INTERDICTIONS AGAINST CHILDREN'S HUMANITY

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In its traditional usage, oppression means the exercise of tyranny by a ruling group. Yet, oppression creates injustice in other circumstances as well. People are not always oppressed by cruel tyrants with bad intentions. In many cases, a well-intentioned liberal society can place system-wide constraints on groups and limit their freedom.

Oppression can be the result of a few people's choices or policies that cause embedded unquestioned norms, habits, and symbols. These societal rules can become a[] restrictive structure of forces and barriers that immobilize and reduce a group or category of people.

No matter which definition you use, oppression is when people reduce the potential for other people to be fully human. In other words, oppression is when people make other people less human. This could mean treating them in a dehumanizing manner.

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> *But [] it could also mean denying people language, education, and other opportunities that might make them become fully human in both mind and body.* (emphasis added).
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> ~ I. Young, FIVE FACES OF OPPRESSION (2004)

ABSTRACT

After *Obergefell*, there was a sharp pivot in cause advocacy related to children's interests in bodily autonomy, identity, speech in school, and family privacy. Within only a few years, there was and continues to be a flurry of legislative activity and attempts to restrict children's access to gender-affirming care, reproductive rights, and Critical Race Theory.[1] The perverse effect of advocates' efforts to curb all parents' decision-making for their children is the dismantling of the parental rights doctrine.

The theory and implementation of parental rights doctrine from the 1920s began and continues to prevail as a core of the suite of personal privacy rights.[2] Dismantling parental rights doctrine pushes the U.S. further away from participating in the global community in support of children's rights. Progressive and conservative cause advocates should be on notice that dismantling parental rights doctrine threatens to forestall future efforts to realize children's incipient human rights. This essay contemplates the deeply unfair and distressing effects of stripping away from children, valuable resources needed to become fully human. This essay contemplates possible implications, internationally and domestically, when cause advocates attempt to enforce their moral and religious norms as the standard against which other people's children are to be measured for childhood outcomes.

I. INTRODUCTION

The outlook for implementing formal children's rights in the U.S. is not promising. For years, the United Nations Convention on the Rights of the Child ("CRC") has been the legal framework of choice for children's rights for most countries in the world.[3] The U.S. is a signatory to the main part of the CRC and a ratifying party to two of three CRC Optional Protocols

1. *See* Jon Passantino, *A Roundup of Controversial Red State Actions Restricting Abortion, LGBTQ Rights and More*, CNN POLITICS (Apr. 18, 2022, 5:17 PM), https://www.cnn.com/2022/04/06/politics/red-states-abortion-lgbtq-critical-race-theory/index.html.

2. *See* Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV., 2529, 2531, 32 (2022).

3. *See* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

("OP").[4] Not ratifying the main instrument means the U.S. has no obligation to implement the CRC's core principles into its existing domestic legal framework, leaving U.S. children without formal human rights. An absence of formal rights is not equivalent to an absence of legal protection altogether,[5] meaning children as a class would not be able to pursue claims for sustainability and development goals against the State.

Suggesting international human rights as a possible source for instituting legal protection for children in the U.S. highlights the relatively thin support children have for realizing their human rights during childhood. Perhaps the U.S. polity does not have an interest in arming children with the tools of litigation and claims filing. Perhaps the need for children to have their own set of rights, separate and distinct from parents, is a threat to U.S. parents instead of a small snapshot of the holistic, interwoven, interdependent nature of international human rights conventions. Analysis and extrapolation of recently available comparator cases by Professor Clare Ryan suggest there is low U.S. tolerance for heavy involvement by State actors in private family legal regulation.[6] Ryan's careful comparison of CRC ratifying States to the U.S. suggests resistance to ratification may be more than a conceptual case of U.S. isolationist exceptionalism, but a deeper, doctrinal distrust of State action vis-à-vis family regulation.[7]

The U.S. maintains a protectionist approach to children in the course of its regulation of families. The State deems children "incompetent" due to a lack of experience and developing capacity from childhood to adulthood. But recognizing a lack of competency (referring to developmental stage and experience level, not intelligence) is only half of the process. The State then assigns parental duties, confusingly referred to as such when the duty is owed to the State, not the child would-be rights-holder. Obviously, in the wilds of courtrooms and various jurisdictions with different rules, there is always some variation in outcomes. But if rules delimit how and what children may experience during formative developmental periods, variation in legal outcomes could increase as families are unable and/or unwilling to conform to the norms. Imagine the outcry if parenting fitness depended entirely on whether children reached developmental milestones, narrowly defined and without sensitivity to an individual child's or their parents' situations. An

4. *See* Luisa Blanchfield, *The United Nations Convention on the Rights of the Child*, CONG. RSCH. SERV. 4 (July 27, 2015), https://crsreports.congress.gov. (search in bar "The United Nations Convention on the Rights of the Child, Luisa"; then click pdf hyperlink).

5. *Id.* at 17.

6. *See* Clare Ryan, *Are Child's. Rights Enough?*, 72 AM. U. L. REV. 2075, 2090, 95-96 (2023) https://ssrn.com/abstract=4448878.

7. *See id.* at 2126, 2127.

extreme example would be a court removing a child from the child's parent(s) if the child failed to reach the weight and height of other children at the same age. Imagine, too, that medical professionals and legislators knew in advance of passing such a law that some parents would never be able to raise their children to meet standardized, developmental outcomes. Instead of allowing for a range of experiences, naturally-occurring differences, and parents' considerable ability to control decision-making, a brightline rule might remove work necessary to review the child's lived reality and the critical thinking necessary to work out what the best interests of the child might be.

And yet, it appears as though the standard created and tested throughout the U.S. is at risk of a system overhaul that will replace a malleable, customizable standard with a narrow, bright-line rule that represents some, but not all, positive outcomes for children. Rather than thinking of U.S. domestic relations as a wild, unstable legal arena that relies on a subpar decision-making methodology instead of using a certain, observable rule, consider that the tension in family law settings is more likely to be a constant tension over the scope of parental rights. Even if rules seem better for establishing stable metrics and fewer opportunities for abuse of discretion, the fear of losing considerable parental rights in exchange for the promise of increased consistency via bright-line parenting laws does not seem to have much traction for the U.S. public. Despite international and domestic encouragement and admonishments to ratify the CRC, the U.S.'s love of parental rights doctrine is the oft-cited reason for not fully embracing the CRC.

In place of ratifying the CRC, scholars cite parental rights doctrine as an equivalent system for protecting children's interests. However much parental rights doctrine may seem like a legal artefact from earlier iterations of family law, there may be an argument that it does not need to be a faulty, outdated system altogether. Combined with pragmatism and a prescient understanding that parents are best positioned to be familiar with a child's needs for human touch and interaction early in life and the reality that parents are more likely to do the daily ministerial work of parenting, i.e., saving records, evidence of medical care, etc., because of their vested interest in their child's healthy development, parental rights doctrine could be realized as a significant rights-protecting tool, regardless of partisanship.

State interests and freedom to raise children according to presumptive parental fitness is a benefit that operates as a rebuttable presumption.[8] In place of asserting children's status as rights holders, the assumption is that

8. *See* Ryan, *supra* note 6, at 2090-91.

parents are benign and act for the good of their children, possibly even helping children develop a greater sense of their own interests. Successful legislative efforts to restrain children's interests suggest plans by conservative cause advocates to spread disinformation and foment unrest in the best interests of the child standard. In the context of a weak, faltering individual rights framework, it should not be surprising or disappointing that conservative interest groups engaged in banning and prohibiting behaviors and disfavoring children's identity traits for other people's children (children identifying as LGBTQ+, children with uncertain immigration status, etc.) continue to have traction in a number of states.[9] Cause advocacy materials for conservative values seem to spare no tolerance or acceptance for children and parents who will not or cannot fit within conservative-created norms. For some progressives, it remains tempting to relinquish the field to avoid seemingly impossible conflicts.

But, without a critical mass of parents and children's advocates willing to maintain and keep investing in a legal system that attempts to balance equities, the system's features could lead instead to its collapse. The system works because of the core principle embedded in the parental rights doctrine. Aside from obviously consensus-based values like children should receive material and intangible welfare needs, a laissez-faire approach to parenting requires minding one's own business, so long as there is no evidence of harm to the child. The classic American attitude of individualism, even if it means opposing government, appears in many iterations, but it is not without any limitations at all. There are safeguards in place, such as contact points with mandatory reporters (doctors, teachers, caregivers, etc.) to act as a safety net.[10] The legal tradition of enjoying a bubble of privacy over one's home and family life is admittedly a privilege for some families who are favored and used abusively against other families who are disfavored by the State (see prison pipeline, child removal, poverty, single parents).[11] Without a coalition to help all parents see that more is at risk than the children at whom cause advocates point when seeking legislative changes, conservative parents falling prey to being duped into supporting actions that will ultimately harm all parents' abilities to care for their children is a chillingly real possibility. For parents whose identities are disfavored by the State, the cost of living in constant fear and the stress of being deemed "not rightful" parents cannot be overstated. Should family processes continue to be overtaken by a brute

9. *See* Elizabeth A. Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups Is Fueling a Surge in Book Bans*, N.Y. TIMES (Jan. 10, 2023), https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html.

10. *See* Ryan, *supra* note 6, at 2084-85.

11. *See* Huntington & Scott, *supra* note 2, at 2540.

force approach with fixed legislative fiats instead of a flowing, dynamic system designed for each child at bar, the hope of bettering children's lives may prove to be too elusive. And, extreme measures, like hiding one's children in remote wilderness areas, may not seem as unthinkable as in the recent past.

Rather than viewing narratives authored by interest groups about the issues they are grappling with as single, isolated instances of emerging issues in urgent need of being addressed, imagine that parental opposition to Critical Race Theory in classrooms, the elimination of minor children's access to contraceptive and reproductive care, and bans on "gender-affirming care" were just varied iterations of the same idea. If each stand-alone issue were a hydra head, battling each and every hydra head would result in a wasteful expenditure of resources with little to show for the exercise. Unleashing a seemingly overwhelming amount of legislative actions everywhere while relentlessly expending energy and resources in lockstep coordination across swaths of the population is the strategy of choice for groups that have set their sights on unlikely targets–children.

Religious and socially conservative interest groups claim their advocacy efforts aimed at children are beneficial and protective for children.[12] The wave of legislation[13] and opposition to children's interests in autonomy,[14] privacy, and free speech[15] are viewed as a composite strategy that creates a picture of a certain kind of childhood. Advocates may believe that they are working for the good of all children in proposing laws informed by a singular vision of childhood. However, not all parents wish to restrain speech about race in classrooms,[16] limit access to reproductive medical care, or prohibit the use of medication for gender-affirming treatment. In what is most certainly a concerted national advocacy effort to push courts to implement a narrowly defined form of parenting and children's development, the risk of harm to parents and children who are outside of that norm is not the only danger. Significant negative implications for supporting current legislative advocacy include creating a prescriptive identity formation experience for

12. *See* THE HERITAGE FOUND., CRITICAL RACE THEORY: KNOWING IT WHEN YOU SEE IT AND FIGHTING IT WHEN YOU CAN, 1, 18 (2021).

13. *See* Redfield et al., *supra* note 14, at 3, 6; *CRT Forward Tracking Project: Final Reflections and Future Directions, supra* note 14.

14. *See Dobbs*, 597 U.S. at 231, 362 (discussing curtailment of reproductive rights and holding that there is no federal right to choose to terminate a pregnancy); *see Bellotti*, 443 U.S. at 651 (blocking parents from consenting to a minor child's choice to terminate a pregnancy).

15. *See* Whitney K. Novak, *supra* note 16, at 1.

16. *See* Leah Watson, *What the Fight Against Classroom Censorship is Really About*, ACLU (Sept. 7, 2023), https://www.aclu.org/news/free-speech/what-the-fight-against-classroom-censorship-is-really-about.

children.[17] Another is *replacing* fit parents' medical decisions made in the best interests of the child with the court or legislative body's opinion about what is best for children, generally.

Any group advocating for one model of childhood to the exclusion of all others, undermines core principles underpinning the U.S. legal framework that regulates parents and children. This essay contemplates the process of changing the nature of the U.S. legal system governing family decisions. If judicial discretion as a legal process, including balancing tests, case by case review, and related methods for tailoring the law to meet the needs of the families at bar, is eradicated because a single group-specific norm/vision of childhood is ossified into law, the State stands to be a tool, available for capture and replacement of parents' judgment. The problem of the State replacing parents' judgment about their children's best interests with its own is the crux of the decision in *Troxel,* where the grave error is replacing a fit parent's judgment with the court's.[18] In other words, legislating substantive norms instead of participating in the process of allowing the law to be responsive and flexible to speak to differences inherent in pluralistic societies at the individual level undermines a long, well-developed theory of parental rights doctrine. Part of the parental rights doctrine in the U.S. includes a presumption of fitness and acting in one's children's best interests. At the start of a State-to-parent interaction, having a presumption of fitness and acting in BIOC is a powerful position; it confers an implicit preexisting status, that of "rightful" parent. Eliminating judicial processes associated with applying standards instead of laws, as evidenced by the disfavored family groups already stripped of their status as "rightful"[19] only places more families at risk of being stripped of "rightful" parent status.

Parents who are seen by the State as "not rightful" are under constant threat of child removal, State scrutiny, privacy violations, and being subjected to numerous criminal and civil tools used to publicly enforce norms.[20] All parents, regardless of their political affinities, should coalesce

17. *See* Ryan, *supra* note 6, at 2130.

18. *See* Troxel v. Granville, 530 U.S. 57, 69, 72-73 (2000) (The Court discussed a Washington statute that was wildly open to visitation petitions by 3rd parties, but the crux of the case was not the nature of the visitation statute ["grandparent visitation statutes" were not prohibited]. Instead, the statute "as applied," where SCOTUS critiqued the lower court for replacing its judgment for a fit parent's, was the cited reason for overturning the lower court decision).

19. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES- AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022).

20. *See* MICHAEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 45 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (discussing state use of the spectacle of torturing bodies meant to teach complying populations the consequences of non-compliance); Ryan, *supra* note 6, at 2106, 2110.

to fight against legislative efforts to read into law a static version of idealized childhood. If the law were to dictate what parents may not do while raising children, there would be no ability for parents to diversify their parenting choices. Imperfect as the system may be, the possibility for better decision-making persists because parental rights are not so diluted by law as to be pro forma, for now.

Returning to the negative outlook for children's rights in the U.S., this essay connects the concerns over partisan-specific goals related to children to show a point of interest convergence. Rather than fighting over the substantive content of laws used to regulate families, all parents should coalesce to first preserve existing rights. By doing so, parents and children's advocates could work together to curtail increasing State capture by groups with interests that do not align with parents or children. This essay continues as follows: Part II begins with a short discussion of the context for monoculture advocacy through aggressive legislative proposals. Part III lays bare problems resulting from delimiting children's interest in self-determination. Relatedly, existing parental rights doctrine protects the process of developing as a person and parents' interest in transmitting cultural, moral, social, religious, and other identity-related characteristics to their children as part of a historically valued process. Finally, part IV contemplates the dangerous effects of undermining existing parental rights doctrine and the foreclosure of developing children's rights in the U.S.

II. COSTLY MISINFORMATION

This grouping of issues (CRT, gender-affirming care, reproductive issues, etc.) makes a motley assortment at first glance. Looking more broadly at commonalities among the issues and more closely at possible ramifications for successful restraint in each category reveals threats at the micro and macro levels. At the micro-level, each issue requires countering with facts to dispel intentional and unintentional misstatements of fact. The cost involved in knowledge creation, the work of universities and think tanks, is significant. There are people in place who are doing the work. For advocates who wish to contribute but are not in the business of knowledge production, there is an immediate and great need for speakers in the middle register. Academic reports and research are designed for a specific audience. When thinking about the connected problems of misinformation generally and monoculture advocacy, in particular, misinformation and monoculture advocacy seem to share qualities of spam email filled with junk, phishing schemes, and malware. The messaging in support of monoculture advocacy, like spam email, is relative to its gains, cheap to produce, effective at reaching a wide swath of people, and appears to adjust to accusations of

falsity with a metaphoric shrug and continuation of its work of spreading misinformation. Countering spammed misinformation is extremely expensive in resources and effort needed to persuade people to review truth-claims and think for themselves about information.

Most adults in the U.S. read at only a sixth-grade level.[21] Critical thinking skills, usually well-developed in college because of the quality and amount of reading and discussion performed as degree requirements have declined to the point that adult college graduates may only read one book during a four-year degree in elite and non-elite schools.[22] Perhaps it is only anecdotal, but with the ubiquity of screens and decline in reading, difficult conversations, and critical thinking, generally, the ability to reach people who are likeliest to be receptive to new perspectives may be a game changer. One has only to look at the difference in materials produced to see that media, socializing, hobbies, and other pedestrian touchpoints with other people can be curated so that there is less contact with people whose viewpoints are substantially different from one's own. Cause advocates who produce brightly colored, simply written, easy-to-understand materials seem to reach their audiences and persuade with little effort.

It is not simply parents with children or parents who value Critical Race Theory whose legal protection is at risk. Instead, the foundational legal framework for parental rights manages the tension between State interests and parental freedom to raise children. Accordingly, presumptive parental fitness of parents and giving deference to parents are at stake. Successful legislative efforts to restrain children's interests overtly replace parental judgment with the State's judgment about the substance of the best interests of the law.[23] For example, a law banning gender-affirming care replaces parental judgment with the State's. The tragedy happening in slow motion threatens to hurt children who consistently feel the impact of having little power and fewer formal rights in society. Seeking coalition building to reach all parents in the fight against dictatorial governance methods by the State may seem like a fool's errand. But it would not be a surprise at all to discover in the near future that theorists like C. Miller Wright and Chris Hedges were prescient in describing power elites who hitchhike along with cause advocates and whip the movement into a frenzy, seeking objectives that ultimately harm the main body of the advocates. Power elites, advocacy

21. *See Literacy Statistics 2024-2025 (Where We Are Now)*, NAT'L LITERACY INST., https://www.thenationalliteracyinstitute.com/2024-2025literacy-statistics.

22. *See* Rose Horowitch, *The Elite College Students Who Can't Read Books*, ATLANTIC (Nov. 2024), https://www.theatlantic.com/magazine/archive/2024/11/the-elite-college-students-who-cant-read-books/679945/.

23. *See* Huntington & Scott, *supra* note 2, at 2533, 2539.

leadership, and lightning-rod figures at the forefront of movements prove time and again to care little for the cause itself and move from power grab to power grab.

Power elite theory is helpful in explaining the threat posed by conservatives seeking to overhaul the process of prescribing the content of laws, instead of allowing them to remain open to interpretation per existing norms and the children at bar. The move by legislative advocates to directly mandate parental behavior through bans and prohibitions is more likely to destroy the parental rights doctrine and forestall children's rights development. While certainly there are likely some parents who would be delighted if the system were to be taken down to the studs and made over into a dream house, the cost of refusing to even entertain the possibility that a monocultural prescription of moral values through law is acceptable for all families is too high. Since all parents stand to be harmed by dismantling existing legal doctrine, tested over time and thousands of cases, all parents should be on notice about the actual costs and ramifications of eradicating the parental rights doctrine, which signifies for future dealings between parents and the State.

The U.S. family law system–while not perfect–is more likely to be responsive to the people at bar and more likely to survive against betrayals of the cause, infighting, and the general problem of living with chronic parenting stress. As the system runs now, it is not the province of people grandstanding about social and moral groundbreaking discoveries and fighting for freedom against oppression. Rather, the legal framework is strong because judges can adjust to improve the law's efficacy in speaking to each family's individual experience. If advocates from interest groups feel entitled to propose and make laws for other people's children, macro-level laws that attempt to impose monoculture, the system should keep a method of checks and balances to preserve fairness in decision-making, and allow parents and courts the opportunity to work in partnership to improve a child's outcome. This flexible, delicate, complex, yet resilient system can withstand years of scientific medical advances and shifting religious and political norms, much like a reliable, high-end operating system that works quietly in the background.

Placing the family law system at risk without understanding the dialogic nature of built-in safety valves and careful weighing of intangible factors would be falling prey to stereotypes about family law as a lesser form of the art of law. Professor Clare Huntington's characterization of family law as eminently pragmatic is a powerful reminder that all theoretical arguments about ideal childhood and better outcomes pale in comparison to the decisions that must be made with less information, fewer resources at hand,

little to no trauma-response for the most vulnerable, and more emotional regulation needed for everyone involved.[24] And yet, as unwieldy and messy as the process is–with plenty of failures and successes sprinkled throughout so that no one can be sure of any one surefire method for finding optimal legal decisions for each family–at least variability remains. On the one hand, planning for a percentage of cases where the legal system will fail a child is a terrible thing. On the other hand, were the system to no longer have space for variety because a few powerful elites capture the norm-setting process, there would be devastating consequences for families. While the number of those negatively impacted might be small, the impact for the few would be world-changing, as it would mean that the children in families predicted to fail in the current system could experience child removal and associated harms up to and including death. The number of predetermined failed cases would be discoverable by virtue of data produced during years of family courts refining their processes, constantly seeking fairness for a variety of family types who must make do with the situation available.

Preventing the U.S. family law system from being dismantled and perhaps stopping for refreshment to reset and clear the mind is by far the better path. The action most likely to change and damage the process for determining parenting norms and defining in real life for the child at bar what good childhood outcomes are is so far removed from the situation that judgment would be fatally compromised. Allowing political ideas to take precedence over a child's life. Many states in the U.S. use similar value systems for making decisions about children.[25] At times. parties argue over custom, culture, and community wisdom, adding to the street-brawl vibe of parenting norms today. Rather than participating in a pluralistic society and complying with basic standards of social decency, some conservative activists mistakenly argue that their right to freely exercise religious beliefs provides grounds to use the law as a sword.[26] An example is State-sanctioned relief for white children from experiencing discomfort in a classroom if race is discussed or not teaching acceptance if one's religious belief runs counter to treating gender-fluid children as equals.

Considering the general lack of formal legal protection for children in U.S. law, disrupting emergent legal rights, foreclosing the possibility of future rights development, and choosing regressive attitudes about parental

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24. *See* Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1507 (Apr. 2023).

25. *See Child Custody Laws & Forms: 50-State Survey*, JUSTIA (Oct. 2022), https://www.justia.com/family/child-custody-and-support/child-custody-forms-50-state-resources/.

26. *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1377 (1994).

ownership of children instead of a parental rights doctrine based on thoughtful balancing means that this moment in time is ripe for change. It is critical that all parents in the U.S. recognize and understand the implications of eradicating and replacing parents' decision-making rights for their children with the State's judgment. While an idealist would say that there has always been a moral duty for all parents to fight for the inequities and indignities visited on disfavored family groups throughout U.S. history, and that is enough to protect children, realists can easily counter with the facts that should persuade everyone who cares for and about children to act. In other words, whatever moral motivation there might be, there is ample evidence now that should act as a catalyst for protective action for children. People could take time to understand how vulnerable our system is to abuse and to improvement. Thanks to a passionate relationship with tracking data and seeking empirical evidence, modern science provides clear evidence about the actions and conditions that make children's lives objectively worse. While society may never know with any certainty what components make up the Best Interests of the Child ("BIOC") standard that would guarantee the best outcomes for all children, there is no reason to avoid preventing the worst harms, the things everyone knows are bad for children.

A. Advocating for Monoculture Under the Cover of BIOC

Using the law to dictate a universalist monocultural vision of childhood is problematic as such a law would not reflect all families subject to it, and parents' and children's ability to experience a wide variety of ideas and ways of being in the world during critical personal identity formation processes endemic to childhood would be compromised. Parents who favor a certain model of childrearing and the accouterments necessary for winning at parenting[27] may advocate for the enforcement of their favored model under the cover of the BIOC standard. No matter how valuable a given model of childhood may be, the process of defining some models of childhood as less valuable/valid is an unfair use of law to reproduce power hierarchies. Worse than simply being inapt as a tool for the problem at bar, legislating social

27. *See* ROBERT D. PUTMAN, OUR KIDS: THE AMERICAN DREAM IN CRISIS 55-57, 58 (2015) (eBook) (Putman notes that, by the 2000s, rich families lived apart from others and outspent middle- and working-class families by at least nine percent compared to the 80s and 90s when they only outspent by one to two times and lived in the same neighborhoods. Economic disparity has increased dramatically, concentrating vast amounts of wealth in fewer people. Because there has been relatively little social economic mobility, middle-class parents scramble to compete with other families; instead of buying things for children as in generations past, current parents invest a significant portion of their income and time into their children's learning experiences. All of this is believed to help secure their children's place in the middle class, despite the economic reality that most U.S. government spending is allocated to adults over age sixty-five.).

norms into solid forms allows powerful, elite groups to prescribe ideal norms rather than utilizing existing dynamic processes for decision making, a process that could reflect respect for other parenting methods, cultural diversity, and embrace human variety.

Using the law to enforce social norms may seem like a good solution for addressing disliked parenting behaviors. Yet, all parents should carefully consider the ramifications of fundamentally changing the core relationship between parents and the State because of partisan-driven legislative reform. Seemingly separate and distinct strands of advocacy strategies from socially conservative interest groups underscore the possibility that all children are at risk of becoming collateral damage to a concerted effort to dismantle existing legal individual rights schemes that will make more parents and children vulnerable to oppression by the State.[28]

While one could argue that the BIOC is a substantive doctrine that sets the norms by fiat, in comparison to proposed legislative bans on gender-affirming care, reproductive rights, and speech limits (expressive conduct and language [restricting mention of race, Critical Race Theory, or sexual minorities and related information in schools]), the BIOC is a bare framework, not a prescriptive guide for best practices in raising children. Most BIOC standards, the preferred and generally adopted standard by courts domestically and internationally, vary in the factors that decision-makers can use.[29] There is no universal standard that enumerates a list of factors based on stable, defined, and widely accepted substantive requirements that could consistently render decisions in the best interests of all children. In the international arena, the BIOC standard, required by human rights conventions, has been intentionally left undefined aside from factors that speak primarily to basic welfare needs[30] and guidelines that direct implementation in alignment with international human rights laws. It is precisely because each State that implements the CRC needs the capacity to tailor the law to domestic norms, that room is left for tailoring the law to the people, and not vice versa.[31] In comparison, shortly after *Obergefell* legalized same-sex marriage in the U.S., interest groups changed tack to focus on transgender and genderfluid children.[32] In short order, content in

28. *See* Ryan, *supra* note 6, at 2075.

29. *See* Stephanie L. Tang, *Best Interest of the Child and the Expanding Family*, 14 U.C. IRVINE L. REV. 263, 281 (2024).

30. *See* Ryan, *supra* note 6, at 2089, 2090.

31. *See Implementation Handbook for the Convention of the Rights of the Child*, U.N. CHILD.'S FUND (UNICEF), 2, 57 (3rd ed. 2007).

32. *See* Sam Cabral & Grace Conley, *Jim Obergefell: The Man Who Helped Legalise Same-Sex Marriage*, BBC (Nov. 30, 2022), https://www.bbc.com/news/world-us-canada-63798243.

children's classrooms, like Critical Race Theory, came under attack.[33] So, rather than developing thoughtful, protective children's rights schemes, advocacy groups turned on children with disfavored identities to promote their own political ascendency. `

B. Developing Parental Rights Doctrine

The development since the 1920s in U.S. domestic relations law has led to a delicate but powerful balance of relationships and interests among parents, children, and the State. The system is worth preserving and investing in improvements in lieu of disregarding the lessons from the system's inception at the beginning of the twentieth century. Weakening and dismantling the parental rights doctrine because some parents dislike other parenting styles is an absurd overreaction to an activity that could be absorbed and transformed into something better. While eradicating doctrine is always a possibility within a dynamic legal system, especially if the doctrine in question could be perceived as a roadblock to children's rights, without fully understanding the significance of dismantling parental rights doctrine, it is not likely to be a result desired by either children's rights supporters or people who take for granted the benefits of a strong parental rights doctrine. At least some portion of parents identify as conservative and are fully engaged with party leaders to eradicate parental rights doctrine without realizing that doing so destabilizes foundational principles regarding the State's deference to parental judgment and choice.[34] It is critical that advocates seeking legal control over children's interests understand the risks associated with hollowing out U.S. parental rights doctrine. Dictating which ideas can be learned in a classroom, whether parents can make medical choices for children, and so forth, disempowers individuals as rightful parents in partnership with, rather than subservient to, the State in raising children. Being in partnership with the State as a rightful parent does not mean the State is prohibited from intervening between parents and children. The State often intervenes, as evidenced by the common law processes built over time to balance the interests of the State, parents, and the child.[35]

Even though parental rights to the "care, custody, and control" of their children is a fundamental right and some family's rights in this regard are routinely violated, further degrading parental rights doctrine is not responsive as reparation for the parents and children who have suffered abusive State interventions and violations of their rights. Laws such as the Indian Child

33. *See id.*

34. *See* Huntington, *supra* note 29, at 1518, 1581.

35. *See* Huntington & Scott, *supra* note 2, at 2529-30.

Welfare Removal Act ("ICWA")[36] are designed for that express purpose. Removing all parents' rights to demand due process from the State would change the nature of an individual's ability to interact with the State. Preserving the right a parent has to demand a fair process and respect as a knowledgeable, fit caregiver would no longer apply. The existence of parental rights, especially when parents are not in agreement with the State, protects all parents. When individuals are at a natural disadvantage because of the power differential between individuals and the State, it seems unfair to further burden an individual and not place any limitations on the State. Much like corrective policies in criminal law, where prosecutors are to seek justice, not just to prevail in court, so, too, is the common law development of parental rights doctrine a corrective measure to temporize the State's immense power. So, too, in domestic relations settings, the State's immense power should be countered by shoring up parents' right to treat with the State more like equals and less like expendable resources. Schemes to improve the system for making legal decisions on behalf of children are many; below are a very few. They include principles that make up the core of the CRC.

One scheme is child-centric, deeming children as rights-holders and adults throughout society, not just parents, as duty-bearers. Duty-bearers have an affirmative duty to recognize the primacy of children's rights, work to realize their rights, and infuse all areas of social participation with the value of giving primacy to children's rights. In the obverse, people in a rights-centric scheme fit themselves to standards so they can qualify as capable of holding and exercising rights.

Amongst international peer countries, the U.S. remains an outlier because it has yet to ratify the United Nations Convention on the Rights of the Child (CRC). Domestically, in U.S. legal tradition, the family[37] and sometimes public schools are settings where children are expected to experience growing capacity to interact with the state as an adult. Children's interests[38] in privacy, autonomous identity development are difficult to

36. *See Indian Child Welfare Act*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., https://www.bia.gov/bia/ois/dhs/icwa.

37. *See* Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 504 (1977).

38. *See Children's Rights*, STAN. ENCYCLOPEDIA OF PHIL., 1 (Jan. 24, 2023), https://plato.stanford.edu/entries/rights-children/ (The idea that children have legal rights and those rights inherit in children because of children's status as human children is one of the organizing principles for modern international conventions. In the obverse, in a rights-centric system, rights are understood as "things" to be selectively bestowed on some, but not all groups. Selective bestowal of rights becomes normalized by transforming individuals' personal traits into rights-qualifying or disqualifying factors needed to access rights. Rights-centric and children-centric schemes for children until such time as capacity is in place, only then can children- in a rules-centric system quality to interact as subject, not object, with the State. In the protectionist version, children may not have legal rights because they are children. Similar to the connective idea that international

anticipate when or if it will happen. The distinction between these two representative legal schemes is critical in understanding how and why conservative interest groups whose advocacy strategies pose a threat of harm to parents and children may be ostensibly motivated to fight against their own interests.

In addition to the harm caused by the substance of bans, the integrity of processes used by advocates to help children find sources of resilience and grace may be compromised. The consequences of eradicating a parental rights doctrine would also be dire, as there is no other structure in place to provide basic legal protection to vulnerable populations. In past years, advocates of children's rights, especially as articulated in the CRC, sought the U.S. ratification of the CRC to provide stronger formal legal acknowledgment of children's status as human beings.[39] Commentators cite public distrust and uncertainty about the effects of international law in domestic family law.[40] Others cite a national attitude of isolationism, rugged individualism, and ego that resists any hint of supervision from another sovereign entity.[41] Recent analysis of children's legal outcomes from ratifying States compared to U.S. outcomes provides additional nuance to the dilemma of children without legal rights. The abstract conversation about whether investing limited available resources in rights advocacy instead of/at the expense of providing children with material resources that directly affect their outcomes is beyond the scope of this essay. However, rights within the U.S. legal system are realized only as they are enforced. How, then, can we improve children's lives when they are without rights to recognize, realize, and enforce?

Parental rights in the U.S. are, in comparison to older legal systems, relatively new.[42]

As recently as 2000, the *Troxel* Court admonished the lower court to refrain from replacing a fit parent's judgment regarding a child's best interests with its own.[43] An argument can be made that courts interpret laws

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human rights law's foundational principle that people have rights because they are human end stop, without qualifications or the need to demonstrate suffering or bear the marks of racialized, marginalized, or other identity category signifiers to qualify for the opportunity to persuade the State that you deserve corrective action by the State to itself or private actors as a matter of anti-discrimination law. I refer to children's rights as interests. For interests to transform into rights, there must be a rights-holder and a duty-bearer who is subject to a regulating and enforcing body.).

39. *See* Blanchfield, *supra* note 4.

40. *See id.*

41. *See id.*

42. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 112 (2021).

43. *See* Troxel v. Granville, 530 U.S. 57, 69, 72-73 (2000).

and are therefore limited to applying tests to measure the totality of the circumstances, the fit between a law's objectives, and the means used to achieve the State's objectives. Balancing tests that weigh competing rights, interests, and equities the law utilizes determine whether its application is legally sound and/or justifiable. Because courts are not legislative bodies with formal law-making power, it is appropriate for courts to provide balancing tests but not necessarily to dictate the substance of factors within a given balancing test. And yet, courts shape both legal process and substance as they sharpen law to effectively respond to issues at bar. Deployed Legislation that mandates the substance of a child's identity development and upbringing runs counter to a system built in the 1920s on balancing tests, discretion, and benign rebuttable presumptions. Viewing cases like *Meyer*[44] and *Pierce*,[45] the origin story for modern U.S. parental rights, through a historical, social lens, hints at popular notions of "rugged individualism."[46]

So parents who are never in contact with child protective services, welfare, and dependency officials, and other State entities may believe that unfair and poor outcomes that disfavored families experience are natural consequences of parents failing their children. There's a wealth of data showing how pervasive structural factors combine to place some people at a disadvantage medically and financially, and that becomes more difficult to overcome as the individuals are held to account for overwhelming demands.[47] And in this case, parents in disfavored identity groups do not enjoy benign State regulation of their families.[48] The State is neither at arm's length nor does its regulation strengthen family cohesion.

This undercuts parental rights to direct the care, custody, and shaping of a child's identity, which is the core principle of parental rights doctrine. From *Meyer* and *Pierce* to *Moore* and *Troxel*, parents are charged with the responsibility and freedom to teach and transmit to children their values, morals, civic duty, religious faith traditions, cultural practices, and generally support children's identity development.[49] The *Moore* Court dramatized

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44. *See* Meyer v. Neb., 262 U.S. 390, 400 (1923).

45. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925).

46. *See* Barbara Woodhouse, *Child's. Rights*, UNIV. PA. L. SCH. PUB. L. AND LEGAL THEORY RSCH. PAPER SERIES (forthcoming 2001).

47. *See* Dailey & Rosenbury, *supra* note 47, at 102.

48. *See id.* at 101-02.

49. *See* Adam Swift, *Parents' Rights, Children's Religion: A Familial Relationship Goods Approach*, J. Practical Ethics, https://www.jpe.ox.ac.uk/papers/parents-rights-childrens-religion-a-familial-relationship-goods-approach/.

State intervention in private family ordering as "slicing deeply" into the site for the reproduction of lives and identities.[50]

The 1920s produced early doctrinal efforts to articulate parental rights as a shield between one's children and the State.[51] Whether born out of deep suspicion of State interference or evidence of rugged individualism is immaterial doctrinal developments have given nuance and sophistication to an earlier iteration of parental rights that equated children and their labor to parents' property. Now, there are safeguards for children through State channels and other points of contact, like schools, medical care providers, and other adults with an affirmative duty to report signs of harm and abuse.[52] Again, legal thought evolves as social and scientific norms about what is best for children shifts. And yet, for the core principle of parental rights as a buffer or shield from unwarranted State intervention to remain without broad, meaningful coalition-building with all parents, regardless of partisan affiliations, is not likely. Without legal protection for parents, and thus any hope of developing a suite of rights for children, advocating for basic individual rights will become more difficult if parental rights are dismantled.

Between the *Dobbs* opinion and several state laws restricting abortion, elective and medically necessary, *Bellotti* is, for most intents and purposes, also undone.[53] Minor children no longer have legal avenues for reproductive care in several states.[54] If *Bellotti* is understood as describing a right to medical choice, not as a separate, individual right, but as a parental right, reproductive medical interventions can be understood as medical choice cases. In *Bellotti*, the minor child at bar could have sought permission to receive treatment from a judge or her parents.[55] Although the case was about limits on the frequency of judicial bypass use, the key point is that parents could have extended consent on behalf of the minor. Without any legal protection of their suite of rights as parents, individuals have even less power and ability to assert claims.

Restraints on parental decision-making relative to minors' reproductive rights run counter to existing precedents in medical decision-making case precedent. First, there is an individual right that is inherent in adults. *Cruzan* allows individuals to refuse medical treatment.[56] *Cruzan* falls in line with

50. *See* Moore v. East Cleveland, 431 U.S. 494, 498, 504 (1977).

51. *See* Huntington & Scott, *supra* note 2, at 2531-32.

52. *See* Dailey & Rosenbury, *supra* note 47, at 80.

53. *See* Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After Dobbs*, 132 YALE L.J. 1908, 1940 (2023).

54. See *id.* at 1911-12.

55. *See* Bellotti v. Baird, 443 U.S. 622, 647, 649 (1979).

56. *See* Cruzan by Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 277 (1990).

cases about the State's interest in inoculations and coercive sterilizations balanced against an individual's right to bodily integrity.[57] The cases concerning parents as religious adherents who deny medical care to their minor children tend to support deference by the State to legal principles of family privacy and autonomy. Despite the divisive nature of cases with religious parents who deny children medical care, the practice and legal treatment of religious parents who restrict medical care do not tend to inspire waves of legislative reform to stamp out parental decision-making in medical choice cases more generally. Perhaps principles from *Prince*, allowing parents to believe and become "martyrs" if they wish, but not to allow a child to suffer for religious beliefs,[58] is a safeguard enough against parental behavior that is too extreme, making legislation unnecessary. The *Prince* Court was able to protect free exercise rights for the parent without compromising protection for the child.[59] After *Prince*, courts adopted a nexus test formulation, requiring a direct connection between religious behavior and harm to the child.[60]

Parents who object for non-religious reasons to vaccinations for their children provide an even clearer view of the scope of parental rights in medical choice.[61] Parents have cited studies and alternatives to science to support claims that vaccinations are too dangerous for their children.[62] Despite the State's interest in the public health of all citizens in the state, parents have been permitted to forego vaccinating children.[63] While the State's permissiveness has resulted in negative outcomes, such as children contracting diseases with painful and sometimes permanent effects and large outbreaks of mumps and measles,[64] State deference to parental rights in medical choice signals the importance of parental rights.

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57. *See id*. at 298.

58. *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

59. *See id*.

60. *See* Megan Laney, Bostock *and the "Nexus Test" in Custody Disputes*, 3 N. C. CIV. RIGHTS L. REV. 230, 231 (2023).

61. *See* Michael S. Wald, *Stanford's Michael Wald on Vaccinations, Children's Rights, and the Law*, STAN. L. SCH. (Feb. 13, 2019), https://law.stanford.edu/2019/02/13/stanfords-michael-wald-on-vaccinations-childrens-rights-and-the-law/.

62. *See* Chephra McKee and Kristin Bohannon, *Exploring the Reasons Behind Parental Refusal of Vaccines*, 21 J. PEDIATR. PHARMACOL. THER. 104, 107 (2016).

63. *See State Non-Medical Exemptions from School Immunization Requirements*, NCSL (Aug. 13, 2024), https://www.ncsl.org/health/state-non-medical-exemptions-from-school-immunization-requirements.

64. *See* Brandy Zadrozny, *How the Anti-Vaccine Movement is Downplaying the Danger of Measles*, NBC NEWS (Feb. 5, 2024), https://www.nbcnews.com/health/health-news/measles-outbreaks-anti-vaccine-misinformation-rcna136994.

Technically, a medical choice argument for reproductive care could cut against some parents, but that is true of all situations with competing rights. If parents of a ten-year-old impregnated by an assailant insisted their religious beliefs prohibited any medical procedures to interfere with a pregnancy, a court could consider the nexus or direct link between harm to the ten-year-old child (mental, physical, emotional) and the parents' religious conduct. In cases where a minor teenager wishes to carry a pregnancy full term, but her parents insist she terminate the pregnancy with medication, the medical choice framing is likely to cut against the parents unless there is a serious risk of harm to the teenager continuing the pregnancy. In other words, there are already structural safeguards and processes in place within case law for the protection of minor children, especially in cases where parents' and children's interests do not align. Given that there is or has been trust in parental fitness and the presumption that they act in the best interests of their children and in judicial discretion, the relentless push for formal legislative regulation of minors' reproductive rights is not clearly warranted.

III. CONCLUSION

At the end of the day, a rule or a standard could be used to provide cover for bias, discriminatory action, and harm to children. Why then encourage preserving parental rights using the best interests of the child standard to resist efforts by powerful conservative advocacy groups to harm and erase children in vulnerable populations? The reason is twofold; the first is to resist and respond as hierarchy does, constantly making itself over to disappear from sight and thus remain undisturbed, and the second is to alert parental rights advocates of the looming danger of abdicating all rights to a political machine that has no interest or incentive to stay the conservative course when parental rights can be scrapped for a better prize, whatever that might be.

Traditionally, advocating for rules instead of standards represents a better advocacy strategy if one is worried about discretionary abuse. Encouraging reform by leaning in hard to standards and supporting parental rights is hardly the usual mark of a child's rights advocate. However, the current climate demands change. To protect the idea of fairness and a moral State that views and treats children equally, children's rights advocates, parental rights advocates, and state actors must adapt and resist oppressive monocultural assimilation demands. Professor Reva Siegel's critique of hierarchy's ability to remain in place without seeming to do so, or as she calls it, "preservation through transformation,"[65] describes current conservative

65. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

reform efforts. The politically conservative elite continually transform themselves and their rhetoric into whatever form is needful to accomplish their political objectives.[66] If it seems as though the truth and facts do not matter to a political advocacy group, it might also seem impossible to launch an effective campaign if one is not willing to forego knowledge, facts, and truth. If progressives make the mistake of conflating preservation-through-transformation with a very loose tie to candor, they might believe there is no honorable method or literal ability to communicate with conservatives. If transformative activity and the substance of the messaging are disaggregated, there may be a way forward by adopting the same transformative tactics to effectively resist oppressive inequality and maintain the traditional values of truth, knowledge production, and facts.

I write to encourage my students who express feelings of defeat when they observe conservative legal actors using the language of resistance and anti-subordination to further marginalize children already vulnerable due to their status. I am heartened by students' drive to keep searching out spaces that allow for creativity and transformation, some as dogged in resistance to oppression as hierarchy is to preserving itself. Imagine what progressive advocates could achieve by harnessing transformative power to preserve a moral center for laws that govern children's lives if those laws were based on equality and valuing difference. Although I wish there were no need for resistance against hierarchy or fighting for basic human rights, my hope is for all of us on the side of children to have the strength and will to stay the course of resistance and continue adapting, innovating, and changing advocacy methodologies to make the world a little better for the children living in it with us.

66. See generally recent cases from *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022) to *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) where a negative right of free exercise of religion (meaning a right that protects individuals from wrongful state intervention, not a right that is asserted to permit one to practice faith-based actions supported by public funding, in public spaces, and with real or apparent government endorsement) is transformed into a positive right in which religious adherents of mainstream religious faith traditions are permitted to demand constitutional protection for prayer in public schools, refusal to provide commercial or employment services and benefits to customers and employees, counter to decades of precedent, and in so doing, avoid complying with the Establishment Clause, public accommodation laws, reproductive rights obligations under the Affordable Care Act, and anti-discrimination laws. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 7TH ED. 1622-1675 (2023).