Minnesota Journal of Law & Inequality

Volume 41 | Issue 1 Article 2

March 2023

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Recommended Citation
Victoria Kalumbi, *Don't Make Them Martyrs: Empowering Children in the Foster Care & Juvenile Justice Systems Through COVID-19 Vaccine Consenting Rights*, 41(1) LAW & INEQ. 29 (2023), DOI: https://doi.org/10.24926/25730037.654.

Minnesota Journal of Law & Inequality is published by the University of Minnesota Libraries Publishing.

Don't Make Them Martyrs: Empowering Children in the Foster Care & Juvenile Justice Systems Through COVID-19 Vaccine Consenting Rights

Victoria Kalumbi†

Abstract

Traditionally, the law has created only narrow avenues for children's rights to be recognized and vindicated. The COVID-19 pandemic has changed and reminded adults what it means to be in control, and what rights we should have to live a full, engaged, and productive life. Children in the foster care and juvenile justice systems have such little control, autonomy, and freedom. As it relates to the pandemic, they are at a higher risk of contracting the disease as they are predominately from underrepresented and underserved communities. This Article explores whether COVID-19 might be the turning point for a change in how children's rights to bodily autonomy can be reviewed across areas of constitutional and state law. Ultimately, for novel vaccines, there should be a strong presumption in favor of the child's right to consent to immunizations. Allowing children to engage in such healthcare decisions will make them active participants in a system where things tend to happen to them. It will require a revolution in how the law views these young people, but this Author believes that these children deserve such a revolution.

†. J.D. 2022, Harvard Law School; B.A., 2015, Stanford University. Thank you to Professor Martha Minow and Professor Mark Tushnet for their insight, comments, and thoughts on drafts of this Note, and the *University of Minnesota Journal of Law & Inequality* Editors and Staff Members for their feedback and revisions. I also thank my mother, Christina Kalumbi, my siblings, and my family for their support and encouragement. I am grateful for the lessons I learned from working in foster care, including the patience, information, and guidance from my colleagues and supervisors from my foster care work, including Ms. Alexis Barber-Davis and Dr. Brenda Triplett. I remain inspired by the resilience, determination, and authenticity of the children and families with whom I had the honor to work.

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Introduction

The 2019-coronavirus disease (COVID-19) pandemic reshaped every aspect of life across the globe: politics, culture, education, and employment were only some components that were affected. While children were not initially "the face of [the] pandemic," they certainly "risk being among its biggest victims."[1] Children face adverse impacts on the health of themselves and their families, decreased access to education, increased risk of violence and exploitation, malnourishment, and instability.[2] As new variants have emerged, children remain at risk of life-altering outcomes as a result of contracting COVID-19.[3]

In the United States, children from historically marginalized communities are particularly vulnerable to the pandemic, its uncertainty, and its life-changing disruptions.[4] Children in the juvenile justice system and foster care system are at the mercy of authority figures from multiple systems: the judiciary; government officials who oversee their day-to-day health, safety, and well-being; parents or legal guardians who may retain control over their bodily autonomy and decision-making; and service providers who have access to their life stories. Given their increased vulnerability and the volatility in their lives, this Article focuses on the rights of youth in the foster care and juvenile justice systems.

The pandemic highlighted why a revitalization and re-conception of children's rights is desperately needed. As countries shut down for months at a time, there was a shift in how we conceptualize normalcy, childhood, community, family, and individual "rights."[5] Many adults

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* This paper will not refer to children as "foster care children," "juvenile delinquents," or similar phrases. Children and youth are children first, and should not be defined by their placement within a particular system.

1. *COVID-19 and Children*, UNICEF DATA (Mar. 2020), https://data.unicef.org/covid-19-and-children/ [https://perma.cc/4KZ8-ZVQV].

2. Id.

3. *E.g.*, Anna Edney, *Kids' Covid Hospitalizations Hit Record in U.S. Omicron Surge*, BLOOMBERG (Dec. 31, 2021), https://www.bloomberg.com/news/articles/2021-12-31/kids-covid-hospitalizations-reach-record-level-in-omicron-surge [https://perma.cc/9Y35-FV2S] (describing a record number of pediatric COVID-19 hospitalizations due to the Omicron variant).

4. The Author uses "marginalized," "underrepresented," and "historically marginalized" to refer to individuals who belong to communities that have been denied "consistent and systematic fair, just, and impartial treatment" and have been "systematically denied a full opportunity to participate in aspects of economic, social, and civic life" in the United States. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). This includes individuals who are Black, Latine/Hispanic, Native American, indigenous, Asian American and Pacific Islanders, and other people of color.

5. *See, e.g.*, Patrick Van Kessel, Chris Barnonavski, Alissa Scheller & Aaron Smith, *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/ [https://perma.cc/3GQH-Z5HD] (providing personal accounts of the profound

fought vigorously for their communities and their "rights" to normalcy and consistency; they fought for public health recommendations for COVID-19 such as a reduction in capacity for in-person services,[6] wearing a mask or face covering to limit the spread of COVID-19,[7] and the transition to remote learning for their children.[8] Others advocated for their right to receive COVID-19 vaccines, while at the same time others protested against lockdowns and vehemently opposed vaccine mandates.[9] At the core of these competing demands seemed to be a desire to retain control: to ensure that one's individual rights, sense of self, personal health, and identity remained constant in the midst of uncertainty.

While adults are free to advocate for change, the legal, social, and political climate of the United States does not enable minors to exercise such rights to the same degree. Yet, COVID-19 has had and will continue to have a profound impact on children's learning, growth, development, and health.[10] These impacts can be even more pronounced for marginalized and underrepresented children.[11] Specifically, this Article examines how existing constitutional and statutory frameworks do not provide a uniform way for youth in the foster care or juvenile justice systems to affirmatively access—or refuse—a COVID-19 vaccine.[12]

Sadly, COVID-19 may not be the last pandemic in our lifetime.[13] In analyzing the rights of these young people to consent to the COVID-19

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impact of the COVID-19 pandemic on the lives of Americans).

6. *E.g.*, Danville Christian Acad. v. Beshear, 141 S. Ct. 527, 527–28 (2020) (denying application for injunctive relief against the Kentucky Governor's order to close secular and religious schools); Cassell v. Snyders, 990 F.3d. 539 (7th Cir. 2021) (deciding a case regarding a challenge to a ten-person limit on religious and other gatherings); Calvary Chapel Dayton Valley v. Sislak, 982 F.3d 1228 (9th Cir. 2020) (deciding a case regarding a challenge to emergency directives limiting gatherings of more than fifty people indoors).

7. *E.g.*, CT Freedom All., L.L.C. v. State Dep't Educ., No. HHDCV206131803S, 2021 Conn. Super. LEXIS 223, at *47 (Conn. Super. Ct. Mar. 8, 2021) (rejecting claim that the executive branch lacked power to order children to wear masks in schools); Parker v. Wolf, 506 F. Supp. 3d 271 (M.D. Pa. 2020) (denying motion seeking to prohibit a mask requirement instated by the Pennsylvania Department of Health).

8. *E.g.*, Aviles v. De Blasio, 2021 U.S. Dist. LEXIS 38930, at *2–4 (S.D.N.Y. Mar. 2, 2021) (denying motion for preliminary injunction to require government to reopen New York City schools for in-person instruction); Hernandez v. Grisham, 508 F. Supp. 3d. 893 (D.N.M. 2020) (rejecting constitutional and statutory challenges against remote learning during the COVID-19 pandemic).

9. *See, e.g.*, Thomas Carothers & Benjamin Press, *The Global Rise of Anti-Lockdown Protests—and What to Do About It*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 15, 2020), https://carnegieendowment.org/2020/10/15/global-rise-of-anti-lockdown-protests-and-what-to-do-about-it-pub-82984 [https://perma.cc/WW6X-F3LV].

10. *See infra* Section I.B.

11. *See infra* Parts I, II.

12. *See infra* Part III.

13. Michaeleen Doucleff, *Next Pandemic: Scientists Fear Another Coronavirus Could Jump*

vaccine—or a future novel vaccine arising out of similar circumstances—there should be a strong presumption in favor of their right to have affirmative access and the ability to consent. Legal and political avenues should be put in place to ensure that these young people have a stake in debates and discussions about public health and vaccination requirements.

Part I of this Article contextualizes the prevalence of COVID-19 among children in the United States, associated health complications, and the disproportionate impact on Black and Hispanic children. Part II explains why youth in foster care and those involved in the justice system are at particular risk for COVID-19. Part III outlines the importance of the COVID-19 vaccine and what is at stake for children who do not obtain the vaccine. Part IV articulates how children and advocates can argue for a right to the COVID-19 vaccine in the face of parental refusal. This Article concludes with policy recommendations to begin the process of patching the many holes in the concept of children's rights for vulnerable and underrepresented youth.

I. COVID-19 in Children in the United States

As of December 2022, the Centers for Disease Control and Prevention (CDC) reported a total of approximately 100 million cases of COVID-19 in the United States, and 1,083,279 deaths are attributed to COVID-19.[14] These immense numbers unfortunately include children, as children can be infected, get sick, and spread COVID-19 to others.[15] While tracking of COVID-19 cases in children has been more limited and inconsistent across states,[16] as of November 2022 there have been

From Animals to Humans, NPR (Mar. 19, 2021), https://www.npr.org/sections/goatsandsoda/2021/03/19/979314118/next-pandemic-scientists-fear-another-coronavirus-could-jump-from-animals-to-hum [https://perma.cc/6L29-ARPY].

14. *CDC COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#pediatric-data [https://perma.cc/Q3VL-QRM7].

15. *E.g.*, *COVID-19 in Children and Teens*, CDC, https://covid.cdc.gov/covid-data-tracker/#pediatric-data [https://perma.cc/AVW7-93N6]; Taylor Heald-Sargent, William J. Muller, Xiaotian Zheng, Jason Rippe, Ami B. Patel & Larry K. Kociolek, *Age-Related Differences in Nasopharyngeal Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Levels in Patients With Mild to Moderate Coronavirus Disease 2019 (COVID-19)*, 174 JAMA PEDIATRICS 902, 902–03 (2020) (concluding that children ages five and under with mild to moderate COVID-19 have high amounts of viral RNA in their nasopharynx compared to older children and adults and can be drivers of COVID-19 in the general population); An Tang et al., *Detection of Novel Coronavirus by RT-PCR in Stool Specimen from Asymptomatic Child, China*, 26 EMERGING INFECTIOUS DISEASES 1337, 1337 (2020) (reporting on a child who was virus positive in stool specimens, indicating that children can spread the virus through feces).

16. *See* Sara Simon, *Inconsistent Reporting Practices Hampered Our Ability to Analyze COVID-19 Data. Here Are Three Common Problems We Identified*, COVID TRACKING PROJECT AT THE ATLANTIC (Apr. 8, 2021), https://covidtracking.com/analysis-updates/three-covid-19-

approximately 15 million reported case of COVID-19 in children; children represent approximately 18% of all cases.[17] Approximately 1,853 children aged seventeen and under have died due to COVID-19.[18]

A. COVID-19 Health Complications in Children

i. Physical Health Complications

Just as with adults, some children may have mild or no symptoms at all, and other children get severely ill.[19] Some children are more at risk than others. Children under age two, children with underlying conditions such as obesity, chronic lung disease, premature birth, and children who are Hispanic or Black have higher COVID-19 hospitalization rates.[20] Of the children who require hospitalization, the majority are not fully vaccinated or are not eligible for the COVID-19 vaccination.[21]

Multisystem Inflammatory Syndrome in Children (MIS-C) is a particular health concern for children who contract COVID-19.[22] MIS-C is "a rare but serious condition associated with COVID-19 in which different body parts become inflamed, including the heart, lungs, kidneys, brain, skin, eyes, or gastrointestinal organs."[23] As of November 2022, there have been 9,139 cases and 74 deaths due to MIS-C reported in the United States.[24] Most cases were in children and adolescents between ages five and thirteen.[25] Black and Hispanic children in particular "bear a disproportionate burden of [the] disease."[26] Over half of the reported

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data-problems [https://perma.cc/M39J-GSXX] (discussing problems in the collecting and publishing of COVID-19 case numbers).

17. *Children and COVID-19: State-Level Data Report*, AM. ACAD. PEDIATRICS, http://services.aap.org/en/pages/2019-novel-coronavirus-covid-19infections/children-and-covid-19-state-level-data-report/ [https://perma.cc/UZN2-H345] (Sept. 15, 2022) (reporting trends in data among child COVID-19 infections across U.S. states).

18. *CDC COVID Data Tracker*, *supra* note 14.

19. *COVID-19 in Children and Teens*, *supra* note 15.

20. *Special Considerations in Children*, NAT'L INST. HEALTH, https://www.covid19treatmentguidelines.nih.gov/special-populations/children/ [https://perma.cc/DV85-GZEK] (Aug. 8, 2022).

21. *Id.*

22. *Multisystem Inflammatory Syndrome in Children (MIS-C)*, CDC, [hereinafter *MIS-C*] https://www.cdc.gov/mis-c/index.html [https://perma.cc/3FZF-META]; Jun Yasuhara, Kae Watanabe, Hisato Takagi, Naokata Sumitomo & Toshiki Kuno, *COVID-19 and Multisystem Inflammatory Syndrome in Children: A Systematic Review and Meta-Analysis*, 56 PEDIATRIC PULMONOLOGY 837, 845 (2020) (describing the devastating effects of MIS-C in children and its prevalence in Black and Hispanic populations).

23. *MIS-C*, *supra* note 22.

24. *Id.*

25. *Id.*

26. Danielle M. Fernandes et al., *Severe Acute Respiratory Syndrome Coronavirus 2 Clinical Syndromes and Predictors of Disease Severity in Hospitalized Children and Youth*, 230 J. PEDIATRICS 23, 29 (2021), https://doi.org/10.1016/j.jpeds.2020.11.016 [https://perma.cc

MIS-C cases were Hispanic and Black children,[27] and numerous studies have indicated that patients with MIS-C are more likely to be Black or Hispanic.[28]

ii. Mental Health Complications

COVID-19 has had devastating effects on the mental and psychological health of children. The Surgeon General of the United States even issued an advisory on protecting youth mental health.[29] The pandemic altered the entire landscape of existence for children, including how they learned, built relationships, and could access the world around them in a meaningful way.

During the height of the pandemic, many states issued orders to quarantine, and these orders had profound impacts on school-aged children's mental health. These lockdowns "impose[d] immediate and lingering psychosocial impact[s] on children due to drastic change in their lifestyle, physical activity and mental excursions."[30] In 2021, school closures impacted over 91% of the world's student population.[31] These closures deprived children of an additional "home outside the home"—a space for them to interact with peers and teachers as they build relationships.[32] School closures increased anxiety and "result[ed] in disruption in routine, boredom and lack of innovative ideas for engaging in various academic and extracurricular activities."[33] Further, "not being able to play outdoors, not meeting friends and not engaging in the in-person school activities" caused decreased affect in some children.[34]

Young children are also not spared from the psychological impacts of the pandemic. Children ages three to six have been found to more often "manifest symptoms of clinginess and the fear of family members being

/XZG7-QCY4]; *MIS-C*, *supra* note 22.

27. *MIS-C*, *supra* note 22.

28. Fernandes et al., *supra* note 26, at 29.

29. OFF. SURGEON GEN., PROTECTING YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY, U.S. DEP'T OF HEALTH & HUM. SERVS. (Dec. 7, 2021), https://www.hhs.gov/surgeon general/reports-and-publications/youth-mental-health/index.html [https://perma.cc/ TKU2-A5ZM].

30. Ritwik Ghosh, Mahua J. Dubey, Subhankar Chatterjee & Souvik Dubey, *Impact of COVID-19 On Children: Special Focus on the Psychosocial Aspect*, 72 MINERVA PEDIATRICA 226, 227 (2020), https://www.minervamedica.it/index2.php? show=R15Y2020N03A0226 [https://perma.cc/9QDN-PKVS].

31. Shweta Singh, Deblina Roy, Krittika Sinha, Sheeba Parveen, Ginni Sharma & Gunjan Joshi, *Impact of COVID-19 and Lockdown on Mental Health of Children and Adolescents: A Narrative Review with Recommendations*, 293 PSYCH. RSCH., Nov. 2020, at 1, 2, https://www.sciencedirect.com/science/article/pii/S016517812031725X [https://perma.cc/73PV-CK3G].

32. Ghosh et al., *supra* note 30, at 228.

33. Singh et al., *supra* note 31, at 2.

34. *Id.*

infected" with COVID-19 than children ages six to eighteen.[35] Children across age groups experienced increased irritability, clinging behavior, "disturbed sleep, nightmares, poor appetite, agitation, inattention and separation related anxiety."[36] Studies "indicate[d] that more than one-third of adolescents report high levels of loneliness and almost half of 18- to 24-year olds [were] lonely during lockdown."[37] Without a doubt, the COVID-19 pandemic and resulting nation-wide lockdowns deeply impacted the mental health of children to a degree that we are only beginning to grasp.

B. Racial Disparities

COVID-19 disproportionately affects Black and Hispanic children.[38] Studies have demonstrated that being in a minority racial/ethnic group is "significantly associated" with testing positive for COVID-19.[39] These racial disparities exist across geographic regions, including rural counties within the United States.[40] In addition to a higher incidence of COVID-19 in Black and Hispanic children, those who contract the virus are more likely to have more severe medical needs and require hospitalization. In one study, while only 20% of children with COVID-19 were hospitalized, 80% of the admitted children were Black.[41]

Researchers and scientists attribute the higher occurrence of COVID-19 in Black and Hispanic children to a number of factors, including biological risk and social and economic structures that place minority families at higher risk.[42] Many of these disparities are rooted in structural and systemic racism that shapes the health and wellness of minority

35. *Id.*

36. *Id.* (citation omitted).

37. Maria Elizabeth Loades et al., *Rapid Systematic Review: The Impact of Social Isolation and Loneliness on the Mental Health of Children and Adolescents in the Context of COVID-19*, 59 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 1218, 1218 (2020) (internal citations omitted), https://doi.org/10.1016/j.jaac.2020.05.009 [https://perma.cc/U8JW-WAPM].

38. *E.g.*, Monika K. Goyal, Joelle N. Simpson, Meleah D. Boyle, Gia M. Badolato, Meghan Delane, Robert McCarter & Denice Cora-Bramble, *Racial and/or Ethnic and Socioeconomic Disparities of SARS-CoV-2 Infection Among Children*, 146 PEDIATRICS 1, 4 (2020), https://pediatrics.aappublications.org/content/146/4/e2020009951 [https://perma.cc/3FZR-TMEZ] (discussing the disadvantages children of certain racial and/or ethnic and socioeconomic backgrounds face in regards to infection with COVID-19).

39. Sindhura Bandi, Michael Zev Nevid & Mahboobeh Mahdavinia, *African American Children Are at Higher Risk of COVID-19 Infection*, 31 PEDIATRIC ALLERGY & IMMUNOLOGY 861, 863 (2020); *see also MIS-C*, *supra* note 22.

40. *See* Kent Jason G. Cheng, Yue Sun & Shannon M. Monnat, *COVID-19 Death Rates Are Higher in Rural Counties with Larger Shares of Blacks and Hispanics*, 36 J. RURAL HEALTH 602, 606 (2020).

41. Bandi et al., *supra* note 39, at 863.

42. *Id.*

children and families.[43] COVID-19 risk factors, such as obesity and diabetes, are more prevalent in "[Black] children than their white counterparts."[44] Moreover, disparities in access to healthcare may result in Black families delaying treatment, which leads to further spreading the virus due to a decreased "awareness for preventive and cautionary practices."[45] The "long history of racist medical practices" also contributes to the Black community's "distrust in the health care system," while "Hispanic immigrants may fear deportation" by getting involved in the healthcare system.[46] Furthermore, children of Black and Hispanic parents likely face a higher risk of exposure to COVID-19 because these marginalized groups are overrepresented in essential service industries that require in-person contact.[47] Finally, structural and geographic barriers contribute to increased prevalence of COVID-19 among Black and Hispanic youth. These children and their families are more likely to rely on public transportation, live in crowded multifamily housing, and live in multigenerational households.[48]

C. Status of Vaccines for Children

The development of vaccines is ongoing, but as of June 2022, children ages six months and over may be vaccinated with Pfizer-BioNTech and Moderna vaccines.[49] The American Academy of Pediatrics (AAP) recommends that the COVID-19 vaccine should be administered to all eligible children.[50] The AAP also recommends that pediatric patients of all ages be included in trials and that all children and adolescents have access to vaccine distribution when approved.[51]

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43. Cheng et al., *supra* note 40, at 606; *e.g.*, David R. Williams, Jourdyn A. Lawrence & Brigette A. Davis, *Racism and Health: Evidence and Needed Research*, 40 ANN. REV. PUB. HEALTH 105, 105–25 (2019) (evaluating the evidence linking systemic racism to mental and physical health outcomes).

44. Bandi et al., *supra* note 39, at 863.

45. *Id.*

46. Cheng et al., *supra* note 40, at 607.

47. Goyal et al., *supra* note 38, at 5.

48. *Id.*

49. Press Release, FDA, Coronavirus (COVID-19) Update: FDA Authorizes Moderna and Pfizer-BioNTech COVID-19 Vaccines for Children Down to 6 Months of Age (June 17, 2022), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-and-pfizer-biontech-covid-19-vaccines-children [https://perma.cc/M2AV-X4DZ].

50. *E.g.*, Comm. Infectious Diseases, *COVID-19 Vaccines in Children and Adolescents*, 149 PEDIATRICS 1 (2021) [hereinafter *COVID-19 Vaccines in Children*], https://publications.aap.org/pediatrics/article/149/1/e2021054332/183385/COVID-19-Vaccines-in-Children-and-Adolescents?searchresult=1 [https://perma.cc/BJ9A-UZCC]; Comm. Infectious Diseases, *COVID-19 Vaccines in Children and Adolescents*, 148 PEDIATRICS 2 (2021), https://pediatrics.aappublications.org/content/148/2/e2021052336 [https://perma.cc/9NVB-SM3S].

51. *E.g.*, *COVID-19 Vaccines in Children*, *supra* note 50.

II. Challenges Facing Youth who are Justice-Involved and Youth in Foster Care

There are approximately 73 million youths under age eighteen in the United States.[52] Approximately 52% of youth are white, 15% are Black, 26% are Hispanic, and 1% are Native American.[53] Youth in the foster care system and those who are justice-involved have faced additional challenges during the COVID-19 pandemic. These youths are more vulnerable given their backgrounds: most are from historically marginalized racial groups, primarily Hispanic and Black; come from underserved areas; and often enter these respective systems with greater unmet medical needs.[54] Additionally, many youths leave these systems with unmet medical needs.[55] This part will provide an overview of the needs of children in foster care and those who are justice-involved and explain why they are particularly likely to benefit from the COVID-19 vaccine.

A. Youth in Foster Care

i. What Is the Foster Care System, and Who Is in It?

Foster care is one component of the child welfare system, which "is a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families."[56] A

52. *Youth (0 To 17) Population Profile Detailed By Age, Sex, and Race/Ethnicity, 2019*, OFF. JUV. & DELINQ. PREVENTION (2020), https://www.ojjdp.gov/ojstatbb/population/qa01104.asp?qaDate=2019 [https://perma.cc/MT6T-WTS2].

53. *Id.*

54. *See, e.g.*, Elizabeth S. Barnert, Raymond Perry & Robert E. Morris, *Juvenile Incarceration and Health*, 16 ACAD. PEDIATRICS 99, 100 (2016), https://www.sciencedirect.com/science/article/pii/S1876285915002843 [https://perma.cc/Z3LP-69A9] (discussing the significant disparities in incarceration for Black and Hispanic youth in comparison to their white counterparts); *Racial Disproportionality and Disparity in Child Welfare*, U.S. DEP'T OF HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU 1, 2 (2014) [hereinafter *Racial Disproportionality*] (analyzing racial disproportionality within the child welfare system and its primary impact on youth of color, specifically Black, Hispanic, and Native youth); Cheng et al., *supra* note 40, at 606.

55. *See* Barnert et al., *supra* note 55, at 101 ("Incarcerated youth have high rates of unmet physical, developmental, and medical needs . . . ."); Council on Foster Care, Adoption, & Kinship Care, Comm. on Adolescence & Council on Early Childhood, *Health Care Issues for Children and Adolescents in Foster Care and Kinship Care*, 136 PEDIATRICS, Oct. 2015, at e1131–32 [hereinafter *Health Care Issues*] ("Limited health care access and unmet health needs precede placement and often endure in foster care."); Stephanie Anne Deutsch & Kristine Fortin, *Physical Health Problems and Barriers to Optimal Health Care Among Children in Foster Care*, 45 CURRENT PROBLEMS IN PEDIATRIC & ADOLESCENT HEALTH CARE 286, 288 (2015).

56. *How the Child Welfare System Works*, DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU 1, 2 (2020). However, the stated purpose of the foster care system differs from its execution. Many scholars and experts view the child welfare system,

majority of families "become involved with the child welfare system because of a report of suspected child abuse or neglect . . . ."[57] Child Protective Services has the authority to remove children from their current parents or caregivers depending on the severity of the case and the alleged abuse or neglect.[58] Each child in foster care should have a permanency plan—a written, legal plan that describes the course of action for a child to achieve a safe, permanent home.[59] In most cases, the permanency plan will be aimed at achieving family reunification.[60] Federal law mandates that courts hold at least one permanency hearing annually in which the child's permanency plan is developed.[61]

In 2019, there were approximately 424,000 children in foster care.[62] Children's placements vary and include non-relative foster homes—the most prevalent placement—relative foster homes, group homes, institutions, and independent living.[63] The median amount of time that children spend in foster care is approximately 13.3 months.[64] Children of all races are represented in the foster care system; in 2019, approximately 44% of youth in foster care were white, 23% were Black, and 21% were Hispanic.[65] It is well documented that Black and Native American children are overrepresented in the child welfare system.[66] However, this "racial disproportionality is most severe and dramatic for African American children."[67]

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including foster care, as the family regulation or family policing system, explaining that the system is founded on "investigating, supervising, and disrupting politically marginalized families" and "has absorbed efforts to mitigate its abuses and continued to operate as a system of family regulation." Dorothy Roberts, *The Regulation of Black Families*, THE REGUL. REV. (Apr. 20, 2022), https://www.theregreview.org/2022/04/20/roberts-regulation-of-black-families [https://perma.cc/HM82-Q3W2].

57. *How the Child Welfare System Works*, *supra* note 56, at 2.

58. *Id.* at 5–6.

59. *See, e.g.*, *Case Planning for Families Involved with Child Welfare Agencies*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU 1, 1–4 (2018).

60. *How the Child Welfare System Works*, *supra* note 56, at 6.

61. *Id.*

62. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU, CHILD WELFARE OUTCOMES 2019: REPORT TO CONGRESS 6 (2022).

63. *Id.* at 98.

64. *Id.* at 99.

65. *Id.*

66. *See, e.g.*, *Racial Disproportionality*, *supra* note 54, at 2; Robert B. Hill, A*n Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels*, CASEY-CSSP ALL. FOR RACIAL EQUITY IN CHILD WELFARE 1, 1 (2007) (examining "racial and ethnic disproportionality and disparities for children" through an analysis of the child welfare system), https://www.aecf.org/m/resourceimg/aecf-AnalysisofRacialEthnic Disproportionality-2007.pdf [https://perma.cc/H625-25MH].

67. MARIAN HARRIS, RACIAL DISPROPORTIONALITY IN CHILD WELFARE xv (Colum. U. Press ed. 2014).

Indeed, Black and Native American children are overrepresented nationally at every single stage of the child welfare system—investigation, substantiation of investigations, and placement into foster care.[68] Once placed into foster care, Black and Hispanic children are less likely to be adopted or reunified with their families, remain in care longer, receive fewer services, and have less contact with child welfare caseworkers than their white counterparts.[69]

ii. Medical Needs

Children in the foster care system have higher rates of health problems than children not in the foster care system.[70] These health issues include higher rates of acute and chronic physical, mental, and developmental conditions.[71] This heightened rate is partially due to the fact that children enter the foster care system in poorer "mental and physical health relative to children in virtually every other type of family situation" and in comparison to children in economically disadvantaged families.[72] Approximately 30 to 80% of children in foster care have chronic health problems,[73] including psychological or behavioral, ophthalmologic, educational, dermatologic, and allergic conditions.[74] Youth in foster care also often have lapses in preventive or primary care and face an increased risk for sexually transmitted infections.[75]

Moreover, the longer children stay in foster care—and the increased number of placements they experience—the worse their health problems.[76] High rates of health problems continue even after children age out of the foster care system.[77] Children with a history of being in foster care tend to have lower self-efficacy and a higher likelihood of obesity, cardiovascular risk factors, and engaging in adverse health behaviors like smoking.[78] As not all reunifications or adoptions are successful, youth who re-enter foster care "comprise a distinct category of medical need and health risks."[79] A study of 392 school-aged students

68. Hill, *supra* note 66, at 1.

69. Tyrone C. Cheng & Celia C. Lo, *Racial Disparities in Access to Needed Child Welfare Services and Worker-Client Engagement*, 34 CHILD. & YOUTH SERVS. REV. 1624, 1624 (2012); HARRIS, *supra* note 67, at xvi.

70. *See, e.g.*, Deutsch & Fortin, *supra* note 55; *Heath Care Issues*, *supra* note 55.

71. *See* Deutsch & Fortin, *supra* note 55.

72. Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 1, 10 (2016).

73. Deutsch & Fortin, *supra* note 55, at 286.

74. *Id.* at 287.

75. *Id.*

76. *Id.* at 288.

77. *Id.*

78. *Id.*

79. *Id.*

reentering foster care showed that their medical history had worsened in seven areas: they had more "subspecialty clinic involvement, health concerns, hospitalizations, prescribed medications, medication allergies, sexual activity, and substance abuse."[80]

iii. COVID-19 and Youth in Foster Care

The pandemic has created numerous challenges for youth in foster care, both in terms of the dangers posed to their health and the difficulty of maintaining family relationships. As previously articulated, children in foster care tend to have poorer health that makes them much more susceptible to contracting COVID-19.[81] Moreover, since children in foster care are primarily minority youth, they are at a higher risk of COVID-19 and are more likely to have severe complications and require hospitalization.[82]

Additionally, the disruptions to court-mandated services, housing, employment, and basic needs as a result of the pandemic pose a significant threat to reunification. The transition to virtual services has made it more difficult for parents to meet their requirements for reunification.[83] For many families, visitation—a core part of a parent's reunification plan—switched to video or phone visits.[84] Some families saw their visits reduced by at least half since the start of the pandemic.[85] While some officials pushed for in-person visits to continue,[86] the increased vulnerability of youth in foster care makes in-person visits riskier for youth—as well as for their foster parents.[87] Losing access to these valuable, consistent visits likely negatively impacts the mental health and well-being of youth in care, who already face poorer mental health outcomes in comparison to their peers.[88] Particularly, young

80. Jill J. Fussell & Larry D. Evans, *Medical Status of School-Age Children Reentering Foster Care*, 14 CHILD MALTREATMENT 382, 385 (2009).

81. *See* discussion *supra* Section II.A.ii.

82. *See* discussion *supra* Section II.A.i.

83. Sarah Font, *The Impact of the COVID-19 Pandemic on Children in Foster Care*, PENN STATE SOC. SCI. RSCH. INST. (July 29, 2020), https://covid-19.ssri.psu.edu/articles/impact-covid-19-pandemic-children-foster-care [https://perma.cc/NDM3-JBR8]; *see also* Kristen Pisani-Jacques, *A Crisis for a System in Crisis: Forecasting from the Short- and Long-Term Impacts of COVID-19 on the Child Welfare System*, 58 FAM. CT. REV. 955 (2020) (discussing how virtual visitation has acted as a barrier to quality family time, yet quality family time leads to a greater likelihood of reunification).

84. Font, *supra* note 83.

85. Michelle Chen, *How Covid-19 Supercharged a Foster System Crisis*, THE NATION (Mar. 15, 2021), https://www.thenation.com/article/society/foster-care-covid/ [https://perma.cc/9CF8-X8ZX].

86. *See id.* (discussing how most Colorado counties are open for in-person visits and are seeking to identify measures that will comply with health guidance to allow these visits).

87. *See, e.g.*, Font, *supra* note 83.

88. *See Health Care Issues*, *supra* note 55, at e1132–33 (describing how many foster

children may not understand why they no longer see their parents on a consistent basis, and older children may suffer emotional harm due to this substantive change in the parent-child relationship.[89]

Despite guidance from the Children's Bureau—a division of the Department of Health and Human Services—that aimed to encourage judges and child welfare officials to relax the Adoption and Safety Family Act (ASFA) timelines for the termination of parental rights,[90] a Brooklyn legal aid group claimed that courts are moving forward with termination proceedings via virtual platforms.[91] Parents who lack the ability to maintain stable housing and work to meet the needs of their children as they seek to have them returned to their care must manage the stress of struggling to survive knowing the clock is ticking for them to retain their parental rights.[92]

Older adolescents in the foster care system face additional challenges. While many states have delayed requirements that mandate when youth must exit foster care, child welfare professionals note that many youths have been forced to leave foster care in the midst of a pandemic with decreased support and immense uncertainty.[93] In an April 2020 survey of older youth in the foster system, participants reported substantial challenges across all aspects of their safety and well-being, including significant issues related to "housing, food security, education, finances, employment, health/mental health, and personal connections during COVID-19."[94] For example, almost 10% reported they had been or were currently being forced to leave their living situation, over 15% were fearful of being forced to leave their living situation, and over 6%

children enter the foster care system with disproportionately higher mental health needs than their non-foster peers).

89. *See, e.g.*, Pisani-Jacques, *supra* note 83, at 956 ("When children and families do not maintain regular contract, it can deteriorate the attachment relationship, sometimes irreparably, and protract time spent in foster care."). The lack of contact between youth and parents may have a significant and long-lasting impact on attachment and citing the age of children as an important factor in attachment. *Id.* at 958–59.

90. Guidance Letter to Child Welfare Legal and Judicial Leaders, U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Childs.' Bureau (Mar. 27, 2020); Guidance Letter to State and Tribal Child Welfare Leaders, U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Childs.' Bureau (June 23, 2020). The State is instructed to file a petition to terminate the parental rights of a child's parents if the child has been in foster care for fifteen of the most recent twenty-two months. 42 U.S.C. § 675(5)(E) (2018).

91. Chen, *supra* note 85.

92. *Id.*

93. David Dodge, *Foster Care Was Always Tough. Covid-19 Made It Tougher*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/parenting/foster-care-coronavirus.html [https://perma.cc/6AWY-HR2B]; Pisani-Jacques, *supra* note 83, at 957 (describing how youth exiting foster care face increased struggles accessing housing and employment during the COVID-19 pandemic).

94. JOHANNA K.P. GREESON, SARA R. JAFFEE, SARAH WASCH & JOHN GYOURKO, THE EXPERIENCES OF OLDER YOUTH IN & AGED OUT OF FOSTER CARE DURING COVID-19 at 57 (2020).

reported that they had experienced homelessness due to a loss of housing since COVID-19.[95] This survey corresponds with youth advocate reports from across the United States that older teens "aging out" of foster care have become homeless or been forced to couch-surf at friends' homes because of the challenges of COVID-19.[96]

Further, because youth are frequently placed in non-kinship settings, it is not just their risk of COVID-19 that must be evaluated.[97] Foster parents tend to be older, and many may be at an increased risk of contracting COVID-19.[98] Furthermore, children placed in foster or group homes are often housed with multiple children from different families.[99] Having multiple children in one placement increases the potential for viral spread.[100] Foster parents have expressed concern about accepting new foster placements because of the increased risk of exposure, with some foster parents only accepting new placements "under the condition all visits would be conducted virtually or by phone."[101] In this way, COVID-19 has forced a precarious balancing of the risk of exposure to foster parents with the importance of parental visitation for reunification and children's well-being.

Moreover, there have been reports of a decline in available foster parents as the number of children in need of a home exceeds the number of available homes.[102] Foster parents who may have previously accepted a placement may not accept further placements due to the fallout from the pandemic—for example, those who have lost employment or suffered other financial constraints due to COVID-19 cannot serve as a resource.[103] Other issues, such as health care issues caused by a foster parent or family member of a foster parent contracting COVID-19, could lead foster parents previously open to visits unable to offer this care.[104] However, it

95. *Id.* at 20.

96. Eli Hager, *Coronavirus Leaves Foster Children With Nowhere to Go*, THE MARSHALL PROJECT (Mar. 24, 2020), https://www.themarshallproject.org/2020/03/24/coronavirus-leaves-foster-children-with-nowhere-togo?utm_medium=email&utm_source=govdelivery [https://perma.cc/F9LU-RMAC].

97. Font, *supra* note 82.

98. *Id.*

99. *Id.*

100. *Id.*

101. Ryan Hanlon, JaeRan Kim, Cossette Woo, Angelique Day, Lori Vanderwill & Elise Dallimore, *An Exploratory Study of the Impact of COVID-19 on Foster Parenting*, 27 CHILD & FAM. SOC. WORK 371, 377 (2022).

102. *See, e.g.*, Keir Chapman, *Foster Parent Shortage May Be Related to COVID-19*, 7 NEWS WWNY-TV (Aug. 4, 2020), www.wwnytv.com/2020/08/04/foster-parent-shortage-may-be-related-covid-/ [https://perma.cc/9NVF-UYNM] (explaining that officials in Watertown, New York experienced a shortage of available foster parents).

103. Dodge, *supra* note 93; *see* Hanlon et al., *supra* note 101, at 377.

104. *See, e.g.*, Hanlon et al., *supra* note 101, at 377 (describing how foster parents considered the health implications of COVID-19 when deciding whether to accept a new

should be noted that not all foster parents are hesitant about opening their home to children in the pandemic.[105] Unfortunately, there are still not enough willing foster parents to bridge the disparity between the number of foster parents and the number of foster children in need of home placements.[106]

B. Justice-Involved Youth

i. What Is the System, and Who Is Being Detained?

A juvenile delinquent is a person with an upper age limit of eighteen who "commits an act that is defined as criminal if committed by an adult."[107] Juveniles are referred to the courts for two types of cases: "[a]cts that would be illegal for adults are termed delinquent offenses, and violations of regulations that apply only to children are labeled status offenses."[108] Courts with juvenile jurisdiction processed 744,500 delinquency cases and "formally disposed" 97,800 status cases in 2018.[109]

The juvenile system process begins when an individual, typically a police officer, files a petition outlining the law or ordinance that the youth reportedly violated.[110] The youth may be arrested or provided with a summons to appear in court.[111] An intake division may also receive a complaint from various other sources (e.g., parents, school officials, community residents, or businesses), though most referrals to the juvenile justice system are from the police.[112] An intake division

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placement).

105. For example, in a 2020 survey of 600 resource parents in Los Angeles, 54% said they were "open to welcoming a new child into their home"—a higher rate than the average for potential parents willing to welcome a new child into their home. AUDRA LANGLEY, MATTHEW RUDERMAN, JILL WATERMAN & TODD FRANKE, UCLA PRITZKER CTR., THE IMPACT OF COVID-19 ON PARENTS 11 (2020), https://pritzkercenter.ucla.edu/wpcontent/uploads/2020/10/UCLA-Pritzker-Center_COVID-19-Impact-on-Foster-Youth-and-Families.pdf [https://perma.cc/9G4F-92M4].

106. Chapman, *supra* note 102.

107. PETER C. KRATCOSKI, LUCILLE DUNN KRATCOSKI & PETER CHRISTOPHER KRATCOSKI, JUVENILE DELINQUENCY: THEORY, RESEARCH, AND THE JUVENILE JUSTICE PROCESS 1 (Springer Int'l Publ'g ed., 2020). The literature in this field often uses terms such as "juvenile" and "juvenile delinquent," but these terms can be disparaging, dehumanizing, and stigmatizing. *See, e.g.*, Adam Jordan, *Risky Children: Rethinking the Discourse of Delinquency and Risk*, 51 J. THOUGHT 31, 31 (2017), https://www.jstor.org/stable/90010894 [https://perma.cc/TD94-S9PW] (describing how the word "delinquency" is "stigmatizing language used to marginalize youth and families").

108. KRATCOSKI ET AL., *supra* note 107, at 1.

109. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2018 at 6, 64 (2020).

110. KRATCOSKI ET AL., *supra* note 107, at 317.

111. *Id.*

112. *Id.* at 289–90; *Juvenile Justice System Structure & Process: Case Flow Diagram*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [hereinafter *Case Flow Diagram*] https://www.ojjdp.gov/

determines if the court has jurisdiction and will determine whether to dismiss the case, handle the matter informally, or request formal intervention by the court.[113] For cases that will be handled judicially, arraignment is scheduled.[114] Following the arraignment, there will be an adjudication hearing and disposition.[115] During this time, a youth may be held at a detention center.[116] In 2018, approximately 26% of youth were detained during the processing of their case.[117] Most youth are released to the custody of their parents or legal guardians.[118]

Correctional facilities for youth vary depending on the type and length of stay. Short-term facilities include detention centers, shelter homes, reception, diagnostic centers, or adult jails.[119] Long-term secure facilities include training schools, ranches, farms, halfway houses, and group homes.[120] Approximately 27% of adjudicated youth are placed in a residential facility.[121] As of 2019, on any given day nearly 37,000 youth are held in residential placement facilities.[122]

Systemic and structural racism plagues every aspect of the juvenile justice system.[123] As of 2019, in all but eight states, the residential placement rate for Black youths exceeds the rate for all other racial/ethnic groups.[124] While youth of color are only 38% of the population, they account for almost 70% of young people in secure confinement.[125] Black youth are treated more harshly at every stage of the juvenile justice system. Although only 16% of Black youth are old enough to be detained, they "represent 28% of juvenile arrests, 37% of

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ojstatbb/structure_process/case.html [https://perma.cc/J85S-7R8T].

113. KRATCOSKI ET AL., *supra* note 107, at 290; *Case Flow Diagram*, *supra* note 112.

114. KRATCOSKI ET AL., *supra* note 107, at 317.

115. *Id.* at 318.

116. *Id.* at 291.

117. *Case Flow Diagram*, *supra* note 112.

118. KRATCOSKI ET AL., *supra* note 107, at 291.

119. *Id.* at 358.

120. *Id.* at 365.

121. *Case Flow Diagram*, *supra* note 112.

122. *Juveniles in Corrections: Demographics*, *One Day Count of Juveniles In Residential Placement Facilities, 1997-2019*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/corrections/qa08201.asp [https://perma.cc/T6LE-MAFX].

123. James Bell, *Toward a Fair and Equitable Public Safety Strategy for the New Century in* A NEW JUVENILE JUSTICE SYSTEM 23, 25 (2015).

124. *Juveniles in Corrections: Demographics*, *State Residential Placement Rates by Race/Ethnicity, 2017*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/corrections/qa08203.asp?qaDate=2017 [https://perma.cc/EDG5-CTLC] (identifying the eight states as Hawaii, Connecticut, Illinois, North Carolina, Rhode Island, Wyoming, Minnesota, and Nebraska).

125. Bell, *supra* note 123, at 26.

detained youth, and 58% of youth admitted to state adult prison."[126] Hispanic youth also face disproportionate outcomes—compared to white youth, they were "4% more likely to be petitioned, 16% more likely to be adjudicated delinquent, 28% more likely to be detained, 41% more likely to receive an out of home placement, and 43% more likely to be waived into the adult system."[127] In certain jurisdictions, Asians, Pacific Islanders, and Native Americans are also overrepresented in the juvenile justice system.[128]

ii. Medical Challenges

Youth in the juvenile justice system have significant healthcare needs relative to their peers in the same community. While some of their needs are influenced by their engagement in high-risk behaviors—behavior that may have contributed to their detention (e.g., violence and substance abuse)—many of their health problems stem from living in impoverished and abusive environments. Others have acquired health issues, such as hypertension and diabetes, "that are neglected or remain undiagnosed."[129] It must also be noted that socioeconomic status shapes medical access and outcomes for youth. There is a complex relationship and correlation between race, lower socioeconomic status, and poor health outcomes, which may explain why youth in the justice system have poorer health outcomes.[130] Approximately 93% of youth entering the juvenile justice system have at least one adverse childhood experience (ACE).[131] Accordingly, youth who enter a detention facility enter the system already facing systemic health inequalities and an increased likelihood for poorer outcomes.[132]

Research on youth in the juvenile justice system indicates that two-thirds of incarcerated youth have "physical health care needs including dental, vision, or hearing" issues.[133] Another study indicated that 46% of incarcerated youth had at least one "diagnosable medical condition requiring medical attention, with respiratory and sexually transmitted infections" being the most common.[134] Health complaints such as "headache, abdominal pain, back or joint pain, upper respiratory

126. *Id.* at 27.

127. *Id.*

128. *Id.* at 28.

129. AM. ACAD. PEDIATRICS, COMM. ON ADOLESCENCE, *Health Care for Youth in the Juvenile Justice System*, 128 PEDIATRICS 1219, 1220–21 (2011).

130. Barnert et al., *supra* note 55, at 100.

131. *Id.*

132. *Id.* at 101 (explaining that individuals exposed to a high number of ACEs may be more prone to risk-taking, adverse health outcomes, and incarceration).

133. *Id.*

134. *Id.*

symptoms, and sleep problems" are also more prevalent among detained youth relative to their non-detained peers.[135] The vast majority of incarcerated children meet the criteria for at least one psychiatric diagnosis.[136] Again, racial disparities dominate mental health diagnoses and treatment among the population—white youth have the highest rates of diagnosed psychiatric disorders, while Black youth have the lowest rate.[137] Further, "[a]mong detained youth with mental health disorders, minority youth are less likely to receive treatment than their non-Hispanic white counterparts."[138]

iii. COVID-19 and Justice-Involved Youth

Taken together, young people in the juvenile justice system have vulnerabilities that warrant individualized mental and medical health treatment. The COVID-19 pandemic may exacerbate underlying mental health challenges in youth due to "fear, social distancing, and disruptions in care, housing, schooling, and routine."[139] Youth who contract COVID-19 may experience isolation resembling solitary confinement, which has deleterious and harmful effects to young people in particular.[140] Moreover, states have taken steps to suspend visitation from family, which likely adds to the disruption and isolation that these youth experience.[141]

In response to the pandemic, states and agencies attempted to reduce the number of youths detained in correctional facilities by decreasing the number of youths that are detained at all (e.g., fewer arrests), facilitating earlier releases, and increasing the use of alternatives to confinement.[142] However, this has not addressed the main

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135. *Id.*

136. *Id.* at 101–02 ("Two-thirds of incarcerated boys and three-quarters of incarcerated girls meet criteria for at least 1 psychiatric diagnosis, with substance use, behavior disorders, and depression being the most prevalent. Roughly 27% of incarcerated youth have a severe mental disorder warranting immediate treatment.").

137. *Id.* at 102.

138. *Id.*

139. Elizabeth S. Barnert, *COVID-19 and Youth Impacted by Juvenile and Adult Criminal Justice Systems*, 146 PEDIATRICS 2 (2020), http://pediatrics.aappublications.org/lookup/doi/10.1542/peds.2020-1299 [https://perma.cc/JL94-RJ9S].

140. *Id.*

141. *Criminal Justice System Responses to COVID-19*, NAT'L CONF. STATE LEGISLATURES (Nov. 16, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx [https://perma.cc/AE2T-VT93]; *see, e.g.*, Anya Kamenetz, *COVID-19 Lockdowns Have Been Hard on Youth Locked Up*, NPR (Mar. 29, 2021), https://www.npr.org/2021/03/29/979986304/covid-19-lockdowns-have-been-hard-on-youth-locked-up [https://perma.cc/9T2X-DJQE] (discussing the impact of COVID-19 lockdowns in juvenile detention centers in Louisiana).

142. Molly Buchanan, Erin D. Castro, Mackenzie Kushner & Marvin D. Krohn, *It's F**ing Chaos: COVID-19's Impact on Juvenile Delinquency and Juvenile Justice*, 45 AM. J. CRIM. JUST.

issue of the present COVID-19 spread among already incarcerated youths. In youth correctional facilities themselves, social distancing has been "virtually nonexistent" despite the fact that youth who are justice-involved are more likely to be at a higher risk of infection.[143]

Many states do not track the rate of COVID-19 in their juvenile detention facilities, making it hard to respond to trends relating to the prevalence of COVID-19.[144] As of March 31, 2022, approximately 3,936 youth in juvenile detention facilities had tested positive for COVID-19 across forty-one states, Washington D.C., Guam, and Puerto Rico.[145] Though still limited, researchers noted greater transparency in public facilities in comparison to private facilities, many of which did not report the prevalence of COVID-19.[146]

Finally, the staff who work at these detention facilities pose a significant risk of harm to the juveniles. Data has shown there has been a higher prevalence of COVID-19 among adult staff than incarcerated youth—given that in-person visitation was decreased due to the pandemic, it is likely that staff are responsible for the rates of COVID-19 among detained young people.[147] Additionally, state and local agencies relaxed hiring protocols, reallocated budgets, and changed shifts to combat instances in which essential employees become ill or quit, leaving facilities understaffed.[148] While beneficial to "employees' stamina, patience, and general mental health," leaving shifts to be covered by "untrained, temporary, or ill-fitting replacement personnel" risks disruption within facilities and increases the risk of exposure to the virus.[149]

III. Children's Voices in the Vaccine Debate

As adults in children's lives make choices on their behalf, where is it that the voice of children can be heard and elevated? Whether children seek to advance arguments against the COVID-19 vaccine or fight to be inoculated against the wishes of their parents, this Part will explore

578, 579–600 (2020), http://link.springer.com/10.1007/s12103-020-09549-x [https://perma.cc/2NC5-HWCQ].

143. *Id.* at 584.

144. *Id.* at 584–85.

145. Josh Rovner, *COVID-19 in Juvenile Facilities*, THE SENTENCING PROJECT (May 18, 2021), https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/ [https://perma.cc/3RVW-BCXK].

146. *See* JOSH ROVNER, THE SENTENCING PROJECT, YOUTH JUSTICE UNDER THE CORONAVIRUS: LINKING PUBLIC HEALTH PROTECTIONS WITH THE MOVEMENT FOR YOUTH DECARCERATION 11, 19 (2020).

147. *See id.* at 11.

148. Buchanan, *supra* note 142, at 590.

149. *Id.*

timely debates surrounding politics, autonomy, and consent for these young people who are uniquely subject to regulations and requirements from government interventions. Just as COVID-19 challenged the social, legal, political, and scientific community, it also presented an opportunity to conceptualize children's rights in the context of competing, overarching authorities. At stake in the vaccine debate about COVID-19 is not only a child's bodily autonomy, but also their ability to be fully integrated with and participate in their community.

Youth in foster care and the juvenile justice system are likely to have an increased risk of contracting COVID-19.[150] Yet whether they can access the COVID-19 vaccine when they lack parental consent is a complex battle between biological or foster parents, courts, and government officials.

A. Who Can Consent?

Children who have not reached the age of majority typically do not have the right to consent to their own medical care.[151] The landscape for consent varies wildly across states. In some states, like Alabama, youth aged fourteen and over may consent to "any legally authorized medical, dental, health or mental health services for himself or herself,"[152] while youth in Rhode Island must be over age sixteen to consent.[153] Other states require a youth to live apart from their parents or be a parent of a child themselves.[154] There are three categories of youth who can make decisions regarding their health care: "exceptions based on specific diagnostic/care categories, the 'mature minor' exception, and legal emancipation."[155]

Children in foster care are not entitled to make their own medical decisions.[156] Forty-five states legally allow biological parents to make medical decisions on behalf of their child if their parental rights have not been terminated; however, the biological parents often do not make these

150. *See* discussion *supra* Part II.

151. *E.g.*, Jonathan M. Fanaroff, *Consent by Proxy for Nonurgent Medical Care*, 139 PEDIATRICS 1, 2 (2017); *see also State Laws that Enable a Minor to Provide Informed Consent to Receive HIV and STD Services*, CDC, https://www.cdc.gov/hiv/policies/law/states/minors.html [https://perma.cc/A857-KREZ] (Jan. 8, 2021) (indicating that forty-six states have an age of majority of eighteen; only Alabama, Mississippi, Nebraska, and Pennsylvania have a higher age of majority).

152. ALA. CODE § 22-8-4 (2013).

153. R.I. GEN. LAWS § 23-4.6-1(a) (2018).

154. *See e.g.*, N.M. STAT. § 24-7A-6.2 (2013).

155. Aviva L. Katz & Sally A. Webb, Comm. on Bioethics, *Informed Consent in Decision-Making in Pediatric Practice*, 138 PEDIATRICS 1, 4 (2016).

156. *See* Zach Strassburger, *Medical Decision Making for Youth in the Foster Care System*, 49 J. MARSHALL L. REV. 1103, 1112–13 (2016) (discussing the prevalence of state statutes that require either birth parents or foster parents to make decisions for children in foster care).

decisions.[157] In the majority of these states, someone other than the biological parent most commonly made medical decisions for the minor.[158] Every state allows for state officials or agents (e.g., caseworkers) to make some medical decisions on behalf of the child.[159] In twenty-two states, these state officials were the most frequent medical decision-maker for the minor.[160] Accordingly, the decision-maker on the medical needs of youth in foster care typically ends up being the caseworker, judge, foster parents, or some other state official.[161]

B. COVID-19 Vaccine Consent Laws

While all states allow minors to consent for services relating to sexually transmitted infections and diseases,[162] this view of consent has not been expanded to include consent for routine care like immunizations. As the pandemic became more politicized, states adopted a patchwork of consent laws for the COVID-19 vaccine, and most states require parental consent.[163] Indeed, forty-two states require parental consent for the COVID-19 vaccine.[164] In four states—Arkansas, Idaho, Tennessee, and Washington—providers may waive parental consent.[165] In San Francisco and Philadelphia, minors who are twelve and eleven years of age can provide sole consent for the COVID-19 vaccine.[166]

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157. *Id.* at 1112.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1135.

162. NAT'L DIST. ATT'YS ASS'N, MINOR CONSENT TO MEDICAL TREATMENT LAWS, 8–10 (2013), https://ndaa.org/wp-content/uploads/Minor-Consent-to-Medical-Treatment-2.pdf [https://perma.cc/QK53-PQEQ].

163. Jeremey Loudenback, *California Juvenile Facilities See Continuing Covid Rise*, L.A. PROGRESSIVE (Jan. 24, 2021), https://www.laprogressive.com/juvenile-facilities-2/ [https://perma.cc/ZMZ7-D53E] (illustrating that young people under age eighteen in California detention centers need parental consent to receive the COVID-19 vaccine); Eileen Grench, *New York's Homeless, Foster and Jailed Teens Now Eligible for COVID Vaccine*, CHALKBEAT N.Y. (Feb. 24, 2021), https://ny.chalkbeat.org/2021/2/24/22299531/ny-homeless-foster-jailed-teens-covid-vaccine [https://perma.cc/KA7J-63YR] (showing that youth in foster care and juvenile detention centers in New York will need "written, informed parental consent" to receive the vaccine, unless they are pregnant, parenting, or are freed for adoption).

164. *State Parental Consent Laws for COVID-19 Vaccination*, KAISER FAM. FOUND. (Nov. 2021), https://www.kff.org/other/state-indicator/state-parental-consent-laws-for-covid-19-vaccination/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#note-1 [https://perma.cc/564P-BPNA].

165. *Id.*

166. *Id.*

C. What Is at Stake for Youth Without a Covid-19 Vaccine?

As institutions continue to respond to COVID-19, it seems there will be a number of benefits beyond health safety that are more accessible to youth who are vaccinated. It is critical that youth be able to assert their right to a vaccine, as they are the ones who know what is at stake—their own health. In advancing a child-centric view of the law, it is the child's experience that should be at the center of the argument. For the COVID-19 vaccine, the social and health costs of remaining unvaccinated remain formidably high.

i. Education Access

Children in the foster care and juvenile justice systems must battle against disparities in educational access—disparities which a lack of vaccination may only exacerbate by decreasing educational opportunities.[167] Over 1,000 colleges and universities instituted a COVID-19 vaccine requirement for the 2021–2022 and 2022–2023 academic years.[168] Vaccine requirements for elementary and secondary schools remain uncertain.[169] In October 2021, California Governor Gavin Newsom announced that, once the FDA gave full approval for the COVID-19 vaccine, it would be required for in-person instruction for elementary, middle, and high school students.[170] California was the first state to

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167. *See generally* Austen McGuire, Joy Gabrielli, Erin Hambrick, Madelaine R. Abel, Jessy Guler & Yo Jackson, *Academic Functioning of Youth in Foster Care: The Influence of Unique Sources of Social Support*, 121 CHILD & YOUTH SERVS. REV. 1, 13–18 (Feb. 2021) (discussing obstacles to education unique to children in foster care, including performance in school and behavioral health); Julian Behen Kubek, Carly Tindall-Biggins, Kelsie Reed, Lauren E. Carr & Pamela A. Fenning, *A Systematic Literature Review of School Reentry Practices Among Youth Impacted by Juvenile Justice*, 110 CHILD & YOUTH SERVS. REV. 1, 1 (March 2020) (discussing school reentry practices for children affected by the juvenile justice system, including school barriers and individual and family risk factors).

168. *What Colleges Require the COVID-19 Vaccine?*, BESTCOLLEGES, https://www.bestcolleges.com/blog/list-of-colleges-that-require-covid-19-vaccine/ [https://perma.cc/AQ98-Z7DS] (Sept. 9, 2022); *see also* Elissa Nadworny & Sneha Dey, *Full FDA Approval Triggers More Universities to Require the COVID-19 Vaccine*, NPR (Sept. 1, 2021), https://www.npr.org/2021/09/01/1031385629/full-fda-approval-triggers-more-universities-to-require-the-covid-19-vaccine [https://perma.cc/J538-WT6U] (connecting FDA approval with increased college COVID-19 vaccine requirements).

169. *See States Address School Vaccine Mandates and Mask Mandates*, NAT'L ACAD. FOR STATE HEALTH POL'Y, https://www.nashp.org/states-enact-policies-to-support-students-transition-back-to-school/ [https://perma.cc/WQJ3-LVCQ] (Nov. 3, 2022) (noting ongoing development of vaccine requirement policies and mask mandates as pediatric COVID-19 cases increase and COVID-19 vaccine and booster shots becoming more widely available to young children).

170. *California Becomes First State in Nation to Announce COVID-19 Vaccine Requirements for Schools*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 1, 2021), https://www.gov.ca.gov/2021/10/01/california-becomes-first-state-in-nation-to-announce-covid-19-vaccine-requirements-for-schools/ [https://perma.cc/QHR8-AW59].

announce an intent to implement such a requirement,[171] but several school districts in other states have also implemented vaccine requirements for their students.[172] Ultimately, the Newsom administration did not mandate the COVID-19 vaccine for children to attend school in the 2022–23 school year.[173] At the same time, at least twenty states have passed bills prohibiting a COVID-19 vaccine requirement in schools.[174]

As the pandemic waxes and wanes, many seek to return to "normal."[175] Schools will open and close, but even amidst the uncertainty, unvaccinated youth remain at the greatest risk.[176] Children in the foster care system and juvenile justice system will be at a distinct disadvantage should they contract COVID-19 given their increased health vulnerability.[177] Indeed, the debilitating long-term consequences of "long COVID" pose a lingering threat to children.[178] Even contracting COVID-19 will inevitably result in exclusion from school and activities, resulting in a disruption in normalcy, relationships, and educational access. Given that youth in the foster care and juvenile justice systems have poorer academic outcomes and attend schools with fewer resources, missing more school may have particularly detrimental effects.

For youth in the juvenile justice system, contracting COVID-19 can lead to increased isolation and burdensome maintenance of virtual learning. Prior to the pandemic, young people in the juvenile justice

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171. *Id.*

172. *States Address School Vaccine Mandates*, *supra* note 169; *see* Matt Zalaznick, *Vaccine Tracker: Schools in 14 States Now Require Students to Get COVID Shots*, DIST. ADMIN. (Nov. 15, 2021), https://districtadministration.com/schools-mandate-student-covid-vaccine-vaccination-tracker/ [https://perma.cc/P79M-2WME] (listing school districts across the country with COVID-19 vaccine requirements).

173. *See* Elizabeth Aguilera, *CDC Paves Way for California to Require School COVID Vaccines – But Lawmakers Have Given Up for Now*, CAL MATTERS (Oct. 27, 2022), https://calmatters.org/education/2022/10/california-vaccination-requirements/ [https://perma.cc/UW56-MCNW].

174. *States Address School Vaccine Mandates*, *supra* note 169.

175. *Cf.* OFF. OF THE SURGEON GEN., *supra* note 29, at 40 (referring to efforts to recover and rebuild after COVID-19).

176. COVID-19 vaccines help prevent or reduce the spread of COVID-19 among children and adults alike. *Cf.* Anna Christina Sick-Samuels & Allison Messina, *COVID Vaccine: What Parents Need to Know*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid19-vaccine-what-parents-need-to-know [https://perma.cc/3TGQ-BY9B] (June 22, 2022) (noting that COVID-19 vaccination helps prevent students from contracting severe illness from COVID-19 and its variants).

177. *See* discussion *supra* Part II.

178. *See* Scott Tong & Serena McMahon, *As Cases of Kids with Long COVID Rise, One Mom Warns: 'It Can Happen to Literally Anyone'*, WBUR (Feb. 8, 2022), https://www.wbur.org/hereandnow/2022/02/08/children-long-covid-pandemic [https://perma.cc/538L-AMZ9] (discussing the rising prevalence of long COVID among youth, which can trigger other, more serious symptoms than the initial COVID-19 infection itself).

system did not have equal access to internet.[179] This disadvantage persisted at the height of the pandemic. For example, because detained youth in New York City were learning primarily through worksheets and packets prior to the pandemic, the pandemic created a new need for technology.[180] Although youth in the juvenile justice system were eventually provided with technology (e.g., laptops or tablets), that technology could be taken away as punishment.[181] Accordingly, as restrictions loosen for other students, youth in the juvenile justice system who are unable to participate in in-person activities will be at a greater disadvantage in accessing educational programming.

Children in the foster care system had challenges accessing educational services in the same way as their non-foster care peers during the pandemic. They often lacked access to internet, which placed them behind their peers academically.[182] Depending on their residence (e.g., a homeless shelter), some youth in foster care do not even have access to WiFi.[183] While local governments have made efforts to increase accessibility to electronic hardware and WiFi, online learning also requires a stable internet connection, a space in which a youth can work quietly and without interruptions, and an adult who can supervise the child during the school day, all of which pose significant challenges for youth in foster care.[184]

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179. *See* JACOB AGUS-KLEINMAN, NINA SALOMON & JOSH WEBER, THE COUNCIL OF STATE GOV'TS JUST. CTR., ON TRACK: HOW WELL ARE STATES PREPARING YOUTH IN THE JUVENILE JUSTICE SYSTEM FOR EMPLOYMENT? 1, 4 (2019) ("[N]ine states do not even provide youth in secure facilities with access to the internet."); Eileen Grench, *Stuck on Mute: Kids in Juvenile Lockups Can't Be Seen or Heard by Teachers During Remote Learning*, THE CITY (Nov. 19, 2020), https://www.thecity.nyc/2020/11/19/21578814/kids-in-juvenile-lockups-cant-be-seen-or-heard-by-teachers-during-remote-learning [https://perma.cc/3CHD-2EUM] (describing delays in providing virtual classes to students in detention centers).

180. Grench, *supra* note 179.

181. *Id.*

182. Disparities in internet access predate the pandemic. One study in California indicated that only 21% of youth in foster care in urban areas and 4% of youth in foster care in rural areas had internet access. Martin do Nascimento, *Fostering Conversation: Spanning the Digital Divide*, RESOLVE MAG. (Apr. 22, 2020), https://resolvemagazine.org/2020/04/22/fostering-conversation-spanning-the-digital-divide/ [https://perma.cc/78MZ-3ZVZ]. However, some states, like California, have implemented programs to ensure access to internet and phones for current and former foster youth. Christopher Weber, *Youth in Foster Care to Get Free Smartphones, Internet Access in Pilot Program*, U.S.A. TODAY (Apr. 25, 2019), https://www.usatoday.com/story/tech/2019/04/25/smartphones-foster-kids-california-giving-free-phone-internet/3578978002/ [https://perma.cc/JP5V-CFCC].

183. *E.g.*, E.G. v. City of New York, No. 20-CV-09879, 2020 WL 7774346, at *2 (S.D.N.Y. Dec. 30, 2020) (explaining the lack of internet access for youth in New York City residing in homeless shelters which became noteworthy with the rise of virtual schooling during the COVID-19 pandemic).

184. *Cf.* Weber, *supra* note 182 (describing efforts in California to increase cellphone and internet access for children in foster systems).

ii. Home Placements and Access to Facilities

A foster child without a COVID-19 vaccine may have more difficulty accessing home placements. Foster parents are at a high risk of exposure to COVID-19 due specifically to their role as foster parents. For instance, caseworkers must conduct visits in the home where the child is residing, and foster parents risk exposure to COVID-19 from family visits if they take place in person.[185] Moreover, if children have in-person services or appointments, the risk of exposure to the foster parent increases.

Youth within the juvenile justice system may be subject to isolating settings within their respective placement without the protection of the vaccine. When outbreaks emerged previously, some young people were isolated and denied visitation with their families.[186] Access to placement with peers may be denied for youth who pose a health risk to others in their facility.

iii. Familial and Community Relationships

Youth who remain at high risk of COVID-19 may continue to lose opportunities to build or maintain relationships with peers, neighbors, and family. While virtual family visits theoretically remain an option, youth in the juvenile justice system reported that virtual visits to talk with family were not always available.[187] Indeed, some young people had to pay to speak to family beyond their allotted time.[188] Vaccinated children have a stronger case to make that they should be entitled to in-person visitation.

While some jurisdictions urged foster care agencies to continue in-person visitation despite the ongoing pandemic, there is no federal mandate requiring such in-person visitation to continue.[189] These formal

185. *Cf.* Font, *supra* note 83 (describing the vulnerability of foster parents to COVID-19 and the risks of viral spread in foster and group homes).

186. *See, e.g.*, Kamenetz, *supra* note 141 (recalling that Louisiana canceled in-person visits in juvenile detention centers for over a year in 2020 when the COVID-19 pandemic began).

187. *See, e.g.*, *id.* (discussing requirements that youth in detention pay for Zoom calls lasting beyond a certain amount of time).

188. *Id.*

189. *Cf.* Jerry Milner & David Kelly, *Top Federal Child Welfare Officials: Family is a Compelling Reason*, IMPRINT (Apr. 6, 2020), https://imprintnews.org/child-welfare-2/family-is-a-compelling-reason/42119 [https://perma.cc/7C3X-APT9]
(detailing how the associate commissioner of the U.S. Children's Bureau has a "strong preference that all measures be taken to continue in-person family time for children in foster care" but did not mandate in-person visitation); Melissa Jenco, *AAP: Safe, In-Person Visits Important for Children in Foster Care During Pandemic*, AAP NEWS (July 27, 2020), https://publications.aap.org/aapnews/news/7238/AAP-Safe-in-person-visits-important-for-children?autologincheck=redirected [https://perma.cc/2FD4-V65Y] (describing the American Academy of Pediatrics' 2020 interim guidance that encouraged in-person visitation with parents, siblings, and child welfare professionals).

visits are distinct from informal visits and opportunities to socialize with peers and friends. Children without a vaccine may lose out on opportunities to hang out with peers after school, play sports, or participate in other activities, and community events due to concerns they may contract COVID-19—even with requirements for social distancing and mask wearing in place.

IV. Shining a Light on Children: Advancing a Right to be Vaccinated & Overcoming Parental Barriers

As outlined above, there are compelling reasons as to why children should have access to the COVID-19 vaccine. The Supreme Court has noted that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[190] In practice, the protections afforded to children by the Constitution are much more limited as a matter of principle and case law.

The United States is a country of negative, not affirmative, rights.[191] Although the Due Process Clause protects fundamental rights and liberties, such rights must be "deeply rooted in this Nation's history and tradition"[192] and "implicit in the concept of ordered liberty."[193] The rights for youth in this analysis have been circumscribed to "reflect judicial concern for ensuring a reasonable 'fit' between legitimate state ends and the means adopted to advance them in cases predicated on distinctions between juveniles and adults."[194]

Parental rights as they pertain to children and families are vast. Parental rights extend to the right to have children,[195] the right to "direct

190. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

191. *Cf.* Deshaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 196 (1989) ("Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

192. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1997)).

193. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)). The unenumerated rights analysis consistently curtails the rights of youth. Children's rights are far from deeply rooted in this Nation's history. Underrepresented and Black children in particular stand to lose in this equation—there is no history to support the protection of fundamental rights when the history is rooted in racism and discrimination. *See* Terri Dobbins Baxter, *Constitutional Demotion*, 41 LAW & INEQ. (2023) (describing how the Supreme Court's emphasis on rights "deeply rooted in this Nation's history and tradition" excludes Black Americans).

194. Hutchins v. District of Columbia, 188 F.3d 531, 564 (D.C. Cir. 1999).

195. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

the education of [their] children,"[196] and the right to family integrity.[197] In comparison, children in the United States are left with few rights—constitutional jurisprudence has denied children an affirmative constitutional right to an education[198] or health care.[199]

International law provides minimal relief because the United States is the sole country in the world that has failed to ratify the Convention on the Rights of the Child.[200] The Convention on the Rights of the Child would provide a source for fundamental rights like the rights to life, healthcare, and education.[201] Without such a framework, children within the foster care and juvenile justice systems must rely on existing federal, state, and local laws and regulations to ground any affirmative rights. This Part will examine how youth can use the existing statutory and constitutional framework to advance their interests. Ultimately, this Article argues that there should be a strong presumption in favor of a youth's right to override the consent of their parents.

Absent a mandate compelling officials to provide the vaccine to youth in foster care or in the justice system, youth can still seek to obtain the COVID-19 vaccine in the face of parental refusal by relying on their state, federal, and statutory rights. There is no primary constitutional right to be vaccinated, but children can make the argument that they have the right to be vaccinated by connecting their other rights to being vaccinated. Specifically, youth and their advocates should consider incorporating arguments relating to the child's best interest through the state's power of *parens patriae*, the young person's right to education, and a right to normalcy to argue they should have access to this primary right: the right to make a decision regarding the COVID-19 vaccine. This Part also addresses counterarguments a child can make should their parent wish to assert a religious argument against the child being vaccinated.

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196. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (discussing the right of a parent's ability to have control over their child and to give their children a suitable education).

197. *E.g.*, Romero v. Brown, 937 F.3d 514, 520 (5th Cir. 2019) (quoting Wooley v. Baton Rouge, 211 F.3d 913, 924 (5th Cir. 2000)) (noting the need to balance the right to family integrity with state interests); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (recalling the right to preservation of family integrity).

198. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

199. *See* Erin C. Fuse Brown, *Developing a Durable Right to Health Care*, 14 MINN. J.L. SCI. & TECH. 439, 448 (2013) (asserting that because the right to health care is tied to health insurance access, and that because health services are unaffordable without health insurance, health care is currently not a federal right in the United States).

200. Megan Corrarino & Robert L. Bernstein, *U.S. Stands Alone: Not Signing U.N. Child Rights Treaty Leaves Migrant Children Vulnerable*, HUFFPOST (Oct. 13, 2016), https://www.huffpost.com/entry/children-migrants-rights_b_8271874 [https://perma.cc/C2A8-AR93].

201. Convention on the Rights of the Child, arts. 6, 24, 28, Nov. 20, 1989, 1557 U.N.T.S. 3.

A. Best Interests of the Child

Parens patriae is Latin for "parent of his or her country, [which describes] the state in its capacity as provider of protection to those unavailable to care for themselves."[202] The Supreme Court has limited parents' rights over their children by relying on the principle of *parens patriae*.[203] As *parens patriae*, states have an interest in preserving and promoting the welfare of children, and to further this interest they can require laws to protect children's health and well-being.[204]

For instance, in the context of providing medical treatment for young people in foster care, courts have authorized medical treatment over parental objection after analyzing "all relevant circumstances, *including the child patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive* alternative treatments."[205] Similarly, for youth in the juvenile justice system, the court may make decisions for the child.[206] The court may also authorize another individual to make medical decisions on behalf of the child.[207]

While *parens patriae* will serve as a limit to parents' tremendous, repeatedly recognized authority over their children, courts may still seek to incorporate and limit children's rights even when the court has the statutory authority to grant the relief the child wants. For example, in the case *In re Athena Y.*, a mother appealed a family court's decision granting her children, ages thirteen and fifteen, the right to decide whether or not

202. *E.g.*, Glob. Travel Mktg., Inc. v. Shea, 908 So.2d 392, 399 (Fla. 2005) (quoting *Parens Patriae*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

203. *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."); Parham v. J.R., 442 U.S. 584, 630 (1979) (Brennan, J., concurring in part and dissenting in part) ("In our society, parental rights are limited by the legitimate rights and interests of their children.").

204. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 766 (1982) (quoting Lassiter v. Dept. Soc. Servs. Durham Cnty., 452 U.S. 18, 27 (1981)) ("[T]he State has an urgent interest in the welfare of the child . . . ."); *In re* A.A., 951 N.W.2d 144, 166–67 (Neb. 2020) ("Parens patriae means, in essence, that the State has a right to protect the welfare of its resident children . . . .[T]he State may impose through laws of neutral and general applicability certain educational requirements, restrictions on child labor, and compulsory vaccination, even when against the parents' wishes."); State *ex rel.* O'Sullivan v. Heart Ministries, Inc., 607 P.2d 1102, 1109 (Kan. 1980) ("Under the doctrine of parens patriae, the State has power to legislate for the protection of minor children within its jurisdiction.").

205. *See In re* Martin F., 820 N.Y.S.2d 759, 772 (N.Y. Fam. Ct. 2006) (quoting Rivers v. Katz, 67 N.Y.2d 485, 497 (N.Y. 1986)).

206. REBECCA GUDEMAN, NAT'L CTR. FOR YOUTH L., CONSENT TO MEDICAL TREATMENT FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM: CALIFORNIA LAW—A GUIDE FOR HEALTHCARE PROVIDERS 5–6 (Nov. 2009).

207. *Id.*

to receive the COVID-19 vaccine.[208] The appellate court reversed and remanded, noting that statutes and regulations authorize minors to make only certain types of medical decisions, and consenting to vaccination—including the COVID-19 vaccination—over parental objection was not one of them.[209] Relying on the notion of judicial restraint, the court concluded it "should not intrude on the other two branches of government by expanding the rights of minors to make decisions in categories not included in those statutes or regulations . . . ."[210] Even though the Family Court is authorized "to do whatever is necessary and appropriate to ensure a child's welfare, including the power to direct surgery or other care over a parent's objection,"[211] the court must also avoid "assum[ing] the role of a surrogate parent and establish[ing] as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity . . . ."[212] Here, there was insufficient procedural due process where the objecting parent was not allowed a hearing, and there was an insufficient factual basis to support the finding that the children were fully informed about the vaccine and had the capacity to consent.[213]

The appellate court's trepidation to affirm the trial court's authority to order the administration of the COVID-19 vaccine undermines the ability of children in foster care and other similar circumstances to get vaccinated. The court's intention not to override the rights of parents or impose judicially created, subjective, standards of ideal parenting barely acknowledges the rights of children. When legislation grants courts the sweeping ability to protect and advance children's health, safety, and well-being, a custom of judicial restraint seems misplaced. When the courts center the parent in their analyses, not the child, they deemphasize the importance of the child's interest, opinion of the vaccine, and capacity to consent.

Through their judicial opinions, courts have emphasized that children have a stake in decisions made regarding their bodies, and thereby provide a blueprint to advance children's rights. For example, in *Bellotti v. Baird*, the Supreme Court analyzed its jurisprudence regarding parents' rights when it came to the constitutionality of a state statute requiring parental consent for abortions.[214] Critically, the Court dedicated

208. *In re* Athena Y.,161 N.Y.S.3d 335, 337 (App. Div. 3d Dep't 2021).
209. *Id.* at 338.
210. *Id.* (internal citation omitted).
211. *Id.* at 339 (citing *In re* Sampson, 65 Misc. 2d 658, 665 (N.Y. Fam. Ct. 1970)).
212. *Id.* at 340 (quoting *In re* Hofbauer, 47 N.Y.2d 648, 656 (N.Y. 1979)).
213. *Id.* at 341.
214. Bellotti v. Baird, 443 U.S. 622, 637–39 (1979) (plurality opinion).

a considerable portion of its opinion to explaining why pregnant minors must have the right to demonstrate they are "mature enough and well enough informed to make [their] abortion decision" or to show that abortion is "in [their] best interests."[215] In finding that pregnant minors are entitled to a proceeding to demonstrate their maturity, the Court emphasized that a pregnant minor faces probable detriments because of an unwanted pregnancy, including in their education and emotional maturity.[216] While there has never been a constitutional right to vaccination—and unwanted pregnancy presents different detriments to minors—getting vaccinated is a time-sensitive matter during a pandemic,[217] and being denied access to the COVID-19 vaccine also poses unique risks to a minor's education, physical health, and emotional maturity.[218] By approaching COVID-19 vaccination in a similar manner using the logic in *Bellotti*, courts can strengthen the autonomy and capacity of young people and protect them against any harmful parental interests and state-imposed barriers to access. These young people must be allowed to demonstrate that vaccination is in their best interests.

The fact that youth subject to the criminal or foster care system have tumultuous—and often unpredictable—lived experiences is a compelling reason to provide them with access to the vaccine. A vaccine will enable them to fully enjoy their childhood in the controlled settings in which they live. Given that children in the foster care system and juvenile justice system face poorer health outcomes and are indeed likely to be at a higher risk of contracting COVID-19, medical health and public health considerations support allowing them to consent to their own vaccination.[219]

B. The Right to Education

If unvaccinated youth are excluded in school due to contracting COVID-19 or long COVID-19, they have a greater risk of receiving an inferior education.[220] Children in the foster care and juvenile justice systems are particularly vulnerable to educational disruptions.

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215. *Id*. at 643–44. While abortion is no longer a constitutional right after Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), the Court's reasoning in *Bellotti* is still influential. The Court's analysis of why minors must be able to establish their maturity relies heavily upon the "unique nature of the abortion decision" rather than the constitutional right to seek an abortion. *Bellotti*, 443 U.S. at 642–44 (describing how a pregnant minor is faced with options and detriments that are "much different" than those facing a minor in other situations). Courts could still use this logic to examine the unique nature of the COVID-19 vaccine for children in foster care and those involved with the juvenile justice system.

216. *Bellotti*, 443 U.S. at 642.

217. *Cf. id.* at 643 ("[T]he abortion decision is one that simply cannot be postponed . . . .").

218. *See supra* Section III.A.

219. *See supra* Part II.

220. *See supra* Section III.C.i.

While all states have a constitutional right to establish public education[221]—and every state constitution requires the state legislature to do so[222]—the strength of this right and its characterization as fundamental varies dramatically across states. The text of a state constitution's education clause can provide a strong legal hook on which to base the strength of the right to education for minors in that state.[223] Approximately sixteen states have a fundamental right to education, while at least fourteen states expressly reject the right to a fundamental education.[224] Youth in states with a fundamental right to education may have the strongest basis on which to make an educational argument regarding their right to a vaccine. For example, a young person could argue that their inability to consent to their vaccination curtails their fundamental right to education by limiting their ability to engage in their education if they contract COVID-19 and become seriously ill or hospitalized. In comparison, youth in states where education is not a fundamental right will have a harder time arguing that they need to become vaccinated to participate in education because it is not a fundamental right and likely subject to a lower tier of scrutiny upon judicial review.

Even in states that do not have a fundamental right to education, children in the foster care and juvenile justice systems may still advance their arguments for the right to a full education. All states have compulsory age requirements for their free education,[225] so children who are required to go to schools where there is a higher risk of contracting COVID-19 must be able to choose the vaccine.

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221. Nicole Lawler, *The Right to Education in the United States and Abroad: A Comparative Analysis of Constitutional Language and Academic Achievement*, FED. LAW., March 2018, at 34, 35.

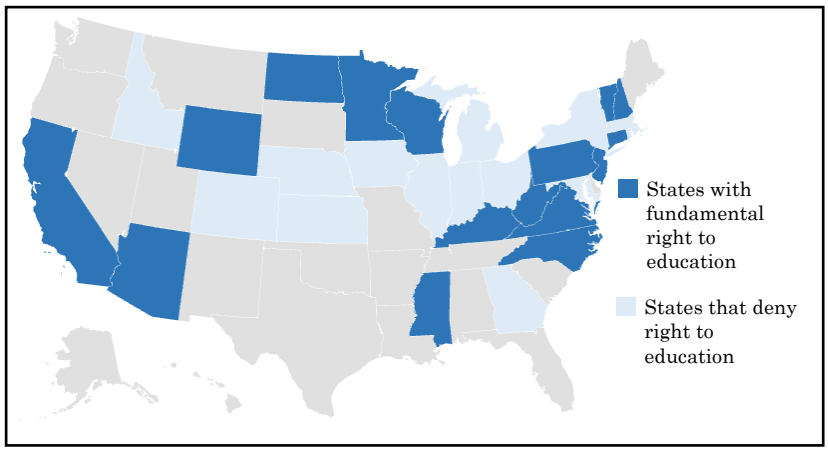
222. Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 788 (2008).

223. *Id.*; *see also* Scott Dallman & Anusha Nath, *Education Clauses in State Constitutions Across the United States*, FED. RSRV. BANK OF MINNEAPOLIS (Jan. 8, 2020), https://www.minneapolisfed.org/article/2020/education-clauses-in-state-constitutions-across-the-united-states [https://perma.cc/H2PZ-VA84] (comparing and analyzing the language in the education clauses of state constitutions).

224. Robyn K. Bitner, *Exiled from Education:* Plyer v. Doe*'s Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 779 (2015); Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 910 (2018); JAMES A. RAPP, EDUC. L. § 8.01, 10 n.68 (3d ed. 2022) (explaining several state courts held that education is not a fundamental right, including: Colorado, Iowa, Georgia, Idaho, Nebraska, Massachusetts, Michigan, and New York); RESTATEMENT (FIRST) OF CHILD. & THE L. § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022) (listing states that have found education to be a constitutional right and those that have rejected it).

225. Cassidy Francies & Zeke Perez, Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES (Aug. 19, 2020), https://www.ecs.org/50-state-comparison-free-and-compulsory-school-age-requirements/ [https://perma.cc/S4M9-W254].

Figure 1. States with a Fundamental Right to Education[226]



Justice-involved youth housed in a detention facility face greater challenges using the right to an education to anchor their right to a vaccine, and their ability to use this right requires a state-by-state analysis on the strength of education clause in their given state. In most states, non-detained young people in the foster care system or justice-involved youth can rely on a state constitutional or statutory right to education to bolster their right to the COVID-19 vaccine,[227] but youth in the juvenile justice system generally have less access to a right to education.[228] Federal legislation, such as the Individuals with Disabilities

226. As of this writing, the states with a fundamental right to education include: Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *See* Bitner, *supra* note 224, at 766–67 n.15; RESTATEMENT (FIRST) OF CHILD. & THE L. § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022). States without this right to education include Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Nebraska, New York, Ohio, and Rhode Island. Bitner, *supra* note 224, at 766–67 n.15; RESTATEMENT (FIRST) OF CHILD. & THE L. § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022). Figure 1 created by author.

227. *See* EMILY PARKER, EDUC. COMM'N OF THE STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/B8VH-JPMN] (reviewing the state constitutional rights to education in all fifty states). Washington, D.C. is not a state, so there is no state constitutional foundation for public education. *Id.* at 2.

228. *See*, *e.g.*, COUNCIL OF STATE GOV'TS, LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 14 (2015) (describing the lack of consistent funding frameworks across the country for accountability, data, and standards when it comes to education for states to provide educational services for young incarcerated people); *cf.* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 2 (2014), https://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf [https://perma.cc/2FNY-YA52] (explaining guiding principles for education reform for youth in juvenile justice

Education Act and Every Student Succeeds Act, are meant to bolster accountability, monitoring, and educational access.[229] However, there remain many existing gaps between quality education and what education is available for incarcerated youth.[230] Further, while some state courts have held that states are bound to provide youth with an education while in the juvenile detention system,[231] others have held that these youth forfeit their right to education.[232]

Detained young people can assert that their inability to participate in limited educational offerings essentially amounts to a punishment. In some detention facilities, "[i]t is not uncommon for school to be canceled or students to be released early because of teacher shortages or inadequate numbers of custody staff to supervise the school."[233] Further, "[s]ome states do not have mechanisms to hire substitutes when teachers are ill or are attending professional development activities."[234] Due to teacher shortages, some teachers in juvenile detention facilities "contend with large class sizes and students who receive less than the state-mandated number of hours of school."[235] From 1975–2014, at least forty-eight class action lawsuits were filed against juvenile detention facilities in the United States alleging a failure to provide special education services.[236] These cases have had varying success in achieving reform for young people.[237] Accordingly, youth who are detained already have fewer educational resources. A young person who is incarcerated with COVID-19 will have even fewer opportunities to engage in the limited

systems). *See generally* Peter E. Leone & Pamela Cichon Wruble, *Education Services in Juvenile Corrections: 40 Years of Litigation and Reform*, 38 EDUC. & TREATMENT CHILD. 587, 587 (2015), https://www.jstor.org/stable/44684085 [https://perma.cc/T2GV-S9KG] (exploring the inadequate and inconsistent access to education guaranteed under the Individuals with Disabilities Education Act and Every Student Succeeds Act).

229. Individuals with Disabilities Education Act, Pub. L. No. 101-476 (codified as amended in scattered section of 20 U.S.C.); Every Student Succeeds Act, Pub. L. No. 114-95 (codified as amended in scattered sections of 20 U.S.C.).

230. *See* sources cited *supra* note 228.

231. *E.g.*, Tommy v. Bd. of Cnty. Comm'rs, 645 P.2d 697, 698 (Wash. 1982) (finding that the state's compulsory education law requires juvenile detention centers to provide free education to young people detained there); Tunstall v. Bergeson, 5 P.3d 691, 708 (Wash. 2000) (concluding that the Washington State Constitution requires a right to education for incarcerated young people).

232. *In re* R.M. v. Washakie Sch. Dist. No. One, 102 P.3d 868, 874 (Wyo. 2004) ("[T]he fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct . . . . The actual receipt of educational services is accordingly contingent upon appropriate conduct in conformity with state law and school rules.").

233. Leone & Wruble, *supra* note 228, at 591.

234. Id.

235. *Id.*

236. *Id.* at 592–93.

237. *See id.* at 593–95 (describing the outcomes of several class-action lawsuits based on failure to provide education).

educational offerings. For these young people, COVID-19 can be a punishment, barring them from reaping the benefits of their education.

For those youth who are detained and live in states with weaker constitutional protections for education, relying on the right to rehabilitation may be effective in accessing the COVID-19 vaccine. The purpose and foundation of the juvenile justice system was predicated on the notion that young people can be rehabilitated, and it is an oft-repeated sentiment in Supreme Court jurisprudence.[238] Many state statutes provide that the purpose of the juvenile justice system is to rehabilitate the young person,[239] and legal scholars argue that there is indeed a constitutional right to rehabilitation that has been recognized by some courts.[240] As this Article has elucidated, a lack of vaccination impacts a young person's ability to access education, and education is integral to rehabilitation and long-term health, stability, and safety.[241] Justice-

238. *See, e.g.*, *In re* Gault, 387 U.S. 1, 15–16 (1967) (analyzing the history of reform to the juvenile justice system and identifying that the purpose of the system is to treat and rehabilitate children, not to punish them); *cf.* Roper v. Simmons, 543 U.S. 551, 570 (2005) (explaining how youth's vulnerability and lack of control means young people "have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment").

239. *See* Rudolph Alexander, Jr., *Incarcerated Juvenile Offenders' Right to Rehabilitation*, 7 CRIM. JUST. POL'Y REV. 202, 205–10 (1995) (examining the constitutional basis for the right to rehabilitation and identifying state laws that implement this right). State statutes also emphasize that the purpose of the juvenile justice system is to ensure the youth has the services necessary for rehabilitation. *E.g.*, MASS. GEN. LAWS ch. 119, § 53 (2022) ("[Children] shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."); NEB. REV. STAT. § 43-402 (2022) (explaining that one of the juvenile justice system's purposes is to "[p]romote the development and implementation of community-based programs designed to prevent unlawful behavior and to effectively minimize the depth and duration of the juvenile's involvement in the juvenile justice system"); N.J. STAT. ANN. § 2A:4A-21 (West 2020) ("Consistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public[.]"); 42 PA. CONS. STAT. § 6301(b)(2) (2022) ("Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the *development of competencies to enable children to become responsible and productive members of the community*." (emphasis added)); WASH. REV. CODE § 13.40.010(2)(f) (2022) (stating that one of the purposes of the juvenile justice system is to "[p]rovide for the rehabilitation and reintegration of juvenile offenders").

240. *See, e.g.*, Martin Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 504 (2016) ("[J]uvenile offenders now appear to have a constitutional right to a meaningful opportunity for rehabilitation . . . .").

241. *See, e.g.*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, EDUCATION FOR YOUTH UNDER FORMAL SUPERVISION OF THE JUVENILE JUSTICE SYSTEM 1 (2019) ("[T]hose youth who do achieve higher levels of education while in the juvenile justice system are more likely to experience positive outcomes in the community once released . . . . Educational risks factors are associated with juvenile . . . recidivism." (internal citations omitted)).

involved youth may be able to argue that their statutory—and perhaps constitutional—right to rehabilitation is violated when they cannot access full education because of lack of vaccination.

C. The Right to "Normalcy"

Specific to young people in foster care, the idea of "normalcy" centers around children's participation in "normal" activities, including "visiting a friend's house, attending school field trips, having a part-time job, volunteering, participating in school clubs and teams, dating, going to the prom, attending faith-based activities, and learning to drive."[242] The purpose of normalcy is to provide opportunities for youth to become responsible and independent.[243] "Normal" activities are linked to improved educational outcomes, processing of negative emotions, relationships, and mentorship—these activities are considered the "hallmark of childhood and adolescence."[244]

Unfortunately, access to these types of "normal" activities has historically been limited for youth in foster care. This inaccessibility is in part due to the risk-averse nature of child welfare agencies, the geographic instability of youth in foster care, the concerns foster parents have regarding liability, and bureaucratic requirements in some regions that require friends' parents to undergo clearance processes before youth can have sleepovers in their homes.[245] Additionally, a large percentage of foster youth experience isolation from "normal" activities because of negative stereotyping surrounding foster care and their limited options outside of the foster home.[246]

Recently, several states have enacted statutory "reasonable and prudent parent" standards to help youth in foster care gain access to such activities.[247] These statutes generally make it easier for foster parents to grant permission for their foster children to participate in activities, as they can authorize participation without first getting permission from the court or the child's caseworker.[248] Additionally, in 2014, the Preventing Sex Trafficking and Strengthening Families Act explicitly addressed normalcy for youth in foster care, codifying a reasonable and prudent

242. Paul Jacobson, *Promoting "Normalcy" for Foster Children: The Preventing Sex Trafficking and Strengthening Families Act*, 81 MO. L. REV. 251, 254 (2016).

243. *Id.* at 255.

244. *Id.*

245. *Id.* at 256–57.

246. *Id.* at 256.

247. *Id.* at 259 ("In the last decade, a small number of states have addressed the difficulty of obtaining access to 'normal' activities for foster children by enacting statutory 'reasonable and prudent parent' standards. These standards are often known as 'normalcy laws.' Such laws have been passed in California, Florida, Ohio, Utah, and Washington.").

248. *Id.*

parent standard with the goal of "allowing children to experience normal and beneficial activities . . . ."[249] On this basis, youth who are at high risk for COVID-19 can argue that not receiving the vaccine denies them normalcy, as without the vaccine many youth may not be able to safely participate in normal activities. Children and their advocates must emphasize the importance of the vaccine to maintain relationships, build new relationships, stay involved the community, and live as close to a "normal" life as possible.

D. Freedom of Religion

Finally, children whose religious beliefs differ from their parents may be able to exercise their independent First Amendment rights to argue that they have a right to be vaccinated. Traditionally, courts have focused on the religious beliefs of parents and imputed these beliefs to the child,[250] but the Supreme Court has explicitly noted that children have the right to exercise their religion.[251] The Supreme Court has yet to address a situation in which the child's religious interest conflicts with their parent's religious interest.[252] The Court has also not defined the scope of this right for young people,[253] but it is "not accorded the same scope as an adult's right to free exercise."[254] Children's right to free exercise is limited by the state's interest in health and the parent's rights to control the upbringing of their child.[255]

However, Supreme Court precedent affirms that children are not completely at the whim of their parents when it comes to expressing religious beliefs. In *Prince v. Massachusetts*, a mother was convicted of violating a state labor law for engaging her child in street preaching.[256] The Court upheld the State's ability to regulate children and denied the mother's free exercise and equal protection claims.[257] The Court specifically addressed the rights of children to exercise their religion, stating that "[t]he rights of children to exercise their religion, and of

249. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, §111 (a)(3), 128 Stat. 1919 (2014).

250. Kimberlee Wood Colby, *When the Family Does Not Pray Together: Religious Rights within the Family*, 5 HARV. J.L. & PUB. POL'Y 37, 53 (1982).

251. *See* Kelsi Brown Corkran, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 338 (2005).

252. *Id.*

253. Colby, *supra* note 250, at 55 ("No other Supreme Court case [besides Prince v. Massachusetts, 321 U.S. 158 (1944)] has separately addressed the question of the scope of the child's right of free exercise of religion and no Supreme Court case has addressed the child's freedom of religion when the child's health was not threatened.").

254. *Id.* at 83.

255. *Id.*

256. 321 U.S. 158, 170–71 (1944).

257. *Id.*

parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here . . . ."[258]

The Court announced that "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[259] Similarly, with the COVID-19 vaccine, a parent's choice should not always be imposed on their children, especially with the unknown, long-term health effects that can affect children who remain unvaccinated.[260]

Conversely, some of the Court's precedents have not been as generous when addressing a conflict between a parent and child. In *Wisconsin v. Yoder*, the Supreme Court upheld the Wisconsin Supreme Court's holding that the conviction of Amish parents who refused to send their children to school—in violation of compulsory school attendance laws—violated the Free Exercise Clause.[261] The majority refused to address the conflicts between children and parents, noting that its:

> [H]olding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.[262]

The Court remained skeptical about the State's intrusion into controlling the religious upbringing of children and stated that there was "nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14–16 if they are placed in a church school of the parents' faith."[263]

In his scathing dissent, Justice Douglas noted that "[r]eligion is an individual experience[,]" and he would have addressed the religious liberty of two of the children who were not opposed to the high school requirement.[264] Most pertinently to Justice Douglas, "[i]t is the future of the student, not the future of the parents" that was impacted by the majority's decision, making it critical that the children "be given an opportunity to be heard."[265]

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258. *Id.* at 165.

259. *Id.* at 170.

260. *See, e.g.*, Tong & McMahon, *supra* note 178 (describing the long-term health effects of COVID-19 in youth).

261. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

262. *Id.* at 231.

263. *Id.* at 232.

264. *Id.* at 243 (Douglas, J., dissenting).

265. *Id.* at 245 (Douglas, J., dissenting).

Despite competing holdings in *Prince* and *Yoder*, the Supreme Court, on at least one occasion, held that children may have religious beliefs independent of their parents—beliefs that may award them rights and an opportunity to be heard. Between a parent who refuses the vaccine for their child on the basis of religious belief and a child who asserts no such beliefs, or holds opposing beliefs, a court may find that the child's religious beliefs should also be taken into account in assessing what is in their best interests.

V. Policy Recommendations

Despite establishing that children in the juvenile justice and foster care systems have mechanisms through which they can seek to obtain the COVID-19 vaccine when their parent or legal guardian refuses, there remain considerable barriers to access. Where there is medical consensus regarding the efficacy of a vaccine, and that vaccine would permit the youth to protect their health and allow them full access to education and other necessary services and community, there should be a strong presumption in favor of the child's right to consent to the immunization regardless of parental authorization. On the other hand, youth who do not consent should be entitled to state the basis of their objection and have that refusal be addressed and rebutted with countervailing data that is particular to their level of risk and exposure. Such a framework would ensure that the child's bodily autonomy and beliefs are respected. If some of the goals of the foster care and juvenile justice systems are to prepare youth to live independently, make informed decisions, and navigate the world, then the interests of society are best served by involving and praising the voices of youth in these decisions.

The existing states of the foster care and juvenile justice systems leave much room for reform, restructuring, and reconceptualization. Such reform cannot take place independently—it will require a revitalization of the educational, housing, employment, and health systems to treat and serve underrepresented, minority, and impoverished families. Until systematic changes take place, there are initiatives that can be implemented at the individual, local, and state levels.

Enforcing the individual rights of children requires that knowledge and enforcement mechanisms be accessible. Ideally, children in the foster care system and juvenile justice system would have access to an independent advocate who could represent their rights beyond the immediate proceedings they face. While juveniles are entitled to counsel under the Due Process Clause for delinquency proceedings,[266] only thirty-five states require children in child protective proceedings to have

266. *In re* Gault, 387 U.S. 1, 41 (1967).

independent counsel.[267] Of these states, only fifteen require "client-directed counsel under all reasonable circumstances."[268] Often, public defenders and providers of indigent legal services have massive caseloads that may lower their availability to oversee these types of arguments and proceedings.[269] The creation of a health advocate for youth who can appear in court or provide recommendations to a child's attorney on the specific topic of health needs could provide a direct right and forum for youth to speak about their health-related concerns.[270]

There is a robust need for education among children about their rights, as well as for adults who interact with youth. As of 2019, fifteen states have enacted a Foster Children's Bill of Rights to inform children of their rights in foster care.[271] Such bills enumerate rights that are guaranteed to youth in foster care by state or federal law.[272] Idaho's Youth in Care Bill of Rights was written by children, for children, and provides youth in foster care a mechanism to be advocates, to fight for their interests, and to share their findings with their peers.[273] Some states, such as Oregon, have an ombudsman to enforce the Foster Children's Bill of Rights by receiving, investigating, and resolving complaints regarding all parties involved in the foster care system.[274] An expansion of avenues that

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267. NOY DAVIS, AMY HARFELD & ELSA WEICHEL, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 23 (4th ed. 2019), https://docs.wixstatic.com/ugd/2b5285_aa4a099876dd40ee853d6861e8ba8b5b.pdf [https://perma.cc/3GZ9-5BQ2] (listing the thirty-four states that require independent counsel for all children in abuse and neglect proceedings as of 2019). As of April 15, 2021, Arizona also mandates the appointment of an attorney to a child's case. *Kids in Foster Care to Have Own Attorneys Under New Arizona Law*, THE IMPRINT (Apr. 15, 2021), https://imprintnews.org/child-welfare-2/kids-foster-care-attorneys-arizona-law/53509 [https://perma.cc/2B64-ZYQ3]; *see also* Barbara J. Elias-Perciful, *The Constitutional Rights of Children*, 73 TEX. B.J. 750, 750 (2010) (advocating for the right to effective assistance of counsel for children in child protection cases).

268. DAVIS ET AL., supra note 267, at 7.

269. *See, e.g.*, Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 119 (1997) ("The caseloads maintained by most professionals working in these systems is too high to expect quality performance.").

270. *See* Strassburger, *supra* note 156, at 1140–41 (discussing why medical practitioners may make effective and independent decision-makers for youth in care).

271. *Foster Care Bill of Rights*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2019), https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx#Children [https://perma.cc/QX4J-AQFD].

272. *Id.*; *see also* Janice Beller, *Our Rights, Our Voice: Idaho Youth in Care Bill of Rights Empowers Youth to Become Their Own Advocates*, 63 ADVOC. 16, 17 (2020) ("The Youth in Care Bill of Rights, while it does not carry the full force and effect of law or judicial rule, is part of the standard of care for foster youth in Idaho."). Additionally, the Preventing Sex Trafficking and Strengthening Families Act requires state child welfare agencies to engage youth ages fourteen or older in the creation of their case plan, and the plan must describe their rights. Pub. L. No. 113-183, § 113(d), 128 Stat. 1919 (2014).

273. Beller, *supra* note 272, at 17.

274. Annette C. Hillman & Jennifer F. Kimble, *Role of the Juvenile Dependency Court—*

provide external mechanisms for youth to advocate and share information would protect their rights. For youth in the juvenile justice system, peer-mediated models of instruction have been shown to have some efficacy in learning outcomes and were the preferred method of instructional delivery for sampled youth.[275]

Finally, health-related issues—particularly relating to COVID-19—are not in the sole control of the adolescent. Any reluctance or unwillingness of foster parents and correctional staff to get vaccinated or use other protective health measures will have a considerable impact on the youths' abilities to protect themselves.[276] Local, state, and county officials should consider mandating health interventions for employees to protect children.

Conclusion

As a normative matter, not all children should have the absolute authority to make medical decisions independently without input from medical professionals, advocates, or whoever constitutes their family. What is missing from the law is a framework that advances the rights of children and young people as having a vested stake in making decisions that are central to their daily lives. Children in the foster care system and juvenile justice system lose so much autonomy, control, and freedom already. Their body remains the one constant in their lives, and any analysis and decision-making process that excludes them harms not only the individuals, but also our society. In so many components of the foster care and juvenile justice systems, things *happen* to the youth—they are *acted upon*. This Article focuses on the most vulnerable youth—as they are among those with the greatest need—and proposes mechanisms to make their voices heard as regards COVID-19 vaccinations. However, the rights to bodily autonomy and health should be emphasized for all young people. The COVID-19 pandemic has only highlighted the disparities that exist among youth. It is this Author's hope that it will lead our society to

Systems and Parties, *in* JUVENILE LAW: DEPENDENCY § 1.2 (2017).

275. *Cf.* Jade Wexler, Deborah K. Reed, Erin E. Barton, Marisa Mitchell & Erin Clancy, *The Effects of a Peer-Mediated Reading Intervention on Juvenile Offenders' Main Idea Statements About Informational Text*, 43 BEHAV. DISORDERS 290, 297–98 (2018). Using student teachers has also increased adolescents' understanding of sexual health practices. Anjali Shekar, Abby Gross, Ellen Luebbers & Jesse Honsky, *Effects of an Interprofessional Student-Led Sexual Education Program on Self-Efficacy and Attitudes About Sexual Violence in Youths in Juvenile Detention*, 33 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 302, 305 (2020).

276. *See* ROVNER, *supra* note 146, at 9, 11; Rachel M. Burke et al., *Patterns of Virus Exposure and Presumed Household Transmission among Persons with Coronavirus Disease, United States, January–April 2020*, 27 EMERGING INFECTIOUS DISEASES 2323 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8386767/ [https://perma.cc/K7J7-Q5EJ] (describing the risks of transmission of COVID-19 within households).

solutions, radical change, and investment in these valuable, and underserved, members of our community.