”).

77. See *id.*

78. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.80(a)(2) (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter A.L.I. Tentative Draft 2].

79. *Id.*

80. See *id.* at cmt. g (“This Section’s harm standard imposes a high burden on a third party seeking contact with a child.”).

81. *Id.* § 1.80(b)(2).

82. *Id.* § 2.23(b).

did not cause, or create “a substantial risk of causing, serious physical harm or gross degradation.”<sup>83</sup> In addition, the Restatement extends such protection to teachers and other school authorities in private schools. In public schools, if state law expressly authorizes corporal punishment, the Restatement privileges such punishment “if the school authority reasonably believes that the force is necessary to maintain order and safety in the school.”<sup>84</sup>

Justifications for this control over children’s lives track those that were once offered for marital coverture. Proponents of expansive parental rights, including the ALI Reporters, justify broad parental control on the grounds that children are dependent creatures and that parents, or in some cases teachers or other state actors, can and will represent children’s interests.<sup>85</sup> As with marital coverture, neither of these justifications suffices. While children are dependent in a way wives were not, that dependency does not necessarily translate into unfettered parental control at the expense of furthering children’s interests. And the myth of parent–child unity is simply that: a myth. Neither dependency nor theories of parental representation justify expansive parental rights given that parents are sometimes unable or unwilling to further children’s independent interests regarding significant life issues. Even more importantly, expansive parental rights harm many children and families, as discussed below.

### *B. The Harms of Expansive Parental Rights*

This Section lays out the primary shortcomings of the near-absolute protection for parental rights in existing law. Expansive parental rights privilege the interests of parents over those of children, reinforce a myth of state nonintervention in the family in ways that further harm children’s interests, and adversely impact racially and economically marginalized families. By conceiving of the family as a unified private entity, existing law represses children’s independent interests and identities and fails to offer nonpunitive forms of state support for children and their families.

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83. *Id.* § 2.23(a).

84. *Id.* § 7.10.

85. See A.L.I. Tentative Draft 1, *supra* note 5, at 3 (“Parents typically know their children better than any third party, and thus usually are better positioned to make decisions on their children’s behalf than outsiders and strangers.”).

1. *Obscuring Children's Interests and Agency.* Expansive parental rights hide children's independent interests and agency beneath the veil of parent-child unity. For example, the law currently obscures how children may develop a gender identity at odds with their parents' values; children may deserve greater privacy than what their parents give them (particularly when parents display their children's private lives on social media); children's bodily integrity may be violated by common forms of corporal punishment; and children may have their access to the world restricted by isolated homeschooling. In all these cases, law fails to see children as people with serious interests and identities separate and apart from those of their parents.

Parents' freedom to control their children's lives sits uneasily within a liberal system of law that protects every person's right to determine their own life course. It is difficult, if not impossible, to justify parental authority solely on the basis of a parent's liberty interest without falling back on the long-discredited notion of children as property.<sup>86</sup> For this reason, advocates of expansive parental rights now justify parental rights on the ground that these rights further *children's* interests. These proponents argue that parental rights serve children's interests because parents are likely to know what their children need and to ensure those needs are met.<sup>87</sup> Parental decisions are thus generally shielded from scrutiny and require no justification because they are presumptively in children's best interests.<sup>88</sup> Advocates of expansive parental rights acknowledge that parents may not always know what is in their children's interests or act to further those interests, but they nevertheless take the position that expansive rights are justified because parents—however imperfect they may be—are better situated than anyone else to make choices regarding their children's welfare.<sup>89</sup>

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86. Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 325–26 (1994).

87. Buss, *supra* note 4, at 647; Huntington & Scott, *supra* note 5, at 1377.

88. Some scholars argue that this shielding feature itself serves children's interests because it ensures parents retain the sense of authority necessary to successfully raise children. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1011 (2003).

89. Huntington & Scott, *supra* note 5, at 1416. Advocates argue, for example, that parents are better situated than judges to determine whether a child should have access to third parties, such as siblings, grandparents, or former stepparents. *See, e.g., id.* at 1423–24; Buss, *supra* note 4, at 647.



Presuming that parents always represent children's interests reflects an overly romanticized vision of the parent-child relationship: that because parents love their children, and indeed sometimes jealously love their children, parents' interests and their children's interests perfectly align. This rose-colored view of parental decisionmaking ignores the reality of intrafamily diversity. We do not dispute that most parents love their children and believe that they are putting their children's interests first. And most parents indeed know what is best for their children and take steps to meet those needs. But the argument that parents are always best situated to make decisions regarding children wrongly equates parental wishes with children's interests. Although some parents will act to further their children's interests, not all parents can or do, for varying reasons at varying times. Parental behavior in child custody disputes and rates of serious child maltreatment readily confirm that not all parents are able or willing to put their children's interests first.<sup>90</sup> Universal compulsory education laws and child labor laws exist in large part because some parents would otherwise be unable or unwilling to ensure that their children receive an adequate education or resist the allure of increased family earnings.<sup>91</sup>

The law's presumption of parent-child unity thereby wrongly elevates parental love above all else, often ignoring parental conflicts of interests, biases, and blind spots. Parents do provide essential love and care, along with the profound sense of security and safety that only loving caregivers are able to provide. But despite that love, or perhaps because of that love, parents do not always see their children as separate people.<sup>92</sup> Most importantly, parents are sometimes unable to acknowledge how their children's interests may depart from their own, even when parents believe they are acting to further their children's interests. In some circumstances, children may be treated as extensions of parental egos or used to satisfy parental needs and desires.

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90. See Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 238-39 (2010) (discussing and citing studies of how exposure to high levels of conflict and stress negatively impacts children); CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at 57 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/8JFB-H745>] (finding that parents of child victims were the perpetrators in 79.7 percent of substantiated cases of child maltreatment nationwide).

91. *Wisconsin v. Yoder*, 406 U.S. 205, 227-28 (1972).

92. As Paula Fass puts it, "Parents love their children, but they also love themselves." PAULA S. FASS, *THE END OF AMERICAN CHILDHOOD: A HISTORY OF PARENTING FROM LIFE ON THE FRONTIER TO THE MANAGED CHILD* 268 (2016).

This Article focuses on the many situations where perfectly fit, and sometimes exemplary, parents might fail to recognize and further their children's interests. For example, parents might allow anger at a former spouse to cloud their judgment concerning the importance of a child maintaining a relationship with former stepsiblings. A parent with conservative religious views might prevent a child from accessing medical care for gender identity issues or from attending school. Otherwise well-intentioned parents might hit or isolate their child in the name of discipline. A parent might post videos on social media that reveal private aspects of a child's life that remain online forever. Moreover, "children are subject to a degree of parental authority that often leaves them little opportunity to conceive interests that diverge from the *nomos* of those who raise them."<sup>93</sup> The current legal regime not only runs the risk of stifling children's interests; it may also prevent those interests from developing in the first place.

Some proponents of expansive parental rights acknowledge these potential conflicts and draw the analogy to fiduciary relationships in an attempt to address these conflicts.<sup>94</sup> Yet, as even proponents of the fiduciary model recognize, fiduciary principles do not serve as a sufficient check on parental wishes. The parent-child relationship is much more comprehensive than most other types of fiduciary relationships, such as trustee and beneficiary, and has intrinsic value in ways those other relationships do not.<sup>95</sup> More importantly, parents are often self-interested in ways that would otherwise disqualify them from serving as fiduciaries. Indeed, parents generally profit from their status as parents.<sup>96</sup> It is simply impossible to disentangle parental wishes and children's interests. As one commentator writes, "the line between the

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93. Cohen, *supra* note 70, at 221–22 (using *nomos* in the sense of custom or norms). As the dissent in *Yoder* noted:

If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.

406 U.S. at 242 (Douglas, J., dissenting).

94. Scott & Scott, *supra* note 4 *passim*; Lionel Smith, *Parenthood is a Fiduciary Relationship*, 70 U. TORONTO L.J. 395 *passim* (2020).

95. Scott & Scott, *supra* note 4, at 2402–03 ("[The parent-child relationship] is broader in scope than are many other fiduciary relationships. Beyond this, the parental relationship, once established, has intrinsic value for the child that extends beyond successful performance of caretaking tasks.")

96. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 190–91 (2001); Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 48 (1992).

ownership and fiduciary model[s] is ambiguous . . . . There is little to prevent parents from acting as owners rather than as fiduciaries, and the difference may be very difficult to discern in more abstract matters of personal belief.”<sup>97</sup> With vaguely defined concepts such as the “best interests of the child” or “child wellbeing,”<sup>98</sup> fiduciary analogies place no restraints on parents’ discretion to act in their own interests.<sup>99</sup>

Moreover, even the fiduciary analogy does not escape assumptions about children’s dependency and parental control, which rest on and reinforce the view that children are more passive and dependent on their parents than they actually are. Of course, children are born physically dependent on adults, but law currently makes this biological fact the defining feature of children’s existence from infancy through adolescence. Expansive parental rights, even when tempered by the fiduciary analogy, position children as unformed beings or adults-in-waiting until they reach the legal status of adulthood.<sup>100</sup>

Expansive parental rights thus construct children as more dependent and passive than they actually are, thereby obscuring the extent to which children possess agency within dependency. *By agency, we do not mean autonomy.* Older children have such autonomy interests, and the law should recognize and further them. But more importantly, children have agency interests, that is, the capacity from

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97. Cohen, *supra* note 70, at 226.

98. Various scholars have analyzed the vagueness of the best interests of the child standard. See, e.g., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL’Y 63, 66 (1995); Susan Frelich Appleton, *Doing Better for Child Migrants*, 17 WASH. U. GLOB. STUD. L. REV. 615, 616 (2018); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11–17 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 256 (1975). For the seminal critique, see generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). But see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 MICH. L. REV. 2215, 2291 (1991) (arguing that the best interest standard “provides as reasonable a framework for balancing the advantages of rules and discretion as we are likely to find”).

99. Moreover, unlike fiduciaries appointed by a court, parents as fiduciaries are not supervised by independent persons to ensure that the parents’ decisionmaking conforms to children’s interests. Scott & Scott, *supra* note 4, at 2441–42. Other scholars have argued that parental rights instead may be justified as a mechanism for allowing parents to hold children’s future interests in trust. See, e.g., Joel Feinberg, *The Child’s Right to an Open Future*, in *WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124, 125–26 (William Aiken & Hugh LaFollette eds., 1980) (arguing that parental rights can be justified as a mechanism for allowing parents to hold children’s future interests in trust). That argument similarly relies on broad parental power to determine children’s interests.

100. Dailey & Rosenbury, *supra* note 3, at 1499.

the earliest age to express their will, engage with others, and be active in the world. Even infants have agentic powers as they learn to control bodily movements, express their needs, respond to caregivers, and act independently. Walking, speaking, and exploring are all ways in which young children express their agency while at the same time being dependent upon adults for supporting and nurturing those agentic activities.

The simple developmental view of children obscures the extent to which children come to possess this agency within dependency. As children grow, their agentic powers grow with them; they become increasingly independent and self-directed. Expansive parental rights thereby inevitably limit and distort what lawmakers and others conceive of as children's interests. If children's agency is downplayed or denied, we are unlikely to see their interests in participating in the public sphere or in expressing their identity. We are unlikely to see the importance of their exposure to ideas outside the home or their need for privacy. It is true that "children may have undeveloped, or developing, minds and capabilities. But this would seem to argue in favor of offering them more, not fewer opportunities to explore worlds outside of that which exists in their home."<sup>101</sup>

Once children's agency is viewed within dependency, it becomes clear that children are not mere ciphers for parental beliefs and values or puppets of parental wishes. Although children may deeply identify with parents, they also—starting at an early age—struggle to separate themselves from their parental caregivers. Indeed, child development can be seen as one long process of separation propelled by children's innate agentic powers. Without a developed understanding of children's interests rooted in developmental science and child psychology, existing law subsumes children's independent interests and represses the extent to which children actively shape themselves and their worlds.

*2. Perpetuating Systemic Race and Class Biases.* Expansive parental rights are often justified on the ground that they are necessary to protect low-income families, particularly poor Black families, against the intrusions of a racially discriminatory state.<sup>102</sup> Scholars

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101. Cohen, *supra* note 70, at 234.

102. See, e.g., Huntington & Scott, *supra* note 5, at 1414 ("[M]odern doctrine reflects an understanding—sometimes explicit, but more often implicit—that deference to parental

describe how the removal of children has been devastating for Black families and communities.<sup>103</sup> Many of these removals are supported by vague conceptions of parental “neglect” which can turn on subjective and racially biased perceptions about parental fitness.<sup>104</sup> In light of concerns about racial disproportionality in the system, it is understandable that many turn to expansive parental rights as a bulwark against child protection interventions by the state.<sup>105</sup>

We share these very serious concerns about the vulnerability of low-income families of color to discriminatory state interventions. Yet relying upon the current doctrine of parental rights to solve the problem of discrimination in the child welfare system in fact multiplies the harms these families face. Expansive parental rights adversely affect low-income families in part by absolving the state of responsibility to further children’s interests.<sup>106</sup> The law currently treats caregiving as entirely privatized, reinforcing the traditional view that children must turn to parents, not the state, for the basic necessities of life.<sup>107</sup> The current regime of expansive parental rights thus fails to help parents in the difficult task of childrearing. From the moment of birth, children’s experiences and opportunities are determined by their parents’ private resources.

The law thus leaves many parents without the resources they need to raise their children. When economic hardships arrive, so often does the state in ways that punish parents and harm children. The state

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decisionmaking typically furthers child wellbeing, serves society’s interests, and provides an important shield against state intervention for low-income families and families of color.”).

103. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2003). *But see* ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE, NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 63 (1999) (arguing that racial disparities in removal rates reflect elevated rates of parental maltreatment due to higher rates of poverty and other risk factors among families of color).

104. Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 31–32 (2003).

105. See Roberts, *supra* note 103, at 178 (“The racial bias in state interventions in the family clarifies the reasons for safeguarding family autonomy. Parents’ freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups.”).

106. Somewhat analogously, LaToya Baldwin Clark compellingly analyzes how systems that depend on parental advocacy to vindicate children’s interests often “exacerbate[] and legitimize[]” racial inequities because the fact of parental involvement legitimizes the outcomes of a system that low-income and minority parents cannot meaningfully shape. LaToya Baldwin Clark, *The Problem with Participation*, 9 MOD. AM. 20, 21 (2013).

107. See EICHNER, *supra* note 24, at 84 (setting out how law “ascribes to parents the responsibility for childrearing, and accords the state residual responsibility only when and if parents fail”).

functionally presumes that all parents have adequate access to the resources needed to raise their children and does not help rectify the effects of systemic inequality.<sup>108</sup> The state then ascribes any parental failings to parents' own moral or economic choices, rather than background distributional inequalities, and intervenes in an all-or-nothing way by removing children from the home.<sup>109</sup> In the current regime, therefore, the state does *not* leave everyone alone. Expansive parental rights reinforce a public–private binary that subjects some children to even greater mechanisms of state control.

Expansive parental rights therefore hurt many families even as they purport to protect them. As Professor Dorothy Roberts has argued, racially subordinated families often want a different kind of state intervention as opposed to no intervention.<sup>110</sup> Law currently places no duty on the state to support parents before problems arise by providing early childcare, financial support, access to health care, and other necessities of life. To the contrary, expansive parental rights create an either-or system where punitive state interventions, including removal and termination of parental rights, become the state's primary response to parental difficulties. The problem is not intervention by the state but rather the lack of preventive intervention in the form of financial supports designed to strengthen families.

Protection against a system that disproportionately removes children of color from their families should be tailored to the specific harm of family separation. Any state action that raises the risk of family separation by child welfare workers must be subject to the highest scrutiny and allowed only where the child is at risk of serious and imminent emotional or physical harm. Strict scrutiny should apply not only to decisions to remove a child but also to steps in the child protection process preceding termination. Expansive parental rights go well beyond such protections, instead erecting barriers against state involvement designed to support families. The broad shield of family privacy absolves the state of its responsibility to help families by providing support for the parent–child relationship.

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108. See Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 2–3 (2008) (“[F]amily inequalities shape children’s life chances.”).

109. See *infra* Part III.C.2.

110. Dorothy E. Roberts, *The Value of Black Mothers’ Work*, 26 CONN. L. REV. 871, 885 (1994).

The law's idealized view of the private family also implicitly reinforces a model of the two-parent nuclear family, disregarding the vast array of family forms in which children are now raised. Expansive parental rights presumes that children are in the custody of one or two parents who have the resources to exercise full decision-making authority against the state and third parties, including other family members.<sup>111</sup> Under this ideal of private caregiving, all others—the state or third parties—are thought to be unnecessary, masking the reality that families need state support and that families today include a much broader range of people than one or two legal parents.<sup>112</sup> In some families, children might be raised by other family members, such as grandparents, or by close family friends whom children consider aunts or uncles. A range of extended family members and other important figures outside the private family may be intimately involved in a child's upbringing. These unofficial caregivers currently have little or no legal standing unless they go through formal channels to become legal guardians or legal parents.<sup>113</sup> As in other areas, the burden here falls especially heavily on children of color who are disproportionately likely to live in single-parent families with fewer financial resources.<sup>114</sup>

Expansive parental rights thus implicitly rest on a naturalized vision of the private two-parent family, one rooted primarily in legal status flowing from biology. Advocates of expansive parental rights have responded to concerns about harm to children in nontraditional

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111. See Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 *LAW & CONTEMP. PROBS.* 25, 26 (2014) (“Even in the parent-child relationship, neoliberalism dominates, as state law leaves children’s fates to depend on their parents’ market earnings.”).

112. See Murray, *supra* note 3, at 386–87, 397–98 (“Just as feminist legal scholars argued that coverture . . . prevented the state from identifying and remedying dysfunction within marriages, parental rights create a zone of privacy that prevents the state from seeing into the black box of family life to understand how caregiving responsibilities actually are performed.” (footnote omitted)).

113. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000) (plurality opinion) (holding a nonparental visitation statute infringed on the fundamental right of parents to make decisions concerning their children); see also Murray, *supra* note 3, at 398–405 (“The law effectively has constructed a parent/stranger dichotomy in which one is either a parent, vested with the rights and responsibilities of caregiving, or one is a legal stranger without legal entitlements or obligations.”).

114. Children in Single-Parent Families by Race in the United States, Annie E. Casey Found. Kids Count Data Ctr., <https://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families-by-race#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/432,431> [<https://perma.cc/P8NK-8JEB>] (providing data that shows 64 percent of Black families and 42 percent of Hispanic or Latino families are headed by one parent as compared to 24 percent of white families).

families by broadening the category of persons who should count as legal parents because they are functioning as parents or otherwise should be seen as de facto parents.<sup>115</sup> If the worry is that many caregivers do not conform to the legal definition of parent, then the solution in this view is to expand the definition of who counts as a legal parent. This is a welcome and long-overdue development. When people have acted as parents for an extended period of time and have developed deep, emotional parent-like bonds with children, it will generally be in the children's interests for these de facto parent relationships to receive legal recognition so that children may maintain important attachment relationships.<sup>116</sup>

Yet expanding the category of legal parenthood—while desirable—does not address the full range of children's relationships or support low-income families in less punitive ways. In some families, for example, grandparents and other family members may serve as primary caregivers for children but do not wish to be designated the child's legal parents and certainly do not wish to terminate the parental rights of existing legal parents.<sup>117</sup> In other families, as discussed in Part III below, children may be cared for by third parties when parents are incarcerated, but it is not necessarily in children's interests to have the rights of their incarcerated parents terminated and their new caregivers proclaimed legal parents, particularly when caregivers do not wish to be designated legal parents.<sup>118</sup> For families struggling with poverty or incarceration, expanding the category of legal parents risks pitting legal parents against subsequent caregivers or, worse, may keep incarcerated parents from seeking help from family members out of

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115. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2331–47 (2017). Stepparents and unmarried partners of biological parents are examples of people who often succeed in fulfilling the requirements of de facto parenthood. See *In re Parentage of J.B.R.*, 336 P.3d 648, 653 (Wash. Ct. App. 2014) (holding that de facto parentage could be extended to stepfather even though child had two biological legal parents); *In re Custody of A.F.J.*, 260 P.3d 889, 890–91, 899 (Wash. Ct. App. 2011) (holding that biological mother's lesbian partner was the child's de facto parent); *In re B.G.*, 523 P.2d 244, 253 (Cal. 1974) (“[A] person who assumes the role of parent, raising the child in his own home, may in time acquire an interest in the ‘companionship, care, custody and management’ of that child. The interest of the ‘de facto parent’ is a substantial one . . .”).

116. See Buss, *supra* note 4, at 641–42; UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017).

117. Cf. Sacha M. Coupet, “*Ain’t I a Parent?*”: *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 609–10 (2010) (“[T]here is a tension between the potential costs of seeking legal recognition of a kinship caregiver’s parenthood and the benefits gained by such a recognition.”).

118. See *infra* Part III.C.3.



fear that they might be surrendering their parental status altogether. Expanding the category of legal parenthood therefore does not address the diversity and needs of many families.

3. *Using Family Privacy to the Detriment of Children and Families.*

As we have seen, expansive parental rights are often justified on the ground that they serve as a bulwark against excessive state intervention in the private family.<sup>119</sup> The state may exercise its *parens patriae* authority to wrest control over children from parents,<sup>120</sup> but the state is justified in doing so only in limited circumstances when parents are failing and, therefore, forfeiting their rights.<sup>121</sup> This conception of parental rights “perpetuates the myth that the state does not intervene in most families.”<sup>122</sup> Efforts by the state to intervene in the lives of children are understood as encroachments on parental rights, and any assertion of parental authority is understood as preempting state interference.<sup>123</sup>

This vision of a private family immune to state intervention is deeply misleading for several reasons, including the minimal protection it provides against a child welfare system that massively intrudes in the lives of families subordinated by race and class.<sup>124</sup> Even more broadly, the state already intervenes in all families by defining who counts as a parent and then continuing the historical practice of allocating almost exclusive control over children to parents.<sup>125</sup> The law’s allocation of control to parents is a choice, not a natural state of affairs. Because the state grants control to parents in most instances, parents are thought to be free of state control until they engage in gross

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119. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 32 (2005); Huntington & Scott, *supra* note 5, at 1374.

120. *Parens patriae* (literally “parent of the country”) authority refers to the power that a state wields when it acts to support or protect children. *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980).

121. See, e.g., EICHNER, *supra* note 24, at 59 (describing the dominant view of the liberal state’s responsibility for supporting children as “residual,” meaning that it is “triggered only *after* families fail in some serious way”).

122. Dailey & Rosenbury, *supra* note 3, at 1457.

123. See Huntington, *supra* note 24, at 1498–99 (analyzing family autonomy as “the idea and ideal that a stark line divides the family from the state”); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 588–91 (2011) (describing the widely held belief, in family law doctrine and scholarship, that “all families, including black families, are able to organize themselves as they see fit without the interference of the state”).

124. See *infra* Part III.C.2.

125. For a recent examination of who counts as a parent in constitutional law, see generally Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020).

misconduct. Expansive parental rights therefore rest on the false notion of a natural divide and opposition between parents and the state.<sup>126</sup>

The law's embrace of the ideal of family privacy distorts the reality of the family–state relationship,<sup>127</sup> with three major adverse consequences for children and families. First, because children are assumed to be under the authority of their parents, children are relegated to the private sphere and hence legal obscurity.<sup>128</sup> “Much like women were under coverture, children are confined to the private sphere, removed from public life – ostensibly for the good of themselves and the polity in general.”<sup>129</sup> The advantages to children are merely ostensible because privatization permits parents to exercise almost unbounded discretion over children's lives. Most children do attend school, which gives them important access to the public domain even as they otherwise remain located in the private realm of the home. But, as discussed below, parents still retain authority to remove children from school altogether and educate them at home.<sup>130</sup> Indeed, children exist largely outside of the law unless their parents engage in misconduct, perceived or real, that comes to the attention of child welfare authorities. Even when that occurs, the state merely assumes *parens patriae* authority, attempting to replicate private parental authority. As a result, “[l]ittle room remains for anyone, parents, children or the state, to create a space for children that lies *between* the world of the parents and the world of the state.”<sup>131</sup>

Second, current notions of family privacy construct the allocation of authority between parents and the state as an on-off switch, precluding shared family–state responsibility for furthering children's interests. State involvement in the family is often seen as punishment instead of support, particularly for families of color, as described above.<sup>132</sup> Attempts to better address children's interests within families

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126. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 *passim* (1983).

127. See Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1257–58 (1999).

128. Fineman & Shepherd, *supra* note 3, at 62.

129. Cohen, *supra* note 70, at 222.

130. See *infra* Part III.A.1.

131. Cohen, *supra* note 70, at 234; see also Rosenbury, *supra* note 9, at 834–35 (discussing childrearing performed by actors who are neither parents nor teachers).

132. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE *passim* (2002); see also Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92

are therefore understandably met with alarm, because it is assumed that the only alternative to parental rights is punitive state intervention into the family.<sup>133</sup> Scholars and policymakers continue to embrace expansive parental rights because they fear any alternative will result in a significant transfer of power from parents to the state. This either-or mentality leads to alarming rates of state separations of children from their parents instead of state support for families.<sup>134</sup> It also limits opportunities for public support of children living with their parents and prevents the development of state initiatives designed to increase the involvement of teachers, pediatricians, religious counselors, and other adults and children in children's lives, as discussed below in Part III. Existing notions of family privacy unnecessarily pit parents against the state, precluding any possibility that states could better partner with parents to support children.

Third, family privacy creates obstacles to affirmative community involvement in children's lives and upbringing. Children interact with a wide range of actors outside of the home, including those affiliated with private schools, religious congregations, sports teams, youth clubs, extended family, political causes, and other social communities.<sup>135</sup> These actors often support parents and almost always influence children's identities and world views, yet existing notions of family privacy continue to cling to a binary of parents and state actors, such as public school teachers and child welfare workers.<sup>136</sup> Family privacy therefore simplifies the lives of both children and parents and overlooks the ways families are supported and influenced by nonstate actors.

For all of these reasons, notions of family privacy predicated on a parent-state binary serve to fortify the "privatization of dependency,"<sup>137</sup> undermining efforts to recognize children's affirmative rights to state support. The U.S. Supreme Court has

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NEB. L. REV. 897, 903 (2014) ("Parental fault is jurisdictional; without it, there are no legal grounds for the court system to intervene or for a child protection agency to force a family to work with it.").

133. See, e.g., Huntington & Scott, *supra* note 5, at 1416 ("Parental rights provide an essential shield against excessive state intrusion driven by bias.").

134. See *infra* Part III.C.2.

135. Rosenbury, *supra* note 9, at 834–36, 843–44, 870–71, 885–89.

136. Murray, *supra* note 3, at 386–87; Rosenbury, *supra* note 9, at 834.

137. For more on the "privatization of dependency," see FINEMAN, *supra* note 24 *passim*; Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 83–84 (2016); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1992–97 (2018).

repeatedly held that the Constitution protects only negative liberties, that is, individuals' rights to be free from governmental interference.<sup>138</sup> In *DeShaney v. Winnebago County Department of Social Services*,<sup>139</sup> a case involving the claims of a young child to safety from his father's violent abuse, the Court held that the Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."<sup>140</sup> In other words, the state has no positive duty to protect children from harm at the hands of their parents, let alone a duty to support parents seeking to foster their children's interests. Visions of the family as a sphere of individual liberty free from government intervention keep the state out *in all ways*.

Current notions of family privacy thereby reinforce an all-or-nothing model that pits parents against the state rather than a model that views the family as both private in certain respects and open to public support in others. This all-or-nothing model justifies the longstanding denial of affirmative rights for children by assigning parents the duty to provide for children's needs, in turn absolving the state of its obligations toward families. When parents are well-off, the lack of affirmative rights to basic necessities may have little effect because parents are able to purchase the goods and services their children need. In contrast, economically marginalized children, who are disproportionately children of color, may suffer. Expansive parental rights and the lack of affirmative rights for children privatize caregiving within the family, leaving children vulnerable to the social and economic inequalities afflicting their adult caregivers.

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138. Parents' expansive parental rights fall within the classic definition of a negative liberty: preserving parents' freedom to raise their children free from governmental control. For critiques of the Court's focus on negative rights and aversion to affirmative rights, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 482 (2006); Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1906 (2001). The Court has recognized only a few affirmative constitutional rights, such as the right to habeas corpus, trial by jury, and possibly marriage in *Obergefell*, but the Court for the most part views the federal Constitution as a charter of negative liberties. See, e.g., Gregg Strauss, *The Positive Right To Marry*, 102 VA. L. REV. 1691, 1691 (2016).

139. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

140. *Id.* at 191, 196. *But see* Schall v. Martin, 467 U.S. 253, 265 (1984) (indicating that children do have one fundamental affirmative constitutional right: the right to be in the custody of an adult caregiver, so "if parental control falters, the State must play its part as *parens patriae*").

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Expansive parental rights reinforce a myth of state nonintervention in the family in ways that harm children's interests, adversely impact low-income and Black children, and privilege the interests of parents over those of children. By conceiving of the family as a unified, private unit, the law ignores or represses children's agency within dependency, intrafamily diversity, and nonpunitive forms of state support. The following Part presents a new model of parental rights that looks beyond the façade of family unity to uncover and better support the interests, outlooks, and identities of all family members.

## II. A NEW MODEL OF PARENTAL RIGHTS

This Part sets forth a new model of parental rights that foregrounds children's relationships with parents and the broader communities in which families live. The model offers a relational conception of parental rights; seeks to strengthen the state's role in supporting the parent-child relationship, particularly for families subordinated by race and class; and 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. In so doing, our model reframes parental rights as a mechanism for furthering children's vital interests in the parent-child relationship as well as their interests in the world beyond the family.

We argue that children's relationships, needs, and interests are important government ends that justify setting limits on parental authority in addition to providing affirmative state support to families. This model builds on aspects of existing law and aspirations voiced for decades by scholars and judges,<sup>141</sup> but the model goes further by comprehensively recalibrating parental rights in light of children's needs for robust parental and state support as well as their important capacities and needs as people in their own right. Of course, existing

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141. For example, Barbara Woodhouse has argued for a conception of parental rights "flowing from parents' responsibilities" and the needs of children rather than claims of ownership. Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 394-95 (1996); see also Dailey & Rosenbury, *supra* note 3, at 1515-27 (explaining "the new tripartite framework [in which] adult responsibilities . . . foster a collaborative relationship between parents and the state").

law already limits parental authority to some extent. Public school boards may impose curriculum requirements over parental objections,<sup>142</sup> states may allow for sex or mental health counseling without parental approval,<sup>143</sup> states require children to attend school and to abstain from most forms of paid labor, and states monitor for maltreatment in the home.<sup>144</sup> Yet, however broad, these existing limits on parental authority are the exception rather than the norm in the current regime of expansive parental rights. Our model, in contrast, foregrounds children by asking how the law might best strengthen the parent–child relationship in a diverse range of families, provide greater state support for children and their families, and better account for the ways children’s interests may diverge from parental interests and wishes.

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. But under our approach, state action that otherwise burdens parental rights should be subject to an intermediate standard of review requiring the government action to substantially further an important state interest in children’s welfare. This two-tiered model of judicial review affirms the fundamental importance of the parent–child relationship to both children and parents and the need to ensure that this relationship is protected from undue disruption by the state. Importantly, our model seeks to foster state and other programs that strengthen parental caregiving and obviate the need for close supervision or children’s removal from the home. Our model therefore does not aim to eliminate parental rights; instead, a relational view of parental rights safeguards the parent–child relationship while also seeking to further children’s broader interests. Although deference to parents is often the best way to help children, particularly young children, flourish, our model emphasizes that

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142. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (affirming a school board’s general authority over the curriculum but holding that the board’s authority does not extend “into the school library and the regime of voluntary inquiry that there holds sway”).

143. See A.L.I. Tentative Draft 2, *supra* note 78, §§ 16.01, 16.02.

144. See *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (stating that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare” and enumerating exceptions to parental authority regarding education, child labor, and health).

deference to parents must be closely tailored to children's diverse interests at any given moment in time.<sup>145</sup>

A. *The Basic Model: Relational Rights and State Support*

The new model of parental rights shifts law's focus to the needs of parents and children in relation to one another and the ways that the state may support those needs. The model therefore conceives of parental rights in relational terms rather than as rights of control focused primarily on parental prerogatives. Children clearly need parental guidance and caregiving, as children's primary attachment to their parents is the single most important factor in children's wellbeing and development.<sup>146</sup> Indeed, attachment theory rooted in developmental science emphasizes that children have relational needs for close, nurturing care from parental figures who provide consistent and stable caregiving.<sup>147</sup> Children need the kind of intimate care and guidance that only parents and other important caregivers can provide. Yet guidance and care need not equate to unfettered parental authority or control. Children are both deeply attached to their caregivers and are independent persons with interests separate and apart from their parents.

By focusing on aspects of the parent-child relationship beyond hierarchical control, the new model of parental rights recasts the fundamental right to direct the upbringing of one's children. The earliest cases recognizing this right—*Meyer v. Nebraska*<sup>148</sup> and *Pierce v. Society of Sisters*<sup>149</sup>—focused on state attempts to dictate aspects of children's education.<sup>150</sup> Because those cases focused on whether parents or states would make these decisions, the analysis was presented as one of either state or parental control. In doing so, children's interests were collapsed into the interests of either parents or the state. The right to direct the upbringing of one's children was framed, and continues to be framed, like other autonomy rights, pitting

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145. In this sense, we would qualify Woodhouse's assertion that "[a]ffording legal protection to the rights of privacy and autonomy, which parents need to carry out their responsibilities, serves both the interests of children and the interests of a larger community." Woodhouse, *supra* note 141, at 394-95.

146. GOLDSTEIN ET AL., *supra* note 98, at 22.

147. Alstott, Dailey & NeJaime, *supra* note 6, at 2-3.

148. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

150. *Meyer*, 262 U.S. at 400-03; *Pierce*, 268 U.S. at 530.

individual parents against the state.<sup>151</sup> From this perspective, individuals enjoy certain fundamental freedoms such as freedoms of speech, religion, and assembly; among them is the freedom to decide whether to have a child, and once the child is born, how to raise and care for the child. This autonomy-based vision of parental rights protects the autonomy of parents to raise their children but does nothing to acknowledge children as persons in their own right. Likewise, because individual parents are pitted against the state, state involvement is constructed as hostile to parental rights instead of facilitative of those rights.

In contrast, the new model of parental rights brings children's interests to the forefront of the analysis and positions the state as a potential partner in childrearing as opposed to an adversary. This dual aspect of the model affirms the fundamental right to direct the upbringing of one's children yet recognizes that parental rights are different than other fundamental rights because they are relational rights rather than individual rights. The model offers an alternative relational perspective on parental rights that emphasizes the ways in which the parent-child relationship is one of emotional reciprocity and exchange between individual yet deeply connected parties, in contrast to a hierarchical relationship in which children are passive recipients of parental caregiving.<sup>152</sup> Children receive physical and emotional caregiving from their parents, but they too provide emotional gratification and, as they age, intellectual exploration. As Professors Martha Minow and Mary Lyndon Shanley have identified, this is the paradox of family life: "family members are individuals, but they are individuals who are in part defined by their relationships with others."<sup>153</sup>

Our relational conception of parental rights respects the parent-child relationship while at the same time limiting parental rights in

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151. GUGGENHEIM, *supra* note 119, at 32 ("The right to bear and raise children is at the core of an individual's autonomy because it permits him or her the opportunity to choose the kind of life that makes the most sense."); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1072 (2003) ("Under a fiduciary model, legal regulation that diminishes parental autonomy in child rearing—by giving third parties custody and visitation rights without full parental status, for example—threatens the law's goal of promoting children's welfare through parental dedication.").

152. See JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 9 (2011).

153. Minow & Shanley, *supra* note 21, at 5. We draw upon Minow and Shanley's theory of relational rights in the family. For a brief overview of that theory, see *id.* at 5–6.



order to foster children's other interests in three important ways. First, in a relational frame, parental rights do more than simply carve out a sphere of caregiving activity free from state control; parental rights are also about negotiating the relationship between parents and children and the ways that the state might support that relationship. A relational perspective sets some limits on parental control by bestowing equal respect on children's independent interests in people and experiences beyond the parent-child relationship. From this perspective, children are active participants in their own lives rather than passive objects of parental control. As Part III describes, a relational approach means narrowing parental rights to allow for recognition of children's interests outside the home.

Second, a relational view of parental rights situates parents in relationship to other important people in children's lives. Under law's current embrace of expansive parental rights, parents have full control over children's relationships with so-called third parties, which includes anyone other than legal parents, no matter how important the relationship to the child.<sup>154</sup> Parental rights under our model reflect the fact that children live within a web of relationships, both within and outside the family, including relationships with important caregivers, mentors, and peers.<sup>155</sup> A relational perspective allows room for children to develop ties to people and communities beyond the family. In discussing children's relationships to foster parents and friends, parental rights must be narrowed in some circumstances to allow for the flourishing of children's broader relationships to people and communities.

Finally, relational rights are not solitary rights of control but instead are shared rights held by both parents and children that encompass claims to affirmative state support. Relational rights reject the model of the individual autonomous actor seeking freedom from state control. Instead, these rights reflect an understanding that parents need affirmative support in carrying out their childrearing duties, and that children, as independent persons, have a right to that state support.<sup>156</sup> The following Sections explain how our model construes

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154. See *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000) (plurality opinion) (determining that a Washington law which allowed any third party to petition a court for visitation rights without deference to the parents was unconstitutional).

155. See Dailey & Rosenbury, *supra* note 3, at 1484–92, 1508–14 (discussing children's web of relationships within the authors' model).

156. See Anne C. Dailey, *Children's Transitional Rights*, 12 *LAW, CULTURE & HUMANS* 178, 191 (2016); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 *CONN. L. REV.* 741, 780–

relational rights as encompassing broad structural reforms to support families and children; Part III illustrates what these reforms might look like.

Because of the importance of fostering children's interests in these three ways, the new model of parental rights establishes a two-tiered approach to reviewing governmental action that restricts parental authority. The two-tiered model of parental rights demands strict scrutiny for government action that threatens to separate children and parents, for example in the child custody or immigration arenas, based on the importance of the parent-child relationship to children's welfare. If states seek to separate children from parents, then strict scrutiny is appropriate, requiring states to provide a compelling governmental purpose and means that are narrowly tailored.

In other cases, however, where the state does not seek family separation, an intermediate standard of review should govern. By emphasizing the importance of children's diverse interests and the ways states may affirmatively support those interests, our model rejects the notion that state involvement in families should always be subject to the highest scrutiny. 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. When evaluating parental rights claims under an intermediate standard of review, the court should ensure that the governmental action substantially furthers children's own interests without unduly disrupting or threatening the parent-child relationship.

The new model of parental rights thus calls for reconsideration of the U.S. Supreme Court's decision in *Troxel v. Granville*, which struck down the state of Washington's third-party visitation statute on the ground that, as applied in this case, it violated the mother's parental rights.<sup>157</sup> The state trial court had awarded visitation to the children's paternal grandparents based solely on the best interests of the child and did not, according to the Court, give adequate weight to the mother's wishes.<sup>158</sup> The case did not produce a majority opinion, and the plurality's opinion leaves unanswered many basic questions about

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81 (2016) ("Relationship-based rights take seriously the nature of relationships and the state's affirmative obligation to support relationships that provide valuable care to children.").

157. *Troxel*, 530 U.S. at 60, 72-73 (plurality opinion).

158. *Id.* at 61-62, 69.

the scope and weight of parental rights. In particular, the plurality describes the rights at stake as “fundamental,” but never clarifies exactly what level of scrutiny should apply when these fundamental rights have been burdened.<sup>159</sup>

Commentators do not offer much greater clarity. Few, if any, openly take the position that parental rights deserve strict scrutiny even though parental rights are deemed fundamental rights under the Due Process Clause. An exception is Professors Clare Huntington and Elizabeth Scott, who argue that parental rights should govern absent harm to the child, a position that risks leaving children, as Justice John Paul Stevens described it, as “so much chattel.”<sup>160</sup> While some commentators have argued in favor of intermediate scrutiny for laws burdening parental rights, these proposals remain focused on the scope of parental interests and the conflict between parents and state.<sup>161</sup> Only Justice Stevens in his dissenting opinion in *Troxel* has affirmed that, in addition to balancing parents’ interests “against the [s]tate’s [] interests as *parens patriae*,” the courts must also weigh “critically[] the child’s own complementary interest,” in that case the child’s interests “in preserving relationships that serve her welfare and protection.”<sup>162</sup> While our model does not advocate for a straightforward balancing of interests among parents, state, and children, it clarifies that children’s interests must be identified and respected as an important governmental end for purposes of intermediate scrutiny.

This two-tiered approach to parental rights confers the highest protection on families when state action threatens to separate children from their parents, thus addressing the important equality concerns of commentators who argue that any weakening of parental rights runs the risk of increased state removal of children from the homes of low-income families, particularly families of color. Racism and white supremacy in the child welfare system are a grave threat to children’s wellbeing and families of color.<sup>163</sup> State action that threatens to separate parents and children, or that threatens to lead to the separation of parents and children, should be treated as presumptively

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159. *Id.* at 65. See Ryznar, *supra* note 13, at 134 (“The language of the *Troxel* plurality established the importance of this parental right, but failed to articulate a level of scrutiny.”).

160. *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting).

161. See Ryznar, *supra* note 13, at 153–54 (“[T]he state may have reasons to become involved in the care and control of a child, and the courts would have to allow a lower level of scrutiny for that intervention to occur.”); Meyer, *supra* note 13, at 570–79.

162. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

163. See *infra* notes 351–52 and accompanying text.

unconstitutional and only sustained for the most compelling reasons, generally limited to preventing serious physical or emotional harm to children. But when state action seeks to support families or to further children's interests outside the home, a lesser level of scrutiny is warranted. Intermediate scrutiny allows an important degree of protection for parental rights while at the same time recognizing that children have interests as independent persons separate and apart from their parents that only grow over time.

The following three Sections elaborate in greater detail the essential elements of our new model of parental rights: the need to formulate parental rights in light of children's independent interests and agency; the importance of recognizing children's affirmative rights to necessities and families' right to support from the state; and the gains to pluralism and equality that follow from reconfiguring parental rights in light of children's independent interests.

### *B. Children's Agency and Independent Interests*

The law has long sought to support pluralism among families but not diversity within families.<sup>164</sup> The new parental rights aims to foster both types of diversity by recognizing the ways in which children are independent persons with interests separate and apart from their parents at the same time that they are dependent on their parents for caregiving and guidance. Children's diverse interests may depart from those of their parents in significant ways, and parents may not recognize those departures or may actively work to suppress them.

Our new model of parental rights therefore recognizes children's agency within dependency, and the ways in which children's agentic capacities give rise to and shape their diverse interests. Children may differ from their parents and have their own interests separate and apart from parental interests.<sup>165</sup> Indeed, developmental psychologists have long confirmed the idea that child development is largely about children distinguishing themselves from their parents and creating their own sense of identity, both connected to but distinct from parents and family.<sup>166</sup>

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164. See Rosenbury, *supra* note 9, at 893 (emphasizing that “[p]luralism currently exists only between families” and “rarely exists within families” (emphasis omitted)).

165. See, e.g., ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY passim* (2012).

166. See, e.g., ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 247–69 (2d ed. rev. & enlarged 1963). Another reason for law's blindness to children's independent and evolving interests is the

Our model uses “agency” to capture children’s affirmative power to direct their own lives, including their power to form relationships, shape and express their identities, seek out new experiences and knowledge, and engage in the world. Agency does not mean autonomy in the sense of persons having independent rational decision-making capacity, although some older children do have the capacity for autonomous decisionmaking in certain circumstances.<sup>167</sup> Rather, the concept of children’s agency as used here signifies children’s power to affect the direction of their own lives even as persons still dependent on others for physical, emotional, and intellectual care and guidance. From an early age, these agentic powers are manifest in children’s growing control over their own bodies and movements, their interest in exploring the world, and their drive to develop relationships with others. Children as young as six months will actively seek out attention from other children, an early sign of children’s relationship-building capacities.<sup>168</sup> Agency is also reflected in children’s resistance to parental authority, from the earliest struggles over feeding or sleeping through adolescent forms of rebellion.

Identifying interests that are of special importance to children is both a descriptive and normative question: what do courts, professionals such as teachers and pediatricians, developmental scientists, parents, and children themselves say about the interests that are most important to life as a child in the United States? Child psychology and developmental science say much about children’s psychological and physical wellbeing, but children’s interests must also draw from shared normative and political values such as diversity, equality, and democracy.<sup>169</sup> Moreover, children’s interests do not exist separate and apart from culture, and they may differ based on race, class, gender, ability, religion, and other identities.

Some advocates of expansive parental rights contend that recognizing these divergent interests will result in more litigation, with

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law’s focus on autonomy and the concomitant need to draw strict lines between childhood and adulthood. *See, e.g.*, Minow, *supra* note 1, at 3–5, 18–21.

167. *See, e.g.*, A.L.I. Tentative Draft 1, *supra* note 5, § 19.01 (delineating mature minor provision for health care).

168. *See* NAT’L RSCH. COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 166 (Jack P. Schonkoff & Deborah A. Phillips eds., 2000).

169. For a description of the relationship between science and values in work advancing children’s interests, see Alstott, Dailey & NeJaime, *supra* note 6 *passim*.

judges standing in for parental decisionmakers.<sup>170</sup> But the assumption that furthering children's agency and diverse interests always means greater litigation is a product of the current all-or-nothing approach to parental rights. Our model does not seek to empower children to run to court every time their desires are impeded, for fulfilling children's every desire is obviously not in their interests. Yielding to children's every wish would reflect a false model of children's autonomy at odds with our conception of agency within dependency. Children absolutely need the parent-child relationship and the love, guidance, and discipline that only parental caregivers can provide.

Moreover, our model emphasizes supports for children outside of the court system. For example, more robust support for children's interests may also be achieved through regulatory and administrative protections, such as prohibitions on corporal punishment or stricter standards for homeschooling; improved procedures, such as those setting limits on parental power to commit children to psychiatric hospitals; laws giving grandparents standing to seek visitation or pediatricians standing to provide certain medical services without parental consent; school policies that provide children with sex counseling or contraceptives; regulations that ensure children's access to ideas and information on issues relevant to their lives; or laws giving children more of a say in custody, foster care placement, or parental rights termination proceedings. A somewhat expanded role for courts may also be expected in certain contexts, such as judicial bypass procedures that may allow some older children to obtain certain kinds of medical treatment without parental consent.

Our model also urges the state to take children's independent interests into account when designing institutions, such as schools and public spaces; when reforming foster care and other child welfare systems; when assuming responsibility for supporting family caregiving; when setting priorities for the distribution of social goods such as food, housing, and internet service; when allocating funds for ensuring children have access to health care; and when deciding disputes over the placement of children who are already subject to court jurisdiction. In recognizing children's position in civil society, our model goes beyond a focus on parents or state actors to support the role of pediatricians, community mentors, coaches, teachers, psychologists, peers, lawyers, and social workers in fostering children's

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170. See, e.g., Guggenheim, *supra* note 4, at 949-50.

interests. The new parental rights also calls for recognizing children's affirmative rights to basic necessities and services, rights that may be vindicated through legislative or administrative means, as well as sometimes by courts.

In earlier work, we laid out the contours of a preliminary template for the range of children's interests that the law should take into account when defining and enforcing parental rights.<sup>171</sup> These interests include children's interests in relationships with parents as well as with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life.<sup>172</sup> In addition to parents and caregivers, a range of persons with knowledge of and connections to children can contribute to the work of identifying and defining children's independent interests, including neighbors, coaches, counselors, clergy, pediatricians, psychologists, developmental scientists, children's lawyers, and social workers. The hard work of articulating and protecting children's interests should be undertaken by courts and policymakers with the help of insights from this much broader range of people invested in promoting children's welfare.

The Supreme Court has occasionally gestured in the direction of a new model of parental rights, one that does not devolve to children suing their parents. In *Parham v. J.R.*,<sup>173</sup> the Court addressed whether parents had unfettered authority to commit a child to a state psychiatric hospital or whether a precommitment hearing was required.<sup>174</sup> We agree that parents should retain a role in such decisionmaking, and that in many cases "the traditional presumption that the parents act in the best interests of their child should apply."<sup>175</sup> But as the *Parham* court emphasized, not in all cases: "[T]he child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized."<sup>176</sup> The Court crafted a review process for child commitments that avoided an adversary hearing pitting child against parent; instead, the Court required that the decision be reviewed by an

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171. See Dailey & Rosenbury, *supra* note 3, at 1448.

172. *Id.* at 1448, 1484–1506.

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

174. *Id.* at 587, 601–02, 604.

175. *Id.* at 604.

176. *Id.*

impartial medical expert to ascertain the necessity of the commitment.<sup>177</sup>

*Parham* exemplifies one possibility for furthering children's independent interests in ways that narrow parental discretion without resort to adversarial litigation. Children's diverse interests may also be fostered through school or other administrative avenues. Some worry that the state or third parties will ask parents to carry out decisions with which they disagree, creating conflict between parents and children, yet existing law already creates such conflict by leaving children at the mercy of parental decisionmaking. Our model seeks to ensure that this already existing conflict inflicts less harm on children's diverse interests. Most parents will comply with good-faith policies regarding their children, in the same way that almost all parents accept their obligation to provide for their children's education or to support their children until the age of majority.<sup>178</sup> Stress certainly may arise for parents when their wishes are not respected, but the harm to children is just as great—or greater—when parents neglect or invalidate children's agency and interests in the first place.

### C. *Broad Structural Supports for Parent–Child Relationships*

Our model of parental rights reconceives the relationship between parents and state by focusing on their shared responsibilities for furthering children's interests. Reframing the parent–child relationship away from family privacy and toward children's independent interests opens up the possibility of seeing the parent–state relationship as a partnership rather than an adversarial contest over children. Caring for children would no longer be viewed as an all-or-nothing proposition, with parents either left alone behind the shield of family privacy or deprived of childrearing authority when the state intervenes. In the same way that children belong to both families and broader communities, families should be regarded “both as private associations and as entities shaped by social policy and state action.”<sup>179</sup>

State support for parental care is therefore central to our model of parental rights. States should further children's interests in remaining with their primary caregivers by providing parents with the support they need to carry out their childrearing responsibilities. This is

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177. *Id.* at 606–08.

178. *But cf.* Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228 (attaching criminal sanctions for failure to pay child support).

179. Minow & Shanley, *supra* note 21, at 6.



particularly important for low-income families. As Professor Anne Alstott argues, a legal regime committed to children's equality "would require supports for parental care, such as an enriched educational program that would include extracurricular activities, as well as institutions like paid family leave, parent counseling, substance-abuse rehabilitation, and other support services."<sup>180</sup> Most importantly, states should have the responsibility to provide services to families that prevent the need to remove children from the home except in cases of serious physical or emotional harm.

Under our model of parental rights, then, the state would be *less* likely, not more likely, to use its police powers to remove children from the care of parents. Our model seeks to replace discriminatory and harmful state interventions with resources and support designed to enable all parents, but particularly low-income and parents of color, to meet their caretaking needs and further their children's broad interests.<sup>181</sup> This restructuring of the family-state relationship might be done through cash payments and supports for housing and daycare, as well as through the education, training, and monitoring of child welfare workers and systemic changes in child welfare policies designed to address deep-rooted racial and cultural biases. A nondiscriminatory state attuned to children's interests would balance its responsibility to provide resources and support to struggling families with careful attention to children's interests in remaining in the care of their parents, however imperfect that care may be. The state would assume its share of the joint responsibility for helping children thrive without unnecessarily removing disadvantaged children from the home.

In doing so, our model seeks to remove barriers to recognizing children's affirmative rights to necessary goods and services, including shelter, health care, food, clothing, education, disability services, and

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180. Alstott, *supra* note 108, at 4.

181. Despite a divergence of views in the literature on child welfare, advocates on all sides emphasize the importance of a radical reallocation of resources toward preventive measures to support families as a way of reducing, if not eliminating, the need for removal. *See, e.g.*, ROBERTS, *supra* note 132, at 129; BARTHOLET, *supra* note 103, at 163–75; Michael S. Wald, *Beyond CPS: Developing an Effective System for Helping Children in "Neglectful" Families*, 41 CHILD ABUSE & NEGLECT 49, 59–60 (2015). For a broader argument to "establish the structures, policies, and funding necessary to ensure the maximum development of every child," see NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 136 (2018); *see also* Anne L. Alstott, *What Does a Fair Society Owe Children—And Their Parents?*, 72 FORDHAM L. REV. 1941, 1942 (2004) (arguing that society cannot demand of parents all the work that goes into raising children without providing them with the baseline resources needed to parent effectively).

protection from physical and emotional harm.<sup>182</sup> Overturning the holding in *DeShaney* that children have no affirmative rights to basic necessities or goods is a crucial step in moving beyond protection for the private family. The new model imposes shared duties on parents and the state to provide children with basic necessities. When parents do not have the resources to meet children's needs, the state should have the duty to provide support in ways that foster children's interests, including their interest in preserving their relationships with their parents.

Such affirmative rights will require significant redistribution of government resources to children,<sup>183</sup> although research demonstrates that investment in children saves government resources in the long term.<sup>184</sup> Indeed, state support is crucial to transform the relationship between parents and state into a partnership rather than a contest over control of children. This state support for families also ensures that our model does not entail a one-to-one shift of decision-making authority from parents to the state. Our model seeks to build supports for children outside of the court system or existing foster care system in order to more robustly protect and strengthen relationships between parents and their children.

#### D. A More Robust Pluralism

In supporting diversity both within and among families, our model of parental rights rejects the traditional view that expansive parental rights are essential to safeguarding the value of pluralism in a liberal society. Pursuant to this view, expansive parental rights allow parents to shape children's moral beliefs and pass on parental values, serving as a bulwark against state standardization,<sup>185</sup> particularly for families of

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182. See Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2149 (2011). For skepticism about the possibility of children gaining affirmative rights, see Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573, 1580 (1995).

183. See Alstott, *supra* note 108, at 4 (recognizing the same difficulties).

184. JOSH BIVENS, EMMA GARCÍA, ELISE GOULD, ELAINE WEISS & VALERIE WILSON, ECON. POL'Y INST., IT'S TIME FOR AN AMBITIOUS INVESTMENT IN AMERICA'S CHILDREN 31 (2016); Paolo C. Belli, Flavia Bustreo & Alexander Preker, *Investing in Children's Health: What are the Economic Benefits?*, 83 BULL. WORLD HEALTH ORG. 777, 783 (2005); Art Rolnick & Rob Grunewald, *Early Childhood Development: Economic Development with a High Public Return*, REGION, Dec. 2003, at 6, 11.

185. Cf. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

color and families seeking to live outside of mainstream culture.<sup>186</sup> We certainly support liberal democracy's commitment to social pluralism, which, as the Supreme Court has emphasized, finds its origins in the family.<sup>187</sup> We also seek to better respect the autonomy of families who have suffered undue state intervention, as discussed above.<sup>188</sup> Yet in our view, expansive parental rights are not the best tool for achieving either.

First, like the doctrine of coverture from which it derives, expansive parental rights mask the fact that there are, and should be, diverse interests *within* the family—not simply between husband and wife, but among all members of the family.<sup>189</sup> For children who are deprived of the opportunity to develop and express their own interests, it is largely irrelevant if the state or a parent is responsible. Expansive parental rights may shield children from one possible tyranny while dispossessing them of legal tools to challenge another.<sup>190</sup> Children who feel different from their families experience difficulties even when parents support that difference. In families where parents ignore or punish such differences, children truly suffer.<sup>191</sup> Advocates for expansive parental rights fail to account for diversity within the family and the harms children may experience when law ignores the myriad ways in which children's values, interests, and identities may differ from those of their parents.

Second, expansive parental rights are not necessary for ensuring a pluralistic society and may actually limit pluralism to the extent parents suppress the development of children's diverse identifies, beliefs, and values. It is not obvious that social pluralism is best fostered by a system that elevates parental rights and family privacy over children's independent interests or that expansive parental rights are the only

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186. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994); Huntington & Scott, *supra* note 5, at 1414.

187. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503–04 (1977).

188. *See supra* Part II.B.

189. *Cf.* Peggy Cooper Davis, *Little Citizens and Their Families*, 43 FORDHAM URB. L.J. 1009, 1017–18 (2016) (“The principle of family announced in *Meyer* and followed in *Pierce* is admirable, but Justice Douglas was right to caution that we owe respect both to the dignity of independent families and to the dignity and the unknowable potential of a developing child.”).

190. Barbara Bennett Woodhouse has developed this argument with respect to child abuse. Woodhouse, *supra* note 51, at 483–84. Other scholars make similar arguments regarding children's right to privacy. *See, e.g.*, Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 763 (2011).

191. SOLOMON, *supra* note 165 *passim*.

alternative to state standardization.<sup>192</sup> Expansive parental rights run counter to diversity values by inviting the assimilation of children into their families while ignoring the diverse influences of the broader communities in which children live.<sup>193</sup> Expansive parental rights arguably impede social pluralism by suppressing children's ties to communities outside the family, thereby inhibiting diversity within the family and its potential carryover to the public sphere as children leave the home.

Expansive parental rights are often justified as ensuring that the state does not itself indoctrinate children into a state-mandated belief system or identity.<sup>194</sup> Yet the best defense against state overreaching is not to cloister children behind parental rights but to confer on children the right to have their interests recognized and protected by both parents and the state. Moreover, by providing the strictest protection for the parent-child relationship, our model ensures that the state cannot completely displace parental guidance and control in a way that would threaten a pluralistic society. Parents will still have primary control over the development of their children's value and belief systems. But opening up room for children to develop their own identities only fortifies the law's commitment to social pluralism.

Most importantly, upholding the value of pluralism in a liberal polity means respecting both the family's role in inculcating values in children *and* the family's responsibility to guard children's right to an open future, meaning their right to develop their own identities and moral commitments. The alternative to expansive parental rights is not unencumbered state control but rather a legal system that recognizes the importance of parental care and guidance at the same time that it sets clear limits on parental rights in recognition of children's distinct identities and their ties to broader communities. Near absolute

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192. Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503, 509–11 (2002) (critiquing the view that compulsory public education would lead to the standardization of children and concluding that “[e]ven if public schools wanted to produce a standardized child, they would have had no prospect of success”).

193. See Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1382 (2014).

194. See A.L.I. Tentative Draft 1, *supra* note 5, at 2 (“Parental rights function to restrain [the state’s] regulatory impulses and allow families to flourish according to their own values and lifestyle choices, absent evidence of serious harm to the child.”).

parental rights are not an inherent, necessary feature of a liberal democratic state.<sup>195</sup>

Our model of parental rights thus seeks to better foster the public interest in social pluralism by recognizing parental inculcation of values while at the same time furthering children's independent interests and their broader engagement in the world outside the family. The Supreme Court has already recognized the importance of this engagement, but expansive parental rights have thwarted its potential for fostering social pluralism. In *Prince v. Massachusetts*,<sup>196</sup> the Court famously proclaimed: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."<sup>197</sup> Implicit in *Prince* is an acknowledgment of the reality that children's values and identities, whether religious or not, may differ from those of their parents and legal guardians. The Court's holding may not have been motivated by a desire to promote such differences—indeed, the Court was likely focused on upholding child labor laws finally passed after the end of the *Lochner* era<sup>198</sup>—but *Prince* stands for the proposition that our liberal democracy will tolerate, and may even require, room for children to develop viewpoints different from those of their parents. The right to an open future articulated in *Prince* means respecting children's independent interests, beliefs, and values from an early age.<sup>199</sup>

To reiterate, parental rights should not be abolished; in fact, parental rights remain crucial. In addition to their emotional needs for close parenting, children benefit from being raised within a particular family culture: children's first sense of self and early identity are formed from the values and commitments instilled in them from

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195. The United States' failure to ratify the U.N. Convention on the Rights of the Child, which would expand legal protection for children's interests, sets the United States apart as the only country in the world not to have done so. See *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://indicators.ohchr.org> [<https://perma.cc/3JZ8-RPQQ>].

196. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

197. *Id.* at 170.

198. See Guggenheim, *supra* note 4, at 945 n.18.

199. For an attempt to balance children's interests in an open future with parents' interests in inculcating their child into their own ways of life, see Scott Altman, *Taking Precautions When Shaping a Child's Values*, 87 UMKC L. REV. 245 *passim* (2019).

birth.<sup>200</sup> Our model simply insists that parental control over children’s identities should not be absolute. Instead, children should have space to modify and even reject their families’ values. A liberal democracy best advances the value of pluralism by supporting parental guidance and the parent–child relationship while, at the same time, honoring children’s individual interests and future selves.

The choice between fostering diversity among families and fostering diversity within families is therefore a misleading one. Challenges to expansive parental rights are assumed to involve a zero-sum transfer of power from parents to the state. Yet the choice need not be between expansive parental rights and state standardization.<sup>201</sup> Instead, law may recognize both intra- and interfamily differences. By acknowledging and promoting both forms of diversity, our model of parental rights seeks to serve both children’s interests and the interests of the broader liberal polity in fostering social pluralism.

### III. THE NEW PARENTAL RIGHTS IN ACTION

This Part illustrates how our new model of parental rights is designed to strengthen many families while simultaneously moving children out from under the cover of parent–child unity. Our model retains the presumption that parents act to further their children’s interests and seeks to better protect parent–child relationships in marginalized families, calling for strict scrutiny of any state action that threatens the separation of parent and child. Yet our model calls for lesser, intermediate scrutiny of all other laws affecting children in order to permit the state to further children’s agency and other interests, which become increasingly strong as children age. In order to better support both children and families, the model also calls for access to the resources and experiences necessary to vindicate children’s agency, interests, and needs over time.

The topics below illustrating the new parental rights—homeschooling, transgender youth medical decisionmaking, foster care, children’s friendships, and forced separations in the immigration, child welfare, and parental incarceration contexts—are not in any way exhaustive. Rather, we have intentionally chosen a disparate range of

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200. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”).

201. Cf. Woodhouse, *From Property to Personhood*, *supra* note 3, at 319 (describing the “zero sum game” of “the provision of rights” to parents or to children as a false dichotomy).

hard issues in an effort to describe how a new model of parental rights could transform the law and the lives of children and their families.

A. *Acknowledging Intrafamily Diversity*

The new parental rights seeks to recognize and foster children's diverse interests, interests that may well diverge from their parents' own interests or wishes. This Section analyzes homeschooling and transgender youth medical decisionmaking as prime examples of such intrafamily diversity. Expansive parental rights are often justified as a way to foster diversity among families, but their pursuit often fails to take account of diversity within families and the harms suffered by children growing up in families whose values and identities the children do not share.

1. *Homeschooling.* The new parental rights calls on states to adequately fund public schools and presumptively ban homeschooling, departing from longstanding practice. Educating children in the home was common prior to the mid-nineteenth century,<sup>202</sup> with fathers dictating their children's education just as they dictated other aspects of their children's lives. Homeschooling began to decline with the advent of compulsory education laws in the late nineteenth century, and the legal status of homeschooling was in doubt in most states by the mid-twentieth century.<sup>203</sup> Yet educational progressives and left-leaning parents viewed homeschooling as an antidote to public schools' rigidity and intellectual oppression,<sup>204</sup> and they joined with Christian fundamentalist parents to fuel the modern homeschooling movement in the mid-1980s.<sup>205</sup> Homeschooling ultimately became legal in every

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202. Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 124 (2008).

203. Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 994 (2010); see also Milton Gaither, *Homeschooling in the USA: Past, Present, and Future*, 7 THEORY & RSCH. EDUC. 331, 339 (2009) (detailing the confused state of the law on homeschooling throughout the 1970s and 1980s).

204. Patricia M. Lines, *Homeschooling Comes of Age*, 140 PUB. INT. 74, 75–76 (2000); Yuracko, *supra* note 202, at 125; see also MILTON GAITHER, *HOMESCHOOL: AN AMERICAN HISTORY* 109 (rev. 2d ed. 2017) (noting “[t]he left-wing critique of public education and preference for a freer, more natural childhood centered in the home”).

205. MITCHELL L. STEVENS, *KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT* 144–45 (2001); see also Mitchell L. Stevens, *The Normalisation of Homeschooling in the USA*, 17 EVALUATION & RSCH. EDUC. 90, 95 (2003) (noting that “religious homeschool groups ultimately secured definitional control of home education” in public discourse).

state, and the rates of homeschooled children skyrocketed.<sup>206</sup> Estimates vary widely for how many children are homeschooled in the United States today, but some researchers place the number near two million.<sup>207</sup> Most states impose minimal or no requirements on homeschooling parents, and only eleven states require that parents serving as homeschool teachers have a high school diploma or its equivalent.<sup>208</sup>

In contrast, our approach seeks to ensure that parents do not have absolute and unrestricted control over children's education.<sup>209</sup> Educating children within the privacy of the home may deprive children of the opportunity to develop relationships with other adults and, most importantly, with other children.<sup>210</sup> Although some homeschooled children may interact with other homeschooled children in extracurricular activities,<sup>211</sup> children's interactions with peers holding different values are central to the identity formation process.<sup>212</sup> Homeschooling may shelter children from exposure to ideas different from those acquired in the home.<sup>213</sup> In these ways, homeschooling may stifle the development of a child's sense of identity

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206. Lines, *supra* note 204, at 77; Ross, *supra* note 203, at 994.

207. JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE 1 (Randall Curren & Jonathan Zimmerman eds., 2019); Vivian E. Hamilton, *Home, Schooling, and State: Education in, and for, a Diverse Democracy*, 98 N.C. L. REV. 1347, 1350 (2020).

208. See *Parent Qualifications*, COAL. FOR RESPONSIBLE HOME EDUC., <https://responsiblehomeschooling.org/research/current-policy/parent-qualifications> [<https://perma.cc/A8J3-Z4F2>] (noting also that six of those eleven states “allow parents without a high school diploma or GED [to] bypass” the requirements in certain situations).

209. For critiques of homeschooling consistent with our own, see Barthelet, *supra* note 3, at 72–76; Fineman & Shepherd, *supra* note 3, at 83–86; Hamilton, *supra* note 207, at 1390–92; Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging “The Power of Parents to Control the Education of Their Own,”* 11 CORNELL J.L. & PUB. POL’Y 481, 490 (2002).

210. As two scholars have described it, homeschooling is “radically separatist and individualistic.” Fineman & Shepherd, *supra* note 3, at 64.

211. Robert Kunzman & Milton Gaither, *Homeschooling: A Comprehensive Survey of the Research*, 2 OTHER EDUC. 4, 19–20 (2013).

212. Emily Buss, *The Adolescent’s Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1263–70 (2000); see also Martha Albertson Fineman, *Equality and Difference—the Restrained State*, 66 ALA. L. REV. 609, 623 (2015) (“[E]xposure to difference and expectations of tolerance for diversity is particularly significant for children, whose experience with classmates from different backgrounds occurs at a time in their life when they are most open to new ideas.”).

213. Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 85 (2002).



separate and apart from parents.<sup>214</sup> In addition, without the protection afforded by adult oversight outside the home, homeschooled children are more vulnerable to physical and emotional abuse within the family.<sup>215</sup> And when homeschooling keeps children isolated in the private sphere of family life, it potentially deprives children of full participation in economic and political affairs.<sup>216</sup> Homeschooling potentially compromises children's interests by shielding them from exposure to people with differing ideas and by weakening social bonds.<sup>217</sup>

We therefore propose a presumption against homeschooling, with limited exceptions where needed to serve children's important interests.<sup>218</sup> Parents who wish to homeschool their children should be required to show that they will further their children's broad interests in exposure to ideas and people outside the home in ways that will also protect children against maltreatment.<sup>219</sup> As the Supreme Court noted in *Board of Education v. Pico*,<sup>220</sup> "access [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."<sup>221</sup> In evaluating parents' claims for homeschooling, the state should take into account the benefits of homeschooling for the particular child, who may have special needs, be subject to bullying or harassment in school, or experience racism or other forms of discrimination.<sup>222</sup> Strict

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214. For discussions of the importance of this development, see Dailey, *supra* note 138, at 484–85; Ross, *supra* note 203, at 1006–07; Jeffrey Shulman, *Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child*, 6 CHARLESTON L. REV. 385, 420–22 (2012).

215. Bartholet, *supra* note 3, at 14–20; Robin L. West, *The Harms of Homeschooling*, 29 PHIL. & PUB. POL'Y Q. 7, 9 (2009).

216. See Fineman & Shepherd, *supra* note 3, at 72.

217. Rob Reich, *The Civic Perils of Homeschooling*, 59 EDUC. LEADERSHIP 56, 58–59 (2002).

218. Our approach therefore dovetails with that of Professor Elizabeth Bartholet. Bartholet, *supra* note 3, at 72–73.

219. Presumptively banning homeschooling would likely require overturning the Supreme Court's decision in *Wisconsin v. Yoder*, which upheld Amish families' desire to keep their high-school children out of school. 406 U.S. 205, 234 (1972).

220. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

221. *Id.* at 868.

222. Exceptions might also be appropriate for children who are engaged in the broader world in ways that are incompatible with attending school, such as children whose parents wish to travel for some period of time or religious parents wanting to take their children on a mission trip. These children are generally exposed to different people and ideas even as they are homeschooled. Some child athletes and child actors might similarly be exposed to a range of viewpoints even as they are homeschooled, but that might not always be the case. Indeed, school attendance might be crucial to expand these children's experiences beyond the sport or studio in question.

regulation of families granted homeschooling exceptions should also be required.<sup>223</sup>

Those supporting unregulated homeschooling take the position that parents have the fundamental right to educate their children at home because homeschooling best serves the interests of children.<sup>224</sup> Under our model, even if homeschooling might fall within parents' fundamental rights, state bans on homeschooling must survive only intermediate scrutiny. Furthering children's interests in exposure to ideas and people outside the home are important governmental ends, and a ban on homeschooling, with exceptions for children where "needed and appropriate," would almost certainly meet the intermediate scrutiny standard.<sup>225</sup> We acknowledge that many homeschooled children do well academically, going on to attend college and generally reporting a high level of satisfaction with their experience.<sup>226</sup> But not all children have a positive experience with homeschooling. Some children receive little to no education or, worse, undergo abuse in an isolated family environment.<sup>227</sup> Even those children who do receive an adequate education may have other important interests that go unfilled, including their interests in forming relationships with other children and adults, in being exposed to new ideas, in expressing their identities, and in participating in public life.<sup>228</sup>

Homeschooling may also have negative externalities that harm children. It may impede racial and ethnic integration as homeschooled

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223. Martha Albertson Fineman and George Shepherd are skeptical that such oversight is possible and therefore would prohibit homeschooling altogether. Fineman & Shepherd, *supra* note 3, at 99.

224. See Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 BYU EDUC. & L.J. 59, 81–91.

225. Stephen Gilles notes:

States will normally have little difficulty showing that their laws intruding on parental authority are intended to improve the welfare of children, and courts will presumably agree that improving the welfare of children is an important governmental interest. The focus will therefore be on whether that interest is substantially advanced by the legislation in question.

Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69, 126–27 (2001).

226. Tanya K. Dumas, Sean Gates & Deborah R. Schwarzer, *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63, 73–78 (2010).

227. See TARA WESTOVER, *EDUCATED: A MEMOIR passim* (2018) (detailing personal experiences of author, whose father prevented her from attending school).

228. For a more detailed discussion, see *supra* notes 210–217 and accompanying text.

children, most of whom are white, withdraw from public schools.<sup>229</sup> Some parents of color may choose to homeschool their children in response to racism in public schools or the low quality of education being offered there,<sup>230</sup> but such choices are deeply constrained by states' failure to fulfill the mandate of *Brown v. Board of Education*.<sup>231</sup> Similarly, parents of LGBTQ students may seek to protect their children from bullying in public and private schools, but those choices are also deeply constrained by failures to address discrimination in schools.<sup>232</sup> These concerns are serious, so the presumption against homeschooling should be rebutted in cases where children's psychological or physical welfare is at risk. But, in the long run, resources should be allocated so that schools can meet their educational responsibilities to provide a nondiscriminatory and safe educational environment for all children.

Indeed, the current system of homeschooling improperly assigns sole responsibility for children's education to parents,<sup>233</sup> shifting the burden for providing an adequate education from the state to parents.<sup>234</sup> In our view, the answer to failing schools is not homeschooling; rather, the answer requires a systemic response on the part of federal, state, and local authorities to adequately fund education and eliminate the continuing racism in our public school systems, a racism undergirded by residential segregation and school

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229. Homeschool Demographics, Coal. for Responsible Home Educ., <https://responsiblehomeschooling.org/research/summaries/homeschool-demographics> [<https://perma.cc/R8WW-LAY3>]. Some have compared homeschooling to white flight in the post-Brown era. Indeed, some white supremacists endorse homeschooling as a way to enforce racial segregation. Carmen Green, Educational Empowerment: A Child's Right To Attend Public School, 103 *Geo. L.J.* 1089, 1097 & n.44 (2015) (describing a website entitled "White Pride Homeschool").

230. Osamudia R. James, *Valuing Identity*, 102 *MINN. L. REV.* 127, 179–80 (2017).

231. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racially segregated schools "deprived" Black children "of the equal protection of the laws guaranteed by the Fourteenth Amendment"). For an argument that homeschooling itself exacerbates this failure, see Melinda D. Anderson, *The Radical Self-Reliance of Black Homeschooling*, *ATLANTIC* (May 17, 2018), <https://www.theatlantic.com/education/archive/2018/05/black-homeschooling/560636> [<https://perma.cc/4ND5-34TQ>] (homeschooling "dilutes the landmark Supreme Court case's symbolic importance and threatens to reinforce the harm African American students experienced when they were banned from attending white schools").

232. See Craig Konnoth, *The Protection of LGBT Youth*, 81 *U. PITT. L. REV.* 263, 270 (2019).

233. Fineman & Shepherd, *supra* note 3, at 104.

234. *Id.* at 70.

funding policies.<sup>235</sup> Of course, in the meantime, some parents may need to remove their children from public school to protect them from harm or racist beliefs or actions. But the state should not be allowed to evade its educational responsibilities to *all* children on the ground that children who are discriminated against in school can be educated at home.

Moreover, a presumptive ban on homeschooling would not unduly limit religious childrearing. Conservative religious parents retain authority over children even if they are required to send their children to school, as parents are still free to counteract the effects of schooling in the many hours children spend with their family outside of school.<sup>236</sup> Our model does not entirely dispossess parents of their childrearing powers. Additionally, constitutional law has long ensured that public schools do not become an engine of standardization, beginning with *West Virginia State Board of Education v. Barnette*<sup>237</sup> in 1943, which held that studentst cannot be forced to recite the Pledge of Allegiance.<sup>238</sup> Our entire public education system is structured in a way that attenuates any governmental entity’s power to effectively indoctrinate schoolchildren.<sup>239</sup> There is no evidence that religious communities are so fragile that schooling, which may include religious

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235. In this way, we build upon the work of Professor Kimberly Robinson, who has argued in favor of a positive federal right to education. *See, e.g.,* Kimberly Jenkins Robinson, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 226 (2016) (urging “that educational opportunity be distributed based on both student needs and the common pursuit of excellence for all children in the United States, rather than based on zip code, class, or race”); *cf. Alstott, supra* note 111, at 30 (critiquing the fact that, under existing law, “parenthood, like other family activities, confers no positive rights to the resources needed to rear children,” emphasizing that “[e]ven education is optional from a federal constitutional perspective”). Our model would therefore require reconsideration of the Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez*, in which the Court upheld unequal funding for public schools tied to local property taxes. 411 U.S. 1, 9–10, 24 (1973).

236. Fineman & Shepherd, *supra* note 3, at 97–98.

237. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

238. *Id.* at 642. And the state makes space for more than religious beliefs; judicial interventions and state laws regarding free expression and other constitutional rights generally ensure that children enjoy protections against state standardization even when they are required to attend school. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 62–88 (2018); Dailey, *supra* note 182, at 2116–20.

239. Shiffrin, *supra* note 192, at 509; *see also* Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 589–93 (1993) (analyzing the Sixth Circuit’s rejection of religious parents’ objections “to the very principles — tolerance and evenhandedness — traditionally used to justify liberal education”).

schools, will threaten these communities' survival. In some cases, children's exposure to the broader world may strengthen, rather than weaken, their religious bonds.<sup>240</sup> Religious life will endure even under a legal regime that protects children's ability to flourish in ways that differ from their parents.

Our proposed presumptive ban on homeschooling dovetails with some scholars' similar concerns with the adverse effects of homeschooling on children, but their critiques remain constrained by the status quo of expansive parental rights. Professor Emily Buss, for example, has described how homeschooling interferes with children's interests in developing peer relationships crucial to the formation of children's sense of identity.<sup>241</sup> In the end, however, Buss argues only for a system where families are "encouraged" or "compelled" to expose adolescents in their last two years of high school to "ideologically unlike peers."<sup>242</sup> As she writes, "[U]ntil sixteen or seventeen, parents would have the full level of educational control protected in *Pierce* and *Yoder*, and even after this age parents would still have legal authority over all other aspects of the child's religious upbringing."<sup>243</sup> Even if the state were to compel public education for these final two years, Buss argues that "parents could have broad authority to exempt their children from particular curricular content, so long as those exemptions did not interfere with the state's ability to facilitate the profitable peer interactions."<sup>244</sup> Having made a persuasive case for the importance of children's peer relationships to children's identity formation, Buss pulls back to the familiar territory of expansive parental rights.

Restrictions on homeschooling, standing alone, will not transform the regime of expansive parental rights in the United States. But a presumption against homeschooling might go a long way toward protecting children's independent interests by establishing the basic framework designed to limit the scope of parental rights in light of children's agency and other interests. Such a mandate would acknowledge that children's interests may diverge from those of their

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240. See, e.g., DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 185–86 (rev. ed. 2001) (noting that over 90% of Amish youth remain in the faith even after they engage in rumspringa, a period of time when they are "no longer under the control of their parents, yet still free from the church").

241. See Buss, *supra* note 212, at 1258–76.

242. *Id.* at 1233, 1284–87.

243. *Id.* at 1286.

244. *Id.* at 1286–87.

parents. The law should recognize and promote this intrafamily diversity instead of permitting parents to stifle it.

2. *Transgender Youth Medical Decisionmaking.* The new parental rights also recalibrates parental authority in some situations where children seek to obtain or refuse medical care over the objection of their parents. We focus here on transgender youths' ability to access identity-affirming medical treatments, which might include mental health counseling, hormone blockers, hormone replacement therapy, trans-informed pediatric care, and, rarely, gender-confirming surgery.<sup>245</sup> Children's interests in identity expression, bodily integrity, and emotional wellbeing suggest that the law must pay closer attention to the plight of transgender youth who often, for varying reasons, cannot obtain parental consent to transition-related medical care or insurance coverage for their treatments.<sup>246</sup>

Gender-affirming treatment for transgender youth is often categorized along the following lines: reversible, such as counseling or hormone blockers; semi-reversible, such as hormone replacement therapy; and irreversible, such as surgery.<sup>247</sup> The World Professional Association for Transgender Health ("WPATH") takes the position that, with one exception, irreversible treatments should not be available until a person reaches the age of legal majority in their jurisdiction (generally eighteen in the United States<sup>248</sup>) and has "lived continuously for at least 12 months in the gender role that is congruent

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245. See *Developments in the Law—Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2165–67 (2021) [hereinafter *Outlawing Trans Youth*].

246. See Emily Ikuta, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 187–88 (2016); Daliah Silver, *Transforming America's Perspective: How Recognizing the Rights of Transgender Youth Will Empower the Next Generation*, 39 CHILD.'S LEGAL RTS. J. 233, 245–49 (2019).

247. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 18 (7th ed. 2012). We question whether any treatments, including hormone blockers, should be characterized as truly "reversible," since any treatment will alter the course of a child's development, however minimally. But with that caveat in mind, we accept the designation of "reversible" and "irreversible" as indicating increasingly invasive levels of medical care.

248. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 65 (2016) (analyzing all fifty states and concluding that the age of 18 "has become firmly entrenched as the presumptive age of majority" in the United States).

with their gender identity.”<sup>249</sup> For transgender youth, the primary question is the availability of care short of surgery.

Should transgender children, both pre- and post-puberty, be able to access certain gender-affirming treatments without parental consent but with the guidance of adults other than their parents? Yes. The availability of transition-related medical care for transgender youth can have lifelong consequences for the individual child.<sup>250</sup> Many children experiment with gender identity through childhood and adolescence,<sup>251</sup> and it is likely for that reason that WPATH does not recommend surgical medical interventions. But research shows that “[u]ntreated [gender] dysphoria in trans youth is associated with . . . depression, social anxiety, and suicidal thoughts and behavior.”<sup>252</sup> The availability of puberty blockers is considered an especially important option, for once an individual enters puberty, many of the physical changes, such as alterations in height and voice, can be permanent.<sup>253</sup> Moreover, transgender children without access to identity-affirming care may suffer serious psychological distress.<sup>254</sup>

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249. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 247, at 21.

250. *See Outlawing Trans Youth*, *supra* note 245, at 2167–72.

251. *See* Brendan S. Abel, *Hormone Treatment of Children and Adolescents with Gender Dysphoria: An Ethical Analysis*, 44 HASTINGS CTR. REP. S23, S24 (2014) (“[O]nly 10 to 20 percent of these children [with gender dysphoria] will still have gender dysphoria by the time they reach adulthood.”); Peggy T. Cohen-Kettenis, *Gender Identity Disorder in DSM?*, 40 J. AM. ACAD. CHILD ADOLESCENCE PSYCHIATRY 391, 391 (2001) (finding that 6 to 23 percent of children who were referred for gender-conforming treatment before puberty changed their gender identity in adulthood). *But see* Julia Temple Newhook, Jake Pyne, Kelley Winters, Stephen Feder, Cindy Holmes, Jemma Tosh, Mari-Lynne Sinnott, Ally Jamieson & Sarah Pickett, *A Critical Commentary on Follow-Up Studies and “Desistance” Theories About Transgender and Gender-Nonconforming Children*, 19 INT’L J. TRANSGENDERISM 212, 212–13 (2018) (questioning the methodology of similar studies).

252. *Outlawing Trans Youth*, *supra* note 245, at 2168; *see id.* (“Over half [of trans youth] reported having thought about suicide, and a third reported at least one attempt.”).

253. Simone Mahfouda, Julia K Moore, Aris Siafarikas, Florian D. Zepf & Ashleigh Lin, *Puberty Suppression in Transgender Children and Adolescents*, 5 LANCET DIABETES & ENDOCRINOLOGY 816, 817–18 (2017). It remains unclear whether hormone blockers are in fact reversible and noninvasive. *See* Sahar Sadjadi, *The Vulnerable Child Protection Act and Transgender Children’s Health*, 7 TRANSGENDER STUD. Q. 508, 511 (2020) (discussing evidence of long-term adverse effects of puberty blockers on fertility and future genital surgeries).

254. Tracy A. Becerra-Culqui, Yuan Liu, Rebecca Nash, Lee Cromwell, W. Dana Flanders, Darios Getahun, Shawn V. Giammattei, Enid M. Hunkeler, Timothy L. Lash, Andrea Millman, Virginia P. Quinn, Brandi Robinson, Douglas Roblin, David E. Sandberg, Michael J. Silverberg, Vin Tangpricha & Michael Goodman, *Mental Health of Transgender and Gender Nonconforming Youth Compared With Their Peers*, PEDIATRICS, May 2018, at 1, 4–8; Maureen Carroll, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 UCLA L. REV. 725, 734 (2009).

Transgender youth also often experience emotional and physical suffering as a result of harassment and violence by parents or others. Although the literature on transgender youth generally assumes a supportive family, “[p]arental abuse of transgender youth is widespread.”<sup>255</sup> Without parental support, transgender youth often find themselves in foster care or unhoused.<sup>256</sup> Even when parents are not overtly hostile, they may lack acceptance.<sup>257</sup> In such circumstances, obtaining parental consent to transition-related medical care simply may not be possible. And in a tragic feedback loop, the lack of adequate medical care may magnify the trauma these youth experience. Because the effects of puberty are physically pronounced and difficult to reverse, delaying treatment may both amplify a child’s near-term distress and undermine the chances of a successful transition.<sup>258</sup>

By requiring parental consent for almost every type of medical care provided to children,<sup>259</sup> the current regime of expansive parental rights harms transgender children lacking parental support. Although there are some circumstances in which children may access medical treatment without parental consent,<sup>260</sup> these exceptions do not now expressly encompass transition-related medical care. Indeed, the nascent ALI Restatement on Children and the Law expressly states that “[t]ransgender minors are not authorized to consent to treatment

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255. Carroll, *supra* note 254, at 733.

256. NICHOLAS RAY, NAT’L GAY & LESBIAN TASK FORCE POL’Y INST., LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 4 (2006); Sonja Shield, *The Doctor Won’t See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 373–75 (2007).

257. SOLOMON, *supra* note 165, at 599–666.

258. Shield, *supra* note 256, at 378–84.

259. See, e.g., A.L.I. Tentative Draft 1, *supra* note 5, § 2.30.

260. For example, the Supreme Court has held that minors may obtain contraception without parental consent, *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693–702 (1977) (plurality opinion), and many states make exceptions to parental consent requirements for treatments relating to substance abuse, see, e.g., MICH. COMP. LAWS ANN. § 330.1264 (West 2021) (providing that “[t]he consent to the provision of substance use disorder related medical or surgical care” by a minor is valid); mental health care, see, e.g., HAW. REV. STAT. ANN. § 577-29 (LexisNexis 2021) (providing that minors “fourteen years of age” and above may “consent to mental health treatment”); and sexually transmitted diseases, see, e.g., N.Y. PUB. HEALTH LAW § 2305 (McKinney 2021) (allowing physicians to prescribe treatment without parental consent). Some states also permit mature minors to obtain “routine, beneficial” medical care when they are deemed mature enough to make the decision, see A.L.I. Tentative Draft 1, *supra* note 5, §19.01, or when they reach a certain age, see, e.g., ALA. CODE § 22-8-4 (2021) (waiving consent requirements for minors at or above fourteen years of age).



associated with gender confirmation.”<sup>261</sup> Moreover, medical providers open themselves to prosecution or civil damages if they provide nonemergency care to children without parental consent.<sup>262</sup> Children’s ability to obtain transition-related health care absent parental consent is therefore severely limited.<sup>263</sup>

Transgender children also are harmed when they are unable to obtain needed guidance about transition options from their parents or other adults. The decision to undertake transition-related medical care is a difficult one with lifelong consequences. All children need guidance in assessing their own wishes and feelings relating to gender transitioning. Many children, particularly those who are prepubescent, are not in a position to make this decision on their own, as they may not appreciate the permanence or impermanence of their feelings or the long-term consequences of the interventions.<sup>264</sup>

The new parental rights seeks to alleviate these harms by providing avenues for children to obtain professional guidance even when their parents object to their children’s exploration of their gender identities.<sup>265</sup> Schools might hire counselors who specialize in identity formation, state public health boards might provide information through publicly available websites, and states might allow children to consult doctors without parental consent. Our model therefore does not replace the current regime of expansive parental rights with an approach that prioritizes children’s autonomy. Importantly, children should not be given full autonomy rights with respect to these decisions. Instead, children need guidance and support given the

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261. A.L.I. Tentative Draft 1, *supra* note 5, §19.02 cmt. b.

262. *Id.* For an early case, see *Zoski v. Gaines*, 260 N.W. 99, 102–03 (Mich. 1935) (holding a doctor liable for assault and battery for operating on a child without parental consent).

263. Carroll, *supra* note 254, at 736–39. One of the biggest hurdles for transgender youth in obtaining medical care over parental objections is the cost of treatment and denials of insurance coverage. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA’AYAN ANAFI, NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 93, 95, 98 (2016). Moreover, without parental support, children may not have access to their insurance records or otherwise be able to avail themselves of coverage. These hurdles could be addressed if the state had an affirmative duty to provide necessary medical care to children.

264. See GABE MURCHISON, HUM. RTS. CAMPAIGN FOUND., *SUPPORTING & CARING FOR TRANSGENDER CHILDREN* 4–10 (2016).

265. See *id.* at 11 (“Competent, compassionate medical and mental health providers are vital resources for transgender and gender-expansive children and their families.”).

complexity of the issues surrounding transition-related medical care for transgender youth.<sup>266</sup>

By eschewing a simple choice between parental authority and child autonomy, the new parental rights seeks to provide the guidance children need while at the same time recognizing the reality of parent–child differences and conflicts. In the abortion context, for example, the Supreme Court has established an option for pregnant adolescents who wish to obtain an abortion without parental notification or consent. In *Bellotti v. Baird*,<sup>267</sup> the Supreme Court observed that pregnant minors may face parental objections or even violence if forced to inform their parents of their wish to obtain an abortion.<sup>268</sup> The Court therefore held that pregnant adolescents have the right to go to court to seek permission to obtain an abortion free from parental notification requirements.<sup>269</sup> Yet while the Court has been willing to recognize a pregnant adolescent’s right to seek court-ordered access to treatment, no court has gone so far as to recognize a similar right on the part of transgender youth. Outside of the reproductive care or substance abuse contexts, legislators and courts have been less likely to challenge the myth of parent–child unity.<sup>270</sup>

The Supreme Court’s decision in *Bellotti* provides a starting point for reforms that better account for children’s interests in their evolving gender identities. For example, a system might be created that allows transgender children to seek medical consent from a court or other neutral decisionmaker. This bypass option is superior to the mature minor doctrine for it allows an “immature” minor—one who is likely prepubescent—to receive permission from a neutral decisionmaker for

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266. For an illuminating commentary on the complexity of identity-affirming care for children, see Sadjadi, *supra* note 253, at 510–13, 514 n.2.

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

268. *See id.* at 647 (plurality opinion) (“[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court.”).

269. *Id.* at 651.

270. For example, courts have upheld parental decisions not to vaccinate a child when justified on religious grounds. *See, e.g., In re LePage*, 18 P.3d 1177, 1181 (Wyo. 2001); *Maier v. Besser*, 341 N.Y.S.2d 411, 413–14 (App. Div. 1972). In addition, on religious grounds, courts have shielded from state override parental decisions to deny children medically recommended procedures such as cancer treatment or blood transfusions, at least when there is no imminent risk of death from failure to obtain the medical treatment. *See Newmark v. Williams*, 588 A.2d 1108, 1120–21 (Del. 1991); *In re D.L.E.*, 614 P.2d 873, 874–75 (Colo. 1980); *In re Green*, 292 A.2d 387, 388, 392 (Pa. 1972).

counseling or hormone blockers.<sup>271</sup> The Supreme Court took a similar approach in *Parham v. J.R.*, where the Court acknowledged the possibility of intrafamily conflict in the context of involuntary commitment of a child to a psychiatric hospital, requiring that such decisions be reviewed by a neutral decisionmaker such as a doctor or judge.<sup>272</sup> In the transgender youth context, enlisting pediatricians, child psychologists, gender specialists, and other important adults in a child's life would be an important step toward designing and implementing a neutral, supportive, and professionally guided system for helping transgender youth through this complex medical decision-making process.

Facilitating access to medically recommended treatment supports children's expression of gender identity, particularly as they enter adolescence. The ability to express one's felt gender identity can be a prerequisite for developing a sense of social belonging at school,<sup>273</sup> heavily influencing children's capacity to develop strong peer-to-peer relationships, to encounter new ideas, to acquire adult mentoring relationships, and to obtain important academic skills.<sup>274</sup> Further, given the limitations of the current healthcare system, providing access to gender-affirming care would help dispel the myth of the public-private binary, moving away from relying on parents for the provision of public goods toward legally recognizing children's affirmative rights to health care.

Providing avenues for children to access transition-related medical care also opens the door to children's engagement with adults outside the family when parental support is lacking.<sup>275</sup> Ideally, parents

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271. The mature minor doctrine allows physicians to provide certain kinds of nonemergency medical care to children without parental consent only when the child is mature enough to consent on their own behalf. See A.L.I. Tentative Draft 2, *supra* note 78, § 19.01.

272. *Parham v. J.R.*, 442 U.S. 584, 602–04, 606–07, 610 (1979).

273. See *Outlawing Trans Youth*, *supra* note 245, at 2169–70.

274. Cf. Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 48–50 (2020) (describing the ways transgender children are best supported socially to avoid negative outcomes).

275. See GABE MURCHISON, *supra* note 264, at 11 (“Competent, compassionate medical and mental health providers are vital resources for transgender and gender-expansive children . . .”). Of course, adults outside the home, such as school officials, should be under a duty to keep information about a child's chosen gender confidential if a child does not want that information to be shared with parents. See, e.g., Shmueli & Blecher-Prigat, *supra* note 190, at 784–85 (discussing guidelines from the American Library Association that recognize “a duty of librarians not to disclose private information about children to their parents”); Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 856–58 (2017)

will further their children's identity and other interests. But the law must contend with the real world, where departures from gender identity norms can enflame parental disappointment, indifference, or anger. Nonparental provision of transition-related medical care to transgender youth reinforces the crucial role that public, nonfamilial sites play in fostering children's access to the relationships, experiences, and ideas that facilitate and underlie their independent interests as children.

Allowing a child to obtain medical care over the objection of parents may sometimes harm the parent-child relationship, and assessments must be made on a case-by-case basis about what will best serve the child's gender identity interests as well as their interests in maintaining family relationships. Yet simply deferring to parental control over what might be essential medical care in the false name of family unity risks harming these children even more. The invocation of parent-child harmony is belied by the fact that conflict has already erupted.<sup>276</sup> If the family truly reflected a harmony of interests between parents and children, then children would not need to bypass parental consent in the first place. Of course, unlike terminating a pregnancy, gender identity is difficult to conceal from parents. In most cases, parents will know that their child is undergoing some kind of treatment. Moreover, the treatment for transgender youth is ongoing, rather than a onetime medical intervention, and complications might arise if parents resist the treatment.<sup>277</sup> One hopes that parents would ultimately support their children's gender-affirming treatments. The new parental rights seeks to provide mechanisms for encouraging parents to better understand their children's interests and needs even as it also provides a mechanism for transgender children to receive guidance and treatment in the face of parental resistance.

With this nuanced approach, the new parental rights leaves room for parents to retain substantial capacity to shape how their children experience and express their identities through the everyday

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(critiquing courts' failures to respect children's reasonable expectations that schools will not share information with parents).

276. *Cf.* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (rejecting a claim of parental authority over their children's access to abortion "where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure").

277. *See Silver, supra* note 246, at 240-45 (describing various forms of parental resistance, including interruptions to medical care, forcing children to undergo conversion therapy, and cutting children off from financial resources and even the home).

interactions that comprise family life. Parents do and should exercise oversight over many day-to-day decisions in a preadolescent child's life, including younger children's ability to express their identities through clothing, hairstyle, and other avenues.<sup>278</sup> Parents should not, however, have absolute, life-altering control with respect to important interests such as gender identity.<sup>279</sup> Because children possess identities independent of their parents, it is in children's interest to have the space and support they need to experience and express those identities even as they are changing.

### *B. Building Relationships*

Courts and scholars have long debated the extent to which children's relationships with adults and children outside the family should be recognized and protected over parental objections.<sup>280</sup> The new parental rights clarifies that, when a child has a close emotional, family-like bond with another adult or child, a presumption exists in favor of the child maintaining that bond.<sup>281</sup> When a conflict is raised in

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278. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . .").

279. We focus on gender identity here because it presents one of the most difficult examples of potential parent-child conflict, but our analysis is by no means limited to gender identity. Similar nuanced approaches will often be required for conflicts regarding children's religion, sexual orientation, and other expressions of identity. See, e.g., Rachmilovitz, *supra* note 193, at 1381, 1428-46 (proposing a "famil[ies] in need of services" framework).

280. See, e.g., *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982) (recognizing possible visitation rights of stepparents); *In re Jennifer P.*, 553 A.2d 196, 197 (Conn. App. Ct. 1989) (per curiam) (upholding the right of a former foster mother to petition a court for visitation); *In re Hood*, 847 P.2d 1300, 1301-02 (Kan. 1993) (denying visitation rights to a child's day care provider); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 437 (Wis. 1995) (permitting an adult with "a parent-like relationship with the child" to petition a court for visitation if the child's parent "has interfered substantially with the child's relationship with" that adult). For scholarship considering third-party visitation rights, see Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 280; Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 894 (2003); Murray, *supra* note 3, at 399-404, 448-49; Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 636 (2012).

281. In this way, our model builds on existing law. Although the Supreme Court, in *Troxel v. Granville*, struck down a statute that had been interpreted as allowing third parties to obtain visitation where it was in the best interests of the child, 530 U.S. 57, 60, 72-73 (2000) (plurality opinion), every state provides some form of visitation rights to third-party relatives, and many states continue to have third-party visitation statutes that allow anyone, whether related to the child or not, to obtain visitation in some circumstances. See A.L.I. Tentative Draft 1, *supra* note 5, §1.80 cmt. a; Mark Strasser, *Custody, Visitation, and Parental Rights Under Scrutiny*, 28

court, parties including the child should be heard on the question of whether the relationship should be protected over parental objections. Policymakers also should respect children's interests in developing and maintaining these relationships when designing schools, juvenile justice centers, child welfare programs, and affirmative forms of family support. This Subsection explores ways to do so by considering two examples: relationships with former foster parents and with friends.

1. *Foster Parents.* The new parental rights seeks to protect children's diverse relationships with former foster parents, broadly defined. There is no single type of foster care placement in the United States; rather, foster care may take many different forms and involves a range of relationships between children and the caregiving adults in their lives.<sup>282</sup> Although foster care arrangements are often facilitated by the state, most nonparental caregiving is created informally by parents or family members themselves.<sup>283</sup> These "parents" might be kin (an aunt or uncle, for example), or they might be unrelated to the child.<sup>284</sup> They might hope to eventually adopt the child, or they might have no interest in formalizing their parental status.<sup>285</sup> There is no one model for what foster care is or should be.

Under the current regime of expansive parental rights, former foster parents are generally not permitted to maintain relationships with the children for whom they have cared unless they succeed in obtaining termination of the legal parents' rights and adopting the child.<sup>286</sup> This holds true even when the relationship between foster

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CORNELL J.L. & PUB. POL'Y 289, 316 (2018); Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties To Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2–6 (2013).

282. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., NO. 25, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUG. 10, 2018, at 1 (2018) (listing various placement settings and case plan goals for children in foster care); *Foster Care*, CHILD TRENDS (May 24, 2018), <https://www.childtrends.org/?indicators=foster-care> [<https://perma.cc/GW4H-P9DA>].

283. Lauren E. Bartlett, *Promoting Permanency and Human Rights*, 23 U.C. DAVIS J. JUV. L. & POL'Y 123, 139 (2019).

284. Coupet, *supra* note 117, at 606–07.

285. See *id.* at 609–10 (emphasizing that informal kinship caregivers often avoid the adoption process because it "usually involves adversarial legal proceedings that pit kinship caregivers against another relative, often their own adult child" and therefore is "emotionally difficult for everyone involved").

286. John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 367–69 (1998); see also *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 853–56 (1977) (declining to hold that foster parents have parent-like liberty

parents and children rises to the level of a psychological parent relationship, that is, a relationship defined by a close emotional bond formed by parent-like caretaking over time.<sup>287</sup> Psychological parents may be the child's biological parents, but they need not be. Children's deep attachments to their psychological parents are crucial to their present wellbeing as well as their healthy development over time.<sup>288</sup>

The existence of a psychological parent bond between a foster parent and child currently does not give rise to any special claim to a continuing relationship once the foster care arrangement is over. Indeed, overly close emotional bonds between foster parents and children are generally discouraged because they are seen as potentially disrupting children's bond to their legal parents.<sup>289</sup> The child-foster parent relationship is understood to be governed by the foster care contract between the state and the foster parents and to be time-limited.<sup>290</sup> When the time is up, the relationship is over, and the child is either returned to the parents, freed for adoption, or moved to another foster care setting.<sup>291</sup> Unless the foster parents become the adoptive parents, neither foster parents nor children have any right to see each other once the foster care arrangement has ended.

Legal recognition of children's relationships with former foster parents is complicated even if we focus exclusively on children's independent interests. Children's interests are often furthered when parents place their children voluntarily with foster parents, and parents might hesitate to do so if they believe foster care will lead to a longer-term loss of custody or ongoing visitation obligations after they regain

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interests under the Due Process Clause). If foster parents are able to adopt their foster children, they then become the children's legal parents with all the rights enjoyed by other legal parents.

287. For the initial use of the term "psychological parent," see GOLDSTEIN ET AL., *supra* note 98, at 18, 80. For a modern adaptation of the psychological parent concept, see Alstott, Dailey & NeJaime, *supra* note 6, at 8 (arguing for the extension of legal parenthood to "psychological parents"). This term generally does not connote a legal status but rather may serve as a justification for visitation rights or for granting de facto parent status. See Scharf, *supra* note 280, at 631-36 (discussing attachment theory as a justification for third-party visitation rights). *But see* Melissa Fried, Note, *Reflecting the Best Interest of the Child: Middleton v. Johnson*, 3 CHARLESTON L. REV. 635, 638-42 (2009) (discussing the development of psychological parent doctrine in Alaska, South Carolina, West Virginia, and Wisconsin).

288. Alstott, Dailey & NeJaime, *supra* note 6, at 10-13.

289. *Smith*, 431 U.S. at 836-37 n. 40.

290. See *id.* at 835 (noting that foster parents "provide care under a contractual arrangement with [the state or an authorized foster-care agency]" and acknowledging that the theory of the foster care system contemplates temporary stays).

291. See Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5).

custody.<sup>292</sup> It is also impossible to evaluate the interests of former foster parents without confronting the fact that Black children are disproportionately removed from the home and placed in foster care.<sup>293</sup> As discussed in greater detail below,<sup>294</sup> the new parental rights posits that children should be removed from the home only if meaningful preventive or rehabilitative state support has failed or if a child's safety is in immediate peril. In other words, removal must be a last resort and survive strict judicial review. Yet even with meaningful supports in place, foster care likely will be necessary in limited circumstances, and bonds of attachment may arise between foster parents and children.

The new parental rights therefore also posits that the prerogatives of legal parents should not automatically hold sway when children have developed a psychological parent relationship with former foster parents. It is more important that the law recognize children's close emotional bonds with their caregivers than maintain an all-or-nothing system of parental rights that requires terminating parental rights in order for other relationships to be legally recognized. Relationships with foster parents may continue past the end of the foster care arrangement through custody and visitation arrangements, particularly when foster parents are relatives. Options are varied: continuing contact might involve permanent guardianship or open adoption arrangements under which foster parents adopt the child but the parents of origin maintain a relationship with the child, too.<sup>295</sup> Although ties with a psychological parent may be severed in law, they cannot easily, if ever, be severed in reality.<sup>296</sup> In many cases, children

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292. We acknowledge that such voluntary placements may not be freely chosen, as families face financial constraints that may induce them to “choose” foster care. *Smith*, 431 U.S. at 826, 834 (noting that “middle- and upper-income families who need temporary care services for their children have the resources to purchase private care,” whereas “[t]he poor have little choice but to submit to state-supervised child care when family crises strike”). Parents may also be threatened by child welfare agencies. Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 847–52 (2020).

293. In 2018, of the approximately 437,000 children in court-ordered foster care nationwide, 44 percent were white, 23 percent were Black, and 21 percent were Latino. CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., FOSTER CARE STATISTICS 2018, at 9 (2020), <https://web.archive.org/web/20201102224811/https://www.childwelfare.gov/pubPDFs/foster.pdf> [<https://perma.cc/2QRN-C6YH>]. We discuss this racial disproportionality in greater depth in Part III.C.2, *infra*.

294. See *infra* Part III.C.2.

295. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 13–23 (2015); Bartlett, *supra* note 283, at 144–50.

296. GOLDSTEIN ET AL., *supra* note 98, at 18, 80; see also *V.C. v. M.J.B.*, 748 A.2d 539, 549, 555 (N.J. 2000) (acknowledging “the psychological parent cases in which a third party has stepped



will have a strong interest in maintaining relationships with both their legal parents and the parents who care for them when their legal parents are unable to do so.<sup>297</sup>

In developing this approach, the new parental rights brings laws governing foster care more closely in line with recent developments acknowledging de facto parents as the legal parents of a child.<sup>298</sup> What constitutes a legally recognizable family has expanded to include same-sex households, nonmarital families, and extended families.<sup>299</sup> So far, foster families have been left behind in this ongoing push to expand the legal family.<sup>300</sup> It is unlikely that any one legal rule will meet children's interests in maintaining ties with their psychological parents.<sup>301</sup> The legal system should be open, however, to ensuring that children's relationships with foster parents are protected when these relationships have become a central part of a child's life.

2. *Children's Friendships.* The new parental rights also recognizes the importance of peer relationships to children's present welfare and healthy development.<sup>302</sup> Under current law, parents have a near-

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in to assume the role of the legal parent who has been unable or unwilling to undertake the obligations of parenthood" and finding that ongoing visitation was justified in the present case).

297. Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 391–92 (1996); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 388–90 (1994).

298. See *supra* notes 115–116 and accompanying text.

299. NeJaime, *supra* note 125, at 319–31.

300. *Id.* at 375–77.

301. Some scholars have argued that the expansion of family recognition developed in the context of families headed by same-sex couples should be extended to other kinds of families. For examples of those arguments, see Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 718 (2016); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1190 (2016). For concerns similar to ours, see Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 81–84 (2017).

302. For general examinations of the law's relationship to friendship, see Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 722–31 (2019); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 *passim* (2009); Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631 *passim* (2007); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 *passim* (2007). Most of that work has examined friendships between adults, however, with children's friendships considered only more recently. See Dailey & Rosenbury, *supra* note 3, at 1488–90 (analyzing how law ignores children's positive relationships with other children); Bell, *supra*, at 725 (briefly analyzing how residential mobility affects the ability of children to form friendships).

absolute right to control their children's access to friends.<sup>303</sup> Indeed, the power to choose whether or not their children associate with other children may be the central component of parents' right to raise children free from governmental interference.<sup>304</sup> Even in cases where the state is already involved in the family, such as in child custody disputes, courts generally defer to one or both parents' decisions regarding children's social relationships.<sup>305</sup> The only time the state might contravene parental authority is when parents' permissive attitudes constitute neglect or lead their children to engage in delinquency,<sup>306</sup> as might occur if parents knowingly allow their adolescent children to socialize with peers engaging in criminal conduct.

Apart from a limited, but growing, attention given to siblings,<sup>307</sup> the current regime of expansive parental rights takes little to no account of children's important interests in maintaining relationships with other children.<sup>308</sup> To the extent legal decisionmakers have focused upon peers, it is almost always in the context of parents' ability to protect children from negative influence or harms that may flow from these relationships.<sup>309</sup> Attention to the damaging effects of children's relationships with other children is vital. Bullying and sexual

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303. *Troxel v. Granville*, 530 U.S. 57, 78 (2000) (Souter, J., concurring) (stating that parents have an interest in choosing their child's social companions and therefore have a right to be free of "judicially compelled visitation" of grandparents over their objections). This right is bolstered by parents' rights to control children's housing, schooling, and extracurricular activities, as discussed *supra* Part III.A.1. *See also* Dailey & Rosenbury, *supra* note 3, at 1486 ("Because children are always within the custody of parents or the state, their relationships are always controlled by their custodians.").

304. *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 970–71 (2003) ("It clearly would be undesirable from a child welfare perspective for the state routinely to make decisions directly about, for example, with whom a child will play."); Rosenbury, *supra* note 9, at 866–67 (analyzing entity-based family privacy, which enables parents "to impart to their children whatever values they please and to exclude anyone they choose from the family home").

305. *See generally* Rosenbury & Dailey, *supra* note 3, at 1459–66 (describing children's autonomy rights in the current state of law and explaining why they are limited).

306. *Cf.* Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 414–15 (emphasizing that parental liability is imposed for children's misconduct when parents fail to live up to duties owed to their children, including by providing inadequate supervision); Dwyer, *supra* note 304, at 971 ("As with most other decisions parents make within the family setting, most parental decisions about children's relationships are legally constrained, if at all, only by the general abuse and neglect provisions in state statutes.").

307. Dailey & Rosenbury, *supra* note 3, at 1489–90, 1511.

308. *Id.* at 1489–91.

309. *Id.* at 1490–91.

harassment are areas where important work has been done to safeguard children's wellbeing from the dangers of social interactions with other children.<sup>310</sup> Experts estimate that ten to fifteen percent of children "experience serious and chronic peer difficulties, including rejection, social exclusion, and victimization."<sup>311</sup>

Yet overlooked in the legal literature on children's relationships is the way in which children's peer relationships, and in particular their friendships, play a vital role in enriching children's present lives and fostering their healthy development.<sup>312</sup> Friendships in childhood may lay the foundation for relationships lasting a lifetime.<sup>313</sup> Friendship "matters to the children themselves, creating a context in which they evaluate their self-worth, competence, and view of the world as pleasant or hostile."<sup>314</sup> Children also learn a wide range of skills through friendships. Children's cross-racial friendships in particular help "teach[] children about the inaccuracy of stereotypes, the inequity of race-based exclusion and the importance of inclusive racial attitudes."<sup>315</sup> Identity formation is also profoundly affected by friendships. Professor Emily Buss, one of the few legal scholars to emphasize the value of peer relationships, observes that "it is largely through these [peer] relationships that [children] pursue the difficult and important task of identity formation—the sorting and selecting of values, beliefs, and tastes that will define their adult selves."<sup>316</sup>

Parents' near-absolute right to control their children's friendships may negatively impact children's interests not just with respect to

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310. See, e.g., CONN. GEN. STAT. § 10-222d (2019) (providing that "[e]ach local and regional board of education shall develop and implement a safe school climate plan to address the existence of bullying . . . in its schools"); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643–48 (1999) (interpreting Title IX to impose tort liability on schools that fail to protect students from harassment by other students on school grounds).

311. DEBRA PEPLER & KAREN BIERMAN, ROBERT WOOD JOHNSON FOUND., WITH A LITTLE HELP FROM MY FRIENDS: THE IMPORTANCE OF PEER RELATIONSHIPS FOR SOCIAL-EMOTIONAL DEVELOPMENT 2 (2018).

312. See generally JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO 147–71 (1998) (analyzing how peer relationships often play a larger role in children's development than parental influence); BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 11–27 (1993) (analyzing how children form rich social worlds with other children at school).

313. Elian Fink & Claire Hughes, *Children's Friendships*, 32 PSYCHOLOGIST 28, 29 (2019).

314. NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 168, at 163.

315. Fink & Hughes, *supra* note 313, at 30.

316. Buss, *supra* note 212, at 1233. Yet in emphasizing only the importance of identity development toward adulthood, Buss herself overlooks the importance of friendship to children in the present.

identity development but also with respect to their exposure to ideas, their bodily integrity, and their participation in the broader world. When we think about children's exposure to ideas outside the home, we tend to focus on formal education. But children learn from other children.<sup>317</sup> Friendships may also help safeguard children's bodily integrity to the extent children turn to friends to help with parental abuse. Friendships may be particularly important for children struggling with hardship, since friend relationships can serve as an important source of emotional resiliency in the face of adversity.<sup>318</sup>

The new parental rights calls on courts, policymakers, and other state actors to more fully recognize the role that children's friendships play in their present lives. Policymakers and courts could at least acknowledge children's friendships when crafting custody and visitation orders, as well as when considering a custodial parent's request to relocate away from a child's noncustodial parent.<sup>319</sup> Child welfare departments could also make arrangements for children to see their friends when in foster care.<sup>320</sup> At the same time, the state should not become involved in day-to-day decisionmaking regarding children's interactions with peers. To the contrary, the presumption that parents know what is best for their children on a daily basis protects children from the disruptive effects of state involvement in their everyday lives.<sup>321</sup> In most cases, parents are best positioned to know when children's friendships may raise concerns about abuse or exploitation and when they may enrich and strengthen children's lives.

The new parental rights also calls on states and parents to work together to facilitate children's peer relationships outside of the home. For example, states could adopt educational curricula that emphasize

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317. HARRIS, *supra* note 312, at 147–71; THORNE, *supra* note 312, at 11–27; Roger Passman, *Experiences with Student-Centered Learning and Teaching in High Stakes Assessment Environments*, 122 EDUCATION 189, 196 (2001).

318. Conversely, as Professor Monica C. Bell explains, the stress of economic and racial inequality may interfere with children's ability to form friendships, further disadvantaging them. Bell, *supra* note 302, at 722–24, 738.

319. This does not mean that, however, that children's interests in maintaining their friendships should trump parental desires to relocate in all or even most situations. See Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL'Y & L. 163, 204–12 (2010).

320. See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 533 (2019) (“Foster children complain not only about losing their immediate families but also about losing contact with other relatives, friends, pets, and possessions.”).

321. Dwyer, *supra* note 304, at 970–71.

the benefits of children learning from one another.<sup>322</sup> Schools could organize children's interactions to promote positive peer dynamics and disrupt negative ones.<sup>323</sup> States could also require public schools to open their doors for afterschool youth activities, including those run largely by other children instead of adults. Juvenile detention and other state-run facilities could be structured around fostering the development of positive friendships. Finally, communities could create more playgrounds and other recreational spaces for children, and ensure their safety. Recognizing and supporting children's friendships, along with the social conditions that give rise to positive peer relationships, are central features of the new parental rights.

### C. *Supporting Families*

Our model also seeks to dramatically reduce state separations of children from their parents. Current law leads to state-enforced separations of children from their parents that inflict significant harm on children. This Section discusses three areas in which forced separations frequently take place: immigration detention, child welfare removal, and parental incarceration. Our model would strengthen parental rights in each of these areas. Both parents and children have rights to maintain relationships with each other when state action aims to separate them. Our model considers the effect of forced separations on children's independent interests in their present welfare and development over time. We focus on creating the conditions under which separations will become unnecessary while also better attending to children's independent interests when separations must occur.

1. *Immigration Detention.* The phenomenon of state-enforced separations recently took a tragic turn at the border. Between July 2017 and October 2019, at least 5,400 children were separated from their parents by U.S. Immigration and Customs Enforcement ("ICE") as families sought to enter the United States.<sup>324</sup> In addition, ICE has

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322. For a meta-analysis of 71 studies analyzing children's peer learning and its positive effects, see Harriet R. Tenenbaum, Naomi E. Winstone, Patrick J. Leman & Rachel E. Avery, *How Effective Is Peer Interaction in Facilitating Learning? A Meta-Analysis*, 112 J. EDUC. PSYCHOL. 1303, 1314–16 (2020).

323. See PEPLER & BIERMAN, *supra* note 311, at 3.

324. Chantal da Silva, *More Than 5,400 Children Were Separated from Their Parents by the Trump Administration, 'Shocking' New Tally Shows*, NEWSWEEK (Oct. 25, 2019, 7:23 AM), <https://www.newsweek.com/trump-administration-family-separation-policy-aclu-1467715> [<https://perma.cc/7ZBR-T6RH>].

deported tens of thousands of immigrant parents of children who are U.S. citizens.<sup>325</sup> In both contexts, the harms to children are rarely addressed.

The justification for these forced separations is explicitly punitive.<sup>326</sup> Parents are viewed as exercising a choice to migrate into the United States or to stay in the United States without valid documentation and are consequently held accountable, including by losing custody of their children.<sup>327</sup> Moreover, the Board of Immigration Affairs and many courts do not view the deportation of undocumented parents with citizen children as a form of forced separation because they believe parents will choose to bring their children with them.<sup>328</sup> Deterrence is also invoked, as some policymakers believe separation and deportation are effective tactics for eliminating family border crossings or otherwise limiting the presence of undocumented parents in the United States.<sup>329</sup>

Whether the rationale is punishment, deterrence, or both, the separation policy focuses almost entirely on the behavior of parents, in line with the current all-or-nothing regime of parental rights. Although U.S. immigration law provides for “cancellation of removal” for some

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325. Madeline Buiano, *ICE Data: Tens of Thousands of Deported Parents Have U.S. Citizen Kids*, CTR. FOR PUB. INTEGRITY (Oct. 12, 2018), <https://publicintegrity.org/inequality-poverty-opportunity/immigration/ice-data-tens-of-thousands-of-deported-parents-have-u-s-citizen-kids> [https://perma.cc/C5CX-HAPJ]; see also RANDY CAPPS, MICHAEL FIX & JIE ZONG, MIGRATION POL'Y INST., A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS 3–4 (2016) (estimating that 79 percent of the 5.1 million children living “with at least one unauthorized immigrant parent” are United States citizens).

326. Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 434 (2020); see Kathy Abrams, *Family as a Vehicle for Abjection*, 2009 UTAH L. REV. 407, 408 (“[P]revious immigration raids and deportations use family as an instrument of abjection” in order “to produce immigrants as somehow less than human—the kind of beings whose deep connections with parents, children or spouses can be disregarded, indeed flagrantly violated, at will.”).

327. For a recent expression of these views, see Michael D. Shear, Katie Benner & Michael S. Schmidt, *We Need to Take Away Children, No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rostenstein.html> [https://perma.cc/JUP6-7RXC].

328. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 71–72 (2012).

329. William Cunnings, *John Kelly Defends Separating Immigrant Families, Saying ‘Name of the Game is Deterrence,’* USA TODAY (May 11, 2018, 4:16 PM), <https://www.usatoday.com/story/news/politics/2018/05/11/john-kelly-splitting-migrant-families-laws-trimip/602982002> [https://perma.cc/6EWP-2NWL]; see also Cordero, Feldman & Keitner, *supra* note 326, at 434 (“[T]he U.S. government’s policies and practices beginning in 2018 represent the first time the United States deliberately separated arriving migrant and asylum-seeking families as a tactic for deterring migration.”).

undocumented immigrant parents if they are able to show that their removal will cause “exceptional and extremely unusual hardship” to their children,<sup>330</sup> the hardship standard is an exceedingly difficult threshold for immigrant parents to meet.<sup>331</sup> Parents are the subjects of the policy’s goals, and children are the objects used to punish or influence parental behavior.<sup>332</sup>

In this way, a parent’s presence in the United States without valid documentation may be viewed as a type of child forfeiture. Parents who cross the border illegally are in no position, so this rationale would go, to claim parental rights, even if they subsequently give birth to U.S. citizens. They have waived their entitlement to custody over their children in the United States by being in the country or attempting to enter the country without documentation.<sup>333</sup> Indeed, the United States classifies children separated from their parents at the border as “unaccompanied minors,” as if their parents had never traveled to the border with them.<sup>334</sup>

This focus on parental behavior fails to take children’s independent interests into account even as the state affirmatively assumes custody over those children. Although a few states have enacted legislation permitting parents to designate guardians for their children in the event of deportation, children of deported parents are often simply absorbed into the child welfare system.<sup>335</sup> As migrant children move from the private family into the custody of the state, the state continues to view them as objects to be kept by parents or forfeited. The United States has not to date adjusted its immigration

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330. 8 U.S.C. § 1229b.

331. See *Monreal-Aguinaga*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001); *Jimenez v. INS*, No. 96-70169, 1997 WL 349051, at \*4–5 (9th Cir. 1997) (unpublished table decision).

332. See David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 *FORDHAM URB. L.J.* 393, 399 (2010).

333. For example, one discussion of *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004), notes that the case upheld the deportation of a mother even though the court agreed that her citizen children would be subject to female genital mutilation (“FGM”) if they also returned to the mother’s home country, thereby confining consideration of the children’s interests to “FGM or the loss of a parent” without considering whether the children’s interests could best be met by allowing the mother to stay in the United States. Note, *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, 134 *HARV. L. REV.* 1456, 1472 (2021) [hereinafter *In the Best Interests of the Child Asylum-Seeker*].

334. Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 *CALIF. L. REV.* 1, 4 (2020).

335. See Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?*, PEW TRUSTS (Oct. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children> [https://perma.cc/RJ8S-UW4B].

policies to mitigate the traumatic harms suffered by children separated from their parents.<sup>336</sup> Immigrant or citizen children separated from their undocumented parents are at increased risk of anxiety, depression, and post-traumatic stress disorder.<sup>337</sup> Young children kept in shelters may also suffer irreversible changes to their brains, leading to future deficits in executive function, memory, and thinking processes.<sup>338</sup>

Many advocates, including the American Psychological Association, share the view that lawmakers should adopt alternative immigration policies that take these harms to children into account.<sup>339</sup> In the absence of serious abuse and neglect on the part of their parents, children's broader interests are almost always furthered by ongoing relationships with their parents.<sup>340</sup> Here, the state is disrupting these relationships for reasons completely unrelated to the quality of the relationships. Simply stopping forced separations therefore seems to be the obvious solution, yet the federal government is unlikely to exempt families from immigration laws, leaving family immigration detention as the only route to keeping families together under current approaches. Family detention is likely to inflict other harms on children,<sup>341</sup> or at the very least is unlikely to foster their interests

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336. See Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump's Family Separation and Child Detention Actions: A Children's Rights Perspective*, 95 WASH. L. REV. 377, 398–408 (2020).

337. Kalina M. Brabeck, M. Brinton Lykes & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 498, 500 (2014); Carola Suárez-Orozco, Hee Jin Bang & Ha Yeon Kim, *I Felt Like My Heart Was Staying Behind: Psychological Implications of Family Separations & Reunifications for Immigrant Youth*, 26 J. ADOLESCENT RSCH. 222, 247–48 (2011); Lisseth Rojas-Flores, Mari L. Clements, J. Hwang Koo & Judy London, *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCH. TRAUMA 352, 353 (2017).

338. Amanda S. Hodel, Ruskin H. Hunt, Raquel A. Cowell, Sara E. Van Den Heuvel, Megan R. Gunnar & Kathleen M. Thomas, *Duration of Early Adversity and Structural Brain Development in Post-Institutionalized Adolescents*, 105 NEUROIMAGE 112, 117 (2015).

339. Letter from Jessica Henderson Daniel & Arthur C. Evans, Jr., Am. Psych. Ass'n, to President Donald Trump (June 14, 2018), <https://www.apa.org/advocacy/immigration/separating-families-letter.pdf> [<https://perma.cc/LJ9G-8WLR>]; AJAY CHAUDRY, RANDY CAPPS, JUAN MANUEL PEDROZA, ROSA MARIA CASTAÑEDA, ROBERT SANTOS & MOLLY M. SCOTT, THE URB. INST., *FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT* 74 (2010).

340. See Trivedi, *The Harm of Child Removal*, *supra* note 320, at 527–41; *In the Best Interests of the Child Asylum-Seeker*, *supra* note 333, at 1473–74.

341. WENDY CERVANTES, *FAMILY DETENTION: THE HARMFUL IMPACT ON CHILDREN* 1 (2015).



beyond the parent–child relationship. Current law therefore leaves limited options, all of which fail to further children’s robust interests.

By challenging the framework of parental fault, the new parental rights opens up alternatives to deportation, separation, or family detention. Most promisingly, we resist the privatization of dependency and insist that the state provide more support for children in need while simultaneously fostering their relationships with their parents.<sup>342</sup> This could involve placements of immigrant families with relatives or in other home settings, with parents subject to supervision requirements.<sup>343</sup> Although parents would be subject to restrictions, those restrictions would not sever their relationships with their children. Children could therefore maintain close relationships with their parents while also attending school or otherwise pursuing interests outside of the parent–child relationship.

The radical change here is in altering the relationship between families and the state to eliminate the state’s punitive response to undocumented parents, a response that directly harms children. Children of undocumented parents should have basic rights to maintain a relationship with their parents, a step not too far removed from the U.S. Supreme Court’s decision in *Plyler v. Doe*,<sup>344</sup> which held that undocumented children may not be denied an education.<sup>345</sup> The new parental rights imposes shared duties on parents and the state to care for children and recognizes that children have affirmative claims to state support, including support that maintains rather than destroys the parent–child relationship.

2. *Child Welfare Removal.* Although attention to children’s interests ostensibly governs the law of child welfare, forced separations in this context are also overwhelmingly defined by notions of parental fault and forfeiture. Because current law protects family privacy and parental authority unless a parent commits abuse or neglect that comes to the attention of the state, child welfare law “depends on parental

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342. See *supra* Part II.A.

343. See Julie Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 614–16 (2020).

344. *Plyler v. Doe*, 457 U.S. 202 (1982).

345. See *id.* at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”).

fault as a predicate for state engagement in the life of the child.”<sup>346</sup> This state engagement often ends in removal of children from the home, an event of traumatic significance even for those children suffering from serious maltreatment.<sup>347</sup> While in cases of severe maltreatment removal may be the only course of action to keep a child safe, the law should recognize the effect of removal for all children. Even maltreated children develop attachment relationships to their parents; separation may bring relief and safety (although not always), but separation may also prompt acute trauma and feelings of loss and self-blame.<sup>348</sup> It is likely rare that maltreated children are not also attached to their parents in emotionally complex ways.<sup>349</sup> Ensuring that removal is always an option of last resort is central to our model, and state steps toward removal are subject to the highest scrutiny.

The current child welfare system<sup>350</sup> privatizes caregiving and then separates parents and children—sometimes permanently—as punishment for perceived caregiving failures. Black children, in particular, are separated from their parents or other primary caregivers

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346. Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 423 (2005); *see also* Gupta-Kagan, *supra* note 132, at 903 (“The present system centers on legal findings of parental faults, not children’s needs.”); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1515 (1996) (stating that parental fault is often the actual standard in child welfare proceedings even when judges explicitly invoke the best interests of the child standard).

347. *See* CHILD’S BUREAU, *supra* note 90, at xiv Exhibit S-2, 11 tbl.2.1, 90 tbl.6-4 (showing that in 2019, out of 4,378,000 referrals, 656,000 children were found to be victims of maltreatment, and 21.7 percent of those children were taken into foster care); Alan J. Dettlaff, *The Evolving Understanding of Disproportionality and Disparities in Child Welfare*, in 2 HANDBOOK OF CHILD MALTREATMENT 149, 152 (Jill E. Korbin & Richard D. Krugman eds., 2014) (“Multiple studies have documented that children who are removed from their homes experience not only significant trauma but also are more likely than other children to experience negative outcomes as adults . . .”).

348. *See* Trivedi, *supra* note 320, at 527–41 (explaining that the act of removing a child itself creates trauma for children).

349. *See id.* at 528 (“[P]rofessionals seem to ignore that for the child, the maltreating parents are the only parents he or she has, and that any separation, particularly if long and abrupt, will evoke strong and painful emotional reactions.” (quoting Douglas F. Goldsmith, David Oppenheim & Janine Wanlass, *Separation and Reunification: Using Attachment Theory and Research To Inform Decisions Affecting the Placement of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 6 (2004))).

350. This system is now often referred to as the family regulation system or family policing system to emphasize the destructive effects of widespread removal on Black families and communities. *See, e.g.*, Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/TU3L-GVWS>].

at alarming rates; studies from 2010 show Black children comprised 29 percent of children in foster care, despite representing only 14.5 percent of children living in the United States.<sup>351</sup> Studies from 2018 show Black children comprised 23 percent of children in foster care.<sup>352</sup> Although some number of children are necessarily removed from parental caregivers for safety reasons,<sup>353</sup> the system of privatized caregiving has devastating consequences for a large number of children, especially Black children living in low-income communities. In a world of vast inequality, the system of privatized caregiving sets the stage for caregiving difficulties and then views parents who falter as having forfeited the right to raise their children.<sup>354</sup>

Taking a step back, this is not a system that serves children's interests in any meaningful way. We focus on two shortcomings here. First, a system of privatized caregiving permits the state to elide its own role in producing the conditions that lead to removals in the first place. In 2017, 75 percent of all child welfare investigations involved parental neglect,<sup>355</sup> which "is frequently defined as the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child's health, safety, and wellbeing are threatened with harm."<sup>356</sup> It is true that child welfare officials can and often do offer in-home supports to parents when they do not perceive an imminent risk of serious harm to the child.<sup>357</sup> But child welfare officials are extremely limited in their capacity to provide what many parents actually need to fulfill their role as parents: the financial resources necessary to reduce stress in the

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351. Dettlaff, *supra* note 347, at 149.

352. CHILD.'S BUREAU, *supra* note 293, at 9.

353. See Gupta-Kagan, *supra* note 132, at 941 (generally advocating for the abolition of mandatory reporting laws, but conceding such laws are still necessary for "cases involving severe abuse or neglect").

354. See ROBERTS, *supra* note 132, at 117 (critiquing rates of child removal as "reject[ing] any national effort to address the systemic causes of children's deprivation and [a decision] to pursue instead the private remedies of marriage and adoption").

355. *Child Maltreatment*, CHILD TRENDS (May 7, 2019), <https://www.childtrends.org/indicators/child-maltreatment> [<https://perma.cc/48YA-372S>].

356. CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2019), <https://www.childwelfare.gov/pubpdfs/define.pdf> [<https://perma.cc/FU3S-KC2X>]. Some instances of parental neglect involve serious maltreatment, as the fatality rate for neglected children confirms. Of the 1,515 children who died of child maltreatment in reporting states in 2019, 72.9 percent were neglected. Only 44.4 percent suffered physical abuse. CHILD.'S BUREAU, *supra* note 90, at 56.

357. CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., IN-HOME SERVICES IN CHILD WELFARE 3 (2014).

family and to “provide needed food, clothing, shelter, medical care, or supervision.”<sup>358</sup> Rather than providing robust preventative support for families, the state erects a child welfare system that punishes many parents struggling to raise their children in poverty.<sup>359</sup> Many of the problems currently plaguing the child welfare system are rooted in a system that privatizes dependency and blames poor parents—particularly Black parents—for their poverty.

The new parental rights acknowledges the state’s role in creating the background conditions of inequality that lead to child welfare involvement and shifts the law’s focus to preventing caregiving failures from arising in the first place. Of course, some children do suffer severe maltreatment in the home, but research suggests that this maltreatment often results from the stresses of poverty, with adjacent hardships such as substance abuse, unemployment, and homelessness.<sup>360</sup> A governmental system that privatizes caregiving can avoid responsibility for addressing the economic inequality that, along with racial bias, fuels the high rates of child removals in communities of color. Reform requires systemic changes in the family–state relationship, including jettisoning the myth of the private family in favor of preventive social and economic policies aimed at keeping children and parents safely together.<sup>361</sup>

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358. Cf. CHILD.’S BUREAU, *supra* note 90, at 77–81 (describing the non-financial prevention services and postresponse services offered to parents).

359. David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right To Parent While Impoverished*, 71 OKLA. L. REV. 885, 895 (2019); Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1023, 1025 (2003). In many cases, the state cannot provide the very thing that parents are lacking—for example, a safe and stable home. See, e.g., Matthew Stone, *Maine is Removing More Kids From Their Homes—Often To Stay in Hotels*, BANGOR DAILY NEWS (July 29, 2018), <https://bangordailynews.com/2018/07/29/mainefocus/maine-is-removing-more-kids-from-their-homes-often-to-stay-in-hotels> [<https://perma.cc/PQ2M-JZCD>].

360. See ANDREA J. SEDLAK, JANE METTENBURG, MONICA BASENA, IAN PETTA, KARLA MCPHERSON, ANGELA GREENE & SPENCER LI, U.S. DEP’T HEALTH & HUM. SERVS., NIS-4, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: REPORT TO CONGRESS 5–11 (2010) (explaining that household socioeconomic status is “significantly related to incidence rates in all categories of Harm Standard maltreatment and levels of outcome severity”).

361. Those who advocate for greater state intervention on behalf of children also recognize the importance of radical reform to address the inequality and underlying racial subordination that produces childrearing difficulties. See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 923 (2009) (explaining that state-run maltreatment prevention programs “provide the best opportunity to protect black children against maltreatment as well as the child welfare system involvement that maltreatment triggers”).

Second, child welfare removals risk reinforcing and sustaining a child welfare system that disproportionately affects communities of color and their children.<sup>362</sup> The strong correlation between poverty and maltreatment is not sufficient to explain the full extent of racial disparities in the child welfare system. Recent studies that control for family income indicate that “racial bias in decision-making remains an important factor in contributing to racial disparities.”<sup>363</sup> It seems clear that racial disparities result in significant part from racialized assumptions about parental fault and predictions of harm.<sup>364</sup> Racial bias in the reporting and investigating of child abuse and neglect undoubtedly plays a role, as do racialized understandings of child maltreatment. Neglect as a general category encompasses discretionary decision points based on perceptions of risk, which opens the door to cultural and racial biases in situations where removal may not be warranted.<sup>365</sup> The amorphous “best interests of the child” standard confers significant discretion on child welfare officials,<sup>366</sup> who may lack familiarity with the communities in which they work or may

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362. See CHILD’S BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 2 (2016) (noting the breadth of research documenting racial disparities present in the child welfare system).

363. Dettlaff, *supra* note 347, at 160.

364. See CHILD’S BUREAU, *supra* note 362, at 6 (noting research suggesting racial disparities in substantiation rates of child welfare cases); Sheila D. Ards, Samuel L. Myers Jr., Patricia Ray, Hyeon-Eui Kim, Kevin Monroe & Irma Arteaga, *Racialized Perceptions and Child Neglect*, 34 CHILD. & YOUTH SERVS. REV. 1480, 1489 (2012) (concluding that racialized beliefs and perceptions among caseworkers “are highly correlated with the overrepresentation of black children among substantiated maltreatment cases”); Alan J. Dettlaff, Stephanie L. Rivaux, Donald J. Baumann, John D. Fluke, Joan R. Rycraft & Joyce James, *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1635 (2011) (concluding that race is correlated with caseworkers’ assessments of risk); see also ROBERTS, *supra* note 132, at 112 (suggesting that unbiased decisions cannot be made regarding adoption placements); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 110 (2008) (“Recent research shows that race impacts professionals’ decision making at almost every stage of the process.”).

365. See Dettlaff, *supra* note 347, at 160 (“[T]he authors suggested that although income is a factor that influences risk assessment, it is not a factor that influences the decision threshold. Rather, the threshold is influenced by factors associated with the decision-maker, such as their perceptions of race.”).

366. The “best interests of the child standard” is the dominant principle in family law, which has long been criticized for the discretion it confers on judges. For a critique of the best interests standard, see Alstott, Dailey & NeJaime, *supra* note 6, at 1.

seek, either consciously or unconsciously, to impose their own parenting values on other groups.<sup>367</sup>

Moreover, the current child welfare system, which prioritizes post-hoc removals over ex-ante support for families, has created a regime of family surveillance in low-income communities of color with devastating consequences for all families living within the communities.<sup>368</sup> Calls to defund the child welfare system are motivated in part by a recognition that, whatever good the system is doing for the small number of children at risk of serious abuse, it is vastly outweighed by the widespread harm to Black children and families living in constant fear of removal.<sup>369</sup> In addition to the harm done to individual children, the threat of removal exerts a terrifying control over communities of color, adversely affecting all children who live there.<sup>370</sup>

Our model illuminates the systemic conditions of economic inequality and racial discrimination that undergird the current child welfare system, conditions that amplify the harms from the privatization of dependency and related parent–state binary. While recognizing concerns about abandoning children to the private sphere of parental control, we join calls for prohibiting removal except in cases of serious and imminent psychological or physical maltreatment. As described above, removals from imperfect but not seriously abusive or neglectful home environments have detrimental developmental consequences for children, and many children experience new forms of abuse and neglect after they are removed from their parents and placed into foster care.<sup>371</sup> Children also often move between multiple foster homes, compounding the destabilizing effects of removal, and

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367. See, e.g., Amy Sinden, “Why Won’t Mom Cooperate?”: *A Critique of Informality in Child Welfare Proceedings*, 11 *YALE J.L. & FEMINISM* 339, 353–55 (1999) (explaining that the “best interests of the child” standard is “extremely malleable and subjective”). To address this problem in the judicial context, Sean Williams has proposed permitting family court judges to adopt rules based on “local values” in order to cabin judicial discretion and limit the influence of unconscious biases. See generally Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law*, 65 *DRAKE L. REV.* 781 (2017) (advocating for the use of judge-made local rules to guide judges use of their “discretion in family law matters”).

368. See Roberts, *supra* note 132 *passim*.

369. See, e.g., Roberts, *supra* note 350.

370. See Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 *J. SOC. WELFARE & FAM. L.* 426, 429–34 (2014).

371. See Trivedi, *supra* note 320, at 528 (referencing studies suggesting that separation from parents imposes adverse developmental and biological consequences); Sarah Katz, *Trauma-Informed Practice: The Future of Child Welfare?*, 28 *WIDENER COMMONWEALTH L. REV.* 51, 80 (2019) (noting the lack of empirical evidence that creating a new family is better for children). LGBTQ children are especially vulnerable. See Konnoth, *supra* note 232, at 274.

frequently spend months, or even years, in the foster care system even though parental reunification is ostensibly the ultimate goal.<sup>372</sup> Due in part to this instability, children in the foster care system are more likely than other low-income children to drop out of high school, experience homelessness, and suffer from mental and emotional health conditions.<sup>373</sup>

Like other commentators, we aim to balance protecting children's interest in remaining with caring parents and their interest in emotional and physical safety. Children's interest in maintaining relationships with their parents should not become an excuse for failing to help children when circumstances warrant. We should be especially concerned about a system of child welfare that does not value the lives of racially and economically marginalized children sufficiently to protect them against harm. This construction minimizes the importance of background structural conditions like poverty and homelessness in producing abuse or neglect, instead ascribing it to parents' "flawed character."<sup>374</sup> When based upon racial norms, child welfare removals also perpetuate ongoing legacies of slavery and past efforts to forcibly assimilate Native American tribes, undermining communities' cohesiveness and their ability to transmit cultural practices from one generation to the next.<sup>375</sup>

In the long run, therefore, our model seeks to ameliorate the background conditions of inequality and racial bias that lead to removal. The need for removal could be vastly reduced if law focused on *all* children's interests in maintaining relationships with their parents instead of focusing on parental fault, whether real or perceived. Under our model, when serious harm to the child is threatened, the

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372. See CASEY FAMILY PROGRAMS, STRONG FAMILIES 2 (2018), [https://caseyfamilypro-pwengine.netdna-ssl.com/media/SF\\_Placement-stability-impacts\\_2021.pdf](https://caseyfamilypro-pwengine.netdna-ssl.com/media/SF_Placement-stability-impacts_2021.pdf) [<https://perma.cc/2Z65-8HPE>] (showing that 67 percent of children over the age of two in foster care had more than two foster care placements).

373. Moira A. Szilagyi, David S. Rosen, David Rubin & Sarah Zlotnik, *Health Care Issues for Children and Adolescents in Foster Care and Kinship Care*, 136 PEDIATRICS 1131, 1132 (2015); VANESSA X. BARRAT & BETHANN BERLINER, THE INVISIBLE ACHIEVEMENT GAP: EDUCATION OUTCOMES OF STUDENTS IN FOSTER CARE IN CALIFORNIA'S PUBLIC SCHOOLS iii–iv (2013) (discussing findings that children in the foster care system showed an achievement gap compared to other students, in addition to experiencing higher drop-out rates).

374. Danielle Keats Citron, *A Poor Mother's Right to Privacy: A Review*, 98 B.U. L. REV. 1139, 1145–46 (2018).

375. See Hari Kunzru, *As American as Family Separation*, N.Y. REV. BOOKS (July 1, 2021), <https://www.nybooks.com/articles/2021/07/01/as-american-as-family-separation> [<https://perma.cc/V6QD-N8Y6>] (reviewing LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2021)).

state must consider the emotional trauma of removal when assessing whether to separate parent and child.<sup>376</sup> Although the state would still be obligated to ensure children's safety when they are clearly endangered by their parents, the state would preemptively fulfill that obligation by providing supports designed to bolster parenting, such as visiting nurses, parenting guidance, and income supplements. If parental failings nonetheless occur, careful case-by-case efforts should be taken to keep children with their parents whenever possible through the provision of state support and rehabilitative services. Training, supervision, and community engagement should be directed to reducing children's removal from the home. Surveillance should be replaced by alliance and trust.

Our model anticipates adequate state support for all families and a child welfare system designed to keep parents and children together to the extent possible without significantly harming children. Some child advocates, rightly troubled by the system's failings, seek to radically reduce child protective services or do away with them altogether.<sup>377</sup> Yet because there will always be some parents who cannot care for their children, we need a child welfare system that protects their safety. Moreover, without the threat of permanent separation, some parents might voluntarily seek state help with childrearing during times of crisis. Perhaps, one day, adequate supports will be in place, making child welfare intervention unnecessary. Yet this day will not arrive until the state has fully assumed its responsibility to support families.

In the meantime, our model calls for preventive state support for struggling families and resources to ensure that children's separation from their parents happens only when absolutely necessary. This initiative means committing federal and state resources to a badly overburdened child welfare system, increasing the number of social workers available, increasing high-quality training in child development and implicit bias, providing at-home services, and dramatically reducing child protection caseloads. The goal is to reinforce parental caregiving to allow children to safely remain in their

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376. See Trivedi, *supra* note 320, at 528 (noting the adverse psychological consequences resulting from removal). Currently, there is no requirement that such emotional trauma be considered.

377. See, e.g., Roberts, *supra* note 350 (arguing that child protective services should be defunded, echoing previous calls for police abolition).



homes, moving away from a punitive regime of child removal toward a regime of family support.

3. *Parental Incarceration.* Imprisonment for low-level drug and other offenses has led to a well-documented crisis of mass incarceration in this country.<sup>378</sup> With mass incarceration has come shocking rates of forced separations of children and parents. These separations are not well-monitored and tracked, but, as of 2007, nearly 810,000 state and federal prisoners reported being parents of minor children.<sup>379</sup> Of these, fathers comprised approximately 92 percent.<sup>380</sup> A disproportionate number of affected children are children of color. In 2007, for example, Black children were 7.5 times more likely than white children to have an incarcerated parent.<sup>381</sup>

Mass incarceration is not only a criminal justice issue; it is a traumatizing assault on children and, because of racial disparities in the criminal justice system, primarily on Black children.<sup>382</sup> Separation may weaken children's attachment to their parents, "which has been linked to poor child outcomes, including poor peer relationships and cognitive abilities."<sup>383</sup> Additional adverse effects include "anxiety, withdrawal, hypervigilance, depression, shame and guilt."<sup>384</sup> Anger, aggression, and

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378. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS passim* (rev. ed. 2010) (documenting systematic mass incarceration in the United States).

379. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STATS., *PARENTS IN PRISON AND THEIR MINOR CHILDREN* 1 (2010).

380. *Id.* at 2. "[T]he number of incarcerated women has more than doubled in the last decade." Shani M. King, Hannah Ayasse, Alyssa Mikytuck, Rachel F. Barr, Jennifer F. Woolard & Terry Harrak, *The Intersection of Juvenile Justice and Early Childhood: How To Maximize Family Engagement*, 71 FLA. L. REV. F. 88, 88 (2019).

381. See Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. OF JUST. (Mar. 1, 2017), <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children> [<https://perma.cc/X324-QYFJ>].

382. See Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 77-78 (2011) (explaining that mass incarceration victimizes the children of those incarcerated); Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1671 (2003) (explaining how imprisonment damages family relationships); Anna R. Haskins, *Paternal Incarceration and Children's Schooling Contexts: Intersecting Inequalities of Educational Opportunity*, 674 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 35 (2017) (suggesting that mass incarceration deepens disadvantages among students); Kristin Turney & Rebecca Goodsell, *Parental Incarceration and Children's Wellbeing*, 28 FUTURE CHILD. 147, 148 (2018) (stating that parental incarceration is associated with negative outcomes for children, even when controlling for other factors like poverty or family instability).

383. King et al., *supra* note 380, at 89.

384. *Id.*

hostility can emerge toward caregivers and siblings and also affect school performance.<sup>385</sup> The effects of parental imprisonment on children may last for generations.

Many scholars and commentators have addressed the effects of mass incarceration, with some specifically focused on the effects on families and children.<sup>386</sup> But the collateral consequences of parental imprisonment for children in this country largely have been ignored by legislators, police departments, and prosecutors' offices. Children's interests are rarely, if ever, taken into account as mandatory minimum sentencing laws are passed and individuals are arrested, prosecuted, and sentenced for often low-level crimes. Indeed, the U.S. Sentencing Commission Guidelines Manual expressly instructs judges to overlook children in the determination of their parents' sentences.<sup>387</sup>

Under current law, the adult criminal justice system is too often blind to children's interests, particularly children's interests in maintaining close attachment relationships with their parents. In the context of parental imprisonment, the prevailing all-or-nothing approach to parental rights is especially pernicious. A parent sentenced to prison will be viewed as having forfeited his or her rights to a relationship with children, at least temporarily and sometimes for good.<sup>388</sup> Children are thus implicitly treated as a kind of property, as they once were at common law. Their compelling interests in maintaining an attachment relationship with their parents go unrecognized. Moreover, because of this focus on parental forfeiture, the system ultimately permits termination of parental rights as a consequence of the crimes that led to imprisonment.

The harms to children from parental incarceration are enormous. They face declines in physical, psychological, and educational wellbeing and increases in the risks of future drug use, unemployment,

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385. *Id.*; see also Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 392 (2018) (noting that parental incarceration is a strong risk factor for school failure).

386. See *supra* note 382 and accompanying text; see also Sarah Katz, *Parental Criminal Convictions and the Best Interest of the Child*, 2019 PA. BAR ASS'N Q. 27, 28 (discussing what consideration should be given to parental criminal convictions in custody determinations).

387. U.S. SENT'G GUIDELINES MANUAL § 5H1.6 (U.S. SENT'G COMM'N 2018); Cyphert, *supra* note 385, at 387.

388. See Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678–79 (2003).

and prison.<sup>389</sup> Families lose income from the incarcerated parent, and parental rights might eventually be terminated.<sup>390</sup> Under the new parental rights, incarceration should never be the sole basis for terminating parental rights. Instead, the state should aim to maintain the relationship between parent and child while at the same time providing the child with custodial care. In some circumstances, that means that individual children may have more than two parental figures in their lives.

More broadly, attention must be paid to the racial inequality that underlies the separation of parents and children of color in the criminal justice system. A serious effort to protect children's interests would mean developing laws and policies that address racial injustices in policing, prosecuting, and sentencing.

The new parental rights thus seeks to dramatically decrease the level of parental imprisonment. In addition to reducing incarceration levels overall, individual sentencing should take into account the effects of prison on children with whom the defendant has a close attachment relationship. Children should not be treated as collateral damage in a war between parents and state. Neither should the parent be viewed as having forfeited the relationship with his or her child, thereby reducing the child to a mere property interest.

Incarceration, where necessary, would be accompanied by state efforts to maintain an attachment relationship between parent and child. Frequent and high-quality visits have been shown to benefit children.<sup>391</sup> Parents should be incarcerated near the child's home; under federal law, inmates must be housed in facilities within five hundred miles of family,<sup>392</sup> but even this distance is too far for many children. Visiting times should be generous, and the state should guarantee that children have the resources to get to prison. Prison facilities should

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389. Cyphert, *supra* note 385, at 390–94 (describing emotional, financial, and social effects of parental incarceration on children).

390. *See id.*; *see, e.g.*, ALA. CODE § 12-15-319 (2020) (providing for termination of parental rights where parents are unable to care for the child, taking into consideration, *inter alia*, “[c]onviction of and imprisonment for a felony.”).

391. *See* NANCY G. LA VIGNE, ELIZABETH DAVIES & DIANA BRAZZELL, URB. INST. JUST. POL’Y CTR., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 10 (2008) (“[M]aintaining contact with one’s incarcerated parent appears to be one of the most effective ways to improve a child’s emotional response to the incarceration and reduce the incidence of problematic behavior.”).

392. First Step Act of 2018, 18 U.S.C. § 3621.

make phones and computers more readily available for calls and videoconferencing with children.

Moreover, increased connections between incarcerated parents and their children could bolster rehabilitation as a stated goal of the adult criminal justice system.<sup>393</sup> Parenting programs could help develop inmates' parenting skills and otherwise encourage interactions between parents and children. The aim would be to maintain attachment relationships with children throughout incarceration and to prepare inmates to resume an important place in children's lives upon release.

### CONCLUSION

This Article presents a new model of parental rights that addresses what the law now denies: the important ways in which children's interests may depart from those of their parents and the need for more robust state support of children and their families. Support for expansive parental rights in this country is undeniably strong but tragically misguided. Although many believe that children and families are better off when parents have full control over their children, the reality is the opposite. The regime of expansive parental rights may directly harm the many children who are different from their parents or who do not live within families that conform to the traditional nuclear form. Moreover, although many advocates for expansive parental rights believe that parental rights are necessary to protect economically and racially disadvantaged families from an overreaching state, expansive parental rights fortify a regime of private support that forces these families to fend for themselves alone.

The new parental rights set forth in this Article seeks to dispel the overly romantic visions of parent-child unity and the public-private divide that have captured the law's imagination for at least the last century. By calling for greater state support of both children and families, our model challenges the privatization of dependency; fosters diversity of family life; and respects the independent needs, values, beliefs, and identities of all children.

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393. See Cyphert, *supra* note 385, at 395 (noting that increased visits are associated with reduced recidivism among incarcerated parents).