CHILDREN'S RIGHT TO ACCESS POTENTIALLY CRITICAL LEARNING: LIBERATING YOUTH FROM PROPAGATION OF STRUCTURAL INJUSTICE

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Over the past two years, U.S. states have passed educational gag orders ("EGOs") that prohibit teaching about antiracism and LGBTQ+ identities. EGOs are destructive in at least two ways. First, they violate children's right to access information that is potentially critical for their individual well-being. Second, they interfere with cultivating mutual respect in a pluralistic society, which serves children's present and future well-being interests. In this article, I aim to demonstrate the harms that EGOs inflict, and how revising the legal framework governing children's rights in the United States can increase both children's and adults' well-being. That revision entails the adoption of my proposed Child's Interests Principle ("CIP"), which I describe and apply to emerging debates regarding youth education and social oppression. The CIP illuminates these issues and how intricately they are connected to another difficult problem: how society can remediate speech harms equitably. I will elucidate this connection and

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clarify why plausible consequences of the CIP are a decline in harmful speech and an opportunity to ameliorate social oppression without resorting to coercive measures. Borrowing insights from critical theory, I explain why the law is often an ineffective tool for dismantling social hierarchies and why early, thorough, and accurate education may be the best hope for transforming our society into a reasonably just one.

I. OVERVIEW: THE RELATIONSHIP AMONG CHILDREN'S INTERESTS, SOCIAL OPPRESSION, AND SPEECH HARM

The law has been an ineffective tool for dismantling unjust hierarchies because it preserves not only their existence, but also their invisibility, often even to those subordinated within them.[1] This is readily demonstrated in American First Amendment jurisprudence. Because social concepts are constructed using language, discriminatory speech is a powerful mechanism for perpetuating unjust social hierarchies. Thus, protection of white privilege and other unjust forms of social power, whether conscious or not, frequently takes cover behind the First Amendment, which is thereby stretched beyond reason to accommodate it. In fact, the law generally operates to maintain the power status quo to the degree possible without calling its legitimacy into question. While language plays a central role in constructing social concepts that can be subconsciously absorbed from one's culture, explicit education about these enculturation mechanisms can loosen their hold on people, especially if it is undertaken early in the socialization process, beginning in childhood. If the law does not dismantle social hierarchies, then early, thorough, and accurate education may be the best hope we have of transforming our society into a reasonably just one. At least, this is a promising strategy if the law does not stand in *its* way, too. Significantly, children *would not* be used as a means for accomplishing this important social end given that any such instrumental use violates their rights as developing rational agents. Instead, children's direct interests and moral rights are served by receipt of accurate, useful information, which is vital to their ability to think critically and effectively promote their well-being, both as they develop reason and agency as well as later in adulthood. Our beliefs and actions—our very conceptions of personal and national identity, what we owe others, and what we are owed—all reflect how we perceive our world.

Although American society has grown from the poisoned roots of colonialism, the Native American genocide, the enslavement of Africans

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[1] According to philosopher Marilyn Frye's influential metaphor, oppression is a birdcage, systematically trapping people within it based on their membership in a subordinated, socially constructed category. The cage is invisible when we fixate on one wire at a time, wondering why the bird does not simply fly around the wire that has our attention. Only when we see the network of wires as a system can we appreciate how it traps its inhabitants. MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 4 (1983). For an example of how the law conceals oppression, *see, e.g.*, Richard Delgado, *About Your Masthead; A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1 (2004); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (examples of critical race theory); and CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (explaining the influential work of feminist jurisprudence).

and their descendants, general and ethnically specific labor exploitation,[2] predatory capitalism,[3] self-sufficiency worship,[4] and ironically, religious intolerance,[5] these roots are invisible to many as busy lives propel us along the surface. If we are privileged enough to be able to avoid noticing these, we are too frenzied and exhausted to notice them. If in age-appropriate ways, since childhood, we were made aware of our society's background, perhaps we would lack an inclination to insult, bully, and harass others based on misconceptions and inaccurate stereotypes about who they are and who we are. Controversial legal remedies would then not be needed to address hate speech,[6] discrimination, and many other social ills. If this seems "utopian," notice how *that term* also works to cement the status quo.

Americans live in a particularly busy culture, and most are consumed with preparing and striving to survive and compete for material resources in a transactional and seemingly indifferent world. "Diseases of despair"—addiction and suicide—rip away members of our community[7] because we fail to spend enough time or resources on human connection, empathy, or commitment to deliberately chosen, valuable projects and relationships that give our lives meaning. We are on polarized teams that view one another as enemies. Hate crimes have increased recently.[8] As we scramble toward the

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[2] *See, e.g.*, Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. RACE & ETHNICITY 52 (2015).

[3] *See*, *e.g.*, MATTHEW DESMOND, POVERTY, BY AMERICA 84 (2023) ("The idea is to protect one kind of dependency, that of the worker on the company, by debasing another, that of citizens on the state.").

[4] *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 10–11 (2008) (arguing that law and social policy should not be designed to serve the postulated "liberal subject" who is autonomous, self-sufficient, and self-interested, but rather the actual "vulnerable subject" with physical and emotional needs that can only be met by a responsive society).

[5] *See generally* RELIGIOUS INTOLERANCE IN AMERICA: A DOCUMENTARY HISTORY (John Corrigan & Lynn S. Neal eds., 2019) (The authors document the persecution of Quakers, Jews, Catholics, Mormons, Shakers, African American denominations, Christian Scientists, Native American religions, Unificationism, Wicca, Santería, and other marginalized religions throughout the history of the United States).

[6] The term "hate speech" is admittedly vague and misleading. Expression that attacks a person because of their membership in a group that faces social discrimination may not be motivated by hate. Instead, the speaker might be indifferent to how the target is affected, while trying to accomplish another objective (such as to curry favor with a social peer group by ridiculing an out-group, or to attract readers to social media content). Despite its drawbacks, I will continue to use the term because it is familiar, but in doing so I do not mean to imply that hate motivates the expression in question, only that the victim can reasonably view it as a kind of discrimination against members of their marginalized identity group.

[7] Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. U.S. 15078, 15079 (2015).

[8] In the United States, the number of hate crimes reported increased by 11.6% from 2020 to 2021. A hate crime is "a criminal offense that is motivated, in whole or in part, by the offender's bias(es)

top of a hierarchy, it does not occur to us to challenge or question it. This system has unfolded without a preconceived design or even a deliberately adopted objective. If our objective was human well-being, is this what we would build? Whether or not the COVID-19 pandemic was the wake-up call, more and more people have become unable to ignore these unhappy truths. Many awoke to the realities we had been avoiding, but others who continue to deny those realities transformed "woke" into a term of derision. This is Plato's Allegory of the Cave instantiated in modern society.[9] Those accustomed to noble lies prefer them to painful truths.

Reflecting on this unfortunate state of affairs is enough to make one long for the utilitarian society that nineteenth-century English philosopher John Stuart Mill dreamed of, which would be carefully constructed to advance the greatest happiness for the entire population in the aggregate.[10] Or for John Rawls's well-ordered society, which would operate according to principles that hypothetical reasonable and rational persons would choose if they did not know which social positions they would occupy within it.[11] "Social engineering"[12] is much maligned for being associated with deceptive or coercive infringement on individual autonomy. Yet surely not all ways deliberately to promote human flourishing as an objective involve coercion or deception;[13] after all, individual self-government is a vital part

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against a person based on race, ethnicity, ancestry, religion, sexual orientation, disability, gender, and gender identity." U.S. DEP'T OF JUST., FBI RELEASES SUPPLEMENT TO THE 2021 HATE CRIME STATISTICS (Apr. 4, 2023), https://www.justice.gov/crs/highlights/2021-hate-crime-statistics [https://perma.cc/8YQ4-MMP4].

[9] *See generally* PLATO, *Book VII, in* THE REPUBLIC (1978). In Plato's allegory, people spend their lives chained inside a cave, where the familiar objects of their world are the shadows of puppets, created by the light of a fire and projected onto the cave walls. They see no other dimensions of reality, and when they are freed from the cave to see the true objects that cast shadows and sunlight itself (which is intense and painful to a cave dweller's eyes), they resist and insist on remaining within the reality familiar to them. They do not believe what is outside the cave is better or more real, particularly since any person returning from the outside has difficulty seeing in the dark cave (with their eyes recalibrated for sunlight), where they could see perfectly well before. In fact, the cave dwellers come to believe, for this reason, that leaving the cave damages a person's ability to perceive reality.

[10] *See generally* JOHN STUART MILL, *Utilitarianism, in* ESSAYS ON ETHICS, RELIGION AND SOCIETY (2006).

[11] *See* JOHN RAWLS, A THEORY OF JUSTICE 3–22, 66–74 (1971).

[12] *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5 (2008) (arguing for policies that embody what they call "libertarian paternalism": Libertarian because choices are not "blocked, fenced off, or significantly burdened," and paternalism because they aim to "steer people's choices in directions that will improve their lives . . . *as judged by themselves*" (emphasis in original, footnotes omitted)).

[13] This refers to what Thaler and Sunstein would call "choice architect[ure]": intentionally designing structures to influence the choices people make. For example, a school cafeteria manager might place carrot sticks instead of french fries at students' eye level to encourage them to eat healthier. *Id.* at 1–3.

of human flourishing. Should we tolerate the institutions that have sprung up with too little planning, simply because they exist and are a lot of trouble to change? We could instead commit ourselves to collectively choosing some broad public objectives (for example, human mental and physical health, a healthy physical environment, quality universal basic education) and use those to guide social policy[14] instead of the wealth-maximizing objective that our society uses now.[15]

How we socialize and educate children shapes who they become, and they collectively shape what society becomes. As both Mill and Rawls recognized, human nature is, within wide bounds, malleable. People can be socialized within institutions that tend to individual and collective happiness, or they can be socialized to trample anyone in the way of their journey to the highest rung of the social hierarchy they believe is achievable.[16] Children are all enculturated by their societies in one way or another. In the United States, parents and educational institutions tend to follow existing cultural scripts and, to a large extent, they adopt (though sometimes modify) methods that their own parents and teachers used to socialize them.[17] Good science on how to guide the development of healthy children is an emerging field, and few children are able to benefit from it yet.[18] Furthermore, it is becoming clear that a great deal of human suffering, including in the United States, arises from childhood trauma, which physically changes the course of development of a child's—and later

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[14] The capabilities approaches of Amartya Sen and Martha Nussbaum are prominent examples of this kind of approach. *See generally* AMARTYA SEN, INEQUALITY REEXAMINED (1995) (arguing that societies should be designed to promote, as far as possible, the equal basic capabilities of all their members, rather than equality of resources or outcomes); MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33–34 (2011) (proposing a list of central capabilities that a society must guarantee for its members in order to qualify as a just society, including life, bodily health, bodily integrity, senses, imagination, and thought, emotions, practical reason, affiliation, (interaction with) other species, and (sufficient) control over one's environment).

[15] *See generally* DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS (2016) (demonstrating how federal and state agencies, government contractors, and even non-profit organizations are incentivized to maximize revenue, even when this undermines their missions and harms the clients they exist to serve).

[16] *See, e.g.*, Mill, *supra* note 11; JOHN RAWLS, THE LAW OF PEOPLES 6–7 (1999).

[17] Marc H. Bornstein, *Parenting and Child Mental Health: A Cross-Cultural Perspective*, 12 WORLD PSYCHIATRY MENTAL HEALTH REV. 258, 259–60 (2013).

[18] *See, e.g.*, PETER C. BROWN, HENRY L. ROEDIGER III & MARK A. MACDANIEL, MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING, Ch. 1 (2014) (explaining that most teachers and students use ineffective teaching and learning methods because the methods feel familiar instead of using methods recently discovered to be more effective); Susan D. Blum, *Introduction: Why Ungrade? Why Grade?*, *in* UNGRADING: WHY RATING STUDENTS UNDERMINES LEARNING (AND WHAT TO DO INSTEAD) (Susan D. Blum ed., 2020) (demonstrating that grading accomplishes none of the objectives that appear to justify it and offering alternatives that more effectively motivate learning).

adult's—brain and behavior. Traumatized adults, usually unintentionally, cause trauma to children, and children then traumatize other children.[19] This is a cycle that arises within social institutions, including the family, educational and religious institutions, and sports and other extra-curricular activities, so a society that is motivated to curtail it has the means to do so. Why do we, as a society, keep engaging in suboptimal or even harmful practices in our treatment of children? Are too few people aware of these impacts on children? Are we unwilling to sacrifice familiar practices for a future that is difficult to visualize? Or worst of all, are we just too busy or self-absorbed to worry about it? These questions are worth asking. A society that operates according to the Child's Interests Principle ("CIP"), I propose, would undoubtedly do better for its children and its future.

To make a case for the CIP[20] and against Educational Gag Orders ("EGOs"),[21] Part II describes the CIP and briefly summarizes my argument to use the CIP as a replacement for the current legal standard: parents' fundamental right to control the upbringing of children. Part A defines the CIP standard, provides justification for its use, and highlights some of the problems with the current approach, focusing on the regulation of home schooling as an example. Part B explores how political rhetoric that appeals to children's interests is often deployed by those whose positions oppose material support for children and, ironically, advocate for policies that create or exacerbate risks of harm to children. Part C demonstrates how EGOs set back children's interests and violate their rights by depriving them of information, the knowledge of which would promote, or may be necessary for, their well-being. In Part III, I illustrate how the CIP can

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[19] *See generally, e.g.*, BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2015) (Van der Kolk details the science behind how trauma reorganizes the brain and body, which in the case of children constitutively forms their personalities and psychological and behavioral responses, making it difficult for many traumatized children to live rewarding adult lives without effective therapeutic treatment); BRUCE D. PERRY & OPRAH WINFREY, WHAT HAPPENED TO YOU? CONVERSATIONS ON TRAUMA, RESILIENCE, AND HEALING (2021) (examining how instances of childhood trauma impact the behavioral patterns of the adults that those children become, emphasizing that what are frequently perceived as character defects are generally the causal impacts of events over which the individual had no control, and are attributable to external forces more than to individual volition); Jack Shonkoff, *How Poverty and Trauma Affect Brain Development*, YOUTUBE (Oct. 1, 2020), https://www.youtube.com/watch?v=YE2fdsRsLto [https://perma.cc/3ECH-RXQB].

[20] Melina Constantine Bell, *Children Are People: Liberty, Opportunity, and Just Parenthood*, 9.1 REV. J. POL. PHIL. 49, 52 (2012). Although I will sometimes refer to "children's interests," especially pertaining to children as a class and policies that might benefit them, I call the principle the (singular) *Child's* Interests Principle, to underscore the importance of respecting the rights of each individual child when making decisions on that child's behalf.

[21] In this paper, "EGOs" refers to recent federal and state laws that restrict teaching about race and LGBTQ+ identity, as well as public school board book bans and curricular restrictions on these subjects.

interrupt reproduction of social oppression, which would provide a better future for children and adults, even though that is not its primary purpose or justification.

II. THE CHILD'S INTERESTS PRINCIPLE

A. THE CIP, ITS JUSTIFICATION, AND ITS ADVANTAGES

As I have argued previously, neither the American legal system nor the most influential theory of justice in American philosophy (John Rawls's *A Theory of Justice*) treats children as persons or recognize children's claims to justice. Because I believe parents' legally recognized fundamental right to determine the upbringing of children is morally unjustified, I have proposed to replace it with a child's interest principle that grants parents conditional authority over children. Such authority is justified by children's best interests rather than by parents' rights.[22]

Although space does not permit me to re-argue my case for the CIP here, I will briefly summarize the argument. In both law and political philosophy, family has generally been treated as a natural, pre-social institution. As political theorist Susan Moller Okin points out, even Rawls, whose subject of justice is the basic structure of society, appears to have begun with this assumption in *A Theory of Justice*.[23] In my view, this assumption is what leads to Rawls's—I would say mistaken—prioritization of the principle of liberty over his second principle of justice, which governs distribution of social and economic opportunities. Only because children are absent from the hypothetical original position, in which parties, behind a veil of ignorance, select the principles of justice to govern their society, can it seem that liberty is more critical to secure than opportunity. From an adult perspective, an individual conception of the good[24] already exists, and freedom to pursue or revise it is what a party in the original position would aim to secure above all. However, this thought experiment skips over childhood, in which individual conceptions of the good begin development among an array of opportunities that adult caregivers control. Rawls stipulates that parties will choose principles for their descendants with those

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[22] Bell, *supra* note 20, at 50.

[23] RAWLS, *supra* note 11, § 3–4; SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 27 (1989).

[24] Following John Rawls, a conception of the good "is an ordered family of final ends and aims which specifies a person's conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile human life. The elements of such a conception are normally set within, and interpreted by, certain comprehensive religious, philosophical, and moral doctrines in light of which the various ends and aims are ordered and understood." JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (Erin Kelly ed., 2001).

descendants' best interests in mind. But even if a child's representatives have the best intentions, there is a conflict of interest that makes this setup unfair.

The American legal system does not treat children fully as persons or recognize their claims to justice. Instead, it carries baggage from a history that treated children as chattel, and used "family privacy" as an excuse to ignore violence against women and children.[25] Even now, government agencies abuse guardianship authority over children, converting their federal survivor and disability benefits to uses unrelated to child welfare, leaving their charges worse off.[26] Although the law nominally recognizes that children have constitutional due process rights,[27] those rights are too often ignored with impunity.[28] Perhaps not surprisingly, given its shabby history on children's rights, the United States is the only member country besides Somalia that has not signed the United Nations Convention on the Rights of the Child.[29]

Under U.S. law, parents have a fundamental right to control the upbringing of their children. This rests on a claim of substantive due process derived from the Fifth and Fourteenth Amendments to the U.S. Constitution, providing that federal and state governments, respectively, may not deprive any person of "life, liberty, or property, without due process of law."[30] Substantive due process has been used to constitutionally protect individual rights as fundamental rights.[31] It legalizes same-sex marriage nationally,[32] prohibits state regulation of consensual adult sex in private (whether or not engaged in by persons of different sexes or taking a form that could accomplish reproduction),[33] and for forty-nine years protected nationwide access to legal abortion services. When the U.S. Supreme Court overturned *Roe v. Wade*[34] in *Dobbs v. Jackson Women's*

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[25] *See, e.g.*, Bradley v. State, 1 Miss. (1 Walker) 156 (1824).

[26] *See* HATCHER, *supra* note 15, at 80–82.

[27] *In re* Gault, 387 U.S. 1, 1–2 (1967).

[28] HATCHER, *supra* note 15, at 24–25.

[29] LUISA BLANCHFIELD, CONG. RSCH.. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, SUMMARY (2015).

[30] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[31] *Id.*

[32] Obergefell v. Hodges, 576 U.S. 644, 663 (2015) ("Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. (Citations omitted.) In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965)") (parallel citations omitted).

[33] Lawrence v. Texas, 539 U.S. 558, 566–71 (2003).

[34] Roe v. Wade, 410 U.S. 113 (1973).

Health Organization,[35] however, it also raised questions about the security of other rights protected by substantive due process.[36] In the case of adult sexual privacy and same-sex marriage, this is lamentable, but it is an opening to dispense with parents' supposed fundamental right to control the upbringing of children.

I have proposed replacing this framework with a CIP that grants parents conditional authority over children, with such authority justified by children's best interests rather than by parents' rights.[37] The scope of legal protection for parents' rights would be narrowed and the scope of legal protection for children's rights would be expanded. This policy shift would foreclose attempts to scrub educational content from curricula designed to benefit youth in order to accommodate parental liberties or other preferences of mature adults. However, the main justification for embodying the CIP in the law is that we owe it to children who, as rights-bearing people, should be empowered to author their own lives.

The CIP, I have argued, is one of the principles that prudent persons would use to allocate liberties and opportunities throughout their lifetime if their age at the time of decision were unknown to them, and if they operated on the assumption that they would have to live each stage of their life according to their chosen allocation. The CIP is: *Whenever an adult makes a decision that primarily affects a child, rather than the adult decision-maker, the child's interests, not those of the adult decision-maker, must justify the decision.* The CIP is focused on *a standard* rather than on *who* is making the decision. It contrasts with other possible *standards* for adult decision-making regarding children, such as the child-rearing approach that is best for the family as a whole, or for society in the aggregate.

Children have a unitary interest in their own welfare, but parents have multiple interests with respect to a child and these interests can conflict with one another: (1) a self-directed interest in the child becoming a certain kind of person who conforms to parental preferences; (2) a self-directed interest in the parent's ability to live a lifestyle conducive to the parent's own welfare; and (3) a child-directed interest in the child's welfare for the child's sake, since the parent generally loves and cares about the child. While (1) and (2) can conflict with the child's interests, (3) should not (unless the parent is mistaken about what serves the child's interest). The state also has multiple interests with respect to a child that can conflict with the child's interests and with each other: (1) a *parens patriae* interest in protecting children as dependent members of society, and (2) an interest in social

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[35] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[36] *Id.* at 2247–48.

[37] Bell, *supra* note 20, at 50. It is important to remember that "child" intersects with other aspects of identity.

reproduction, meaning the survival of its own institutions and values. While the *parens patriae* interest should not conflict with a child's interests (in the absence of a mistake in identifying them), an interest in social reproduction can easily conflict with the interests of individual children (for example, state attempts to "assimilate" Native American children by forcibly removing them from families to attend state-mandated boarding schools).

A variety of historical cases serve as examples of these conflicting interests. Some parents have, on religious exercise grounds, withheld lifesaving medical care from a child, resulting in the child's death.[38] Meanwhile, others have risked prosecution for child abuse in order to obtain gender-affirming care necessary for their minor child's well-being.[39] This demonstrates that neither the parents nor the state is always the best decision-maker for a child. Each is subject to its own biases and conflicts of interest in different decisional domains and individual cases. What is important, instead, is that the criteria used for determining what is in children's best interests are based on reliable empirical data, either about *what* is in children's bests interests (when such data are available) or about *who* is in a better position to decide for a child in that particular context.

States are divided on whether parents whose religious beliefs forbid them to receive conventional medical treatment can be held criminally responsible for their children's deaths when they provide seriously ill children with only "spiritual treatment."[40] Even if parents had their children's best interests in mind (believing, perhaps, their spiritual health is most important), this gives parents too much discretion to decide their children's fate based on parents' conception of the good. Children may thus be deprived of any chance to develop their own conception of the good. Parents' fundamental right to the free exercise of their religion preempts their child's opportunity to practice a religion of their own choosing one day. In a less extreme example, Amish parents have a legal right, derived from their right to freely exercise their religion, to withdraw children from formal education before the state-mandated age of sixteen.[41] Since people have significantly fewer opportunities in U.S. society with an eighth-grade

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[38] *See, e.g.*, Hermanson v. Florida, 604 So. 2d 775, 782 (Fla. 1992) (reversing the state appeals court's affirmation of parents' convictions for third-degree murder and felony child abuse because parents could not be expected to understand that the religious accommodation law in the child support statute did not also protect them from criminal prosecution). *But see* Walker v. Super. Ct. of Sacramento Cnty., 763 P.2d 852, 855-56 (Cal. 1988) (parent's conviction of involuntary manslaughter and felony child endangerment upheld on facts similar to *Hermanson*).

[39] Eleanor Klibanoff, *Judge Temporarily Blocks Some Texas Investigations into Gender-affirming Care for Trans Kids*, TEX. TRIB. (June 10, 2022), https://www.texastribune.org/2022/06/10/texas-gender-affirming-care-child-abuse [https://perma.cc/MV4R-AMYD].

[40] *See Hermanson*, 604 So. 2d 775.

[41] Wisconsin v. Yoder, 406 U.S. 205, 205–06 (1972).

formal education versus a high school education, parents' liberty to exercise their religion (if they are white and Christian)[42] may restrict children's opportunities. Why should one individual's liberty include the freedom to restrict other people's corresponding liberties or opportunities?

That is not to say that parents of minor children lose their moral right to pursue their own individual conceptions of the good. The CIP does not require children's interests to receive precedence, only *to be regarded as separate from and equally important as parents' interests*. For instance, a child's aspiration to become an Olympic figure skater does not morally obligate a parent to drive them to a rink ninety minutes away for daily practice, or to pay for expensive lessons, even if the family can afford it. Parents are generally in the best position to allocate family resources to satisfy all members' needs, and parents' own projects may foreclose three-hour commutes to skating practice. This decision does not "primarily" affect the child, since it is not essential for the child's well-being and directly affects the adult decision-maker and the entire family by drawing significant family resources. Contrast this with a decision to seek medical treatment for a child, or the decision for a child to receive a high school education: these primarily, directly, concern the child's welfare. A child's health and education are in the domain, primarily, of the child's well-being, and affect the parent's well-being only indirectly because the child depends on the parent and the parent cares about the child. Although the decision about a child's skating skill development affects the whole family and must be balanced with other family members' individual life plans and aspirations, the decision about a child's medical care and education (assuming financial accessibility) is one that affects the child themselves incomparably more and is critical to their well-being. Parents are therefore morally obligated to decide based on the child's best interests, regardless of parental preference. When it is not in a child's best interests to have a parent serve as decision-maker (as in cases of abuse and neglect), the state in its

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[42] Note that Native Americans and Afro-Caribbean practitioners of Santería have not been accorded the same degree of deference for their free exercise of religion. *See* Emp. Div. v. Smith, 494 U.S. 872, 872 (1990) (providing a state may deny unemployment benefits to members of the Native American Church whose employer fired them for using peyote in a religious ceremony). In Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 520–21 (1993), the U.S. Supreme Court reversed the District and Appeals Courts' decisions in favor of the city, whose council had passed ordinances specifically targeting the Church's practice of ritual animal sacrifice. *Id.* at 522. The U.S. Supreme Court recognized the free exercise rights of church members but only after adverse actions by a city council and two federal courts. *Id.* at 520–21. By contrast, the Amish families were each fined $5 for violating a generally applicable compulsory school attendance law and won in state court, prompting the state's appeal to the U.S. Supreme Court. Wisconsin, 406 U.S. at 208–09. The Religious Freedom Restoration Act (RFRA) of 1993 has superseded cases such as *Emp. Div*., Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067–68 (9th Cir. 2008).

parens patriae role should protect the child by securing a decision-maker who will decide in the child's best interests.

To avoid misunderstanding, this argument does not involve removing children from families in cases of alleged educational, medical, or other neglect. Marginalized families and poor families receive disproportionate scrutiny from child welfare agencies who have too much discretion in removal, which happens far too often. Neither is the project to judge whether, in particular circumstances, parental behavior constitutes abuse or neglect. Parents perform critical and difficult social reproductive work for a society that fails to support them adequately. The CIP is not meant to be a weapon to criticize parents, micromanage their decisions, or remove their children from their families. Instead, the CIP project is aimed at considering how current *policy* debates can be resolved by reference to the CIP and an expanded definition of what it means (for society) to neglect children's needs.

Influenced by Rawls (though critical of aspects of his theory), my approach to children's rights—one that recognizes children fully as people—attempts to envision how the institutions of an ideally just society would regard and treat children. In doing so, I have defended the CIP, and here I wish to demonstrate how it can be used to reform particular policies and resolve policy disputes. I put aside the complications introduced by poverty, institutional racism, and other flaws of the United States and other societies. I take for granted that if institutions were just, everyone would have access to the means to eat, adequate housing and education, healthcare and other means of satisfying basic needs and living a life worthy of human dignity. If that were the case, no child would be neglected or abused because their parents were in prison for, or lacked access to treatment for, addiction; or because they could not access decent food or housing; or because children were unsupervised due to lack of safe, affordable childcare. The issues I wish to address might arise even in a society that supported families and ensured them adequate resources. These issues have to do with deliberate adult (including parental) decision-making in a context of viable options, especially when parental liberties or state interests are in tension with children's interests.

However, the use of the CIP to critique the injustices to children created by our current institutions seems entirely appropriate. Society owes children a nourishing diet, adequate housing and education, and access to healthcare and other means of satisfying basic needs, regardless of who their caregivers are and the choices their caregivers make. Children's interests also demand support for their caregivers rather than removal from them. The core question is: what does it mean *for society* to neglect children's needs and use them instrumentally, either for parental happiness and as

subjects of parental rights, or as pawns to advance certain political agendas, rather than as full persons in themselves?

The CIP's purpose is to guide broad social policies that secure children's rights. For example, is it in children's interests, according to public health data, to allow parents to opt them in or out of age-appropriate sex education? Some parents believe that children will become sexually active earlier, and risk teen pregnancy if they receive this education. However, empirical data show the opposite: when children receive comprehensive sex education, they are more likely to delay sexual debut, and less likely to experience a teen pregnancy, sexually transmitted diseases,[43] or even sexual abuse by an adult.[44] We have good public health data, and we should obtain more, about what types of education and other practices conduce to child and adolescent health. The data should be used to set public policy, rather than the preferences of parents and other adults who may be uninformed about the effects of their decisions on the physical and emotional health of youth. Children have a right to have decisions made in their best interests based on the best available empirical data when it exists and is clear. If data tell us that vaccines are the best way to protect children's health, all children (without medical contraindications) should be vaccinated.

Vaccination, sex education, and the like should not be viewed as menu options based on parental preferences. These are the types of situations in which parents may not be the best decision-makers for their children. Parents' health is not directly affected, and they are not always in a position to make informed choices. Parents' right to freely exercise their personal beliefs should not extend to a right to impose their beliefs on their children's minds and bodies. Children should have a competent decision-maker for the particular context and the correct standard should be used (the child's best interests only, or a balance of competing interests similarly affected by the decision, as appropriate in the circumstances).

With the CIP as the standard, who should make decisions for children? In general, the best legal presumption seems to be that a child's caregivers are most likely to know the child well and to love the child, and therefore

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[43] *See generally, e.g.*, John Santelli, Stephanie A. Grilo, Laura D. Lindberg, Ilene Speizer, Amy Schalet, Jennifer Heitel, Leslie Kantor, Mary A. Ott, Maureen Lyon, Jennifer Rogers, Craig J. Heck & Amanda J. Mason-Jones, *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. ADOLESCENT HEALTH 400 (2017) [hereinafter, *Abstinence-Only Policies*] (stating that CRR programs "had favorable effects on self-reported current sexual activity . . . STI's, and pregnancy").

[44] RONALD GOLDMAN & JULIETTE GOLDMAN, CHILDREN'S SEXUAL THINKING: A COMPARATIVE STUDY OF CHILDREN AGED 5 TO 15 YEARS IN AUSTRALIA, NORTH AMERICA, BRITAIN AND SWEDEN 323 (1982) (explaining that children who believe sexual subjects are too taboo to discuss, and who have an inadequate vocabulary to describe sexual abuse, are more at risk of being sexually abused and less able to seek adult intervention).

are in the best position to make individualized decisions for the child when that is required. However, that presumption should be defeasible, and parents should be informed that the CIP limits their authority. Children's emotional needs include being regarded and treated as special, and children need moral guidance, not just substitute decision-making.[45] Larger or more impersonal institutions do not conduce to the sort of intimacy that children need emotionally, or to their development as unique individuals. Neither is it healthy for children's development to have their families' decisions micromanaged or vetoed by an impersonal state. Children are most secure if they trust caregivers with authority over them and regard those caregivers as powerful enough to protect them.[46] Broad social policies should better detect cases of abuse, neglect, or other situations in which children's needs are not being met (perhaps due to parental health or resource challenges). Intervention to assist families and protect children is called for in such cases.

When educational or medical expertise is pertinent, experts generally will be in the best position to decide what is in children's best interests. Exceptions that recognize a child's special circumstances (for example, a medical waiver for a vaccine that is contraindicated for a particular child) should be part of the system, as should a process in which a child or their representative can demonstrate that what is in children's best interests generally is not in a particular child's best interests. Children's own views of what is in their interests should also be accounted for when they are of an appropriate age. For example, if a sixteen-year-old wishes to visit with a grandparent, a parent should not have legal authority to prevent such visitation without a good reason (for example, the grandparent uses illicit drugs with the child or unsafely handles firearms with the child). Under the CIP, children can participate in their own development. Agency over parts of their identities and lives should be gradually transferred to them.

Yet current law leaves such matters almost entirely to parents' discretion.[47] Under the current legal regime, parents who have not been adjudicated as abusive or neglectful have near-total discretion over decisions about their children. Most state statutes define child neglect as involving the failure of a parent or guardian to provide adequate food, clothing, shelter, medical care, or supervision to ensure the child's health, safety, and well-being.[48] Half of the states specify that failure to provide a

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[45] *See, e.g.*, ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 16–20 (2005).

[46] *Id.*

[47] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 57 (2000) (invalidating the trial court's visitation order, sought by grandparents, which was deemed in the children's best interest, on grounds that the order violates the mother's fundamental right to control the upbringing of her children).

[48] CHILD WELFARE INFORMATION GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT (2019).

child with state-mandated education can be regarded as neglect.[49] In ten states, failure to provide necessary medical care *may* constitute neglect.[50] However, under the federal Child Abuse Prevention and Treatment Act ("CAPTA"), and under many state statutes, parents and guardians are excused from providing treatment that is against their religious beliefs.[51] In nearly all states, emotional maltreatment counts as child abuse. But emotional abuse is generally defined as "injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition" and "injury as evidenced by anxiety, depression, withdrawal, or aggressive behavior."[52] Seventeen states permit parents or guardians to physically discipline a child if the discipline is deemed "reasonable" and does not cause "bodily injury" to the child.[53] Thus, much conduct that is against children's interests is legally permitted.

Moreover, despite the expectation that adult family members will act in children's best interests out of affection for them, an alarming number of children are physically and sexually abused,[54] neglected,[55] abandoned,[56] and even murdered by adult family members.[57] Intergenerational trauma,[58]

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[49] *Id.* at 2–3.

[50] *Id.* at 3.

[51] *Id.* at 4.

[52] *Id.* at 3.

[53] *Id.* at 4.

[54] The Centers for Disease Control and Prevention ("CDC") estimates that one in four girls and one in thirteen boys experiences sexual abuse, although many (possibly most) cases go unreported. More than 90% of this abuse is perpetrated by a family member or someone known by the child. CDC, *Fast Facts: Preventing Child Abuse*, https://www.cdc.gov/violenceprevention/childsexualabuse/fastfact.html [https://perma.cc/8RGC-3QU6].

[55] According to the CDC, at least one in seven children is abused or neglected in the United States each year, and probably more because many cases are not reported. During 2020, 1750 children died of abuse and/or neglect. *Id.*

[56] Laura Navne & Marie Jakobsen, *Child Abandonment and Anonymous Surrendering of Babies: Experiences in Ten High-Income Countries,* 16 VULNERABLE CHILD. & YOUTH STUD. 195, 201 (2021). From 1999 to 2020, 3524 infants in the United States were abandoned legally under state safe haven laws, which allow parents to abandon them at a hospital emergency department, fire station, or police station. Yet study authors note that safe haven laws might not benefit children overall, since, for example in California, the increase in abandonments after implementation of safe haven laws "far exceeds the decrease in illegal abandonments." *Id.* at 202.

[57] Parents who kill minor children account for 2.5% of all homicide arrests in the United States. Phillip J. Resnick, *Filicide in the United States*, 58 INDIAN J. PSYCHIATRY S203, S204 (2016).

[58] *See, e.g.,* VAN DER KOLK, *supra* note 19, at 20–21.

mental health crises involving addiction,[59] poisonous gender norms,[60] and lack of access to health care and family support infrastructure,[61] along with other structural factors, create barriers to children's well-being. In practical terms, children have very little legal protection when it comes to their bodily integrity or age-appropriate liberty.[62] Although the law cannot and should not protect all moral rights, children's vulnerability and unavoidable subjection to adult authority makes their position unique. Unable to protect themselves, children should receive special legal protection under the CIP.

Parents in the United States are required by state laws to provide their children some form of education,[63] but they have wide discretion over how to accomplish that. They may choose public or private school, or may home-school their children. Homeschooling standards range from nonexistent to

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[59] *See generally* BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018) (documenting how opioid addiction spread across Central Appalachia, destroying and ending lives and devastating communities, in large part because a politically powerful pharmaceutical industry effectively silenced public concern and resisted regulation). Many teenagers and adolescents have died from the opioid/heroin epidemic, sometimes from a single dose. *Id.* at 61, 91. Some parents in economically depressed rural areas, viewing federal disability benefits as one of the few means of survival, set their children up to be able to collect by pressuring their doctors to diagnose them with ADHD in childhood. A high school student, when asked about his career aspirations, reported that he hoped to collect federal disability benefits one day. *Id.* at 124. Macy also shares a story about a young woman who overdosed on heroin in a parked car with her infant in a car seat, and another mother in her mid-twenties who became addicted to opioids after receiving a prescription to relieve mastitis from breastfeeding; she progressed to heroin when she could no longer obtain prescription refills, and her eighty-year-old grandmother raised her child. *Id.* at 190–91. The systemic effects of poverty are devastating for children and the adults that some will become.

[60] *See generally* KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY (2017); Michael Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in* TOWARD A NEW PSYCHOLOGY OF GENDER 223 (Mary M. Gergen & Sara N. Davis eds., 1997) (explaining the connection between masculinity, sexuality, and becoming a "man").

[61] James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, *in* THE INEQUALITY READER 1900 (David Grusky et al. eds., 2011) (explaining how a disadvantaged household environment early in a child's life is costly to the child's academic development); Sean Reardon, *Education and Inequality*, *in* OCCUPY THE FUTURE (David Grusky et al. eds., 2013); *see, e.g.*, Janet Currie, *Inequality at Birth: Some Causes and Consequences*, 101 AM. ECON. REV. 1, 4 (2011).

[62] *See generally, e.g.*, DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189 (1989) (stating that a state has no constitutional duty to protect a four-year-old against a parent's violence, even when it was on notice that the violence was ongoing, and when it resulted in the child suffering a life-threatening coma, permanent brain damage and disability). As Justice Blackmun points out in his dissent, the *DeShaney* opinion relied heavily on the state's claim that it had not created the danger suffered by the child. However, this fails to account for the wide scope of legal authority over children that the state grants to parents. This grant of authority is itself state action, rather than state inaction. *Id.* at 212–13 (Blackmun, J., dissenting). I would add that, given children's vulnerability, a child should enjoy a constitutional right to affirmative state protection, if not through the due process clause, then by constitutional amendment.

[63] *State Education Practices (SEP)*, NAT'L CTR. FOR EDUC. STAT., (2017), https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/Q44R-DQHP].

rarely enforced, and some students whose parents elect "homeschooling" may not give them an acceptable basic education. For example, a sixteen-year-old child, homeschooled by his mother under a Virginia religious exemption statute (alongside his eleven siblings, including a middle school-aged student who could not read), "had never written an essay. He didn't know South Africa was a country," and "couldn't solve basic algebra problems."[64] Virginia did not require parents to demonstrate that they had a high school diploma or that the child was proficient in any subject. When the child realized he was behind and asked his mother for help, she instructed him to pray. Similar cases have been documented in many states. Often, there is no recourse for children who wish to attend school and learn if their parents will not allow them to do so.[65] Although parents of children who attend public school have no legal right to tailor the curriculum to their preferences,[66] many schools provide parents an "opt-out" provision when they teach anything contentious, like sex education, which can leave children vulnerable to misunderstanding and misinformation, to say nothing of sexually transmitted infections, teen pregnancy, and sexual abuse.[67]

The homeschooling loopholes not only harm individual children, but also harm other members of society. Additionally, they undermine important interests of the state's reproductive role. For example, there is a white supremacist homeschooling network which apparently allows parents to fulfill their obligations under state school-attendance laws by educating elementary school-aged children this way.[68] Thus, children can be insulated from learning about the civic virtue of respect and the value of diversity, and as our nation grows more diverse, children so insulated will struggle to function within it. Moreover, this state-sanctioned activity poisons cultural attitudes and will surely have downstream victims as misguided enmity generated by misunderstanding flows into public discourse. Although First Amendment fundamentalism[69] ties the government's hands when it comes to most hate speech, the government has the authority to close these harmful

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[64] Carmen Green, *Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L. J. 1089, 1090–92 (2015).

[65] *Id.* at 1094.

[66] *See* Mozert v. Hawkins, 827 F.2d 1058, 1058–70 (6th Cir. 1987) ("If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." (quoting McCollum v. Bd. of Ed., 333 U.S. 203, 235 (1948)).

[67] *See, e.g.*, Soc'y for Adolescent Health & Med., *supra* note 43; GOLDMAN & GOLDMAN, CHILDREN'S SEXUAL THINKING, *supra* note 44, at 323.

[68] Omar Jimenez, *Ohio's Education Department Is Investigating a White Supremacist Homeschooling Network that Shares Nazi-Related Resources*, CNN (Feb. 2, 2023), https://www.cnn.com/2023/02/02/us/ohio-investigating-white-supremacist-homeschooling-network/index.html [https://perma.cc/PRB6-PYYJ].

[69] *See infra* text accompanying note 131 for a discussion of First Amendment fundamentalism.

homeschooling loopholes and use education effectively to meet children's present and future needs. Instead, by passing EGOs, lawmakers prevent students from learning about social background conditions, their effects on people with similar and different identities and experiences, and about how social institutions can better fulfill all our needs. Society can be structured to incline people to be tolerant, civil, and respectful. But we are going in exactly the wrong direction.

B. WRONGFUL POLITICAL AND SOCIAL USE AND NEGLECT OF CHILDREN

In political arguments, rhetoric about the well-being of children can be emotionally powerful. Sometimes it is sincerely deployed to increase children's well-being and does so. For example, in *Brown v. Board of Education of Topeka*[70] (without explicitly overturning *Plessy v. Ferguson*,[71] which ruled that separate but equal facilities were permitted by the Fourteenth Amendment), the Court held that separate educational facilities are inherently unequal because they inculcate in children a profound feeling of inferiority. However, appeals to children's interests are also made to benefit more socially powerful constituencies even when they fail to help, or even harm, children. For example, arguments against abortion, and even contraception, [72] can harm children. These practices are frequently characterized as killing children, even though low-income children have even fewer resources when their mother's attempt to prevent pregnancy or seek abortion is thwarted. Additionally, forcing mothers who receive government assistance to identify children's fathers for child support collection can undermine any chances children might have for a relationship with their low-income father.[73]

Simultaneously, children's interests are completely ignored in many political debates that directly affect them. For example, opponents of firearm regulations maintain their opposition even though firearms are the

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[70] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[71] Plessy v. Ferguson, 163 U.S. 537, 537–38 (1896).

[72] In Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 682–83 (2014), the Court recognized the right of owners of a closely held for-profit corporation to refuse to provide contraceptive coverage to employees as required by the federal Patient Protection and Affordable Care Act of 2010. The holding relied on the federal Religious Freedom Restoration Act's protection of the owners' belief that life begins when an ovum is fertilized, such that contraception is functionally equivalent to abortion. *Id.* at 691. Opponents of legal abortion frequently claim that aborting a pregnancy kills a child. *See, e.g.*, Kaia Hubbard, *Making Abortion Murder*, U.S. NEWS (May 6, 2022, 4:27 PM), https://www.usnews.com/news/national-news/articles/2022-05-06/the-push-to-make-fetuses-people-and-abortion-murder [https://perma.cc/P69M-BJFU].

[73] HATCHER, *supra* note 15, at Ch. 5.

top cause of death to children and teens in the United States.[74] Additionally, children regularly experience the trauma of active shooter drills in schools because mass shootings are probable enough to require them. The United States has tolerated dangerous and cruel labor exploitation of immigrant children.[75] Often, the very lawmakers who vote against effective firearm and labor regulation also vote to cut child tax credits, supplemental nutrition assistance, and healthcare benefits[76] that would assist the most vulnerable children. They use possible "harm to children" to advance their agendas even though those very agendas actually harm children or deny them what they need to survive.

While ignoring actual harms to children, these political actors seek to ban celebratory, identity-affirming drag shows[77] and to deprive some children of medically necessary healthcare by threatening healthcare providers and parents with serious legal consequences. Anti-gay and anti-trans policies often are presented as ways to protect children from sexual abuse or "recruitment" to identities and orientations that certain groups disfavor even though child sexual abuse is most likely to be committed by heterosexual men,[78] and LGBTQ+ children are certainly harmed by policies that stigmatize them and deny them medically necessary care. Gender-affirming health care can help alleviate the negative mental health outcomes that trans and non-binary youth often experience, but more than twenty

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[74] Matt McGough, Krutika Amin, Nirmita Panchal & Cynthia Cox, *Child and Teen Firearm Mortality in the U.S. and Peer Countries*, KAISER FAM. FOUND. (July 18, 2023), https://www.kff.org/global-health-policy/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries [https://perma.cc/8EFZ-K5MN].

[75] Hannah Dreier, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, N.Y. TIMES, (Apr. 17, 2023), https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html [https://perma.cc/CD2L-3TTA].

[76] *See* Tami Luhby, *Child Tax Credit Enhancement Fails to Make It into Federal Spending Bill*, CNN (Dec. 20, 2022, 6:56 PM), https://www.cnn.com/2022/12/20/politics/child-tax-credit-spending-bill/index.html [https://perma.cc/4TNJ-DGAF]; *see* Catie Edmondson, *House G.O.P.'s Plan to Cut Food Stamps Threatens a Tough Vote*, N.Y. TIMES (Apr. 6, 2023), https://www.nytimes.com/2023/04/06/us/politics/food-stamps-house-republicans-farm-bill.html [https://perma.cc/XG8J-MAWL]; *see* Edwin Park, *Center for Renewing America Budget Plan Would Cut Federal Medicaid Spending by One-Third, Repeal Affordable Care Act's Coverage Expansions*, CTR. FOR CHILD. & FAMILIES (Feb. 27, 2023), https://ccf.georgetown.edu/2023/02/27/center-for-renewing-america-budget-plan-would-cut-federal-medicaid-spending-by-one-third-repeal-affordable-care-acts-coverage-expansions [https://perma.cc/9R6S-94AN].

[77] Suzanne Nossel, Opinion, *The Drag Show Bans Sweeping the US Are a Chilling Attack on Free Speech*, THE GUARDIAN, (Mar. 10, 2023, 6:04 PM), https://www.theguardian.com/culture/commentisfree/2023/mar/10/drag-show-bans-tennessee-lgbtq-rights [https://perma.cc/UGE5-B56X] ("The breadth of these bills is staggering, and many go beyond their purported goals of protecting children from obscenity.").

[78] *E.g.*, Kurt Freund & R.J. Watson, *The Proportions of Heterosexual and Homosexual Pedophiles Among Sex Offenders Against Children: An Exploratory Study*, 18 J. SEX MARITAL THERAPY 34, 34 (1992).

states have recently proposed—and Alabama and Arkansas have actually passed—legislation to prohibit evidence-based, medically necessary gender-affirming care for minors.[79] The American Medical Association,[80] American Academy of Pediatrics,[81] and other medical associations have strongly opposed these types of measures, and their constitutionality is clearly in question.[82] The political use of "harm to children" is terrifyingly dystopian when used to deprive children of necessities for their well-being in order to advance a political agenda that ignores actual harm to children and works to defund social supports for them and their families, including essential health care and education.

Using children to advance political agendas, or to fulfill parents' needs for affection, legacy, or care in their advanced years is a grave moral wrong. The moral reasoning is provided clearly by eighteenth-century philosopher Immanuel Kant, who authored the most influential secular moral theory of our time.[83] Within a Kantian moral framework, an action is morally wrong when it fails to respect a rational being's self-government. Human beings are essentially rational, even when they are still developing or are faced by a disability that makes it impossible for them to protect their own interests at a particular time. Persons are thus not to be used in any way for others' purposes to the detriment of their own interests. Such use treats them as objects, dehumanizes them, and makes them pawns in the wrongdoer's scheme. Undermining by force, manipulation, or deception the choices of a person capable of rational self-government is wrong no matter what it can accomplish. Although children and those presently not capable of rational

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[79] Jack Resneck, Jr., *Everyone Deserves Quality Medical Care Delivered Without Bias,* AM. MED. ASS'N (Aug. 16, 2022), https://www.ama-assn.org/about/leadership/everyone-deserves-quality-medical-care-delivered-without-bias [https://perma.cc/W674-SF7X].

[80] *Id.*

[81] Moira Szilagyi, *Why We Stand Up for Transgender Children and Teens*, AM. ACAD. PEDIATRICS (Aug. 10, 2022), https://www.aap.org/en/news-room/aap-voices/why-we-stand-up-for-transgender-children-and-teens [https://perma.cc/4F9H-V8EV].

[82] *See, e.g.*, Associated Press, *Judge Strikes Down Arkansas Ban on Gender-Affirming Care for Transgender Minors*, POLITICO (June 20, 2023, 5:22 PM), https://www.politico.com/news/2023/06/20/arkansas-gender-affirming-care-transgender-minors-00102769 [https://perma.cc/2AG3-RW8P] (ruling that the law violates the Fourteenth Amendment due process and equal protection rights of trans youth); *see* Associated Press, *Judges in Kentucky and Tennessee Block Parts of Transgender Youth Care Bans*, NBC NEWS (June 29, 2023, 8:09 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/judges-kentucky-tennessee-block-parts-transgender-care-bans-rcna91832 [https://perma.cc/6L9R-CFJ4]; *see US Judges Across Country Block Healthcare Bans for Trans Youngsters*, THE GUARDIAN (July 3, 2023, 10:40 AM), https://www.theguardian.com/us-news/2023/jul/03/us-judges-block-transgender-healthcare-bans [https://perma.cc/S6XW-3B3C]; *see* Reuters, *Court Reinstates Tennessee Ban on Gender-Affirming Care for Trans Youth*, THE GUARDIAN (July 8, 2023, 10:10 AM), https://www.theguardian.com/us-news/2023/jul/08/tennessee-transgender-care-ban-youth-court [https://perma.cc/5LT2-VNC2].

[83] *See, e.g.*, ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY xiii (1989).

choice may be treated paternalistically without violating moral duties owed to them, a necessary condition of that treatment is that it be for the child's own good, not the good of another.[84] This is the foundation of the CIP: paternalistic decisions about children, which substitute for those children's own decision-making in matters that primarily impact those children, should be made on those children's behalf for those children's own benefit. Using children for other ends, especially when against their interests, is a serious moral wrong against them, and it is a wrong committed in the United States with alarming frequency.

C. HOW EDUCATIONAL GAG ORDERS DIRECTLY THREATEN CHILDREN'S INTERESTS AND MORAL RIGHTS

Educational Gag Orders are another legislative trend exemplifying the use of the "harm to children" rhetoric in order to advance political ends that run against the general interests of children and directly harm many individual children. To many, EGOs appear to be motivated not by misguided aims to advance children's welfare, but by ambitions to reinstate traditional gender norms and to roll back the social equality gains of the civil rights era.[85]

A key target of EGOs is critical race theory ("CRT"), which emerged in the law school curriculum in the 1960s. EGOs are eerily apt illustrations of a central claim of CRT: the law is an instrument for reproducing social power relations, including white-dominant race hierarchy and heteropatriarchy.[86] EGOs violate First Amendment constitutional norms of free speech, which U.S. courts have interpreted to prohibit the regulation of hate speech. The court's interpretation also prohibits a university that is attempting to deter members of its campus community from targeting other members with racial epithets. The proper response to such speech, the courts maintain, is more speech.[87] Dominant groups want to have it both ways: to be able to yell the N word at their peers on campus but not allow public

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[84] *See, e.g.*, Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFS. 249, 256–65 (1995); *see also* Onora O'Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFFS. 252, 262–64 (1985).

[85] The U.S. Supreme Court's recent decision in Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230–31 (2023) (ruling that affirmative action in university admissions violates the Equal Protection Clause of the Fourteenth Amendment) is another example of this apparent campaign.

[86] *See generally, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (summarizing critical legal studies, the more general approach to which critical race theory and feminist jurisprudence belong); Harris, *supra* note 1; Delgado, *About Your Masthead*, *supra* note 1; MACKINNON, *supra* note 1.

[87] Corry v. Stanford Univ., No. 740309, 1, 35–36 (Cal. Super. Ct. Feb. 27, 1995), web.archive.org/web/20050419211842/http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm [https://perma.cc/F3XG-LBTU].

schools to teach them about aspects of the world that might nullify such an urge. If the answer to "offensive"[88] speech is more speech, legally blocking the prescribed remedy strips away the pretense that the law is committed to racial equality.

Hostility against people based on their demographic characteristics often arises from lack of knowledge or understanding of relevant features of social background conditions. Epithets, jokes, and stereotypes express this hostility as well as reinforce it culturally.[89] Early CRT scholars proposed tort remedies to deter hate speech and compensate victims for harm.[90] Given the Anglo-American legal framework for understanding causation, however, it is extremely difficult to satisfy a burden of proof to connect particular individuals' speech acts to particular harms.[91] How many racist jokes or remarks must a hiring manager hear in their lifetime before they develop an implicit bias[92] that results in hiring the white candidate over the Black candidate? Is the last person to influence the manager with racist expression, forming the implicit bias, the person who is causally responsible? Are all the people whose accumulated expression caused the bias responsible proportionate to how much of the bias they caused? Consider this analogy: If a dozen factories dump waste into a river and it becomes polluted, causal responsibility might be imputed to each proportional to the amount of waste they dumped. In a tort action the downstream residents could recover damages to clean contaminated property, cover medical costs if disease develops, and decontaminate the river itself. Perhaps the factories would be fined and ordered to install filtration mechanisms to prevent further pollution.

Could we use this strategy to address the contamination of our public discourse by hierarchy-reinforcing falsehoods and self-esteem-destroying verbal attacks? Are we prepared to create tort remedies or fines to spread

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[88] I have argued that much of the speech courts would label "offensive" is actually harmful. *See* Melina Constantine Bell, *John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm*, 33 UTILITAS 162, 173 (2021).

[89] *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 94–95 (2018).

[90] *E.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C.L. L. REV. 133 (1982); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1343, 1354–55 (1992) (suggesting that a victim compensation system could be a fairer way to address the costs of speech harms, compared with leaving its victims to bear the entire burden, particularly since such burdens tend to be systematically and unevenly distributed based on social position).

[91] *See, e.g.*, Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 332–34 (7th Cir. 1985) (striking down on First Amendment grounds an Indianapolis civil rights ordinance granting those harmed by pornography a cause of action to sue, for damages, certain parties involved in its creation and distribution).

[92] To learn more about implicit bias, or to experience an implicit bias test, visit Harvard's Project Implicit at https://implicit.harvard.edu/implicit [https://perma.cc/7VZ5-9DBJ].

the costs of harm caused by perpetuation of antisemitic conspiracies, stereotypes about Black and immigrant criminality, or stereotypes about female irrationality? It has been proposed,[93] but would it work? It is not clear. What is clear, however, is that the political winds seem even less favorable to that sort of solution than when it was initially proposed. Besides, legal coercion has been so misused historically—and then so much more to reinforce status hierarchies than to dismantle them—it does not seem like a promising option. Such actions could even induce counterproductive backlash. So, do we throw up our hands in despair?

Maybe not yet, because it is possible that righting a different wrong—which should be righted anyway—will create positive externalities. Our society owes its children an accurate-as-possible picture of the world and escape from the distorted cultural myths and ideologies that one generation has transmitted to the next, not by persuasion, but by cultural osmosis or by practices deliberately structured to circumvent the critical reason of young people (such as abstinence-only sex education and drug use prevention programs employing scare tactics). Adults often say that bypassing children's critical reason is for their own good, but adults are in denial about how this makes adults' lives easier and children's lives harder. For example, "protecting" children from learning about death, sex, crime, their country's racist past, and so on, is not possible. Though adults might convince themselves otherwise, it merely allows adults and children to avoid present discomfort while creating greater confusion for children in the long run. Meanwhile, there is an urgent need for children to know some things about themselves, their families, and their peers right away.

According to the Trevor Project, which the U.S. Department of Health and Human Services designated as a White House resource for bullying and suicide prevention, LGBTQ+ youth are at a sharply increased risk for numerous negative outcomes including suicide. [94] In the last year, 45% of LGBTQ+ youth aged 13-24 seriously considered suicide, with nearly 20% of trans and nonbinary youth actually attempting suicide.[95] Only 37% of LGBTQ+ youth felt supported at home, but those with supportive schools (55%) attempted suicide at lower rates.[96] 73% of LGBTQ+ youth reported symptoms of anxiety, and 58% reported symptoms of depression.[97]

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[93] *E.g.*, Delgado, *supra* note 90; Schauer, *supra* note 90.

[94] THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH, https://www.thetrevorproject.org/survey-2022 [https://perma.cc/3NGC-TL5U].

[95] *Id.* at 4.

[96] *Id.* at 20.

[97] *Id.* at 8.

LGBTQ+ youth are also at high risk for homelessness[98] and substance abuse.[99] Because youth spend so much time in school and encounter such high rates of bullying and stigma there, health experts identify school as a prime site to integrate LGBTQ+ education to help support youth.[100]

Youth who belong to a marginalized racial group, regardless of sexual orientation and gender identity, face higher and increasing rates of anxiety, depression, substance use disorders, suicide, community violence, and trauma, including intergenerational trauma.[101] Risks for negative outcomes are compounded for youth with intersecting racial, ethnic, and LGBTQ+ identities, and further compounded by low socioeconomic status.[102] Attention to antiracist curricula and teaching methods, along with antiracism education, can improve the cognitive, social, and emotional learning of *all* children, but especially those with marginalized ethno-racial identities.[103] Empirical evidence strongly supports—and none calls into question—that antiracism education is in the best interests of children, especially but not only children with marginalized ethno-racial identities.[104] Inclusive LGBTQ+ education likewise benefits all children.[105]

Legislative attempts to restrict or ban teaching about institutional racism, sexism, and LGBTQ+ identity in public K-12 and higher education

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[98] *See, e.g.*, Harmony Rhoades, Joshua A. Rusow, David Bond, Amy Lanteigne, Anthony Fulginiti, & Jeremy T. Goldbach, *Homelessness, Mental Health and Suicidality Among LGBTQ Youth Accessing Crisis Services*, 49 CHILD PSYCHIATRY & HUM. DEV. 643, 649–50 (2018).

[99] Michelle M. Johns, V. Paul Poteat, Stacey S. Horn & Joseph Kosciw, *Strengthening Our Schools to Promote Resilience and Health Among LGBTQ Youth: Emerging Evidence and Research Priorities From the State of LGBTQ Youth Health and Wellbeing Symposium*, 6 LGBT HEALTH 146, 146 (2019).

[100] *Id.* at 152.

[101] Andres J. Pumariega, Youngsuhk Jo, Brent Beck & Mariam Rahmani, *Trauma and US Minority Children and Youth*, 24 CURRENT PSYCHIATRY REPS. 285, 285–295 (2022).

[102] *See* Sylvia Shangani, Kristi E. Gamarel, Adedotun Ogunbajo, Jieyi Cai & Don Operario, *Intersectional Minority Stress Disparities Among Sexual Minority Adults in the USA: The Role of Race/Ethnicity and Socioeconomic Status*, 22 CULTURE, HEALTH & SEXUALITY 398, 399 (2019).

[103] Greg Wiggan & Marcia J. Watson-Vandiver, *Pedagogy of Empowerment: Student Perspectives on Critical Multicultural Education at a High-Performing African American School*, 22 RACE, ETHNICITY & EDUC. 767, 783–84 (2019); Susan E. Smalling, *Overcoming Resistance, Stimulating Action and Decentering White Students Through Structural Racism Focused Antiracism Education*, 27 TEACHING IN HIGHER EDUC. 601, 611–12 (2022); *see generally, e.g.*, Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *How Racially Diverse Schools and Classrooms Can Benefit All Students*, THE CENTURY FOUND. (Feb. 9, 2016), https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students [https://perma.cc/9KMZ-3BPV].

[104] *See, e.g.*, CHRISTINE E. SLEETER, THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW 8 (2011) (benefits for students of color); *id.* at 17–19 (benefits for white students); LaShorage Shaffer, Megan Vinh, Dorothy Shapland & Courtney O'Grady*, Practicing Anti-Racism as Inclusion: Start in Early Childhood!* 55 TEACHING EXCEPTIONAL CHILD. 350, 353 (2022).

[105] *See, e.g.*, Johns et. al., *supra* note 99.

(EGOs), as well as to restrict or ban diversity and inclusion training in educational and workplace settings have proliferated over the last two years. They are the backlash to antiracism programs developed after George Floyd was murdered by police, and to the growing acceptance (for example, legal recognition of same-sex marriage as constitutionally guaranteed) and public visibility of persons with LGBTQ+ identities. Proponents of these measures seem committed to returning to a cultural order they find comfortable, which, whether or not they are aware, affords them special privileges.

EGOs appear calculated to discourage or prohibit educational discussion of race and gender in the United States, especially discussion implying that race and gender discrimination and inequality continue to exist in systemic and institutional forms. Ten states have EGOs[106] that ban curricular materials that "promote, normalize, support, or address lesbian, gay, bisexual, or transgender (LGBT) issues or lifestyles."[107] Five states allow parents to opt their children out of discussions of LGBTQ+ issues,[108] which signals to children that the subject is taboo or controversial and otherizes LGBTQ+ people and identities. EGOs that target antiracism list vague prohibited or "divisive concepts" to be avoided. List items misrepresent what actually is taught, forbidding, for example, the teaching that one race is inherently superior to another, that one's race determines one's moral character, or that a person should feel distress or be discriminated against because of their race or sex.[109] Others caricature parts of the curriculum that might teach about institutional racism or sexism by forbidding the teaching that "the United States is fundamentally racist or sexist" or "meritocracy or traits such as hard work ethic are racist or sexist or were created by a particular race to oppress another race."[110] Some ban what they refer to as race or sex stereotyping or "scapegoating,"[111] but their intended effect appears to be to advance a color-blindness narrative. Not being racist or sexist, on this notion, is *not seeing* difference or inequality, since mentioning it automatically assigns blame for injustice to the heroic Founders and all white men. Some specifically ban study of *The New York*

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[106] *See Equality Maps: LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [https://perma.cc/W2AC-ALLP] (indicating that Alabama, Northern Arkansas, Northern Florida, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Oklahoma, and Texas have bans).

[107] H.B. 800, 112th Gen. Assemb. (Tenn. 2021).

[108] MOVEMENT ADVANCEMENT PROJECT, *supra* note 106.

[109] JONATHAN FRIEDMAN & JAMES TAGER, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH (Nov. 2021), https://pen.org/report/educational-gag-orders [https://perma.cc/W55G-39MB].

[110] State lists of "divisive" or prohibited concepts often borrow heavily from former President Trump's Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020). FRIEDMAN & TAGER, *supra* note 109.

[111] FRIEDMAN & TAGER, *supra* note 109.

Times 1619 Project,[112] or "critical race theory," used as a catch-all for study of institutional racism or any antiracism program. At least one of the antiracism forms of EGO has become the law in nine states, and is proposed or pending in at least a dozen more.[113]

Teachers, professors, and other education professionals are uncertain what they legally can say about any of the subjects restricted by EGOs. The language tends to be so vague or ambiguous that it is either designed to chill speech on any of the mentioned subjects or will have the effect of doing so.[114] That is, the EGO prohibitions will cause education professionals to remain reticent on subjects that might lead them into legal trouble even when the law would not prohibit what they would have said. Not only is this literal government censorship—the harm that the First Amendment is supposed to safeguard Americans against—but it also deprives children of a pedagogically warranted and responsible curriculum that will equip them to be well-informed, productive, healthy, and fully participating members of society.

As we have seen, states' interests in generating particular cultural reproductive values can conflict with children's interests in accessing educational support conducive to, or even necessary for, their well-being. Under the CIP, governments' reproductive interests in children must yield to the rights of children as persons to have decisions made for them that are justified by their best interests using appropriate expertise. Furthermore, granting parents a fundamental right to control the upbringing of their children violates children's rights as separate persons by permitting their parents' preferences to sharply curtail children's life opportunities. Instead, parents' authority over children should be justified and bounded by children's interests. Concerns about children should not be wielded as a political tool to accomplish purposes unrelated to children's well-being (such as maintaining, or returning to, the cultural order one favors) or inimical to children's well-being (such as abstinence-only sex education).

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[112] *The 1619 Project*, N.Y. TIMES, https://www.nytimes.com/interactice/2019/08/14/magazine/1619-america-slavery.html [https://perma.cc/6YN6-BQ5R] (last visited Nov. 12, 2023).

[113] Arizona, Arkansas, Idaho, Iowa, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas have antiracism-targeted EGOs. *See PEN America Index of Educational Gag Orders* (2023), https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870 [https://perma.cc/TP7K-JD5T].

[114] *See generally* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 114 (2019) (addressing how lawful speech can be "chilled" by ambiguity and vagueness). Franks also discusses campus policies that penalize students for engaging "in violence or other disorderly conduct that disrupts others' free speech." *Id.* at 144. She finds such policies chilling because it is unclear what they prohibit: "[C]hanting quietly? Holding up large signs? Turning one's back to the speaker?" *Id.*

III. HOW THE CHILD'S INTERESTS PRINCIPLE CAN INTERRUPT REPRODUCTION OF SOCIAL OPPRESSION

Using the CIP to make decisions that primarily affect a child, regardless of who makes the decision, is what we owe children as separate persons. This holds independently of its consequences for society at large, just as procedural due process is owed to every person even if in some cases bypassing it would produce a better result for society as a whole. An ancillary virtue of the CIP, however, is that it holds promise for interrupting the reproduction of social oppression, for reducing speech harm, and for improving social discourse, institutions, and interpersonal relationships among members of society. As Part II illustrates, EGOs violate the CIP and harm children. EGOs also conflict with constitutional principles because they run counter to the First Amendment's original purpose to protect dissenters from government suppression of criticism and ideas it opposes. State legislatures that wish to suppress knowledge about institutional racism, sexism, LGBTQ+ identity, and other forms of identity-based oppression seem perfectly willing to do it in defiance of the First Amendment. Meanwhile, the First Amendment has been interpreted to protect activities that the Founders surely never had in mind, like strip clubs[115] and unlimited individual and corporate donor contributions to political campaigns.[116] Even the current U.S. Supreme Court will find EGOs difficult to defend. But without the CIP, opponents of social progress will find other ways to use children to galvanize a status quo that privileges them but harms children and children's futures. Those futures are ones in which the most effective remedies for social oppression are legally prohibited.

In Part III, I explain how the CIP can interrupt the reproduction of social oppression, even though that is not its primary purpose or justification. Part A begins with the lesson from critical legal studies that the law is designed to preserve the order established by the status quo and protect powerful interests from forces that might challenge them. Part B presents examples from First Amendment law, and Part C briefly describes jurisprudential models for understanding law and power, which together

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[115] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560–61 (1991). Sexually charged nude dancing in a club marketed to male clientele is protected by the First Amendment as a form of expression, but it was not an impermissible burden, and it did not change the dancers' "message of eroticism and sexuality" to require dancers to be minimally clothed. *Id.* at 560. The Court found the ordinance requiring pasties and G-strings to be an incidental restriction on speech aimed at preventing crime and prostitution rather than at the "speech element" *Id.* at 584, 561. The "substantial government interest" that justified the requirement for pasties and G-strings was identified as "protecting societal order and morality." *Id.* at 567–68.

[116] *See* Melina Constantine Bell, Citizens United*, Liberty, and John Stuart Mill*, 30 NOTRE DAME J. L. ETHICS & PUB. POL'Y ONLINE 1, 2, 22–23 (2016).

illustrate how law reinforces the interests of the powerful. Part D makes explicit how childhood education and socialization, guided by the CIP, may be our best tool for interrupting social oppression.

A. CRITICAL LEGAL STUDIES INSIGHTS INTO IDENTITY NEUTRALITY, CONTEXT, AND EQUAL PROTECTION OF LAW

As their five children slept, Russ and Laura Jones woke to the sound of voices and a cross burning in their yard. The only Black family in the neighborhood, they had moved into a four-bedroom home in St. Paul, Minnesota a few months earlier. Shortly after they moved in, their car tires were slashed, a car window was broken, and a teenager called one of the children by the N word. Now they were being subjected to an established and well-recognized symbol of white supremacy and intimidation. The state trial court convicted the two men who perpetrated the cross-burning under St. Paul's hate crime ordinance. The case[117] percolated up to the U.S. Supreme Court, where Justice Scalia wrote for a majority voting to strike down the St. Paul ordinance. The Court acknowledged that crimes such as arson and trespass could be prohibited, and these defendants might be found responsible for committing those crimes. But to target for criminal prosecution acts that are racially motivated, the Court explained, is unconstitutional. It expresses "special hostility" to a particular point of view, in this case white supremacy.[118]

Thus, the government was constitutionally forbidden from expressing special hostility to white supremacy, but free to treat abortion with hostility, even when there was a constitutionally protected right to it.[119] In *Rust v.*

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[117] R.A.V. v. City of St. Paul, 505 U.S. 377, 380, 391 (1992) (holding, unanimously, that the St. Paul ordinance prohibiting as disorderly conduct (a misdemeanor) the act of placing "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was facially invalid because it prohibited "speech" based on its viewpoint). The Court rejected St. Paul's claim that its ordinance only prohibited "fighting words," which do not receive First Amendment protection, because the prohibition applied only to fighting words based on certain protected classes rather than to all fighting words. *Id.* at 391.

[118] Delgado, *supra* note 90, at 133–36 (discussing *R.A.V.*, 505 U.S. 377).

[119] Roe v. Wade, 410 U.S. 113, 169–70, 149–50 (1973) (recognizing the fundamental right of a pregnant person to obtain an abortion against which state interests in maternal safety and fetal life would have to be balanced by any permissible legislation). The constitutional right to obtain an abortion was recognized until it was overturned by Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022). Therefore, when Rust v. Sullivan, 500 U.S. 173 (1991) was decided, there was a constitutional right to abortion.

Sullivan,[120] the U.S. Supreme Court upheld Health and Human Services regulations that prohibited healthcare providers who receive federal Title X funds for family planning services from speaking with their patients about or referring them to abortion services. According to the Chevron doctrine,[121] courts should defer to an administrative agency's interpretation of a statute so long as that interpretation is plausible and not in conflict with the intent expressed by Congress in the statutory language. The statutory language does not refer specifically to counseling about abortion or referrals for abortion.[122] In response to the healthcare providers' claim that the "gag order" violated their First Amendment rights, the Court opined that it did not because the agency can limit the use of Title X funds to the purposes of the program receiving funds, and can disallow the use of funds to support other activities (such as discussing matters outside the scope of the program).[123] The Court regarded the speech prohibition as *not* viewpoint-discriminatory since Congress may make a value judgment in deciding which activities to fund as long as they do not violate program providers' or recipients' First Amendment rights.[124]

As Mari Matsuda and Charles Lawrence point out in their critique of First Amendment law, the Court renders its decisions by isolating First Amendment law completely from any social context.[125] The history of

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[120] State of New York v. Sullivan, 889 F.2d 401, 404 (2d Cir. 1989), *aff'd* 500 U.S. at 173–76. *Rust*, 500 U.S. at 174–75 ("[T]he Government may make a value judgment favoring childbirth over abortion, and implement that judgment by the allocation of public funds . . . In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another. Similarly, in implementing the statutory prohibition by forbidding counseling, referral, and the provision of information regarding abortion as a method of family planning, the regulations simply ensure that appropriated funds are not used for activities, including speech, that are outside the federal program's scope.") (citations omitted).

[121] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). The Court is reconsidering this standard. Amy Howe, *Supreme Court Will Consider Major Case on Power of Federal Regulatory Agencies*, SCOTUSBLOG (May 1, 2023, 11:54 AM), https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies [https://perma.cc/5HCR-2BGF].

[122] Title X §1001, which specifies services covered by the U.S. Department of Health and Human Services Office of Population Affairs funding, only mentions abortion twice. First, it specifies that "[t]he broad range of services does not include abortion as a method of family planning." Second, §1008 provides that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."

[123] *Rust*, 500 U.S. at 174–75.

[124] *Id.*

[125] Prohibiting restriction of speech based on content and viewpoint may sound neutral to people who have not faced violence and discrimination because of a demographic group to which they belong (in particular, some white men), but "[v]ictims of hate propaganda experience physiological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis,

cross-burning and its use as racist intimidation is lost; it becomes not an act of harassment or subordination directed at a Black family, but a "point of view" that the government must accept as a legitimate political view. The message of white supremacy cannot be suppressed, even when it is expressed in ways meant to intimidate a family and undermine the quiet enjoyment of their new home. In *Virginia v. Black*, the Court decided that cross burning could only be criminalized if an element of the crime was intent to intimidate, thus qualifying as a "true threat" of bodily harm, rather than intent to share an ideological message.[126] Therefore, a plurality struck down Virginia's statute treating a cross burning as prima facie evidence of an intent to intimidate.[127] In his dissent, Justice Thomas expressed his view that cross-burning should be an exception to the First Amendment.[128] Virginia's statute, he explained, "prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point."[129] There are other ways to express white supremacist views that do not involve terrorism and intimidation.

In *The Cult of the Constitution*, Mary Anne Franks extends this point of critical theory to more recent situations, including revenge porn and campus protests against controversial speakers.[130] Franks contends that many Americans across the political divide are buying into what she calls First Amendment fundamentalism, which has uncanny parallels with

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and suicide . . . To avoid receiving hate messages, victims have to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story, in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 24 (1993) [hereinafter, WORDS THAT WOUND]. Charles Lawrence explains "There is a great difference between the offensiveness of words that you would rather not hear because they are labeled dirty, impolite, or personally demeaning and the *injury* inflicted by words that remind the world that you are fair game for physical attack, that evoke in you all of the millions of cultural lessons regarding your inferiority . . . and that imprint on you a badge of servitude and subservience for all the world to see." Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus, in* WORDS THAT WOUND 74 (1990). Lawrence also argues that although Brown v. Bd. of Educ. can be narrowly understood as a case about equal educational opportunity, it "can also be read more broadly to articulate a principle more central to any substantive understanding of the equal protection clause . . . [which is] the principle of equal citizenship . . ." "*Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys – the message that Black children are an untouchable caste, unfit to be educated with white children." *Id.* at 59.

[126] Virginia v. Black, 538 U.S. 343, 359–60 (2003).

[127] *Id.* at 362–63.

[128] *Id.* at 388 (Thomas, J., dissenting).

[129] *Id.* at 398–400 (Thomas, J., dissenting).

[130] *See generally* FRANKS, *supra* note 114.

Second Amendment fundamentalism: fundamentalists view any new regulation of speech or guns as an illegitimate infringement on their constitutional rights. Both types of fundamentalism marshal civil rights rhetoric to protect the interests of wealthy white men as a class, often at the expense of women, people of color, and other socially marginalized groups.[131] Why would politically progressive people be First Amendment fundamentalists? Because a prevalent linguistic spin equates being unpopular and disliked with being vulnerable, which white supremacists in the United States are not.[132] Additionally, nearly "half of First Amendment legal challenges now benefit business corporations and trade groups,"[133] which are also not vulnerable members of society. Still, social progressives are strongly inclined to protect groups characterized as vulnerable from abuses of governmental power.

Consider revenge porn, which, like online stalking and harassment, primarily harms women, girls, and members of marginalized groups, and is perpetuated disproportionately by white men.[134] Some perpetrators of intimate partner violence use sexual images of their partner as a means of control.[135] Yet the ACLU, devoted to First Amendment fundamentalism, has opposed legislative attempts to control the damaging invasion of privacy that revenge porn constitutes,[136] while legislative remedies have been slow and ineffectively designed.[137] Another example of how the

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[131] *Id.* at 106–08. ("The mere *possibility* that white men's speech might be slightly curtailed is regarded as an unimaginable horror while the systemic silencing of women and minorities is dismissed as mere inconvenience.").

[132] *Id.* at 113.

[133] *Id.* at 121 (citing John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–224 (2015)).

[134] *Id.* at 127–28. "Revenge porn" is the publication of nude or sexual photographs or videos without the consent of the person depicted. Sometimes, but not always, it is ex-partners who engage in this conduct purposely to cause harm or get "revenge." Those depicted may need to change their employment, school, or otherwise withdraw socially to avoid daily embarrassment, quite apart from suffering emotional distress. *Id.*

[135] *Id.* at 128.

[136] *Id.* at 131–33.

[137] Although all but two states (Massachusetts and South Carolina) now have laws against nonconsensual pornography, most states require the prosecution to prove that the defendant acted with "intent to harass or annoy another person." *See* FindLaw Staff, *State Revenge Porn Laws*, FINDLAW, https://www.findlaw.com/criminal/criminal-charges/revenge-porn-laws-by-state.html [https://perma.cc/46LJ-GSAR] (last visited Jan. 25, 2024). The intent requirement in state laws, and those which place the onus on the victim to bring a suit, significantly reduce the level of protection for potential victims. As part of the federal Violence Against Women Reauthorization Act of 2022, the SHIELD Act was introduced. If passed, it would make it a crime to "knowingly distribute (or intentionally threaten to distribute) an intimate visual depiction of an individual (1) with knowledge of or reckless disregard for the individual's lack of consent and reasonable expectation of privacy, and (2) without a reasonable belief that distributing the depiction touches a matter of public concern." SHIELD Act of 2022, S. 2777, 117th Cong. (2022).

American legal framework silences women to protect men from accusations of wrongdoing is actor Johnny Depp's successful defamation lawsuit against his former wife, actress Amber Heard, for speaking out publicly against intimate partner violence (which she suffered at his hands) without even naming him.[138]

Franks demonstrates how civil rights rhetoric—for example, the need to protect the speech of vulnerable parties such as civil rights activists, labor organizers, and opponents of a war or draft—has been co-opted and weaponized to protect powerful members of society against vulnerable members advocating for change.[139] Before addressing further how the First Amendment has been used for this purpose, I will briefly turn to the concept of colorblindness, which helps illuminate the pivotal mistake in the cross-burning cases and others. The U.S. Supreme Court increasingly insists on colorblindness, not only in free speech cases but also in affirmative action and criminal justice cases. This policy further undermines the power of the law to address racial hierarchy in the United States and the harms that flow from it.

Michelle Alexander, in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, warns against the dangers of so-called "colorblind" law and jurisprudence, in which lawmakers and judges assume that *merely because* the law does not explicitly mention race or make law enforcement and prosecutorial decisions on the basis of race *alone*, the system is not racially discriminatory. The enormously disparate impacts of policies that are facially race-neutral in housing, health care, policing, criminal justice, and so forth, are shielded from scrutiny by the lack of evidence that an agent *deliberately* engaged in racial discrimination. The legal system can be recalcitrantly blind to institutional racism and other forms of institutional oppression.[140]

Lawrence Blum makes this point persuasively in discussing the legal rhetoric surrounding application of the Civil Rights Act of 1964. In this model, there are "suspect classification[s]" that trigger a level of judicial scrutiny higher than the usual rational basis inquiry. Much of this framework developed in the course of Title VII jurisprudence (governing

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[138] Katelyn Fossett, *What Was Really at Stake in the Depp-Heard Trial*, POLITICO (June 3, 2022, 11:02 AM), https://www.politico.com/newsletters/women-rule/2022/06/03/what-was-really-at-stake-in-the-depp-heard-trial-00036985 [https://perma.cc/4ZU8-ENV9].

[139] FRANKS, *supra* note 114, at 121.

[140] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 234–40 (2010). This point is underscored by the Court's recent decision in Students for Fair Admissions v. Univ. of N.C., No. 21-707 & Students for Fair Admissions v. Harvard Coll., No. 20-1199, slip op. (U.S. June 29, 2023), which found that affirmative action in university admissions violates the Equal Protection Clause of the Fourteenth Amendment.

employment discrimination).[141] Suspect classifications are categories whose members are likely targets of legal and social discrimination because they have historically been discriminated against, stereotyped or stigmatized; or because they have a highly visible (usually "immutable") trait that makes them vulnerable to discrimination; or because they lack the ability to protect themselves using the political process because they are a historically oppressed group.[142] Examples of suspect (or semi-suspect) classifications are race, color, religion, sex, and national origin; sometimes disability, sexual orientation, gender expression, immigrant status, and political beliefs are also suspect classifications.[143]

The language that Blum finds misleading is "discrimination on the basis of" such as, for example, "discrimination on the basis of sex" or "discrimination on the basis of race."[144] The implication is that discriminating against a man, or a white person, is the moral equivalent of discriminating against a woman or a Black person. For reasons of historical context, and because of social hierarchies of power, these are not morally equivalent. But "on the basis of" makes them sound equivalent.[145] And the propensity to engage in colorblind analysis is strengthened by the symmetrical-sounding nature of the phrase. Perhaps this framework is what leads to the conclusion that affirmative action policies in education discriminate objectionably against white people, or that criticisms of white people or taking race into account in college admissions are "racist" against white people.[146] "Racism" is an attitude or judgment that people of a particular race (or ethnicity, in common use) are *inferior*. Distinguishing among people based on their race (or sex) does not automatically stigmatize them or show a lack of proper respect for them.[147] Hiring preferences for well-qualified persons of color, for example, more likely reflect a desire for a more diverse workforce than some kind of animus directed at white people.

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[141] Lawrence Blum, *Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-discrimination Thought*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 182, 182 (Deborah Hellman & Sophia Moreau eds., 2013).

[142] *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

[143] Blum, *supra* note 141.

[144] *Id.* at 183–84.

[145] *Id.*

[146] *Id.* at 184–86.

[147] *Id.* at 187.

B. DE-CONTEXTUALIZED INTERPRETATIONS REINFORCE EXISTING POWER AND SUPPRESS CHANGE: FIRST AMENDMENT EXAMPLES

Regarding free speech, the First Amendment to the United States Constitution proclaims, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[148] Yet American law restricts speech in many ways. As critical legal studies, including critical race theory and feminist jurisprudence began demonstrating decades ago, the restrictions permitted tend to protect more dominant and powerful members of society from others and each other, and stand aside when non-state actors cause sometimes more serious harms to marginalized and subordinated members of society.[149]

To understand this claim, recall the permitted categories of state restriction on expression. The government may impose content-neutral time, place and manner restrictions, but it may not restrict a message's content or arbitrarily favor one speaker's viewpoint over another. No restriction may be more burdensome than necessary to achieve an important government interest, such as ensuring safety and maintaining order (leaving available other means of communicating the idea). [150]

But some speech content, which is deemed to have low social value and pose high risks of harm, is entirely excluded from First Amendment protection and can be prohibited outright. Examples include "defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography." [151] Commercial speech can be regulated to a greater degree than noncommercial speech, so, for example, false claims in advertising can be prohibited to protect consumers.[152]

Consider the "fighting words" exception to the First Amendment, which was first articulated in *Chaplinsky v. New Hampshire*. In *Chaplinsky,* the defendant was arrested and fined for violating a New Hampshire statute that prohibited "any offensive, derisive or annoying word to anyone who is lawfully in any street or public place," and calling any such person "by an offensive or derisive name."[153] The defendant's "fighting words," addressed

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[148] U.S. CONST. amend. I.

[149] *See* Bell, *supra* note 88.

[150] Content-neutral standards are not based on the subject of the speech, and viewpoint-neutral ones apply to any point of view expressed on the subject. For example, if a group advocating for environmental causes or civil rights is permitted to picket or hold a rally in a public park, advocates for de-regulation and white supremacy must also be permitted to picket and rally there on equal terms. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 828–32 (1995).

[151] VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019).

[152] *Id.*

[153] Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

to the town marshal, were: "You are a Goddamned racketeer" and "a damned Fascist."[154] The Court defined fighting words, which it declared outside First Amendment protection, as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[155] First Amendment exclusion was justified because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[156] Chaplinsky was a Jehovah's Witness, a member of a religious minority, preaching on a sidewalk when a hostile mob assembled. Instead of protecting Chaplinsky from the crowd, a police officer came to arrest him. The town marshal, who had earlier appeared to warn Chaplinsky not to make trouble, was also present, and Chaplinsky addressed the insults at him.[157] Thus, the law protected a town marshal against verbal insults from a member of a religious minority who was, essentially, arrested for preaching peacefully because it caused a crowd to become hostile. The First Amendment was no friend to a dissenter when he confronted government power.

To the extent a court would recognize the fighting words doctrine today, it would articulate that doctrine differently. In *Corry v. Stanford*, the California Superior Court struck down Stanford University's speech code, which prohibited "discriminatory intimidation by threats of violence" and by "personal vilification" based on sex, race, color, disability, religion, sexual orientation, or national and ethnic origin. Personal vilification was defined as expression that (1) is intended to insult or stigmatize on the basis of membership in the protected class; (2) is addressed directly to an individual or individuals whom it insults or stigmatizes; and (3) makes use of insulting or "fighting words" or nonverbal symbols.[158] Stanford had

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[154] *Id.*

[155] *Id.* at 572–74.

[156] *Id.* at 572.

[157] *Id.* at 569–70.

[158] Corry v. Stanford Univ., No. 740309, 1, 2–3 (Cal. Super. Ct. Feb. 27, 1995), web.archive.org/web/20050419211842/http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm [https://perma.cc/F3XG-LBTU]. Plaintiff students alleged that Stanford's campus speech code violated their free speech rights under the U.S. Constitution's First Amendment, a California constitutional provision, and a California statute. They also alleged violations of the U.S. Constitution's Fourteenth Amendment Equal Protection Clause and the Due Process clauses of the Fourteenth and Fifth Amendments, and sought a preliminary injunction against enforcement of the code. *Id.* at 1. Although Stanford is a private university, California's "Leonard Law" "allows a private university student to have the same right to exercise his or her right to free speech on campus as he or she enjoys off campus." *Id.* at 4. Both parties agreed to accept the court's ruling on that motion as the final decision at the California Superior Court level. *Id.* at 3. Stanford's president chose not to appeal, deciding that would not be a prudent use of Stanford's resources. Gerhard Casper, President, Stanford Univ., Statement to the Faculty Senate on *Corry vs. Stanford*

carefully tailored its policy to reflect the *Chaplinsky* and other First Amendment exceptions in order to survive a free speech challenge.[159] However, the court decided that the code prohibited not only fighting words, but also other insults and offensive speech that there was no reason to believe would lead to fighting or violence.[160] It noted that the *Chaplinsky* doctrine on fighting words had been narrowed by more recent decisions so that only words that are likely to lead to immediate violence may be prohibited (not offensive speech or speech that "by its very utterance inflicts injury"). Additionally, Stanford's prohibition of not all fighting words, but only those based the specified categories, was judged an unconstitutional form of viewpoint discrimination. The court's example is that "aspersions upon a person's mother," could be used freely in the service of those advocating racial equality, but not by those opposing it.[161] This difficult-to-imagine scenario comes across as conceptual gymnastics.

Superficially, it may appear that the *Chaplinsky* "fighting words" doctrine is now interpreted to reject First Amendment exclusions based on offense, aiming only to prevent actual harm. That is, it has abandoned the notion that utterances themselves can inflict injury, and requires a substantial risk that harm will occur to justify speech restrictions. However, whether there is a substantial risk of harm depends on which insults are interpreted as ones that "tend to incite an immediate breach of the peace." The design of the New Hampshire law challenged in *Chaplinsky* appears to protect men from harassment on the streets. A law prohibiting sexual harassment on the streets, which women regularly experience, would almost certainly be found to violate the First Amendment. Courts would probably find there is no significant risk of harm. Insults against men might be taken

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University (Mar. 9, 1995). Although without an appeal *Corry* remains a California decision, it cited a federal case that is still good law and endorses the same rationale. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (The government may prohibit all fighting words, but may not discriminate against particular ones because of hostility to the message expressed; thus the St. Paul ordinance unconstitutionally banned only fighting words insulting people because of their "race, color, creed, religion, or gender" and not other statuses, such as political affiliation or union membership). Discussion of *Corry* herein involves only the federal First Amendment issue.

[159] *See* Thomas C. Gray, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 911–12 (1996). Gray wrote Stanford's policy with the specific intention of making it narrow enough to survive free speech challenges, reasoning that it was more comparable to laws prohibiting hostile environment discriminatory harassment in educational settings than it was to prohibiting speech that expressed a hostile viewpoint. This was primarily because a necessary feature of prohibited speech conduct was that it specifically targeted an individual or small group of individuals. Gray also believed that the Stanford policy's language tracked cases in which plaintiffs successfully recovered damages for intentional infliction of emotional distress as a result of "verbal abuse using racial epithets," which clearly would put such abuse outside First Amendment protection as harmful conduct rather than protected speech. *Id.* at 916.

[160] Corry, No. 740309, at 5–6.

[161] *Id.*

to pose a risk of harm because of the assumption that a man insulted or harassed might understandably fight back physically. No such assumption accompanies harassment of women on the street. Nor does it, on *Corry*'s rationale, accompany vilification of college students because of their race, sex, sexual orientation, and so forth. The less power a social group has, understandably, the less likely its members are likely to physically fight back. The less likely a member of a group is to physically fight back, the less legal protection that group is afforded by the First Amendment under the fighting words exception.

American Booksellers Association, Inc. v. Hudnut[162] is another example of the pattern whereby socially powerful actors receive First Amendment protection at the expense of more vulnerable members of society. In *American Booksellers*, a federal appeals court struck down an Indianapolis civil rights ordinance creating a tort cause of action for persons who can prove they have been harmed by the manufacture, distribution, and sale of pornography (which is defined as "the graphic sexually explicit subordination of women" in particular situations).[163] The court refused to acknowledge the ordinance as a civil rights measure to ensure women's equality, as a prohibition of sexual discrimination in the workplace would be, despite its inclusion in the same section of the Indianapolis Code. Instead, they measured it according to First Amendment obscenity standards, and concluded it fell short. In the process, however, the court accepted Indianapolis's factual judgments on which the ordinance was premised, and dismissed them:

> Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets . . . [P]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights[164] . . . Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental

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[162] Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

[163] *Am. Booksellers*, 771 F.2d at 324.

[164] *Id.* at 329 (quoting Indianapolis Code §16-1(a)(2)).

> intermediation. Pornography affects how people see the world, their fellows, and social relations.[165]

One might be forgiven for wondering why "fighting words" do not depend on "mental intermediation" to result in harm, or if they do, why that did not invalidate the New Hampshire law in *Chaplinsky*. Similarly, if customers stop patronizing a business because someone defamed its owner, is mental intermediation not required for harm to result? Yet, the First Amendment has not been interpreted to prohibit legal remedies for defamation. The inconsistent treatment of "mental intermediation" lends credibility to the claim of critical legal studies that legal resources can be used flexibly to protect socially powerful interests (business owners, including makers of pornography, whose profits are at risk, but not women and girls, whose equal membership in society and well-being are at risk). These decisions protect the privileges of socially powerful actors behind cover of the First Amendment, immunizing them from defensive measures mustered by vulnerable groups and their allies. If the First Amendment was adopted to protect political dissenters from a powerful government, its purpose has been inverted, and it now facilitates the exploitation and oppression of vulnerable members of society by well-resourced, predatory corporations, organizations, and individuals.

Finally, consider a case that not only provides an example of the pattern whereby socially powerful actors receive First Amendment protection at the expense of more vulnerable members, but in which the well-being of children is directly at issue. In *Brown v. Entertainment Merchants Association*,[166] video game manufacturers challenged California's 2005 law prohibiting the sale of violent video games to minors on grounds that the prohibition violated the First Amendment free speech rights of children who wished to purchase the games. The U.S. District Court judge found the statute unconstitutional because the causal connection between video game violence and harm to children had not been established to his satisfaction, and California had not demonstrated any difference between video games and other violent entertainment that would justify treating video games differently.[167]

The Ninth Circuit affirmed the District Court's summary judgment in favor of the manufacturers, applying the strict scrutiny standard (requiring that the law be narrowly tailored to advance a compelling state interest) because it was a content-based restriction.[168] It rejected California's

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[165] *Id.*

[166] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794–96 (2011).

[167] *Id.* at 800–02.

[168] *Id.* at 791–92.

argument that the material was excluded from First Amendment protection as obscenity because the legal category of obscenity established in *Miller v. California* applies only to sexual material, not to violent material. [169] It also found no compelling state interest, since it did not agree that the empirical evidence produced established that violent video games damage a child's brain. Commentators have noted that the standard of empirical proof required here, insisting on proof of a "direct causal link" rather than statistical correlation,[170] seems new to legal decisions: a standard that often cannot be met in, for example, health studies, even though strong correlations are used to justify policy in those domains. It would not be enough to show a video game influenced a child's thoughts such that the child might be more likely to engage in violence, since the influence of "speech" on thoughts (so-called "mental intermediation") is not subject to state regulation, even for children. The statute had also required a "violent video game[s]" label on each video, indicating that California regarded the game as violent.[171] However, the court found this measure an unconstitutional violation of the manufacturers' right not to speak.

The U.S. Supreme Court echoed this reasoning, with Justice Scalia, writing for the majority, expressing concern that other material deemed violent might be restricted, such as comic books, films, and even fairy tales. Justice Scalia explicitly stated the reason for granting these games First Amendment protection: "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) . . ."[172] In his concurrence, Justice Alito was less willing to push aside the empirical evidence that had been offered about the effects of video games on children, acknowledging that "the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show."[173] He also raised the legitimate question of why sexual material is treated differently from violent material, with the free speech clause protecting the

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[169] *Id.* at 792–93.

[170] *See generally, e.g.*, Clay Calvert & Matthew D. Bunker, *An "Actual Problem" in First Amendment Jurisprudence? Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMMC'NS. & ENT. L.J. 391 (2013) (critiquing how *Brown* raised the bar in First Amendment cases for states trying to prove that a regulation burdening a First Amendment expression right was narrowly tailored to serve a compelling government interest by requiring the state to prove "a direct causal link" between the expression right burdened and an "actual problem" caused by exercise of that right).

[171] *Brown*, 564 U.S. at 790.

[172] *Id.*

[173] *Id.* at 806 (Alito, J., concurring).

latter but not the former. Are depictions of sex more inappropriate for children to view than depictions of violence? In his dissent, Justice Breyer put it even more poignantly: "But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?"[174] Both Justices Breyer and Thomas, in their separate dissents, objected to the wide construal of children's rights to include access to speech that their parents have no opportunity to monitor.[175]

As explained, much of what counts as "speech," such that it receives First Amendment protection, does not advance First Amendment purposes. Instead, it seems to cloak in protection activities that are not primarily "speech" for social, economic, and political reasons. When directed at members of vulnerable or marginalized groups, harmful speech acts are protected, while harmless speech that is offensive to members of dominant groups is excluded from First Amendment protection. First Amendment jurisprudence looks away from social contexts, and instead of securing equal liberty to participate in a free exchange of ideas, it formalistically and myopically limits itself to legal sources in making decisions that establish arbitrary distinctions and collapse many important ones.

First Amendment free speech interpretations follow no discernible principle. A person is *not* generally protected by the First Amendment if their lies damage another's reputation (and the person harmed has the social capital and resources to bring a lawsuit),[176] or if it is foreseeable that their insult will prompt their addressee to punch them in the face. Harmless expression that a Court finds to be offensive to the community, lacking in social value, and expressing an unhealthy interest in sex (as judged, usually, by wealthy white male judges)—that is, obscenity—is *not* protected by the First Amendment.[177] Telling your patients about, or answering questions about, the full range of reproductive services is *not* protected free speech if you work in a federally funded reproductive health practice (which is more likely to serve low-income women). Meanwhile, "personal vilification" based on race, sex, color, disability, religion, sexual orientation, national or ethnic origin addressed to and intended to insult a fellow college student on a campus *is* protected by the First Amendment, and cannot be restricted by

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[174] *Id.* at 857 (Breyer, J., dissenting).

[175] *Id.* at 822–23 (Thomas, J., dissenting); *id.* at 848–49 (Breyer, J., dissenting).

[176] New York Times Co. v. Sullivan, 376 U.S. 254, 267–71 (1964) (to ensure that valuable speech is not burdened unduly, if the defamed person is a public figure, or if the statement involves a matter of public concern, the person alleging defamation must demonstrate that the speaker knew the statement was false or uttered it in reckless disregard of its truth or falsity).

[177] *See* Miller v. California, 413 U.S. 15, 24 (1973).

the institution. A "systematic practice of exploitation and subordination based on sex which differentially harms women,"[178] and, as the court acknowledges, fosters acts of aggression and violates women's moral rights, *is* protected by the First Amendment.

Feminist legal scholar Catharine MacKinnon has plausibly argued that the Founders of the U.S. Constitution intended for the First Amendment to protect vulnerable dissenters from a powerful government.[179] However, in a strange reversal, the First Amendment provides cover for privileged and powerful people to abuse and exploit vulnerable and marginalized people such as those belonging to the groups named in Stanford's speech code, sexually exploited women, and children who play violent video games. Simultaneously, the First Amendment protects the activities of a multi-billion-dollar pornography industry, manufacturers of violent video games, and millionaires and corporations who seek to control the political process.[180] A federal court has found that the subordination of women and destruction of their equal opportunities in society are not "compelling" enough to justify a civil rights process that addresses these injuries, but a federal agency may require censorship of comedians and filmmakers on broadcast television to protect viewers from words that offend them and from a glimpse of an unclothed breast or buttock.[181] First Amendment jurisprudence does not recognize the relative magnitude of the various interests at stake, or its own effect on the social power dynamic that constructs American culture.

C. JURISPRUDENTIAL MODELS FOR UNDERSTANDING LAW AND POWER

There are different frameworks for understanding what the "law" is, the social need it fulfills, and how it operates. Within legal formalism, current First Amendment free speech doctrine (like other domains of jurisprudence) seems contradictory and unprincipled; from the perspective of critical legal studies, it is roughly what one would expect as a product of American legal processes. To expose the discernible pattern in these decisions, I will characterize three legal philosophy frameworks relevant

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[178] Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

[179] CATHARINE A. MACKINNON, ONLY WORDS 9–10 (1996).

[180] *See generally* Bell, *supra* note 116.

[181] *See* FED. COMMC'NS COMM'N, CONSUMER GUIDE: OBSCENE, INDECENT AND PROFANE BROADCASTS, https://www.fcc.gov/sites/default/files/obscene_indecent_and_profane_broadcasts.pdf [https://perma.cc/F2BL-9PEW].

here: legal formalism, legal realism, and critical legal studies.[182] Then, I will explain how these frameworks can help us understand the development of First Amendment jurisprudence in the ways described above.

Judicial opinions often are written as if judges were using a legal formalist framework to decide the case. Legal formalism entails that proper legal decisions not involve significant judicial discretion. Thus, judges might articulate decisions in formalist terms to avoid or disclaim personal responsibility for the decision. They simply "call balls and strikes."[183] In a legal formalist framework, judges are charged with applying legal rules and principles to the particular facts of a case, as mechanistically as possible. Sometimes this involves extensive parsing of language or reliance on the definitions of words used in a legal text or decision. All legal rules and principles are regarded as part of a coherent system that determines what the law is in a given case. From the legal formalist perspective, it is unnecessary and undesirable for the judge to entertain extra-legal considerations, such as moral, social, or political factors.[184]

Legal realism, by contrast, understands law not as a system of rules and principles, but as the decisions judges actually make.[185] It focuses on patterns in judicial decisions, rather than on the reasons judges give for their decisions. Sometimes, as legal realists recognize, judges will shape interpretations of rules to get a just outcome for parties to a case, or to establish precedent for a sound legal policy. That is, judges depend on non-legal reasons, such as justice, efficiency, and precedential impact, as much as legal reasons to reach their decisions. This theory can be controversial because it seems to compromise separation of powers: judges are supposed to be interpreting existing law rather than making new law. And while legal realism can be used fruitfully to explain particular decisions, including ones that seem contrived from the viewpoint of legal formalism, it does not provide a judge with much guidance for determining their scope of discretion, or what the decision should be, in a particular case.[186]

Legal realism is a reaction against legal formalism, and from legal realism, critical legal studies (CLS) developed. For proponents of CLS, like for legal realists, law is not a system of rules and principles that are applied for the most part mechanistically, but a collection of result-oriented judicial

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[182] For simplicity, I use "critical legal studies" to encompass critical race theory and feminist jurisprudence, as well as other critical movements.

[183] *Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat*,' CNN (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement [https://perma.cc/2PRJ-3NTF].

[184] *See* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 3.2 (1935).

[185] *See* Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. REV. 699, 700–02 (1998).

[186] This is H.L.A. Hart's criticism; Brian Leiter tries to refute it. *See* Brian Leiter, *Rethinking Legal Realism: Toward A Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 270–72 (1997).

decisions made for largely non-legal reasons.[187] Where legal realism regards decisions as means of reaching a just result in the case or a legal policy going forward that seems just to the court, CLS regards law as a vehicle for protecting and advancing the interests of the powerful lawmaking class. In general, the lawmaking elite do not deliberately use law to promote their own ends and may not even realize they are doing so. Judges view the world from a privileged position. But the way law has developed as an institution, and the way it continues to develop by following precedents and relying on certain presumptions, further entrenches the privilege of the lawmaking classes.

How could the First Amendment free speech clause be understood as a formal rule? "Congress shall make no law . . . abridging the freedom of speech, or of the press."[188] In the syllogistic form favored by the legal formalist, the rule applied literally would prohibit any federal law restricting speech. Concepts and categories that create exceptions to the First Amendment's free speech clause appear arbitrary and cobbled together given how simple and absolute the text itself is. How can one resist thinking that if the same cases were before different judges, in different cultural contexts, First Amendment law might look very different? And if that is so, mechanistic application of established rules cannot be what is taking place.

First Amendment jurisprudence makes no sense, as a coherent system, from the perspective of legal formalism. But if we switch to the legal realist perspective, it begins to make sense. Here, we might imagine judges aiming to justify an interpretation of the First Amendment that would be least likely to threaten any speech that could be of value, since they are unable to imagine much speech that could significantly harm people. Perhaps judges have been enculturated from childhood to believe "sticks and stones will break my bones but words will never hurt me," and that for the sake of liberty, people must develop a thick skin and shake off hurtful words. After all, they might think society would be worse off if we all had to monitor what we say to avoid offending someone. A possible inference from this view is that judges believed Stanford and its students would be better off without a speech code, and used legal rules creatively to justify that decision.

The legal realist story omits an important element, though, and CLS can complete the picture. Recall that CLS regards the law as a vehicle for protecting and advancing the interests of the powerful lawmaker class.

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[187] One might think this neglects statutory and constitutional law, considering only case law. But on a legal realist view, it is the judicial decisions themselves—legislated rules or Constitutional provisions *applied*—that constitute law. A rule passed by a legislature that is never applied, on this view, is not "law" in the relevant sense.

[188] U.S. CONST. amend. I.

From that perspective, we can acknowledge that people who serve as judges tend to share many attributes of privilege. They are disproportionately wealthy, white, and male. Even if they commit to impartiality, they see the world from a particular standpoint. They might imagine we all get hurt by words and hurt others with words at about the same rate. The playing field is conceptualized as even if they view it through the legal lens of colorblindness or gender neutrality, rather than through the personal experience of marginalization or oppression. The dominant perspective of a wealthy white male generally looks "objective" to judges in a way it might not look to people located in other, more marginalized social positions. These people have an "oppositional consciousness"[189] because they notice how they are made "other" by the dominant perspective.

To illustrate, in *Corry v. Stanford*, like in *R.A.V v. City of St. Paul,*[190] the fatal flaw of the policies struck down on First Amendment grounds was that rather than prohibiting all fighting words or burning, they prohibited only those based on specific protected categories, which the courts interpreted as an unconstitutional form of viewpoint discrimination. But, as discussed earlier, the law's insistence on "colorblindness" ignores the lamentable reality of racial inequality in America and invalidates measures aimed at addressing it, thus exacerbating it. Free speech jurisprudence, which develops a civil liberty, is created through a colorblind, race-neutral lens that is in tension with civil rights laws. The First Amendment Free Speech Clause is a constitutional provision, as is the Fourteenth Amendment Equal Protection Clause. But while free speech jurisprudence tends to be absolutist or fundamentalist, protecting speech seemingly at the cost of almost all other principles and activities, equal protection jurisprudence is narrow and uneven. It subjects state provisions that discriminate against women to an intermediate level of scrutiny, rather than the highest level, supposing that it is more legitimate for the government to use sex as a legal category than, for example, race.[191] To prove that criminal enforcement practices and procedures are discriminatory, discriminatory intent must be (and almost never can be) demonstrated[192]; that a practice or policy has a remarkably disparate effect on people of different races is not enough to prove discrimination.

But statutory civil rights law has offered more protection to employees and students. Some "speech" can be restricted to extend equal opportunity to those who would otherwise be subject to a hostile environment, and

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[189] SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 169 (1993).

[190] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[191] *See* Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 468–69 (1981).

[192] *See* McCleskey v. Kemp, 481 U.S. 279, 292–94 (1987).

unable to reap educational benefits or earn a living (which are obvious harms). Title IX of the Educational Amendments of 1972 prohibits sex discrimination in education,[193] Title VI of the Civil Rights Act of 1964 prohibits (inter alia) race discrimination by institutions receiving federal funds,[194] and Title VII prohibits (inter alia) sex and race discrimination in employment.[195] Discriminatory harassment, including pervasive or severe discriminatory verbal comments, is prohibited as unlawful discrimination. Targeted individuals have a legal remedy against sexist and racist remarks that create a hostile environment even if the speaker does not intend to harm the victims, and even if the remarks are pervasive because different parties are uttering them. Why, then, is it too great a restraint on Stanford students to avoid intentional personal vilification of other individuals using insults? Perhaps most judges lack the moral imagination to place themselves in the shoes of a person at the receiving end of a racist or sexist insult. Only classifying reality using rigid, formal legal categories, while ignoring social and historical contexts and realities, will get us the result that true threats, or fighting words, are outside First Amendment protection, but stigmatizing insults are not.[196]

The court was unable to view Indianapolis's ordinance, challenged in *American Booksellers*, as a civil rights statute; the judge attempted to force it into the mold of "obscenity," which is a First Amendment concept. The fit is poor; however, the opinion is intelligible from the standpoint of CLS or feminist jurisprudence. Ironically, obscenity is outside First Amendment protection even though it harms no one; pornography, as defined in the Indianapolis ordinance, is not judged to warrant an exception to the First Amendment, even if actual harm is proved or acknowledged. Judges and their associates are more likely to be consumers of sexual materials that objectify women than people whose bodies are used, often under circumstances that call into question the robustness of full information or consent, to make the material.[197] Judges might view as a substitute for

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[193] 20 U.S.C. § 1681 et seq.

[194] 42 U.S.C. § 2000d et seq.

[195] 42 U.S.C. § 2000e et seq.

[196] While Stanford's speech code was not regarded as justified by the need to protect campus order and morality or decency, Indiana was permitted to require erotic dancers in private adult clubs to wear pasties and G-strings for those reasons. Although nude dancing was found to come within First Amendment protection because dancers were conveying a "message of eroticism," the "substantial government interest" that justified the ordinance was identified as "protecting societal order and morality." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991).

[197] Men use pornography at about twice the rate that women do. Mark Regnerus, David Gordon & Joseph Price, *Documenting Pornography Use in America: A Comparative Analysis of Methodological Approaches,* 53 J. SEX RSCH., 873, 877 (2016). Pornography objectifies women and their bodies to a greater extent than men or their bodies. *See* Malachi Willis, Ana J. Bridges

healthy sexuality, or part of a healthy sexual life, what people who have faced various sorts of coercion and exploitation all their lives—sexual and otherwise—will see as a high-grossing commercial industry that harms vulnerable people.

Because well-off men are overrepresented among judges, judges are statistically less likely to be primary caregivers for children.[198] Formal legal rules dispose them, perhaps, to see video games in terms of "speech," rather than as commercial products, because the games are physically instantiated on a medium (for example, a disk or live stream) that can be used to convey messages or record artistic expressions. Video games are sold by manufacturers, the vast majority of whom would not create them if they were not profitable simply to make an artistic statement.[199] Their function is to be played as a game, like Dominoes or Jenga; they are not a medium of communication.[200] Businesses do not create games or hire erotic dancers to communicate messages[201]; application of the First Amendment to these

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& Chyng Sun, *Pornography Use, Gender, and Sexual Objectification: A Multinational Study*, 26 SEXUALITY & CULTURE 1298, 1299 (2022). In the United States, only 30% of all judges are female. AMERICAN BAR ASSOCIATION, ABA PROFILE OF THE LEGAL PROFESSION 2022 1-20, https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [https://perma.cc/Y93S-J3T3]. With judges more than twice as likely to be male than female, and males about twice as likely than females to be using pornography that objectifies women's bodies, judges are more likely to be users of pornography than performers in pornography. For situations that call into question the robustness of performer consent in pornography, *see, e.g.,* Robert T. Muller, *Lack of Regulation in Porn Industry Leaves Women Unprotected*, PSYCH. TODAY (Jan. 25, 2017), https://www.psychologytoday.com/us/blog/talking-about-trauma/201701/lack-regulation-in-porn-industry-leaves-women-unprotected [https://perma.cc/GQ2V-6NS2]; Aurora Snow, *When Porn Consent Goes Horribly Wrong*, THE DAILY BEAST (Dec. 4, 2021, 2:28 AM), https://www.thedailybeast.com/when-porn-consent-goes-horribly-wrong [https://perma.cc/A3PJ-JB8G].

[198] *See, e.g.*, Julia Haines, *Gender Reveals: Data Shows Disparities in Child Care Roles*, U.S. NEWS (May 11, 2023, 11:58 AM), https://www.usnews.com/news/health-news/articles/2023-05-11/gender-reveals-data-shows-disparities-in-child-care-roles#:~:text=It%27s%20a%20deeply%20rooted%20truth,leaving%20little%20room%20for%20improvement [https://perma.cc/BX5K-F2WL]; Leah Ruppanner, Caitlyn Collins, Liana Christin Landiver & William J. Scarborough, *How Do Gender Norms and Childcare Costs Affect Maternal Employment Across US States?*, 35 GENDER & SOC'Y 910, 915–17 (2021).

[199] *See, e.g.*, Priscilla Martins, *Gaming Industry: The Good the Bad and the Ugly*, TOWARDS DATA SCI. (Mar. 1, 2018), https://towardsdatascience.com/gaming-industry-the-good-the-bad-and-the-ugly-47c8e1244e24 [https://perma.cc/SFZ3-QHD7] ("Developing games is a business like any other, and therefore the studios will develop whatever is lucrative to them.").

[200] I do not mean to claim that the artwork these games incorporate lacks independent aesthetic value, only that manufacturers would not pay for this art if they did not believe it would increase profits.

[201] Nude dancing in adult clubs enjoys First Amendment protection because courts believe dancers are conveying a "message of eroticism." *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560 (1991). A more plausible way to cloak near-nude dancing in First Amendment protection might have been to label it art.

activities is arbitrary and artificial. The video game industry, a powerful economic actor, benefits while children, who are natural persons, are left vulnerable to significant harm.

Social media expands the spaces in which vulnerable people can be harmed and makes that harm far more difficult to regulate. For example, bullying is facilitated by the anonymity of some social media spaces, as well as the absence of adults in some of the social media spaces children occupy.[202] Hate speech and bigotry absolutely thrive on social media, where insular groups can reinforce each other's bigoted viewpoints without facing challenges to the factual bases for these viewpoints. Just as there is a well-recognized systemic need for speech to be protected, there is a systemic need for class-based discriminatory harms to be prevented[203] if we are ever to heal our divides and have peace in our nation. A society that thinks and speaks in stereotypes cultivates a culture in which unfair discrimination will regularly occur. The stereotypes become deeply entrenched, and they affect people's actions, leading people to clutch their bags as they pass someone that society has labeled dangerous and untrustworthy and to engage in employment and housing discrimination.[204] Exceptions to the First Amendment are made when free speech collides with other important values, such as privacy, reputation, security, and ownership of ideas. Hate speech contravenes important social values, such as equal opportunity and equal dignity of persons.[205] But hate speech is an important weapon to help those in power retain their privilege, and protecting it makes free speech absolutists appear to be principled, as though they are claiming the high ground.[206]

A fair conclusion is that even if there are resources within American law to treat equality and liberty—including free speech—as equally important values, there is for the foreseeable future insufficient political will to accomplish this. In fact, we are arguably going backwards in the endeavor to balance liberty appropriately with equality. If it seems impossible to advance equal opportunity and equal membership in society using political or legal means, perhaps there is another way to nourish the emerging sprouts of equality and weed out as much encroaching prejudice as possible so the seeds of equality have room to grow.

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[202] *See* Wendy Craig, Meyran Boniel-Nissim, Nathan King, Michal Molcho, Ylva Bjereld & William Pickett, *Social Media Use and Cyber-Bullying: A Cross-National Analysis of Young People in 42 Countries*, 66 J. ADOLESCENT HEALTH S100, S107 (2020).

[203] *See* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 149 (2004).

[204] *Id.* at 82–84.

[205] *Id.* at 153.

[206] *Id.* at 158–59.

D. HOW CHILDHOOD EDUCATION AND SOCIALIZATION GUIDED BY THE CIP CAN INTERRUPT SOCIAL OPPRESSION

As discussed, viewing the matter charitably, judges tend to be socially positioned so that it is difficult for them to see oppressive hierarchies in society because they view the operation of society and law through the lenses of the current legal framework. For example, a cross-burning can seem to them like expression of a message they are ineligible to take a position on, rather than as a threat directed at a family. Broadening the way interpreters of law perceive reality begins with ensuring that the children who will become adult judges are fluent in the paradigms necessary to arrive at fully informed and just decisions.

Psychologist Sandra Lipsitz Bem details the process of enculturation in order to explain how people develop lenses of gender in a gendered society. We all receive subliminal messages from society about what is important and what our attitudes toward certain things and people are expected to be. We internalize these messages and use them to form our identities and beliefs without even realizing we are doing so. In this way, we learn to see what our culture does as natural or inevitable, as just the way things are.[207] For example, during childhood, if your parents knock before they enter your bedroom, buy you a diary with a lock on it, and discuss with an older sibling where they would like to go away to university, you learn that individuals are separate social units whose definite boundaries are to be honored. In some societies, families share space in a way that is not conducive to individual privacy, and extended families stay together as a unit in one locality, without their members moving away for university study or work. In the United States, we expect elementary school teachers to be women and doctors to be men. This is not culturally universal, however, and it is certainly not given by nature. What seems natural will depend on one's enculturation.[208] The enculturation process is also how we form our implicit biases. Seeing few Black doctors or teachers and hearing that many Black people have been incarcerated for drug crimes reinforces white supremacist stereotypes and makes it appear natural when the school custodian is Black but the principal is white, and unnatural when the reverse is true. *Brown v. Board of Education*, in rejecting separate but equal childhood education, cited a psychological study revealing that even Black children preferred white dolls.[209] The existence of Black principals and doctors depends on Black children having the confidence and resources to pursue those professions. It also depends on educational institutions and

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[207] BEM, *supra* note 189, at 133–47.

[208] *See id.*

[209] Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

hiring officers lacking, or overcoming, the inclination to view the white person as naturally a better fit, while unable to see the decision as influenced by race.[210]

Bem's "lenses of gender" metaphor is useful for understanding implicit bias. Since before we can remember, we have been trying to identify people's gender pronouns using their outward appearance, and we know it is a terrible *faux pas* to get this wrong.[211] We therefore see the whole world through gender-detecting lenses without even realizing we have them. Bem's book is meant to help us remove the lenses and look directly at them, rather than through them. Other scholars are at work helping us see our lenses of race, heterosexism, ableism, and so forth. This has been a goal of critical race theory and gender theory for decades. The various lenses are powerful social mechanisms that affect the way we all think and see the world, and each of us is entitled to know how these processes operate so that we can govern ourselves more effectively with a more accurate picture of the world.

Government or other dominant forces, such as powerful corporations or religious organizations, might wish to keep these processes hidden to undermine our individual self-government and to retain their own power.[212] They can check our power by making us fear each other and fear change.[213] They can lure us to click on a link or buy a product.[214] Psychological mechanisms may also bias us toward what is familiar, the status quo, or what is accepted by our society, including false beliefs that avoid painful facts.[215] We regard ourselves as absolved of responsibility for changing

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[210] *See* DEVON W. CARBADO, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA 138–39 (2013).

[211] Thankfully, we now have the convention of introducing ourselves using our gender pronouns.

[212] *See, e.g.*, ALEXANDER, *supra* note 140. Alexander provides three excellent examples of a political cabal or party protecting the interests of wealthy white people by offering a "racial bribe" to poor white people, to win their allegiance based on race even though their economic interests were aligned with people of color who shared their income class. *Id.* at 25 (the planter elite after Bacon's Rebellion); *id.* at 32–33 (1890s defeat of the Populist Party platform); *id.* at 42–44 (Republicans' Southern strategy).

[213] *See generally, e.g.*, BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (2018) (detailing the way Americans' perception of danger has increased over the last two decades or so, disproportionate to actual risks, because of financial and political incentives that organizations and individuals have to create and thus perpetuate unreasonable fear about, for example, vaccines, immigration, crime, drug use, and terrorism; simultaneously Americans tend to ignore real threats, such as climate change and growing inequality).

[214] *E.g.*, Jacques Perretti, *SUVs, Handwash and FOMO: How the Advertising Industry Embraced Fear*, THE GUARDIAN (July 6, 2014, 12:00 PM), https://www.theguardian.com/media/2014/jul/06/how-advertising-industry-concept-fear [https://perma.cc/VD98-6CN6].

[215] *See, e.g.*, DANIEL GILBERT, STUMBLING ON HAPPINESS 188–94 (2006).

what we do not know about or have no power over. So as long as we believe, for example, that poverty arises from poor people being unwilling to work or making bad choices though they had plenty of opportunity to make good ones, we feel free to lower taxes and free ourselves of other associated societal responsibilities. Realizing how we all contribute to and support a system that keeps people poor[216] confers on us a burden of responsibility we do not want. The same holds for our systems of race, gender, and so on. And those of us who have unjust privileges under these systems are often reluctant to recognize reasons to give them up.[217]

What if these systems were visible to us from the earliest time we could remember, like the rigid binary gender system that has already been hyper-visible to most of us? Becoming aware of a conceptual schema can help a person resist its pull; it is a necessary first step to reconfiguring that schema. Imagine if we could avoid internalizing harmful schemas, including the worst implicit biases, by immunizing ourselves against them as children during the time we are educated and socialized to become critically-thinking adults. This is the promise of critical studies, including but not limited to critical race theory, gender schema theory, queer studies and trans theory. From a causal standpoint, forces attempting to protect the status quo and smother change are correct to target these forms of education at all life stages, but especially early ones. Yet from a moral standpoint, this violates the rights of children, who are entitled to become critically thinking self-governors, and galvanizes unjust social hierarchies that, in some form, cause harm to the majority of individuals in society.[218]

As I have argued, replacing parents' fundamental right to control the upbringing of children with the CIP would be the better legal rule, and could change the way our society thinks about children and fulfillment of their needs. However, as should now be apparent, the law does not have a good track record when it comes to protecting vulnerable populations. So where does that leave us?

Law and society scholar Martha Albertson Fineman has called attention to the inadequacies of the law as a means to move society toward a meaningful form of equal citizenship, for reasons not unlike those

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[216] *See generally* DESMOND, *supra* note 3 (demonstrating how financially comfortable people in the U.S. exploit poor people through institutional mechanisms and government policies that keep wages down, housing costs up, and make credit difficult for the poor to access). Desmond explains how government policies augment the wealth of the financially secure through home mortgage and charitable contribution tax deductions, for example, while making social safety net programs such as Medicaid, housing subsidies, and SNAP benefits burdensome to obtain and insufficient to meet basic needs. Opportunities and resources, he argues, are hoarded by the financially well-off, who are largely indifferent to the unmet needs of the poor).

[217] *See, e.g.*, FRYE, *supra* note 1, at 13–14; STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA 79–83 (1989).

[218] *See generally* Kimmel, *supra* note 60.

discussed above. Specifically, she questions the legal conception of the person (which she calls "the liberal subject") as a self-sufficient individual who makes economically rational decisions and only needs the government for protection against competitors. Usually, this idealized individual needs the government to just stay out of their way. Instead, she argues, government should seek to prioritize the needs of vulnerable persons in society rather than ideally rational self-sufficient people.[219] Additionally, Fineman demonstrates that dependency is actually universal, even though the law treats it like an exception to the self-sufficiency norm. We are all dependent in childhood and many of us are in old age, but throughout our lives we depend on other members of our society for our well-being. We depend on a government for physical infrastructure like roads, bridges, and utilities, but also for institutions like education, hospitals and health care, a court system to enforce contracts and adjudicate disputes, and so on.[220] Human bodies are vulnerable and have needs that must be met if we are to survive, so vulnerability should not be stigmatized while self-sufficiency is valorized. Independent autonomous beings are theoretical constructs, whereas our reality is lived in actual human bodies.[221]

In my view, the CIP works in the spirit of vulnerability theory. The abstract parents who control the upbringing of their children are not the single parents struggling to find child care so that they do not lose their minimum wage job, become unable to pay rent, get evicted, and have their child taken from them. Attention to the interests of children, who everyone already knows are vulnerable, prescribes the availability of universal, high-quality child care, food and housing assistance, living wages for working parents, appropriately staffed schools with quality teachers in safe facilities, and the like. It also requires the use of empirical data and expertise to ascertain and provide for children's needs, since many parents lack the information, time, or resources to do this on their own. The priority should not be parental control and responsibility, but child well-being.

Additionally, the Vulnerability and the Human Condition Initiative at Emory University,[222] which Fineman founded, seeks to effect improvements to society using incremental changes in specific domains of law through advocates who endorse the mission in various policymaking arenas. It is a

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[219] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 2–4, 11 (2008).

[220] *Id.* at 10–12.

[221] *Id.* at 12–13.

[222] EMORY UNIV., *Vulnerability and the Human Condition Initiative*, https://web.gs.emory.edu/vulnerability/index.html [https://perma.cc/4PXM-WAF3] (last visited Nov. 12, 2023).

decentralized project that aims to change the way legal rules and standards are oriented and conceptualized.[223]

One implementation of the CIP could be a substantive due process right of children under a corrected interpretation of the Fifth and Fourteenth Amendment Due Process clauses. Yet given U.S. legal history, this seems unlikely. The sitting U.S. Supreme Court recently has called substantive due process rights into question, and the parental rights interpretation has been in effect for nearly a century. However, if the parents' right were no longer construed as protected by the U.S. Constitution, Congress or individual states could pass legislation making the CIP the legal standard in key decisions made on children's behalf. Alternatively, state courts might proclaim it to be among the protections afforded by their state's constitution. Individual state agencies or other groups making decisions about children or families could recognize the CIP as a moral right of children and adopt it as the standard they will use in their decision-making.

Even when the purpose of a statute is purportedly to benefit children, the perverse economic incentives, bureaucratic hurdles, and formalistic approaches of courts can result in children's best interests being ignored entirely. In *The Poverty Industry*, legal scholar Daniel Hatcher discusses egregious practices used by U.S. government agencies and private contractors to exploit vulnerable populations for revenue (including foster children and disabled children), leaving them worse off.[224] He describes heartbreaking legal cases in which these practices are challenged unsuccessfully. For instance, in *Harvey v. Marshall*,[225] the Maryland Court of Appeals denied the petition of Harvey, a father supporting five children[226]

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[223] Professor Fineman explained this in an answer to a question from the audience during her April 3, 2023 Tucker Lecture at W&L University School of Law, entitled "Vulnerability Theory." *See* Law Communications, *Martha Fineman to Deliver Annual Tucker Tucker Lecture at W&L Law*, THE COLUMNS (Mar. 23, 2023), https://columns.wlu.edu/martha-fineman-to-deliver-annual-tucker-lecture-at-wl-law [https://perma.cc/6SF7-ZYSZ].

[224] HATCHER, THE POVERTY INDUSTRY, *supra* note 15. Professor Hatcher has written *amicus curiae* briefs supporting vulnerable parties, including in *Harvey*. Another noteworthy case he discusses in *The Poverty Industry* bears similar themes to *Harvey*. In Powers v. Off. of Child Support, 795 A.2d 1259 (Vt. 2002), the Vermont Supreme Court dismissed, for failure to state a claim on which relief can be granted, the petition of a mother who received state assistance for a brief period, during which she assigned her child support claim to the state. *Id.* at 1264–65. The state agency collected monies from her ex-husband, who had moved to New York, but did not keep her informed of the proceedings or pay her any of the monies collected. *Id.* at 1261–62. Although the state made many careless errors, including losing documents (*id.* at 1261), her claim of negligence was dismissed because the state had no statutory duty of care that it owed to her. The court explained: "Vermont's statutory scheme was not intended to benefit individual children and custodial parents, but was intended to benefit Vermont society as a whole. Vermont law does not create a specific duty owed by OCS [Office of Child Support] to any particular groups of persons." *Id.* at 1265.

[225] Harvey v. Marshall, 884 A.2d 1171 (Md. 2005).

[226] *Id.* at 1174–75.

on a wage of $10.96 per hour. He had requested that the Maryland Child Support Enforcement Administration ("CSEA") forgive his arrearages for support of four of the children.[227] When he and his second wife divorced, she was granted custody of his three youngest children. Harvey did not satisfy his child support obligations for those children, and their mother began to receive welfare assistance, which required her to assign the right to collect child support payments to the state. Harvey's first wife, who had custody of his eldest daughter, had done the same. In 1996, when the younger children's mother became unable to care for them, Harvey took custody. He also took custody of his eldest daughter and her half-sister the same year their mother died. He repeatedly informed the child support collection agency that all four of his biological children were in his physical custody because they continued to try to collect child support from him.[228] In 2000, he sought the assistance of a legal aid attorney, who helped him secure a court order in November 2001 granting him custody of his children. The order was made effective as of October 1, 1996, the date the children moved in with him. That order also terminated child support payments and eliminated arrearages as of the 1996 date.[229]

Although CSEA was amenable to forgiving the arrearages accruing before 1996,[230] given Harvey's immediate need to support his family, the private company, Maximus, Inc., with whom the agency contracted to collect arrearages, did not wish to do as the agency proposed. It claimed that its computer system was unable to keep the different amounts and dates of accrual separate, and that forgiving the pre-1996 arrearages "would potentially harm the numbers that show the local enforcement office's collection rate."[231] Harvey filed suit, and both the trial and intermediate appellate courts denied his petition to have the arrearages forgiven.[232]

On appeal, the Maryland Court of Appeals engaged in a lengthy and formalistic statutory analysis, including a trip to Black's Law dictionary, to determine that setting aside Harvey's arrearages would constitute a modification of a child support order.[233] Such modifications were forbidden by a Maryland statute passed after much national public uproar over judges setting aside child support arrearages[234] because "the result is that thousands

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[227] *Id.* at 1177.
[228] *Id.* at 1175–76.
[229] *Id.*
[230] *Id.* at 1176–77.
[231] *Id.* at 1177.
[232] *Id.* at 1177–78.
[233] *Id.* at 1178–83.
[234] *Id.* at 1183–86.

of dollars owed to children and their families are lost forever."[235] The court outright rejected Harvey's argument that child support payments should be collected only when they are in the best interests of the children for whom they are owed. In this case collecting those payments was *not* in the children's best interests,[236] argued Harvey, because that would reduce an already low family income and further impair the family's access to credit.[237] The court countered by citing a statute providing that CSEA is permitted to settle a child support arrearage when it, in its discretion, "considers it to be in the best interest of this State."[238] As the court noted, the statute did not mention the best interests of children, which it easily could have done if it wanted that to be considered.[239] So *the best interests of the state, not the child,* was the standard used[240] to deprive five children of the immediate benefit of their father's meager income, all so the state could be reimbursed for its previous expenditures.

For the CIP to have any impact, of course, it would have to actually be observed in practice and taken seriously. "The child's best interests" is already supposed to be the legal standard governing a narrow range of decisions about children, including decisions about child custody and support. However, it is too easily overridden by other considerations or trampled by bureaucratic inefficiency and corruption. Attention to the CIP can assist in the development of a culture that actually empathizes with children instead of treating them as revenue or property. That children are cherished is expressed in the United States much more in word than in deed. Perhaps one day we can live up to our platitudes.

Even if the CIP does not become a widespread standard for making decisions on behalf of children, its content and justifications can be used to resist actions adverse to children's well-being and rights, such as EGOs. One strategy to promote children's access to information for their well-being is to press the parent proponents of EGOs to explicitly state that they believe their preferences supersede their children's welfare interests. This challenge might persuade parents to seriously consider, as they prepare to defend, their judgments that the policies they propose conduce to children's well-being. At a minimum, this would force an open debate about what is in children's bests interests, a welcome shift of focus from what parents

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[235] *Id.* at 1183.

[236] *Id.* at 1193–98.

[237] *Id.* at 1177.

[238] *Id.* at 1197.

[239] *Id.* at 1196–97.

[240] *Id.* at 1193 ("[T]he CSEA is not bound to consider with the same primacy, if at all, the 'best interests of the child,' as that standard applies to most decisions when relating to children, when exercising its discretion under §10-112 [the Maryland Family Law provision governing CSEA's power to settle child support arrearages for less than the full amount owed].").

have a right to do with respect to their children's education. These strategies might also work with lawmakers who sincerely believe EGOs are justified, if not with those opportunistically using them to wage a culture war that they expect will benefit them politically. Finally, the CIP is the morally required standard, the only one that recognizes children fully as people. As with most civil rights arguments, stating and defending it is worthwhile regardless of the form or time in which it becomes accepted.

IV. CONCLUSION

The law can superficially and formally advance racial and gender justice, or improve labor conditions, but the social backlash generally erases these gains by generating new mechanisms for maintaining unjust hierarchies.[241] American law is therefore more likely to hinder remedies to speech harm than produce them. The nation's best hope for stemming the tide of chauvinistic hostility, and even unintentional bias, is to educate children in sincere, comprehensive, and age-appropriate ways about their social realities, rather than attempting to mold them by indoctrination into patriots.

State protection of what appears to be a patriotic ideology moves us dangerously close to authoritarianism. Consider an Idaho bill that bans educational material because it could "exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."[242] If we assume that Idaho lawmakers are correct that it is in the state's interests to prioritize unity over children's rights to learn about institutional racism, LGBTQ+ identity, or any idea

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[241] For example, a notion of colorblindness is now being deployed to invalidate remedies for racism, such as affirmative action in college admissions and diversity and inclusion programs, by characterizing attempts to advance ethno-racial equality as racism against white people. *See generally, e.g.*, Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61 (2021) (demonstrating that following a historical pattern, the justice-related reforms spurred by George Floyd's murder are meeting "resistance and retrenchment" in the form of legislation that prohibits teaching about institutional racism in government workplaces and public educational institutions; ironically, the critical race theory that is being silenced greatly contributes to understanding these very events); Zoe Masters, *After Denial: Imagining with Education Justice Movements*, 25 U. PA. J. L. & SOC. CHANGE 219 (2022) (arguing that the maintenance of white supremacy in the U.S. has depended on the denial that it exists, and recent legislative efforts to prevent children from learning about racism are aimed at preserving this denial; thus, challenging this denial and "radical structural transformation," not incremental educational reform, are needed to interrupt the intergenerational transmission of the ideology of white supremacy).

[242] IDAHO CODE § 33–138 (2), *available at* https://legislature.idaho.gov/statutesrules/idstat/title33/t33ch1/sect33-138 [https://perma.cc/JV56-6YFH].

Idaho deems divisive but that is likely to be beneficial—or critical—to the child's social functioning and mental health, then this is a case in which state interests in social reproduction conflict with the interests of children. I believe this conflict is illusory, however, because among a state's interests in its people's well-being is successfully fostering a society in which people respect one another while accepting different identities and values. Respect in a pluralistic society requires members to be well-informed about their country's history, how the basic structure of society is organized and operates, how various socioeconomic and identity groups are actually faring, what their challenges are, and how they are affected by particular policies and public rhetoric. As our society grows more diverse along many different dimensions, suppressing uncomfortable truths and protecting existing social hierarchies will only aggravate disunity, not prevent it, in the long run.

Education seems like our best chance. As John Stuart Mill stated more than 150 years ago in his argument against legal paternalism to restrict bad adult behavior, "[s]ociety has had absolute power over [its members] during all the early portion of their existence: it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life."[243] A school-aged child's capacity for empathy is correlated with not only better academic and social functioning for the empathetic child, but also reduced aggression toward others.[244] Helping children understand the struggles others face and why struggles arise can preempt inclinations to hurt peers or condone others doing so.

Children soon learn that most important features of their world have both good and bad aspects; this is a useful lesson that need not be delayed. Society benefits when children are educated to understand social background conditions and how rational people can be expected to respond to them. This gives children more empathy and respect for diverse others, and undermines their motivation to use insults and epithets to protect or reinforce a privileged place in a social hierarchy. Such education would help children recognize the harm this conduct causes, and the unjustness of that harm. Furthermore, understanding can discourage propensities to perpetuate harmful social myths, which serve as obstacles to creating social structures and policies conducive to the welfare of all. Empathetic education and education that enhances children's well-being benefit children into adulthood by situating them better to deliberately

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[243] John Stuart Mill, *On Liberty*, *in* 18 THE COLLECTED WORKS OF JOHN STUART MILL, Ch. 4, §11 (John M. Robson ed., 1977).

[244] Tracy L. Spinrad & Nancy Eisenberg, *Empathy, Prosocial Behavior, and Positive Development in Schools*, *in* HANDBOOK OF POSITIVE PSYCHOLOGY IN SCHOOLS 119, 121 (Rich Gilman et al. eds., 2009).

choose and pursue life objectives and plans that promote their flourishing. Reflexive pursuit of a default notion of "success," which is understood to mean wealth and prestige, has not been leading to individual happiness or societal flourishing. Other societies are doing better for their members.[245]

We should, therefore, acknowledge that children's still-developing interests are just as important as adult interests. Adults are not morally justified in using children to vicariously fulfill their dreams, serve their gods and families, or make them proud. Protecting and educating children should not serve as a pretext for pushing other parental or political agendas. Adults should help children grow into physically and mentally healthy critical thinkers and give them the chance to do better than we adults have done so far. Future generations have an opportunity to face the difficult conversations and undertake the painful work of dismantling unjust hierarchies. We should not sabotage them as they begin to prepare for that task. That is the utilitarian public policy argument for not walling children from information that threatens a status quo that many adults embrace.

Aside from the CIP's utility, justice demands that we respect children as people with interests equally important to those of adults. With the CIP, we can help children grow into physically and mentally healthy critical

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[245] For example, life expectancy in the United States has been declining because of addiction and suicide. John Elflein, *Diseases of Despair in the U.S. - Statistics & Facts*, STATISTA (Oct. 7, 2021), https://www.statista.com/topics/5961/diseases-of-despair-in-the-us/#topicOverview [https://perma.cc/5WG2-WAAA]; U.S. CENSUS BUREAU, *National Poverty in America Awareness Month: January 2023* (Jan. 2023), https://www.census.gov/newsroom/stories/poverty-awareness-month.html [https://perma.cc/RV4R-3KL5] (stating that the official poverty rate is 11.6%, with Black children's poverty rate at 31%); Eric Ravenscraft, *What a 'Living Wage' Actually Means*, N. Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html [https://perma.cc/9LLN-WD5M] (claiming wages are too low for many people to afford housing, health care, or child care); *Drug Abuse Statistics*, NAT'L CTR. FOR DRUG ABUSE STAT. (2023), https://drugabusestatistics.org [https://perma.cc/Y8WC-VS6W] (7.4% of people older than twelve have a substance use disorder); SAMHSA, *SAMHSA Announces National Survey on Drug Use and Health (NSDUH) Results Detailing Mental Illness and Substance Use Levels in 2021* (Jan. 4, 2023), https://www.samhsa.gov/newsroom/press-announcements/20230104/samhsa-announces-nsduh-results-detailing-mental-illness-substance-use-levels-2021 [https://perma.cc/NYD4-Y4PP] (approximately 25% of adults had a mental illness in 2021); GUN VIOLENCE ARCHIVE (Oct. 23, 2023), https://www.gunviolencearchive.org [https://perma.cc/N9AQ-94LW] (374 mass shootings took place in 2023 and 22,825 people died of gun violence); Nazish Dholakia, *The Difference Between Jail and Prison*, VERA (Feb. 21, 2023), https://www.vera.org/news/u-s-jails-and-prisons-explained [https://perma.cc/7XGY-F7NS] (about 1.2 million people are incarcerated in the United States); ROBIN A. COHEN, AMY E. CHA, EMILY P. TERLIZZI & MICHAEL E. MARTINEZ, HEALTH INSURANCE COVERAGE: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, 2021 (2022), https://www.cdc.gov/nchs/data/nhis/earlyrelease/insur202205.pdf [https://perma.cc/Z2QX-5ZGM] (30 million people—9.2% of Americans—have no health coverage.). There is much room for improving our lives as individuals and as a society by reshaping the well-worn grooves that conduce to destructive old patterns.

thinkers and authors of their own lives. Let us give them the chance to do better than we have done.