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# Restating Childhood

*Susan Frelich Appleton*<sup>†</sup>

## INTRODUCTION

As the American Law Institute (ALI) contemplates undertaking work on children and law, several challenges loom large, especially challenges of conceptualization, framing, and scope. I use this brief essay as an opportunity to express my enthusiasm for an ALI project on children, despite the minefields along the way. My principal objective is to show why children merit their own “Restatement of” and their own fresh analytical approach, in place of reliance on familiar frames and tempting analogies.

Part I outlines a series of problems characterizing the present legal treatment of children, including the contradictions and unarticulated assumptions that this treatment reflects. Part II examines the role that the ALI might play in addressing these problems, based on the types of work the ALI undertakes, the process the ALI uses, and the underlying objectives of any ALI project: clarifying, modernizing, and improving the law.<sup>1</sup> In considering possible responses to the challenges of restating childhood, I canvass two familiar legal approaches to children

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<sup>†</sup> Lemma Barkeloo & Phoebe Couzins Professor and Vice Dean, Washington University School of Law. In the interest of full disclosure, I note that I write as a member of the American Law Institute (ALI) who has played an active role, serving as Secretary 2004–2013 and on the Council since 1994, and who recently has been advocating for more attention to family law generally and this project on children more specifically. I express my thanks to the band of persistent ALI members who participated in preliminary conversations over the last two years about possible work on children (Nina Dethloff, Herma Hill Kay, Solangel Maldonado, Melissa Murray, Angela Onwuachi-Willig, Reginald Leamon Robinson, and Anne Tamar-Mattis); to Anne Dailey and Laura Rosenbury for their thoughtful efforts to launch the project; to Lance Liebman and Stephanie Middleton for their patience, encouragement, and guidance; to Anita Bernstein for organizing and Brooklyn Law School for hosting the *Restatement of . . .* symposium, which generated this essay; to Annette Appell, Anne Dailey, Herma Hill Kay, Courtney Joslin, Laura Rosenbury, and participants in the Children’s Issues Discussion Group at the 2013 SEALS Annual Conference, all of whom provided valuable comments on earlier drafts; to the Israel Treiman Faculty Fellowship (2012–2013) and Dean Kent Syverud for support; and to Amanda Wolter for outstanding research assistance.

<sup>1</sup> See *ALI Overview*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Feb. 22, 2014).

(the “dependency model”<sup>2</sup> and children’s rights) as well as four analogies available from other areas (laws once applicable to married women, modern antidiscrimination rules protecting persons with disabilities, a hypothetical ALI project on LGBT issues, and the critique of “the law of the horse”). Showing that none of these templates will permit a systematic approach to childhood under the law, I propose that the ALI seek to develop a new vision, guided by clearly expressed normative commitments, acknowledgement of the competing policies at work, and consistent organizing principles. As summarized in my brief conclusion, restating childhood poses conceptual difficulties but promises enormous rewards.

## I. THE LEGAL CHALLENGE OF CHILDHOOD

The ordinary word “child” denotes an extraordinary legal category, which in turn makes childhood an exceptional legal status. Yet, the contours, content, and consequences of this category all reflect disarray. This section identifies at least three different origins of such disorder that invite the sort of clarification, modernization, and improvement of the law that the ALI claims as its mission.<sup>3</sup>

First, a welter of different laws, from different sources, governs children and childhood, as the following examples reveal. Common law provides doctrines such as a minor’s ability to disavow a contractual obligation<sup>4</sup> and the mature minor rule, which allows certain minors to consent to medical treatment (thus immunizing a health care provider from battery claims).<sup>5</sup> In many jurisdictions, state statutes govern emancipation,<sup>6</sup> parentage,<sup>7</sup> school attendance,<sup>8</sup> child custody,<sup>9</sup> and child support.<sup>10</sup> Congress too has weighed in on matters concerning children—sometimes directly, as in enacting the

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<sup>2</sup> For the source of this term, see Memorandum from Anne Dailey & Laura Rosenbury on Proposed ALI Project on Children and Law to the ALI Program Committee (Oct. 14, 2013) (on file with author); *see also infra* note 122 and accompanying text.

<sup>3</sup> *See ALI Overview, supra* note 1.

<sup>4</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

<sup>5</sup> *E.g.,* *Cardwell v. Bechtol*, 724 S.W.2d 739, 755 (Tenn. 1987).

<sup>6</sup> *E.g.,* KAN. STAT. ANN. §§ 38-108 to 38-109 (2012); VA. CODE ANN. § 16.1-331 (2013).

<sup>7</sup> *E.g.,* CAL. FAM. CODE §§ 7600 *et seq.* (West 2013).

<sup>8</sup> *E.g.,* WIS. STAT. ANN. § 118.15 (West 2013).

<sup>9</sup> *E.g.,* MO. REV. STAT. § 452.375 (2011).

<sup>10</sup> *E.g.,* KY. REV. STAT. ANN. § 403.211 (West 2013).

Family and Medical Leave Act,<sup>11</sup> and often indirectly, by establishing standards that states must follow to receive federal funds for programs focused on child support enforcement,<sup>12</sup> adoption,<sup>13</sup> and child abuse and neglect,<sup>14</sup> for example.

The Constitution also pertains to children, according them certain rights accorded to others, such as equal protection<sup>15</sup> and some freedom of expression,<sup>16</sup> while recognizing that children differ from their adult counterparts; these differences, in turn, justify abortion restrictions for minors that would not be permissible for adults<sup>17</sup> and disallow capital punishment<sup>18</sup> and life sentences<sup>19</sup> for young offenders. International conventions, such as the Hague Convention on the Civil Aspects of International Child Abduction<sup>20</sup> and the United Nations Convention on the Rights of the Child,<sup>21</sup> provide yet additional sources of relevant legal principles, whether or not officially entered into force in this country.<sup>22</sup>

These multiple sources and the various domains addressed bring to bear diverging assumptions, normative commitments, and objectives. For example, some authorities assume that minors lack mature decisionmaking capacity; some treat minors as if they have such capacity; and still others require an individualized assessment of maturity for each minor. Other values and policies no doubt are at work as well, probably accounting for some differences in the bottom-line treatment of children in, say, the administration of criminal justice, on one hand, and child custody, on the other. Yet, even beyond predictable divergences in the conclusions reached or balances struck across the range of legal contexts, the underlying premises about children that yield these responses lack consistency.<sup>23</sup>

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<sup>11</sup> 29 U.S.C. § 2612(a)(1)(A)–(C) (2011).

<sup>12</sup> *E.g.*, 42 U.S.C. § 666 (2011).

<sup>13</sup> *E.g., id.* §§ 670–71, 673–74.

<sup>14</sup> *E.g., id.* § 5106c.

<sup>15</sup> *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>16</sup> *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

<sup>17</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>18</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>19</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

<sup>20</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 49; 42 U.S.C. §§ 11601–11611 (2011).

<sup>21</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>22</sup> See *infra* note 123 and accompanying text.

<sup>23</sup> See, e.g., SAMUEL M. DAVIS, CHILDREN'S RIGHTS UNDER THE LAW (2011); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1145 (2012).

This lack of consistency exposes a second problem: Childhood presents a legal puzzle. Indeed, the clashing premises all make sense to some degree, frustrating any simplistic reconciliation. Complicating the puzzle, moreover, law does not simply govern here; it shapes our understanding of childhood, children, capacities, and needs.<sup>24</sup> This puzzle and its complications produce a deep theoretical uncertainty.

To illustrate: law identifies children as rights-holders,<sup>25</sup> but places the exercise of their rights almost exclusively in parents' hands.<sup>26</sup> Children's assumed dependency provides one primary rationale for this principle,<sup>27</sup> but equally consequential is the constitutional right of parents to control their children's upbringing on matters of education,<sup>28</sup> visitation,<sup>29</sup> and many aspects of health care.<sup>30</sup> In addition, although parents have affirmative duties toward children, law pursues direct enforcement against parents only of those duties concerning schooling and financial support.<sup>31</sup> (For other unfulfilled parental obligations, the state steps in and follows through, as when it removes children from their homes in neglect cases and places them in foster care or terminates parental rights.<sup>32</sup>) As the contexts of schooling and financial support demonstrate, sometimes state interests trump parental autonomy, leaving children subordinate to multiple vertical authorities—all in the name of their vaguely defined

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<sup>24</sup> See Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J. L. & GENDER 715, 736-40 (2013). Indeed, Annette Appell sees the child-adult divide as essential to liberalism. *Id.* at 749; see also Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 825 (2009) (noting how available child care and schooling options, not children's needs, define the meaning of "early childhood education").

<sup>25</sup> *E.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009); *Schall v. Martin*, 467 U.S. 253 (1984); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2099-2100 (2011).

<sup>26</sup> See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833-34 (2007); Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

<sup>27</sup> See, *e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("[J]uveniles, unlike adults, are always in some form of custody.").

<sup>28</sup> *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>29</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>30</sup> *Parham v. J.R.*, 442 U.S. 584 (1979).

<sup>31</sup> See, *e.g.*, *Elisa B. v. Superior Ct.*, 117 P.3d 660 (Cal. 2005) (recognizing biological mother's former partner as children's second mother with child support duties); *State v. Oakley*, 629 N.W.2d 200 (Wis.) (upholding as a condition of defendant's probation a requirement that he father no more children unless he can support them), *reconsideration denied & opinion clarified*, 635 N.W.2d 760 (Wis. 2001).

<sup>32</sup> See, *e.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982).

best interests.<sup>33</sup> In turn, children's present lives and preferences receive diminished respect in presumed service not only to parental prerogatives but also to the children's future role as full adult citizens.<sup>34</sup>

What is missing is a coherent vision that takes into account across a range of topics the important tensions that surface in the different sources of law and underlie the puzzle—such as dependency and maturity, agency and relationships (both within and outside families), rights and responsibilities (not only of children but also of adults and institutions affecting children's lives), and children's experiences and interests (present as well as future). And, of course, despite the transsubstantive objectives, values and policies specific to given areas of law must enter the analysis when relevant.

A third problem stems from a growing body of scientific and social scientific information that has enhanced and complicated our understanding of childhood, with legal authorities beginning to take note. For example, new learning from neuroscience and behavioral psychology has made adolescent brain development an important element in three recent Eighth Amendment cases in which the Supreme Court held unconstitutional the imposition on juvenile offenders of adult penalties, specifically capital punishment and life sentences without parole.<sup>35</sup> In each case, the Court invoked such learning to emphasize “the reduced culpability of juveniles because of their developmental immaturity, pointing to adolescents' diminished decision-making capacity, their vulnerability to external pressures (including peer pressure), and their unformed characters.”<sup>36</sup> Even though assumptions about developmental immaturity undergird

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<sup>33</sup> This standard, invoked routinely in child custody disputes, also surfaces in other contexts, including emancipation, adoption, and placement after adjudications of abuse and neglect. For the classic critique of this standard, see Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); see also Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 LAW & CONTEMP. PROBS. (forthcoming 2014).

<sup>34</sup> See Dailey & Rosenbury, *supra* note 2, at 18-20; Memorandum for ALI Invitational Conference, Laura Rosenbury & Anne C. Dailey, Children and Law: Overview of Possible Topics for an ALI Project (Aug. 27, 2012) (on file with author); see also Appell, *supra* note 24, at 722-24.

<sup>35</sup> *Supra* notes 18-19 and accompanying text. See, e.g., Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS IN PSYCH. SCIENCE 158 (2013).

<sup>36</sup> Bonnie & Scott, *supra* note 35, at 160.

many legal distinctions between children and adults,<sup>37</sup> the implications of neuroscientific and developmental research for issues other than criminal punishment have not been fully explored.<sup>38</sup> This is a task that could be undertaken as part of a broader effort to bring coherence to the legal conceptualization of childhood and the legal treatment of children.

## II. ENTER THE AMERICAN LAW INSTITUTE

The law pertinent to the legal category of child certainly needs clarification, modernization, and improvement. And surely these are the routinely stated objectives of ALI work.<sup>39</sup> Yet, determining whether an ALI project would provide an appropriate apparatus, whether the ALI process would make a significant contribution to realization of the goal, and even whether the challenges of coherent reconceptualization can be met all require closer consideration.

### A. *ALI Projects and Products*

#### 1. The Work of ALI at 90

Now starting its tenth decade, the ALI has ventured beyond its foundational and familiar work in areas such as torts<sup>40</sup> both to carve out and tackle new fields, such as American Indian law, election law, and government ethics.<sup>41</sup> These fledgling projects present special difficulties for achieving the ALI's traditional objectives. For example, while the successive torts projects<sup>42</sup> have had as their core the distillation of state common law developments, *American Indian Law* must clear a path

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<sup>37</sup> See, e.g., Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. & POL'Y 275, 285 (2006); Todres, *supra* note 23.

<sup>38</sup> E.g., Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip Flop"*, 64 AM. PSYCHOLOGIST 583, 592 (2009). *But see generally* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009) (noting the limitations of using scientific findings, including those from neuroscience, to resolve legal issues).

<sup>39</sup> See *supra* note 3 and accompanying text.

<sup>40</sup> See, e.g., RESTATEMENT (FIRST) OF TORTS (1934); RESTATEMENT (SECOND) OF TORTS (1979).

<sup>41</sup> See *ALI Overview*, *supra* note 1.

<sup>42</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010 & 2012); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998); *supra* note 40 and accompanying text.

through a more uneven terrain that includes the United States Constitution, Indian treaties, federal statutes and case law, tribal authorities, and sometimes state law.<sup>43</sup> In the meantime, *Election Law* sets out to develop a model calendar and procedures for resolving disputed presidential elections,<sup>44</sup> while *Government Ethics* will likely take the form of a set of best practices.<sup>45</sup>

Although these projects might seem to stretch beyond the ALI's established approach, the Institute over the years has often confronted the discord between "clarifying" existing law, on one hand, and "modernizing" and "improving" it, on the other. As Wisconsin Chief Justice Shirley Abrahamson, asked: "Is [ALI] a 'restater' of the law as it is, or an agent of law reform?"<sup>46</sup> She invokes ALI lore about a bird that flies forward as well as backward to make the point that the ALI is both.<sup>47</sup> And, indeed, some of the ALI's guiding principles—long emblazoned on the walls at the Institute's conference center under the heading "On Restatements and Legal Change"—have come from a pair of statements by former Director Herbert Wechsler that demonstrate how the enterprise entails much more than a recitation of some majority view:

[W]e should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.<sup>48</sup>

In judging what was "right", a preponderating balance of authority would normally be given weight, as it no doubt would

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<sup>43</sup> See Memorandum from Matthew Fletcher to Discussion Participants at the American Law Institute on American Indian Law (Mar. 29, 2012) (on file with author); see also RESTATEMENT OF THE LAW THIRD: THE LAW OF AMERICAN INDIANS, (Discussion Draft Apr. 11, 2013), available at [http://extranet.ali.org/docs/LAI\\_DD\\_online.pdf](http://extranet.ali.org/docs/LAI_DD_online.pdf).

<sup>44</sup> See Principles of Election Law: Resolution of Election Disputes, Report to ALI, Apr. 16, 2012, available at [http://www.ali.org/00021333/Election\\_Law\\_report%20-%20online.pdf](http://www.ali.org/00021333/Election_Law_report%20-%20online.pdf).

<sup>45</sup> See *Current Projects*, A.L.I., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=22](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=22); Principles of Government Ethics, Reporters' Memorandum No. 3, Nov. 23, 2011, available at <http://extranet.ali.org/docs/2011%20-%20November%20-%20PGE%20RM%203%20-%20online.pdf>.

<sup>46</sup> Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute, the Fairchild Lecture*, 1995 WIS. L. REV. 1, 7.

<sup>47</sup> See *id.*

<sup>48</sup> Herbert Wechsler, *Report of the Director*, 1967 A.L.I. ANN. REP., 1, 5 (1967) (as quoted on the wall of the Wolkin Conference Center, American Law Institute, Philadelphia, PA). In the original report, the full sentence reads: "I pointed out that the official statements in our records always have affirmed some scope for such a judgment and suggested as a working formula that we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."

generally weigh with courts, but it has not been thought to be conclusive.<sup>49</sup>

Modern day Restatements reflect an appreciation of the complexity and uncertainty of law,<sup>50</sup> even though, as formally described, they provide “clear formulations of common law and its statutory elements or variations,’ reflecting ‘the law as it presently stands or as it might plausibly be stated by a court.’”<sup>51</sup> Further, notwithstanding the ample space that contemporary Restatements allow for creative approaches, normative positions, and nuance, the development of alternative formats increases ALI’s flexibility to take on varied topics. For example, work designated as “Principles,” including the *Principles of the Law of Family Dissolution*<sup>52</sup> and new projects on election law and government ethics, is explicitly aspirational because it “assume[s] the stance of expressing the law as it should be, which may or may not reflect the law as it is.”<sup>53</sup> “Legislative Recommendations,” which usually take the form of a model statute, such as the now classic *Model Penal Code*,<sup>54</sup> provide still additional opportunities to improve upon existing law.<sup>55</sup> Although I imagine a Restatement project devoted to children, I would not foreclose use of one of the other forms.

As this summary suggests, the ALI’s diverse portfolio should easily accommodate work that focuses on children, including their legal status and rights, their decisionmaking, their relationships with others, and the obligations and duties owed to them. True, a project on children must consider many different sources, but so must *American Indian Law*, for example. To the extent that work on children must try to find or develop coherence amid disarray and must consider new learning from other disciplines, two earlier ALI projects stand

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<sup>49</sup> Herbert Weshler, *Report of the Director*, 1966 A.L.I. ANN. REP. 1,6 (1966) (as quoted on the wall of the Wolkin Conference Center, American Law Institute, Philadelphia, PA).

<sup>50</sup> G. Edward White, Speech at Luncheon Honoring New Life (25-year) and New 50-year Members, ALI Annual Meeting (May 21, 2013) (transcript forthcoming), available at <http://2013am.ali.org/2013-am-booklet.pdf>.

<sup>51</sup> G. Edward White, *From the Second Restatements to the Present: The ALI’s Recent History and Current Challenges*, 16 GREEN BAG 2D 305, 312 (2013) (quoting AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE (2005 handbook)).

<sup>52</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter PRINCIPLES OF FAMILY DISSOLUTION].

<sup>53</sup> See White, *supra* note 51, at 312.

<sup>54</sup> MODEL PENAL CODE (Official Draft 1985); see *infra* notes 68-71 and accompanying text.

<sup>55</sup> See White, *supra* note 51, at 312.

out as especially illuminating guideposts, although neither is labeled a “Restatement.”

## 2. Two Guideposts

### a. The Principles of the Law of Family Dissolution

For obvious reasons, a project on children would look to the *Principles of the Law of Family Dissolution*,<sup>56</sup> which devoted some attention to children, specifically their residence,<sup>57</sup> relationships,<sup>58</sup> and economic support<sup>59</sup> in the specific context of parental divorce or the end of a domestic partnership. Even apart from such topical convergences, however, the *Principles of the Law of Family Dissolution*, published in 2002, provide a useful prototype because they brought a conceptual coherence to an undertheorized and unruly tangle of family laws. Three particular features of the *Principles* should prove instructive in an effort to develop a more systematic approach to laws governing children and childhood.

First, a distinct premise animates the *Principles* and makes clear the project’s objectives: enhancing predictability on matters historically committed to indeterminate standards and judicial discretion. By making likely outcomes in court more predictable, the *Principles* seek to promote party agreement and settlement.<sup>60</sup> To accomplish this end, the *Principles* propound default rules for which courts must articulate reasons for departures and from which parties must affirmatively choose to opt out.<sup>61</sup> A clear premise designed to advance specific objectives would likewise serve as a valuable unifying tool for a project centered on the legal category of child.

Second, the *Principles* set out certain normative commitments, including some that were emerging but not yet fully approved by other legal authorities. Thus, the *Principles* reject not only discrimination based on race and sex<sup>62</sup> but also discrimination based on sexual orientation.<sup>63</sup> Here, the ALI was

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<sup>56</sup> PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52.

<sup>57</sup> See *id.* at 91-408 (Chapter 2 on “The Allocation of Custodial and Decisionmaking Responsibility for Children”).

<sup>58</sup> See *id.* § 2.02 (making continuity of existing parent-child attachments an objective to facilitate in serving the child’s best interests); *id.* § 2.03(c) (recognizing “de facto parents” based on co-residence with child and performance of caretaking functions).

<sup>59</sup> See *id.* at 409-644 (Chapter 3 on “Child Support”).

<sup>60</sup> See *id.* § 1.01 cmt. a.

<sup>61</sup> See *id.* §§ 1.01-1.02.

<sup>62</sup> See *id.* § 2.12(1)(a)–(b).

<sup>63</sup> See *id.* § 2.12(1)(d).

ahead of its time, assimilating same-sex couples to their cross-sex counterparts<sup>64</sup> as long as the relationship meets specific criteria<sup>65</sup> and doing so before any U.S. jurisdiction permitted same-sex marriage.<sup>66</sup> The law governing children is riddled with often unexamined normative assumptions, so a readiness to stake out expressly one or more values that shape the project would promote clarification and coherence.

Third, the *Principles* embrace an openness—albeit limited—to departures from traditional constructs, for example, defining “family” in functional (not just formal) terms through such moves as recognition of de facto parents and parents by estoppel.<sup>67</sup> Given the dilemma of dependency and the tendency to subordinate children’s interests to parental rights, openness to new understandings is essential for modernizing and improving the law.

#### b. The Model Penal Code

The *Model Penal Code* (MPC), officially adopted by the Institute in 1962,<sup>68</sup> remains one of the ALI’s signature projects. The Code proved enormously influential in law reform throughout the United States, and it continues to occupy a central place in criminal law casebooks and hornbooks.<sup>69</sup> This project’s success tends to obscure earlier growing pains, revealed in Herbert Wechsler’s 1952 article, *The Challenge of a Model Penal Code*, which urged the ALI to move forward on the

<sup>64</sup> See, e.g., *id.* § 4.03(6).

<sup>65</sup> See, e.g., *id.* § 6.03.

<sup>66</sup> Massachusetts, the first U.S. state to legalize marriage for same-sex couples, did so after judicial decisions in 2003 and 2004. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

<sup>67</sup> See, e.g., PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, § 2.03(b)–(c).

<sup>68</sup> MODEL PENAL CODE, *supra* note 54.

<sup>69</sup> Even those who have expressed disapproval of specific elements concede the stature and influence of the project:

Four decades after its completion, the American Law Institute’s *Model Penal Code* remains a singular landmark of doctrinal rigor and conceptual clarity in its statement of the major elements of the substantive criminal law. Herbert Wechsler’s mastery of the elements of offenses and the proper contours of defenses remains a mainstay in the criminal law classroom and a standard against which less-accomplished real-world statutes can be measured. The Code has had major influence in several states, but for the most part it remains more a model than a standard form of codification of the substantive criminal law.

Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1397 (2005).

MPC proposal that had languished for 20 years as “unfinished business” on the Institute’s agenda.<sup>70</sup> Wechsler would later serve as Reporter for the MPC and then become the Institute’s third Director.<sup>71</sup>

Wechsler’s article catalogues several pressing reasons why the ALI should proceed with the proposal, including “the lack of comprehensive treatment of penal law,”<sup>72</sup> “substantive defects,”<sup>73</sup> “domination by administration,”<sup>74</sup> and “psychological and scientific criticism.”<sup>75</sup> Although the ALI has been considering work on children only recently, thanks to a grassroots effort by some Institute members,<sup>76</sup> the reasons cited by Wechsler for moving forward on his project apply to this field as well. As already noted, comprehensive examination is missing; law’s treatment of children is riddled with contradictions and unsubstantiated assumptions; and the haphazard influence of scientific developments has invited criticism. In addition, some legal matters concerning children, most notably child custody<sup>77</sup> and abuse and neglect proceedings,<sup>78</sup> manifest considerable administrative overlay.

In identifying as an important issue the extent to which rehabilitation ought to be a major objective of criminal law, Wechsler cited the rehabilitation-centered “theory of the juvenile court and youth offender laws.”<sup>79</sup> Of course, today rehabilitation has fallen so out of favor that even many young offenders are now tried as adults and receive adult sentences.<sup>80</sup> Indeed, the contemporary willingness to depart from this theory has sparked the recognition by the Supreme Court of constitutional limits on criminal punishment for youth.<sup>81</sup> Thus, the erosion of Wechsler’s

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<sup>70</sup> Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1097 (1952).

<sup>71</sup> See *ALI Overview*, *supra* note 1; Officers & Council, A.L.I., <https://www.ali.org/index.cfm?fuseaction=about.officers> (last visited Feb. 22, 2014).

<sup>72</sup> Wechsler, *supra* note 70, at 1098.

<sup>73</sup> *Id.* at 1100.

<sup>74</sup> *Id.* at 1101.

<sup>75</sup> *Id.* at 1102.

<sup>76</sup> Several new members of the Institute asked for consideration of this idea at the Annual Meeting of 2011 in San Francisco, CA. Conversations have continued periodically, and the ALI hosted an invitational conference to discuss the idea in September, 2012. See Rosenbury & Dailey, *supra* note 34. Subsequently, at the request of the Program Committee, a proposal was prepared and submitted. See Dailey & Rosenbury, *supra* note 2.

<sup>77</sup> See, e.g., PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, § 2.02(1)(f); Mnookin, *supra* note 33.

<sup>78</sup> *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>79</sup> Wechsler, *supra* note 70, at 1104.

<sup>80</sup> See, e.g., *Bonnie & Scott*, *supra* note 35, at 159-60.

<sup>81</sup> See *supra* notes 18-19 and accompanying text.

own premises for work on model criminal legislation now helps to make the case for a project on children and youth.

In any event, the ALI took up Wechsler's challenge, grappling with the difficulties he named as well as those that have surfaced more recently—whether in the Institute's recent stand against capital punishment,<sup>82</sup> in an ongoing project on sentencing that attempts to respond to the collapse of the rehabilitative ideal,<sup>83</sup> or in work designed to revisit the MPC's chapter on sexual assault.<sup>84</sup> That the MPC became the catalyst for wide-ranging criminal law reform and remains a vital force demonstrates the important contribution that the ALI can make when it brings its process to bear on an area of law in need of comprehensive, multidisciplinary, and normative examination. The legal category of "child" stands out as an area in need of precisely this type of analysis.

### B. *ALI Process*

ALI's inclusive and rigorous process brings together legal academics, practicing attorneys, and judges. Although legal scholars shoulder the initial drafting responsibilities, typically conceptualizing and organizing the project, others contribute as advisers and participants in members consultative groups.<sup>85</sup> Advisers may include non-lawyers with valuable expertise from other disciplines for a given project. For example, two scholars without law degrees who had conducted relevant empirical research participated as advisers for the *Principles of the Law of Family Dissolution*,<sup>86</sup> while the advisers for the sentencing project include the Deputy Director for the Office of Policy and Offender Reentry of the Ohio Department of Rehabilitation and Correction, who has a PhD but not a JD.<sup>87</sup>

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<sup>82</sup> See *Current Projects*, A.L.I., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=2](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=2) (reporting action of the Council, Oct. 23, 2009) (last visited Oct. 1, 2013).

<sup>83</sup> See, e.g., MODEL PENAL CODE: SENTENCING (Discussion Draft No. 5, Apr. 18, 2013), available at [http://extranet.ali.org/docs/MPC%20Sentencing%20DD%20No%205\\_Online\\_2.pdf](http://extranet.ali.org/docs/MPC%20Sentencing%20DD%20No%205_Online_2.pdf).

<sup>84</sup> See, e.g., MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Discussion Draft, Apr. 22, 2013), available at [http://extranet.ali.org/13drafts/MPC%20Sexual%20Assault%20\\_DD\\_online.pdf](http://extranet.ali.org/13drafts/MPC%20Sexual%20Assault%20_DD_online.pdf).

<sup>85</sup> See *ALI Overview*, *supra* note 1; *How ALI Works*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=about.instituteworks> (last visited Oct. 1, 2013).

<sup>86</sup> See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, at vii-viii (listing Jessica Pearson and Lenore Weitzman).

<sup>87</sup> See MODEL PENAL CODE: SENTENCING v-vi (Discussion Draft No. 5, Apr. 18, 2013), available at [http://extranet.ali.org/docs/MPC%20Sentencing%20DD%20No%205\\_](http://extranet.ali.org/docs/MPC%20Sentencing%20DD%20No%205_)

Even after such groups of experts weigh in, the Council and Institute's general membership have the opportunity to offer suggestions and ultimately to vote work up or down.<sup>88</sup> Only with an affirmative vote of both the Council and the general membership can a draft become an official ALI product.<sup>89</sup>

This uniquely multilayered process should prove especially valuable for work on children and law. Judges who confront children in court will likely have a different perspective from those of scholars who theorize about children, lawyers who represent children, or lawyers who work with their parents. The sprawling expanse of laws touching children requires consulting a variety of experts because those who focus on, for example, child custody cases will bring something to the enterprise that those with experience in juvenile justice cases cannot contribute and vice versa. The relevance of learning from the sciences and social sciences might well call for the inclusion of experts from these disciplines. If the law governing children is to be clarified, modernized, and improved, then it is difficult to imagine a methodology more promising than that offered by the ALI.

### C. *The Search for Coherent Reconceptualization*

No matter how fitting the forum and how illuminating the process, ALI work on children is worth pursuing only if the aimed-for coherence can be achieved. To “ask the child question”<sup>90</sup> expansively and to develop an answer that responds to the diffuse and inconsistent regulation of children constitute daunting assignments. For good reason, the Supreme Court has explicitly disclaimed the opportunity to consider “the totality of the relationship of the minor and the State.”<sup>91</sup> Going forward on this topic requires a vision of what the law should say about children, with due attention to scope and organization.

As I imagine it, an ALI project *might* identify those aspects of existing law that reflect the desired normative choices. These aspects in turn could reveal the scaffolding for new approaches in areas where the current regime seems normatively misguided or otherwise out of joint. On the other

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Online\_2.pdf (listing Edward E. Rhine, PhD, Deputy Director for the Office of Policy and Offender Reentry of the Ohio Department of Rehabilitation and Correction).

<sup>88</sup> See *ALI Overview*, *supra* note 1; *How ALI Works*, *supra* note 85.

<sup>89</sup> See *How ALI Works*, *supra* note 85.

<sup>90</sup> See Woodhouse, *supra* note 24, at 821 (internal quotations omitted).

<sup>91</sup> *Ginsburg v. New York*, 390 U.S. 629, 636 (1968).

hand, inconsistencies might remain, but with an explanation for the differences provided. For example, the scaffolding might rest on foundational considerations of maturity or capacity;<sup>92</sup> if and when such considerations are not determinative, however, then the countervailing policies would be made explicit. I have described just one possibility, however, and the prospect of a project on children is exciting precisely because of the need to work out a basic theory to undergird the analysis and to serve as a touchstone in the resolution of doctrinal tensions.

In terms of scope, any laws specifically aimed at children, their presumed interests and needs, and their special legal status would seem well-suited for inclusion. Beyond these, however, countless laws on countless subjects pertain, or potentially pertain, to children—whether through direct application to all persons or through an explicit or implicit exemption for children, for example, the infancy defense in the law of contracts. Selectivity is essential because too comprehensive an initiative might take too long, become unwieldy, or even defeat the objective of coherent reconceptualization. Yet, an overly narrow project on children could stunt the ability to tease out unifying themes and the best way to rationalize or harmonize inconsistencies.<sup>93</sup> Between an initiative that is too large and one that is too small, what choices will make the scope “just right”?

Decisions about vision and scope will drive the development of an organizational scheme—how to present and order the issues to be addressed.<sup>94</sup> Returning to the *Principles of the Law of Family Dissolution* as a guide, one can view existing law favoring parties’ resolution of their own disputes (embodied in the cases and statutes on prenuptial<sup>95</sup> and

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<sup>92</sup> See, e.g., Cunningham, *supra* note 37; Todres, *supra* note 23; see also Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 507 (1973) (advocating “abolition of the general status of minority and adoption of an area-by-area approach (as has already been done . . . in the motor vehicle statutes)”).

<sup>93</sup> For example, an ALI project on child sexual abuse and the issues it raises, including statutes of limitations, evidentiary problems, and institutional liability, as proposed by one contribution to this symposium, might have much to offer. See Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397 (2014). Nonetheless, the scope of a project on this topic, although relevant to children, would neither permit a systematic review of the legal category of child nor provide an opportunity to grapple with cross-cutting themes and inconsistencies.

<sup>94</sup> One possible way to organize the analysis would break it into three parts: relationships, responsibilities, and rights; then, within each of these parts, the examination would proceed to consider topics pertinent first to parents, then the state, and finally children. See generally Dailey & Rosenbury, *supra* note 2 (outlining organizational structure for a table of contents).

<sup>95</sup> E.g., *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

separation agreements<sup>96</sup>) as the scaffolding that supports a more thoroughgoing system centered on private ordering,<sup>97</sup> with mechanisms for rebutting presumptions,<sup>98</sup> opting out,<sup>99</sup> or accessing other escape valves when needed.<sup>100</sup> The *Principles*' scope encompasses issues that arise out of family dissolution,<sup>101</sup> although there is no provision on "grounds" for dissolution despite a clearly expressed normative commitment to a no-fault approach to all issues.<sup>102</sup> Topics covered by the *Principles* are organized in a logical manner, with a few notable features. For example, the placement of child custody and child support before other issues can be read as a normative statement about priorities,<sup>103</sup> and the unified consideration of premarital, marital, and separation agreements highlights the commonalities and contrasts.<sup>104</sup>

I leave to those who will serve as Reporters for a project on children the formidable responsibility of proposing for their work a suitable vision, scaffolding, and scope, along with organizing principles.<sup>105</sup> Even if the project cannot reconcile all the existing inconsistencies in how law treats children and clean up all the current disarray, it could accomplish much by making the underlying policies explicit and providing standards for resolving any conflicts among these policies, thus developing a framework that integrates competing considerations and values. Distinguishing easy matters, or those that existing law addresses coherently, from more challenging problems, with a rubric for

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<sup>96</sup> *E.g.*, MO. REV. STAT. § 452.325 (2013).

<sup>97</sup> *See supra* note 60 and accompanying text.

<sup>98</sup> *E.g.*, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, § 5.04 (calculation of compensatory spousal payments).

<sup>99</sup> *E.g.*, *id.* § 4.12(4).

<sup>100</sup> *See id.* § 1.02.

<sup>101</sup> Some of the matters covered have relevance outside of dissolution, for example, the recognition of parents by estoppel and de facto parents. *See supra* note 67 and accompanying text.

<sup>102</sup> *See generally* PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, chapters 4-5; *see also* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 274-75 (1997-1998) ("[T]he American Law Institute recently adopted a number of the proposed *Principles of the Law of Family Dissolution*, which argue for the total abolition of all fault-based factors of marital dissolution or divorce.").

<sup>103</sup> *See* PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, at xxiii-1 (table of contents). By contrast, for example, the Uniform Marriage and Divorce Act's provisions on property division (§ 307) and maintenance (§ 308) precede those on child support (§ 309) and child custody (§§ 401-410). UNIF. MARRIAGE & DIVORCE ACT, *available at* <http://www.uniformlaws.org/shared/docs/Marriage%20and%20Divorce%20Act/UMDA%201973.pdf>. *Cf.* Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 565-83 (2012) (examining the case for according special priority to children).

<sup>104</sup> *See* PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 52, at 945-1032 (Chapter 7 on "Agreements").

<sup>105</sup> For one preliminary "take," *see* Dailey & Rosenbury, *supra* note 2.

approaching the latter, would also constitute an important contribution. Expressed in the familiar words of the ALI's mission, the project will succeed to the extent that it can clarify, modernize, and improve the legal treatment of children and childhood. In anticipation of such efforts, however, I explain how certain frameworks, although providing tempting points of departure, would produce false starts and thus ought to be rejected at the outset.

### 1. Familiar but Deficient Frames

Two familiar frames claim to resolve the puzzle of childhood under the law—though in fact they help create this puzzle. Family law's conventional frame emphasizes parental authority first and state authority next.<sup>106</sup> Many justify this model by citing children's dependency, the "natural affection" that parents have for their children,<sup>107</sup> the pluralism that such family autonomy allows,<sup>108</sup> and the quid pro quo parents receive in return for supporting their children,<sup>109</sup> thus relieving the state of that burden.<sup>110</sup> The state steps in under limited circumstances of parental default.<sup>111</sup> Often, the question posed is whether parents or the state can best speak for the child in a particular context,<sup>112</sup> with the rationale that such adult authorities safeguard the development of children into future citizens who then will have the capacity to make their own choices.<sup>113</sup> A reflexive effort to "restate" the law governing children would probably use this traditional dependency model.<sup>114</sup>

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<sup>106</sup> See *supra* notes 28-32 and accompanying text.

<sup>107</sup> *E.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>108</sup> See, *e.g.*, Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348 (1994); William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 236-38 (1998).

<sup>109</sup> See, *e.g.*, Anne L. Alstott, *Is the Family at Odds with Equality?: The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297-98 (1988); see also, *e.g.*, Scott Altman, *A Theory of Child Support*, 17 INT'L J. L. POL'Y & FAM. 173 (2003); Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107 (2008).

<sup>110</sup> *E.g.*, *Elisa B. v. Superior Ct.*, 117 P.3d 660, 669 (Cal. 2005); Anne Alstott, *Private Tragedies?: Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3 (2010).

<sup>111</sup> See, *e.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>112</sup> *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part). Compare MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005), with Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999); see also, *e.g.*, Rosenbury, *supra* note 26, at 833-34; Woodhouse, *supra* note 26, at 997.

<sup>113</sup> See, *e.g.*, Appell, *supra* note 24, at 736-37; Dailey, *supra* note 25, at 2113.

<sup>114</sup> See Dailey & Rosenbury, *supra* note 2, at 4-5.

A competing frame, based on children's rights,<sup>115</sup> would evoke familiar references that pervade all "rights talk."<sup>116</sup> Exemplified in the United Nations Convention on the Rights of the Child (UNCRC),<sup>117</sup> this frame rejects the treatment of children as "property" of their parents<sup>118</sup> and often includes a list of specific entitlements for children.<sup>119</sup>

Neither of these familiar models, however, is up to the task required for an ALI Restatement (or Principles) project on children. The first, the traditional approach, expressly marginalizes children and their experiences in the here and now; it treats their dependency as an all-defining characteristic and equates it with incapacity.<sup>120</sup> Further, it emphasizes parental authority or state control over children at the expense of the responsibilities of parents and the state. In celebrating vertical relationships, it ignores children's horizontal relationships, such as those with peers and siblings.<sup>121</sup> Accordingly, this dependency model<sup>122</sup> cannot effectively address important cross-currents and does little to "improve" the law.

The second, the children's rights approach, would probably be a nonstarter politically here in the U.S., one of only two United Nations countries that have refused to adopt the UNCRC because of perceived threats to parental supremacy.<sup>123</sup> Moreover, translated into U.S. rights discourse, this approach might unduly

<sup>115</sup> See generally DAVIS, *supra* note 23; JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 279-85 (2011) (discussing the rise of "children's rights" in twentieth century family law).

<sup>116</sup> See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

<sup>117</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>118</sup> See Woodhouse, *supra* note 26.

<sup>119</sup> *E.g.*, Convention on the Rights of the Child, Art. 7 § 1, Nov. 20, 1989, 1577 U.N.T.S. 3. ("The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."); *id.* Art. 17 ("States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."); *id.* Art. 27 § 1 ("States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."); see also Dixon & Nussbaum, *supra* note 103, at 558 n.37 (listing threshold entitlements under Nussbaum's capabilities approach).

<sup>120</sup> See Appell, *supra* note 24, at 721, 771-72.

<sup>121</sup> See, e.g., Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 899 (2012); Rosenbury, *supra* note 26.

<sup>122</sup> See Dailey & Rosenbury, *supra* note 2, at 7.

<sup>123</sup> See GROSSMAN & FRIEDMAN, *supra* note 115, at 280; see also, e.g., Senate Proceedings on the Hague Convention on International Recovery of Child Support and Family Maintenance, Sept. 29, 2010 (emphasizing commitment to parental rights and reaffirming U.S. nonratification of CRC).

elevate autonomy claims over other important interests, including children's relational interests. Although the UNCRC includes responsibilities to children and relational interests,<sup>124</sup> the reluctance to recognize positive rights more generally in the U.S.<sup>125</sup> provides one more reason why this approach would face forceful headwinds here. In addition, the history of some of the UNCRC's listed rights invites skepticism about the weight accorded to the interests of children versus those of others,<sup>126</sup> particularly parents.

Moreover, even to the extent that each of these familiar frames has elements worth incorporating in a new approach, the project must face intractable conflict. Consider, for example, the permissibility of corporal punishment. The traditional approach allows reasonable physical discipline of a child by parents<sup>127</sup> or the state.<sup>128</sup> The children's rights approach emphasizes the negative right to be free from such harm and might well use the standard applicable to adults, under which any unwanted touching constitutes a battery.<sup>129</sup> The inadequacy of each of these familiar frames alone and their irreconcilable premises call for a new understanding.

## 2. Tempting but Unsatisfying Analogies

### *a. Children and Married Women*

One new understanding might emphasize how legal treatment of children parallels the way law once treated married women, in each case making a social construction appear

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<sup>124</sup> See *supra* note 119 (citing examples). Cf. Appell, *supra* note 24, at 732; Dixon & Nussbaum, *supra* note 103, at 553.

<sup>125</sup> See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989).

<sup>126</sup> See RITA ARDITTI, *SEARCHING FOR LIFE: THE GRANDMOTHERS OF THE PLAZA DE MAYO AND THE DISAPPEARED CHILDREN OF ARGENTINA* 145-51 (1999) (documenting how parents of those "disappeared" during Argentina's "dirty war" fought to recover their grandchildren, achieving the incorporation of a child's "right to identity" in Article 8 of the UNCRC). I am grateful to Barbara Stark for acquainting me with this history.

<sup>127</sup> See, e.g., *State v. Lefevre*, 117 P.3d 980 (N.M. 2005); CAL. WELF. & INST. CODE § 300(a) (West 2013); OKLA. STAT. ANN. tit. 21, § 844 (West 2013).

<sup>128</sup> See *Ingraham v. Wright*, 430 U.S. 651 (1977) (upholding corporal punishment by Florida schools).

<sup>129</sup> Convention on the Rights of the Child, Arts. 19 & 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 19, 37. See Barbara Stark, *Rhetoric, Religion, and International Human Rights: "Save the Children!"*, in *WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* 46, 49-50 (Martha Fineman & Karen Worthington eds., 2009). Indeed, laws developed for adult abuse (domestic violence) might apply to the parental use of physical force to discipline.

natural and inevitable.<sup>130</sup> Just as those who occupy the legal category of “child” today, married women were once considered necessarily dependent, lacking legal capacity to make important choices such as domicile<sup>131</sup> or binding contractual responsibility.<sup>132</sup> The parent-child relationship, just like the marital relationship once did, subsumes the identity and autonomy of one member of the family in the authority of another.

Feminist legal theorists, most notably Martha Fineman<sup>133</sup> and Jennifer Nedelsky,<sup>134</sup> emphasize how dependency is universal,<sup>135</sup> despite the celebration of autonomy in traditional liberalism. Thus, for example, Nedelsky makes the case for a relational understanding of autonomy, situated in an appreciation for our collective interdependence.<sup>136</sup> Although Nedelsky has matters of gender in her sights, she invokes the child as the classic illustration of dependency.<sup>137</sup> Viewed through this lens, we might well see an opportunity to deploy legal changes in the treatment of married women—including the rise of formal gender equality<sup>138</sup>—as a template for a new approach to children and law.

Certainly, there are many useful insights for work on children that might come from such sources, including notions of pervasive dependency,<sup>139</sup> relational autonomy, collective interdependence,<sup>140</sup> and childhood as a socially and legally constructed status.<sup>141</sup> Nonetheless, we cannot seamlessly apply to children what we have learned about married women. Despite variations in the capacities of each individual woman (and man), differences between infants and adolescents stand

<sup>130</sup> See Dailey & Rosenbury, *supra* note 2, at 3; see also Appell, *supra* note 24, at 737 (noting how “the child question is quite similar to the woman, race, and sexual minority questions—the topics of feminist jurisprudence, critical race theory, and queer theory”).

<sup>131</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 27 (1934).

<sup>132</sup> *E.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

<sup>133</sup> *E.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 31-54 (2004); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).

<sup>134</sup> See JENNIFER NEDELSKY, LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2011).

<sup>135</sup> See Dixon & Nussbaum, *supra* note 103, at 574 (noting how “many forms of vulnerability experienced by children are common to others”).

<sup>136</sup> NEDELSKY, *supra* note 134, at 27-28.

<sup>137</sup> See *id.* at 19-30, 39.

<sup>138</sup> See, *e.g.*, Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

<sup>139</sup> See Woodhouse, *supra* note 24, at 818-24 (expressing such ideas in a theory of “ecogenerism”).

<sup>140</sup> See generally NEDELSKY, *supra* note 134.

<sup>141</sup> See Woodhouse, *supra* note 24, at 819-20 (noting the frequent absorption of “children’s issues” in “women’s issues”).

out as something more than a legal or cultural artifact, even if the generalizations vary from one context to another. Taking into account the developmental arc, without seeing children simply as future adults or making each developmental stage a self-fulfilling prophecy, emerges as an especially challenging aspect of work that takes seriously children themselves in the here and now.<sup>142</sup> Thus, undue reliance on the analogy of married women would marginalize or even exclude some of the special considerations that a project on children must confront.

*b. Children and Individuals with Disabilities*

Another analogy with apparent traction is the contemporary legal treatment of persons with disabilities, as reflected in the Americans with Disabilities Act (ADA)<sup>143</sup> and specifically its antidiscrimination principle and its reasonable accommodation requirement.<sup>144</sup> These provisions work together to treat as discrimination the failure to provide reasonable accommodation needed for a qualified individual with a disability to perform a job (with “qualified individual” defined as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”<sup>145</sup>).<sup>146</sup> Thus, the ADA not only disallows discrimination that might be considered “rational;” it also requires affirmative departures from the workplace status quo to enable the individual with disabilities to obtain or retain a job.<sup>147</sup> Moreover, the ADA treats as discrimination the failure to make accessible to those with disabilities public transportation services<sup>148</sup> and many public accommodations and commercial facilities.<sup>149</sup> Accordingly, the ADA challenges our society’s background “givens” and norms to the extent they privilege the able-bodied to the detriment of those with disabilities.

Perhaps this way of thinking offers a rubric for reconceptualizing childhood.<sup>150</sup> Although children lack certain capacities,<sup>151</sup> they are often able “with or without reasonable

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<sup>142</sup> See Dailey & Rosenbury, *supra* note 2, at 18-20.

<sup>143</sup> 42 U.S.C. §§ 12101(a)–(b) (2011).

<sup>144</sup> *Id.* §§ 12112(a), 12112(b)(5).

<sup>145</sup> *Id.* § 12111(8).

<sup>146</sup> See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003).

<sup>147</sup> See *id.*

<sup>148</sup> 42 U.S.C. § 12184.

<sup>149</sup> *Id.* § 12183.

<sup>150</sup> See Appell, *supra* note 24.

<sup>151</sup> See Dixon & Nussbaum, *supra* note 103.

accommodation [to] perform the essential functions” required by adult freedoms and responsibilities. Excluding children from certain important choices, opportunities, relationships, and responsibilities based on crude age-based classifications reflects a form of discrimination (even if “rational”), when a more nuanced analysis incorporating accommodation would better achieve the important value of equality.<sup>152</sup> Accommodation, at least in the employment context, typically requires an individualized assessment, which might help make the distinctions necessary between, say, an infant and an adolescent or even two thirteen-year-olds in certain contexts. In addition, this approach invites us to question background rules that maintain and accentuate the dependency of children.<sup>153</sup>

Annette Appell has advocated this approach, proposing a constitutional “Children’s Participation Amendment” (CPA).<sup>154</sup> As she explains: “The CPA promotes inclusion by removing barriers to, and providing assistance for, children’s integration into civic life and their independence in their own lives.”<sup>155</sup> Although Appell would not displace the private family,<sup>156</sup> she would certainly limit its authority<sup>157</sup> through the development of principles designed to enhance children’s agency,<sup>158</sup> for example, presuming children to be competent<sup>159</sup> and recognizing rights beyond the canonical negative liberties.<sup>160</sup>

Although tempting as an analogy and offering some promising insights, the disability/accommodation frame cannot alone provide a foundation for ALI work on children. First, in recounting what the idea would mean in practice, Appell paints a picture that would make the UNCRC, already politically controversial because of its allegedly radical challenge to parental rights,<sup>161</sup> seem conservative and mainstream. True, Appell’s proposed CPA offers a valuable thought experiment, highlighting how the current regime fails to respect children—

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<sup>152</sup> Appell prefers liberty over equality. See Appell, *supra* note 24, at 719, 722.

<sup>153</sup> See, e.g., *id.* at 767 (critiquing some child labor restrictions as contrary to a right to self-support); Frances Olsen, *The Myth of State Intervention In the Family*, 18 U. MICH. J. L. REFORM 835, 852 (1985) (critiquing privatization of property for making children dependent).

<sup>154</sup> Appell, *supra* note 24, at 754.

<sup>155</sup> *Id.* at 722.

<sup>156</sup> *Id.* at 758, 779.

<sup>157</sup> See, e.g., *id.* at 757-64.

<sup>158</sup> *Id.* at 733 (criticizing CRC’s limitations); *id.* at 747 (noting need to recognize children’s “agency and intentionality”).

<sup>159</sup> *Id.* at 751.

<sup>160</sup> *Id.* at 751-54.

<sup>161</sup> See *supra* note 123 and accompanying text.

and what it might take to implement thoroughgoing change. Nonetheless, the ALI's goal of spurring law reform would have no chance of success with a proposed *constitutional* amendment read to guarantee retrofitting of the family home,<sup>162</sup> to call for direct subsidies to children to promote their independence,<sup>163</sup> and to require parents to negotiate and justify their childrearing decisions.<sup>164</sup> Further, this framework could compel sweeping revisions of existing ALI projects that have something to say about children.<sup>165</sup>

Second, from a theoretical perspective, treating the characteristics of childhood as disabilities reinforces adulthood as the norm. Similar critiques have surfaced in analyses that treat pregnancy as a disability for purposes of workplace accommodation even though pregnancy is a "normal" event in (female) life.<sup>166</sup> Childhood, of course, is more widely "normal" than even pregnancy; everyone who survives to adulthood has experienced childhood, even if it is a socially and legally constructed phase of life. The disability/accommodation frame risks an understanding of children centered on what they lack, rather than what they have. It thus bolsters the tendency to treat children in a manner that emphasizes what they will become later (adult citizens) instead of accepting them as valuable members of society with meaningful interests and experiences in the present tense.

### *c. Children and LGBT Persons*

Some analogies suggest that the ALI should not undertake a project on children at all, but rather should integrate legal principles relevant to children in work on various substantive topics, as relevant. In their contribution to this symposium, *The Restatement of Gay(?)*, Courtney Joslin and Lawrence Levine urge this integrative approach in place of a project devoted specifically to LGBT issues, important as those issues are.<sup>167</sup> As they observe, the "ALI does not have any publications specifically devoted to the application of law to any other identity-based group," citing the absence, for example, of

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<sup>162</sup> See Appell, *supra* note 24, at 758.

<sup>163</sup> See *id.* at 759.

<sup>164</sup> See *id.* at 761.

<sup>165</sup> See *infra* notes 171-76 and accompanying text.

<sup>166</sup> See, e.g., Deborah Dinner, *The Costs of Reproduction*, 46 HARV. J. CIV. RTS.-CIV. L. REV. 415, 473-77 (2011).

<sup>167</sup> Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621 (2014).

any *Restatement of Race* or *Restatement of Gender* (although they do note the work in progress on American Indian law).<sup>168</sup> They argue that separate treatment risks marginalization, while the benefits of integration include the exposure of more lawyers and judges to such matters and concerns.<sup>169</sup>

Applied to children, this integrative approach reflects the ALI's current course. Even beyond the entire chapters devoted to custody and child support in the *Principles of the Law of Family Dissolution*,<sup>170</sup> one can find provisions on children in ALI publications on torts,<sup>171</sup> conflict of laws,<sup>172</sup> contracts,<sup>173</sup> property,<sup>174</sup> restitution,<sup>175</sup> and sentencing,<sup>176</sup> to name only a few illustrations. If followed exclusively, this status quo would remove from the ALI's consideration a possible project on children and childhood.

Despite the force of Joslin and Levine's argument for LGBT issues (indeed, I join them in rejecting the idea of a *Restatement of Gay*, as well as one on race or gender), I would distinguish children from most other identity-based groups. Law reform on race, gender, and sexual orientation has moved steadily in one direction—toward assimilation or uniform treatment<sup>177</sup> (despite sometimes compelling arguments that substantive equality requires recognizing difference<sup>178</sup>). For children, however, different treatment remains the norm, and some of the most recent developments, like the Supreme Court's cases about constitutional limits on punishment for minors, highlight new justifications for such different treatment.<sup>179</sup> Children merit separate consideration by the ALI and their own "Restatement of" (or "Principles of"), because law treats children as a special class.

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<sup>168</sup> *Id.* at 626.

<sup>169</sup> *Id.* at 627-30.

<sup>170</sup> See *supra* notes 57 & 59 and accompanying text.

<sup>171</sup> *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41 (2012).

<sup>172</sup> *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 (1971).

<sup>173</sup> *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

<sup>174</sup> *E.g.*, RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.2 (2003).

<sup>175</sup> See Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 KAN. L. REV. 343 (2012).

<sup>176</sup> *E.g.*, MODEL PENAL CODE: SENTENCING § 6.11A (Tentative Draft No. 2, 2011).

<sup>177</sup> See, *e.g.*, *Orr v. Orr*, 440 U.S. 268 (1979); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Windsor v. United States*, 133 S. Ct. 2675 (2013).

<sup>178</sup> See generally, *e.g.*, *Dinner*, *supra* note 166; *Franklin*, *supra* note 138; *Woodhouse*, *supra* note 24, at 854.

<sup>179</sup> See *supra* notes 18-19 and accompanying text.

An ALI project devoted to children would allow a more systematic search for instances of such exceptional treatment and evaluation of the classification itself. Only expansive and sustained attention to the special class under existing laws allows determination of what the extent of the exceptional treatment should be and what it should entail. Piecemeal consideration of children and childhood risks obfuscation of the larger themes, rationales, and inconsistencies across the different substantive areas.<sup>180</sup>

*d. Children and Horses*

Skepticism about a project devoted to children could arise, by analogy, from the critique captured by Judge Frank Easterbrook's facetious phrase "The Law of the Horse." Easterbrook used the term, in reflecting on the then emerging "law of cyberspace,"<sup>181</sup> to emphasize how studying many subject-matter-connected strands from diverse areas of the law would necessarily come at the expense of appreciating the broader rules, policies, and "unifying principles"<sup>182</sup> at work in each of the areas, as traditionally defined.<sup>183</sup> In other words, one could certainly study contracts about horses, personal injury cases involving horses, and even criminal prosecutions for illegal gambling on horse races—but so what? What would one learn?

Easterbrook's analogy has been recalled and rejected with respect to a particular slice of the law applicable to children, adolescent medical decisionmaking.<sup>184</sup> Amanda Pustilnik and Leslie Henry contend that studying adolescent medical decisionmaking exposes the absence of consensus about the reasons for different laws and norms governing adolescents and

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<sup>180</sup> Cf. Todres, *supra* note 23, at 1107 (attempting holistic assessment of the law's approach to maturity).

<sup>181</sup> See generally Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

<sup>182</sup> *Id.* at 207.

<sup>183</sup> Easterbrook explains:

Far better for most students—better, even, for those who plan to go into the horse trade—to take courses in property, torts, commercial transactions, and the like, adding to the diet of horse cases a smattering of transactions in cucumbers, cats, coal, and cribs. Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the *law* about horses.

*Id.* at 208.

<sup>184</sup> Amanda C. Pustilnik & Leslie Meltzer Henry, *Introduction: Adolescent Medical Decisionmaking and the Law of the Horse*, 15 J. HEALTH CARE L. & POL'Y 1 (2012).

adults.<sup>185</sup> In turn, such investigation “can elucidate a set of general questions about doctrinal reliance, or lack thereof, on neuroscientific evidence about human development and behavior.”<sup>186</sup>

Neither Easterbrook’s critique of cyberlaw nor the claimed value of studying adolescent medical decisionmaking captures the work performed by the legal category of “child,” however. Unlike the law of horses, or even cyberspace, the law of childhood, as well as family law in which it is encompassed, does reflect broader policies and unifying themes concerning relationships, responsibilities, vulnerability, dependency, and presumed affection. Moreover, unlike adolescent medical decisionmaking, the value lies not in the exposure of the inconsistent use of a particular type of evidence. The payoff from systematically grappling with the legal treatment of children is both narrower and broader: narrower because childhood itself is an underexamined legal construct that merits focused attention and broader because the task will require confronting rules and policies in torts, contracts, and a host of other areas in which the legal category of “child” plays a part.

#### CONCLUSION

Legal questions about children are critically important, if only because they are so pervasive—in family law and well beyond. Alongside the inconsistencies produced by the piecemeal and diffuse regulation of children and childhood awaits the conceptual hurdle of recognizing children’s own interests, experiences, and agency while acknowledging, in varying degrees, their dependency and vulnerability. These difficulties deserve thorough, thoughtful, and creative analysis—or, in ALI terms, clarification, modernization, and improvement. If the ALI accepts the challenge, its contribution will necessarily be significant. Restating childhood entails no less than defining a field of law.

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<sup>185</sup> *Id.* at 2.

<sup>186</sup> *Id.* The authors invoke Lawrence’s Lessig’s response to Easterbrook, which “asserted that cyberlaw illuminated a general set of issues about the law’s ability to function as a regulator in physical and non-physical space. The lessons of cyberlaw, [Lessig] argued, could inform scholarship in many areas concerned with law’s capacities and limits.” *Id.* (citing Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999)).