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Keywords

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THE UPBRINGING OF A CREATURE: THE SCOPE OF A PARENT'S RIGHT TO TEACH CHILDREN TO HATE

By
Brooke A. Emery*

There is no absurdity so obvious that it cannot be firmly planted in the human head if you only begin to impose it before the age of five, by constantly repeating it with an air of great solemnity.¹

INTRODUCTION: THE BIRTH OF A CREATURE

This paper examines racist² speech that is passed down from parent to child and asks whether the State can constitutionally impose regulations³ on such speech.⁴ The regulation of parent-to-child racist speech implicates two distinct constitutional rights: one's right to free speech and a parent's right to control the upbringing of her child.

The United States Constitution contemplates that its citizens be free to "think as [they] will and speak as [they] think."⁵ The First Amendment protects this freedom by prohibiting laws that limit or punish speech.⁶ Perhaps because of its prominence as the first of all enumerated rights⁷ or because of its simple but magnanimous message,⁸ the First Amendment has captured the hearts and minds of its citizens:⁹ it is romanticized by the avant-garde as a protector of art and intellectual freedom,¹⁰ it reverberates throughout suburban lunchrooms as irreverent rebuttals to schoolhouse teasing,¹¹ and it is proclaimed a tool for political and social change by the downtrodden and oppressed.¹² There is no doubt that its tenets, secured by our country's founders, have allowed American culture to breathe unorthodox air,¹³ a communicative freedom that is often stifled by less expansive speech protections in other countries.¹⁴ Lurking in the shadows, however, is speech's power to harm.¹⁵ Speech, capable of much more than mere offense, can cause psychological¹⁶ and physical¹⁷ harm to its intended targets, as well as message recipients.¹⁸

There has been much debate over the legitimacy and propriety of regulating racist speech.¹⁹ This debate has typically focused on racist speech made in a public setting that causes harm to the target of the hate speech. Efforts to regulate such speech have largely failed²⁰ because of the doctrinal prohibition on regulating speech based on the ideology of its message.²¹

This article argues that the unique nature of parent-to-child racist speech allows it to be regulated under the present First Amendment framework, notwithstanding the failed attempts to regulate other racist speech. The article further argues that such speech should be regulated because the core principles that underlie speech protection are not applicable to parent-to-

child racist speech. By focusing on the child as the hearer of hate speech, First Amendment roadblocks that typical hate speech regulations run into may be bypassed. After showing that First Amendment principles such as "marketplace" theory and autonomy theory are unpersuasive when applied to a child, this article will show that the captive audience doctrine allows the State to regulate a parent's decision to raise her child as a racist.

Parent-to-child racist speech also implicates the constitutional right of a parent to raise her child as she sees fit. Although a parent has the right to control the upbringing of her child, she does not have a right to raise her child as a racist. The Supreme Court has long recognized a parent's fundamental right to control the upbringing of her child as a liberty interest protected under the due process clause of the Fourteenth Amendment. The Fourteenth Amendment, in turn, requires that courts show deference to a parent's decisions.²² Underlying this right is the presumption that most parents act in the best interest of their children. In reality, however, a parent's decision is not always in the best interest of her child.²³ To accommodate this reality, a parent's fundamental right is limited by the rights of the child and the State's interests in protecting children from harm and promoting societal well-being.²⁴

When a child's "physical or mental health is jeopardized," the State has the power to abrogate the parent's rights if it is in the best interest of the child.²⁵ Teaching racism to a child jeopardizes a child's mental and physical health.²⁶ Once the harm to a child is established, the State can potentially limit a parent's fundamental right. In sum, parent-to-child racist speech can be regulated without violating either a parent's right to free speech or a parent's right to control the upbringing of her child.

Part I begins with a discussion of the legal proceedings through which the State has the opportunity to regulate parent-to-child racist speech. It then discusses how the transmission of racist speech from parent to child harms the child. Part II addresses the substantive due process analysis. This Part discusses the scope of the parental rearing right, and it shows that the State's interest in protecting the welfare of the child and promoting societal well-being may allow the State to interfere when a racist upbringing exists. Part III begins with an examination of a child's speech rights. It moves into an explanation of the underlying justifications for free speech and argues that they are inapposite to parent-to-child racist speech. Finally, it introduces the captive audience exception and shows that parent-to-child racist speech is not protected because a child is essentially "captive" to her parent's racist speech. Part IV concludes with a discussion of the obstacles and implications of regulating parent-to-child racist speech.

parent-to-child racist speech can be regulated without violating either a parent's right to free speech or a parent's right to control the upbringing of her child.

CHILDREN AND RACISM IN THE REAL WORLD

At a county fair, a young girl sings sweetly in front of a small crowd:

Well sit down and listen, to what I have to say.
Soon will come a great war, a bloody but holy day.
And after that purging our people will be free,
and sing up in the bright skies, a sun for all to see.

Times are very tough now for a proud White man to live. And although it may appear that this world has no life to give. Times are soon changing, this can[']t go on [f]or long. And on that joyful summer's day, we'll sing our Victory song.²⁷

In another part of the country, a young boy comes home after school and becomes a virtual Klansman, killing Blacks, Latinos, and Jews in an "ethnic cleansing" video game.²⁸ Somewhere else, a child creates a kid's page for his father's hate group's web site.²⁹ A six-year-old African-American boy riding on a school bus sees a group of white men and women through the window and proclaims, "I hate white people."³⁰ Somewhere else, a group of middle-school children paints swastikas on cars in a predominantly Jewish neighborhood.³¹ A group of high-school students is on trial for brutally beating a young girl because of her race.³²

The aforementioned acts, based on real events, invoke a response of sadness for the child, rather than revulsion. This response to children exhibiting racist tendencies stems from a sense that the racist child has been robbed of the innocence of childhood, and that the adult that she becomes will have been robbed of opportunities as she matures down a path already paved for her. Although there are many factors that cause a child to hate another based on race,³³ this article addresses only parental influence.³⁴ This article sets out to determine whether the State may prevent harm to a child and to society from parents who pass racist hatred down to their children. This section begins with a description of the legal arenas in which the State may wield its power to restrict racist parental indoctrination.

SOCIAL CONTEXT: INHERITING RACISM

Parents pass down many things to their children: genes, personality traits,³⁵ values, oral histories.³⁶ Some parents pass down racism to their children through racist speech.³⁷

For the purposes of this article, racist speech is hate speech that targets groups or individuals based on race. There are several defining characteristics of hate speech.³⁸ First, hate speech sends a message of hatred or contempt. Second, hate speech usually conveys a message of inferiority. Third, its message targets a specific group or an individual because she is a member of that group. Racist speech includes racial threats, slurs, epithets, symbols, depictions, and "sanitized racist comments."³⁹

The effect on a child of growing up in a racist home has not generated much scholarly work and a need exists for a larger body of social science and legal research on this topic. How-

ever, some observations can be gleaned from the field of developmental psychology and research on racism in general. Available research indicates that "[a]ttitudes of prejudice begin to form between the ages of 3 and 4 years, with immediate family members having the most profound effect on the development of attitude and values."⁴⁰ Moreover, younger children have a decreased cognitive ability to discern reasonable from unreasonable information, making them more susceptible to racist speech.⁴¹ Thus, racism should have a more profound effect on children, especially younger ones, than on adults. It is with an eye sensitive toward this impressionability of young children to racist speech that we turn to discuss racism's effect on the racist speaker.

Hate is a defining characteristic of racist speech. Hate is a "complex, affective state alloyed with aggression. It is aroused by the experience of frustration and, in its most stark and uncompromising manner, by events that are felt to threaten life."⁴² Within the psychiatric community, there has been debate over whether extreme racism is a serious mental illness. Some psychiatrists propose its inclusion in the *Diagnostic and Statistical Manual of Mental Disorders*.⁴³

Those who argue that racism is a mental illness explain that "[extremely racist] patients experience problems of impulse disturbance. This disinhibition may activate *inculcated, socially learned, biased beliefs*; adverse cognitive appraisals and stereotypes; hostile behaviors toward out-group persons; or some combination of these things."⁴⁴ Children, who have lower impulse control relative to adults, are therefore more prone to act upon racist beliefs. Researchers have also discovered psychological and physiological problems associated with clinical racism: "[f]requent clinical problems include lability, hypo-mania, and marked anxiety. Additionally, these patients evidence relational deficits. Psychotherapy patients who expressed biased attitudes toward members of cultural out-groups . . . also had higher ratings for . . . paranoid, borderline, and antisocial personality disorders, when compared with other psychotherapy patients."⁴⁵

While there is no conclusive evidence that learning racism causes psychological or physiological harm to the racist, the law does not always require conclusive evidence in order to protect children from likely harm.⁴⁶ Moreover, racial bias has a severe impact on the social competence of the racist:

For patients who evidence severe forms of bias, intergroup contact is predictably aversive. For these patients, out-group persons are often seen as threatening. For some clinically biased patients, the solution is avoidance. Other patients experience marked anxiety, and yet others express overt hostility. . . Pathologically biased patients may engage in overtly hostile behaviors in benign intergroup situations.⁴⁷

An inability to engage in culturally diverse interactions is also a practical disability. It prohibits the child and future adult from fully participating in society, inhibiting even the most basic activities, such as going to the grocery store, workplace, or voting booths.

Parents who instill racist beliefs in their children contribute to their children's feelings of threat, anxiety, and fear. For example, most members of the American white racist movement believe that "they, as White men, are members of an endangered species."⁴⁸ Racist parents strip their child of any sense of personal security.⁴⁹ The fear instilled by racist parents goes

beyond teaching a child to be cautious about talking to strangers or crossing the street. Whereas there is a rational basis to fear crossing the street, the fear of people of another race is irrational.⁵⁰ Further, racism not only instills fear, but also creates contempt and hatred. It is the combination of both fear and hatred that harms the child.

Some members of the psychiatric community have argued that teaching racism to a child is a form of psychological abuse, which constitutes child abuse in some States.⁵¹ Psychological abuse is “sustained inappropriate behaviour which damages, or substantially reduces, the creative and developmental potential of crucially important mental faculties and mental processes of a child . . . [including] intelligence, memory, recognition, perception, attention, language and moral development.”⁵²

One reason offered to show that racist indoctrination is psychological abuse is that it adversely affects a child’s moral development. For example, “children taught to hate are prevented from incorporating the desirable virtues of tolerance, reverence for life, respect for individual differences and mutual understanding,” causing these children to “suffer an arrest in their moral development.”⁵³ Recent neurobiology studies have also linked early childhood psychological abuse to abnormalities in brain development.⁵⁴ Thus, parent-child hate indoctrination may have an irreversible effect on a child’s developing brain.

A related concern is that children who are taught to hate will later commit hate crimes. While no definitive link has been shown between racist indoctrination during childhood and hate crimes, it is estimated that 70% of all hate crimes are committed by juveniles.⁵⁵ One possible reason for this statistic is that young people are more likely to act on racist beliefs than adults.⁵⁶

The power of the State to interfere with a parent’s decision to raise her child as a racist person rests on the availability of legal forums in which the State can exercise its power, the type and degree of the parent’s racist behavior, and the extent of harm the behavior has on the child. The next section discusses the jurisprudence that has developed around the State’s ability to interfere with the family.

LEGAL CONTEXT

The State plays several substantial roles in protecting and supporting children.⁵⁷ Under the child protection umbrella, the State provides services ranging from family counseling to parenting education,⁵⁸ and it governs the removal and termination of parental rights.⁵⁹ Under the family dissolution umbrella, the State may determine custody of a child, limit visitation rights, and order a parent to behave in a specific way to retain custody of a child. Through public assistance, the State aids a parent in supporting her child. In addition, the State influences a child’s upbringing by providing public education and mandating medical care.⁶⁰ Each of the aforementioned roles potentially provides the State with the opportunity to interfere with a parent’s decision to teach racism to her child.⁶¹ However, as State intervention is often tied to family failure or dysfunction,⁶² parents of intact families may be granted more freedom to teach racism to their children, and children of intact families may not be appropriately protected from racist indoctrination.

Today, some courts consider a parent’s use of racist speech as a factor in determining custody and visitation rights.⁶³ In *In re Bianca W.F.*,⁶⁴ the Superior Court of Connecticut found

that “the father’s use of racial slurs or derogatory racial references” in front of the children constituted a “continuing form of neglect of the children’s educational and moral needs.”⁶⁵ Courts have also ordered parents not to use specific racist language in front of their children.⁶⁶ While this practice has largely escaped the notice of all but a few First Amendment scholars,⁶⁷ this article argues that prohibiting or restricting a parent from teaching her child to hate is constitutionally permissible. The contrary view is that the consideration of speech in such proceedings is impermissible because it violates free speech and substantive due process.⁶⁸ The debate survives partly because of the little attention paid to family law proceedings.⁶⁹

Today, amidst war, increasing intolerance of immigration, and rising hate crime statistics, racist indoctrination of children by parents must be examined. The State can and should use its power to protect children from such indoctrination.

II. SUBSTANTIVE DUE PROCESS: BALANCING RIGHTS

Three interests are implicated when the State interferes with a parenting decision: (1) the parents’, (2) the State’s, and (3) the child’s.⁷⁰ A court will weigh these interests to determine whether a State statute or action infringes on a parent’s constitutional right.

The ability of the State to interfere with a parent’s right to teach her child racism depends, first, on the relative importance assigned to the parent’s right to control the upbringing of her child. The United States Supreme Court has found that a parent’s right to raise her child is a fundamental right.⁷¹ This fundamental right of the parent to raise her child as she sees fit rests on a presumption that parents act in the best interests of their children.⁷² The parental right in part derives from the child’s interest in being taken care of properly; however, real world experience calls into question the validity of the presumption that parents always act in their children’s best interest.

The Court has also recognized that the State has the authority to intervene when a child’s welfare is at stake. The State has greater power over children than it has over adults because “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”⁷³ The State may interfere with the parent-child relationship where necessary to protect the welfare of the child or to educate future citizens.⁷⁴

The State’s ability to impose itself into the parent-child relationship derives not only from its own interest in protecting its citizens, but also from the unique constitutional status of the child. A child has constitutional rights, but not to the extent that adults do.⁷⁵ The limitations on a child’s rights are explained by the unique characteristics of childhood. For example, the child’s underdeveloped cognitive processes limit a child’s ability to make appropriate decisions about her life. Young children “are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience.”⁷⁶ For this reason, the law restricts a minor’s choice to marry,⁷⁷ engage in sexual activity with adults,⁷⁸ consume alcohol, and vote in elections.

It is often unclear how a parent’s right to control the upbringing of her child ought to be balanced against the State’s interest in protecting the well-being of the child and the child’s individual rights. The Supreme Court has failed to define the

scope of the parental right to control the upbringing of children.⁷⁹ States have largely filled in this gap on a case-by-case basis.⁸⁰ Legal scholars and social scientists have also weighed in. One view is that a parent should not have a fundamental right to control the upbringing of her child at all.⁸¹ A more common view—that a parent should have some rights—stops short of relegating the child to parental property.⁸² Under this view, a parent should make decisions about her child with limited State interference for several reasons: (1) a child cannot support herself or make important decisions; (2) optimal child rearing includes intimate and continuous relationships; (3) parents are in the best position to know what is best for the child, and they care more about their child than anyone else; and (4) parents have traditionally held these rights.⁸³ Additionally, some commentators justify parental rights by noting that parents have a personal interest in molding their children in accordance with their desires and ideals.⁸⁴ The issue of parent-child racist speech falls into the gray area of parent-child-state jurisprudence.

SCOPE OF PARENTS' FUNDAMENTAL RIGHT

Two of the earliest cases to recognize the right to parent were *Meyer v. Nebraska*⁸⁵ and *Pierce v. Society of Sisters*.⁸⁶ Both cases involved parents' right to educate their children as they see fit. *Meyer* addressed a Nebraska statute that prohibited the teaching of foreign languages, with the exception of Latin, Greek, and Hebrew, to school children below the eighth grade.⁸⁷ The purpose of the statute was to "promote civic development" by ensuring that children "learn English and acquire American ideals" before they are educated in foreign languages and ideals.⁸⁸ The plaintiff, a parochial school teacher, was convicted under the statute for teaching a ten-year-old student to read German.⁸⁹ The Court struck down the statute as unconstitutional for unreasonably interfering with three interests: the "calling of modern language teachers," the "opportunities of pupils to acquire knowledge," and the "power of parents to control the education" of their children.⁹⁰ The Court was also concerned that the statute would disadvantage the foreign-born segment of the population⁹¹ absent proof that learning foreign languages harmed the health or well-being of a child.⁹² In *Meyer*, the Court noted that teaching a child German was not in fact harmful and that there was some evidence that it was actually helpful to a child.⁹³

Pierce v. Society of Sisters also recognized a parent's right to control the upbringing of her child.⁹⁴ In *Pierce*, the Court struck down an Oregon statute that required all parents and guardians of children between the ages of eight and sixteen to send their children to public school.⁹⁵ Two private schools challenged the statute on the basis that compulsory public school attendance threatened business.⁹⁶ The Court rested its decision on the statute's impermissible interference with the plaintiff's property rights.⁹⁷ In reaching its decision, however, the Court found the statute was not a proper exercise of State power because it unreasonably and arbitrarily interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁹⁸ The Court reasoned that the

underlying purpose of the parental right is "to recognize and prepare him for additional obligations."⁹⁹ According to the Court, "[t]he child is not the mere creature of the State."¹⁰⁰ The State thus has a limited role in raising a child.

Meyer and *Pierce* both suggest that the parent's interest in controlling the upbringing of her child can outweigh the State's interest. Later cases reinforced the fundamental right of a parent to control the upbringing of her child.¹⁰¹ In 2000, in *Troxel v. Granville*, the Court struck down a Washington statute that allowed a judge to override a parent's decision not to allow third-party visitation with her child.¹⁰² The plurality reaffirmed the presumption that fit parents act in their children's best interest.¹⁰³ The Court recognized the parental interest in the care, custody, and control of their children as "perhaps the oldest of

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the fundamental liberty interests recognized by the Court."¹⁰⁴ The broad nature of the statute¹⁰⁵ and the failure to accord deference to the parent's choice made this statute unconstitutional.¹⁰⁶

So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent's children.¹⁰⁷

LIMITS ON PARENTS' RIGHT

The parental right is not without limits. The State's power to limit a parent's child rearing discretion is at its highest when the child's physical or mental health is jeopardized.¹⁰⁸ The State, however, has the power to interfere even if the parent's decision does not severely jeopardize the child's health. An early case to recognize the limits on parental rights was *Prince v. Massachusetts*.¹⁰⁹ In *Prince*, the Court held that the State's power to ensure that "children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens" outweighed the parent's interest.¹¹⁰ The statute in *Prince* imposed criminal sanctions on guardians who permitted their minor children to sell newspapers or other literature on the street.¹¹¹ The plaintiff, a Jehovah's Witness, was charged with violating the statute when she and her niece were distributing religious pamphlets for a suggested donation of five cents.¹¹² The Court concluded that while the "custody, care and nurture of the child reside first in the parents," the State can override the parent's right in order to guard the child's well-being,¹¹³ which may include "matters of conscience and religious conviction."¹¹⁴ State power over matters of conscience strengthens its ability to regulate parent-child hate indoctrination, which is largely a matter of conscience.

Thus, the limit on a parent's fundamental right and the State's powerful interest in protecting the well-being of its children leaves room for the State to intervene when a parent's racist speech harms the child's mental health, public safety, or peace and order. Even so, before the State may intervene it must overcome a separate constitutional concern: the parent's and the child's right to free speech. This constitutional concern is the focus of the following section.

III. FREEDOM OF SPEECH

Under the First Amendment, regulating parent-to-child racist speech implicates both the parent's right to speech and the child's right to access speech.

CHILDREN AND FIRST AMENDMENT COMMENTARY

*The cognitive, moral, and emotional immaturity of children can render them especially vulnerable to some forms of expression that they are ill equipped to protect themselves from. They depend on others to advance their crucial interests and protect them from harm.*¹¹⁵

Over the course of a lifetime, welfare interests wane and liberty interests wax. When a person is born, she cannot care for herself and therefore has the greatest interest in being cared for. As she matures, she becomes better able to take care of herself, so her welfare interest decreases. Liberty interests, or interests in being free, increase as a child grows into an autonomous being. Paternalism is thus less offensive to a child than to an adult.¹¹⁶

The scope of the child's right to free speech depends on a balancing of welfare or developmental interests and liberty interests.¹¹⁷ Developmental interests are comprised of two types of interests: those interests that affect the present well-being of the child and those interests that are held in trust.¹¹⁸ Describing the present developmental interests of a child, one commentator suggests:

[B]ecause we must show concern for the quality of the experience of childhood, we have reason to insulate children from unsettling materials even if exposure does not result in significant harm . . . We do not augment the quality of children's lives by exposing them to materials that they cannot grasp, but which nonetheless elicit strong unsettling responses from them.¹¹⁹

The developmental interests of a child are harmed by racist indoctrination.¹²⁰ If a child manifests the psychological and physical effects of clinical racism,¹²¹ her quality of life during childhood is low.

Future-oriented interests are those that "equip children with the habits and capacities for reflective deliberation and self-direction that will permit them to live successful and responsible adult lives."¹²² If an activity harms a child's ability to develop a sense of justice or hinders growth of deliberative faculties, then the child's developmental interests are harmed.¹²³ It is in this sense that it can be said that hate speech indoctrination has a "silencing effect" on the child. "If children are to become the sort of beings for whom full rights of free expression are valuable, then the moral capacities on which the value of these rights depends must be suitably nurtured and developed."¹²⁴ Indoctrinating a child with racist hate or fear of race extinction silences future speech, thus degrading the interest that the First Amendment was meant to protect. While most of the scholarship discussing First Amendment rights during childhood primarily addresses children's access to obscenity and violence, much of the

argument is applicable to hate speech. There is a presumption in much of the scholarship that the State and parents agree that children should not be subject to obscenity and violence, or that the State can regulate only in situations where the parent invites such intervention.

Kevin Saunders discusses the effect on a child of learning hate speech,¹²⁵ arguing that "a racist child is of questionable psychological health, and the existence of hate-based crime demonstrates the danger of racism to community safety, so attempts to teach racism to children harm both the psychological health of children and the physical safety of society."¹²⁶ Saunders focuses on the constitutionality of prohibiting third parties from teaching racism to a child. In developing his thesis, however, he states without analysis that the State would have no right to interfere if the parent wanted the child to receive hate material from a third party.¹²⁷ This article rejects that argument because it fails to consider the State's two distinct interests in protecting a child: a *parens patriae* interest and an interest in aiding the parent. Saunders thus overlooks the ability of the State, as *parens patriae*, to protect the child from receiving racist information even when the parent wants the child to receive the information.

The Supreme Court recognized the two interests of the State in *Ginsberg v. New York*, in which the Court upheld the conviction of a luncheonette owner for selling sexually explicit magazines to a minor, in violation of New York law.¹²⁸ The Court identified two legitimate interests that granted the State the power to restrict children's access to speech. The first interest is the State's "independent interest" in fulfilling its *parens patriae* function—in protecting the well-being of its youth and in seeing "that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens."¹²⁹ The second interest is the State's function in aiding parents in their role of parent.¹³⁰ The first interest is most salient in determining the State's power to interfere with parental discretion.

Restricting a parent's ability to transmit racism to their children serves the State's *parens patriae* interest when the child's well-being is harmed and her ability to grow into an independent, well-developed citizen is hindered by the parent's racist ideas. For example, the *parens patriae* interest is served by protecting a young child from being taught songs that call for a racial holy war and pro-

claim the inferiority of other races. The developmental effects of racism on a child, which support this assertion, are discussed in Part I.

Modern cases that restrict a child's access to harmful information must deal with the effect that any restriction may have on adult access to information.¹³¹ *FCC v. Pacifica Foundation* recognized that children can be protected from offensive speech by restricting broadcasting of offensive speech to hours when children will not likely be listening.¹³² Unlike restricting a radio broadcast to certain hours, which may potentially affect a large number of willing adult radio listeners, restricting a parent from teaching racism to her children will have only a nominal effect on third-party adults. Any restrictions would affect only a parent's speech to her own child. It is likely that no one but the parent and child will be affected by the restriction.

NO MARKET PLACE FOR CHILDREN

An abundance of scholarship has been dedicated to explaining why speech must be protected from government regulation. The first justification is that free speech unearths the truth.¹³³ Justice Holmes argued that free speech is essential to finding truth and that only through a clash of ideas can truth be attained.¹³⁴ According to Holmes, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹³⁵ John Stuart Mill, British philosopher and political economist, provided a similar justification for protecting speech:

[T]he peculiar evil of silencing expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.¹³⁶

Suppressing speech would have the unintended ramification of driving speech underground and effectively allowing bad ideas to “smolder,” rather than being ousted through opposition.¹³⁷ Consistent with the marketplace of ideas is the argument that offensive speech should be combated with more speech rather than with censorship.¹³⁸

The marketplace of ideas argument has been criticized on several grounds.¹³⁹ First, proponents of the market-failure model argue that there are inequities in the speech market, such as lack of media access, that create a need for market intervention.¹⁴⁰ Second, critics argue that absolute protection of speech is unjustifiable even though “truth” may eventually prevail because the harm caused in the short term is too great.¹⁴¹

In the context of speaking to a child, the marketplace of ideas is untenable. First, children “lack the experiential basis of adults and are more likely to be led astray.”¹⁴² They often lack the capacity to distinguish poorly reasoned ideas from well-reasoned ideas.¹⁴³ The marketplace theory presupposes that the “buyers” of ideas will have the capacity to reason. Thus, where the “buyers” in a market are children, the truth is less likely to surface, if at all. Our society acknowledges that a child has no real bargaining power and cannot be counted on to make serious decisions responsibly. This is exemplified by the fact that children are shielded from other free markets as well (e.g., children may not work, buy cigarettes or alcohol, or obtain a credit card).

Second, with respect to children, the marketplace of ideas is not competitive. Parents are the major source of ideas for young children, especially those who are home-schooled or isolated. If prejudices begin to form around three or four years of age, being exposed to different ideas in school after age three or four will not successfully correct the bias.¹⁴⁴ Just as there is skewed access to media for adults,¹⁴⁵ parents occupy a disproportionate market share when it comes to their children.

The second justification for free speech is that it acts as a check on abuse of governmental authority by enabling people to speak out against the government and reveal truths about

those who have political power.¹⁴⁶ One view is that this justification survives when applied to parent-to-child speech: “Government power to coercively restrict parental speech, on top of its power to engage in its own speech in public schools, would tend to cement existing orthodoxies and suppress potentially valuable but unpopular ideas.”¹⁴⁷ This argument misses the point that whatever value the expression of potentially valuable but unpopular ideas may have, this value is lost on children who are unable to comprehend the information. When a child reaches maturity, a parent’s racist speech will be less harmful to the child, and thus such “unpopular ideas” will not be absolutely prohibited.

The third justification for free speech is that a democracy relies on the ability of its members to debate political issues and make informed choices. Free expression must be the centerpiece of self-government. The self-governance argument¹⁴⁸ suggests that “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”¹⁴⁹ When we are speaking of those who do not participate in the political process, however, this argument is not persuasive. Because children are not allowed to vote, the political process is not weakened by restricting adults from expressing political ideas to children. This is especially true for very young children who do not possess the cognitive ability even to understand political ideas. Of course, children become future voters, so there is an interest in preparing them for their political role by exposing them to diverse beliefs when they are capable of understanding them. However, these goals are furthered by preserving the autonomy of future generations of voters, not by indoctrinating with racist hate. Where a child has been taught to hate, she will not be in a position to make informed choices, for her ability to make choices based on reason, rather than on preprogrammed fear and contempt, will have been impaired.

A non-instrumental justification for protecting speech is that it respects individual autonomy and nurtures certain beneficent character traits.¹⁵⁰ According to this view, the practice of tolerating offensive speech rather than punishing it serves the individual and society by providing a forum for people to exercise their “capacity for tolerance,” which translates generally into a disposition of restraint and self-denial.¹⁵¹ For example, “[s]imply coexisting and overcoming the wish to establish an overly homogenized society are important goals,” and “free speech may simply function as a zone of extreme tolerance, not because the behavior tolerated is important to human self-realization or to truth, but because as a practical matter living with divergent behavior is necessary.”¹⁵² It is inapposite, however, to argue that teaching children to hate based on race creates a general atmosphere of tolerance on the playground. An adult racist arguably has chosen to be racist. Thus, it makes sense to suggest that forcing one to hear another’s racist beliefs may create a more tolerant society. Unlike racist speech among adults, allowing children to be indoctrinated for the sake of nurturing a tolerant society sacrifices the well-being of the child for the mere possibility that a tolerant society will emerge. This sacrifice is too costly.

One argument against the absolute protection of hate speech that is relevant to parent-to-child hate speech focuses on the expressive function of the law. In the hate speech context, the proponents of this view argue that by protecting hate speech, the law endorses of hate speech. This argument is even more

persuasive when applied to parent-to-child hate speech. A child, with a developing identity and a developing sense of self, may look to the law as guidance on what society approves. By permitting a parent to teach racist hate to a child, the law implies societal approval and even suggests encouragement of prejudicial ideas.¹⁵³

CONTOURS OF FREE SPEECH DOCTRINE

The most basic and inaccurate interpretation of the First Amendment is that it is absolute, that it protects all speech.¹⁵⁴ Until 1931, the First Amendment applied only to Congress.¹⁵⁵ Thus, free speech protections were once much more limited than most people have come to expect.¹⁵⁶ The key to assessing and predicting the constitutionality of certain speech regulations lies in navigating the turbulent waters of free speech rules and exceptions. One of the most important rules in First Amendment jurisprudence is that speech restrictions must be both content and viewpoint neutral:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . [T]here is an 'equality of status in the field of ideas,' and government must afford all points of view an . . . opportunity to be heard.¹⁵⁷

The regulation of parent-to-child racist speech violates the content-neutral requirement. One could argue that the restriction derives from the harm it causes to children and not its message, but that argument masks the true motivation.¹⁵⁸ Even if the regulation is content-based, the captive audience doctrine may allow the speech to be regulated.

The Supreme Court has identified a hierarchy of protected speech based on the value of the speech.¹⁵⁹ The speech with the highest value is political speech because there is "practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs."¹⁶⁰ Political speech "includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to the political process."¹⁶¹ Restrictions on this category receive strict scrutiny, the most stringent protection under the First Amendment. Speech with lower value, such as obscenity¹⁶² and commercial speech,¹⁶³ is easier for the government to regulate.

Thus, a relevant question is whether parent-to-child racist speech is high-value or low-value speech. Some racist speech carries a political message and therefore should be considered high-value speech, although perhaps not as valuable as speech directly concerning a political campaign. On the other hand, some parent-to-child racist speech (e.g., speech regarding the social characteristics of a race and degrading speech) may not be political speech and should receive lesser status. However, a viable argument may be made that no speech to a child is political speech because a child cannot comprehend such political ideas. Even if parent-to-child racist speech is considered to be of lower value, the Supreme Court has held that content-based regulations of unprotected speech must still meet strict scrutiny.¹⁶⁴ In sum, parent-to-child racist speech regulations that restrict political speech based on content place an extremely

high burden on the government to overcome. That burden may be overcome by the captive audience doctrine.

FREEDOM FROM BEING CAPTIVE TO RACIST SPEECH¹⁶⁵

*[A]child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.*¹⁶⁶

Under the captive audience doctrine, speech is exempted from First Amendment protection if it is delivered to a captive listener.¹⁶⁷ The exception potentially allows the Court to sidestep the content-neutrality requirement of the First Amendment and to curtail political expression.¹⁶⁸

A captive audience, in the First Amendment sense, describes listeners who, under certain circumstances, cannot escape offensive language.¹⁶⁹ The degree and type of captivity necessary to invoke this doctrine is often a central point of contention and confusion.¹⁷⁰ Critics first point to the ambiguity of the word "captive," arguing that "[w]e are always captive in some senses, and never captive in others . . . [W]e are virtually never captive, because there is almost always something we can do to avoid exposure to whatever we find most offensive."¹⁷¹

The more central problem in employing this doctrine, however, is that the Court has been unclear in its application of the doctrine.¹⁷² It is difficult to find guiding language in case law or a common thread among cases that apply the captive audience doctrine.¹⁷³ For example, the Court has found people entering health facilities captive to anti-abortion protests.¹⁷⁴ It has also found a person riding in a car or at home listening to the radio captive to an offensive radio broadcast;¹⁷⁵ a homeowner captive to focused residential picketing;¹⁷⁶ a homeowner captive to sexually oriented mailings that she has requested not to receive;¹⁷⁷ and a public bus rider captive to political campaign advertising on the bus.¹⁷⁸ It is difficult to discern an identifiable pattern from which a person can determine whether the captive audience doctrine should apply in a specific case.

Several concepts have been offered to make sense of First Amendment captivity.¹⁷⁹ The first basic concept is that the captive audience doctrine is founded upon preserving "the right to be let alone" or "the right to privacy."¹⁸⁰ Two principles underlie this right: an autonomy interest and a right to repose.¹⁸¹ The second concept is that the State has an interest in protecting the privacy rights of an unwilling listener.

The autonomy principle is common to both the right to free speech and the right to privacy. Being free to speak one's mind nurtures and preserves individual autonomy.¹⁸² Likewise, being able to choose the ideas and thoughts to which one is exposed nurtures and preserves individual autonomy.¹⁸³ Despite the various plausible definitions for the word "captivity," at its core, captivity suggests that a captive person is one who is deprived of autonomy or meaningful choice. With that definition in mind, the captive audience doctrine can be understood as a tool that balances power between the captor and the captive in order to restore individual autonomy.¹⁸⁴

These underlying principles reveal that the goals of the First Amendment and the right to privacy are not in conflict: by placing a premium on autonomy, both require protection of the child from racist indoctrination. Because the young mind is so easily, and often irreversibly, shaped, parent-to-child racist speech disturbs the autonomy of the future adult. The State has

an interest in protecting the autonomy rights of the future adult disturbed by such speech.

In addition to the right to make individual choices, the right to be let alone is concerned with the right to repose or to be at peace. This right is most often violated when a person is being disturbed at home. This is so because if she cannot retreat to her home, there may be nowhere to retreat at all. Consequently, the home has a special status in captive audience jurisprudence.¹⁸⁵ The right to repose in one's home has a strong implication for parent-to-child racist indoctrination because such communication likely occurs in the home. Thus, the child has nowhere to retreat from unwanted racist inculcation. In sum, both the child's autonomy interest and the child's right to repose the two interests the captive audience doctrine endeavors to protect will be served if the captive audience doctrine is applied to the parent-to-child hate speech paradigm.

The State also has an interest in protecting the unwilling listener. In the parent-to-child hate speech paradigm, the child may seem to be a willing listener. Being willing, however, presupposes that the listener has a choice. In the parent-to-child model, the child has no choice and is therefore presumptively unwilling. A young child is truly captive to her parents.¹⁸⁶ She cannot decide to be born, to be born into a particular family, or to be provided with a particular level of care.¹⁸⁷ In addition, "[w]hatever chance [she] may have at achieving autonomy depends on the emotional and material resources invested during [her] childhood."¹⁸⁸ Because a child is dependent upon her guardian¹⁸⁹ for everyday necessities, a child has no choice but to listen.¹⁹⁰ In that sense, a child is powerless to turn off harmful speech.

CONCLUSION: WAIT UNTIL THEY'RE OLDER

Free speech and a parent's right to control the upbringing of her child are two of the most important rights granted by the United States Constitution. Both rights protect and reflect autonomy and privacy. They secure a profound sense of liberty, under which this country has flourished. At the same time, both rights have limitations founded on a basic principle of collective well-being. Those limitations are at its strongest when the well-being of a child is at stake. While a child is not a mere creature of the State, neither is a child a mere creature of her parents. The reality is that some parents do not act with the best interests of their child in mind. As social science research suggests, a parent who raises her child as a racist does not act in the best interests of her child. Therefore, a parent's right to control the upbringing of her child may be limited by the State's power to protect the child's well-being.

The State's power to restrict a parent from indoctrinating her child is governed by both the free speech doctrine and the substantive due process doctrine. Under the best-interests-of-the-child standard, the State may interfere with a parent's right to control the upbringing of the child, though the State action must meet strict scrutiny to prevail on constitutional

grounds. The precise scope of the State's power under this standard is unclear and is largely within the court's discretion. Wide discretion in this area may be problematic because it leaves it up to a judge, with little guidance, to decide what is best for the child.

Under the captive audience doctrine, a state may have the power to limit a parent's racist speech to her child because the child is captive to her parent's speech. The main theoretical obstacle to regulating parent-to-child hate speech is that it interferes with one of the central tenets of free speech: the content and viewpoint-neutrality requirement. It is not up to the government to prescribe orthodoxy. Proscribing parent-to-child hate speech can be considered a viewpoint-neutral restriction—that is, *no one* can teach their children to hate. Even if the neutrality requirement is not met, the captive audience doctrine may allow the State to bypass the requirement when the child is deemed captive to her parent's hate speech.

There are also several practical obstacles that must be addressed if the State is to regulate parent-to-child hate speech. First, the State may not be in a position to know what a child is learning in the home. A possible answer to this obstacle would be to treat parental racist indoctrination as akin to child abuse. Like child abuse, there are physical and verbal manifestations of racism. A second related obstacle is finding a plaintiff to assert the child's rights in court. A possible solution is that, as in child abuse cases, the State could assert the child's rights. A next friend or a guardian ad litem can be assigned.

Even if a way to enforce a regulation or rule is found, there is the potential that the restrictions will disproportionately affect divorced parents, single parents, or African-American parents because of their overrepresentation in the legal system. Affording a judge broad discretion may also lead to inconsistent application.

Another obstacle to regulating parent-to-child hate speech is the ability to find an appropriate remedy. Absent other evidence of abuse, separating a child from her parent may be too extreme, especially when such separation is based on inconclusive science and inconsistent application of the law. A practical response would instead be a judicial order not to use specific language in front of the child or mandatory enrollment in a tolerance workshop for the parent and child.

This article is just a small step toward the goal of protecting children from their parents' racist indoctrination. It sets forth a possible goal, though one with many well-intentioned legal obstacles in the way.

ENDNOTES

*J.D., Emory University School of Law (2008). Thanks to Alissa Jones, Julie Seaman, and the participants of the Spring 2007, Emory University School of Law Seminar on the Intersection of Free Speech and Equality for encouragement and helpful comments.

¹ Arthur Schopenhauer, *Psychological Observations*, in *STUDIES IN PESSIMISM: THE ESSAYS OF ARTHUR SCHOPENHAUER* 29 (T. Baily Saunders trans., London Swan Sonnenschein & Co. 3d ed. 2004).

² The focus of the paper is *racist* hate speech. A similar argument could be made for other forms of hate speech, such as that based on gender, religion, nationality, and sexual orientation. Some examples used in this paper include other forms of hate speech.

³ Throughout this paper, “regulations” will refer to statutorily and judicially imposed prohibitions, limitations, and restrictions.

⁴ Racist speech passed on from parent to child encompasses a wide range of activity. See discussion *infra* Part II.

⁵ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁶ The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment applies to States as well as to Congress. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

⁷ OWEN M. FISS, *THE IRONY OF FREE SPEECH* 12 (1996) (“The First Amendment should be first, they argue . . . [But] [t]he firstness of the First Amendment appears to be little more than an assertion or slogan.”).

⁸ *Id.* at 5 (“The First Amendment—almost magisterial in its simplicity . . .”).

⁹ Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS AND CIVIL LIBERTIES* 17, 18 (1994) (“[I]f America has a civic religion today, the First Amendment may be its central credo.”); CATHARINE MACKINNON, *ONLY WORDS* 76-77 (1993) (“[T]hose who embrace [free speech] think it is their own personal faith, their own original view.”).

¹⁰ See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* (1990). Other commentators have rejected the romanticized notion of free speech. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991).

¹¹ American children, at least where the author grew up, defend their words by invoking the First Amendment. Two typical retorts are “It’s a free country” and “Sticks and stones may break my bones, but words can never hurt me.” See GATES, *supra* note 9, at 18; MACKINNON, *supra* note 9, at 76 (“Americans are taught this view by about the fourth grade and continue to absorb it through osmosis from everything around them for the rest of their lives.”).

¹² See Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL’Y 273, 273 (2004) (“By protecting dissident speech, the First Amendment purports to offer a way for subordinate social groups to participate in political discourse, to hold and exercise power through communication”). Free speech advocates credit the advancement of the civil rights movement to free speech. These advocates point to protesting and prohibiting States from curbing such protests. But see FISS, *supra* note 7, at 12 (“Those favoring liberty often refer to the role that free speech played in securing equality during the 1960s, suggesting that free and open debate is a precondition for achieving a true and substantive equality. But certainly the converse may also be true: that a truly democratic politics will not be achieved until conditions of equality have been fully satisfied.”).

¹³ See *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[The First Amendment] is a prized American privilege to speak one’s mind, although not always with perfect good taste.”); MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY*, at xiv (2004) (“[A]mericans have a historic and highly romanticized affair with the ideals of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good.”).

¹⁴ European speech laws more strictly regulate hate speech. See, e.g., Karen L. Bird, *Racist Speech or Free Speech? A Comparison of the Law in France and the United States*, COMP. POL. 399, 400 (2000) (“Freedom of speech is more widely protected in the United States than in any other country.”); Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 488 (2001) (discussing the differences between American and foreign governments’ reactions to hate speech); Claudia E. Haupt, *Regulating Hate Speech—Damned If You Do and Damned If You Don’t: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT’L L. J. 299 (2005) (providing an in-depth analysis of German and U.S. hate speech regulation and discussing the

utility of comparative analysis as applied to hate speech regulations); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003) (providing a comparative analysis of hate speech jurisprudence); Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2 MICH. ST. L. REV. 377 (2006) (exploring the differences between American and foreign governments’ treatment of hate speech).

¹⁵ Lee C. Bollinger, *The Tolerant Society: A Response To Critics*, 90 COLUM. L. REV. 979, 980 (1990) (“Some speech, in fact, has a great capacity for harm.”).

¹⁶ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2336 (1989). Psychological harms of being the target of racist speech include feelings of worthlessness, humiliation, isolation, and self-hatred. It may also cause psychological disorders and cause a person to turn to drugs and alcohol as a way of coping with low self-esteem. *Id.* at 2336 n.84. See also 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) (discussing social science research on harms caused by racist speech).

¹⁷ Victims of hate propaganda experience fear, which may manifest as pain in the stomach, rapid pulse rate, difficulty breathing, nightmares, hypertension, and suicide. Matsuda, *supra* note 16, at 2336.

¹⁸ See discussion *infra* Part II.B.

¹⁹ Many scholars have argued that hate speech should be regulated. See, e.g., Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992) (proposing to inject the principle of antisubordination into First Amendment jurisprudence in order to give a voice to targets of racist speech); Matsuda, *supra* note 16, at 2380 (arguing for a recognition of harms to victims of hate speech caused by both the racist speech itself and by State authorization of such harmful speech). But see Bollinger, *supra* note 15, at 980 (arguing that protecting even the worst and most appalling speech is beneficial to society). For a catalog of neoconservative arguments against regulating hate speech, see Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D’Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994).

²⁰ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down a hate speech ordinance on the ground that it was not content neutral).

²¹ Content neutrality is a key principle of First Amendment jurisprudence. The Supreme Court has consistently held that the First Amendment must protect citizens from speech regulations based on the ideology of its message. See *id.* at 382 (holding that “[c]ontent-based regulations are presumptively invalid”). Hate speech regulation is considered content based because it favors non-racist ideologies over racist ideologies. The implication of this rule is that a content-neutral hate speech regulation would require a regulation that regulates anti-hate speech to the same extent as it regulates racist speech in order to pass constitutional muster. Anatole France illuminates the absurdity of this application: “The law, in its infinite majesty, forbids rich and poor alike from sleeping under bridges.” Quoted in GATES, *supra* note 9, at 32.

²² The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”). Technically, the First Amendment applies to State action through the Fourteenth Amendment liberty interest. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). To avoid confusion in this article, the Fourteenth Amendment and substantive due process will refer only to the right of a parent to control the upbringing of her child and not to free speech.

²³ For example, Judge Nanette Dembitz reveals that “mothers who opposed their daughters’ abortions have expressed a vengeful desire to punish the daughter for her sexual activity by making her suffer [an] unwanted child, a fervor to impose a religious conviction the mother has failed to instill in her daughter, a hope of caring for her daughter’s baby as her own because of an inability or unwillingness to bear another child herself, a defensive or resentful attitude because she bore illegitimate children without seeking or being able to secure an abortion, or a general distaste for abortion.” Kathryn D. Katz, *The Pregnant Child’s Right to Self-determination*, 62 ALB. L. REV. 1119, 1161-62 (1999) (quoting Nanette Dembitz, *The Supreme Court and a Minor’s Abortion Decision*, 80 COLUM. L. REV. 1251, 1255 (1980)).

²⁴ See *Parnham v. J.R.*, 442 U.S. 584, 603 (1979) (“Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

²⁵ See also *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Spiering v. Heinman*, 448 F. Supp.2d 1129

(2006) (holding that a State law requiring parents to get metabolic testing for their infant does not violate the parents' fundamental liberty right to control the upbringing of their child).

²⁶ Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

²⁷ This example is based on Prussian Blue, a blond-haired, blue-eyed teenage neo-Nazi singing duo. PRUSSIAN BLUE, *Victory Day*, on FRAGMENT OF THE FUTURE (Resistance Records 2004), available at <http://www.lyrics007.com/Prussian%20Blue%20Lyrics/Victory%20Day%20Lyrics.html>.

²⁸ Ethnic Cleansing is a video game created by Resistance Records, in which the player can choose to be a skinhead or Klansman. The player runs through the ghetto, killing blacks and Latinos, until finally reaching the "Jewish Control Center." To win the game, the player must assassinate former Israeli Prime Minister, Ariel Sharon. Anti-Defamation League, *ADL Report: Growing Proliferation of Racist Video Games Target Youth on the Internet* (2002), available at http://www.adl.org/PresRele/Internet_75/4042_72.htm. The game's website has posted the following reviews, which I reproduce here without alteration:

Just got my game, E.C. and wanted to say thank's comrades! You have made me so fuckin happy, tear's are rollin off my white face and on to my assault rifle which I must now clean to prevent rust! You bastard's(lol).....I dont want to seem ungrateful but is there any chance of a patch, that can include new's reporter's or gook's? – Nolan

I got a beta test version 4.01 and it was a scream! . . . I made my way down some stairs and went outside, at once, I was being shot at by ghetto groids, I swung into action and blasted the nig, copius amounts of blood spewed from the nig and the sound of the nigs death left me in stitches! The sound is like a monkey being killed by asians for a meal of brains! I proceeded to shoot niggers and spics slowly cleansing the street and vacant lot. I found an ammo store hidden in one of the rooms. . . . I finished cleansing all of level one and destroyed "Big Nig", I made my way to the subway and entered level 2. The place is full of jews, I shoot one of the foul pigs and it said "Oy Vey!" I continued to shoot them, they seem a lot harder to kill than niggers. After cleansing part of the subway I began searching for more life and ammo. I found some in a bathroom but I had to kill 6 or 7 niggers to get to it, and no sooner than the bathroom was cleansed, a jew was in my face with a machine gun! I blasted the kike and made my way back to the platform, I would write more but I need to get back to the game! – Bob. H.

Resistance Records, Reviews of Ethnic Cleansing: The Game, <http://www.resistance.com/ethniccleansing/reviews.htm> (last visited May 16, 2007).

²⁹ This example is based on a well-known leader in the white supremacist movement and his son, who is rumored to have managed a children's website for his father's white supremacist organization.

³⁰ This event is based on the author's personal experience in Atlanta, Georgia.

³¹ This event is based on the author's personal experience in Long Island, New York.

³² Nine teenagers were convicted in California for the hate-based beating of three women on Halloween night. Greg Risling, *9 Youths Convicted in SoCal Halloween Beating Hate-crime Case*, ASSOCIATED PRESS ST. & LOC. WIRE, Jan. 27, 2007.

³³ There is a wealth of scholarship on factors influencing child development. For a good discussion on such influences, see Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 839-840 (2007) (arguing that while influences outside the family and the school contribute to the development of a child, they are "legally invisible"). See also Barbara Bennett Woodhouse, *Reframing the Debate About Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85 (2004); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003) (discussing influences of schools and mass media on children).

³⁴ A parent's influence on a young child's mind is supported first by common sense and ordinary experience. Although there are arguments to the contrary, this common-sense theory is supported by scientific and psychological research. See discussion *infra* Part II.B.

³⁵ There is a general consensus that environmental influences, such as parent-child interaction, affect the development of a child. Diane Scott-Jones, *Family Influences on Cognitive Development and School Achievement*, 11 REV. OF RESEARCH IN EDUCATION 259, 260 (1984).

³⁶ See LINDA TATE, *A SOUTHERN WEAVE OF WOMEN: FICTION OF THE CONTEMPORARY SOUTH* 280 (The University of Georgia Press) (1994) ("Many voices are in my mouth . . . those of my mothers and grandmothers; and finally my own. The matrix and the voice, the womb and the loom, become one.").

³⁷ My use of "speech" refers to speech as defined by the First Amendment. See discussion *infra* Part II.B. Jeffrey Evans Stake proposes a "memetic" or evolutionary approach to ideas, which fits nicely into the subject of parent-to-child racist speech. Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213 (2001). Stake suggests that ideas, like memes, have the power to replicate. *Id.* at 1214. A memetic approach aims to "prevent memes [ideas] from using harm and threats of harm to their human vessels." *Id.* In the case of parent-to-child racist speech, a parent is a host, intentionally or unintentionally passing harmful memes to her young child. Once passed, those memes draw on the resources of the child, harm her psyche, and continue to replicate.

³⁸ Demaske, *supra* note 12, at 290 (citing as characteristic of hate speech any message "directed to a historically oppressed group" or "persecutatory, hateful, and degrading").

³⁹ Sanitized racist comments are those made by people who are educated or economically advantaged that are less vulgar sounding than outright racist speech, but have the same sting (e.g., off-hand comments that members of certain ethnic groups are welfare cheaters). Matsuda, *supra* note 16.

⁴⁰ Annie Steinberg, Jane Brooks & Tariq Remtulla, *Youth Hate Crimes: Identification, Prevention, and Intervention*, 160 AM. J. PSYCHIATRY 979, 984 (2003).

⁴¹ *Id.* One study that focused on parents of juvenile offenders indicated that "children tended to identify with their parents' beliefs, thus demonstrating some of the same beliefs, including tolerance of certain groups." *Id.*

⁴² *Id.* at 979.

⁴³ For a discussion of the bias-as-mental-illness debate within the mental health community, see Shankar Vedantam, *Psychiatry Ponders Whether Extreme Bias Can Be an Illness*, WASH. POST, Dec. 10, 2005, at A01. Some psychiatrists have cautioned against classifying extreme racism as a psychological disorder because it may allow perpetrators of hate crimes to claim not guilty by mental insanity at trial. See, e.g., Michael J. Grinfeld, *A Tale of Two Atrocities: Can Psychiatry Handle the Controversy?*, PSYCHIATRIC TIMES, Oct. 1999, at 32.

⁴⁴ Edward Dunbar, *Reconsidering the Clinical Utility of Bias as a Mental Health Problem*, 41 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE 97, 98 (2004).

⁴⁵ *Id.*

⁴⁶ E.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (declining to require scientific proof of harm to children potentially caused by reading sexually explicit magazines). Because obscenity is non-protected speech, however, the standards for scientific evidence are lower. Parent-to-child racist speech can be interpreted as a higher value speech because of the political message, and therefore may require evidence of harm to a child. See discussion *infra* Part IV.C.

⁴⁷ Dunbar, *supra* note 44, at 98 ("For patients who evidence severe forms of bias, intergroup contact is predictably aversive. For these patients, out-group persons are often seen as threatening. For some clinically biased patients, the solution is avoidance. Other patients experience marked anxiety, and yet others express overt hostility. It is not surprising that these patients are interculturally incompetent. Pathologically biased patients may engage in overtly hostile behaviors in benign intergroup situations.").

⁴⁸ Raphael S. Ezekiel, *An Ethnographer Looks at Neo-Nazi and Klan Groups: The Racist Mind Revisited*, 46 AM. BEHAV. SCIENTIST 51, 53 (2002).

⁴⁹ *Id.*

⁵⁰ See generally Susan Feldman, *The Shadow of Difference: Sex, Race, and the Unconscious* (Aug. 2006) (unpublished Ph.D. dissertation, SUNY/Buffalo) (on file with Lockwood Memorial Library, SUNY/Buffalo).

⁵¹ E.g., ALA. CODE § 26-14-1(1) ("[Abuse] . . . can occur through nonaccidental . . . mental injury."); ALASKA STAT. § 47.17.290 ("Mental injury means a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness."); ARIZ. REV. STAT. § 8-201(2) ("'Abuse' means . . . the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior, and which emotional damage is diagnosed by a medical doctor or psychologist, and is caused by the acts or omissions of an individual having care, custody and control of a child."); CAL. PENAL CODE § 11166.05 (Supp. 2008) ("[S]erious

emotional damage [is] evidenced by states of being or behavior, including, but not limited to, severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others.”); FLA. STAT. ANN § 39.01(43) (“Mental injury means an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior.”); N.Y. FAM. CT. ACT § 1012 (“Impairment of emotional health and impairment of mental or emotional condition includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, acting out, or misbehavior, including incorrigibility, ungovernability, or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.”).

⁵² KIERAN O’HAGAN, EMOTIONAL AND PSYCHOLOGICAL ABUSE OF CHILDREN 33 (1993).

⁵³ Gerald H. Katzman, *A Bioethical Analysis of a Form of Psychological Abuse: Teaching Hatred to Children*, 44 CLINICAL PEDIATRICS 143, 147 (2005).

⁵⁴ See, e.g., Martin H. Teicher, *Wounds That Time Won’t Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM 50 (2000) (summarizing research performed on humans and animals that suggest early psychological abuse causes irreversible changes in the brain).

⁵⁵ Steinberg, Brooks & Remtulla, *supra* note 40, at 980.

⁵⁶ Jo Goodey, *Understanding Racism and Masculinity: Drawing on Research with Boys Aged Eight to Sixteen*, 26 INT’L J. SOC. OF L. 393 (1998) (analyzing racist aggression in young males as a social construct of masculinity).

⁵⁷ Huntington, *supra* note 26 (cataloging child welfare rights and proposing a problem-solving based approach to child welfare).

⁵⁸ See e.g., GA. DEPT. OF HUM. RESOURCES, DIVISION OF FAM. & CHILD. SERVICES, <http://dfcs.dhr.georgia.gov> (last visited May 16, 2007) (providing parent education and referrals to counselors to families of abused children who remain in the home); N.Y. STATE, OFF. OF CHILD. & FAM. SERVICES, <http://www.ocfs.state.ny.us> (last visited May 16, 2007) (providing parenting advice through home visitation to expectant mothers and new parents).

⁵⁹ Huntington, *supra* note 26, at 627.

⁶⁰ James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1353-54 (1996) (arguing that children whose parents religiously object to vaccinations are denied protection from serious diseases). The most common statutory requirement is that parents have their children vaccinated before attending any school. *Id.* at 1356-57. See also Walter Wadlington, *David C. Baum Memorial Lecture: Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311 (1994).

⁶¹ The downside to preventing teaching hate speech within the existing framework is that doing so may have a disproportionate impact on minorities, single mothers, and divorced families. See e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at vii (2002) (discussing systematic bias and overrepresentation of African-American children in the child-welfare system); Huntington, *supra* note 26, at 657 n.106 (summarizing the scholarly debate on the causes of overrepresentation of African-Americans in the child-welfare system); Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 LAW & SOC’Y REV. 461 (2002) (attributing the overrepresentation of African-American children in the child-welfare system to poverty).

⁶² Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 423 (2005) [hereinafter *Ecogenerism*] (rejecting the traditional approach to child welfare policy arguing for an ecological approach to child welfare).

⁶³ E.g., *Reimann v. Reimann*, 39 N.Y.S.2d 485, 485 (1942) (denying custody to father for his connections to Nazism); *McCorvey v. McCorvey*, 916 So.2d 357, 367 (2005) (ordering both parents to refrain from using racial slurs in the presence of the child).

⁶⁴ *In Re Bianca W.F.*, 1999 Conn. Super. LEXIS 1807 (Conn. Super. Ct. July 12, 1999).

⁶⁵ *Id.* at *9. Importantly, though, the original custody decision was made based on physical abuse. *Id.* at 4.

⁶⁶ *McCorvey*, 916 So.2d at 367.

⁶⁷ E.g., Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

⁶⁸ *Id.* at 649.

⁶⁹ Perhaps little attention is paid because family law decisions often go unpublished.

⁷⁰ The relationship between parent, child, and State is commonly illustrated as a triangle, with the State at the apex, and child and parent on opposing ends of the base. Woodhouse, *Ecogenerism*, *supra* note 62, at 422 (rejecting the triangle approach and arguing for an ecological approach to child welfare); Huntington, *supra* note 26, at 642 (rejecting the triangle approach). Other scholars have illustrated the relationship as an inverted triangle, with the child represented at the bottom point of the triangle and the parents and the State at the top two points, thus demonstrating the authority of both the State and parents over the child. See Rosenbury, *supra* note 33.

⁷¹ Rebecca M. Stahl, “Don’t Forget About Me”: Implementing Article 12 of the United Nations Convention on the Rights of the Child, 24 ARIZ. J. INT’L & COMP. L. 803, 816 (2007) (pointing out that the right of parents to raise their children without state interference is not only historical, but internationally recognized as well).

⁷² *Parnham v. J.R.*, 442 U.S. 584, 602 (1979).

⁷³ *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

⁷⁴ *Id.* at 173.

⁷⁵ The Supreme Court has also upheld statutes that restrict a minor’s right to an abortion by requiring parental consent or notification. *Bellotti v. Baird*, 443 U.S. 622 (1979) (finding parental consent statute unconstitutional, but noting that a State can require parental consent for an unmarried minor’s abortion if the statute provides for an adequate judicial bypass). See also *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upholding an abortion statute that required parental consent for minors, but provided a judicial bypass option); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (upholding a statute that made it a crime to perform an abortion on a minor unless the physician personally informed one of the parents). The Court has also upheld a statute that requires a minor to provide parental notification, while striking down a different provision in the same statute that required an adult to provide spousal notification. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See also *Katz*, *supra* note 23.

⁷⁶ Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 46 (2004) (quoting Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 274 (1979)).

⁷⁷ Every state except Mississippi requires parental consent to marry unless the parties are at least eighteen years old. E.g., CAL. FAMILY CODE §§ 302 (Supp. 2007), GA. CODE ANN. § 19-3-2, N.Y. DOM. REL. §14-2-7.

⁷⁸ E.g., GA. CODE ANN. §16-6-3 (sexual intercourse with someone under the age of sixteen is a crime), ARIZ. REV. STAT. §13-1405 (sexual intercourse with someone under the age of eighteen is a crime).

⁷⁹ *Katz*, *supra* note 23, at 1128-29.

⁸⁰ *Id.*

⁸¹ James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371, 1372-73 (1994) [hereinafter *Parents’ Religion*].

⁸² Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1114 (1992) (arguing that a child has become a “conduit for the parents’ religious expression, cultural identity, and class aspirations”); Dwyer, *Parents’ Religion*, *supra* note 81, at 1372-73 (arguing that parents should not have a right to control the upbringing of their children).

⁸³ *Parnham v. J.R.*, 442 U.S. 584, 602 (1979) (discussing the historical significance of the family unit and broad parental authority). See Dwyer, *Parents’ Religion*, *supra* note 81, at 1424 (criticizing the reliance on tradition as a justification for parental primacy).

⁸⁴ But see Christine Ryan, *Revisiting the Legal Standards that Govern Requests to Sterilize Profoundly Incompetent Children: In Light of the “Ashley Treatment,” Is a New Standard Appropriate?*, 77 FORDHAM L. REV. 287, 299-301 (2008) (asserting that even though parents have a fundamental right to raise their children, even this right has its limitations, mainly for the protection of the child).

⁸⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁸⁶ *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). The early cases were decided during the Lochner era, a period characterized by expansive protection of economic liberties. Thus, the early cases were not decided purely on parental rights grounds; they were also decided on the grounds of economic liberty. The Court, however, has never repudiated the right of the parent to control the upbringing of her child. *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

⁸⁷ *Meyer*, 262 U.S. at 401.

⁸⁸ *Id.*

⁸⁹ *Id.* at 396-97.

⁹⁰ *Id.* at 401.

ENDNOTES CONTINUED

- ⁹¹ “The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” *Id.*
- ⁹² *Id.*
- ⁹³ *Id.*
- ⁹⁴ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 (1925).
- ⁹⁵ *Id.*
- ⁹⁶ *Id.* at 513.
- ⁹⁷ *Id.* at 536.
- ⁹⁸ *Id.* at 534.
- ⁹⁹ *Id.* at 535. The Court noted that the appellees in this case were not parents but corporations, and thus Fourteenth Amendment liberty guarantees were not implicated. The case was decided under the threatened loss of property that the schools would endure under the Act. *Id.* at 536. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. *Pierce*, 268 U.S. at 535.
- ¹⁰⁰ *Pierce*, 268 U.S. at 535.
- ¹⁰¹ See generally, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
- ¹⁰² *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Washington law permitted “[a]ny person” to petition for visitation rights “at any time” and authorize[d] state superior courts to grant such rights whenever visitation may serve a child’s best interests.” *Id.* In this case, a mother limited her children’s visitation with their grandparents to once a month. *Id.* The grandparents sued for visitation rights under the statute. *Id.* The superior court ordered visitation one weekend per month, one week during the summer, and four hours on each of the grandparents’ birthdays. *Id.* at 61.
- ¹⁰³ *Id.* at 67.
- ¹⁰⁴ *Troxel*, 530 U.S. at 65.
- ¹⁰⁵ The Court held that the Washington statute unconstitutionally infringed on a parent’s constitutional right because the statute was “breathhtakingly broad” in that it allowed any person to petition for visitation rights at any time and allowed the court to grant such visitation whenever the court deemed it in the best interest of the child. *Id.* at 67.
- ¹⁰⁶ The statute did not instruct the court to presume that the parent’s choice was in the best interest of the child, and thus the State court could essentially overturn any decision by a fit custodial parent based solely on the judge’s determination of the child’s best interest. *Id.*
- ¹⁰⁷ *Id.* at 68-69. The burden is on the State or grandparent to disprove the presumption. *Id.*
- ¹⁰⁸ *Parnham v. J.R.*, 442 U.S. 584, 603 (1979) (“Nonetheless, we have recognized that a State is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).
- ¹⁰⁹ *Prince v. Massachusetts*, 321 U.S. 158 (1944).
- ¹¹⁰ *Id.* at 160-61. The statute in this case prohibited children to work selling newspapers or other articles on the street. *Id.* *Prince* argued that the statute unconstitutionally violated the child’s First Amendment right to practice her religion and the aunt’s Fourteenth Amendment right to control the upbringing of the child. *Id.* at 164.
- ¹¹¹ *Id.* at 161.
- ¹¹² *Id.* at 162.
- ¹¹³ *Id.* at 166.
- ¹¹⁴ *Id.* at 167 (“[T]he [S]tate has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.”).
- ¹¹⁵ Colin M. Macleod, *A Liberal Theory of Freedom of Expression For Children*, 79 CHI.-KENT L. REV. 55, 69 (2004) (integrating a liberal theory of the Constitution with the promotion of children’s rights).
- ¹¹⁶ William Galston, *When Well-Being Trumps Liberty: Political Theory, Jurisprudence, and Children’s Rights*, 79 CHI.-KENT L. REV. 279, 281 (2004) (“If children are treated as mini-adults, the law puts them at risk by failing to recognize their distinctive needs, vulnerabilities and dependencies. On the other hand, if adults are treated as overgrown children, the law slips into an unwarranted paternalism that is at best condescending and at worst tyrannical.”).
- ¹¹⁷ Macleod, *supra* note 115, at 69.
- ¹¹⁸ Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD?: CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125 (William Aiken & Hugh LaFollette eds., 1980). “Rights in trust” are “rights given to the child, but held in trust for the person of the adult she will become.” *Id.*
- ¹¹⁹ Macleod, *supra* note 115, at 72-73.
- ¹²⁰ Laura Leets, *Responses to Internet Hate Sites: Is Speech too Free in Cyber-space?*, 6 COMM. L. & POL’Y 287, 315 (2001) (mentioning that racist indoctrina-
- tion develops a set of beliefs, which over time may manifest as “moral exclusion and subsequent crimes against humanity”).
- ¹²¹ See discussion *infra* Part II.B.
- ¹²² Macleod, *supra* note 115, at 71.
- ¹²³ David Archard, *Free Speech and Children’s Interests*, 79 CHI.-KENT L. REV. 83, 87 (2004) (“[T]he most important [right given to a child] is a child’s right to . . . the maximal possible range of subsequent autonomous choices as an adult.”) (citing Feinberg, *supra* note 118, at 124-27).
- ¹²⁴ Macleod, *supra* note 115, at 69.
- ¹²⁵ Kevin W. Saunders, *The Need for a Two (Or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 267-69 (2004).
- ¹²⁶ *Id.* at 268 (noting racist hate music by groups such as Aggravated Assault, Nordic Thunder, Angry Aryans, Brutal Attack, RaHoWa (which stands for Racial Holy War), and racist video games such as Ethnic Cleansing).
- ¹²⁷ *Id.* at 269 (“The free expression rights of adults should not include the right to reach an audience of other people’s children.”) “There is the danger that government could use the right to limit the expression of nonparents to children to impose orthodoxy on the next generation. To prevent such an imposition, it is important to recognize the right of parents to provide their children with material that society may feel unsuitable.” *Id.* at 273. “Parents must be allowed to disagree with the State and purchase and provide the material to their children themselves.” *Id.* at 276.
- ¹²⁸ *Ginsberg v. New York*, 390 U.S. 629 (1968).
- ¹²⁹ *Id.* at 640-41.
- ¹³⁰ *A parens patriae* is a parent in the last instance, whereas the parent in the first instance is the natural parent or guardian. This means that the State can only act on this interest when “there is a clear failure” by the parents in the first instance. *Id.*
- ¹³¹ See Etzioni, *supra* note 76, at 7.
- ¹³² *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
- ¹³³ See JOHN MILTON, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE (Meritt Y. Hughes ed., Odyssey Press 1957) (1644).
- ¹³⁴ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
- ¹³⁵ *Id.*
- ¹³⁶ JOHN STUART MILL, *Of the Liberty of Thought and Discussion*, Ch. 2, in ON LIBERTY (1959).
- ¹³⁷ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1977-1978).
- ¹³⁸ See FISS, *supra* note 7, at 23 (criticizing the fight-speech-with-more-speech justification).
- ¹³⁹ See Delgado & Yun, *supra* note 19, at 1822 (arguing that the marketplace of ideas is unfair in the context of racist hate speech).
- ¹⁴⁰ Baker, *supra* note 137, at 965; see Delgado & Yun, *supra* note 19, at 1822; MACKINNON, *supra* note 9, at 78-80 (“Speech . . . belongs to those who own it, mainly big corporations . . . The resulting law of libel has had the effect of licensing the dominant to say virtually anything about subordinate groups with impunity while supporting the media’s power to refuse access to speech to the powerless, as it can always cite fear of a libel suit by an offended powerful individual.”).
- ¹⁴¹ See Lawrence, *supra* note 19, at 803.
- ¹⁴² Saunders, *supra* note 125, at 272.
- ¹⁴³ *Id.*
- ¹⁴⁴ Steinberg, Brooks & Remtulla, *supra* note 40, at 984.
- ¹⁴⁵ MACKINNON, *supra* note 9, at 78.
- ¹⁴⁶ Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 142 (1989).
- ¹⁴⁷ Volokh, *supra* note 67, at 681.
- ¹⁴⁸ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).
- ¹⁴⁹ *Id.*
- ¹⁵⁰ These arguments are characterized here as non-instrumental, but also serve the instrumental function of promoting community character. See Bollinger, *supra* note 15, at 984.
- ¹⁵¹ *Id.* Catharine MacKinnon criticizes this justification. See MACKINNON, *supra* note 9, at 78 (“This has become the ‘speech you hate’ test: the more you disagree with content, the more important it becomes to protect. You can tell you are being principled by the degree to which you abhor what you allow.”).
- ¹⁵² Bollinger, *supra* note 15, at 984.
- ¹⁵³ See GATES, *supra* note 9, at 40. See also *Ginsberg v. New York*, 390 U.S. 629, 642-43, n.10 (1968) (“[A] child might not be as well prepared as an adult to make an intelligent choice. . . The child is protected in his reading of pornogra-

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phy by the knowledge that it is pornographic, *i.e.*, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.”)

¹⁵⁴ GATES, *supra* note 9, at 20-21.

¹⁵⁵ *Id.* at 21.

¹⁵⁶ *Id.* (“[T]he expansive First Amendment that people either celebrate or bemoan is really only a few decades old. And even the Court’s most expansive interpretation of First Amendment protection has always come with a list of exceptions.”)

¹⁵⁷ Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”)

¹⁵⁸ Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (arguing that the statute is content-based).

¹⁵⁹ Cent. Hudson Gas & Electric Corp. v. Public Serv. Comm’n, 477 U.S. 557, 563 (1980) (stating that the Constitution accords less protection to commercial speech).

¹⁶⁰ Mills v. Alabama, 384 U.S. 214, 218 (1966).

¹⁶¹ *Id.* at 218-19.

¹⁶² Roth v. U.S., 354 U.S. 476 (1979) (holding that obscenity is not protected by the Constitution). *See also* Miller v. California, 413 U.S. 15 (1973) (articulating a test to determine whether expression is obscene).

¹⁶³ *Central Hudson*, 477 U.S. at 566 (articulating intermediate scrutiny test for commercial speech).

¹⁶⁴ R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

¹⁶⁵ The term “freedom from speech” is derived from Franklyn S. Hamins, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U. L. REV. 123, 123 (1972) (“[T]he increasing extent to which speech has become militant and abrasive has led its sometimes reluctant hearers to yearn for ‘freedom from speech’ rather than ‘freedom of speech.’”)

¹⁶⁶ Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

¹⁶⁷ The doctrine has been recognized by the Supreme Court for at least fifty years. Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) [hereinafter *Redefining*]. *See* Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (“The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.”)

¹⁶⁸ 336 U.S. at 86-87. *See generally* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

¹⁶⁹ Strauss, *Redefining*, *supra* note 167, at 85.

¹⁷⁰ *See id.* at 86.

¹⁷¹ *See id.* Robert D. Nauman, *The Captive Audience Doctrine and Floating Buffer Zones: An Analysis of Hill v. Colorado*, 30 CAP. U. L. REV. 769, 777 (2002) (“The . . . truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, ‘we are inescapably captive audiences for many purposes.’”)

¹⁷² *See* Strauss, *Redefining*, *supra* note 167, at 86 (“Courts routinely invoke the talismanic phrase ‘the right to be let alone,’ as though these words explain all. Rarely do judges explain what this right means, or why it is valued.”)

¹⁷³ Several commentators have discussed the vagaries of the captive audience doctrine. *See id.* at 90 (discussing the likelihood that the Court finds an audience captive when in the home rather than outside of it and when speech is spoken rather than written, and proposing an alternative balancing test that weighs the privacy interests of the hearer with the speech interests of the speaker); J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Daniel E. Hartstein, Comment, *Collateral Censorship and First Amendment Theory*, 8 U. PA. J. LAB. & EMP. L. 765 (2006) (arguing that “unwillingness” of the listener is the common thread among captive audience cases); Nauman, *supra* note 171, at 780 (“It appears that the opinions of several commentators as to the Court’s ‘schizophrenia’ in applying the doctrine may have been in fact confirmed.”)

¹⁷⁴ Hill v. Colorado, 530 U.S. 703, 716 (2000) (applying the captive audience doctrine to uphold a statute that prohibited anyone from protesting 100 feet from the entrance of a health care facility or eight feet from any person without that

person’s consent). *But see* Cohen v. California, 403 U.S. 15 (1971) (rejecting the captive audience doctrine and finding a conviction for wearing a jacket that said “Fuck the Draft” in a courthouse unconstitutional); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1971) (striking down an ordinance that prohibited drive-ins from showing nudity if screens were visible from the public street).

¹⁷⁵ FCC v. Pacifica, 438 U.S. 726 (1978) (applying the doctrine to uphold FCC fines for offensive daytime radio broadcasts). *Pacifica* is an interesting case in that it applies the captive audience doctrine to listeners at home or in a car who could very easily turn off the radio to avoid the offensive speech.

¹⁷⁶ Frisby v. Schultz, 487 U.S. 474 (1988) (applying the doctrine to uphold ordinances that prohibit focused residential picketing).

¹⁷⁷ *E.g.*, Rowan v. U.S. Post Office Dep’t, 397 U.S. 728 (1970) (upholding postal provisions allowing residents to block sexually oriented mailings); Breard v. Alexandria, 341 U.S. 622 (1951) (upholding a statute that prohibited commercial door-to-door solicitation without prior consent of the homeowner). *But see* Bolger v. Youngs Drugs Products Corp., 463 U.S. 60 (1983) (striking down statute prohibiting unsolicited mailings of contraceptive advertisements); Consol. Edison Co. v. Public Service Comm’n, 447 U.S. 530 (1980) (nuclear power advertisements); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (communist propaganda); Martin v. Struthers, 319 U.S. 141 (1943) (unwanted door-to-door solicitation).

¹⁷⁸ Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

¹⁷⁹ *E.g.*, Balkin, *supra* note 173, at 2307 (proposing practical captivity rather than necessary captivity as the basis for finding the workplace a paradigm instance of First Amendment captivity); Strauss, *Redefining*, *supra* note 167; Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L.REV. 1 (1990); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990); Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1535 (N.D. Fla. 1991).

¹⁸⁰ *See* Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (“The unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men.’”); Rowan, 397 U.S. at 736 (“[T]he right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate.”); Strauss, *Redefining*, *supra* note 167, at 108 (noting that the right to be let alone as applied to unwanted speech is a “vague but rhetorically powerful concept”).

¹⁸¹ Strauss, *Redefining*, *supra* note 167, at 107.

¹⁸² While the concept of autonomy is difficult to define precisely, it encompasses notions of meaningful choice and free will. Autonomy as a defense to protecting hate speech is much debated. The proponents of regulating hate speech have argued that free expression should be analyzed under an agency concept, which rejects individual autonomy and redefines the “self” in relational and social terms. *See* Demaske, *supra* note 12, at 277.

¹⁸³ Strauss, *Redefining*, *supra* note 167, at 110.

¹⁸⁴ *See* Hill, 530 U.S. at 716 (“The right to free speech . . . includes the right to attempt to persuade others to change their views . . . [b]ut the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.”) (quoting Frisby v. Schultz, 487 U.S. 474, 487 (1988)).

¹⁸⁵ Strauss, *Redefining*, *supra* note 167, at 110. *But see* Hill, 530 U.S. at 753 (Scalia, J., dissenting) (“[T]he Court today elevates the abortion clinic to the status of the home.”). Not surprisingly, the captive audience doctrine’s connection with the home has been used to support the constitutionality of hate-speech codes on college campuses. To a college student, her dormitory is her home, and racist slurs written on a board outside of her room are akin to focused residential picketing. *See* Matsuda, *supra* note 16.

¹⁸⁶ Social science research should be used to determine the age.

¹⁸⁷ Woodhouse, *Ecogenerism*, *supra* note 62, at 433.

¹⁸⁸ *Id.*

¹⁸⁹ *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

¹⁹⁰ Other scholars, notably Mari Matsuda, have argued that the captive audience doctrine is applicable to campus-hate speech because “[l]iving on or near campus, studying in the library and interacting with fellow students are integral parts of university life.” Matsuda, *supra* note 16, at 2372.