

# Nudging Improvements to the Family Regulation System

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*The Restatement of Children and the Law features a strong endorsement of parents' rights to the care, custody, and control of their children because parents' rights are generally good for children. Building on that foundation, the Restatement's sections on child neglect and abuse law would resolve several jurisdictional splits in favor of greater protections for family integrity, thus protecting more families against the harms that come from state intervention, especially state separation of parents from children.*

*But a close read of the Restatement shows that it only goes so far. It is not likely to significantly reduce the wide variation in practice by jurisdiction, nor will it satisfy calls for a more fundamental transformation of the legal system. For instance, the Restatement requires consideration of the harm of removing children from their parents, without explaining how to weigh that against possible harms of remaining at home. It provides that poverty alone does not amount to neglect, without providing much guidance on the difficult question of how to implement that principle. The Restatement creates a clear preference for placement with relatives over strangers, without clarifying what suffices to overcome those preferences. It recognizes a right of parents and children separated by the state to visit with "frequency," without defining that term.*

*This analysis is not a criticism of the Restatement—by codifying existing law, it does what the Restatement should do. Rather, this analysis highlights how this Restatement can contribute to child neglect and abuse law in the present context. It can help nudge the law in a modestly improved direction and highlight areas that require more transformative legal changes.*

## INTRODUCTION

If a restatement's job is to codify consensus views about a body of law, this is a challenging time to draft a restatement of the law of child neglect and abuse. The Restatement of Children and the Law<sup>1</sup> describes the legal system that defines child neglect

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<sup>1</sup> Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

and abuse. It determines when families should be subject to family court and Child Protective Services (CPS) agency oversight, when the state should separate parents and children, if and when they can reunify, and what to do if they cannot. But there is not a consensus about that legal system. It is under attack for intervening in and separating families too frequently and for too long, and for disproportionately taking those draconian steps toward families in poverty, families of color, and families in which one parent has a disability. Calls for dramatic change—whether it be the “aboli[tion] [of] child welfare as we know it”<sup>2</sup> or “transformation”<sup>3</sup>—abound. The very name of the system is subject to debate: common titles like “child welfare” and “child protection” are criticized as misnomers, and “family regulation” or “family policing” are proposed as alternatives.<sup>4</sup> One dominant critique of the status quo does seem to be emerging: the system should be significantly narrowed in scope, reserving its most invasive interventions for the most severe cases of maltreatment where the harm of maltreatment outweighs the harm of intervention. Instead of relying on coercion and separations, the system should develop alternative methods of helping families at the margins and pursue greater equity by race and class for families impacted by the legal system.<sup>5</sup> While the status quo is unsteady and under attack,

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<sup>2</sup> Alan Dettlaff, Kristen Weber, Maya Pendleton, Bill Bettencourt & Leonard Burton, *What It Means to Abolish Child Welfare as We Know It*, IMPRINT (Oct. 14, 2020), <https://perma.cc/92E5-U3F8>. For other sources seeking to abolish the present system, see generally Dorothy E. Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021). See Alan J. Dettlaff, Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt & Leonard Burton, *It Is Not a Broken System, It Is a System That Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 508–10 (2020); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 300–19 (2021).

<sup>3</sup> E.g., Jerry Milner & David Kelly, *The Need for Justice in Child Welfare*, 99 CHILD WELFARE J., Dec. 2021, at 1, 1.

<sup>4</sup> Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 428, 431 (2021) (describing the names of the “child welfare” and “child protection” systems as “misleading”); see Dorothy Roberts, *Feminism, Race, and Adoption Policy*, in ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 234, 234 (Sally Haslanger & Charlotte Witt eds., 2005); Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition 14–16* (2020) (unpublished B.A. thesis, Oberlin College) (on file with author).

<sup>5</sup> Mainstream foundations and agencies announce their goals of dramatically shrinking the foster care system. See, e.g., *About Us*, CASEY FAM. PROGRAMS, <https://perma.cc/REC2-FB9F> (seeking to cut the number of children in foster care by half); *Strategy*, REDLICH HORWITZ FOUND., <https://perma.cc/47H2-5GXB> (seeking to “narrow the front door to foster care”); Shereen A. White, Shanta Trivedi, Shakira Paige, Meredith

relatively little legal doctrine has changed, at least yet, and the agenda for such change is not fully formed.

Another challenge exists. While the law on the books—the black-letter law advanced by the Restatement—does have significant commonalities across the United States, what state and local legal systems actually do under that law varies significantly across jurisdictions. That variation results from the legal indeterminacy that has long been part of this field<sup>6</sup> and recognized by those on opposite sides of the ideological spectrum.<sup>7</sup> When observing how the law operates in practice, there really is no consensus.<sup>8</sup> There is wide variation by state in substantiation rates, removal rates, kinship placement rates, and termination of parent-child

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Giovanelli & Makena Mugambi, *Help Not Hotlines: Replacing Mandated Reporting for Neglect with a New Framework for Family Support*, 2022 FAM. INTEGRITY & JUST. Q. 132, 143; see also Closing Remarks from Aysha E. Schomburg, Assoc. Comm’r, Child’s Bureau, Culturally Responsive Engagement and Partnership Planning for Action Session, Child Welfare Virtual Expo (2021) (available at <https://perma.cc/7LUV-DBW5>) (describing the Children’s Bureau commitment to pursuing equity and recognizing historic harms).

Critics of this consensus exist as well. See, e.g., NAOMI SCHAEFER, RILEY BRETT DRAKE, SARAH A. FONT & EMILY PUTNAM-HORNSTEIN, AM. ENTER. INST., *WHAT CHILD PROTECTION IS FOR 2* (2021) (acknowledging nevertheless that “economic and material support programs have shown promise in reducing the need for CPS involvement”).

<sup>6</sup> See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 255 (1975); see also Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000 (1975); Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 LAW & CONTEMP. PROBS. 221, 223 (2014).

<sup>7</sup> Compare, e.g., Angela Olivia Burton & Joyce McMillan, *How Judges Can Use Their Discretion to Combat Anti-Black Racism in the United States Family Policing System*, 61 FAM. CT. REV. 265, 267 (2023) (noting “the gross indeterminacy of the substantive legal framework,” and connecting it to “oppressive, disrespectful, and punitive” treatment of Black families subject to family court jurisdiction), with Sarah Font & Naomi Schaefer Riley, *Foster Kids Need Permanent Homes*, WALL ST. J. (Mar. 23, 2023), <https://perma.cc/2MXN-F4ZR> (noting that different practices in different states are “the result of choices made by particular state and county child-welfare agencies and family courts” in the exercise of discretion granted them by indeterminate laws).

<sup>8</sup> See, e.g., Youngmin Yi, Frank Edwards, Natalia Emanuel, Hedwig Lee, John M. Leventhal, Jane Waldfogel & Christopher Wildeman, *State-Level Variation in the Cumulative Prevalence of Child Welfare System Contact, 2015–2019*, 147 CHILD. & YOUTH SERVS. REV., Feb. 4, 2023, at 1, 2 (describing a wide variation in the cumulative rates of investigation, substantiation, foster care placement, termination of parent-child relationships, and racial disparities in each of those decision points); Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 250 (2023) (“There is significant variance across the country as to the prevalence of those TPRs.”); SARAH FONT, AM. ENTER. INST., *HOW LONG DO STATES LET CHILDREN IN FOSTER CARE WAIT FOR PERMANENT FAMILIES? TIMELY PERMANENCY REPORT CARDS 12–27* (2023) (providing data on state-by-state variations in the time until reunifications and other forms of permanency); Michael S. Wald, *New Directions for Foster Care Reform*, 68 JUV. & FAM. CT. J. 7, 28–30 (2017) (providing examples of state variations in response to child maltreatment).

relationship rates, just to name a few important decision points.<sup>9</sup> The indeterminate substantive law permits this variation by effectively granting discretion to agencies and, secondarily, family courts, which then use that discretion differently in different jurisdictions. Moreover, legal system failures—especially weakness in family defense legal services provisions in many if not most jurisdictions in this country—ensure that few functional checks exist on exercises of this discretion.<sup>10</sup>

The Restatement enters the legal field in the context of significant political contest about where it should be going, and significant variation in practice by jurisdiction. Beyond fairly restating the law on the books, I will argue that because of these challenging contextual features, the Restatement offers two useful contributions to this field. First, it advances black-letter law by identifying areas where jurisdictions have differences and choosing the option which better protects the constitutional right to family integrity. This step is normatively valuable because this legal system has a long record of unnecessarily invading that fundamental constitutional right.<sup>11</sup> By choosing modestly stronger standards to limit government intervention, the Restatement will modestly limit those harmful interventions and slightly reduce the wide variety in practices.

Second, the Restatement simultaneously illustrates how much work remains and how much legal change is required to truly transform the system. It is not the Restatement's role to identify what the law ought to be in the future, and the Restatement appropriately does not attempt that task. But by critically analyzing the areas where the Restatement takes sides—and especially by critically analyzing how much, or how little, impact the Restatement's perspective is likely to have—we can illustrate how much further the law must change. The Restatement offers

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<sup>9</sup> For variations in substantiation, removal, and termination rates, see the Appendix. See also Yi et al., *supra* note 8, at 11–13. For variations in kinship placements rates, see Josh Gupta-Kagan, *Creating a Strong Preference for Kinship Care*, 2022 FAM. INTEGRITY & J. Q. 18, 24 [hereinafter Gupta-Kagan, *Kinship Care*].

<sup>10</sup> COMM'N ON PARENTAL LEGAL REPRESENTATION, INTERIM REPORT TO CHIEF JUDGE DIFIORE 34 (2019) (“[P]arents’ attorneys carry excessive caseloads, resulting in inadequate representation and denial of parents’ due process rights.”).

<sup>11</sup> See, e.g., DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 21 (1st ed. 2022); see Polikoff & Spinak, *supra* note 4, at 433; S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1576 (2023).

nudges in the directions of greater respect for parents' and children's right to family integrity. But it leaves plenty of indeterminacy in the law and thus room for continued variation among states and for what I would consider harmful interventions in families. Analyzing those areas in the law helps identify areas that lawyers, policymakers (both legislative and judicial), and advocates can focus on in the coming years.

This Essay begins with a brief discussion in Part I of the Restatement's endorsement of parental rights as an essential legal tool to protect families and serve children's interests. That foundation drives the Restatement's choice of legal rules that provide greater protection for parents' and children's rights to family integrity. Part II analyzes several of those specific areas; it identifies and describes areas where the Restatement takes sides on issues where some disagreement exists across jurisdictions. It then analyzes how each of those decisions still leaves plenty of room for discretion and thus, while representing helpful steps forward, are unlikely on their own to lead to the dramatic change that the emerging consensus rightly suggests is needed. That analysis can point the way toward some areas that require more creative thinking and dramatic change than the Restatement is positioned to provide.

### I. THE RESTATEMENT'S COMMITMENT TO PARENTAL RIGHTS

The foundation of the Restatement is its strong endorsement of parental rights as the first principle of this field.<sup>12</sup> While the field generally recognizes the importance of parental rights, debate remains over how strong parents' rights ought to be. For instance, in recent years, some academics have called for limiting parents' rights as a means to recognize children's interests in things parents may object to—like relationships with other family members, peers, or certain health care.<sup>13</sup>

This debate is relevant here because some of the leading responses to such critiques come from the Restatement's lead

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<sup>12</sup> Though it is not the topic of this Essay, a strong endorsement of parental rights does not diminish children's rights. Rather, it diminishes state power over families. Just as parents have the well-established right to the "care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000), children have the right to be in their parents' care, custody, and control. See Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 282 (2021) [hereinafter Trivedi, *My Family*] (collecting cases).

<sup>13</sup> See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1514, 1526 (2018).

reporter, Elizabeth Scott, and one of its associate reporters, Clare Huntington,<sup>14</sup> and their views are imbued throughout the Restatement: the law respects parents and their rights to—indeed, their power over—children because that is good for children.<sup>15</sup>

One reason parental rights remain essential parts of the law (and the Restatement) is that, whatever problems may result from the law granting parents control over children, any limitations on those rights necessarily imposes some form of state power over families. Some state actor has to adjudicate a claim as to whether a parent's view prevails, and that requires some state actor discerning what they believe is best for the child. As Professor Martin Guggenheim has written, to expand children's rights over parents' rights requires "that a randomly assigned official, who will have only very briefly met the child, possess the enormous power to make decisions affecting the child's lives."<sup>16</sup> It should also be clear that endowing such officials with that power risks them exercising it in a way that not only hurts children (despite good intentions), but also specifically hurts them in a way that is unequal based on the class, race, (dis)ability, sex, sexual orientation, gender, immigration status, or other factors of parents or children. Not incidentally, a core justification for parental rights (both in the adoption of the Fourteenth Amendment and in Supreme Court case law) is to protect against racial and ethnic bias in state decision-making regarding families.<sup>17</sup>

Nowhere are these risks more evident than in the child neglect and abuse system. This legal system is designed to figure out whether and how the state should intervene when someone alleges that a parent is maltreating their child. This is the area where parents' rights should be at their apex because it is where the state seeks its most severe invasion of family integrity—the physical and legal separation of parent from child. This is an area

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<sup>14</sup> See generally, e.g., Clare Huntington & Elizabeth S. Scott, *The Enduring Importance of Parental Rights*, 90 *FORDHAM L. REV.* 2529 (2022); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 *MICH. L. REV.* 1371 (2020) [hereinafter Huntington & Scott, *Conceptualizing Legal Childhood*].

<sup>15</sup> See Huntington & Scott, *Conceptualizing Legal Childhood*, *supra* note 14, at 1374–79 (describing a "Child Wellbeing framework" that "grows out of" the Restatement).

<sup>16</sup> Martin Guggenheim, *The (Not So) New Law of the Child*, 127 *YALE L.J. F.* 942, 949 (2018).

<sup>17</sup> Josh Gupta-Kagan, *The Constitutional Right to Family Integrity*, in *CHILD WELFARE LAW & PRACTICE: REPRESENTING CHILDREN, PARENTS, AND AGENCIES IN NEGLECT, ABUSE, AND DEPENDENCY CASES* 9, 28–29 (Josh Gupta-Kagan et al. eds., 4th ed. 2022).

where our legal system has more than a century of experience adjudicating disputes and purporting to balance parental rights with children's safety and other needs. And the legal system's record is not good.<sup>18</sup> So I am glad that the Restatement does not endorse giving this system more power over families and instead endorses a strong view of parental rights as a tool to protect families from this system. In the next Part, I turn to how the Restatement does this—and how effective we can expect it to be.

## II. THE RESTATEMENT'S ENDORSEMENT OF PARENTAL RIGHTS IN CHILD NEGLECT AND ABUSE LAW—AND THE LIMITATIONS OF THAT ENDORSEMENT

The Restatement's endorsement of parental rights is evident in how it addresses splits between states, where the Restatement consistently chooses provisions that more strongly support parental rights and the right to family integrity, and limit (however modestly) state power to intervene in families. Identifying those choices also prompts an evaluation of how effective they will be in changing the family regulation system.

For each of these decisions examined here, the Restatement takes a relatively modest step—it nudges state agencies and family courts to improve their practices somewhat, but without achieving the transformative change the legal system needs. This is not a criticism of the Restatement—its task is to “clarif[y] an evolving area of law,” not design what the law should be.<sup>19</sup> Rather, this Section uses the Restatement to help identify the gap between the status quo and calls for transforming the legal system, and to help illustrate specific legal provisions that could demand attention from those calling for change.

### A. Reporting and Investigation Structures

One of the most persistent demands for change is to reduce the number of families who are subject to CPS agency investigations, which reaches 37.4% of all children and 53.0% of Black children when measured across childhood.<sup>20</sup> This tremendous scope

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<sup>18</sup> See, e.g., JANE M. SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* 3 (2023) (tracing the family court's history, and calling for its abolition).

<sup>19</sup> Huntington & Scott, *Conceptualizing Legal Childhood*, *supra* note 14, at 1379.

<sup>20</sup> Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among U.S. Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017) (presenting data from 2014).

results at least in part from mandatory reporting and investigation statutes, which require a long list of child- and family-serving professionals (therapists, teachers, doctors, law enforcement, and more) to report any suspected neglect or abuse to CPS agencies, and often requires those agencies to investigate such reports.<sup>21</sup> Academics have long critiqued mandatory reporting for targeting many families with unnecessary investigations, deterring families from seeking help, preventing some professionals from providing help to families, and disproportionately hurting poor and minority families.<sup>22</sup> As the Restatement follows a child well-being approach,<sup>23</sup> it is worth noting one recent study finding that the CPS investigations triggered by the present legal structure are associated with worse mental health, school disciplinary, and other well-being outcomes.<sup>24</sup>

Those critiques have gained traction since prominent parts of calls for abolition or transformation of the system target mandatory reporting statutes. One leading abolitionist, Joyce McMillan, coined the phrase “transform mandated reporting to mandated supporting,” capturing both a critique of mandatory reporting statutes and a call for harnessing reporters’ concerns for children into more effective assistance.<sup>25</sup> Perhaps most tellingly, some CPS agency initiatives appear to include an homage to McMillan’s “mandated supporting” phrase. The New York Office of Children and Family Services has launched a new training for mandatory reporters which will “help mandated reporters identify when a

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<sup>21</sup> *E.g.*, N.Y. SOC. SERV. LAW § 413(1) (2023) (mandating certain persons and officials to report suspected maltreatment); *id.* § 424(6)(a) (2017) (requiring N.Y. CPS agencies to investigate reports of suspected child maltreatment within twenty-four hours).

<sup>22</sup> *See generally* KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES (2023); Mical Raz, *Calling Child Protective Services Is a Form of Community Policing That Should Be Used Appropriately: Time to Engage Mandatory Reporters as to the Harmful Effects of Unnecessary Reports*, 110 CHILD. & YOUTH SERVS. REV., Jan. 2020. *See also* Michael S. Wald, *Taking the Wrong Message: The Legacy of the Identification of the Battered Child Syndrome*, in C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 89, 95–96 (Richard D. Krugman & Jill E. Korbin eds., 2013); Gary B. Melton, *Mandatory Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 14 (2005).

<sup>23</sup> *See* Huntington & Scott, *Conceptualizing Legal Childhood*, *supra* note 14, at 1378–79 (summarizing “the Child Wellbeing framework” and its reflection in the Restatement).

<sup>24</sup> Michael Evangelist, Margaret M.C. Thomas & Jane Waldfogel, *Child Protective Services Contact and Youth Outcomes*, 136 CHILD ABUSE & NEGLECT, Feb. 2023, at 1, 9.

<sup>25</sup> *Mandated Supporting*, JMAC FOR FAMS. (Jan. 16, 2022), <https://perma.cc/57J8-NGVF> (quotation marks omitted). McMillan is credited with coining the “mandatory supporting” language. *See, e.g.*, *When Mandated Reporting Does More Harm Than Good: Tools for a New Approach*, AM. FED’N OF TEACHERS, AFL-CIO (June 28, 2023), <https://perma.cc/PY8N-B8VE>.



family could instead be supported.”<sup>26</sup> Los Angeles County has launched a “mandatory supporting initiative” with similar goals.<sup>27</sup> These reforms are thus far limited to administrative efforts to change practice within the existing body of law—though legislative change is possible in the foreseeable future.<sup>28</sup>

Those steps follow well-established efforts to limit mandatory investigation statutes by permitting agencies to use “alternative response”—agencies offering services rather than an investigation to families assessed to be at low risk of serious maltreatment—which now accounts for nearly 500,000 cases each year.<sup>29</sup>

The Restatement is silent on these topics. This silence reflects one limit of the Restatement’s potential impact—it does not speak to one of the most important issues in the field, and one which demands reform. I highlight this issue for a second reason: anyone who wants to develop a full understanding of the legal structure which creates the family regulation system must look beyond the topics covered in the Restatement.

## B. Removal Standards

### 1. Balancing harms.

Whenever the state seeks to remove a child from a parent, the Restatement requires courts to consider not only whether the child faces some danger from neglect or abuse, but also whether that danger “outweigh[s]” the danger from a removal.<sup>30</sup> This requirement recognizes the foundational point that removal imposes significant trauma on children, even when children have

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<sup>26</sup> *New York State Office of Children and Family Services Launches Updated Mandated Reporter Training*, N.Y. OFF. OF CHILD. & FAM. SERVS. (Feb. 15, 2023), <https://perma.cc/Y9CN-4BUW>.

<sup>27</sup> *See generally* COUNTY OF L.A., LOS ANGELES COUNTY MANDATED SUPPORTING INITIATIVE (2023).

<sup>28</sup> Legislative hearings espousing a critical view of mandatory reporting have occurred in at least one major state. *See* Susanti Sarkar, Adilia Watson & Michael Fitzgerald, *New York Lawmakers Weigh Calls to Overhaul Mandated Reporting of Child Maltreatment*, IMPRINT (Sept. 27, 2023), <https://perma.cc/A4YJ-JHAC>.

<sup>29</sup> States that reported alternative response data counted 476,930 children in FY 2021 who were the subjects of alternative response cases. CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2021, at 32 (2023). That number may be an undercount because not every state reported such data and because much of that time period involved the early months of the COVID-19 pandemic, which reduced hotline calls and the resulting responses.

<sup>30</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW §§ 2.42(a)(4), 2.43(a)(3), 2.44(a)(4) (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter RESTATEMENT Draft No. 4].

endured some neglect or abuse in their parents' care.<sup>31</sup> The Restatement's comments explain: even if a child faces a risk of harm that cannot be mitigated in the care of a parent or guardian, removing the child from the care of that parent or guardian creates different risks, which must be weighed in the decision whether to remove the child. In the words of one leading case, "in many instances removal may do more harm to the child than good."<sup>32</sup> Most fundamentally, removal interferes with the stability of the parent-child relationship, which is critical to healthy child development.<sup>33</sup> Removal also creates a risk that the child will experience "multiple-foster home placements, gaps in schooling and other services, loss of contact with siblings and other family members, and, if the child remains in foster care, the risk that the parent's rights will be terminated."<sup>34</sup>

This balancing of harms appropriately reflects the high value the law places on family integrity<sup>35</sup> and the high burden to justify the state separating children and parents.<sup>36</sup> It is not, however, clearly stated in each state's law, a point reflected in the Restatement's comments, which cite one leading court case and three statutes.<sup>37</sup> The Restatement rests this important principle on foundational concepts of family integrity and the need for great caution before separating families, as much as it does on the authority of the law in that relatively small number of states. In doing so, the Restatement makes an important statement of principle.

But how does the Restatement suggest courts balance the harms of removal with any harms to children remaining in their parents' custody? The Restatement gives little guidance, which makes one reasonably question whether its important statement

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<sup>31</sup> For leading recent articles on this point, see Melissa Friedman & Daniella Rohr, *Reducing Family Separations in New York City: The Covid-19 Experiment and a Call for Change*, 123 COLUM. L. REV. F. 52, 58–60 (2023); Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease?: The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1166–69 (2019).

<sup>32</sup> *Nicholson v. Scopetta*, 820 N.E.2d 840, 849 (N.Y. 2004).

<sup>33</sup> Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 528 (2019) (explaining that the disruption of a parent-child relationship "has adverse developmental . . . consequences").

<sup>34</sup> RESTATEMENT Draft No. 4 § 2.42 cmt. f.

<sup>35</sup> Trivedi, *My Family*, *supra* note 12, at 286.

<sup>36</sup> RESTATEMENT Draft No. 4 §§ 2.42(a)(4), 2.43(a)(3), 2.44(a)(4).

<sup>37</sup> *Id.* § 2.42 reporters' note, cmt. f. The American Law Institute could have cited additional authority. See, e.g., D.C. FAM. CT. RULES GOVERNING NEGLECT AND ABUSE PROCEEDINGS § 13(c) (2004) (requiring courts to "evaluate the harm to the child that may result from removal"). At least one state is considering an effort to codify this principle. See generally Cal. S. 578, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

of principle will lead to significant change in practice. The Restatement offers only one illustration of this balancing test, and it is not a difficult or helpful one. It posits a parent who has failed to obtain medical care, though the children “do not need immediate medical treatment.”<sup>38</sup> The Restatement rightly instructs that “[t]he potential harm to the children of being separated from their mother as well as the risks of removal are greater than the risk to the children of staying in [her] care, at least at this stage in the proceedings.”<sup>39</sup> But this analysis says very little. Because the children needed no treatment, there was no short-term harm risked by leaving them with their parent who did not provide medical care. So there is no actual balancing to analyze—the harm of removal obviously outweighs the absence of any immediate harm in keeping the family intact. Changing actual practice will require a more difficult application of the balancing test, when there are actual harms on both sides. The Restatement dodges this task.

## 2. Court oversight.

The Supreme Court has held that “as a matter of due process of law, [a parent is] entitled to a hearing on his fitness as a parent before his children [a]re taken” by the state.<sup>40</sup> That formulation merges two central themes: separating parents and children is a major invasion of constitutional rights, and all people are innocent until proven guilty. So, the Constitution generally requires a state to first prove parents unfit before taking their children. In practice, emergencies may arise which lead state agencies to assert that family separations are necessary before a family court can determine parental unfitness. And this practice has raised long-standing concerns that emergency removals allow state agencies to evade important due process protections.<sup>41</sup>

How, then, to balance the need for some emergency actions? The Restatement creates a hierarchy. Consistent with *Stanley v. Illinois*,<sup>42</sup> a court may order a family separation *after* an adjudication

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<sup>38</sup> RESTATEMENT § 2.42 cmt. f, illus. 7. Other sections including the balancing test cite back to this single illustration. *Id.* §§ 2.43 cmt. f, 2.44 cmt. g.

<sup>39</sup> *Id.* § 2.42 cmt. f, illus. 7.

<sup>40</sup> *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

<sup>41</sup> Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540, 543 (2004).

<sup>42</sup> 405 U.S. 645 (1972).

that the parent has neglected or abused the child.<sup>43</sup> A pre-adjudication removal is possible, but court oversight, ideally in a contested hearing, is required<sup>44</sup> because “[j]udicial oversight of removals helps protect a child and family from an unnecessary removal and makes it less likely that a child will be removed in a circumstance in which the removal may harm, rather than protect, the child.”<sup>45</sup> In limited circumstances, the state may seek ex parte removal orders when “taking the time for the court to set and hold a contested removal hearing . . . would subject the child to the imminent threat of severe harm,”<sup>46</sup> and emergency removals without court orders are only permitted when there is no time to seek an ex parte order.<sup>47</sup> This hierarchy, disfavoring removals without court oversight, follows the leading case of *Nicholson v. Scopetta*,<sup>48</sup> in which the New York Court of Appeals described analogous provisions as reflecting a “continuum of . . . urgency and . . . a hierarchy of required review.”<sup>49</sup>

Not every state, however, requires such court oversight for removals. Current Massachusetts law, for instance, permits the agency to remove children based only on reasonable cause without any requirement of being unable to seek a court order first.<sup>50</sup> This law has generated public criticism, and one pending bill would change it.<sup>51</sup> The Restatement view, if adopted, would improve the law in states like Massachusetts and ensure some basic interbranch checks and balances on the immense power of CPS agencies.

### C. Right to Counsel for Parents

The constitutional right to counsel expanded greatly under the Warren Court, which applied it to state criminal cases in *Gideon v. Wainwright*,<sup>52</sup> then, four years later, *In re Gault*<sup>53</sup> extended

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<sup>43</sup> See RESTATEMENT Draft No. 4 § 2.44.

<sup>44</sup> See *id.* § 2.43.

<sup>45</sup> *Id.* § 2.42 cmt. a.

<sup>46</sup> *Id.* § 2.42(a)(2).

<sup>47</sup> See *id.* § 2.41(a)(2).

<sup>48</sup> 820 N.E.2d 840 (N.Y. 2004).

<sup>49</sup> *Id.* at 849 (citations omitted).

<sup>50</sup> MASS. GEN. LAWS ch. 119, § 51B(c) (2012).

<sup>51</sup> See Laura Crimaldi, *State Legal Aid Agency Seeks More Oversight When DCF Removes Children from Homes Without Court Order*, BOS. GLOBE (Jan. 17, 2023), <https://perma.cc/72TR-H7VL>; see also H.R. 257, 192d Leg. (Mass. 2021–2022).

<sup>52</sup> 372 U.S. 335 (1963).

<sup>53</sup> 387 U.S. 1 (1967).

it to family court delinquency cases.<sup>54</sup> And then, as the Warren Court era ended and the Court's composition shifted rightward, progress on the right to counsel stalled. The Court denied parents facing state efforts to forever terminate their legal relationship with their children an absolute constitutional right to counsel in *Lassiter v. Department of Social Services*.<sup>55</sup> The harm caused by that crabbed reading of due process remains, with twelve states qualifying their right to counsel for parents in neglect and abuse cases or subjecting it to some amount of judicial discretion.<sup>56</sup> And the harm extends to other areas of law, where *Lassiter* supports the continued denial of a right to counsel in a range of cases imposing extreme consequences on individuals.<sup>57</sup>

But this constitutional ruling is not the end of the discussion, as *Lassiter* itself foretold, because “wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution.”<sup>58</sup> The Restatement rightly recognizes that parents have a right to counsel under state law at each stage of a neglect or abuse case, consistent with what a strong majority of state laws and practice now recognize.<sup>59</sup> The Restatement goes further and recognizes that parents have the right to effective assistance of counsel, following the majority of state courts to have addressed that question.<sup>60</sup> This black-letter law reflects an important lesson for this field: as important as Supreme Court decisions are, the Court does not always have the last word. Providing counsel for parents is not only the norm, but properly recognized as a legal right of parents as a means to protect both their and their children's fundamental constitutional right to family integrity—whatever errors *Lassiter* may have placed into existing law on the constitutional right to counsel.

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<sup>54</sup> *Id.* at 34–42.

<sup>55</sup> 452 U.S. 18 (1981).

<sup>56</sup> *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNSEL, <https://perma.cc/4DP7-UN44>.

<sup>57</sup> See, e.g., *Turner v. Rogers*, 564 U.S. 431, 435 (2011) (denying a categorical right to counsel for parents facing the threat of incarceration when states seek to enforce child support orders over objections that the parents lacked the finances to comply with such orders); see *id.* at 442–43, 445 (citing and discussing *Lassiter* in support of denying a categorical right to counsel).

<sup>58</sup> *Lassiter*, 452 U.S. at 33; see also *id.* at 33–34 (discussing how “[i]nformed opinion” supports a right to counsel including, at that point, thirty-three states plus the District of Columbia that provided a statutory right to counsel in termination cases).

<sup>59</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.10 (AM. L. INST., Council Draft No. 9, 2023) [hereinafter RESTATEMENT Council Draft No. 9].

<sup>60</sup> *Id.* § 2.10 cmt. i.

But the Restatement stops there, saying nothing about how or when the legal system actually provides counsel—essential topics where dramatic changes are occurring in real time. There are two key areas that any scholar or practitioner in this field should be aware of but that are not discussed in the Restatement. First, the field has developed a strong body of empirical evidence that both parents and the overall legal system are best served through interdisciplinary law offices. Compared to solo practitioners on a panel of attorneys appointed by family court judges to represent parents, interdisciplinary law offices achieved better results: more and faster reunifications; more and faster guardianships; and no harms to children’s safety.<sup>61</sup> The average impact is reducing children’s stay in foster care by 118 days, primarily providing a significant benefit to the children and families involved and, secondarily, saving the state funds.<sup>62</sup> This research has identified the factors that make interdisciplinary law offices so successful—a mix of traditional zealous lawyering in the form of more motion practice, a more assertive posture in court, closer relationships with clients, and interdisciplinary advocacy from social workers and others who helped parents obtain the services necessary for authorities to support reunification and advocating for parents with state caseworkers.<sup>63</sup> These findings echo earlier studies of parent representation.<sup>64</sup> Following this empirical research, the federal Children’s Bureau adopted what I believe is the most important national legal doctrinal development in this field in the twenty-first century—it opened federal funding to support state and local efforts to provide high quality representation

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<sup>61</sup> See Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 44, 52 (2019).

<sup>62</sup> *Id.* at 52–53.

<sup>63</sup> See generally Lucas A. Gerber, Martin Guggenheim, Yuk C. Pang, Timothy Ross, Yana Mayevskaya, Susan Jacobs & Peter J. Pecora, *Understanding the Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 116 CHILD. & YOUTH SERVS. REV., Sept. 2020.

<sup>64</sup> See Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. & YOUTH SERVS. REV. 1337, 1343 (2012); Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 152–53 (2012).

for parents,<sup>65</sup> citing this research to urge states to use that funding to provide high-quality representation models for parents.<sup>66</sup>

Second, the field is expanding efforts to provide lawyers to parents to help avoid family separations by providing legal services ahead of time, known as “pre-petition representation” or, more broadly, “preventive legal advocacy.”<sup>67</sup> Such legal services have garnered support from the federal Children’s Bureau,<sup>68</sup> influential foundations,<sup>69</sup> and academics,<sup>70</sup> including those calling for their expansion.<sup>71</sup>

Highlighting these omissions is not a criticism of the Restatement, but an acknowledgement of the limitations of its format. The field is not yet at the place where a parent can claim a legal right to representation by an interdisciplinary law office or before the state files a petition against them. Just as *Lassiter*, happily, was not the last word on parents’ right to counsel, the now-black-letter right to counsel is far from the last word on the importance of counsel, how that right is effectuated, and how it can improve the field.

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<sup>65</sup> *Child Welfare Policy Manual § 8.1B*, U.S. CHILD’S BUREAU (2019), <https://perma.cc/59CK-R4CG> (referring to Question 30).

<sup>66</sup> U.S. DEP’T OF HEALTH & HUM. SERVS., UTILIZING TITLE IV-E FUNDING TO SUPPORT HIGH QUALITY LEGAL REPRESENTATION FOR CHILDREN AND YOUTH WHO ARE IN FOSTER CARE, CANDIDATES FOR FOSTER CARE AND THEIR PARENTS AND TO PROMOTE CHILD AND FAMILY WELL-BEING 2–6 (2021).

<sup>67</sup> Pre-petition representation typically provides legal services to families already facing CPS agency involvement (and the agency often refers the family to the legal services organization). See CASEY FAM. PROGRAMS, HOW CAN PRE-PETITION LEGAL REPRESENTATION HELP STRENGTHEN FAMILIES AND KEEP THEM TOGETHER? 1–2 (2020). Parents can also seek their own counsel when faced with a CPS investigation, and family defense offices have developed early defense units. See, e.g., *Family Defense*, BROOKLYN DEF. SERVS., <https://perma.cc/5JFZ-VXK8>. Preventive legal advocacy is a broader term, encompassing provision of legal services before CPS agency involvement with a goal of preventing such involvement. CASEY FAM. PROGRAMS, HOW IS PREVENTIVE LEGAL ADVOCACY CRITICAL TO THE CONTINUUM OF LEGAL ADVOCACY? 1 (2021) [hereinafter CASEY FAM. PROGRAMS, PREVENTIVE LEGAL ADVOCACY].

<sup>68</sup> U.S. DEP’T OF HEALTH & HUM. SERVS., CIVIL LEGAL ADVOCACY TO PROMOTE CHILD AND FAMILY WELL-BEING, ADDRESS THE SOCIAL DETERMINANTS OF HEALTH, AND ENHANCE COMMUNITY RESILIENCE 1 (2021).

<sup>69</sup> CASEY FAM. PROGRAMS, PREVENTIVE LEGAL ADVOCACY, *supra* note 67, at 1.

<sup>70</sup> E.g., Vivek S. Sankaran, *Preventive Legal Advocacy*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND AGENCIES IN NEGLECT, ABUSE, AND DEPENDENCY CASES 801, 811–15 (Josh Gupta-Kagan et al. eds., 4th ed. 2022).

<sup>71</sup> See, e.g., Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools’ Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 600–04 (2021).

#### D. The Poverty Defense

States differ in the way their statutory definitions of neglect address poverty. Neglect generally includes a failure to provide a child with adequate food, clothing, or shelter.<sup>72</sup> About half of the states provide a “poverty defense,”<sup>73</sup> which defines neglect to exclude situations when such failure results from parental poverty.<sup>74</sup> The other half of the states do not include such a defense. Respecting poor parents’ and children’s rights to family integrity, the Restatement includes a poverty defense.<sup>75</sup> This is an important position, consistent with long-standing assertions that poverty and neglect are distinct concepts,<sup>76</sup> and which have consensus support across otherwise warring factions of the present-day landscape.<sup>77</sup>

Stating this position, however, does not answer the question of whether the present legal system does, in fact, confuse poverty with neglect, as leading voices in the field suggest.<sup>78</sup> Nor does it address *how* the legal system is supposed to distinguish poverty and neglect, especially when poverty and some disapproved-of parental behavior overlap, as decades of social science research makes clear occurs with some frequency. Given the strong correlations between poverty and race,<sup>79</sup> this position also does not address how possible confusion or overlap of neglect and poverty contribute to racial disparities in the system in government intervention in families.

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<sup>72</sup> See, e.g., N.Y. FAM. CT. ACT § 1012(f)(i)(A) (2021).

<sup>73</sup> See Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 510 (2013).

<sup>74</sup> See, e.g., FAM. CT. ACT § 1012(f)(i)(A) (providing that physical neglect only occurs when the parent fails to provide adequate food, clothing, or shelter “though financially able to do so or offered financial or other reasonable means to do so”).

<sup>75</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.24 cmt. m (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2].

<sup>76</sup> The 1909 White House Conference on Children famously declared that only “inefficiency or immorality” and not poverty should justify family separations. PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN 10 (1909); see also *id.* at 5 (sharing a message from President Theodore Roosevelt stating, “[s]urely poverty alone should not disrupt the home”).

<sup>77</sup> See Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. (forthcoming 2024) (manuscript at 8–12) (on file with author) (describing the normative agreement that poverty should not justify family separations and disagreement over whether and how often that happens and what it means for a separation to be because of poverty).

<sup>78</sup> Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, IMPRINT (Jan. 17, 2020), <https://perma.cc/97Q8-FSGA>.

<sup>79</sup> See, e.g., JOHN CREAMER, EMILY A. SHRIDER, KALEE BURNS & FRANCES CHEN, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2021, at 5 (2022).



As I have explored elsewhere,<sup>80</sup> these failures are not the fault of the Restatement but of the law. The law does not provide meaningful tools to distinguish poverty and neglect. And the Restatement reflects failings of the present law. It gives us the normative principle—we should not confuse poverty with neglect—without providing tools to apply it. The poverty defense that the Restatement rightly incorporates has not helped families much where it has been in effect, as Professor Michele Gilman demonstrated a decade ago, and which remains true today.<sup>81</sup>

The limitations on the Restatement's adoption of the poverty defense are evident in the illustrations it provides and the narrow circumstances in which they suggest the poverty defense would succeed. The Restatement's definition of "physical neglect" would require courts to "tak[e] into consideration the financial resources of the parent."<sup>82</sup> The only illustration it provides in which the poverty defense succeeds involves an unusually clear-cut case. If parents lose public benefits due to a computer glitch with the benefits office, are denied food at a local food bank, and cannot give their children enough food to eat "for a brief period," then the poverty defense would win.<sup>83</sup> That the Restatement feels it necessary to qualify the fact pattern reflects an ambivalence about it. If we take the poverty defense seriously, it should not matter if the children's deprivation is "for a brief period" or anything longer. Either way, the fault is not with the parent, and the state should find a way to address the children's needs without labeling the parents neglectful.

The Restatement's illustrations go further and show, consistent with Gilman's description, that if a parent "choose[s]" to spend their meager resources on alcohol, the poverty defense would not succeed.<sup>84</sup> That illustration does not suggest much improvement on frequent problems in the family regulation system. Its language choice suggests a moral choice by the parent—"choosing" to use addictive substances—rather than suffering from a health condition that requires treatment. And the illustration views that health condition as distinct from poverty, even

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<sup>80</sup> Gupta-Kagan, *supra* note 77, at 21.

<sup>81</sup> Gilman, *supra* note 73, at 523; Gupta-Kagan, *supra* note 77, at 22 (reviewing "poverty defense cases decided since Gilman's 2013 article").

<sup>82</sup> RESTATEMENT Draft No. 2 § 2.24(b)(1).

<sup>83</sup> *Id.* § 2.24 cmt. m, illus. 23.

<sup>84</sup> *Id.* § 2.24 cmt. m, illus. 21.

though poverty impacts parents' access to treatment and to mitigation strategies. Plenty of wealthy parents use or abuse substances, but can more easily access treatment and use their resources to arrange for mitigation strategies, like hired childcare, to reduce risk to their children from such substance use.

Similar points are available across a range of other fact patterns.<sup>85</sup> Consider a parent who is homeless and chooses to live with someone she knows has a criminal record because the parent judges that individual to be less of a threat to her children than living in a shelter. Or a parent who has a serious chronic health problem and, lacking alternative childcare options for her frequent hospital stays, relies on a family member who regularly tests positive for crack cocaine (despite never being under the influence while with her children). Or a parent who left her child home alone when, lacking childcare options and needing money to pay the rent, she decided the threat of eviction was greater than the threat of leaving a child home alone so went to work.<sup>86</sup> Or a parent whose landlord has not abated a vermin infestation, leading to unhygienic conditions. All of these cases involve facts that go beyond the mere lack of money. But they all involve problems that more money would solve. The poverty defense generally offers little recourse. Reasonable efforts requirements generally do not require the state to expand the availability of essential safety net services like childcare and housing.<sup>87</sup> And while the legal system fails to offer such assistance to parents to prevent family separations, it simultaneously pays strangers a monthly stipend—an amount well more than that available to parents through public benefits—that includes money to help pay for housing and childcare.<sup>88</sup>

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<sup>85</sup> Each of the following examples is based on a real case in which I have been involved or have studied. Citations are provided when public documents are available.

<sup>86</sup> For a discussion of such a case, see Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 223–31 (2022).

<sup>87</sup> See, e.g., *In re Shirley B.*, 18 A.3d 40, 55–56 (Md. 2011) (affirming the finding that the CPS agency made reasonable efforts despite its failure to provide certain services because the CPS agency was “at the mercy of [other] agencies”). See also generally LEONARD EDWARDS, RECURRING FACTUAL SITUATIONS IN THE TRIAL COURTS, in REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE (2014) (collecting sources holding similarly, and critiquing the practice).

<sup>88</sup> See 42 U.S.C. § 675(4)(A) (defining “foster care maintenance payments” paid to foster parents, 42 U.S.C. § 672(1), to include “payments to cover the cost of . . . food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals”).

## E. Placement Preferences

When a court determines that children cannot safely remain with their parents, where should the child live? On this question, the Restatement codifies laws that would represent a significant step forward over the law and practice in many states—yet still leaves many questions unanswered. The Restatement creates a clear hierarchy of placement options: When safe, the child should remain at home.<sup>89</sup> When that is not safe, the first option is custody with the other parent.<sup>90</sup> When that is not possible, the next option is custody with a kinship caregiver.<sup>91</sup> Only if the above options are ruled out may the court place the child in the custody of the state, which may then place the child with strangers.<sup>92</sup>

Here again, the Restatement codifies the stronger side of a doctrinal divide. Many states do have such placement preference hierarchies in their laws.<sup>93</sup> But many do not.<sup>94</sup> In its preference for placements with nonrespondent parents over others, the Restatement follows increasing recognition of the constitutional rights of such parents, pushing back on long-standing practices which declared that maltreatment by one parent sufficed for the state to take jurisdiction over children and place them with strangers without evaluation of other parents as an option. Courts have increasingly (and correctly) found that this practice violates the constitutional rights of parents.<sup>95</sup> In related fact patterns, a majority of states to have decided the question now hold that bureaucratic barriers to placement across state lines that were designed for foster placements cannot apply to parents.<sup>96</sup>

<sup>89</sup> RESTATEMENT Draft No. 4 § 2.30(a).

<sup>90</sup> RESTATEMENT Council Draft No. 9 § 2.45(a)(1).

<sup>91</sup> *Id.* § 2.45(a)(2)(A).

<sup>92</sup> *Id.* § 2.45(a)(2)(B). When a court orders a child placed in state custody, a similar hierarchy exists, in which the state should first place a child with kinship foster parents, then with stranger foster parents, and, only when no foster family placement is possible, in congregate care or some other institutional setting. *Id.*

<sup>93</sup> *See id.* § 2.45, reporters' notes, cmt. a (compiling sources).

<sup>94</sup> *See, e.g.*, D.C. CODE § 16-2320(a)(3)(A) (2018) (disposition statute which does not preference kinship placements); GA. CODE ANN. § 15-11-212(a)(2) (2017) (same); ME. STAT. tit. 22, § 4036(1)(F) (2021) (same); MO. REV. STAT. § 211.181.1 (2021) (same); MONT. CODE ANN. § 41-3-438(3) (2023) (same); OHIO REV. CODE ANN. § 2151.353(A) (2023) (same); 42 PA. CONS. STAT. § 6351(a) (2022) (same).

<sup>95</sup> *E.g.*, *In re Sanders*, 852 N.W.2d 524, 537 (Mich. 2014); *In re D.S.*, 88 A.3d 678, 689 (D.C. 2014); *In re A.A.*, 951 N.W.2d 144, 170 (Nev. 2020). Some state statutes provide similar rules. *See, e.g.*, FLA. STAT § 39.521(3)(b) (2016); CAL. WELF. & INST. CODE § 361.2(a) (2022).

<sup>96</sup> *E.g.*, *In re R.S.*, 235 A.D. 3d 914, 932–33 (Md. 2020); *In re D.L.*, 201 N.E. 3d 771, 776–77 (N.Y. 2022); *A.G. v. Cabinet for Health & Fam. Servs.*, 621 S.W.3d 424, 431–32 (Ky. 2021); *In re J.B.*, 310 Or. App. 729, 740 (Or. Ct. App. 2021); *In re C.R.-A.A.*, 521 S.W.3d

In its preference for kinship placements over placements in state custody with strangers, the Restatement follows what it fairly discerns as the common practice around the country which increasingly favors kinship placement and has led to steadily increasing rates of children in foster care placed with kin.<sup>97</sup> The federal government is now taking a step to further that trend, promulgating regulations that would permit states to develop more flexible foster home licensing rules for kin than for strangers.<sup>98</sup> This trend follows a normative judgment that kinship placements are less invasive of family integrity. As the Restatement makes clear, placing children with kin limits the scope of state intervention by limiting the likelihood of extended state supervision and eventual termination of the parent-child relationship.<sup>99</sup> And this trend finds support in a strong empirical evidence that kinship placements provide more stable placements and better outcomes than placements with strangers.<sup>100</sup>

Yet the increasing acceptance, in practice, of a kinship placement preference has obscured the reality that federal law does not actually contain a clear preference for kinship placements—it only requires that states “consider” such a preference<sup>101</sup>—and many states do not have such a preference.<sup>102</sup> That legal structure

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893, 907 (Tex. App. 2017), *In re Emoni W.*, 48 A.3d 1, 6–11 (Conn. 2012); *In re Dependency of D.F.-M.*, 236 P.3d 961, 966–67 (Wash. Ct. App. 2010); *In re Alexis O.*, 959 A.2d 176, 185 (N.H. 2008). *But see, e.g., In re T.K.M.*, 2019 WL 6724547, at \*2 (Ohio Ct. App. 2019); *Green v. Div. of Fam. Servs.*, 864 A.2d 921, 927 (Del. 2004). The trend includes overturning or narrowing past decisions applying the Interstate Compact on the Placement of Children to parents. *See, e.g., In re D.L.*, 201 N.E. at 771 (overturning *In re Tumari W.*, 65 A.D.3d 1375 (N.Y. App. Div. 2009)); *Donald W. v. Dep’t of Child Safety*, 444 P.3d 258, 269 (Ariz. 2019) (limiting *Arizona Department of Economic Security v. Leonardo*, 22 P.3d 513 (Ariz. 2001), to its facts).

<sup>97</sup> The federal government reports that 35% of all foster children on September 30, 2020, lived in a “foster family home” with a relative. U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2021 ESTIMATES AS OF JUNE 28, 2022 – NO. 29, at 1 (2021). That compares, for instance, with 24% on September 30, 2005. U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006, at 1 (2006).

<sup>98</sup> *See generally* Separate Licensing Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 9411 (Feb. 14, 2023). *See also* *New Proposed Rule Changing the Foster Care Licensing Regulation Supports Keeping Families Safely Together through Kinship Care*, ADMIN. FOR CHILD. & FAMS., <https://perma.cc/3VVV-GLQP> (describing the proposal).

<sup>99</sup> RESTATEMENT Council Draft No. 9 § 2.45 cmt. d.

<sup>100</sup> For recent summaries of this research, see Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD LEGAL RTS. J. 101, 104–08 (2019).

<sup>101</sup> 42 U.S.C. § 671(a)(19).

<sup>102</sup> *See, e.g.,* GA. CODE ANN. § 15-11-212(a) (2017) (exhibiting no preference for kinship placements).

shifts discretion in many states to agencies and family courts to determine whether to place children with kin.<sup>103</sup> Unsurprisingly, this discretion leads to kinship placement rates that vary widely by jurisdiction.<sup>104</sup>

The Restatement's endorsement of a clear placement hierarchy is a welcome choice, and a step toward reducing that wide variation and recognizing a legal preference for placement with parents and kin over strangers and state custody. But the Restatement only goes so far. It does not provide a standard for what the state must prove to move down the hierarchy of options. The court may place a child in state custody (and the state may place a child with strangers) "if the court finds that the child cannot be placed in the custody of another family member or an adult with whom the child has a significant relationship"—without providing a black-letter standard for when a court may so find.<sup>105</sup> There is a similar hierarchy of placements within state custody, with kinship placements preferred over placements with strangers.<sup>106</sup> But there is no substantive standard provided for moving down the hierarchy; the Restatement permits a placement with strangers when "placement with a relative . . . is not possible."<sup>107</sup> Nor does it say what authorities must do to facilitate or maintain a kinship placement.<sup>108</sup>

So there is a hierarchy, but a weak one, in which states can too easily give up on the possibility of a kinship placement. This reality was powerfully illustrated in the case of Ma'Khia Bryant, a Black foster child in Ohio shot to death by police during an incident outside her nonkinship foster home.<sup>109</sup> After the CPS agency removed Ma'Khia from her mother, it placed her with her grandmother, where she stayed for the next sixteen months. When her grandmother's landlord discovered Ma'Khia was there,

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<sup>103</sup> See, e.g., ME. STAT. tit. 22, § 4036(1) (2021) (granting courts wide discretion to determine the disposition of a child).

<sup>104</sup> Gupta-Kagan, *Kinship Care*, *supra* note 9, at 24.

<sup>105</sup> RESTATEMENT Council Draft No. 9 § 2.45.

<sup>106</sup> *Id.* § 2.45(a)(2)(B).

<sup>107</sup> *Id.* § 2.45 cmt. g.

<sup>108</sup> *Id.* § 2.45.

<sup>109</sup> The facts in this paragraph are taken from the *New York Times's* exhaustive account of her case. See Nicholas Bogel-Burroughs, Ellen Barry & Will Wright, *Ma'Khia Bryant's Journey Through Foster Care Ended with an Officer's Bullet*, N.Y. TIMES (May 8, 2021), <https://perma.cc/ZQT4-JTLG>. For a critique of the handling of kinship care in this case and an argument to "exhaust all other options" before placing a child with strangers, see Vivek Sankaran, *Ma'Khia Bryant's Story Reveals Flaws in Foster Care System*, IMPRINT (May 31, 2021), <https://perma.cc/HEG5-NP5P>.

he evicted the family. Rather than help the grandmother defend against the eviction, help her obtain alternative family housing, or even permit the grandmother to take the family to a hotel temporarily while she sought alternative housing on her own—all steps one can envision a strong kinship placement preference requiring—the agency took Ma’Khia away from her grandmother and placed her with strangers. A series of short-term placements followed, ultimately leading to the turbulent final placement and Ma’Khia’s death at the hands of police. The case did not need a deadly end to illustrate the point that the law and legal system failed to keep Ma’Khia with her grandmother and instead left her with a succession of strangers.

Other poverty-related issues can interfere with kinship placements. Perhaps most importantly, states will typically perform criminal and child-maltreatment background checks on prospective kinship foster parents and other adults who live in the home. Given the well-established disparities in both the criminal justice and family regulation systems, hits on these background checks correlate strongly with poverty and race and can prevent many kinship placements, without an analysis of any correlation between such backgrounds and children’s safety.<sup>110</sup>

The Restatement does not solve this problem. It gives an example where the specific background is relevant—“recent criminal convictions [for] multiple counts of domestic violence and child abuse.”<sup>111</sup> Those facts fairly describe a case when the state has demonstrated a good reason to not place a child with kin. But that hardly represents the most common situation. What about a kinship caregiver who has a drug possession conviction from four years ago? Or a simple assault conviction from six years ago? Or when the kinship caregiver’s partner who lives in the home has a conviction from three years ago? The Restatement is silent. These

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<sup>110</sup> See Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 8–9 (2021). For several examples of registry placements denying parents employment without protecting children, see Scott Pham, *The Blacklist: “It’s Like a Leech on Me”*, *Child Abuse Registries Punish Unsuspecting Parents of Color*, BUZZFEED NEWS (Apr. 27, 2022), <https://perma.cc/B52Z-C5B3>. Criticisms of due process protections in registry schemes are also strong. See generally, e.g., Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 WASH. & LEE L. REV. 857 (2020).

<sup>111</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.36 cmt. c, illus. 3 (AM. L. INST., Preliminary Draft No. 7, 2020).

are the situations where a more meaningful kinship placement preference would make a difference.

The Restatement's placement preference hierarchy has another weakness: it overly emphasizes a preexisting relationship between kinship caregiver and child.<sup>112</sup> A familial relationship can trigger a deep commitment to a child who a family member has never met or does not know well. And statements from children who grew up in foster care and were denied the opportunity to live with kinship caregivers, even those with whom they did not have a strong preexisting relationship, speak to the power of these bonds.<sup>113</sup> Coupled with the absence of clear substantive standards for moving down the hierarchy, these provisions will leave many children living with strangers in state custody who could be living with family members.

The Washington Supreme Court's recent decision in *In re K.W.*<sup>114</sup> provides an example of what a stronger kinship placement preference ought to mean.<sup>115</sup> Like the Restatement, the court recognized a preference for placing children with kinship caregivers. But the Washington court went further, making clear that agency predictions of a family member's likelihood of passing an agency home study, or past involvement with the agency, does not suffice on its own to overcome a kinship placement preference.<sup>116</sup> That essential holding flips the current legal structure in many cases. Currently, kinship caregivers seeking foster care licenses must frequently convince agencies why they deserve a waiver from licensing standards. The meaningful kinship preference required by *In re K.W.*<sup>117</sup> instead requires an agency or any party opposing a kinship placement to prove why any perceived problem with kinship caregivers renders living with strangers better for a child than living with kin. The agency would have to establish what threat a criminal conviction for a misdemeanor, or a relatively minor neglect substantiation, poses to the specific child at issue.

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<sup>112</sup> See, e.g., *id.* § 2.35 cmt. c, illus. 7 (suggesting that a child who has never met their aunt should not be placed with them due to the absence of a "preexisting relationship").

<sup>113</sup> See, e.g., Sixto Cancel, *I Will Never Forget That I Could Have Lived with People Who Loved Me*, N.Y. TIMES (Sept. 16, 2021), <https://perma.cc/E4SG-UZUA>.

<sup>114</sup> 504 P.3d 207 (Wash. 2022).

<sup>115</sup> The Washington legislature did recently codify a similar rule, requiring kinship placements unless a risk to the "health, safety, or welfare of the child" exists. WASH. REV. CODE § 13.34.130(3) (2019).

<sup>116</sup> *In re K.W.*, 504 P.3d at 221–22.

<sup>117</sup> *Id.* at 222 ("Courts *must* afford meaningful preference to placement with relatives." (emphasis in original)).

The Washington Supreme Court continued by admonishing agencies and family courts to be wary of discretionary decisions based on such factors because they will have disproportionate impact on low-income families and families of color,<sup>118</sup> and family courts must review agency denials of kinship placements to ensure they are not based on factors which could serve as “proxies for race.”<sup>119</sup> Indeed, establishing a stronger kinship preference and a clearer standard for when agencies may place children with strangers can serve to limit the potential for racial or class bias to infect decisions.

## F. Visitation

When the state separates parents and children, visitation arrangements between parents and children are widely recognized as essential steps to maintaining the parent-child relationship and moving toward reunification.<sup>120</sup> The Restatement codifies a requirement on the state to “facilitate consistent and frequent visitation between the child and parent.”<sup>121</sup> The unfortunate reality is that visitation is often infrequent—as infrequent as every two weeks<sup>122</sup>—and that visitation norms vary significantly by jurisdiction.<sup>123</sup>

The Restatement includes useful commentary on the essential nature of visits. They are “critical.”<sup>124</sup> That is especially true for young children, whose developmental status requires more frequent visits than every two weeks, and for whom visits “at least every two or three days” is a “best practice[.]”<sup>125</sup> Moreover, the state is obligated to facilitate visits, even when older children resist it: the state “must . . . address psychological barriers to visitation” by providing counseling to older teens who may resist visits.<sup>126</sup>

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<sup>118</sup> *Id.* at 220–21.

<sup>119</sup> *Id.* at 222.

<sup>120</sup> See, e.g., Sacha M. Coupet, *Disposition and Reunification*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND AGENCIES IN NEGLECT, ABUSE, AND DEPENDENCY CASES 293, 300 (Josh Gupta-Kagan eds., 4th ed. 2022) (describing parent-child visitation as “critical to effective reunification” and “essential to the maintenance of parent-child attachment”).

<sup>121</sup> RESTATEMENT Draft No. 5 §§ 2.70(a), 2.71(a)(1).

<sup>122</sup> Some states even present this wide interval as all that is required. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(d)(1)(i) (2016).

<sup>123</sup> Compare *id.* (preferring at least biweekly visitation), with TEX. FAM. CODE § 263.107 (2013) (establishing no requirement or preference for visitation frequency).

<sup>124</sup> RESTATEMENT Draft No. 4 § 2.50 cmt. m.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*



But I am not optimistic that the Restatement would lead to much improvement in practice, because its terms leave so much discretion with judges and agencies. It recognizes the right to “consistent and frequent visitation,” but, crucially, it does not define those terms in the black-letter text or comments.<sup>127</sup> The illustrations are of little assistance. One concludes that the state fails to meet its obligation to make reasonable efforts to reunify when it “allows only infrequent visitation,”<sup>128</sup> a description which merely repeats the black-letter term “frequent” without defining or illustrating it. Even the otherwise strong language about young children is presented as a “best practice” rather than a right.<sup>129</sup> And that language applies only to children described as “very young,” a category the Restatement does not attempt to define. But its illustrations suggest the category “very young” is not a wide category—for example, the illustrations involve a newborn child, for whom the category is undeniable.<sup>130</sup> And the suggestion is that, for every child who does not fall in that narrow category, visits every other week suffice.

Other omissions are telling. The Restatement does not speak to when the state is justified in supervising visits, or how to determine the least restrictive environment for visits. Given the common practice of courts ordering supervised visits even when state statutes suggest unsupervised visits as a default,<sup>131</sup> the absence of such rules reveals the limited effect of this portion of the Restatement.

### G. Limiting Reliance on Terminations

Few topics have been as contested as heatedly and as long as the question of when the state should permanently sever the legal relationship between parents and children, commonly known as the termination of parental rights. In an effort to help more children leave foster care to new permanent families, the 1997 Adoption and Safe Families Act<sup>132</sup> (ASFA) required (with several notable exceptions) state agencies to pursue terminations when children

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<sup>127</sup> *Id.* § 2.50(a)(3); RESTATEMENT Draft No. 5 §§ 2.71(a)(1), 2.71 cmt. b.

<sup>128</sup> RESTATEMENT Draft No. 4 § 2.50 cmt. m, illus. 30.

<sup>129</sup> *Id.* § 2.50, cmt. m.

<sup>130</sup> *Id.* § 2.50 cmt. m, illus. 31.

<sup>131</sup> For example, New York law provides that visits, at least pre-adjudication, should be unsupervised unless the court finds that “supervised visitation is in the best interest of the child.” N.Y. FAM. CT. ACT § 1030(c) (2021).

<sup>132</sup> Pub. L. No. 105–89, 111 Stat. 2115 (1997).

had been in foster care for fifteen months.<sup>133</sup> Such frequent use of terminations has been criticized for decades as using a far more invasive tool than necessary<sup>134</sup> and for creating legal orphans by terminating parent-child relationships when adoption by new parents is not likely to follow.<sup>135</sup>

Although ASFA's fifteen-month rule remains in effect, much evidence has pushed against it.<sup>136</sup> When authorities will not reunify parents and children, states increasingly offer permanency options that do not require the termination of the parent-child relationship, especially guardianship, which Congress began funding in 2008.<sup>137</sup> Empirical evidence has shown that guardianship is as lasting as adoption in practice, limiting concerns that it is an inferior option.<sup>138</sup> And in January 2021, the federal Children's Bureau issued guidance which seemed to push for guardianship over adoption, asserting, "We should offer [children in foster care] the opportunity to expand family relationships, not sever or replace them."<sup>139</sup> The Bureau emphasized the need to "protect[ ] and preserve[ ]" children's relationships with parents "whenever safely possible"<sup>140</sup> and to counsel foster parents about the harms that can come from terminating parent-child relationships unnecessarily.<sup>141</sup>

Despite strong evidence, those views are not universal. Federal funding law explicitly creates a hierarchy, requiring states to rule out adoption before a family can become eligible for a guardianship subsidy,<sup>142</sup> thus continuing to present terminations (a prerequisite to adoption) as the default. In many jurisdictions those

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<sup>133</sup> 42 U.S.C. § 675(5)(E).

<sup>134</sup> See, e.g., Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425 (1983) (arguing that terminations should only occur when the parent would otherwise cause a "specific, significant harm and [ ] any alternative short of termination will not avert that harm").

<sup>135</sup> Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 132–34 (1995).

<sup>136</sup> For a recent summary of this evidence and a discussion of its implications, see Sankaran & Church, *supra* note 8, at 253–57.

<sup>137</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 101(3) (codified at 42 U.S.C. § 673(d)).

<sup>138</sup> Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS. J. JUV. L. & POL'Y 1, 17–19 (2015) (collecting and discussing studies) (cited in RESTATEMENT Draft No. 5 § 2.80 reporters' note, cmt. m).

<sup>139</sup> U.S. DEPT OF HEALTH & HUM. SERVS., *ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH* 10 (2021).

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 19.

<sup>142</sup> 42 U.S.C. § 673(d)(3)(A)(ii).

pushing for alternatives like guardianship are “swimming upstream against the great adoption tide.”<sup>143</sup> In one recent high-profile decision, the Michigan Supreme Court upheld a termination over the dissent of then–Chief Justice Bridget McCormack that, among other objections, urged greater consideration of guardianship over termination.<sup>144</sup>

The Restatement takes the side of termination skeptics, imposing requirements on family courts before they terminate parent-child relationships: they must consider “the existence of appropriate permanency alternatives to termination”<sup>145</sup> and, to prevent the creation of legal orphans, must consider the likelihood a child will be adopted.<sup>146</sup> The Restatement’s comments recognize the “potential harm to the child if the relationship with the parent is severed.”<sup>147</sup>

But the Restatement only goes so far, and provides little guidance about how courts should evaluate those factors. Having to consider the existence of options like guardianship does not require judges to favor guardianship, nor does it limit terminations and adoptions to narrower circumstances when those are the only options to protect the child from harm. The Restatement’s commentary suggests guardianship is “especially” appropriate “in cases involving an older child who has a relationship with the parent and does not wish to be adopted”<sup>148</sup>—a framing which can be read to let adoption remain the default for all other children.

#### H. Delineating Reasonable Efforts (Somewhat)

The law obligates state agencies to make reasonable efforts to prevent family separations and, when they happen, to reunify families.<sup>149</sup> This obligation is supposed to ensure that family separations only occur then and only extend as long as necessary to protect children. In practice, the reasonable efforts requirement is frequently derided as having little impact, with family court

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<sup>143</sup> See generally Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence,”* 34 CAP. U. L. REV. 405 (2005) (cited in RESTATEMENT Draft No. 5 § 2.80 reporters’ note, cmt. m).

<sup>144</sup> *In re G.M. Dixon*, 981 N.W.2d 62, 67 (Mich. 2022) (McCormack, C.J., dissenting).

<sup>145</sup> RESTATEMENT Draft No. 5 § 2.80(b)(3).

<sup>146</sup> *Id.* § 2.80(b)(4).

<sup>147</sup> *Id.* § 2.80 cmt. l., illus. 14 (providing an example of harm to a child from the unnecessary termination of a relationship with their parent).

<sup>148</sup> *Id.* § 2.80 cmt. m.

<sup>149</sup> 42 U.S.C. § 671(a)(15).

judges rubber-stamping agency requests for judicial findings.<sup>150</sup> The requirement has its roots in federal funding law, which requires states to make reasonable efforts as a condition of receiving federal funding in a given case.<sup>151</sup> But both Congress and the federal Children's Bureau have declined to define the phrase, leaving it to states to do so. State courts have widely deferred to agencies, whose funding from the federal government depends on courts making findings that the agencies made reasonable efforts—something state courts generally do, even when they have doubts over agencies' efforts.<sup>152</sup>

The Restatement pushes definitions of reasonable efforts forward, drawing on existing state statutory and case law to require agencies to arrange services “tailored to the needs of the family” and that are “available and accessible, and consistent and timely.”<sup>153</sup> “If there is a significant benefit to the parent and child and a significant increase in the opportunity for family preservation,” then the reasonable efforts law requires the state to provide the service at issue.<sup>154</sup> It appropriately describes exceptions to the reasonable efforts requirement as “narrow” ones<sup>155</sup> for specifically identified cases involving particularly severe abuse.<sup>156</sup>

The Restatement also suggests a greater level of specificity regarding agencies' obligations when working with parents who have disabilities—who are overrepresented among families facing state intervention.<sup>157</sup> A comment in the Restatement makes clear

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<sup>150</sup> See, e.g., Jerry Milner & David Kelly, *Reasonable Efforts as Prevention*, AM. BAR. ASS'N (Nov. 5, 2018), <https://perma.cc/H4M6-8LPH> (“[E]vidence remains scarce . . . that [the] reasonable efforts determination is treated with the rigor or seriousness required under the law.”).

<sup>151</sup> 42 U.S.C. § 671(a)(15).

<sup>152</sup> MUSKIE SCH. OF PUB. SERV., CUTLER INST. CHILD & FAM. POL'Y, AM. BAR ASSOC., CTR. ON CHILD. & THE L., MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 105 (2005) (finding that 90% of Michigan judges “rarely” or “never” found that the agency failed to make reasonable efforts and that 40.5% “admitted to having at some time made affirmative findings when DHS had failed to make reasonable efforts”); Leonard Edwards, *Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention*, IMPRINT (Dec. 5, 2018), <https://perma.cc/CE4S-46CB>.

<sup>153</sup> RESTATEMENT Draft No. 4 § 2.30(a)(2); see also *id.* § 2.50(a)(2) (stating that, for reasonable efforts to reunify, they must include “services . . . that are tailored to the needs of the family, available and accessible, and consistent and timely”).

<sup>154</sup> *Id.* § 2.30 cmt. m.

<sup>155</sup> *Id.* §§ 2.30(c), 2.50(c).

<sup>156</sup> See *id.* § 2.30, cmt. c.

<sup>157</sup> Sarah Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1326–29 (2022).

that states must “tailor” services to families’ “individual circumstances,” including disabilities.<sup>158</sup> And the comments assert that the Americans with Disabilities Act<sup>159</sup> (ADA) applies, citing a few states which explicitly apply it.<sup>160</sup> This is an improvement from the widespread practice of courts effectively declining to apply the ADA in any meaningful way.<sup>161</sup>

A deeper challenge remains. Child neglect and abuse law is strongly criticized for its “pathology logics.”<sup>162</sup> The legal system is built for a parent who is at fault for some risk or harm to the child, and the system must fix that parent or permanently separate the child from that parent. This framing excludes consideration of structural barriers to children’s safety, like family poverty.

The Restatement’s description of reasonable efforts illustrates pathology logics. It gives a set of examples for what services the state should provide to rehabilitate a parent—substance abuse treatment<sup>163</sup> or parenting classes.<sup>164</sup> Antipoverty measures like the provision of housing or childcare are not nearly so clear. In one illustration, the Restatement suggests that the state must do more than refer a parent to a housing website when it insists she obtain stable housing, but it does not describe what housing assistance, if any, the state must actually provide.<sup>165</sup> In another, an unsafe physical environment only triggers a state obligation to encourage parents to “seek housing assistance,” not provide the parents with it.<sup>166</sup> In perhaps the most concerning illustration, the Restatement describes parents who physically neglect their children “by living in a home that does not meet the basic health and safety needs of the children [and] leaving the children unsupervised for extended periods of time.”<sup>167</sup> Strikingly, the Restatement does not even discuss providing housing assistance as a reasonable effort. And while it does suggest a duty on the state to provide childcare assistance, the Restatement hedges by suggesting that parents bear the burden of rearranging their work schedule if

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<sup>158</sup> RESTATEMENT Draft No. 4 § 2.50 cmt. j, illus. 18.

<sup>159</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990).

<sup>160</sup> RESTATEMENT Draft No. 4 § 2.50 cmt. k.

<sup>161</sup> Lorr, *supra* note 157, at 1342.

<sup>162</sup> See generally S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523 (2023).

<sup>163</sup> RESTATEMENT Draft No. 4 § 2.30 cmt. d, illus. 2.

<sup>164</sup> *Id.* § 2.30 cmt. d, illus. 3.

<sup>165</sup> *Id.* § 2.50 cmt. i, illus. 15.

<sup>166</sup> *Id.* § 2.30 cmt. f, illus. 8.

<sup>167</sup> *Id.* § 2.30 cmt. m, illus. 26.

necessary to adjust to the state's limited assistance.<sup>168</sup> The Restatement does not address the reality that many parents lack sufficient control over their work schedule to make such a change. And most striking of all, this illustration suggests that the state's curmudgeonly approach to assisting this family does not equate to "unreasonable efforts" when state budget cuts limits available childcare assistance.<sup>169</sup> The result makes little moral or fiscal sense—the state can refuse to spend money to help parents address safety risks to their children and justify its failure to support the family with budget cuts, then remove the child and place the child with strangers, which then trigger state expenditures to help those strangers provide the child with housing and childcare.<sup>170</sup>

### CONCLUSION

Child neglect and abuse law should change in deeper ways than the Restatement can provide. The Restatement nonetheless takes several essential steps toward a transformed legal system. First, its reaffirmation of the centrality of parental rights and family integrity are a helpful reminder when those rights are most directly at stake: when the state seeks to break up a family. Second, the Restatement takes modest steps in the direction of more strongly respecting parents' and children's rights to family integrity.

The Restatement, however, leaves much room for practitioners to apply these principles and for advocates to identify how to do so in a way that changes law and practice. The Restatement cannot and will not bring the change that many of us believe this legal system requires. Nor will it eliminate the state-by-state practice variations that describe this field. But it does help crystallize areas that require change. And my hope is that change comes and, many years from now, the Restatement (Second) of Children and the Law will codify it.

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<sup>168</sup> RESTATEMENT Draft No. 4 § 2.30 cmt. m, illus. 26.

<sup>169</sup> *Id.*

<sup>170</sup> Federal funding law requires states to provide foster parents with "foster care maintenance payments," which it defines as "payments to cover the cost of . . . food, clothing, *shelter*, *daily supervision*, school supplies, a child's personal incidentals . . ." 42 U.S.C. § 675(4)(A) (emphasis added).

APPENDIX: VARIETY IN SUBSTANTIATION, REMOVAL, AND TERMINATION OF PARENT-CHILD RELATIONSHIP RATES BY STATE

When agencies investigate an allegation of neglect or abuse, they must determine whether to substantiate the case—that is, administratively decide if the allegation is true and if it amounts to neglect or abuse. Much variation exists by state regarding how frequently agencies substantiate, regardless of how one measures. The percentage of investigations leading to substantiation ranges from 5% to 45% of all investigations (Figure 1), and the rate of substantiated cases per one thousand children in the population varies from under two to over eighteen (Figure 2).

FIGURE 1: PERCENTAGE OF INVESTIGATED CASES LEADING TO SUBSTANTIATIONS

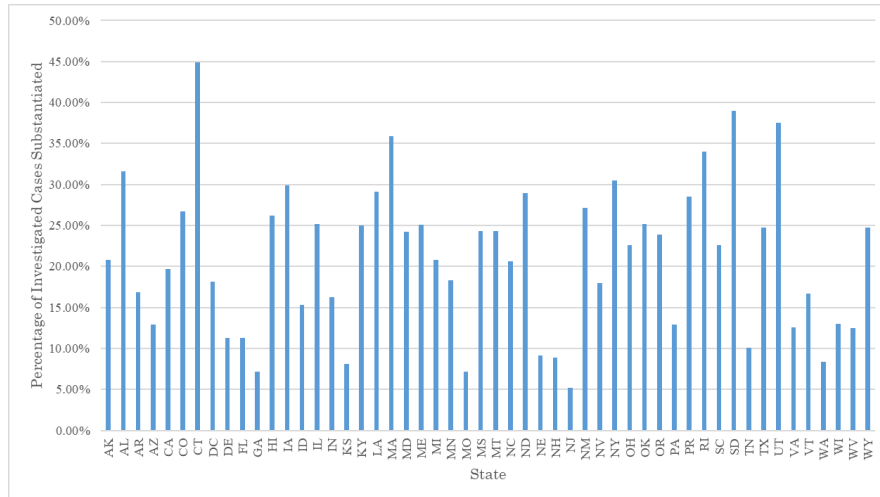
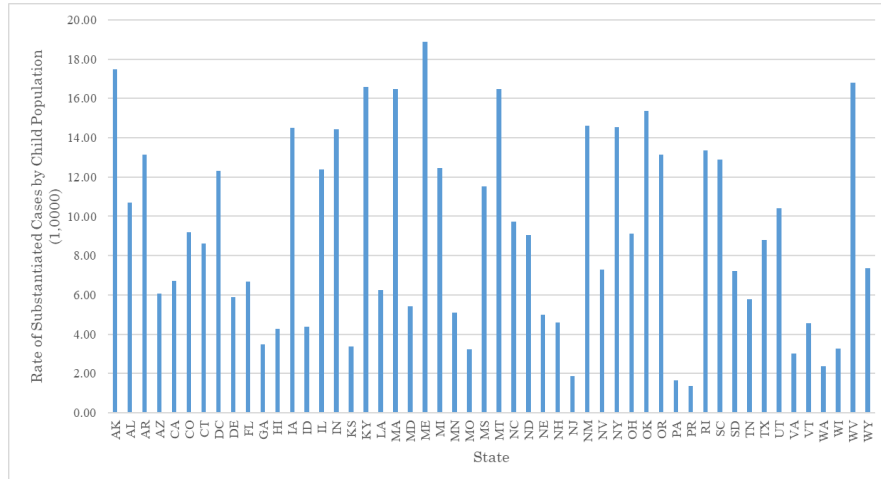


FIGURE 2: RATE OF SUBSTANTIATED CASES PER ONE THOUSAND CHILDREN

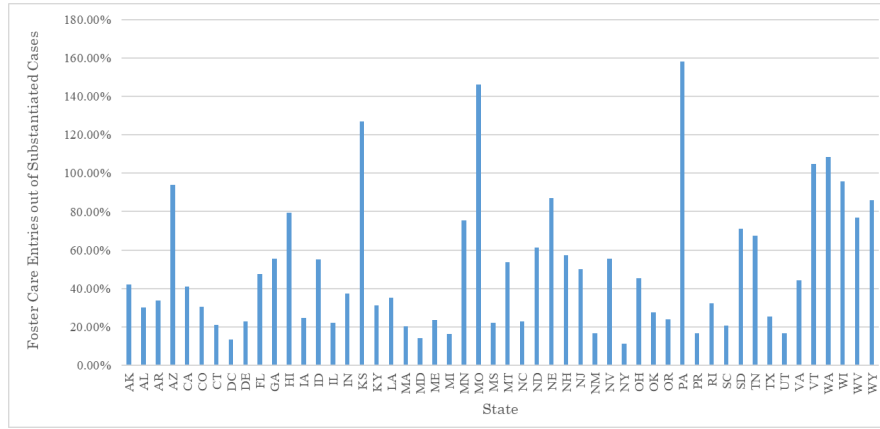


Not all substantiated cases lead to family separations. Most do not, and rates of foster care entries vary significantly by state. Measured in reference to substantiations, states range from removing 11% of children who were the subjects of substantiated cases to nearly 160%<sup>171</sup> of that number (Figure 3). Measured in reference to child population, states range from removing less than one out of every one thousand children to removing about thirteen (Figure 4).

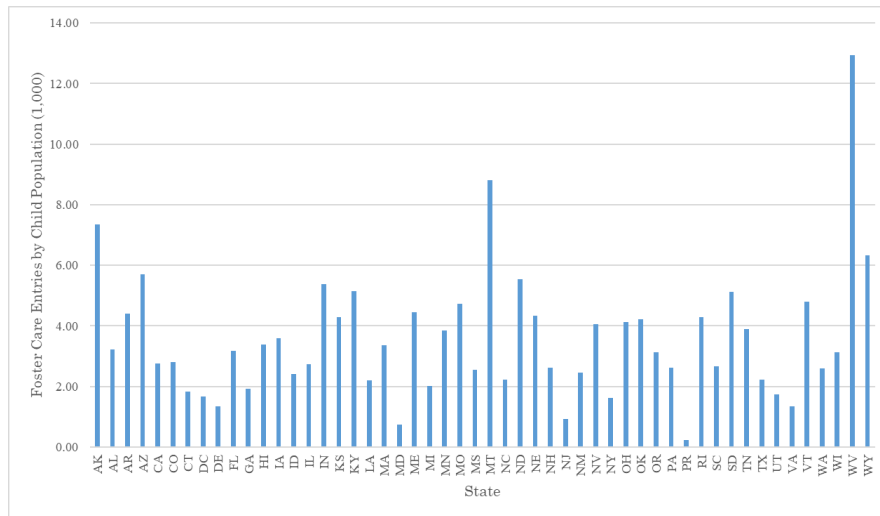
<sup>171</sup> States can remove more than 100% of substantiated children if they first remove children and then return them home after determining to not substantiate an allegation, or by removing other children in the home of a child who is the subject of a substantiated report, if the state codes such a report about only one child in the home.



**FIGURE 3: FOSTER CARE ENTRIES AS A PERCENTAGE OF SUBSTANTIATED CASES**

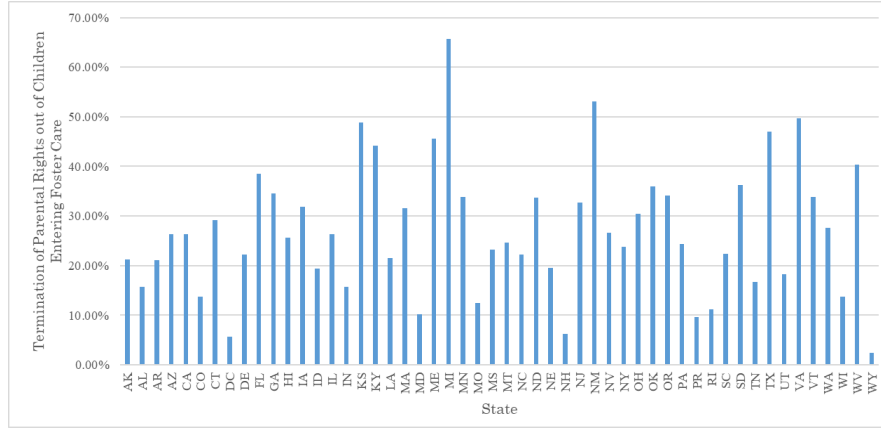


**FIGURE 4: FOSTER CARE ENTRIES PER ONE THOUSAND CHILDREN**

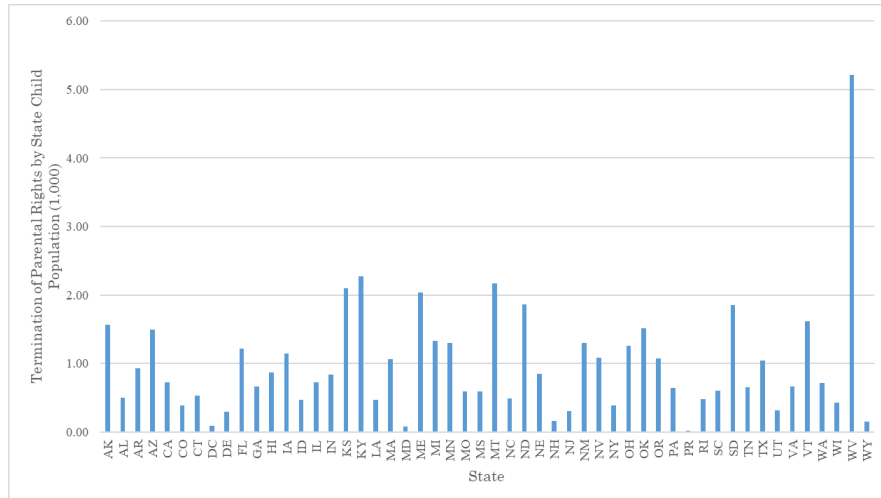


Differences by jurisdiction extend to rates of terminations of parent-child relationships (commonly known as terminations of parental rights). The number of terminations each year as a percentage of foster care entries that year ranges from 2% to 65% (Figure 5), and the number of terminations per one thousand children in the population ranges from nearly zero to 5.2 (Figure 6).

**FIGURE 5: TERMINATIONS AS A PERCENTAGE OF FOSTER CARE ENTRIES**



**FIGURE 6: TERMINATIONS PER ONE THOUSAND CHILDREN**



These tables were created using federally reported data for 2020, published in the annual Child Maltreatment and Adoption and Foster Care Analysis and Reporting System reports.<sup>172</sup>

<sup>172</sup> U.S. DEPT OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2020 (2022); U.S. DEPT OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2020 ESTIMATES AS OF OCTOBER 4, 2021 – No. 28 (2021).