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COGNITIVE COMPELLING INTERESTS

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Both emerging claims of constitutionally protected cognitive liberty and expanding state efforts to address alleged psychological harms associated with technology use necessitate deeper thinking about state interests that might be sufficient to justify regulation of constitutionally protected cognitive activity. Drawing from precedent recognizing state interests in other contexts, this Piece suggests a research agenda of five challenging questions for work articulating and elaborating on cognitive state interests. These are (1) how to define "children" for the purposes of either the state interest in safeguarding children from physical and psychological harm or the state interest in deterring addictive drug use by children, (2) whether state interests that courts have articulated with respect to minors might be generalized to apply to vulnerable adults, (3) whether state interests in preventing addictive drug use among minors are limited to addictive drugs or would also apply to other addictive products and services, (4) whether the state's interest in protecting minors from psychological harm is to be medicalized, and (5) whether the state's general interest in protecting public health includes a state interest in protecting the public generally from psychological harm.

INTRODUCTION

Legal scholars have developed serious arguments that new technologies necessitate, and new understandings support, explicit legal protection for cognitive liberty.[1] While the "freedom of thought" has long

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1. See, e.g., Jan-Christoph Bublitz, My Mind Is Mine!? Cognitive Liberty as a Legal Concept, *in* Cognitive Enhancement: An Interdisciplinary Perspective 233, 236 (Elisabeth Hildt & Andreas G. Franke eds., 2013) ("Cognitive liberty's main claim[] [is] the right to self-determine what is on (and in) one's mind . . . ."); Marc Jonathan Blitz, Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution, 2010 Wis. L. Rev. 1049, 1068–73, 1116 [hereinafter Blitz, Extended Mind] (arguing that new technologies necessitate new constitutional protections for freedom of thought); Nita A. Farahany & Paul W. Grimm, The Battle for Your Brain, 107 Judicature, no. 3, 2024, at 44, 47 (discussing the origins of the concept of "cognitive liberty" and asserting neurotechnology as a significant danger to it); Nita A. Farahany, The Costs of Changing Our Minds, 69 Emory L.J. 75, 98–110 (2019) (introducing and defining a right to cognitive liberty and then ultimately applying it to different parts of law); Matthew B. Lawrence, Addiction and Liberty, 108 Cornell L. Rev. 259, 272–73 (2023) [hereinafter Lawrence, Addiction and Liberty]

been taken for granted as a fundamental aspect of the American legal order, these scholars argue that technological and scientific development is putting the lie to any assumption that the freedom of thought is *inherently* protected by the physical impossibility of third parties controlling the inner workings of a person's mind.[2] On this view, the erosion of inherent protection for cognitive liberty will force on courts a choice between explicitly recognizing and protecting cognitive liberty through doctrine, on the one hand, and seeing the erosion of a liberty long taken for granted, on the other.[3]

To date, scholars exploring cognitive liberty in the context of American constitutional law have understandably focused on the affirmative case for doctrinal protection—on the definition of cognitive liberty "rights," on the historical grounding for such rights, on their potential implications, and so on.[4] In other words, cognitive liberty scholarship has largely focused on what free speech scholars would call the "coverage" of constitutional cognitive liberty arguments,[5] that is, the contexts in which constitutional cognitive liberty interests might limit state action. The corollary question of what state regulation of cognitive liberty might be permitted has been marginal, when addressed at all.[6]

(collecting sources); Dustin Marlan, The Nightmare of Dream Advertising, 65 Wm. & Mary L. Rev. 259, 302–03 (2023) (describing cognitive liberty as a "penumbra right" of freedom to think (internal quotation marks omitted)); Marta Sosa Navarro & Salvador Dura-Bernal, Human Rights Systems of Protection From Neurotechnologies that Alter Brain Activity, 15 Drexel L. Rev. 893, 931–32 (2023) (arguing that cognitive liberty is an "updated version" of the freedom to think and that it includes both autonomy and privacy); Dominique J. Church, Note, Neuroscience in the Courtroom: An International Concern, 53 Wm. & Mary L. Rev. 1825, 1851 (2012) (highlighting the role of neuroscience in courtrooms and how it will invade individuals' freedom of mental privacy).

2. See Lucas Swaine, Freedom of Thought in Political History, *in* 1 The Law and Ethics of Freedom of Thought 1, 19 (Marc Jonathan Blitz & Jan Christoph Bublitz eds., 2021) (describing how emerging technologies have threatened freedom of thought in various areas of democratic life).

3. See Lawrence, Addiction and Liberty, supra note 1, at 272–73.

4. See, e.g., id. at 300–06; Mason Marks, Cognitive Content Moderation: Freedom of Thought and the First Amendment Right to Receive Subconscious Information, 76 Fla. L. Rev. 469, 474 (2024) (arguing that "[f]raming freedom of thought in terms of information flow allows existing free speech doctrine to apply to freedom of thought").

5. See, e.g., Marc Jonathan Blitz, The Freedom of 3D Thought: The First Amendment in Virtual Reality, 30 Cardozo L. Rev. 1141, 1156 (2008) (defining "'coverage' questions" as "questions about what kinds of non-verbal activity count as speech or thought within the scope of the First Amendment").

6. This is not to say that scholars have ignored the question but that it has not been a focus of cognitive liberty work. See, e.g., Brief Amicus Curiae of the Center for Cognitive Liberty & Ethics in Support of the Petition at 15–16, Sell v. United States, 539 U.S. 166 (2002) (No. 02-5664), 2002 WL 31898304 (briefly addressing possible government interests); Bublitz, supra note 1, at 239–40 (discussing European and U.S. involvement in fostering societal values, such as encouraging or discouraging certain conduct); Marlan, supra note 1, at 103 (discussing individuals' ability to live their lives without mental interference from the government).

This Piece approaches the implications of cognitive liberty for constitutional doctrine from a different direction. It argues that in addition to exploring "coverage" questions about when cognitive liberty warrants constitutional protection, cognitive liberty scholarship can valuably identify and refine state interests sufficient to overcome constitutional cognitive liberty claims. Drawing from prior precedent recognizing state interests in other contexts, this Piece suggests a research agenda for work articulating and elaborating on cognitive state interests.

Part I motivates the project, providing background on cognitive liberty and highlighting the current need for scholarship exploring state interests that would potentially be sufficient to overcome cognitive liberty claims. Part II looks backwards, surveying state interests that have previously been recognized by courts that might be invoked in support of interference with cognitive liberty. Part III looks forward, isolating five challenging questions posed by the effort to apply previously articulated state interests to support state interference with cognitive liberty.

I. FROM COGNITIVE LIBERTY TO COGNITIVE INTERESTS

Courts and scholars have long recognized the freedom of thought as an important component of liberty, in both the philosophical sense[7] and the legal sense.[8] That said, American courts have not developed explicit constitutional doctrines that directly protect freedom of thought, a fact legal scholars Marc Blitz and Jan Bublitz attribute not to any doubt about its importance but to the longstanding assumption that "[f]reedom to think is absolute of its own nature" because "the most tyrannical government is powerless to control the inward workings of the mind."[9]

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7. See John Stuart Mill, On Liberty 11 (Elizabeth Rapaport ed., Hackett Publ'g Co., Inc. 1978) (1859) ("[T]he appropriate region of human liberty . . . comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, [and] absolute freedom of opinion and sentiment on all subjects . . . ."); Frederick Schauer, Freedom of Thought?, 37 Soc. Phil. & Pol'y 72, 72, 79 nn.18–20 (2020) ("[T]he philosophical literature takes freedom of thought as a virtue whose acceptance spans the diversity of philosophical perspectives."); id. at 72 (collecting sources).

8. See Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) ("[F]reedom of thought[] and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 18 (Dec. 10, 1948) ("Everyone has the right to freedom of thought, conscience and religion . . . ."); Charles Fried, Perfect Freedom, Perfect Justice, 78 B.U. L. Rev. 717, 735 (1998) ("[F]reedom of thought is the highest order freedom . . . .").

9. Marc Jonathan Blitz & Jan Christoph Bublitz, Preface to The Law and Ethics of Freedom of Thought, supra note 2, at v, vi (alteration in original) (internal quotation marks omitted) (quoting Jones v. Opelika, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting), vacated, 319 U.S. 103 (1943) (adopting Justice Frank Murphy's dissenting opinion)); Swaine, supra note 2, at 15–16; cf. Frederick Schauer, Free Speech: A Philosophical Enquiry 93 (1982) ("[T]hought is intrinsically free.").

A growing body of scholarship notes ways that the assumption of freedom of thought's inviolability is increasingly false, arguing that courts should recognize cognitive liberty in various manifestations.[10] For example, Blitz builds the case for recognition of a "right to mental autonomy" that protects not only how we "use our minds" but how we "shape them."[11] And Professor Mason Marks focuses on neuroscience evidence regarding information flows *within* the mind and argues that "[t]he government interferes with the right to receive subconscious information when it impedes the free flow of information within one's brain or restricts access to substances or technologies that facilitate intrapersonal communication."[12]

The time has come for cognitive liberty scholarship to center not only the fundamental question of constitutional protection for cognitive liberty but also the corollary question of state interests justifying infringement of cognitive liberty interests, for two reasons—one focused on the short term, one on the long term. In the short term, emphasizing state interests could be pivotal to translating cognitive liberty from scholarship to doctrine. Any constitutional cognitive liberty argument made in court will quickly run into questions about "slippery slopes"—if a court recognizes an asserted cognitive liberty interest in, for example, using psychedelics such as MDMA in the context of mental health treatment,[13] would that mean a right to use any psychoactive drug for any purpose? Where to draw the lines?

To some extent, the nature of a cognitive liberty interest itself will be the answer to "slippery slope" arguments—if an interest does not reach a hypothetical situation, then that is the end of the story. But given the nature of cognitive liberty claims, it may be possible for opponents to argue that many extreme hypotheticals would potentially implicate an asserted cognitive liberty interest. In any such case, the best answer will require fully fleshing out state interests that might justify countervailing regulation even in the face of cognitive liberty claims. Extreme hypotheticals could be answered as "easy" cases for state regulation given established or potential state interests. In this way, by developing and articulating state interests sufficient to overcome cognitive liberty claims, scholars can ensure courts do not inappropriately refuse to recognize legitimate liberty interests simply for fear of consequences that, properly understood, would never materialize.

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10. See supra notes 1, 4 (collecting sources).

11. Blitz, Extended Mind, supra note 1, at 1068–73.

12. Marks, supra note 4, at 474.

13. See id. at 501 (discussing that when those with mental health issues take psychedelics, they can gain insights about themselves and become more connected with their surroundings); see also id. at 512 (noting that employers are encouraging their employees to take psychedelics as a way of improving not just their mental health but also their "empathy[] and creativity").

In the long term, it is possible to speculate (though speculation it is) that neuroscience research aided by artificial intelligence and other, as-yet-undiscovered research tools may come to reveal the ways that many everyday stimuli—from a teacher's reprimand to a calm breeze to a page-turning novel—are measurably, predictably "psychoactive" in the sense that they may prompt durable, predictable changes in brain functioning and chemistry.[14] If and when the fog of ignorance that permits today's separation of mind and body (and indeed mind and the built environment[15]) is lifted in this way, "cognitive liberty" arguments will become difficult or impossible to distinguish from "bodily autonomy" arguments, making the constitutional protection of cognitive liberty perhaps a foregone conclusion. While cognitive liberty proponents might celebrate that inevitability, such an epistemological rupture[16] will risk prompting an era of "cognitive Lochnerism" in which—as in today's digital Lochnerism[17] and the economic Lochnerism of the twentieth century[18]—state regulation is strictly limited even when necessary to protect individuals against private domination by corporations, platforms, or other economic actors. To forestall that result, clear understandings must be developed of the interests that justify state interference with cognitive processes.

II. PRECEDENTS

In *Stanley v. Georgia*, the Supreme Court expressed skepticism that the state interest in the way people think could *ever* support interference with constitutionally protected liberty.[19] That said, the Court has in other contexts endorsed state interests directly or potentially related to

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14. See Matthew W. Lawrence, The Effects of Rejecting Mind-Body Dualism on U.S. Law, 26 Wm. & Mary. J. Race, Gender & Soc. Just. 77, 83–87 (2019) (explaining duality).

15. See Blitz, Extended Mind, supra note 1, at 7 (describing the "extended mind" understanding of built environment).

16. See Hans-Jörg Rheinberger, On Historicizing Epistemology: An Essay (David Fernbach trans., Stanford Univ. Press 2010) (2007) (describing the concept of epistemological rupture); Mary Tiles, Bachelard: Science and Objectivity 12–13 (1984) (same).

17. See Neil Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 89–90 (2015) (emphasizing that if data is speech, the ability to regulate social issues will be "impossible"); see also Neil M. Richards, Why Data Privacy Law Is (Mostly) Constitutional, 56 Wm. & Mary L. Rev. 1501, 1531 (2015) (calling for a rejection of a "digital *Lochner*").

18. See Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. Rev. 677, 686–87 (2005) ("The *Lochner* Era Court imposed laissez-faire conservative values through its interpretations of national power and the Due Process Clause. . . .").

19. See 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at . . . giving government the power to control men's minds.").

cognition as sufficient to support the regulation of constitutionally protected expression.[20]

In the context of a future cognitive liberty claim, five particular state interests that courts have previously recognized would be the most likely source of support for state interference. As briefly elaborated upon below, these include the state's interest in (1) protecting children's physical and psychological well-being, (2) protecting public health, (3) preventing addiction, especially through limiting access to addictive drugs, (4) preserving the privacy of the home, and (5) promoting public safety. These state interests would not necessarily be sufficient to overcome a cognitive liberty claim, but they would likely be the first place a court would look in evaluating such a claim.

First, the Supreme Court has repeatedly found that the state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."[21] Thus, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[22] As the Court wrote in upholding a ban on child employment in *Prince v. Massachusetts*, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection."[23] Thus, "When acting to protect children, the state enjoys unusually broad powers."[24] Among other sources, this interest is "predicated on the fact that it is assuming responsibility for young people who lack the competence to protect themselves."[25]

Second comes the state's interest in promoting public health. The Supreme Court acknowledged this interest as sufficient to support a mandatory vaccination law in *Jacobson v. Massachusetts*, holding that "a

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20. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (holding that speech rights may be limited in order to preserve a place for the state to "inculcate the habits and manners of civility" in students (internal quotation marks omitted) (quoting Charles A. Beard & Mary R. Beard, New Basic History of the United States 228 (1968))); see also Morse v. Frederick, 551 U.S. 393, 407 (2007) (holding that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest" (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995))).

21. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 (1982); see also Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." (citing New York v. Ferber, 458 U.S. 747, 756–57 (1982); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968))).

22. *Ferber*, 458 U.S. at 757.

23. 321 U.S. 158, 168–69 (1944).

24. Lipscomb ex rel. DeFehr v. Simmons, 962 F.2d 1374, 1389 n.12 (9th Cir. 1992) (Kozinski, J., dissenting).

25. Id. at 1930 n.12.

community has the right to protect itself against an epidemic of disease which threatens the safety of its members" and positioning this interest within a broader state interest in public health.[26] Since then, courts have repeatedly employed this interest to uphold public health measures against free exercise and bodily autonomy challenges.[27]

Third, and perhaps related to both the public health interest and the interest in minors' well-being, is the state interest in "deterring drug use by schoolchildren" recognized by the Supreme Court in *Morse v. Frederick*[28] and *Vernonia School District 47J v. Acton*.[29] As the Wyoming Supreme Court summarized, "Courts appear unanimous in identifying drug and alcohol use by students as a serious threat to their health, safety, and welfare."[30]

These three interests—in public health, in minors' psychological well-being, and in preventing drug addiction—are the most apparent sources of support for state interference with cognitive liberty. Two others bear consideration. Psychological change that is durable may implicate the state's interest in protecting the privacy of the home: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[31] The Supreme Court's decision in *Public Utilities Commission v. Pollak* refusing to recognize interference with the "freedom of thought" from state-broadcasted messages on public transportation might be distinguished

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26. Jacobson v. Massachusetts, 197 U.S. 11, 26–27 (1905) ("Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others."); see also id. at 31 ("Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety.").

27. See, e.g., *Prince*, 321 U.S. at 166–67 ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." (citing People v. Pierson, 68 N.E. 243 (N.Y. 1903))); Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 353–54 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest. . . . [T]he West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman's right to free exercise."); id. (collecting cases); Sherr v. Northport–East Northport Union Free Sch. Dist., 672 F. Supp. 81, 88 (E.D.N.Y. 1987) ("[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs.").

28. 551 U.S. 393, 407 (2007).

29. 515 U.S. 646, 661 (1995) ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . .").

30. Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 498 (Wyo. 2011); see also Joy v. Penn–Harris–Madison Sch. Corp., 212 F.3d 1052, 1060 (7th Cir. 2000) ("[D]eterring drug use by schoolchildren[] was obviously important, especially given that '[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe.'" (third alteration in original) (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 661)).

31. Carey v. Brown, 447 U.S. 455, 471 (1980).

from intentional psychological manipulation by a state on the ground that the latter follows a person home.[32] The "substantial, indeed compelling[] governmental interest[] in public safety and crime prevention"[33] might also come into play.[34]

III. AGENDA

Invoking any of the interests listed above to support interference with cognitive liberty would pose challenging questions, many surely depending on the nature of the specific cognitive liberty interest at issue and the circumstances of the infringement. But abstracting from specific contexts, efforts to employ the foregoing interests to support state interference with cognitive liberty could present several questions that either scholars developing particular cognitive liberty theories or advocates developing legal claims may find worth exploring sooner rather than later.

How should we define "children"? First is the question of how to define "children" for purposes of either the state interest in safeguarding children from physical and psychological harm or the state interest in deterring addictive drug use by children.[35] Given that courts have justified these interests based on the need to protect people during a psychologically vulnerable developmental stage,[36] an aggressive state might argue that these interests should apply up until age twenty-five,

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32. See Lawrence, Addiction and Liberty, supra note 1, at 328–29 ("[W]hatever rights a person might have at home, '[t]he liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others.'" (second alteration in original) (quoting Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 465 (1952))).

33. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) (internal quotation marks omitted) (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012)); see also Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 376 (1997) (referring to "the governmental interests . . . [of] ensuring public safety and order"); Schall v. Martin, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted. . . . We have stressed before that crime prevention is 'a weighty social objective[]' . . . ." (first quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960); then quoting Brown v. Texas, 443 U.S. 47, 52 (1979))).

34. But cf. Anthony Burgess, A Clockwork Orange 37 (1962) ("Deprived of choice. A man who cannot choose ceases to be a man. This overbearing evil government. To turn a decent young boy into a piece of clockwork.").

35. For more discussion on how to define children, see Zephyr Teachout, In Techno Parentis: Teens, Social Media, and the First Amendment 26–38 (Apr. 5, 2024) (unpublished manuscript), https://law.shu.edu/documents/in-techno-parentis-teens-social-media-and-the-first-amendment.pdf [https://perma.cc/M553-59FR].

36. See Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989) ("[T]he Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages . . . ."); see also Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate . . . ."); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) ("But the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a 'sale' or otherwise, does not mean it cannot do so for children.").

when evidence indicates the brain reaches maturity.[37] But a focus on history and tradition might support a narrower definition that is capped at eighteen or younger.[38]

Self-determination beyond kids? Second is the question of whether the state interests that courts have articulated with respect to minors might be generalized to apply to vulnerable adults. Recall that courts have described the state's interest in protecting minors' psychological well-being as "predicated on the fact that [the state] is assuming responsibility for young people who lack the competence to protect themselves."[39] This rationale could perhaps be extended to support state intervention to protect adults who lack the competence to protect themselves, as well as regulation of access to psychoactive products and services to ensure that all adults have a real opportunity to make an informed choice before exposing themselves to a durably psychoactive experience.

For example, it has been argued that a right to freedom from addiction is firmly grounded in the nation's history and tradition,[40] and that such a right supports a corresponding state interest in protecting residents from unwitting exposure to addictive products and services. This interest might support regulation of "addictive design" in social media to ensure informed consent by users prior to exposure to operant conditioning,[41] but further work is needed to examine whether this interest could support only state insistence on de minimis "consent" of the click-wrap variety or also the thicker, meaningful informed consent of the medical variety.

Just addictive drugs, or other addictive products and services? As discussed above, the Supreme Court has repeatedly recognized state interests in preventing addictive drug use among minors as sufficient to support intrusion on expression.[42] Is that interest limited to addictive *drugs*, or

37. See, e.g., When Does the Brain Reach Maturity? It's Later Than You Think, Journey to Coll., https://journeytocollege.mo.gov/when-does-the-brain-reach-maturity-its-later-than-you-think [https://perma.cc/RJU5-ZXV8] (last visited Feb. 28, 2025) ("[T]he pre-frontal cortex of the frontal lobe . . . 'lets us to do things most animals cannot . . . . Decision making, logical thinking, reasoning—all of those things happen because of the frontal lobe.'" (quoting Dr. Angeline Stanislaus, Chief Med. Officer, Mo. Dep't of Mental Health)).

38. See Teachout, supra note 35, at 27–29 ("In the United States, we largely think of teenagers as encompassing the six years between 12 to 18; the lower bound has, throughout history, been around the age of puberty, and the upper bound has ranged from 15 to 30.").

39. Lipscomb ex rel. DeFehr v. Simmons, 962 F.2d 1374, 1390 n.12 (9th Cir. 1992) (Kozinski, J., dissenting).

40. See Lawrence, Addiction and Liberty, supra note 1, at 300–06 (highlighting two issues with narrowing the freedom of thought to exclude certain thoughts); see also id. at 305 ("[A]ddiction interferes with the long-venerated freedom of thought and . . . demonstrate[s] that there are important historical examples of extraordinary constitutional treatment of addiction.").

41. See id. at 290–98.

42. E.g., Morse v. Frederick, 551 U.S. 393, 407 (2007) (discussing past cases that recognize that deterring drug use by schoolchildren is a compelling interest).

would it apply as well to other addictive products and services? Courts have long excluded gambling from First Amendment coverage, even though much gambling activity is inherently expressive.[43] Might that seeming anomaly be explained by the state's interest in preventing behavioral addiction? And could this interest apply to new products and services shown to be addictive, potentially including social media?

How to determine psychological harm? Regardless of whether the state interest in protecting people from psychological harm is limited to minors or more expansive, there remains the question of how psychological harm is to be determined. In particular, should this state interest be medicalized, with the question of whether a state law is necessary to protect against psychological harm resolved solely by reference to contemporary medical definitions of mental illness as set forth in the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*)?[44] Or should the state interest be resolved by legislators, permitting recognition of psychological harms that fall short of mental illness or for which medicine has not yet—but might someday—develop evidence of medically recognized harm?

For example, prior to 1980 neither gambling addiction nor tobacco addiction were recognized in the *DSM* as mental illnesses.[45] If regulation of either slot machines (because expressive) or cigarettes (on a cognitive liberty theory) was subject to intermediate or strict scrutiny, could a state law in the 1970s have regulated either slot machines or cigarettes based on the then-extant evidence of psychological impacts, even though medicine had not yet deemed such evidence sufficient to warrant inclusion as a mental illness in the *DSM*? Professors Craig Konnoth and Allison Hoffman have offered insightful treatments of the costs and benefits of medicalization of civil rights,[46] and their analyses might helpfully inform

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43. See, e.g., Interactive Media Ent. & Gaming Ass'n v. Att'y Gen., 580 F.3d 113, 118 n.8 (3d Cir. 2009) (holding that gambling "lacks any 'communicative element' sufficient to bring it within the ambit of the First Amendment" (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968))); see also Lawrence, Addiction and Liberty, supra note 1, at 304 n.232 (discussing cases in which the Supreme Court has ruled against applying freedom of speech to gambling); Marisa E. Main, Simply Irresistible: Neuromarketing and the Commercial Speech Doctrine, 50 Duq. L. Rev. 605, 606–14 (2012) (surveying cases where courts upheld restrictions on gambling-related speech).

44. Lawrence, Addiction and Liberty, supra note 1, at 316 n.284 ("I assume above courts would adopt the broadest understanding of this right on which the 'harm' element could be satisfied without a medical diagnosis of addiction . . . .").

45. F. Cosci, F. Pistelli & L. Carrozzi, Tobacco Smoking: Why Do Physicians Not Make Diagnoses?, Eur. Respiratory Rev., Mar. 2011, at 62, 62.

46. Compare Craig Konnoth, Medicalization and the New Civil Rights, 72 Stan. L. Rev. 1165, 1168–75 (2020) (arguing for "medical civil rights-seeking"), with Allison K. Hoffman, Response, How Medicalization of Civil Rights Could Disappoint, 72 Stan. L. Rev. Online 165, 166–69 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/10/72-Stan.-L.-Rev.-Online-Hoffman.pdf [https://perma.cc/NZ9K-YP8G] (highlighting why such medicalization may not be a long term "cure" and emphasizing the potential challenges of increased investment in this area). For a further discussion of medicalization, see Lawrence, Addiction and Liberty, supra note 1, at 313 n.270.

research into the question of whether state cognitive interests should be medicalized.

Public mental health? Of course, all the foregoing would largely be moot if courts were to find that the state interest in protecting public health included an interest in protecting the public from psychological harm—in that case, states need not rely on interests in preventing addiction or protecting minors from psychological harm. There is certainly precedent suggesting that the state's interest in promoting public health should be read so broadly; the Illinois Supreme Court has explained, for example, that "the State has a compelling interest in protecting and promoting public health" and "States enjoy broad discretion in devising means to protect and promote public health."[47]

In *Constitutional Contagion: COVID, the Courts, and Public Health*, however, Professor Wendy Parmet notes federal courts' growing skepticism toward state public health interests.[48] In light of the headwinds Parmet describes, courts may limit the "public health" interest to epidemics analogous to the smallpox epidemic at issue in *Jacobson v. Massachusetts*.[49] If they do so, state efforts to regulate in the face of cognitive liberty claims might need, for better or worse, to point to analogous epidemic risks, such as through serious evidence of an actual or potential addiction epidemic associated with unregulated access to a particular product or service.[50]

CONCLUSION

In *The Constitution of the War on Drugs*, Professor David Pozen notes that promising steps toward recognition of liberty interests related to drug use in the early days of the "drug war" fell short, largely for trivial reasons—including forfeited arguments and litigation choices.[51] There is a lesson in his analysis for those hoping to see cognitive liberty arguments gain traction: The details will matter.

The question of the historical, theoretical, scientific, and doctrinal bases for legal protection of cognitive liberty is of course an important detail, and the development of cognitive liberty claims by scholars is a necessary first step to their advancement by advocates and, ultimately, their adoption by courts. But as explained above, it is also essential for cognitive liberty scholars to simultaneously develop our understanding of when,

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47. People v. Adams, 597 N.E.2d 574, 581 (Ill. 1992) (citing Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905); Methodist Med. Ctr. of Ill. v. Ingram, 413 N.E.2d 402, 407–08 (Ill. 1980); People ex rel. Baker v. Strautz, 54 N.E.2d 441, 443–44 (Ill. 1944)).

48. See Wendy E. Parmet, Constitutional Contagion: COVID, the Courts, and Public Health 90 (2023) (noting that "individuals who object to public health laws on free exercise grounds now hold a trump card" in federal court).

49. See 197 U.S. at 12–13.

50. See Lawrence, Addiction and Liberty, supra note 1, at 294–95 (developing such an argument).

51. David Pozen, The Constitution of the War on Drugs 30 (2024).

where, and why state interests might support infringement of cognitive liberty claims.

This Piece has articulated several open questions about potentially available state interests that warrant further exploration. These include the questions of how to define "children" for purposes of the state interests in safeguarding children from physical and psychological harm or in deterring addictive drug use by children, whether the state interest in deterring drug use applies to other addictive products and services, how "psychological harm" is to be determined for purposes of the state interest in protecting against psychological harm, and whether the state's interest in advancing public health applies to all aspects of public health, or only to communicable disease epidemics. The future of cognitive liberty may hinge as much on courts' understandings of these questions—and so their evaluations of the seriousness of "slippery slope" arguments against the recognition of an apparently novel (if in fact longstanding) right—as it does on their judgments of the affirmative case for recognition.