

**SYMPOSIUM**  
**CHILLING PARENTAL RIGHTS**

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INTRODUCTION

When an individual becomes a parent, they are immediately presented with a dizzying array of different, often conflicting, advice. Should you co-sleep with your children or let them cry it out? Is it good—or bad—to be a Helicopter parent or a Lawnmower parent?<sup>1</sup> Should you practice attachment parenting or let your kids be free-range? Do you identify as a Tiger Mom or an Elephant Dad?<sup>2</sup> There is a seemingly endless supply of articles, books,

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1. See Sonja Haller, *What Type of Parent Are You?: Lawnmower? Helicopter? Attachment? Tiger? Free-range?*, USA TODAY (Sept. 19, 2018, 6:38 PM), <https://www.usatoday.com/story/life/allthemoms/2018/09/19/parenting-terms-explained-lawnmower-helicopter-attachment-tiger-free-range-dolphin-elephant/1357612002/> [<https://perma.cc/3N6U-7EAM>].

2. KIM BROOKS, SMALL ANIMALS: PARENTHOOD IN THE AGE OF FEAR 13 (2018) (“For every one of my children’s needs—food, sleep, affection, discipline, socialization, and education—there’d be at least a hundred different ways of responding, countless methods and

podcasts, and blogs devoted to trying to ascertain the “best” parenting style. Of course, this wealth of information represents an underlying motivation that is essentially positive: the desire to effectively perform the important task of parenting. Indeed, across multiple group demographics, people consistently list family and children as the most important and meaningful things in their lives.<sup>3</sup> So, it is no surprise that a huge industry has developed from this desire to parent our children in a way that hopefully ensures the positive outcomes we seek. But the quantity and breadth of information also reveals that there is still a great deal of *uncertainty* regarding many of the choices that parents face. It reflects the truism that despite millennia of debating the topic of parenting (and testing out our theories on each new generation),<sup>4</sup> we have yet to reach a consensus on the best way to raise a child.

Despite this clear *lack* of consensus as to what constitutes ideal parenting, state actors have increasingly intervened in families when they feel that a particular parenting choice is wrong. These interventions increasingly occur through the use of criminal law and punishment.<sup>5</sup> This criminalization extends beyond prosecutions for what would traditionally be considered abuse or neglect to a wide range of parenting choices that do not rise to this level. Although many scholars have critiqued this criminalization of parenting, the focus of these critiques has centered on the harm to the families that are actually criminalized and on how a disproportionate burden of this harm is borne by racial minorities and other marginalized groups.<sup>6</sup> To the extent that scholars have noted that this criminalization results in harm to society more generally, these critiques have been periphery.

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approaches for nurturing these little people I loved so deeply. And for every choice that needed making, for every path not taken, I'd feel a tiny tinge of fear, a ripple of anxiety passing through me about the infinite ways it seemed possible to mess up.”)

3. PEW RSCH. CTR., WHERE AMERICANS FIND MEANING IN LIFE (2018), <https://www.pewforum.org/2018/11/20/where-americans-find-meaning-in-life/> [<https://perma.cc/H2RU-ECJ3>] (“Americans are most likely to mention family when asked what makes life meaningful in the open-ended question, and they are most likely to report that they find ‘a great deal’ of meaning in spending time with family in the closed-ended question.”).

4. Jessica Grose, *A Brief History of Questionable Parenting Advice*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/parenting/vintage-parenting-advice-archives.html> [<https://perma.cc/AD42-66D8>] (noting both the long history of parenting advice and its sometimes wildly divergent prescriptions for successful parenting).

5. David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1447 (2010) (“The last two decades have witnessed an astonishing increase in the use of the criminal justice system to police neglectful parents.”).

6. *See id.* at 1462–63 (collecting scholarship on the disproportionate harm of criminalization on women, particularly poor women and women of color); Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform> [<https://perma.cc/8JAP-7HNW>] (“[W]hile serious child abuse does occur, it’s rare, and many issues that fall under the broad umbrella of ‘neglect’ . . . are simply the everyday struggles of low-income families.”).

This Essay focuses squarely on the threat of harm that the criminalization of parenting creates for parents regardless of whether there is a reasonable chance that they will individually face criminal prosecution. It does so by drawing not only on the literature and precedent surrounding the constitutional right to parent, but also on the literature and precedent regarding the “chilling” of other constitutional rights, such as the freedom of speech and association.<sup>7</sup> By drawing parallels between the long-articulated risks associated with the chilling of rights in these latter contexts, the potential for real harm that accompanies the chilling of parental rights can be better understood. And when these harms are fully articulated and appreciated, it becomes clear that the current trend toward criminalizing parenting should concern us all.

Part I of this Essay charts the increased use of criminal law to regulate parenting. Part II applies the precedent surrounding the chilling of other types of constitutional rights to parental rights. Part III details how this chilling of parental rights is bad for children, dangerous to our pluralistic ideals, and contrary to the purpose of our democratic system.

#### I. THE INCREASING CRIMINALIZATION OF PARENTS AND PARENTING

One could not be faulted for assuming that modern parents are not doing a great job. A brief scan of the headlines of local newspapers over the last several years reveals many instances of state intervention due to a parent’s allegedly criminal parenting choices.<sup>8</sup> But, upon closer inspection, these headlines often do not reflect an increase in abusive or neglectful parenting, but rather an increase in state intervention as a result of more mundane parenting choices. In recent years, parents have been criminally prosecuted for leaving their children with caretakers or family members, including the children’s own teenage siblings, whose care the state deems insufficient.<sup>9</sup> They have been prosecuted for homeschooling their children,<sup>10</sup> breastfeeding

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7. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967).

8. David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 4 (2016) (“The spate of news items suggests a trend toward enhanced, arguably invasive, scrutiny of parents, with the state second-guessing the parenting decisions they make, and intervening whenever they disagree with the parents’ judgment call.”).

9. See Chenue Her, *Single Mom Faces Reckless Conduct Charges After Struggling to Find Childcare During Pandemic*, 11 ALIVE (June 9, 2021, 10:04 PM), <https://www.11alive.com/article/news/local/single-mother-wants-charge-dropped-after-toddler-wanders-into-neighbors-house/85-fbbd3259-d39c-4886-8ddf-c391d3670bd5> [<https://perma.cc/ALB3-99Y9>].

10. See Hannah Buehler, *Was Buffalo Mom Jailed over Homeschooling Decision?*, WKBW BUFFALO (Feb. 8, 2017, 9:44 PM), <https://www.wkbw.com/news/was-buffalo-mom-jailed-over-homeschooling-decision> [<https://perma.cc/Z5XP-GRDW>].

their children,<sup>11</sup> taking pictures of their children in the bathtub,<sup>12</sup> or allowing their children to get sunburned.<sup>13</sup>

So-called “free-range” parenting cases are being prosecuted all over the United States. In South Carolina, Debra Harrell let her nine-year-old daughter play at the park while she went to work.<sup>14</sup> Parents in the neighborhood say that it is common for children to play at the park without their parents.<sup>15</sup> Nonetheless, Ms. Harrell was charged with felony child neglect and faced up to ten years in prison.<sup>16</sup> In Florida, Nicole Gainey was arrested for felony child neglect after she let her seven-year-old son walk to a park less than half a mile away.<sup>17</sup> She faced a \$5000 fine and up to five years in jail.<sup>18</sup> In Texas, Laura Browder left her children at a food court in the mall where she was interviewing for a job.<sup>19</sup> She could see the children throughout the fifteen-minute interview, but she was still charged with child abandonment.<sup>20</sup>

The stories become even more bizarre. In South Carolina, Shannon Cooper was attending her daughter’s high school graduation when she was arrested because she was cheering and screaming too loudly in support of her

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11. See Tara Culp-Ressler, *Arkansas Mother Thrown in Jail for Breastfeeding While Drinking a Beer*, THINKPROGRESS (Mar. 27, 2014, 5:47 PM), <https://archive.thinkprogress.org/arkansas-mother-thrown-in-jail-for-breastfeeding-while-drinking-a-beer-13fee2d00b2c/> [<https://perma.cc/X94Y-VHKR>]; Michael Smith, *Woman Arrested for Breastfeeding at Walmart*, EMPIRE NEWS (Aug. 27, 2014), <https://empirenews.net/woman-arrested-for-breastfeeding-at-wal-mart/> [<https://perma.cc/2DPD-6HKN>].

12. See Dan Przygoda, *Couple Sues Walmart for Calling Cops over Bath Time Photos*, ABC NEWS (Sept. 20, 2009, 8:49 AM), <https://abcnews.go.com/GMA/Weekend/parents-sue-wal-mart-children-bath-time-photos/story?id=8622696> [<https://perma.cc/MXX6-3NX5>]; see also Eli Saslow, *Allegation Ends Coach’s Career*, ESPN (May 25, 2013), [https://www.espn.com/espn/otl/story/\\_/id/9308806/minnesota-state-mankato-coach-todd-hoffner-career-was-ruined-child-porn-allegation-espn-magazine](https://www.espn.com/espn/otl/story/_/id/9308806/minnesota-state-mankato-coach-todd-hoffner-career-was-ruined-child-porn-allegation-espn-magazine) [<https://perma.cc/QBT4-XYZP>].

13. See Michael Winter, *N.J. “Tanning Mom” Cleared of Child Endangerment*, USA TODAY (Feb. 26, 2013, 5:44 PM), <https://www.usatoday.com/story/news/nation/2013/02/26/new-jersey-tanning-mom-charges-dismissed/1949749/> [<https://perma.cc/D72P-3SRT>].

14. See *S.C. Mom’s Arrest over Daughter Alone in Park Sparks Debate*, CBS NEWS (July 28, 2014, 8:01 PM), <https://www.cbsnews.com/news/south-carolina-moms-arrest-over-daughter-alone-in-park-sparks-debate/> [<https://perma.cc/P4WX-53GJ>].

15. See *id.*

16. See *id.*

17. See Caitlin Schmidt, *Florida Mom Arrested After Letting 7-Year-Old Walk to the Park Alone*, CNN (Aug. 1, 2014, 7:43 AM), <https://www.cnn.com/2014/07/31/living/florida-mom-arrested-son-park/index.html> [<https://perma.cc/5XTU-AYJG>].

18. See Lenore Skenazy, *This Mom Beat Ridiculous “Child Neglect” Charges, but Life Is Still Tough*, REASON (Mar. 20, 2015, 12:45 PM), <https://reason.com/2015/03/20/this-mom-beat-the-ridiculous-child-negle/> [<https://perma.cc/DTQ6-JWPE>].

19. See Christopher Brennan, *Mother of Two Charged with Abandoning Kids in Mall Food Court During Job Interview Despite Saying That She Could See Them the Entire Time*, DAILY MAIL (July 20, 2015, 2:03 AM), <https://www.dailymail.co.uk/news/article-3167849/Mother-two-charged-abandoning-kids-mall-food-court-job-interview-despite-saying-entire-time.html> [<https://perma.cc/F5EJ-X5E6>].

20. See *id.*

child.<sup>21</sup> In Ohio, Jeffrey Williamson was arrested on child endangerment charges when his son skipped church.<sup>22</sup> Danielle Wolfe was shopping with her family when her husband threw a frozen pizza on top of the bread in their shopping cart; when she allegedly told her husband to “stop squishing the f\*\*\*\*\* bread” in the presence of their children, she was charged with disorderly conduct.<sup>23</sup>

In Utah, Tillie Buchanan was charged with three counts of criminal lewdness when her stepchildren happened to walk in on her and her husband topless.<sup>24</sup> They had removed their itchy shirts after a long day of working in the hot garage.<sup>25</sup> Utah’s lewdness law prohibits showing the lower section of the female breast to children in a manner that would shock the child.<sup>26</sup> So, despite the fact that Mrs. Buchanan was in her own, private home, with only her own family, the state marshaled its resources to “protect” her stepchildren from her allegedly “criminal” choice.<sup>27</sup>

In some respects, these cases are outliers—most parents do not face this type of criminal prosecution. But these examples, and many others like them, represent a troubling increase in the tendency to criminalize parents and parenting.<sup>28</sup> This increasing criminalization reflects the larger tendency to reach for criminal law, as opposed to less punitive approaches, any time a

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21. See Shannon Cooper Said S.C. Police Arrested Her for Cheering During Her Daughter’s Graduation, CBS NEWS (June 6, 2012, 11:23 AM), <https://www.cbsnews.com/news/shannon-cooper-said-sc-police-arrested-her-for-cheering-during-her-daughters-graduation/> [https://perma.cc/JE83-DEPM].

22. See Jordan Richardson, *Son Skips Church, Father Arrested for Child Endangerment*, DAILY SIGNAL (July 7, 2014), <https://www.dailysignal.com/2014/07/07/son-skips-church-father-arrested-child-endangerment/> [https://perma.cc/9LHJ-RXBS].

23. Philip Caulfield, *S.C. Woman Arrested for Cursing in Front of Kids—and Later Receives Apology*, N.Y. DAILY NEWS (Aug. 15, 2014, 12:59 PM), <https://www.nydailynews.com/news/national/s-woman-arrested-cursing-front-kids-recvies-apology-article-1.1904846> [https://perma.cc/2XDL-8L9K].

24. See Jessica Miller, *This Utah Woman Was Charged for Being Topless in Her Own Home. Now, She’s Arguing That the Lewdness Law Is Unconstitutional.*, SALT LAKE TRIB. (Sept. 30, 2019, 4:10 PM), <https://www.sltrib.com/news/2019/09/30/this-utah-woman-was/> [https://perma.cc/S9PA-8ZK4].

25. See *id.*

26. Abigail Weinberg, *A Utah Woman Was Charged for Going Topless in Her Own Home. Her Legal Case Is Not Going Great.*, MOTHER JONES (Jan. 22, 2020), <https://www.motherjones.com/politics/2020/01/utah-lewd-law-tilli-buchanan-topless-own-home-criminal-charges/> [https://perma.cc/5FGX-LAMZ].

27. This story—and the ones that precede it—also reflect the stretched interpretations of criminal law that are sometimes utilized to criminalize parental choice. See BROOKS, *supra* note 2, at 123–24 (describing her own criminal charge for “[c]ontributing to the delinquency of a minor” for leaving her son unsupervised in a car and the experiences of many other women she spoke with who had “been charged with half a dozen different crimes for similar acts, everything from felony child neglect to misdemeanor child endangerment”).

28. This criminalization can, in turn, affect their parental rights, as states increasingly use parents’ criminal convictions as a reason to deny or restrict their custody rights. See, e.g., Sarah Katz, *Parental Criminal Convictions and the Best Interests of the Child*, 90 PA. BAR ASS’N Q. 27 (2019) (detailing how Pennsylvania utilizes the existence of a criminal conviction for a wide variety of crimes as the basis for a presumption against awarding custody).

social ill presents itself.<sup>29</sup> It also, as many scholars correctly point out, affects already marginalized and overpoliced communities disproportionately, unfairly burdening parents of color, poor parents, and disabled parents.<sup>30</sup> There is also a gendered element to these prosecutions. It is perhaps not surprising that the majority of defendants in these cases are women, reflecting both the disproportionate share of parenting that women perform and the more stringent set of societal expectations placed on mothers than on fathers.<sup>31</sup> But these cases also reflect the modern truism that—almost whatever choice parents make—they are often met with an unforgiving and judgmental response.<sup>32</sup>

## II. OVERCRIMINALIZATION NECESSARILY CHILLS PARENTAL RIGHTS

The harm that results from the overcriminalization of parenting is not limited, however, to the racial and gender inequities that often accompany the turn toward criminal law. Overcriminalization affects parents of all backgrounds and identities, even if they never interact with the criminal justice system. And that is because the criminalization of parenting unavoidably results in the chilling of parental rights.<sup>33</sup> The uncertainty that cases like those detailed above inject into the popular discourse about parenting—What is good parenting? What is *criminal* parenting?—undoubtedly changes behavior, even for parents who will never face criminal prosecution.<sup>34</sup> In the face of uncertainty regarding whether a particular action could possibly expose them to criminal liability,<sup>35</sup> many parents will

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29. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (“How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over?”).

30. See *supra* note 6.

31. See generally BROOKS, *supra* note 2, at 74 (describing the disproportionate number of women who are criminalized for parenting choices); Jane H. Aiken, *Motherhood as Misogyny*, in WOMEN & L. 19, 29 (2020) (noting that although failure-to-protect statutes are written in gender-neutral terms, it is almost exclusively mothers who are prosecuted under them); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 818 (2000) (describing the disproportionate impact on women on criminalizing child neglect); Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 440 (2017) (describing a “regulated and policed motherhood, corralled from all sides into an ideal of mothering that may not exist in reality”).

32. See Pimentel, *supra* note 8, at 12 (“Human weakness, even human frailty, can be forgiven in almost every endeavor, it would appear, *except* parenting which, ironically, may be the most difficult thing most people will do in their lives.”).

33. *Id.* at 5 (“The existing case law suggests that the enforcement of overprotective parenting norms in society is, at worst, a gross violation of the constitutional rights of parents, and at best, a severe chilling of those rights.”).

34. *Id.* at 20 (“The impact is not limited to that family. Neighbors, onlookers, and anyone who has learned of the story in the media may be similarly intimidated, profoundly chilling the exercise of the parents’ constitutional rights.”).

35. Part of the reason for this uncertainty is that a lot of discretion to determine what actions constitute criminal parenting is given to individuals who do not necessarily have the appropriate training to make such determinations. See BROOKS, *supra* note 2, at 152–53 (“The caseworkers at protection agencies aren’t licensed social workers. They often have minimal training. Police certainly aren’t experts on parenting or childcare. So basically we, as a society, have entrusted people who have no real training or serious knowledge about children

reasonably err on the side of not taking such action.<sup>36</sup> This is true whether the parent believes the action is *harmful* or *helpful* to the task of raising their child.

Substantive due process precedent is clear that the right to the care, custody, and control of one's own children is a fundamental constitutional right.<sup>37</sup> The right to make parenting decisions was foundational to the development of the modern canon of substantive due process cases.<sup>38</sup> But if the exercise of a fundamental right is sufficiently chilled—in other words, if the exercise of the right feels tenuous, risky, and fraught, and if we change our behavior in ways that we do not want to and should not have to—then, even if the technical right persists, it has become a nullity.

For decades, jurists have grappled with these questions in the freedom of speech context. The U.S. Supreme Court has recognized that government regulations that have a chilling effect on the exercise of First Amendment free speech rights can be tantamount to constitutional violations.<sup>39</sup> To determine whether a government action results in the chilling of free speech rights, courts will inquire whether a person of “ordinary firmness” would be deterred from exercising free speech rights in light of that state action.<sup>40</sup> It is clear that an arrest itself is not required for a finding that free speech rights have been impermissibly chilled; only a “realistic threat of arrest” is necessary.<sup>41</sup> There is no reason to believe that a “realistic threat of arrest” in the context of parental rights would be any less chilling than in the speech context. In fact, as the threat of arrest for parents is often coupled with the threat of the temporary or permanent removal of children, it is not hard to see how state action that creates a reasonable chance of criminal liability would result in an even more aggressive chilling of rights.<sup>42</sup>

There is a distinction between the state compelling certain choices through incentivizing or disincentivizing certain behavior—even when done with the heavy hand of government benefits—and actually criminalizing a choice

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and families with critical issues involving children. And they are making decisions about who gets to be a parent and who gets to raise their children . . . and whether you'll be labeled a child-abuser and unable to work.” (quoting Diane Redleaf, founder and director of the Family Defense Center)).

36. *Cf. Farkas v. Barry*, 335 F. Supp. 681, 683 (E.D.N.Y. 1972) (noting that “‘bad faith’ arrests in the past which are still threatened in the future . . . chill plaintiffs’ constitutional rights”).

37. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”).

38. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the 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.”).

39. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972).

40. *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).

41. *Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004).

42. *See Pimentel*, *supra* note 8, at 19 (“Typically, when parents are reported and either law enforcement or CPS arrives to assess the situation, the parents are likely to be afraid, desperately afraid, of one thing: having their children taken away from them.”).

different from the one a particular government official might make.<sup>43</sup> Conditioning public school attendance on vaccination<sup>44</sup> or conditioning the receipt of additional food aid on breastfeeding<sup>45</sup> are certainly assertions of state power that will likely have an effect on parental choices. But to *criminalize* parents who choose not to vaccinate or breastfeed would reflect an entirely different level of state coercion. Criminal law carries with it not only more extreme potential punishment but also the specter of moral disapproval.<sup>46</sup> This level of coercion results in a much more realistic threat of chilling behavior that is *not* criminal, as parents seek to avoid actions that carry even the slightest chance of being perceived as criminal.

### III. WHAT WE LOSE WHEN WE CHILL PARENTS' RIGHTS

In the freedom of speech context, the risks of too much state intervention are apparent. If the state aggressively restricts speech, we cannot criticize those in power nor have a robust debate concerning alternative approaches.<sup>47</sup> Therefore, the undue restriction of speech represents a risk to the very survival of our democracy.<sup>48</sup> Narrow tailoring is crucial where First

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43. Although the Supreme Court has recognized that even state action that does not impose a criminal penalty, but only exposes an individual to a *risk* of adverse employment action or public disclosure of private information, has been held to be sufficiently chilling on constitutional rights, that is invalid. *See Shelton v. Tucker*, 364 U.S. 479, 486–87 (1960) (finding state requirement for teachers to report organizations that they are associated with would “operate to widen and aggravate the impairment of constitutional liberty” contained in the First and Fourteenth Amendments). *But see Laird*, 408 U.S. at 13–14 (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; ‘the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.’” (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947))).

44. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, STATE SCHOOL IMMUNIZATION REQUIREMENTS AND VACCINE EXEMPTION LAWS (2022), <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf> [<https://perma.cc/DJT7-5AUP>].

45. *See* D.C. DEPT. OF HEALTH, WIC FOOD PACKAGES FOR MOMS, [https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Wic\\_Food\\_Packages\\_For\\_Moms\\_Babies\\_English.pdf](https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Wic_Food_Packages_For_Moms_Babies_English.pdf) [<https://perma.cc/XJQ7-ESSL>] (noting the extra food benefits to exclusively or mostly breastfeeding moms, including an additional six months of WIC support).

46. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (discussing the stigma associated with criminal prohibition). Even absent criminal sanctions, societal stigma for particular parenting choices can powerfully influence individual choices. *See BROOKS, supra* note 2, at 41 (describing the “all-consuming, increasingly intensive, super-pressurized, status-obsessed, safety-fixated world of modern, American, middle-class parenthood”). Nevertheless, the criminalization of such choices only further constrains and chills the exercise of parental rights, adding unwarranted fuel to the cultural fire already raging.

47. *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“The First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ That is because ‘speech concerning public affairs is more than self-expression; it is the essence of self-government.’ Accordingly, ‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.’” (first quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); then quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); and then quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

48. *See id.*

Amendment activity is chilled—even if indirectly—“[b]ecause First Amendment freedoms need breathing space to survive.”<sup>49</sup>

When it comes to parental rights, however, there is a tendency to focus only on the risk of too *little* state intervention, ignoring or downplaying the risks of too much.<sup>50</sup> The risk of harm to children if the state *fails* to intervene can feel pressing and immediate in a way that the risk of chilling the exercise of parental rights simply does not.<sup>51</sup> Protecting children from harm is a “public policy objective that is both easy to defend and hard to dismiss.”<sup>52</sup> And so we fail to meaningfully account for what we lose when we allow the state to go too far.<sup>53</sup> This part more concretely articulates what is at stake when we chill parental rights. It argues that the chilling of parental rights *matters*—not just to parents themselves, but to children, to society, and to the larger structure of our democratic freedoms.

#### A. Children Are Harmed When Parents’ Rights Are Chilled

The most obvious response to the argument that we must err on the side of not criminalizing parental choices to avoid a chilling of parental rights is clearly that the *most* important objective is not to protect parenting, but to protect children.<sup>54</sup> Any incidental chilling effect on parents’ rights, this argument goes, is a worthwhile price to pay for ensuring that the state intervenes to protect vulnerable children. This argument, however, misses two critical truths—first, that unwarranted and aggressive state intervention

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49. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also* *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (“The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.”).

50. *See* BROOKS, *supra* note 2, at 87–93 (discussing the panic around child safety that surged in the late 1970s and the historical and psychological reasons that these fears—almost entirely unfounded—became salient for many Americans).

51. *See* Frank D. Fincham et al., *The Professional Response to Child Sexual Abuse: Whose Interests Are Served?*, 43 FAM. RELS. 244, 249 (1994) (“A CPS investigator who concludes that abuse did not occur or that abuse will not reoccur takes a serious risk, if she or he is wrong and the child is subsequently harmed, the public outcry could easily lead to the loss of his or her job. . . . In contrast, identifying abuse is a relatively safe course of action with minimal, if any, potential adverse consequences for the investigator; if the investigator is wrong (false positive), there is absolutely no threat to his or her livelihood.”).

52. Pimentel, *supra* note 8, at 5.

53. Interestingly, the protection against chilling parental rights is sometimes discussed by courts when these rights are implicated simultaneously with free speech rights. For instance, the United States District Court for the Eastern District of New York considered the effect of the arrest of the mother of a fourteen-month-old child under a statute prohibiting endangering the welfare of a child because she brought the baby along with her to a lecture on birth control. The court discussed how the arrest was detrimental to both the mother’s rights to parent and her rights to free speech. *See* *Farkas v. Barry*, 335 F. Supp. 681, 682 (E.D.N.Y. 1972) (noting the “important rights of free speech, assembly and parent-child relationship[s]” are “protected by the First, Ninth and Fourteenth Amendment”).

54. *See, e.g., State v. Dade*, 376 P.2d 948, 949–50 (Utah 1962) (“Quite beyond and more important than the rights and privileges of the parents is the welfare of these children and their prospects for becoming well-adjusted, self-sustaining individuals. This is the consideration of paramount importance.”).

in the lives of children has the potential to create enormous harm to children themselves. And second, that children benefit from confident parental figures who base their parenting choices on what they truly believe is best for their children.<sup>55</sup>

The criminalization of parenting results in direct harm to children. This harm can be extreme—including physical and psychological trauma<sup>56</sup>—or subtler. For instance, the father who was prosecuted after his son skipped church reports that, now, “[e]very time that we leave in our car or drive down the street or something like that, every time they see a cop in Blanchester, they freak out and say, ‘Daddy, Daddy, Daddy, are they going to arrest you?’”<sup>57</sup> Of course, children do benefit from state intervention when such intervention protects them from actual abuse or neglect. But the cases discussed at the beginning of this Essay—and many more like them—clearly do not rise to that level.<sup>58</sup> They instead reflect interventions that are meant to supplant parental decision-making with state decision-making on issues about which there is reasonable disagreement. Such interventions are as likely to create harm as they are to protect against it.<sup>59</sup> While drawing the line between criminal and noncriminal parenting choices is not simple—and is outside the scope of this Essay—it is indisputable that the line for what constitutes potentially criminal parenting choices has shifted enormously in just a few decades, leaving parents in the uncanny position of being

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55. See Priscilla K. Coleman & Katherine Hildebrandt Karraker, *Maternal Self-Efficacy Beliefs, Competence in Parenting, and Toddlers' Behavior and Developmental Status*, 24 *INFANT MENTAL HEALTH J.* 126, 127–30 (2003) (reviewing literature connecting parents' own perceptions of their efficacy to positive parenting outcomes). As author Kim Brooks recounts of her own experience following a criminal prosecution for leaving her small child in a car while she ran into a store, “[I]t's hard to continue to believe that you have all the answers when you find out that someone has called the police to report you for criminal negligence of your son.” BROOKS, *supra* note 2, at 36.

56. See, e.g., Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 *WM. & MARY L. REV.* 413, 518–21 (2005) (discussing the emotional and psychological damage to children resulting from the state's aggressive and intrusive interventions in the name of child protection).

57. Richardson, *supra* note 22.

58. See Joyce, *supra* note 6 (noting that reports of “child abuse or neglect” in New York can “encompass a wide range of circumstances, from bruising and other visible signs of mistreatment to things like frequent absence from school, excessive fatigue or hunger, or simply walking home alone”). As Kim Brooks points out in her book *Small Animals: Parenthood in the Age of Fear*, it would statistically take 750,000 years for a child left alone in a public space to be taken by a stranger, and yet, “when it comes to this fear about leaving children alone, which is . . . irrational and . . . not based on data or risk, the fear has become both common custom and law.” BROOKS, *supra* note 2, at 113–15.

59. Pimentel, *supra* note 8, at 6 (“[P]rotecting the rights of parents to parent as they see fit—safeguarding their discretion in parenting, including issues of risk-management for their children—is likely to do far more to advance the interests of children than the emerging pattern of state intervention can hope to achieve.”); David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 *PEPP. L. REV.* 235, 244 (2015) (noting that unfounded reports of abuse were “detrimental to both children and families: not only do some of these reports result in unjustified removals, the investigation itself intrudes upon and disrupts family privacy and security, which similarly compromises the best interests of the child”).

potentially criminally liable for raising their own children the way they themselves were raised.<sup>60</sup>

The criminalization of parenting also harms children by undermining effective parenting. The threat of potential criminal liability for “non-ideal” parenting choices results in parents lacking confidence and focusing on avoiding criminal liability rather than assessing what is truly best for their children.<sup>61</sup> The Supreme Court has recognized that fit parents are *presumed* to act in their child’s best interest.<sup>62</sup> The state cannot supplant its own vision of what is best for the child absent an initial finding that a natural parent is not fit to make such decisions.<sup>63</sup> Parenting that occurs merely as a response to a potential punitive state reaction is highly unlikely to result in parenting that reflects any parent’s true beliefs about what is best for their child.<sup>64</sup> And, as parents are presumed to act in the best interests of their children, state action that results in altering parental behavior is contrary to ensuring optimal parenting and, as a result, the best outcomes for children.

Many parents who are not criminalized but are aware of this amorphous threat of criminalization will understandably alter their behavior, second-guessing their choices not because of an internal sense that something is incorrect for their child, but because they are fearful of the criminal consequences of “choosing wrong.”<sup>65</sup> This is not a healthy or sustainable way to do the hard work of parenting, an enterprise that is already inherently filled with uncertainty.

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60. See BROOKS, *supra* note 2, at 86–93 (describing the shift in acceptable parenting choices that occurred in the last two generations).

61. See Pimentel, *supra* note 8, at 20–21 (arguing that, when parents see stories of other parents being criminalized for borderline parenting choices, they “learn from these incidents that they are not permitted to trust their own instincts in parenting their kids”).

62. See *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (reaffirming the “traditional presumption that a fit parent will act in the best interest of his or her child”).

63. *In re Castillo*, 632 P.2d 855, 856 (Utah 1981) (“[A] child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the courts, may believe to be in a child’s best interest . . .”).

64. Cf. Leslie J. Harris, *Making Parents Pay: Understanding Parental Responsibility Laws*, 31 FAM. ADVOC. 38, 40 (2009) (“The parent who seeks to ensure that he or she will not be found in violation of the laws may believe that very strict parenting rules must be established and obeyed absolutely. This kind of highly authoritarian parenting does not help a child learn to be autonomous (besides being likely to generate a high level of conflict between parent and child).”).

65. See, e.g., Susan Kravet, *A Visit from Child Protective Services Changed How I Parented My Teens*, GROWN & FLOWN (Jan. 25, 2019), <https://grownandflown.com/visit-child-protective-services/> [<https://perma.cc/A5BY-XYPF>] (describing how, following a neighbor’s filing a report with child investigative services because of the author’s toddlers’ boisterous behavior, she “didn’t trust [her]self about what was right for [her] family for fear of being called a bad parent or being reported”). This fear is of course even more acute for those who have already experienced criminalization. See Her, *supra* note 9 (reporting that a mother who was arrested when she struggled to find childcare stated that she is “constantly in fear of leaving [her] children [because she] could be arrested again”).

B. *Chilling Parental Rights Undermines Pluralism*

The chilling of parental rights should be concerning not only because it may result in harm to children, but also because it undermines the pluralistic democracy that we strive to maintain.<sup>66</sup> As briefly referenced in the introduction to this Essay and explored in great detail in voluminous anthropological and historical studies, the way we parent is deeply influenced by our cultural backgrounds, our religious traditions, and our moral beliefs.<sup>67</sup> Thus, what constitutes “good” parenting is not the same in Topeka as it is in Tehran or in Tokyo. It likely looks different even in Tallahassee. And, even within a single location, what constitutes good parenting evolves as new information is learned and new approaches are attempted.<sup>68</sup>

Pluralism reflects the idea that allowing a diverse set of beliefs and practices to flourish within a single society is beneficial not only to minority groups, but also to society as a whole—the idea that society is made richer when it is heterogenous.<sup>69</sup> Pluralism is one of the hallmarks of American democracy.<sup>70</sup> While pluralistic ideals are foundational to America, however, America has not always lived up to these ideals generally<sup>71</sup> or with reference to disparate parenting practices specifically.<sup>72</sup> But there is good reason to zealously protect our pluralistic ideals, and protecting them in the realm of parenting is one obvious place to start as the transmission of different cultural

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66. See *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1982) (“For example, family autonomy helps to assure the diversity characteristic of a free society. There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma.”).

67. See BROOKS, *supra* note 2, at 60–61 (“The way we parent today is molded by our particular class affiliation, political orientation, aesthetic preferences, and personal convictions and beliefs.”).

68. Scholars have noted the sharp increase in concern for child safety and its connection to the potential restriction of pluralistic ideals that should be inherent in parental rights. See Pimentel, *supra* note 8, at 15 (“Enforcement of the new child-safety obsessed orthodoxy threatens not only those who are less advantaged socio-economically, it is also an attack on cultural and religious pluralism in America.”).

69. See generally John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 795–99 (2014) (discussing the history and theoretical underpinnings of American pluralism).

70. See, e.g., U.S. CONST. amend. I (protecting religious minorities through the Establishment and Free Exercise Clauses). Even the motto on the seal of the United States, *E Pluribus Unum* (“from the many, one”), reflects an appreciation for bringing together diverse people in a common purpose. James Madison famously espoused “[e]xtend[ing] the sphere” of parties and interests as an antidote to potential tyranny of the majority. See THE FEDERALIST NO. 10, at 64 (James Madison) (Jacob E. Cooke ed., 1961).

71. See Andrew Extein, *Fear the Bogeyman: Sex Offender Panic on Halloween*, HUFFINGTON POST (Oct. 25, 2013, 5:09 PM), [https://www.huffpost.com/entry/fear-the-bogeyman-sex-off\\_b\\_4161136](https://www.huffpost.com/entry/fear-the-bogeyman-sex-off_b_4161136) [<https://perma.cc/HW6T-HUQK>] (“American culture is steeped in moral panics. Puritanical witch-hunts, racial persecution, xenophobic internment, and institutionalization of gay men are all examples of misplaced solutions to deeply engrained cultural fears of difference.”).

72. Pimentel, *supra* note 8, at 15–19 (describing cultural practices of non-American parents and how they might be viewed as inappropriate—and even criminal—in the United States).

practices and values begins within the family.<sup>73</sup> Parents are often the source of children's first guidance regarding a range of beliefs and practices, including religious, moral, and ethical codes of appropriate conduct. Parents cannot be expected to effectively pass on the broad range of these beliefs and practices if they have a legitimate concern that, by doing so, they might be exposing themselves to criminal liability and their family to aggressive state intervention.<sup>74</sup> Thus, society loses the richness that would otherwise exist as we squelch at least some of the traditions that otherwise would have been passed down.<sup>75</sup>

Of course, pluralism requires that we tolerate choices that we would not ourselves make. To avoid chilling the variety of choices that parents might pursue, we must accept that some parents will make choices that we vehemently disagree with, including, for example, the choice to engage in corporal punishment,<sup>76</sup> to circumcise or engage in other body modifications,<sup>77</sup> or even to teach ideas that we find hateful.<sup>78</sup> To protect speech generally, we must protect speech that we vigorously disagree with, absent an imminent risk of harm.<sup>79</sup> The same ought to be true for parental rights. If we believe that the right to parent is inherent in substantive due process, then it must also be true that the right to parent in ways that deviate—

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73. *In re J.P.*, 648 P.2d 1364, 1375–76 (Utah 1982) (“This recognition of the due process and retained rights of parents promotes values essential to the preservation of human freedom and dignity and to the perpetuation of our democratic society. The family is a principal conservator and transmitter of cherished values and traditions. Any invasion of the sanctity of the family, even with the loftiest motives, unavoidably threatens those traditions and values.” (internal citation omitted)).

74. See BROOKS, *supra* note 2, at 156 (arguing that by “mak[ing] it a crime to take your eyes off your children,” we are “criminaliz[ing] poverty and single, working-class parenthood[,] . . . Latino parenting cultures, European parenting cultures, African American parenting cultures, and all parenting cultures with a tradition of sibling care or informal community care or independent childhood activities”). Of course, as discussed in this Essay, many of these choices will not actually be subject to criminal prosecution—but that uncertainty is a large part of the problem. *Cf. Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (“Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts.”).

75. See *In re J.P.*, 648 P.2d at 1376 (“To allow a court to decide who can best provide a child intellectual stimulation could chill the propagation and perpetuation of disfavored political, philosophical, and religious views within the privacy of the family circle.”).

76. See *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003) (“[N]o matter one’s view of corporal punishment, the plaintiff parents’ liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment . . .”).

77. See generally Stephen R. Munzer, *Examining Nontherapeutic Circumcision*, 28 HEALTH MATRIX 1, 74 (2018).

78. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 645 (2006) (arguing against the use of constitutionally protected speech in custody determinations).

79. *Virginia v. Black*, 538 U.S. 343, 358–59 (2003) (stating that although “[t]he hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomfoting,” there have always been exceptions for certain categories of speech that risk imminent harm (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

perhaps upsettingly so—from the parenting choices that we might desire is also constitutionally protected, absent a similar risk of imminent harm.

*C. Our Democracy's Basic Goals Are Undermined When Parents' Rights Are Chilled*

Parental rights are correctly labeled as “fundamental” rights. But the argument that parental rights should not be chilled is not merely a knee-jerk reaction to this label. Rather, parental rights are “fundamental” both because they are a necessary foundation for the exercise of many other important rights and because, through their exercise, they are themselves an expression of the foundational purpose of a democratic society. In other words, parental rights are fundamental both for what they do—add meaningful dimension to related rights of religion, speech, and association—and because of what they represent—the ability to define the meaning of one’s own life and existence.

While freedom of speech, religion, and association are important rights on their own accord, they are also related to, and overlap with, the rights of parents. Protections for religious belief and custom would mean little if parents could not impart religious beliefs and values freely to their children.<sup>80</sup> Parenting choices have an expressive value that is not unlike the expressive freedoms protected by the First Amendment.<sup>81</sup> There is a “marketplace of ideas” in parenting similar to the “marketplace of ideas” in politics, and both touch on fundamental issues about morality and our conceptions of the good life.<sup>82</sup> In other words, parenting choices reflect our religious, political, and cultural values in much the same way that speech, association, or religious practices do.

The freedom of speech is often understood as so critical because speech is a mechanism through which we protect and develop our democratic order.<sup>83</sup> The speech itself might be valuable or not, but through its all-encompassing protection, we ensure the robust conversation necessary to perpetuate democratic institutions.<sup>84</sup> In many ways, parental rights more directly implicate the purpose of our political system, however, as they are not a

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80. *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding compulsory state education law that conflicted with religious beliefs of Amish parents unconstitutional).

81. EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 143 (1997) (arguing that parents’ rights to raise their children according to their moral beliefs is an expression of their own conscience that should be protected).

82. *See Pimentel*, *supra* note 8, at 56–57 (“[U]nless parents are allowed to trust their own judgment on these issues, to make these decisions without fear of state intervention, the marketplace of ideas, as applied to parenting, will be effectively shut down.”).

83. *Janus v. Am. Fed’n of State, Cty., and Mun. Emp., Council 31*, 138 S. Ct. 2448, 2464 (2018) (“Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.”).

84. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate breathing space to the freedoms protected by the First Amendment.’” (quoting *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988))).

mechanism for some larger goal but are themselves *the purpose of that system*.<sup>85</sup> All political rights are ultimately in the service of the individual's right to define the purpose and scope of their own life and experience. There are few choices that are as life-defining as those associated with deciding whether to have children and how to raise them.<sup>86</sup> Parenting is a source of deep meaning and connection.<sup>87</sup> The founders were aware that protection of these hard-to-define but nonetheless fundamental rights were, themselves, the ultimate objective of the democratic system.<sup>88</sup> Perhaps, more importantly, they understood these rights as *predating* our democratic system and envisioned the system they created as a vehicle to protect and promote such rights.<sup>89</sup>

When we chill parents' rights, however, we strike a blow to the fundamental purpose of our constitutional system and order—the right to seek and define the meaning of one's life and to pursue happiness.<sup>90</sup> Making decisions about something as fundamental as how we parent our children under the perceived threat of state intervention cheapens the deep and meaningful work of parenting. These decisions—reflective of our individual and unique visions of the world, our sense of morality and fairness, and our visions for the future—are robbed of some of this profound meaning when they are made not to maximize our children's happiness or our own, but merely to avoid punishment. State action that chills our parental rights is thus unconstitutional, whether it comes in the form of statutory schemes that criminalize parental choices that do not rise to the level of abuse or neglect or in the form of overzealous prosecutions of parents under attenuated theories of potential harm.<sup>91</sup>

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85. *In re Castillo*, 632 P.2d 855, 856 (Utah 1981) (“[T]he ideals of individual liberty which we consider essential in our free society are those which protect the sanctity of one's home and family.”).

86. Importantly, it is not *only* the decision to have children that is protected by the Constitution, but also a wide variety of parenting and family choices. *See Moore v. City of East Cleveland*, 431 U.S. 494, 500–01 (1977) (plurality opinion) (noting application of substantive due process protection of choice to broader family choices).

87. Blackstone stated that “the most universal relation in nature is that between parent and child.” 1 WILLIAM BLACKSTONE, COMMENTARIES 446.

88. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

89. *See In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982) (“The integrity of the family and the parents' inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions.”).

90. *See id.* at 1376 (“Finally, this recognition of the inherent and retained rights involved in family relationships protects freedoms, relationships, and values that many citizens consider as fundamental to the purpose and enjoyment of life as the freedoms of speech and press are to the preservation of our political order.”).

91. *See Shelton v. Tucker*, 364 U.S. 479, 489 (1960) (“Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.” (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939))).

## CONCLUSION

A few months ago, my in-laws offered to watch my two young children so my spouse and I could have a rare date night. Upon returning home, my mother-in-law reported to me that the kids had been singing a silly song in the bathtub and that, while she had wanted to capture a video of it for me on her phone, she had decided against it because she feared it was somehow inappropriate for her to do so. When queried, she was clear that she had not planned to share the video, would never have considered posting it on social media, and was not concerned about the fundamental security of her phone. And, nonetheless, she was scared. Of course, the loss here is not monumental—my children sing silly songs all the time, so I will have plenty of additional opportunities to hear them. And yet, it made the looming, amorphous threat of criminal sanction that pervades even the simplest, everyday interactions with our children literally hit home; I realized, on a deeper level, how this threat affects even the most privileged among us.<sup>92</sup>

Of course, you cannot say *anything* you want to and expect the freedom of speech to protect you from criminal liability.<sup>93</sup> So too with parenting. Laws that criminalize abuse or neglect, when applied equally, help protect the most vulnerable members of society. But laws that seek to criminalize parenting choices that do not clearly constitute abuse or neglect, or state actors who interpret and execute laws in a manner that supplants parents' views with those of the state, are meaningfully chilling the exercise of fundamental parental rights. This is a loss that should concern all who strive to create a society that lives up to its ideals and gives the next generation the best chance for success.

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92. This is not to discount at all the disproportionate and unfair effect that criminalization has on poor parents or parents of color. That phenomenon is independently important to recognize and combat. This project only aims to add to that discussion the idea that there is an additional harm borne by all parents and by society generally when the threat of criminalization—real or perceived—chills the exercise of our fundamental parental rights.

93. See *Virginia v. Black*, 538 U.S. 343, 358–59 (2003) (collecting exceptions to First Amendment protection from criminal liability).