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# Equality, Equity, and Dignity

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## Introduction

The 2018 immigration crisis is a vivid reminder of how structural choices impact children.<sup>1</sup> The Trump administration’s decision to enforce a “zero tolerance” policy of any violation of immigration law, no matter whether a first time misdemeanor or a felony, irrespective of legitimate claims for asylum, triggered a second policy—separating children from their parents who violated the “zero tolerance” policy at the time of crossing into the U.S.<sup>2</sup> The reality of the state separating children of all ages, infants and toddlers to teenagers, from their parents provoked widespread criticism and resistance to such an inhumane policy.<sup>3</sup> Further questions followed: Where would the children be taken? What would be the conditions of their care? How would the trauma of separation from their parents be dealt with? What was the process to ensure that parents and children would be reunited?

The chaos of policy implementation raised the specter that some parents and children will never be reunited.<sup>4</sup> At the same

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1. See Dara Lind, *The Trump Administration’s Separation of Families at the Border, Explained*, VOX (June 15, 2018), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>.

2. See Miriam Jordan, *How and Why ‘Zero Tolerance’ Is Splitting Up Immigrant Families*, N.Y. TIMES (May 12, 2018), <https://www.nytimes.com/2018/05/12/us/immigrants-family-separation.html>.

3. See, e.g., William Cummings, *States Rise Up in Resistance to Trump Immigration Policy of Separating Families*, USA TODAY (June 19, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/06/19/states-react-zero-tolerance-immigration-policy/715625002> (outlining how thirteen states have pushed back against the family separation policy).

4. See Miriam Jordan, *Trump Administration Says It Needs More Time to Reunite Migrant Families*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/politics/trump-immigration-reunite-migrant-families.html>.

time, policy missteps compounded, notably the possibility of keeping parents and children together in detention during the lengthy time frame for their cases to move through the immigration and asylum processes.<sup>5</sup> This proposal triggered further questions about the justification for a policy that would restrain the liberty of children and families in settings reminiscent of the Japanese internment camps, just as the separation of children from parents, and boys from girls, has generated eerie reminders of the Nazi practices of separation and categorization of Jews, Gypsies, and others deemed less than human.

These are not any children or any families: they are children of color, ethnically Mexican or Central or South American.<sup>6</sup> Their race/ethnicity is not incidental or inconsequential. Separating children from their parents in a variety of state systems is a phenomenon disproportionately experienced by children of color.<sup>7</sup> This phenomenon includes the intrusion of the child welfare system into families and communities, the impact of the criminal justice system incarcerating parents, and the detention of youth in the juvenile justice system.<sup>8</sup> Similarly, the policing of children on the streets and in schools (through disciplinary systems) disproportionately impacts youth of color.<sup>9</sup>

The stark realities of state policies regarding immigrant children, then, is an example that should lead us to ask other questions. We should ask if there are other harms or intersections of identities that we have missed. For example, is the treatment of

8/07/06/us/migrant-children-court-families.html; Caitlin Dickerson, Miriam Jordan & Ron Nixon, *I Want Her Back: Some Migrant Families Reunite, but Other Parents Grow Desperate*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/trump-migrants-children-border.html>.

5. A recent ruling appears to reject that policy alternative. See Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/migrants-family-separation-reunification.html>.

6. Jordan, *supra* note 2.

7. See Denise-Marie Ordway, *Family Separation: How Does It Affect Children?* (June 27, 2018), <https://journalistsresource.org/studies/society/public-health/family-separation-child-health-research>; see DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 6–8 (2002).

8. See ROBERTS, *supra* note 7, at 200–20; JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM (Nancy Dowd ed., 2011). On the impact of poverty, see Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POLY 53 (2012); and KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013).

9. See JUSTICE FOR KIDS, *supra* note 8; Frank Rudy Cooper, “Who’s the Man?,” *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER L. REV. 671 (2009).

immigrant children differentiated by gender? In addition, we should also follow the lead of similar patterns of disadvantaging particular children, and question how other state systems and policies render children unequal through lack of support, unequal support, or outright harm. The state should, to the contrary, be responsible for the care, support and development of children so that each child may reach their potential.

In order to resist the inhumane conduct currently taking place in the immigration system, while also responding to the other questions of how to fully support children, we need greater articulation of their needs and more persuasive advocacy. The visceral reaction to physical separation has generated calls for action. Those calls should resonate with children's claims for equal protection and fundamental rights.

What I aim to explore in this Essay is the definition and scope of children's equality. I argue that equality includes equity and dignity. The meaning of each of these concepts is critical in imagining a deep, rich vision of equality, and in constructing policies to achieve that vision.<sup>10</sup> This definition of equality creates affirmative rights, demands action to resolve structural discrimination that creates and sustains hierarchies among children, and requires affirmative support for children's developmental equality.

## I. Children's Inequalities

The American context is one of severe inequalities and hierarchies among children.<sup>11</sup> Hierarchies are created by erecting barriers as well as by conferring privilege.<sup>12</sup> But the American

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10. In this Essay, I explore the conceptualization of children's equality. In an Article in progress, *Children's Equality Rights*, I develop a detailed constitutional and policy analysis of children's rights based on this conceptual framing, as a basis for the state's responsibility and duty to support children's equality. It asserts positive rights, an argument made by other scholars as well. See, e.g., Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. FORUM 942 (2017–2018) (discussing the 'new law of the child' as a potential framework of legislation and rights to reduce childhood inequality).

11. See generally NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 9–50 (2018) (discussing inequalities by race and class among American children).

12. For example, a recent study on the differential between girls' and boys' achievement in math and English notes that suburban White boys contradicted the general gender pattern, reflecting the benefit of race and class privilege. See Claire Cain Miller & Kevin Quealy, *Where Boys Outperform Girls in Math: Rich, White and Suburban Districts*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/interactiv>

context is not unique; inequalities among children are typical, even in countries where the devotion to principles of equality runs deep. So, for example, Roma children are likely to be at the bottom of measures of poverty, education, health, and well-being in European countries in which their families live.<sup>13</sup> Muslim children, particularly when they are easily identified with a headscarf, similarly are disproportionately at the bottom of indicators of well-being where they are a religious minority.<sup>14</sup> Immigrant children, with or without their families, and particularly when they are Black and Brown, are not even allowed to get on the bottom rung of the ladder.<sup>15</sup>

The American context, however, is particularly severe and egregious. It contradicts a mythology of equal opportunity and is linked to the privatization of responsibility for children. Such privatization means that children are not viewed as a social responsibility, based on self-interest in their value as an eventual economic benefit to the social whole, or as persons with human rights and value as well as distinctive rights as children.<sup>16</sup> In my recent work, I have argued that the hierarchies among children do not simply happen; they are created by the state, by erecting barriers as well as conferring privilege.<sup>17</sup> Throughout childhood, developmental hurdles are put in the way of some children, while others receive developmental support and privilege.<sup>18</sup> By making children unequal, the state violates its obligation to provide each with the equal protection of the law. In addition, the state also fails

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e/2018/06/13/upshot/boys-girls-math-reading-tests.html.

13. See Nancy E. Dowd, *A Developmental Equality Model for the Best Interests of Children*, in IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BEST INTERESTS, WELFARE AND WELL-BEING 112–30 (Elaine E. Sutherland & Lesley-Anne Barnes Macfarlane eds., 2016).

14. *Id.* at 120.

15. Or they are required to leave their culture behind. See *id.*, see also Ellen Barry & Martin Selsoe Sorensen, *In Denmark, Harsh New Laws for Immigrant ‘Ghettos’*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/europe/denmark-immigrant-ghettos.html>.

16. See BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008) (discussing the history of childhood identity and autonomy); see also BARBARA BENNETT WOODHOUSE, *THE ECOLOGY OF CHILDHOOD: SMALL WORLDS IN PERIL* (forthcoming 2020).

17. See REIMAGINING EQUALITY, *supra* note 11.

18. See Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 48 (2016). For additional insight into educational inequality among children, see Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006).

to fulfill its affirmative obligation to children: to ensure equal support, for every child.

The state's obligation to children is developmental equality: each child should be supported to maximize their developmental capacity. The obligation of the state is grounded in our collective responsibility for children and our collective benefit from their adult lives, as well as their inherent dependency and reliance on us. My most radical proposal to accomplish developmental equality is a comprehensive New Deal for Children. A New Deal for Children, briefly, is a comprehensive set of affirmative policies to achieve developmental equality. The state would be responsible for remedying inequalities. Additionally, but more importantly, the state would be responsible for establishing an interlocking set of policies and systems, with robust funding, to sustain and ensure developmental equality.<sup>19</sup>

Central to my proposal of a New Deal for Children is the concept that children deserve equality. Therefore, the meaning of equality is critical to this project. Alternative strategies are also centered on the definition of equality. How we frame our vision, therefore, and what our words mean, matters. There is no lack of critique of what we mean by equality, or of how the Equal Protection clause under the Constitution has been interpreted as meaning "formal," limited equality.<sup>20</sup> What I focus on here is what the reconstruction and reimagining of equality would look like for children.

## II. Equality, Equity, and Dignity

I propose that children's equality must include equity and dignity; these are inseparable components and co-constituents of a definition of equality.<sup>21</sup> A frequent image used to capture

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19. The New Deal for Children would include system creation as well as system reform. So, for example, early childhood is in need of system creation to support all children and the existing K-12 education is in need of drastic system reform to ensure every child has an education supportive of their maximum development.

20. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 746 (2007) (noting that school segregation on the basis of race is unconstitutional regardless of whether facilities are 'equal', because segregation itself denotes inferiority). For a discussion on the construction of equal protection, Liu, *supra* note 18, at 336-45; Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003).

21. It should be noted that equality, equity, and dignity are present in the United Nations Convention on the Right of the Child (UNCRC). Nov. 20, 1989, 1577 U.N.T.S. 3. But in application their meaning is differentiated and contested, as well

differences between equality and equity is that of three children of different heights trying to look over a fence.<sup>22</sup> Equality is imagined as providing a box of the same size for each child to stand on. The tallest child is able to see; the middle-height child gets just a glimpse; while the shortest child cannot see at all. Equity, on the other hand, is pictured as giving each child a box sized so that all the children can see easily. Thus three boxes of different sizes provide the same outcome for all three children.<sup>23</sup> Some have argued the real problem is the fence. It creates a barrier, so just take it down.<sup>24</sup> Tearing down the fence somewhat reflects viewing equality through the lens of dignity.

The image of the children and the fence is useful but we might recast it. Imagine a crowd of children, not just three; children of different heights, but also children of different races, genders, abilities, religions, and immigration status. Do all of them have the same opportunity to look over the fence? What if some kids are led forward by the hand; while others are shoved aside or to the rear; and still others are sorted into other categories defined by identities to determine their access? Are those children who are blocked or deterred divided by race? Gender? Class? Religion? Able-bodiedness? Mental ability?

Equality, equity, and dignity must be applied simultaneously to this picture. This is not an either/or; this requires us to hold each of these principles in mind if we are to ensure that every child has an equal opportunity to see, if seeing stands for their ability to maximize their development and ultimate participation in our democracy.<sup>25</sup> I explore each principle in turn even while urging that they remain interlinked.

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as their interaction with each other, to define the substantive impact on children. The American refusal to adopt the UNCRC does not preclude the embrace of equality, equity, and dignity. Those concepts are present in our Constitution. HIDDEN IN PLAIN SIGHT, *supra* note 16.

22. On equality versus equity, including taking down the fence in the name of “justice” or changing the image entirely, Paul Kuttner, *The Problem with That Equity vs. Equality Graphic*, CULTURALORGANIZING.ORG (Nov. 1, 2016), <http://culturalorganizing.org/the-problem-with-that-equity-vs-equality-graphic/>; see also Angus Maguire, *Equality vs. Equity*, MADEWITHANGUS.ORG, <http://madewithangus.com/portfolio/equality-vs-equity/> and Nathan W. Pyle, *This Teacher Taught His Class a Powerful Lesson About Privilege*, BUZZFEED (Nov. 21, 2014), <https://www.buzzfeed.com/nathanwpyle/this-teacher-taught-his-class-a-powerful-lesson-about-privil>.

23. See Maguire, *supra* note 22.

24. See Kuttner, *supra* note 22.

25. For a complex view of equality and the importance of each of its facets in the context of health care and human rights, see Alicia Ely Yamin, *Shades of Dignity: Exploring the Demands of Equality in Applying Human Rights Frameworks to*

### A. *Equality*

We have defined equality to mean nondiscrimination and sameness or same treatment.<sup>26</sup> Equality should mean elimination of hierarchies as well as positive rights. This requires radicalizing and redefining nondiscrimination and sameness, triggering positive action and responsibility of the state to insure both. The sameness of opportunity and full development would include the sameness of support for each child as needed. Non-discrimination would be inclusive of our knowledge of cognitive bias but not limited by a required state of mind. Inequality or lack of sameness would trigger the obligation of affirmative response and ongoing positive rights. The state, according to this redefinition of sameness and nondiscrimination, has the responsibility to implement our collective duty to achieve equality. This duty includes the state's responsibility to correct and remediate its actions that have created inequalities, and to perform its affirmative responsibility to children.

#### i. *Equality as Anti-discrimination*

Equality as anti-discrimination can be a very limited concept of equality unless it includes an affirmative component or encompasses a broad definition of discrimination. It presumes a context of equality in the absence of discrimination, where inequality is the exception, rather than the rule. But if equality is limited to differences in treatment and requires intentional discrimination to be actionable, then it leaves unaddressed structural and cultural discrimination that is embedded "to the bone."<sup>27</sup>

Children are born equal; cognitively, they are highly similar.<sup>28</sup> If we do not 'discriminate' between children, they are assured

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*Health*, 11 HEALTH & HUM. RTS. 2, 1–18 (2009).

26. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (discussing race-based school segregation); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (discussing affirmative action programs in a general sense, applied to universities); *Washington v. Davis*, 426 U.S. 229 (1976) (discussing hiring procedures); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (discussing affirmative action as used in civil service); *United States v. Virginia*, 518 U.S. 515 (1996) (regarding a women's-only military academy).

27. *See* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1639 (1999).

28. *See* Margaret R. Burchinal et al., *Early Intervention and Mediating Processes in Cognitive Performance of Children of Low-Income African American Families*, 68 CHILD DEV. 935, 950 (1997).

equality. Non-discrimination is a right in and of itself. It is also a principle that should be applied to other rights, such as health care and education: those rights should not be disparately differentiated due to discrimination.<sup>29</sup> Differences among children currently emerge as early as eighteen months, not due to differences in capacity, and not because someone discriminated against a child out of deliberate animus and engaged in differential actions. Rather, differences emerge because some children develop in contexts that are less rich for cognitive development than others.<sup>30</sup> Their ‘social context’ or ‘social gradient’ has a significant impact on children’s substantive equality. If nothing happens, these differences widen, so children enter preschool or kindergarten unequally in terms of developmental capacity.<sup>31</sup> If anti-discrimination were understood as recognizing these emerging inequalities as discrimination in context and patterns of advantage with known developmental consequences, then anti-discrimination might encompass positive responsibilities to support early childhood development. Currently, severe limits on affirmative action are linked to a very narrow definition of inequality for which the state is held accountable.<sup>32</sup> Anti-discrimination understood as the elimination of patterns of inequality and disproportionality would be a radical tool to ensure children’s equality.

Linking anti-discrimination to motivation, including conscious and unconscious thought, nevertheless is important. Discrimination understood as including the full psychological dynamic of subordination and privilege, such as that exposed by research on cognitive biases and the perpetuation of subordinating and discriminating conduct, is an important facet of equality.<sup>33</sup> This is especially critical for children because of their dependence on adults. Once they move beyond their families, their interaction with

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29. Yamin, *supra* note 25, at 3.

30. See Margaret Burchinal et al., *Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development*, 82 CHILD DEV. 1404, 1405–06 (2011).

31. *Id.*

32. See Woodhouse, *supra* note 16 (discussing ways in which children’s rights are not contemplated in our current affirmative action schemes).

33. For further information on cognitive bias, see Jason Nance, *Dismantling the School to Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313 (2016) (discussing early segregation of childhood, which contributes to inequality), and Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055 (2017).

authority figures such as teachers, police officers, and health care workers are particularly significant to their success.<sup>34</sup>

ii. “Sameness” is the flip side of anti-discrimination

Treat every child the same. Yet sameness can simply reinforce inequalities if it fails to provide for each child according to need or in relation to the maximization of each child’s outcomes and opportunity. Identical universal benefits to all children certainly have some value. For example, what if we treated all children who qualify for Head Start and Early Head Start “the same,” meaning all eligible children were funded and could access early childhood education?<sup>35</sup>

Equality as “sameness” might be quite radical. For example, imagine if schools were the “same,” *actually* equal at the level of a substantive quality education, so that any child could attend any school and receive the same quality of teaching, resources, extra-curriculars, etc.<sup>36</sup> “Sameness” could also include the requirement that every child achieve the “same” outcomes based on their capabilities. In a context of inequality that lines up with particular hierarchies, radical “sameness” should remove the hierarchies, identification by disfavored identities, and privileges associated with favored identities. What would remain are differences among children that are individualized and related to their interests and competencies.

Accomplishing this vision of “sameness,” means confronting the forces of poverty and racism. Doing so would reach beyond schools to neighborhoods and families. Opportunity is not enough without reference to context. Intergenerational change is essential

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34. See *A Developmental Equality Model*, *supra* note 13, at 112–30.

35. In 2013, fewer than 50% of all eligible children were served by the Head Start program designed to serve low income children age three to five; fewer than 5% of eligible children under age three are served by Early Head Start. See *Only 42 Percent of Eligible Children Participate in Head Start*, CTR. FOR L. & SOC. POL’Y (Nov. 26, 2013), <https://www.clasp.org/only-42-percent-eligible-children-participate-head-start>. The data for 2017 showed a drop in the Head Start figure to 31% and a marginal increase in Early Head Start to 7%. See National Head Start Association, *National Head Start Fact Sheet*, <https://www.nhsa.org/facts> (last visited Mar. 15, 2019). These national figures do not reflect individual state percentages, which vary widely.

36. For a discussion on educational inequalities, see Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* 91-111 (Greg J. Duncan & Richard J. Murnane, eds., 2011), and Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 NYU L. REV. 2044 (2006).

at the neighborhood level.<sup>37</sup> We cannot make kids equal or ensure their equality—their “same” opportunities—without taking care of their families,<sup>38</sup> and their neighborhoods. Such a goal does not mean children transcending or leaving their families and neighborhoods.<sup>39</sup>

Under this version of “sameness,” achieving equality requires positive support of children. Positive developmental inputs are necessary to sustain their equality, including support of their families and communities.

### *B. Equity*

The principle of equity dramatically strengthens the principles associated with equality. This is because equity reinforces equality of outcomes by paying attention to differences in where children stand as well as differences in capacity. While children are born equal, they are not born into equal circumstances nor are they all alike in their capabilities and potential. Taking differences into account is essential to achieving fairness, to acknowledging and understanding differences, and to identifying and correcting subordinating hierarchies in order to achieve equality.

Equity underscores attention to context and thus further focuses attention on families and communities as the essential ecologies for children. In order for families and communities to function, “equity” must not simply be reactive (leaving structures that create hierarchy in place), nor should it reinforce dialogues of inadequacy or deviancy. Instead, equity should ensure that each child achieves full developmental capacity, by implementing supportive structures while also removing unnecessary obstacles and negative policies that harm children.

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37. See generally THOMAS PIKETTY, *THE ECONOMICS OF INEQUALITY* (Arthur Goldhammer trans., 2015) (discussing persistent inequality).

38. See generally Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099 (2011) (arguing strongly for the essential role of families and caregiving for children).

39. Compare STEPHANIE DELUCA, SUSAN CLAMPET-LUNDQUIST, & KATHRYN EDIN, *COMING OF AGE IN THE OTHER AMERICA* (2016) (“Baltimore study”), with CARLA SHEDD, *UNEQUAL CITY: RACE, SCHOOLS AND PERCEPTIONS OF INJUSTICE* (2015) (“Chicago study”). In Baltimore, young people who seized opportunities for change and advancement frequently were pulled back down economically and otherwise by the needs of other family members. In the Chicago study, students offered the opportunity to attend “good” or “outstanding” schools nevertheless felt that they were never accepted or completely belonged in those schools.

One example of the equity principle is the treatment of children with physical, mental or emotional disabilities. Collectively and individually, each disabled child needs something different to be equal. If the standard of treatment is set by the assumption of a non-disabled child, then they will be inherently disadvantaged. If the equality principle includes equity, however, whatever is needed to reach developmental capacity should be provided.<sup>40</sup> In addition, the anti-discrimination principle would require that disabled children not be marginalized or segregated. Affirmative support for these children requires respect for their humanity, which is captured by the dignity principle discussed below.

A second example of the equity principle in action is the structure and function of the juvenile justice system. James Bell argues for making the system more rehabilitative, with incarceration as a last resort.<sup>41</sup> He calls this “*achieving equity*.”<sup>42</sup> If we only use the anti-discrimination principle to remove bias in the system, at best we might achieve redistribution of the children in the juvenile justice system to eliminate racial and ethnic disproportionality. It would be no small thing, to eliminate the biases that got them there; the biases resulting once they are in the system, and most radically, the conditions that contribute to greater juvenile violations. But that does not address the failure of the juvenile justice system to achieve well-being for the children in its care, or its failure to increase public safety.<sup>43</sup> Changing the color of mass incarceration does not change the wrongfulness of the policy (its scale and cost) and its failure. A fully developmentally informed system designed to correct, rehabilitate, and achieve positive developmental capacity for every child would be a totally reformed system. Such drastic change indeed can occur, as models exist that achieve these goals.<sup>44</sup>

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40. This is the principle inherent in the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1400 (2004).

41. James Bell, *Child Well Being: Toward a Fair and Equitable Public Safety Strategy for the Twenty-First Century*, in *NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* 23, 23–24 (Nancy E. Dowd ed., 2015).

42. *Id.* at 23 (“We must use humanity, restoration, and equity as an orientation of the spirit to change the conversation toward child well-being, allowing us to achieve equity and excellence as the preferred strategy for true public safety.”).

43. *Id.*

44. For an example of radical reform in the juvenile justice system, see the case of Ireland as critically examined by Ursula Kilkelly, *Youth Courts and Children’s Rights: The Irish Experience*, 8 *YOUTH JUST.* 39 (2008).

Equity means dealing with children where they are, where they stand. At the same time, it means noticing how they got there, and therefore dismantling structural barriers that contribute to developmental harm or lack of support. So, for example, we might use the Adverse Childhood Experiences (ACEs) framework to identify children who are in need of interventions proactively or reactively.<sup>45</sup> When it is clear that structures or actions create trauma, we are obligated to change those structures or actions, not simply to mitigate harm done. The policies with respect to migrant children and families crossing the border are an example of policies that add to the trauma children have already experienced, whether they are with their families or unaccompanied. Instead of imposing more trauma, policy should evaluate children where they stand, provide support, and ensure that irrespective of the ultimate outcome of their immigration case, they are developmentally supported.<sup>46</sup>

### C. Dignity

The final principle integral to equality is dignity.<sup>47</sup> Dignity connotes respect *for* children, and affirmative valuing and supporting *of* children. Respect for children requires confronting and dealing with subordination of children based on identities.

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45. We need to know that children have been subject to trauma and identify their needs, but not to see them or their families and communities as broken, or lesser. For more on ACEs, see American Academy of Pediatrics, *Adverse Childhood Experiences and the Life-long Consequences of Trauma* (2014), [https://www.aap.org/en-us/Documents/ttb\\_aces\\_consequences.pdf](https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf) (last visited Oct. 13, 2018); CDC, *About the CDC-Kaiser ACE Study*, <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/about.html> (last visited Oct. 13, 2018); CDC, *A Science Based Framework for Early Childhood Policy*, [www.developingchild.harvard.edu](http://www.developingchild.harvard.edu) (last visited Oct. 13, 2018).

46. Countless stories have emerged about the heartbreak and trauma of separation. See, e.g., Miriam Jordan et al., *As Migrant Families Are Reunited, Some Children Don't Recognize Their Mother*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-administration-catch-and-release-migrants.html>. Experts are unanimous about the harm of the existing policy of separation and detention. See, e.g., Eoin O'Carrel, *After Family Separation: How to Promote Healing for Migrant Children*, CHRISTIAN SCI. MONITOR (June 29, 2018), <https://www.csmonitor.com/USA/Society/2018/0629/After-family-separation-How-to-promote-healing-for-migrant-children>.

47. One children's rights advocate recently suggested that dignity corresponds to the Dutch word *gelijkwaardigheid*, which he translated as meaning "equality plus" where the "plus" is equivalence. Communication with Ton Liefwaard, UNICEF Professor of Children's Rights, Programme Director, International Children's Rights, Leiden Law School, TWITTER (June 19, 2018–May 25, 2018) (on file with the author).

Otherwise we fail to value each child; we may as well be marking their cribs at birth.

It is not about whether children *have* dignity; rather it is about recognizing, respecting, and valuing that dignity, meaning their individual self-worth and humanity.<sup>48</sup> As one scholar notes, dignity has at least three meanings: inherent dignity; the recognition of dignity by valuing and respect for each person; and the realization of dignity through socioeconomic rights and support.<sup>49</sup>

In every interaction, dignity requires sensitivity to children's developmental context; their voice and participation; and their treatment, with individualized attention to their unique expression of being. It includes respect for, and embrace of, pluralism as critical to individual value, as opposed to the idea of a common identity or culture (which too often is translated into a dominant culture that reinforces hierarchy under the concept of common humanity).<sup>50</sup>

One advocate expresses the dignity principle as “worthiness,” which includes constitutional principles of life, liberty and equality.<sup>51</sup> In addition, “dignity” is located in the constitutional goal of “happiness.”<sup>52</sup> Disabled children, for example, have needs and capacities that require “reasonable accommodation,” but the goal for them and all children is the fullest, richest individual life possible, with the greatest dignity. Another example of dignity is the delivery of medical care with cultural competence, thereby

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48. Another use of dignity has been “death with dignity,” or the right to exercise dignity at the end of life, see *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (upholding Oregon Death with Dignity statute).

49. A. C. Steinmann, *The Core Meaning of Human Dignity*, 19 POTCHEFSTROOM ELEC. L.J. 1, 5 (2016).

50. An example of the valuing of some children more than others are the famous doll studies cited in *Brown v. Board of Education*. *Brown*, 347 U.S. at 494 n.11 (citing a study finding that children of color preferred white dolls over black dolls and concluding that culture teaches children that the white child has the highest value). Professor Margaret Beale Spencer's recent work replicating these studies and interpreting their meaning, can be found in The Root Staff, *The Doll Test for Racial Self Hate: Did They Ever Make Sense?* THE ROOT (May 17, 2014), <https://www.theroot.com/the-doll-test-for-racial-self-hate-did-it-ever-make-se-1790875716>.

51. This includes protection from harm (life); autonomy, privacy, empowerment and participation, decision-making, and physical liberty (liberty); and anti-discrimination, cultural responsiveness, integration and productivity (equality). Rod Turnbull, 1976 Symposium at Anita Zucker Center for Excellence in Early Childhood Education, Univ. of Florida College of Education (Jan. 26, 2018); see also Interview with Rod Turnbull, *The Convergence of Disability Law and Policy: Core Concepts, Ethical Communities, and the Notion of Dignity*, <http://mn.gov/mnddc/rud-turnbull/index.html>.

52. *Id.*

insuring health equity for children. This must begin before children are born to maximize their health at birth.<sup>53</sup> Such care contrasts sharply with the realities of hierarchical racialized maternal care that translates into lower birthrates, higher serious medical problems at birth, and a higher death rate in infancy.<sup>54</sup> Dignity for all children requires valuing the dignity of their parents, so that systems to help and support children and families engender parental trust, not parental fear of intrusion or harm.

Dignity is a far less developed concept in constitutional law, and there are challenges to using it conceptually.<sup>55</sup> One example of the range of definitions and applications of “dignity” is the use of the term in the opinions of Justices Kennedy and Thomas in *Obergefell*.<sup>56</sup> Justice Kennedy describes dignity in his majority opinion as integral to crafting self-identity, and therefore subsumed under liberty:

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights . . . In addition *these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.*<sup>57</sup>

Justice Thomas’s *Obergefell* dissent, on the other hand, is a clarion defense of “human dignity” as inherent and incapable of state appropriation. At the heart of Thomas’s opinion lies the immortal “all men are created equal” phrase from the Declaration of Independence:

The corollary of that principle is that *human dignity cannot be taken away by the government*. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in

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53. For a deeper look at health equity, see Rachel Rebouché & Scott Burris, *The Social Determinants of Health*, in OXFORD HANDBOOK ON UNITED STATES HEALTHCARE LAW 1097–1112 (I. Glenn Cohen, Allison K. Hoffman & William Sage eds., 2017).

54. Linda Villarosa, *Why America’s Black Mothers and Babies Are in a Life or Death Crisis*, N.Y. TIMES MAG. (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

55. See Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017).

56. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015) (“From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.”).

57. *Id.* at 2597 (emphasis added) (internal citations omitted).

internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. *The government cannot bestow dignity, and it cannot take it away.*<sup>58</sup>

Both of these opinions reflect the variable meanings of dignity noted earlier. These meanings are integral to each other. Most significantly for children, in my view, is that dignity can only be meaningful by honoring its existence. Children can achieve their full dignity only with help and support.

Dignity contributes both to a norm of individual treatment and provides a means to confront patterns of inequalities rather than accept them as “normal.” For example, in seeking to implement an approach to equality that addresses the history of apartheid and the social and economic inequality endemic in South African society, the South African Constitutional Court has developed a substantive interpretation of equality based on the protection of human dignity.<sup>59</sup> Such an approach incorporates a socioeconomic method of concrete valuing that is essential to children’s developmental equality.

### **Conclusion**

Equality for children is unique in some respects.<sup>60</sup> Their development is dependent on the treatment of their families and communities, and the institutions and systems critical to the maximum development of each child. Their equality thus inherently includes the requirement of positive state action to insure that each child can maximize their development. That maximized development contributes to their families and communities, and to our collective good as a society. Children’s equality requires equity: providing for each child according to their needs to achieve full developmental capacity. The dignity principle demands substantive support and valuing each child through attentiveness to the way in which children are treated and respect for their identity.

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58. *Id.* at 2639 (Thomas, J., dissenting) (emphasis added).

59. See THE DIGNITY JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA: CASES AND MATERIALS, VOLUMES I & II (Drucilla Cornell et al. eds. 2013).

60. Equality is also not the only perspective from which children’s lives should be evaluated. For a recent argument in favor of rethinking the relationship between children and law that focuses particularly strongly on relationships, see Anne C. Dailey & Laura Rosenbury, *The New Law of the Child*, 127 Yale L.J. 1448, 1506–11 (2018).

State action that interferes with children's development, particularly (but not exclusively) when it correlates with one or several identities violates their affirmative right to develop and the state's duty to support their development. Negative or inadequate state action harms the communities in which children grow, and society as a whole. Such negative state action not only violates a substantive norm of entitlement to support of their positive development, but also violates the anti-discrimination principle when inequality disproportionately affects some groups of children.

What we must imagine for children is equality, equity, and dignity that is expressed in responsibility to children. It would be a New Deal for children<sup>61</sup> that would embody the wisdom of children that "[a] world fit for children . . . is a world fit for everyone."<sup>62</sup>

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61. REIMAGINING EQUALITY, *supra* note 11, at 9.

62. UNITED NATIONS CHILDREN'S FUND (UNICEF), A WORLD FIT FOR CHILDREN: MILLENNIUM DEVELOPMENT GOALS SPECIAL SESSION OF CHILDREN DOCUMENTS CONVENTION ON THE RIGHTS OF THE CHILD at 9 (2002), [https://www.unicef.org/bangladesh/wffc-en\\_main.pdf](https://www.unicef.org/bangladesh/wffc-en_main.pdf).