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Did Anyone Ask the Child?: Recognizing Foster Children's Rights to Make Mature Decisions Through Child-Centered Representation

Katie Chilton

DID ANYONE ASK THE CHILD?: RECOGNIZING FOSTER CHILDREN'S RIGHTS TO MAKE MATURE DECISIONS THROUGH CHILD-CENTERED REPRESENTATION[†]

ABSTRACT

A child placed in foster care finds themselves in an especially vulnerable position. Removed from their homes, apart from family, and living with strangers, a foster child's voice often gets lost in the shuffle. While the Supreme Court has recognized some constitutional rights for children, legislators and judges tread lightly when expanding children's rights for fear of infringing upon parents' fundamental rights to determine the care and upbringing of their children. This situation creates a unique disadvantage for a child in foster care who is subject to the trauma of removal, placement in a temporary home of strangers, outside the bounds of parental protection, and often without a voice or an advocate.

This Comment focuses on the plight of foster children in America's legal system and how children's lack of decision-making authority leaves their rights under-protected. Through analysis of prominent Supreme Court cases discussing parents', children's, and foster parents' rights, and an examination of state and federal foster care legislation, this Comment argues that the foster child often falls through the gaps among parents, foster parents, and state officials, none of whom exercise full authority over the child. Moreover, the Court's justification for its failure to grant children the full spectrum of rights rests largely on the premise that the child is cared for by a fit, loving parent who acts in the child's best interests. However, for the child in foster care, this premise is flawed from the start. The foster child is not in the custody of their legal parent.

This Comment argues that courts must adopt and expand the mature minor doctrine to provide a framework for entertaining and assessing the foster child's ability to make rational, informed decisions about their own life. Moreover, states must amend their statutory child welfare schemes to guarantee children in foster care the right to an attorney, and, specifically, an attorney who advocates for the child's expressed wishes throughout the child's time in foster care. Through these measures, states can return some of the continuity that

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children in foster care have lost by allowing the children themselves to have a voice.

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INTRODUCTION

On June 17, 2021, the Supreme Court decided its second major case concerning the foster care system.[1] Despite the Court's careful contemplation of the rights attendant to parties on both sides of the litigation, one consideration remained notably absent from the Court's determination: the interests of the foster child. In *Fulton v. City of Philadelphia*, the Court considered whether a religious foster care agency contracting with the City of Philadelphia could discriminate against prospective foster parents on the basis of a couple's sexual orientation.[2] The Court unanimously concluded that the City's refusal to contract with the religious foster care agency violated the agency's First Amendment rights.[3] However, as is often the case with state involvement in the lives of children, the Court carefully deliberated the constitutional rights of the adult parties without more than a mere nod to what rights and interests the foster children themselves might have in the situation when, arguably, they were the most affected party.[4]

This Comment explores the rights of the foster care child against the backdrop of the children's rights movement, focusing on how the broader debate surrounding children's rights intersects with the specific needs of the child in foster care. This Comment argues that more active, decision-making rights must be afforded to children in foster care to truly facilitate the best interests of the child. The current state of the foster care system fails to adequately protect the rights of children, demanding a more child-centered solution.

This Comment proceeds in five parts. Part I provides an overview of the rights of legal parents, the State, and foster parents as they currently stand, discussing how the fractured legal oversight granted to each of these parties creates what this Comment calls the "rights gap" in the life of the foster child. Part II outlines the constitutional rights of children both inside and outside of state custody, specifically via analysis of the landmark Supreme Court cases that have recognized and limited the rights of children. Secondly, it explores the

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[1] *See U.S. Supreme Court: Adoption, Foster Care*, ABA, https://www.americanbar.org/groups/public_interest/child_law/resources/case-law/u-s—supreme-court/ (compiling a list of landmark Supreme Court cases relating to children, adoption, and foster care and noting only one case relating directly to the rights of key stakeholders in the foster care system); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021). The first major Supreme Court case covering the foster care system was *Smith v. Organization of Foster Families for Equality and Reform*. 431 U.S. 816, 816–17 (1977).

[2] *Fulton*, 141 S. Ct. at 1882.

[3] *Id.* at 1874, 1882. The Court's analysis primarily rested on whether the City's laws were permissible under the Free Exercise Clause of the First Amendment. *Id.* at 1874.

[4] *See generally id.* at 1878–82.

origins and mechanics of the mature minor doctrine. Part III examines how federal and state foster care legislation expand and interpret the rights of the foster child. It then argues that the rights of foster children primarily fall into two categories—what this Comment dubs "passive" rights and "active" rights—asserting that children in foster care are granted the former under most state statutory schemes but denied the latter.

Part IV proposes a two-part solution that increases the protection of rights for children in foster care. First, juvenile and state courts must implement and expand the mature minor doctrine as a framework for deferring to the wishes of the child, relying on a child's age, maturity, and moral agency to determine the level of deference that should be afforded to the child's wishes. Second, states must mandate legal representation for foster children in *all* judicial or quasi-judicial actions in the form of a child-centered attorney who represents the express wishes, rather than best interests, of the child. Finally, Part V addresses the implications of the two-part solution advocated in Part IV.

I. THREE'S A CROWD: THE RIGHTS OF LEGAL PARENTS AND FOSTER PARENTS, AND THE POWERS OF THE STATE

This Part provides an overview of the rights of key figures in the foster child's life: the legal parent, the State, and the foster parent. First, this Part discusses the mechanics of the foster care system and how it works. Second, it examines Supreme Court cases establishing and defining parental rights governing the upbringing and care of the child. Third, it explores the power of the state to intervene in the parent-child relationship, analyzing what countervailing interests allow the state to remove a child from the custody of their legal parents. Fourth, it examines the rights of the foster parent, primarily exploring a sampling of state laws and the Court's 1977 holding in *Smith v. Organization of Foster Families for Equality and Reform (O.F.F.E.R.)*[5] as a basis for defining the outer limitations of the foster parent's rights. Finally, it argues that these three parties fail to provide adequate protection for the rights of the foster child due to the incomplete set of rights held by each individual party.

[5] *Smith*, 431 U.S. at 855–56.

A. The Foster Care System: An Overview

On any given day in the United States, there are over 400,000 children in foster care.[6] A child enters foster care for a variety of reasons, including voluntary surrender of the child by the parents; death or incarceration of the child's parents; or the determination of parental unfitness due to abuse or neglect.[7] In these situations, the state assumes temporary care of the child until they can be reunited with the parent or the state elects to terminate the parent's rights to the child, making them eligible for adoption.[8] During this interim period, the state assumes legal custody of the child, but often transfers physical custody to a foster care agency, which then places the child in a temporary living situation with foster parents or—in an increasingly rare number of cases—a group home or institutional care.[9]

As many as 6% of children in the United States will enter the foster care system before they turn eighteen, and the federal government alone spends approximately $5 billion a year to reimburse states for foster care expenditures.[10] Despite foster care's massive size and the high volume of children continuously entering and exiting the system, the standard of care within the foster care system varies significantly among different homes and caretaking facilities.[11] Moreover, although there have been numerous efforts to reform the foster care

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[6] ADMIN. FOR CHILD. & FAMILIES: CHILD.'S BUREAU, THE AFCARS REPORT 1 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf [hereinafter ADMIN. FOR CHILD. & FAMILIES: CHILD.'S BUREAU, THE AFCARS REPORT] (reporting that on September 30 of each fiscal year spanning from 2016 to 2020, there was an average of 427,096 children in the United States' foster care system).

[7] Matthew R. Asman, *The Rights of a Foster Parent Versus the Biological Parent Who Abandoned the Child: Where Do the Best Interests of the Child Lie?*, 8 CONN. PROB. L.J. 93, 106 (1993); *see Foster Care Explained: What It Is, How It Works, and How It Can Be Improved*, ANNIE E. CASEY FOUND. (May 20, 2022), https://www.aecf.org/blog/what-is-foster-care.

[8] GA. DEP'T HUM. SERVS., FOSTER CARE IN GEORGIA 1, https://dhs.georgia.gov/sites/dhs.georgia.gov/files/DFCS.Foster%20Care.5.12.pdf (explaining most children in foster care return to their families, while others are adopted or stay in the system for long-term care).

[9] Mark C. Fleegle, Smith v. Org. Foster Fams. for Equality & Reform*: Adequacy of Procedures to Protect Whatever Liberty Interest Foster Families May Have*, 5 OHIO N.U. L. REV. 513, 514 (1978); Child Welfare Info. Gateway, *Group and Residential Care*, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN FOR CHILD. & FAMILIES, https://www.childwelfare.gov/topics/outofhome/group-residential-care/ (noting the Federal Family First Prevention Services Act's preference for family foster homes over group homes).

[10] Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 5 (2016); U.S. DEP'T HEALTH & HUM. SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 1 (2005), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//138206/ib.pdf.

[11] Teresa Wiltz, *Finding Foster Families for Teens is a Challenge in Many States*, PEW CHARITABLE TRS. (June 20, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/20/finding-foster-families-for-teens-is-a-challenge-in-many-states (discussing the difficulty of finding foster families for teens, particularly after the Family First Prevention Services Act placed stringent restrictions on children's stays in congregate care facilities, or "group homes").

system throughout the past fifty years,[12] deep fractures still remain, with racial and ethnic disparities,[13] overburdened caseloads,[14] and continual reports of abuse,[15] leaving children vulnerable to the very kinds of ills the system is designed to prevent.[16]

Despite the numerous strains[17] already burdening America's child welfare efforts, the plight of foster children is often exacerbated by their inability to advocate for their own rights amidst a network of other actors.[18] The framework of children's constitutional rights in America rests on a presumption that the child has a parent or a competent guardian making decisions for them in a way that shields them from harm and neglect.[19] However, in the case of the foster child, this framework is often flawed from the start, since many children enter the system due to a finding of abuse or neglect by the child's legal parent(s).[20] In these situations, the parent[21] often retains some measure of legal rights over

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[12] Michael S. Wald, *New Directions for Foster Care Reform*, 68 JUV. & FAM. CT. J. 7, 10 fig. 1 (2017).

[13] *See* Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 217–18 (2013) (discussing the disproportionately high numbers of Native American and black children in America's foster care system).

[14] Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 CHILD., FAMS., & FOSTER CARE 74, 77 (2004) (identifying overburdened caseloads and high staff turnover as "major" problems in the child welfare system).

[15] *See, e.g.*, Josh Salman, Daphne Chen & Pat Beall, *Foster Kids Lived with Molesters. No One Told Their Parents.*, USA TODAY (Oct. 16, 2020, 2:42 PM), https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002/; Michael Wilson, Ashley Southall & Chelsia Rose Marcius, *At Birth, She Already Had a Case File. At 7 Years Old, She Was Dead*, N.Y. TIMES, https://www.nytimes.com/2021/08/30/nyregion/child-dead-foster-care.html (commenting on the failures of the New York foster care system to detect abuse and neglect in the case of Julissia Batties, a seven-year-old girl in and out of the New York foster care system throughout her life who was tragically beaten to death).

[16] *See, e.g.*, Wald, *supra* note 12, at 8 (enumerating the many issues with the foster care system in America, including "instability, impermanence, and the uneven quality of care").

[17] *See, e.g.*, Dale Margolin Cecka, *The Civil Rights of Sexually Exploited Youth in Foster Care*, 117 W. VA. L. REV. 1225, 1227 (2015) ("[W]ell-documented challenges in the child welfare system[] . . . include[] 'poor monitoring[;] . . . inadequate policies, training, and supervision; lack of effective decision making tools and safety assessment protocols; and poor tracking systems, along with high caseloads that limit the time available for visiting with families.'" (citation omitted)); Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 2–3 (2006) (discussing the "legal conundrum" of pregnant and parenting youth in foster care, who often lack rights over their own lives, but maintain a responsibility to govern the care and upbringing of their children).

[18] *See* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2171 (2011).

[19] *Id.* at 2101.

[20] *Foster Care Explained: What It Is, How It Works, and How It Can Be Improved*, ANNIE E. CASEY FOUND. (May 20, 2022), https://www.aecf.org/blog/what-is-foster-care.

[21] While the term "parent" is often used broadly to encompass both legal and biological parentage, these concepts are not necessarily synonymous in the law. For instance, Georgia law defines "biological father" as "a male who impregnated the biological mother resulting in the birth of the child." GA. CODE ANN. § 19-8-1(2)–(3) (2018). By contrast, Georgia law defines "legal father" to encompass a man who "[h]as legally adopted such

the child,[22] since the ultimate goal in most cases is to eventually reunite the child and legal parent, if possible.[23] When a child is in state custody, the state steps into the child's life to exercise a greater degree of legal control than it otherwise would.[24] In this period, key decisions in a child's life are divided between state officials and the child's legal parent, parties that are often at odds with one another due to the contentious nature of state-initiated child removal.[25]

In addition to the complex relationship between the state and a child's legal parent, the foster parent, as temporary custodian, also plays a role in the foster child's life. This party adds another stakeholder with the ability to make daily decisions on behalf of the child,[26] but without the same panoply of rights as the

child; [w]as married to the biological mother of such child . . . within the usual period of gestation, unless paternity was disproved . . . or [h]as legitimated such child." GA. CODE ANN. § 19-8-1(11) (2018). This Comment will primarily use the terminology of "legal parent," not to the exclusion of biological parentage, but also not necessitating a biological connection between parent and child.

[22] CASA: COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN, WHEN YOUR CHILD IS IN FOSTER CARE: A HANDBOOK FOR PARENTS AND GUARDIANS 1, https://fopjc.org/wp-content/uploads/2017/08/Parent_Guardian-Handbook181.pdf ("As the parent or guardian of a child in foster care, you have the right to: [k]now the reason your child was removed[,] [k]now and understand what you must do to have your child returned to you[,] [b]e represented by an attorney[,] [b]e notified of the date and time of all court hearings[,] . . . [and] [r]eceive updates from your social worker on your child's health, development, behavior and progress in school.").

[23] 42 U.S.C. § 675(5)(B) ("[T]he status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review . . . to determine . . . the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home . . . ."); *see* Zach Strassburger, *Medical Decision Making for Youth in the Foster Care System*, 49 J. MARSHALL L. REV. 1103, 1142–43 (2016) (noting that a majority of children who enter the foster care system are eventually reunited with their legal parents, with over 75% of reunifications occurring within the first year of a child's placement in foster care).

[24] *Compare* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 189–190 (1989) (holding that the state has no duty to protect children who are not within its physical custody), *with* Laura A. Harper, *The State's Duty to Children in Foster Care—Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793, 795 (2003) (explaining that, upon a finding of abuse or neglect, a government "agency may obtain a court order [to remove] the abused child from his or her home" and into the custody of the state).

[25] Kendra Huard Fershee, *The Parent Trap: The Unconstitutional Practice of Severing Parental Rights Without Due Process of Law*, 30 GA. STATE UNIV. L. REV. 639, 649 (2014) (describing the advent of an "adversarial" relationship between courts and parents deemed to be unfit in the mid-to-late-1800s when courts began involving themselves in situations of child abuse, and noting the continuance of this "struggle" in the modern child custody context); Santosky v. Kramer, 455 U.S. 745, 759–60 (1982) ("[T]he fact-finding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. . . . Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.").

[26] *See, e.g.*, GA. CODE ANN. § 49-5-281(a) (2019) (enumerating a number of rights held by foster parents, including: the right to participate in planning a foster child's visitation with his or her biological parent, the right to be considered as a preferential placement when a child who was formerly under the foster parent's care reenters the foster system, and the right to be considered as the first choice of permanent placement for a child

fit legal parent.[27] It is against this complicated landscape that the foster child's rights are often inadequately represented, as the child struggles to find their voice and express their views amidst a host of other parties that often maintain competing interests and disagree on what outcomes appropriately serve the "'best interests' of the child."[28]

B. Constitutional Rights of the Parent

The rights of parents are well-established in American jurisprudence.[29] In 1923, in *Meyer v. Nebraska*, the Court first recognized the substantive due process rights of parents to "establish a home and bring up children."[30] In *Meyer*, the Court held that a Nebraska law restricting the teaching of foreign languages was an unconstitutional violation of the "liberty" guaranteed by the Fourteenth Amendment.[31] The Court in *Meyer* explicitly recognized "the natural duty of the parent to give his children education," expanding the liberty interest violated by the Nebraska law to protect the family unit's right to autonomy.[32] This nod to parental rights laid the groundwork for later cases to build on the idea of the

who goes up for adoption and has lived with the foster parent for more than twelve months); DEP'T HUM. SERVS. ONLINE DIRECTIVES INFO. SYS., GEORGIA DIVISION OF FAMILY AND CHILDREN SERVICES CHILD WELFARE POLICY MANUAL § 14.26 (2021) (describing the duty of a child's temporary caregiver to apply a "reasonable and prudent parenting standard" while making decisions in the day-to-day care of the child or children placed under their physical custody).

[27] Smith v. Org. Foster Fams. for Equal. & Reform, 431 U.S. 816, 844–47 (1977) (finding that, despite the "deeply loving and interdependent relationship between an adult and a child in his or her care[,]" the foster family "has its source in state law and contractual arrangements[,]" and thus the liberty interests of the foster parent must be "substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents").

[28] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 1, 2 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf (explaining the centrality of the "best interests of the child" standard in judicial determinations affecting "placement and [child] custody determinations, safety and permanency planning, and proceedings for termination of parental rights"). The "best interests of the child" permeates many decisions surrounding the care and custody of children, and although it denotes no set definition across jurisdictions, the standard generally allows courts to consider a number of factors such as emotional ties between the child and their siblings or parents; the parents' capacity to provide for the child; the mental, physical, and emotional needs of the child; and various other factors that may come to bear on the child's situation in both positive and negative ways. *Id.*

[29] *See* Linda L. Lane, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 837 (1988).

[30] 262 U.S. 390, 399 (1923); *accord* Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM. STUD. 71, 73 (2006). In 1920, Robert Meyer, a teacher at a parochial school in Nebraska, was convicted of violating the Nebraska's anti-foreign language law. Lawrence, *supra*, at 71–74. After his conviction was upheld by the Nebraska Supreme Court, Meyer appealed to the U.S. Supreme Court, where his conviction was overturned. *Id.*

[31] *Meyer*, 262 U.S. at 400.

[32] *Id.* at 400–01 ("Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.").

fundamental right of a parent to make key decisions in the upbringing of their child.[33]

Two years after *Meyer*, the Court decided its second major parental rights case, *Pierce v. Society of Sisters*.[34] The Court in *Pierce* struck down an Oregon compulsory education statute that required all children between ages of eight and sixteen to attend public schools, holding the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[35] The Court reaffirmed its prior recognition of parental rights, going on to proclaim, "[t]he child is not the mere creature of the State," but rather, the parents "have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[36] In framing the child as such, the Court reinforced the idea of the family as a province carved out from undue interference by the state, thus strengthening the jurisprudence recognizing parental rights.[37]

Meyer and *Pierce* set the stage for subsequent cases upholding a parent's right to make key decisions for their child. The Court has upheld parental rights in other contexts, such as an unwed father's right to a hearing on parental fitness prior to the removal of his children;[38] an unwed father's right to block the adoption of his children where the father had been involved in the children's lives;[39] and parents' rights to govern the religious upbringing and education of their children, even where it deviated from state education regulations.[40] In 1982, the Court struck down a statute requiring only "fair preponderance of the evidence" as the standard for termination of parental rights, mandating instead that the state meet the higher standard of clear and convincing evidence given the fundamental nature of parental rights.[41] The Court even affirmed the right of

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[33] *See, e.g.*, Pierce v. Soc'y Sisters, 268 U.S. 510, 534–35 (1925); Wisconsin v. Yoder, 406 U.S. 205, 207, 214, 222, 232 (1972); Troxel v. Granville, 530 U.S. 57, 65, 77 (2000).

[34] *Pierce*, 268 U.S. at 534–35.

[35] *Id.* at 535.

[36] *Id.*

[37] Richard Seid, *75 Years After* Pierce v. Society of Sisters, 78 U. DETROIT MERCY L. REV. 373, 374 (2001) ("Furthermore, [*Pierce*], read for all it is worth, opens the door to a limitless and standardless development of substantive due process.").

[38] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[39] Caban v. Mohammed, 441 U.S. 380, 381–82 (1979).

[40] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

[41] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982). The Court in *Santosky* noted that, even when parents fail to act as "model parents," their fundamental liberty interest in the care and upbringing of their children "does not evaporate." *Id.* at 753. Moreover, in *Reno v. Flores*, the Court noted the best interests of the child may be "subordinated to the interests of other children, or indeed even to the interests of the parents or guardians," suggesting the best interests of the child standard is not always the applicable litmus test to determine parental fitness. 507 U.S. 292, 304 (1993).

parents to commit their child to a mental institution over the child's own objection, reasoning that the law presumes parents possess superior capacity for judgment, rational decision-making, and "generally . . . act in the child's best interests."[42] In one of its more recent parental rights cases, the Court also protected the parent's right to govern decisions regarding child visitation absent a finding of parental unfitness.[43]

Despite the Court's consistent affirmation of parental rights, it has set limits concerning who is entitled to the rights and responsibilities of a legal parent and what those rights entail. For instance, the Court has rejected the rights of fathers to establish paternity or legitimate their children absent some indicia of relationship with the child,[44] and, in some cases, has rejected such a right even when such indicia of relationship *did* exist.[45] In the realm of representation, the Court has held indigent parents are not constitutionally entitled to an attorney in child custody proceedings, despite the gravity of the interests at stake.[46] Further, as discussed in the following section, parental rights are subject to significant limitations by the state when the child is endangered or is at risk of endangerment.[47]

Thus, it is clear the Court grants significant, though not limitless, authority to the legal parent to make decisions regarding the upbringing of their child. This authority often wins out over other competing interests held by third parties or

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[42] Parham v. J. R., 442 U.S. 584, 602–03, 620–21 (1979). However, the Court in *Parham* conditioned their holding on the reasoning that the state statute required third-party review before a child could be institutionalized. *Id.* at 604, 606, 620–21.

[43] *See* Troxel v. Granville, 530 U.S. 57, 66–67 (2000).

[44] Lehr v. Robertson, 463 U.S. 248, 261 (1983) (disallowing a putative father from blocking or vacating an adoption of his biological child where the father had not established a substantial relationship with the child, noting "the mere existence of a biological link does not merit equivalent constitutional protection"); Quilloin v. Walcott, 434 U.S. 246, 255–56 (1978) (holding a biological father was not allowed to bar his child's adoption where the biological father was never substantially involved in the child's life and failed to petition for legitimation until the child was eleven years old).

[45] *See* Michael H. v. Gerald D., 491 U.S. 110, 128–29 (1989) (finding that a biological father, despite having a relationship with his child, could not establish paternity where the child already had a presumptive father under relevant state law).

[46] Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 18, 33 (1981). *But see* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 639 (2006) (noting that, despite the Court's holding in *Lassiter*, most states do provide counsel for indigent parents in proceedings terminating parental rights).

[47] *See infra* Section I.C.

the state,[48] but can be temporarily suspended—or even revoked—if such action is demanded by the countervailing interests of child protection.[49]

C. Parens Patriae: The Powers of the State

Parens patriae[50] is a legal doctrine encompassing the state's power to assume care and protection of a child.[51] When the state removes a child from their legal parents due to a finding of actual or perceived abuse or neglect, the state is exercising its parens patriae authority.[52] Under this authority, the state encroaches on the rights of the parent to protect the child's best interests.[53] The foster care system is one of the state's mechanisms for exercising its parens patriae authority when it determines a child is no longer safe at home.[54]

The Court explicitly addressed the state's power to exercise its parens patriae authority in *Prince v. Massachusetts*.[55] In *Prince*, the Court considered whether a child's guardian,[56] also a professing Jehovah's Witness,[57] violated Massachusetts's child labor laws by furnishing her nine-year-old niece with religious materials to distribute on the street.[58] The guardian argued her actions were protected by the First Amendment Free Exercise clause and the right to parental authority recognized in *Meyer*.[59] Though the Court acknowledged the importance of the religious and parental rights at stake, the Court ultimately

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[48] Pierce v. Soc'y Sisters, 268 U.S. 510, 534–35 (1925); Santoksy v. Kramer, 455 U.S. 745, 753 (1982); Reno v. Flores, 507 U.S. 292, 304–05 (1993) (denying a facial challenge by a class of juvenile aliens to an Immigration and Naturalization Service regulation that required juvenile aliens to be detained on suspicion of being deported and to be released only to their parents or legal guardians absent especially compelling circumstances).

[49] *See infra* Section I.C.

[50] The terminology of parens patriae was taken from chancery court, used to describe the state's power to take control of the property and person of the child when acting *in loco parentis*, or in the place of a parent. Stacy Robinson, Comment, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L.Q. 395, 395 n.2 (1993).

[51] Harper, *supra* note 24, at 802.

[52] Carolyn Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 COLUM. J.L. & SOC. PROBS. 149, 165–66 (1980).

[53] *Id.* at 166.

[54] Harper, *supra* note 24, at 802–03.

[55] 321 U.S. 158, 165–67 (1944).

[56] The plaintiff in *Prince* was the aunt of the child in her care and had legal custody over the child, thus the Court ascribed to her the same level of parental rights as it would a natural parent. *Id.* at 159, 161.

[57] Jehovah's Witnesses are members of a Christian religious group, known for their extreme devotion to proselytism and idiosyncratic beliefs, including deep distrust of the government and other organized institutions. Michael Lipka, *A Closer Look at Jehovah's Witnesses Living in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2016), https://www.pewresearch.org/fact-tank/2016/04/26/a-closer-look-at-jehovahs-witnesses-living-in-the-u-s/.

[58] *Prince*, 321 U.S. at 159–61.

[59] *Id.* at 164.

ruled against the guardian, finding the state could—as a valid exercise of its parens patriae authority—restrict parental control by imposing limitations "to guard the general interest in youth's well-being."[60] The Court maintained that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare,"[61] and that such authority may be exercised to a greater degree over children than adults.[62] Thus, the Court in *Prince* set key limitations on parents' rights to control the activities of their child where the parents' choices might put the child at risk of harm.[63]

D. The Rights of the Foster Parent

Once the state has exercised its authority to remove a child from their legal parent or guardian, the child is sometimes placed into the physical custody of the state, often in a foster home, to receive temporary care.[64] One prevalent criticism of the foster care system, however, is that a foster child's status is anything but temporary.[65] The issue of "foster care drift"—when a child moves from home to home and is trapped in the system for years on end—garnered widespread attention in the 1970s.[66] Despite growing concerns and increasing federalization of foster care legislation,[67] states differ significantly on what rights and authority foster parents hold in relation to the children in their care.[68]

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[60] *Id.* at 166.

[61] *Id.* at 167.

[62] *Id.* at 168.

[63] *Id.* at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before [their children] have reached the age of full and legal discretion when they can make that choice for themselves."). However, the Court has not imposed a clear duty of care on the state for children in its custody. Reno v. Flores, 507 U.S. 292, 304 (1993) ("Thus, child-care institutions operated by the State in the exercise of its *parens patriae* authority . . . are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care." (internal citations omitted)); *see also* Tanya M. Washington, *Throwing Black Babies out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 13 (2008) ("The long-term social, educational, developmental and emotional costs to children raised in foster and institutional care are well documented.").

[64] *See* Harper, *supra* note 24, at 802–03.

[65] Curtis, *supra* note 52, at 150.

[66] *See id.*; Asman, *supra* note 7, at 116.

[67] *See, e.g.*, Wald, *supra* note 12, at 10 fig. 1 (depicting a timeline of major federal legislation regulating the foster care system and exhibiting twenty-nine separate pieces of legislation passed from 1974 to 2015).

[68] *See generally* CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS (2018), https://www.childwelfare.gov/pubpdfs/background.pdf (describing over the course of ninety-four pages the varying state approaches to background check requirements for prospective child caretakers); CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, KINSHIP GUARDIANSHIP AS A PERMANENCY OPTION (2018), https://www.childwelfare.gov/pubpdfs/kinshipguardianship.pdf (outlining the differing approaches in all states

In all states, foster parents have at least some authority to make decisions concerning the day-to-day upbringing of foster children, such as clothing,[69] meals, extracurricular activities,[70] and daily needs.[71] Foster parents also have the right to assist with development of the child's care plan in many states,[72] and, in a few states, foster parents even have the right to refuse placement or request removal of a child from their foster home.[73] Moreover, in Nevada, foster parents can even limit a foster child's exercise of the child's own rights if the child causes disruption in the foster home.[74]

However, no matter how close to parental rights they may seem, the statutory rights granted to foster parents do not rise to the same level as those of a fit legal parent.[75] The actions of the foster parent are subject to oversight and approval

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and U.S. territories to allowing kinship guardianship as opposed to traditional foster care placements and each state's varying grant of rights and duties to kinship guardians).

[69] *See, e.g.*, GA. DIV. FAM. & CHILD SERVS., FOSTER PARENT MANUAL 53 (2017), https://fostergeorgia.com/wp-content/uploads/2017/09/Georgia-Foster-Parent-Manual-September-2017.pdf (establishing a foster child's clothing as the purview of the foster parent and the caseworker) [hereinafter FOSTER PARENT MANUAL].

[70] *See, e.g.*, *id.* at 22 (noting the responsibility of choosing a child's extracurricular activities is held by the foster parent).

[71] MO. REV. STAT. § 210.566(1) (2020) (granting foster parents the right to "make decisions about the daily living concerns of the child"); S.D. ADMIN. R. 67:42:05:13 (1) (2016) ("[A foster parent] shall provide daily activities designed to promote physical, social, intellectual, and emotional development of the children in the foster parent's home in accordance with the reasonable and prudent parent standard."); ILL. DEP'T OF CHILD. & FAM. SERVS., FOSTER FAMILY HANDBOOK 13 (2014) (requiring that foster parents "have input into educational planning" and "encourage children to participate in school-related and extracurricular activities"); TENN. DEP'T OF CHILD.'S SERVS., FOSTER PARENT HANDBOOK: JOURNEY TO EXCELLENCE 19 (2022) ("On a daily basis, foster parents . . . [p]rovide day to day care.").

[72] *See, e.g.*, CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES 3 n.10 (2018), https://www.childwelfare.gov/pubPDFs/caseplanning.pdf (explaining that foster parents may participate in a foster child's case plan in eighteen states); LA. STAT. ANN. § 46:286.13(6) (2007) ("Foster parents shall be entitled to . . . [t]he right to actively participate in the development of the child's case plan, educational plan, and in other service planning decision-making processes."). A case plan is a vital part of a foster child's experience in the child welfare system. The case plan, also known as a care plan, outlines aspects of the child's time in foster care, such as the circumstances causing the child's placement in foster care, an assessment of the child's (and the child's family's) strengths and needs, specific goals for the child's permanency, a timeline for services, and a schedule of visits between the child and family members. *See, e.g.*, GA. CODE ANN. § 15-11-201 (2020).

[73] *See, e.g.*, ALA. CODE § 38-12A-1(11) (1975) (affirming the foster parent's right to refuse placement of a foster child within the parent's home and to request the removal of a child from the parent's home with no adverse consequences).

[74] *See, e.g.*, NEV. REV. STAT. ANN. § 432.545 (West 2013) (authorizing a foster parent to impose "reasonable restrictions" on a child's exercise of his or her rights to ensure "order, discipline or safety of the foster home").

[75] Smith v. Org. Foster Fams. for Equal. & Reform, 431 U.S. 816, 844–47 (1977) (finding that, despite the "deeply loving interdependent relationship between an adult and a child in his or her care," the foster family "has its source in state law and contractual arrangements," and thus the liberty interests of the foster parent "must

by the foster care agency[76] and, ultimately, the state.[77] This system, punctured by supervision from various parties, leaves foster parents with an incomplete set of rights over the children in their care, producing difficulty for foster parents in navigating the constant decisions attendant to everyday life.[78] For instance, the consent of a minor's legal parent or guardian is often required before the minor can receive medical treatment, even in the face of a medical crisis. This requirement is made significantly more difficult when the legal parent or guardian is difficult or even impossible to access.[79] Thus, although physicians may be able to provide care under an emergency exception, this quandary might result in some delay of treatment and confusion because the proper consent-holder is not the same party providing daily care to the child.[80]

In addition to the everyday caretaking decisions largely governed by state law, the Court also weighed in on the foster parents' rights to a relationship with the child in the 1977 case, *Smith v. O.F.F.E.E.R.*[81] The plaintiffs in *O.F.F.E.E.R.*[82] sought an injunction to a New York regulation allowing the state to remove foster children from the foster parents' home despite the foster parents' objections.[83] While the Court acknowledged that a close relationship may exist

be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents").

[76] TERESA TOGUCHI SWARTZ, NEW APPROACHES IN SOCIOLOGY: STUDIES IN SOCIAL INEQUALITY, SOCIAL CHANGE, AND SOCIAL JUSTICE *in* PARENTING FOR THE STATE: AN ETHNOGRAPHIC ANALYSIS OF NON-PROFIT FOSTER CARE 3 (Nancy A. Naples ed., 2013); *see, e.g.*, FOSTER PARENT MANUAL, *supra* note 69, at 8.

[77] TOGUCHI SWARTZ, *supra* note 76, at 3; *see, e.g.*, GA. COMP. R. & REGS. 290-9-2-.06(10) (stating behavior management of foster children by their foster parents must not include techniques such as corporal punishment, seclusion, or deprivation of meals, hydration, or sleep).

[78] Hannah Roman, *Foster Parenting as Work*, 27 YALE J.L. & FEMINISM 179, 181, 195, 200 (2016); *see, e.g.*, N.J. DEP'T CHILD. & FAMILIES, A GUIDE FOR PARENTS WHEN YOUR CHILD IS IN FOSTER CARE 17 (2014), https://www.nj.gov/dcf/families/dcpp/ParentGuideFosterCare_English.pdf (stating that, among other rights, the legal parent retains the right "to make important decisions regarding [the] child's health and educational needs" while their child is in foster care).

[79] Strassburger, *supra* note 23, at 1124 (explaining that if a foster child needs a major medical procedure and the legal parent cannot be reached, a welfare agency or a guardian *ad litem* must petition the judge for permission to obtain the procedure, which can take considerable time).

[80] *See, e.g.*, Moira A. Szilagyi, David S. Rosen, David Rubin, Sarah Zlotnik, 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 1142, 1149 (2015) (noting that "[i]n situations in which the birth parent/guardian is uncooperative or unable to provide consent," the child welfare director may be able to provide consent but only "after diligent effort has been made to engage the parent/guardian" and sometimes only after the commissioner has petitioned the courts for consent).

[81] 431 U.S. 816 (1977).

[82] The plaintiff class in *O.F.F.E.E.R.* included a number of individual foster parents and an organization representing foster parents' interests. *Id.* at 818 & n.1.

[83] The relevant New York procedure required the state to provide the foster parents with ten days' notice before removal of the child could be effectuated and allowed the foster parents to object and plead their case in a hearing prior to the removal. *Id.* at 820 n.3. The Court's primary consideration in *O.F.F.E.E.R.* was whether this

between foster parents and children in their care, it left open the question of what constitutional liberty interests—if any—foster parents possess.[84] The *O.F.F.E.R.* majority hypothesized the existence of such a "liberty interest," but decided the case on narrower procedural grounds.[85] However, some subsequent interpreters of *O.F.F.E.R.* have surmised that the Court's opinion points toward a lack of such "liberty interest" for foster parents, especially when pitted against the interest a child's legal parent has in the care and custody of the child.[86] Ultimately, the Court determined that because foster parents did not have a liberty interest in the care and custody of foster children coequal to that of legal parents, New York's removal procedure was constitutional.[87]

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system provided adequate procedural protections to satisfy the Due Process Clause of the Fourteenth Amendment. *Id.* at 818–20; Steven W. Fitschen & Eric A. DeGroff, *Is It Time for the Court to Accept the* O.F.F.E.R.*: Applying* Smith v. Organization of Foster Families for Equality and Reform *to Promote Clarity, Consistency, and Federalism in the World of* De Facto *Parenthood*, 24 S. CAL. INTERDISC. L.J. 419, 420–21 (2015).

[84] *Smith*, 431 U.S. at 844–45, 847 (noting that, although the "appellees' claim . . . raises complex and novel questions," the Court will decide the case on narrower grounds).

[85] *Id.* at 847, 856 ("Since we hold that the procedures provided by New York State . . . are adequate to protect whatever liberty interests appellees *may* have, the judgment of the District Court is reversed." (emphasis added)). In concurrence, Justice Stewart rejected the idea of a liberty interest for foster parents, arguing "the relationship for which constitutional protection is asserted would not even exist" but for the state placing the child with the foster parent. *Id.* at 856. (Stewart, J., concurring). As such, Justice Stewart felt states can choose to dissolve the relationship without considering foster parents' interests at all. *Id.* at 857–58, 863.

[86] Curtis, *supra* note 52, at 170 ("[M]any commentators view [*O.F.F.E.R.*] as discouraging the notion that the child's interests may require an exception to the fit parent's right to custody."); Rodriguez v. McLoughlin, 214 F.3d 328, 341 (2d Cir. 2000) (holding foster parents did not have a liberty interest to the children in their care); Kyees v. Cnty. Dep't Publ. Welfare, 600 F.2d 693, 693, 699 (7th Cir. 1979) (finding foster parents and foster children were not entitled to due process protections prior to removal); Drummond v. Fulton Cnty. Dep't Fam. & Child.'s Servs., 563 F.2d 1200, 1207 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978) (finding the foster family has never been given equivalent protections to the natural or adoptive family in the eyes of the law). *But see* Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 DUKE J. GENDER L. & POL'Y 223, 241 (2008) ("*OFFER* would seem to support the notion that the interests of the foster family in remaining intact have constitutional weight."); *In re* Diana P., 424 A.2d 178, 179 (N.H. 1980) (upholding foster parents' right to intervene in a hearing to terminate parental rights).

[87] *Smith*, 431 U.S. at 853, 855–56. The Court's decision in *O.F.F.E.R.* also prompted numerous conversations regarding psychological and de facto parenthood. In essence, psychological parenthood proposes the true parent of the child, and the child's rightful custodian, is the individual with whom the child has developed the strongest emotional bond, regardless of the biological relationship between the child and that individual. Dailey, *supra* note 18, at 2164. By contrast, de facto parenthood is a court-adjudicated status awarded to an individual who meets certain criteria, often set forth by state statute. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1891(3) (2016). States have recognized these concepts to varying degrees in making permanency determinations for foster children, with several states giving preference to a child's former or current foster parents when considering renewed placement of a child who has formerly been in foster care or adoption of a foster child whose parents' legal rights have been terminated. *See, e.g.*, Fitschen & DeGroff, *supra* note 83, at 427–36 (discussing the spectrum that exists among states of whether to accept or reject the notion of de facto or psychological parenthood); KY. REV. STAT. ANN. § 620.360(1)(o)–(p) (2022).

E. The Rights Gap: The Struggle that Ensues Where No Party Has Complete Legal Rights over the Child in Foster Care

The multiplicity of parties involved in the care and upbringing of the foster child often yields confusion and, unfortunately, dysfunction.[88] While the state is the party that retains custody over a child in foster care,[89] the state has not always been an adequate caretaker of the child. The reality is that state bureaucrats are unable to exercise the same individualized and adaptable authority that a natural parent can over a child. The state is simply too slow, too large, and too distant from a child's daily life to have the empathy and understanding of a natural parent, and, though the state may try to work in the "best interests of the child," its calculus is oftentimes rather cold and limited by the financial and logistical restrictions attendant to operating such a large and complex system.[90]

In the absence of natural parents, the state attempts to overcome these problems through use of foster agencies and, ultimately, foster families or institutional caretakers.[91] But these caretaking parties do not have the rights to exercise the same level of authority over the children in their care as a natural legal parent has.[92] Furthermore, by design, these parties are *intended* to be temporary custodians of the foster child, thus limiting their ability to create the kind of stable and lasting relationships that better serve the child's emotional and psychological needs.[93] The real loser in all this is the child.[94] Thus, when the conflicting and incomplete rights of the legal parent, the state, and the foster parent do not provide adequate protection of the rights of the foster child, additional procedural safeguards must exist to ensure the child's interests are properly represented.

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[88] Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 893–94 (1975) (explaining the conflicting interests between the state, the parents, and the child).

[89] Curtis, *supra* note 52, at 166.

[90] *See* Bellotti v. Baird, 443 U.S. 622, 638 (1979) (discussing the child-rearing process and asserting "this process, in large part, is beyond the competence of impersonal political institutions"); *see also* Harper, *supra* note 24, at 794–95 ("In a system riddled with institutional and professional abuses in which thousands of children suffer from physical abuse and neglect, courts must work to find a suitable standard with which to judge the performance of the child welfare system . . . ."); *supra* Section I.A.

[91] *Smith*, 431 U.S. at 823.

[92] *Id.* at 844–47.

[93] Curtis, *supra* note 52, at 150.

[94] *See, e.g.*, Patricia Whitten, Comment, *The Rights of Foster Parents to the Children in Their Care*, 50 CHI.-KENT L. REV. 86, 92 (1973) ("Because of the weakness of the law in this area, the children are the losers in such custody disputes.").

II. WHAT THE SUPREME COURT SAYS (AND DOES NOT SAY) ABOUT CHILDREN'S RIGHTS

This Part first discusses the rights of children as they have been recognized and limited by the Supreme Court. It then focuses particularly on the mature minor doctrine and judicial bypass procedure and the treatment of these concepts by both the Supreme Court and state courts, suggesting these could be implemented as a viable means of expanding foster children's procedural protections. Finally, this Part looks to the sparse line of Supreme Court precedent addressing the rights of children in state care and custody, arguing this dearth of recognition contributes to the "rights gap"[95] in the lives of foster children.

A. The Supreme Court and the Constitutional Rights of Children

At base, children have constitutional rights.[96] As early as 1932, the Supreme Court in *Powell v. Alabama* recognized constitutional protections afforded to children, but failed to define the scope of these rights.[97] The Court has since expanded its recognition of children's rights in limited areas; however, it has not always allowed the child's interests to prevail against countervailing interests of the state, the child's parents, or other authorities.[98] For instance, the Court has recognized some substantive due process rights for children in juvenile delinquency[99] and free expression contexts.[100] However, when measured against the full scheme of constitutional rights guaranteed to their adult counterparts, the ensemble of rights the Court attributes to children proves relatively slim.[101]

The Court's hesitancy to more broadly recognize the rights of children makes sense in light of the high valuation of parental rights discussed in Part I.[102] The

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[95] *See supra* Section I.E.

[96] Dailey, *supra* note 18, at 2099–100 (explaining that, although children "were largely absent from the class of constitutional rights-holders" for the past two centuries, the Supreme Court first explicitly recognized children as constitutional rights-holders in 1932 in *Powell v. Alabama*).

[97] Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that, despite their youth, defendants were still entitled to due process of law under the Fourteenth Amendment).

[98] *See generally* Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953–92*, 27 FAM. L.Q. 307, 308–10 (1993) (tracing the Supreme Court's treatment of children's rights through the latter half of the twentieth century).

[99] *See generally In re* Gault, 387 U.S. 1, 30–59 (1967) (recognizing a minor's right to a selective number, but not the entirety, of Sixth Amendment rights).

[100] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (finding that students have First Amendment rights which they are hardly expected to "shed . . . at the schoolhouse gate").

[101] *See* Dailey, *supra* note 18, at 2100–01 (partially attributing the "long history of denying children the full range of constitutional rights" to "choice theory," which purports that children lack the requisite mindset to be fully rational actors, and thus are not entitled to the full spectrum of constitutional rights until they come of age).

[102] *See supra* Section I.B.

prevailing fear remains that if the Court granted children *too many* individual, fundamental rights, children's rights would come into frequent conflict with parental rights,[103] undermining the integrity of the family structure so adamantly protected by the Court.[104] However, this framework incorrectly assumes each child has a fit, rational parent acting in the child's best interests.[105] It also assumes that when the child comes to the age of majority, the child will automatically be equipped to make their own rational, mature decisions after receiving the kind of morally and socially formative care a fit parent ought to provide.[106] While this framework may be ideal, it is far from realistic, particularly in the case of the foster child.[107] Research reveals foster children consistently struggle to make the transition from the child welfare system to the freedoms of adulthood, and are often subject to higher rates of substance abuse, homelessness, and incarceration than their peers.[108] These struggles, in part, can be attributed to the child's lack of autonomy while within the system[109] paired with their reaction to the unpredictable changes of life in foster care.[110]

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[103] Dailey, *supra* note 18, at 2100–01 (describing how the Court's "enthusiastic recognition of parental rights" suggests a view that children lack the mature state of mind to exercise their own constitutional rights, thus falling under the umbrella of their parents' status as "constitutional rights-holders").

[104] *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Pierce v. Soc'y Sisters, 268 U.S. 510, 534–35 (1925); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[105] Dailey, *supra* note 18, at 2114 ("The constitutional doctrine of parental rights reflects in part the view that an upbringing for autonomous choice requires, in the first instance, a loving home in which parents have the authority and duty to foster values in their children.").

[106] Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 29–30 (2011) (discussing the "importance of a secure and stable family relationship to a child's healthy development," including the child's ability to self-regulate and gain social competence and "form a sense of his own identity").

[107] *See, e.g.*, Dailey, *supra* note 18, at 2166 (noting the interests of the legal parent and the child are "no longer aligned" where the parent is not the child's primary caregiver); Nora E. Sydow & Victor E. Flango, *Physical and Emotional Well-Being: Court Performance Measures for Children and Youth in Foster Care*, JUV. & FAM. CT. J. 1, 10 (2012) ("[Foster youth] are often exposed to family violence, parental substance abuse and mental illness, homelessness, or chronic poverty.").

[108] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, PREVENTING, IDENTIFYING, AND TREATING SUBSTANCE USE AMONG YOUTH IN FOSTER CARE 2 (2020), https://www.childwelfare.gov/pubPDFs/bulletins_youthsud.pdf (citation omitted) ("According to data from the National Youth in Transition Database, 27 percent of 17-year-olds in foster care had been referred for substance use treatment . . . ."); Shannon Barnett, *Foster Care Youth and the Development of Autonomy*, 32 INT'L REV. PSYCHIATRY 265, 265 (2020) ("[Y]outh who age out of foster care . . . experience rates of homelessness estimated between 20–50% and experience unemployment rates of 20% . . . .").

[109] Barnett, *supra* note 108, at 265 ("[P]oor functional outcomes for many youth involved in foster care suggest that many of these youth may not have adequately developed autonomy.")

[110] For instance, one study showed as many as 27% of children who left foster care for reunification with their legal parents or placement with guardians reentered the foster care system, leading to uncertainty for the child regarding the status of his or her permanent caretaker and skepticism about the likelihood of successful reunification. Fred Wulczyn, FLORIE SCHMITS & SCOTT HUHR, CTR. FOR STATE CHILD WELFARE DATA, REENTRY TO FOSTER CARE: IDENTIFYING CANDIDATES UNDER THE FAMILY FIRST ACT 22 (2019), https://assets.aecf.org/m/resourcedoc/chapinhall-reentrytofostercare-2020.pdf.

Turning again to examine the lean body of case law delineating children's rights more broadly, one of the earliest areas where the Court recognized children's rights was in the realm of juvenile delinquency. In the 1967 case *In re Gault*, the Court held for the first time that children possess a limited number of procedural due process rights in some juvenile proceedings.[111] The Court in *Gault* noted the possible dangers of the broad judicial discretion present in juvenile proceedings, finding children should not lack several of the procedural protections awarded to adults in criminal proceedings.[112] Since *Gault*, the Court has gone even further to recognize certain areas of exceptionalism in the juvenile delinquency context, giving way to additional protections for minors not provided to adult defendants.[113] For instance, the Court has designated the death penalty as applied to minors as a violation of the Eighth Amendment,[114] and held courts should consider age as a factor when evaluating the voluntariness of a confession.[115]

Apart from the juvenile delinquency context, children's rights have also developed in the area of First Amendment free expression and free exercise. As early as 1943, in *West Virginia State Board of Education v. Barnette*, the Court held that schools cannot compel children to recite the Pledge of Allegiance,[116] painting children's rights to free expression in broad strokes that it would temper in later opinions.[117] In a similar vein, the Court held in the 1969 case, *Tinker v. Des Moines Independent Community School District*, that children have First

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[111] *In re* Gault, 387 U.S. 1, 16 (1967) ("The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance.").

[112] *Id.* at 18–19 (1967) (holding that juveniles have a right to notice of charges against them, appointment of counsel, confrontation, cross-examination, and the right against self-incrimination in proceedings where deprivation of their physical liberty is at stake).

[113] The expansion of children's rights in the juvenile justice system are intertwined with the rights of foster care children, given the high rates of "cross-over" between the foster care and juvenile justice systems. Wald, *supra* note 12, at 27.

[114] Roper v. Simmons, 543 U.S. 551, 573–74, 578–79 (2005).

[115] J.D.B. v. North Carolina, 564 U.S. 261, 264, 272 (2011) (basing their conclusion, in part, on the well-established precedent that children are "generally . . . less mature and responsible than adults," and are "more vulnerable or susceptible to . . . outside pressures" (internal quotation marks and citations omitted)); *see also* Haley v. Ohio, 332 U.S. 596, 599–601 (1948) (holding a child's confession taken during an interrogation where the child was without representation or his parents was coerced in violation of the Due Process clause of the Fourteenth Amendment); Gallegos v. Colorado, 370 U.S. 49, 54–55 (1962) (finding a child should not be viewed to possess the same maturity as an adult when determining whether a child's confession was coerced).

[116] 319 U.S. 624, 642 (1943) (affirming children's rights to abstain from saying the Pledge of Allegiance in schools based on ideological or religious objections).

[117] Dailey, *supra* note 18, at 2124 ("The Court did not indicate that it was interpreting the First Amendment's Free Exercise Clause in any way differently than it would have had the school children been adults.").

Amendment rights to free speech and expression, which they are not forced to "shed . . . at the schoolhouse gate."[118]

1. The Abortion Cases: The Mature Minor Doctrine and Judicial Bypass Procedure

Another area where the Court has more readily recognized the rights of children is in the context of medical decision-making and, specifically, a minor's right to an abortion. This body of law illustrates judicial incorporation of the mature minor doctrine, a mechanism for considering a minor's capability of making key decisions. This Comment's proposed solution will draw upon the mature minor doctrine in Part IV.

Only three years after the Court upheld a woman's right to abortion in the 1973 case *Roe v. Wade*,[119] the Court addressed the same question as applied to minors in *Planned Parenthood of Central Missouri v. Danforth*.[120] In *Danforth*, the Court struck down a state statute requiring parental consent before a minor could obtain an abortion.[121] In justifying its decision, the Court reasoned that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," affirming that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."[122]

However, the Court's subsequent treatment of minors' access to abortion after *Danforth* expressed a more reserved approach.[123] For instance, six years after *Danforth*, in *Bellotti v. Baird*, a case also concerning a parental notification statute, the Court explicitly listed three reasons for why the constitutional rights of children cannot be coequal to those of adults: (1) children's "peculiar vulnerability;" (2) "their inability to make critical decisions in an informed,

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[118] 393 U.S. 503, 506 (1969); *see also* Ginsberg v. New York, 390 U.S. 629, 640, 643 (1968) (upholding a New York statute designating certain material "obscene" for minors but not adults by appealing to parental interests in the upbringing of their children and the parens patriae powers of the state to "protect the welfare of children" (internal quotation marks omitted)); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 685 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

[119] 410 U.S. 113, 164–65 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[120] 428 U.S. 52 (1976).

[121] *Id.* at 75.

[122] *Id.* at 74.

[123] *Compare id.* ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."), *with* Bellotti v. Baird, 443 U.S. 622, 638–39 (1979) ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.").

mature manner;" and (3) "the importance of the parental role in child rearing."[124] However, despite the Court's clear outline of the differences between adults and minors, it still struck down the parental consent requirement with a judicial exception for "good cause shown," finding that the good cause standard was still too discretionary to afford mature minors an adequate opportunity to prove their competence to consent to an abortion.[125] Going forward, the Court consistently upheld state statutory schemes with one-parent notification and consent requirements, provided that such statutes allowed for a judicial bypass option, thus preserving the applicability of the mature minor doctrine to this area of law.[126]

Danforth and *Bellotti* demonstrate the Court's adoption of the mature minor doctrine in the abortion context. In these cases, the Court required states to include in their minor abortion statutes a unique procedural protection known as a judicial bypass—a legal mechanism that allows a minor to obtain permission from a judge that overrides a requirement for parental consent or notification prior to obtaining an abortion.[127] However, procuring a judicial bypass is not always easy. For instance, in Georgia, a minor must first file a petition with the clerk's office of any juvenile court in the state.[128] After the minor files their petition with the juvenile court, a judge will schedule a hearing to take place three days after filing where the judge will ask questions to determine whether the minor is mature enough to be granted a judicial bypass, or whether a judicial bypass is in the minor's best interests.[129]

The judicial bypass framework, unique to the context of minors requesting abortions, demonstrates the Court's utilization of an additional procedural protection to allow minors to make autonomous decisions outside the authority

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[124] *Id.* at 634.

[125] *Id.* at 644, 650 (noting the "unique character" of the right to an abortion as one justification for the Court's decision to overturn the statutory scheme in question).

[126] *See* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 899 (1992) (upholding a one-parent consent requirement for a minor to obtain an abortion with a judicial bypass option); Lambert v. Wicklund, 520 U.S. 292, 298–99 (1997) (same). *But see* Hodgson v. Minnesota, 497 U.S. 417, 457–58 (1990) (striking down a state statute requiring two-parent notification on the grounds that it unjustifiably interfered with the privacy of the family).

[127] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976); *Bellotti*, 443 U.S. at 647–48; *Judicial Bypass*, PLANNED PARENTHOOD LEAGUE OF MASS., https://www.plannedparenthood.org/planned-parenthood-massachusetts/online-health-center/judicial-bypass (last visited Aug. 17, 2022).

[128] *Judicial Bypass Wiki: Georgia*, IF, WHEN, HOW: LAWYERING FOR REPROD. JUST., (Aug. 16, 2022, 3:50 PM) https://judicialbypasswiki.ifwhenhow.org/wiki/georgia/#:~:text=What%20is%20a%20judicial%20bypass,free%20if%20you%20want%20one.

[129] *Id.*

of their parents.[130] While the Court was not clear on which constitutional right mandates this additional protection,[131] this procedure holds promising potential for expansion into other decisions a mature minor may be well-poised to make, and, as suggested by this Comment, offers an opportunity to expand the active rights of children in foster care.[132]

Although *Bellotti* did not introduce the mature minor doctrine to the Court until 1972, the doctrine has long been germinating in lower courts and legislatures in contexts beyond abortion. The mature minor doctrine originated in the common law but has been codified by several states.[133] The doctrine allows minors who have shown themselves to be adequately informed, rational decision-makers to supply or withhold consent for medical treatment over the objection of other interested parties, such as the minor's parents, doctors, and the state.[134] The requisite criteria for maturity is set by the jurisdiction in which the minor appeals to the court, but most jurisdictions focus on factors such as "age, ability, experience, education, training, and degree of maturity or judgment

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[130] *Id.*

[131] *See* Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 639 (2002) (arguing *Bellotti* did not recognize an expansion of constitutional rights for minors, but merely shifted the adult oversight of the minor's abortion decision from the parent to the judge).

[132] *See infra* Section IV.A. Further, according to a report compiled by the Children's Bureau, as of September 30, 2020, 47% of children in foster care were age eight or older, while 22% of foster children were age fourteen or older. ADMIN. FOR CHILD. & FAMILIES: CHILD.'S BUREAU, THE AFCARS REPORT, *supra* note 6. Though age is not determinative in the mature minor evaluation, this suggests a significant number of foster children may be well-poised to prove themselves of sufficient maturity to take on greater responsibility in their own decision-making.

[133] Emily Ikuta, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 199 (2016) ("The mature minor exception to the parental consent requirement first developed through common law in the 1800s."). The mature minor doctrine has since been codified in some jurisdictions. *E.g.*, W. VA. CODE ANN. § 16-30-3(o) (West 2022) ("'Mature minor' means a person, less than 18 years of age, who has been determined by a qualified physician, a qualified psychologist, or an advanced nurse practitioner to have the capacity to make health care decisions."); ARK CODE ANN. § 20-9-602(7) (2019) (allowing "[a]ny unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures" to consent for themselves). Other jurisdictions have established the doctrine by judicial decision. *See, e.g.*, Cardwell v. Bechtol, 724 S.W.2d 739, 755 (Tenn. 1987) (establishing the mature minor doctrine in Tennessee); *In re* E.G., 549 N.E.2d 322, 326 (Ill. 1989) (establishing the mature minor doctrine in Illinois, though weighed against the wishes of the third parties such as the minor's parents).

[134] Cara D. Watts, *Asking Adolescents: Does a Mature Minor Have a Right to Participate in Health Care Decisions?*, 16 HASTINGS WOMEN'S L.J. 221, 238 (2005); *see also* Melinda T. Derish & Kathleen Vanden Heuvel, *Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment*, 28 J.L., MED. & ETHICS 109, 110 (2000) (arguing chronically ill mature minors should have the right to withhold consent for life-sustaining medical treatment).

obtained by the child, . . . [and] whether the minor has the capacity to appreciate the nature, risks, and consequences"[135] of the matter at hand.

Presently, at least six states have indicated acceptance of the mature minor doctrine, while most others have remained silent on the issue.[136] Though the Court has not discussed the mature minor doctrine outside the abortion context, several state supreme courts have upheld the doctrine as applied to other types of medical consent provided by minors.[137] Use of the doctrine in several jurisdictions suggests that when it is paired with the procedural protection of the judicial bypass proceeding, it has potential to be expanded beyond the medical context to provide greater recognition for foster children's decision-making abilities in appropriate situations.[138] As discussed in Part IV, this Comment asserts that such potential must become a reality.

B. Constitutional Rights for Foster Children? A Blank Slate

Turning from the state of children's rights broadly to the foster child's rights specifically, Court precedent contouring foster children's rights proves scant. The right to receive food, water, and adequate medical treatment for individuals subject to state care and custody is well-established.[139] Moreover, the Court has upheld the child's affirmative right to education, regardless of citizenship or familial status.[140] However, beyond these most basic rights, the Court has

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[135] Belcher v. Charleston Area Med. Ctr., 422 S.E.2d 827, 838 (W. Va. 1992).

[136] Shawna Benston, *Not of Minor Consequence?: Medical Decision-Making Autonomy and the Mature Minor Doctrine*, 13 IND. HEALTH L. REV. 1, 10 & n.29 (2016) (noting Illinois, Maine, Tennessee, West Virginia, Michigan, and Massachusetts have all "held or suggested that mature minors, like other competent people, have the right to consent to or forego medical treatment" (internal quotation marks omitted)).

[137] *See In re E.G.*, 549 N.E. at 328; *Cardwell*, 724 S.W. at 748–49; *Belcher*, 422 S.E. 2d at 838; Baird v. Att'y Gen., 360 N.E.2d 288, 296 (Mass. 1977).

[138] *See infra* Section IV.A.

[139] *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that the Due Process Clause requires the state to provide individuals involuntary committed in mental institutions with services necessary to ensure "reasonable safety" for themselves and others); DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 199–200 (1989) (noting when the state restrains an individual's freedom through "incarceration, institutionalization, or other similar restraint of personal liberty," the state owes a duty of "food, clothing, shelter, medical care, and reasonable safety"); Strasser, *supra* note 86, at 223 ("Courts in many of the circuits have recognized that foster children have limited rights against the state with respect to the care that they receive."); Nicini v. Morra, 212 F.3d 798, 807 (3d Cir. 2000) ("After *DeShaney*, many of our sister courts of appeals held that foster children have a substantive due process right to be free from harm at the hands of state-regulated foster parents."); Kara B. v. Dane County, 555 N.W.2d 630, 637 (Wis. 1996) ("We hold that those entrusted with the task of ensuring that children are placed in a safe and secure foster home owe a constitutional duty that is determined by a professional judgment standard."); Andrea L. *ex rel.* Judith B. v. Child. & Youth Servs. Lawrence Cnty., 987 F. Supp. 418, 423 (W.D. Pa. 1997) (noting the "well accepted" right of foster children to be free from extreme psychological harm).

[140] Plyer v. Doe, 457 U.S. 202, 230 (1982).

hesitated to expand the state's duty of care to encompass fewer tangible rights, such as moral or psychological formation.[141]

Some scholars argue foster children possess a right to permanency[142] and more robust kinds of care that will form their social and emotional well-being.[143] This argument is partially rooted in the reasoning that such permanency and emotional stability are fundamental in forming children into productive members of society[144] and addressing the high crossover rates between the foster care system and the juvenile justice system.[145] However, the movement to promote permanency for foster children—sometimes achieved through adoption—is not without its critics. Some writers condemn the elevation of adoption in American child welfare law, arguing against a one-size-fits-all solution.[146] Other critics point out the disproportionate demands of adoption on children of color and children from poor families, arguing adoption calls upon these children to surrender their past lives and start anew in the name of "rebirth," despite the fact such a solution may not actually be in the best interests of the child.[147] Furthermore, the option of an adoption can serve to exacerbate the already traumatic experience of family separation for some children who—despite what may be a manifest showing of parental unfitness—still desire a relationship with their natural parents.[148]

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[141] Dailey, *supra* note 18, at 2116 ("Parental rights operate as an important limitation on the state's power to mold children through the indoctrination of morals.").

[142] *See, e.g.*, Barbara Bennett Woodhouse, *Waiting for* Loving*: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 316 (2005) (arguing adoption, like marriage, "is the statutory recognition of a fundamental family relationship"); Jackson & Fasig, *supra* note 106, at 2–3 (arguing the parentless child has a fundamental right to a permanent family relationship stemming from the state's duty to provide the nurturing necessary to develop the child into an "autonomous human being").

[143] *See* Jackson & Fasig, *supra* note 106, at 3 (noting the importance of "enduring attachment relationship[s]" in forming the child's self-regulation skills and sense of autonomy and promoting "healthy psychological adjustment").

[144] Dailey, *supra* note 18, at 2155–56; Jackson & Fasig, *supra* note 106, at 20, 28 (discussing how "attachment relationship[s]" early on in an infant's life are key to forming necessary social behaviors).

[145] *See* Wald, *supra* note 12, at 27 ("A large percentage of [foster care] youth 'cross-over' to the juvenile justice system.").

[146] Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "*Im*permanence"*, 34 CAP. U. L. REV. 405, 410 (2005) (critiquing adoption as a "downstream" solution to issues of child welfare, which directs attention and resources from the "upstream," root causes of child displacement into the foster care system).

[147] Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 387 (1996) (comparing the "legal[] reincarnat[ion]" associated with adoption with the "family failure" and socioeconomic disadvantage associated with foster care).

[148] Wald, *supra* note 12, at 8 (noting "removal can be traumatic for many children," especially where subsequent placements fail to provide children with adequate care).

Another common solution to the issue of permanency in foster care is kinship placement, where a child is removed from the home and placed with a relative who agrees to care for the child in the legal parent's stead.[149] While some scholars praise kinship placements as less traumatic for the child,[150] others criticize the lack of regulation and oversight attendant to these placements, pointing out that it too is an imperfect solution.[151] In addition to the argument for rights concerning permanency, other suggested rights for foster children include a right to: visitation and placement with siblings;[152] an environment conducive to nurturing and moral formation;[153] and a safe environment free from egregious harm.[154] While some of these rights are encouraged by the federal statutes discussed in the following section,[155] the Court has never recognized a constitutional basis for such rights.[156]

In sum, although the Court has defined a limited number of constitutional rights for children, there is little Supreme Court precedent governing what, if any, unique constitutional rights are afforded to children in foster care. The Court is consistently hesitant to overstep in the realm of children's rights, lest they tread on the long-established ground of parental rights and authority.[157] However, as the children's rights movement has gained popularity,

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[149] Child Welfare Info. Gateway, *Kinship Care*, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.'S BUREAU, https://www.childwelfare.gov/topics/outofhome/kinship/ (defining kinship care as the placement of children in the homes of relatives or close family friends).

[150] Wald, *supra* note 12, at 21 (acknowledging some evidence supports the conclusion children do better when placed with relatives as opposed to traditional foster care placements with strangers).

[151] Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 844 (2020) (describing how kinship placements are "hidden from the public, the federal government, and policymakers" due to the lack of reporting requirements in federal legislation for kinship placements).

[152] Aristotle P. v. Johnson, 721 F. Supp. 1002, 1009–10 (N.D. Ill. 1989) (finding the plaintiffs, children in state custody, stated a valid substantive due process claim where the plaintiffs alleged officers of the Illinois Department of Children and Family Services were deliberately indifferent in pursuing policies that impaired the plaintiffs' sibling relationships); Sydow & Flango, *supra* note 107, at 12.

[153] Jackson & Fasig, *supra* note 106, at 28.

[154] *Id.* at 5 ("[W]hen the government takes an individual into custody, the Constitution requires that at least minimally adequate provision be made to protect the individual's safety and welfare.").

[155] *See infra* Section III.A.

[156] *See* Dailey, *supra* note 18, at 2169 (noting the Court has recognized a limited number of affirmative constitutional rights for children, mostly in the area of procedure).

[157] *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 203 (1989) (noting that, although the state was criticized for failing to remove a child from a home where abuse was suspected, had the state moved too quickly in removing the child, it would have been criticized for "improperly intruding into the parent-child relationship"); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (noting a minor's privacy interest in obtaining an abortion must be weighed against, if anything, a parent's interest in the termination of the daughter's pregnancy).

commentators have increasingly pushed the Court to attribute more constitutional rights to children, particularly those in state custody and care.[158] These sentiments have largely fallen on deaf ears thus far, since the Court has yet to afford any significant expansion to children's rights.[159] However, as the push for children's rights gains momentum, such aims are increasingly reflected in legislation at the federal and state levels, suggesting openness on the part of legislatures to address the pressing issues in the nation's foster care system.[160]

III. BEYOND THE COURTROOM: FEDERAL AND STATE FOSTER CARE LEGISLATION

The previous two Parts focused on an overview of the foster care system, the rights of legal parents and foster parents, and Court precedent recognizing some constitutional rights for children. This Part examines a sample of federal and state legislation regulating the foster care system. It concludes that these statutory enactments are ultimately inadequate to properly fill in the rights gap that exists for the child in foster care and urges that greater procedural protections are required to fully safeguard the active rights of the foster child.

A. Federal Legislation and Foster Care Reform

This section examines recent federal statutes imposing increased regulation on state-run foster care systems. It also details the impact of these federal statutes on the issues discussed previously, such as the foster child's rights to decision-making authority, familial and psychological connections, medical decisions, and other daily choices. It then discusses the pitfalls of the federal legislation.[161]

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158 Aristotle P. v. Johnson, 721 F. Supp. 1002, 1009–10 (N.D. Ill. 1989); Sydow & Flango, *supra* note 107, at 12; Dailey, *supra* note 18, at 2131; *supra* notes 144, 154 and accompanying text.

159 *See, e.g.*, Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199, 222 (1992) (noting the Court has minimized constitutional rights for children, creating significant issues in the juvenile justice sphere particularly); Wisconsin v. Yoder, 406 U.S. 205, 244–45 (1972) (Douglas, J., dissenting in part) (urging the Court to consider the constitutional rights of Amish *children*, and not simply those of their parents, in striking down a Wisconsin compulsory education statute).

160 *See, e.g.*, Wald, *supra* note 12, at 10 fig. 1.

161 42 U.S.C. § 1983. Furthermore, since authority over child welfare is not a federal power enumerated in the Constitution, this authority has historically fallen to the states. *See* CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 1 (2020), https://www.childwelfare.gov/pubpdfs/cpswork.pdf. Therefore, the federal government has limited ability to legislate in this area of law apart from tying legislation to spending initiatives. *Id.* at 1–2. However, if the federal legislation does not protect a constitutional right and the ultimate authority is left to the states, each state may choose whether to abide by the federal law and receive the corresponding federal funds or disregard federal law and forego such funding. *See id.* This system weakens the effectiveness of federal foster care legislation.

In doing so, it argues that current federal legislation does not provide an adequate, workable solution to these problems, yielding the need for additional safeguards to protect the rights of youth in foster care.

The federal government first provided grants to states for preventative and protective child welfare services in 1912 with the creation of the Children's Bureau,[162] and later formed the Child Welfare Services Program as part of the Social Security Act in 1935.[163] Though child welfare law is still largely within the purview of the states,[164] the federal government has regulated the foster care system with various pieces of legislation throughout the years.[165]

The first major federal law addressing the foster care system was the Child Abuse Prevention and Treatment Act of 1974 ("CAPTA").[166] CAPTA focuses largely on encouraging states to gather data and set standards for reporting mechanisms to keep track of and respond to instances of child abuse and neglect.[167] Moreover, CAPTA requires states, Indian tribes, and both private and public organizations to develop informed response protocols and reporting mechanisms for instances of substance abuse that result in child removal.[168] CAPTA urges states to provide children with either a guardian *ad litem* ("GAL")[169] or a court-appointed special advocate ("CASA")[170] in some proceedings.[171] This right is limited: it applies only to abuse or neglect

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[162] STAFF OF H. WAYS & MEANS COMM., 112TH CONG., REP. ON CHILD WELFARE LEGIS. HIST. (Comm. Print 2011), https://greenbook-waysandmeans.house.gov/book/export/html/303 [hereinafter STAFF OF H. WAYS & MEANS COMM.].

[163] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 1 n.1 (2019), https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf.

[164] *See id.* at 1.

[165] *See* STAFF OF H. WAYS & MEANS COMM., *supra* note 162 (describing how a number of federal laws regulate the foster care system by incentivizing states to comply with federal requirements in exchange for funding).

[166] 42 U.S.C. §§ 5101–5119c.

[167] *See, e.g.*, *id.* § 5102(f)(3) (describing one of the duties of the advisory board on child abuse and neglect as recommending "modifications needed to facilitate coordinated national data collection with respect to child protection and child welfare").

[168] *Id.* § 5106(a).

[169] A GAL is an individual who represents a child at all judicial proceedings related to an adjudication of abuse or neglect. The GAL system functions differently in each state, with differing requirements surrounding whether the GAL is a licensed attorney, has training in child welfare law and best practices, and how the GAL advocates for the child. *See* CHILD WELFARE INFORMATION GATEWAY & CHILD.'S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS 1–2 (2021), https://www.childwelfare.gov/pubpdfs/represent.pdf.

[170] A CASA is a lay volunteer who is appointed by a judge to advocate for a child's best interests throughout abuse and neglect proceedings. Robinson, *supra* note 50, at 402–03.

[171] 42 U.S.C. § 5106a(b)(2)(B)(xiii).

proceedings before a judge, it does not require the child to have a licensed attorney per se, and it only requires the child's GAL or CASA to advocate for the best interests of the child, without requiring deference to the child's wishes.[172] Furthermore, like the vast majority of federal legislation in this area, CAPTA only imposes these requirements on states in exchange for additional funding, an offer states may choose to refuse.[173]

Subsequent federal legislation increased the focus on child permanency. In 1980, Congress passed the Adoption Assistance and Child Welfare Act ("AACWA"),[174] which required that first and foremost, "reasonable efforts" were taken to prevent removal of the child from their home. AACWA accomplishes these objectives by increasing funding for family-centered programs that address issues of abuse and neglect prior to removal of the child.[175] In the event removal is required, AACWA also mandates that states make reasonable efforts to return the child to the home when it is safe and possible to do so.[176] Moreover, in the Fostering Connections to Success Act, Congress requires states to make reasonable efforts to place siblings together and locate extended family members for the possibility of pursuing a kinship placement,[177] reinforcing some of the relational rights contemplated in the previous section.[178] Congress addressed racial and ethnic inequities in the foster care system by enacting the Multiethnic Placement Act ("MEPA") in 1994, which was revised in 1996 to prohibit discrimination on the basis of a child's, or the child's potential foster or adoptive parents', race, color, or national origin.[179] It also allows individuals to sue for enforcement of MEPA under Title VI of the Civil Rights Act.[180]

Facing concerns about hasty reunification and the harms of placing children back with their legal parents despite continued risk to the child, Congress

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[172] *Id.* § 5106a(b)(2)(B)(xiii)(II).

[173] *Id.* § 5116d ("A grant may not be made to a State under this subchapter unless an application therefor is submitted by the State to the Secretary and such application contains the types of information specified by the Secretary as essential . . . .").

[174] Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 502 (codified as amended at 42 U.S. § 671).

[175] 42 U.S.C. § 671(a)(15)(B).

[176] *Id.*

[177] Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, § 103.

[178] *See supra* note 152 and accompanying text; Sydow & Flango, *supra* note 107, at 12.

[179] Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. § 5115a); STAFF OF H. WAYS & MEANS COMM., *supra* note 162.

[180] STAFF OF H. WAYS & MEANS COMM., *supra* note 162.

enacted the Adoption and Safe Families Act of 1997 ("ASFA").[181] ASFA stresses the importance of the child's safety and welfare as "paramount" in any reunification efforts and increases emphasis on adoption.[182] It establishes exceptions to the "reasonable efforts" standard set forth by AACWA and enacts measures to ensure the safety of children in temporary and long-term placements, such as requiring background checks for prospective foster or adoptive parents.[183] ASFA also shortens the timeline for "permanency" hearings to twelve months, and encourages permanency through both "time-limited family reunification" and "adoption promotion and support services."[184] Significantly, ASFA also requires states to initiate or join proceedings to terminate parental rights on behalf of children who have been in the foster care system for fifteen of the past twenty-two months (absent an exception).[185] Following ASFA, subsequent federal legislation sought to increase caseworker visits for children in foster care,[186] ensure continuity of education and medical care,[187] provide extended services for youth aging out of foster care,[188] and

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[181] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 305(c)(1) (codified as amended at 42 U.S.C. § 670).

[182] STAFF OF H. WAYS & MEANS COMM., *supra* note 162; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 305(c)(1)(C) (codified as amended at 42 U.S.C. § 670).

[183] STAFF OF H. WAYS & MEANS COMM., *supra* note 162 (describing the requirement for case plans to address the child's placement, services to the child, child's parents, and child's foster parents with the goal of reunification or a new home for the child, and mandating reviews of the case plan every six months).

[184] *Id.*; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 103(c)(2)(B) (codified as amended at 42 U.S.C. § 670).

[185] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 103(a)(3) (codified as amended at 42 U.S.C. § 670).

[186] Child and Family Services Improvement Act of 2006, Pub. L. No. 109-288, 120 Stat. 1233, § 6 (codified as amended at 42 U.S.C. § 629) ("[The Child and Family Services Reviews] also found a strong correlation between frequent caseworker visits with children and positive outcomes for these children, such as timely achievement of permanency and other indicators of child well-being."); Child and Family Services Improvement and Innovation Act, Pub. L. No. 112-34, 125 Stat. 369, § 101(c) (requiring states perform no less than 90% of federally mandated caseworker visits).

[187] STAFF OF H. WAYS & MEANS COMM., *supra* note 162.

[188] *See, e.g.*, The Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822, § 121 (providing the states greater flexibility to put funding toward extending education, employment, and Medicaid services to help youth successfully age out of foster care); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, § 201 (defining "child" so as to allow youth to continue receiving foster care maintenance payments until their twenty-first birthday, provided they are in school, employed, preparing for employment, or medically unable to seek education or employment); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, § 5052 (allowing states to provide independent living services up until the age of twenty-one for youth who aged out of foster care); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 2955 (requiring states to educate youth aging out of foster care about having a health care power of attorney or health care proxy).

ensure children of a certain age are consulted in the formation and revision of their permanency plan.[189]

However, even when federal legislation heightens the standard of care for foster children, this legislation has proved disappointingly ineffective due to the relatively low qualification standards levied on the states and the states' options to forego the funding in favor of noncompliance.[190] To compound this problem, individuals wishing to vindicate grievances against the foster care system under Section 1983[191] face a high threshold.[192] These steep steps leading to the courthouse door, paired with the relatively low standard of care required to thwart a Section 1983 claim, render it unlikely that claimants will succeed in vindicating violations of their rights in court.[193] This difficulty, in conjunction with the unpersuasive amount of monetary incentives attached to federal foster care legislation, renders the protections discussed above inadequate to guard the rights of the child in foster care.

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[189] *Foster Care Bill of Rights*, NAT'L CONF. STATE LEGISLATURES (Oct. 29, 2019), https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx [hereinafter *Foster Care Bill of Rights*] (describing how the Preventing Sex Trafficking and Strengthening Families Act of 2014 requires child welfare agencies ensure participation of foster children over the age of fourteen in their case plans, which also must contain a description of the child's rights).

[190] U.S. GOV'T ACCOUNTABILITY OFF., FOSTER CARE: HHS NEEDS TO IMPROVE OVERSIGHT OF FOSTERING CONNECTIONS ACT IMPLEMENTATION 25 (2014), https://www.gao.gov/assets/gao-14-347.pdf; *see, e.g.*, Emily Palmer, *How We Measured States' Compliance With a Forgotten Federal Child Abuse Law*, PROPUBLICA (Dec. 13, 2019, 8:59 AM), https://www.propublica.org/article/how-we-measured-states-compliance-with-a-forgotten-federal-child-abuse-law (finding only thirteen states tracked compliance with CAPTA GAL requirements, and, of those, only two provided representation to every child in a hearing).

[191] "Section 1983 provides a private cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States." Strasser, *supra* note 86, at 225–26 (internal quotations omitted) (quoting Yvonne L. by & through Lewis v. N.M. Dep't of Hum. Servs., 959 F.2d 883, 886 (10th Cir. 1992)). To succeed in a Section 1983 claim, the claimant must prove the "state played an important role in bringing about" the harm which comprises the subject of the complaint. *Id.* at 226.

[192] The Court has limited the enforceability of Section 1983 claims against the states in the child welfare context, mandating the plaintiff prove the state knew or suspected the perpetrating individual to pose a risk of harm to the child. *See id.* at 232–33.

[193] Though the Supreme Court has never explicitly delineated what showing of care is owed by the state to foster children, some lower courts have guessed the professional judgment standard, rather than the more permissive deliberate indifference standard, would apply. *Compare* Braam *ex rel.* v. State, 81 P.3d 851, 858 (Wash. 2003) ("[T]he proper inquiry [for a Section 1983 claim] is whether the State's conduct falls substantially short of the exercise of professional judgment, standards, or practices."), *with* James *ex rel.* James v. Friend, 458 F.3d 726, 730 (8th Cir. 2006) ("Deliberate indifference will be found only if the officials were aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and the officials *actually drew that inference*." (emphasis added) (citations omitted)). *But see* Strasser, *supra* note 86, at 226, 227 n.24 (noting several courts, including the Eight Circuit, have adopted a deliberate indifference, or a shock-the-conscience, test to Section 1983 claims and pointing to several lower courts applying the deliberate indifference standard to Section 1983 claims in the foster care context).

From this survey of major federal legislation concerning the foster care system, it is clear much of the policy revolves around monitoring the status of foster children and providing them access to resources for success.[194] This last century of federal foster care legislation has oscillated between the sometimes disharmonious concerns of family preservation and the prioritization of child safety.[195] While these legislative measures advocate for important improvements in the foster care system, they largely fail to acknowledge the state of children's rights within the system.[196] Instead, federal foster care legislation focuses primarily on what children in foster care are entitled to passively *receive*, rather than what substantive, active rights they *possess* while under state custody and care.[197] As a result, these federal statutes are not only an inadequate means of protecting foster care youth from harm,[198] but they also fail to properly account for the individual rights and autonomy of the child in foster care.[199]

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[194] *See generally* CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION (2019), https://www.childwelfare.gov/pubpdfs/majorfedlegis.pdf (describing several provisions under the Fostering Connections to Success and Increasing Adoptions Act of 2008 and listing several federal reporting requirements and recommendations for states to provide programs and funding for initiatives such as healthcare, education, and career services).

[195] Child Welfare Info. Gateway, *Concept and History of Permanency in U.S. Child Welfare*, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, https://www.childwelfare.gov/topics/permanency/overview/history/.

[196] *See Foster Care Bill of Rights*, *supra* note 189.

[197] *See, e.g.*, 25 U.S.C. § 1912(b) ("The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child."). Thus, even among the "gold standard" of child welfare laws, children are not guaranteed the right to an attorney, much less decision-making authority. *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/about-icwa/ (last visited Oct. 15, 2022).

[198] *See, e.g.*, Reese Oxner, *Texas Foster Care Children Exposed to Sexual Abuse, Given Wrong Medication and Neglected in Unlicensed Placements, New Report Says*, TEX. TRIB. (Sept. 14, 2021, 3:00 PM), https://www.texastribune.org/2021/09/14/texas-foster-care-children/ (describing egregious harm to children in foster care amidst the confusions of the COVID-19 pandemic); Allegra Abramo, *Despite Court Order, WA Foster Care System Still Out of Compliance*, CROSSCUT (Aug. 12, 2021), https://crosscut.com/news/2021/08/despite-court-order-wa-foster-care-system-still-out-compliance (describing Washington's lack of compliance with state and federal foster care legislation, resulting in unsafe conditions for children in the state's foster care system); Jennifer Huber & Bill Grimm, *Most States Fail to Meet the Mental Health Needs of Foster Children*, NAT'L CTR. FOR YOUTH L. (Dec. 31, 2004), https://youthlaw.org/publication/most-states-fail-to-meet-the-mental-health-needs-of-foster-children/ (discussing the detriment to youth in foster care resulting from the lack of compliance with the minimum standards of mental healthcare set forth by federal legislation).

[199] *See Young Adults Formerly in Foster Care: Challenges and Solutions*, YOUTH.GOV, https://youth.gov/youth-briefs/foster-care-youth-brief/challenges (last visited Oct. 15, 2022).

B. State Foster Care Legislation

The shortcomings to federal legislation in the child welfare context, however, are not fatal to the foster child's rights. Family law, the child welfare system, and the foster care system are largely the responsibility of the states, and federal laws serve to set a minimum standard, rather than a ceiling, on what rights and protections states may provide.[200] However, when it comes to foster child autonomy, states largely fail to make up for the rights gap in the foster child's life.[201] A majority of states do not provide significantly more, if any, decision-making authority or personal autonomy to children in foster care than the federal legislation discussed above.[202] This section will briefly examine variations in child welfare laws across states, focusing particularly on different models of child representation.

Every state has specific statutory provisions governing its own foster care system. These provisions can differ broadly on matters such as the best interests of the child standard,[203] involuntary termination of parental rights,[204] and background check requirements prior to kinship placements.[205] Moreover, when

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[200] Linda D. Elrod, *The Federalization of Family Law*, ABA (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/ (tracing the uptick in federalization of family law while still recognizing that family law, and especially child welfare, has historically been an area of the law left to the states).

[201] *See id.*

[202] *See, e.g.*, Strassburger, *supra* note 23, at 1135 ("[N]o state allows all young people to make all of their own medical decisions."); Amy Reichbach & Marlies Spanjaard, *Guarding the Schoolhouse Gate: Protecting the Educational Rights of Children in Foster Care*, 21 TEMP. POL. & C.R. L. REV. 101, 103, 110 (2011) (noting foster children are often unable to challenge their school suspensions or expulsions effectively—partially due to a lack of effective advocacy by an adult—leading to higher rates of expulsion than peers and a risk of severe long-term impact on the likelihood of successful transition to adulthood); Matthew M. Cummings, *Sedating Forgotten Children: How Unnecessary Psychotropic Medication Endangers Foster Children's Rights and Health*, 32 B.C. J.L. & SOC. JUST. 357, 361–62 (2012) (describing the overuse of mind-altering prescriptions for children in foster care and arguing the foster child's lack of medical advocacy rights contributes to this problem).

[203] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD, *supra* note 28, at 2–4. Only twenty-two states lay out specific factors for courts to consider when applying the best interests of the child standard. *Id.* at 2. Moreover, while some states instruct courts to consider factors such as emotional ties and visitation with family members, other states explicitly prohibit courts from considering factors such as sex or disability. *Id.* at 2–4. Only twelve states and the District of Columbia specifically instruct courts to consider the express wishes of the child. *Id.* at 4.

[204] CHILD WELFARE INFORMATION GATEWAY & CHILD.'S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2–4 (2021), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf. For instance, five states prohibit involuntary termination of parental rights for the sole reason that a parent could not provide adequate care due to poverty, while three states and Puerto Rico specify parental rights cannot be terminated solely due to legitimate practice of religious beliefs. *Id.* at 4.

[205] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS, *supra* note 68, at 2–4.

it comes to the child's ability to participate in making decisions that affect their everyday life, the laws of each state vary even more. For instance, in Delaware, the child has an explicit right to be notified about, and participate in, any court hearings and to speak to the judge regarding decisions that may have an impact on the child's life.[206] Similarly, in California, the child has a right to be involved in their own case plan, including placement decisions, permanency, and the child's gender identity.[207] On the other end of the spectrum, some state laws make no mention of consulting with the child when formulating a case plan.[208] Since states have principal authority to create their own child welfare laws, a foster child's experience in one state may differ significantly from the experience of a similarly situated child sitting across the state line.[209]

One area of the law particularly susceptible to this jurisdictional variance is found in the context of child representation before the court. As mentioned previously, states are required under CAPTA to appoint representation for children in abuse and neglect proceedings.[210] However, representation of the child in this context can occur in different ways.

First, the most common representation scheme—utilized in some form by forty-one states—requires states to appoint a GAL to represent the best interests of the child.[211] While this model ensures that there is an advocate for the child present during abuse and neglect proceedings, many states do not require the GAL to be an attorney,[212] while others fail to specify training prerequisites for the GAL.[213] Moreover, this model runs the risk of allowing the GAL—whether intentionally or unintentionally—to unduly impose their own thoughts, opinions, and beliefs and advocate for a position that fails to properly voice the child's wishes.[214] Furthermore, the traditional best-interests-centered GAL

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206 DEL. CODE ANN. tit. 13, § 2522(a)(10) (West 2022); *see also* N.H. REV. STAT. ANN. § 170-G:20 (2018).

207 CAL. WELF. & INST. CODE § 16001.9(37) (West 2019).

208 *See, e.g.*, HAW. REV. STAT. § 587A-27 (2022) (failing to require the child's presence, involvement, opinion, or approval in the formation of the child's case plan); IDAHO CODE § 16-1621 (2011) (requiring only the child's GAL and attorney be given copies of the child's case plan and notified of the planning hearing to adopt the case plan, but not the child).

209 *See supra* notes 203–205 and accompanying text.

210 42 U.S.C. § 5106(a)(2)(B).

211 CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS, *supra* note 169, at 2.

212 *Id.*

213 *Id.* at 3–4.

214 Steven C. Teske & Melissa Dorris Carter, *The Next Generation of Child Advocacy: Protecting the Best Interest of Children by Promoting a Child's Right to Counsel in Abuse and Neglect Proceedings*, 13 GA. BAR J. 22, 24–26 (2007).

model can create issues with confidentiality between the child and the GAL.[215] Even if the GAL is an attorney, the GAL is not necessarily bound by the typical rules of attorney-client privilege,[216] and, in many ways, is acting as an agent of both the court and the child simultaneously.[217] Thus, though the GAL model aims to achieve child representation in all abuse and neglect proceedings, this model does not always guarantee adequate representation of the foster child.

Second, and in contrast to the GAL model, some states appoint a traditional attorney (what this Comment calls a "child-centered attorney") to represent the express wishes of the child in abuse and neglect proceedings.[218] In this model, the child-centered attorney maintains a traditional attorney-client relationship with the child and advocates for their explicit wishes if the child is old enough to express such wishes.[219] Sixteen states require the appointment of a child-centered attorney, and eight states require the appointment of both a child-centered attorney and a GAL.[220]

A third common protection for the foster care child in court proceedings is the appointment of a CASA. A CASA is a volunteer who may be appointed by the court to investigate the child's circumstances and provide recommendations for living situations and services that better serve the child's needs.[221] While a CASA can also function as the child's GAL, the two roles are not necessarily the same under every state system.[222] Some states assign the CASA to assist the court, while others designate the CASA as the child's GAL.[223] Like the GAL and the child-centered attorney, the CASA need not be the only party representing the child, and some states allow for the appointment of a CASA in addition to a GAL or child-centered attorney.[224]

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[215] *See id.*

[216] *See, e.g.*, People v. Gabriesheski, 262 P.3d 653, 659–60 (Colo. 2011) (holding that attorney-client privilege did not apply to a child's statements made to her GAL in an abuse and dependency proceeding).

[217] *See* Robinson, *supra* note 50, at 412–13 (discussing the need for clarification of the GAL role as either fact finder for the court or champion for the child, but rejecting the idea that both roles can be adequately performed by the same person).

[218] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS, *supra* note 169, at 2; *see, e.g.*, HAW. REV. STAT. § 587A-16(c)(6) (2022) (providing that, if the child's requests differ from those advocated by the GAL, the court shall appoint a separate attorney for the child if it finds doing so is in the child's best interests).

[219] *See, e.g.*, GA. CODE ANN. § 15-11-103(c) (2022) (noting that an attorney appointed to a child in an abuse or neglect proceeding owes the child the duties of attorney-client privilege as imposed by Georgia law).

[220] CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS, *supra* note 169, at 2.

[221] *Id.*

[222] *Id.*

[223] *See id.* at 2–3.

[224] *See id.* at 2.

It is clear from these varying configurations that the system for child representation in abuse and neglect proceedings can differ significantly from state to state. In some states, a child may only be represented by a non-attorney CASA volunteer who advocates for the child's best interests, while in other states the child may be appointed a child-centered attorney who advocates for the child's wishes *in addition to* a CASA or GAL who advocates for the child's best interests.[225] This latter model provides far more robust support for the foster child, since the child's legal interests and wishes are represented before the court.[226] By contrast, the former model runs the risk of drowning out the child's voice with the sole representation of a CASA or GAL who may lack legal training and misconstrue the best interests model to advocate for a position entirely different than the child's own wishes.[227]

C. Return to the Rights Gap: What Can Be Done?

As the above Parts illustrate, both the constitutional rights for foster children recognized by the Court and the additional rights afforded by federal and state legislation are passive rights—children's rights to *receive* care and certain standards of treatment. However, legislation and jurisprudence recognize very few active rights—children's rights to *exercise* decision-making authority.

This situation yields a "rights gap" in the life of the child in foster care. As the law stands, deference to parental rights, together with recognition of the state's parens patriae authority over the lives of children, "operate to reinforce and justify the paternalistic treatment of children as less than full constitutional rights-holders."[228] However, for the child in foster care, this already-questionable equation is even more off-balance. In that situation, the legal parent is unable to exercise their parental rights due to their absence or a court's finding of parental unfitness, so the state steps further into the life of the child to exercise greater parens patriae authority.[229]

New variables enter the equation as well. The state introduces a number of other actors into the foster child's world who hold varying degrees of authority over the child's life, such as the foster care agency, case worker, and foster

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[225] *Id.*

[226] *See* Jesica Matthews Eames, Comment, *Seen But Not Heard: Advocating for the Legal Representation of a Child's Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 EMORY L.J. 1431, 1438 (1999).

[227] *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1314 (1996).

[228] Dailey, *supra* note 18, at 2113.

[229] Curtis, *supra* note 52, at 166.

parent.[230] However, none of these parties hold the same autonomy and unity of rights as the legal parent.[231] Thus, the foster child is left with a fractured patchwork of rights-holders who are often subject to an added layer of government bureaucracy and, at times, are unsympathetic to even the reasonable desires and wishes of the child.[232] Moreover, while legal parents in traditional, intact families may gradually choose to cede autonomy to the child as they grow older and more mature,[233] the child in foster care is not always afforded these privileges due to a lack of recognition of the child's own voice under federal and most state schemes.[234]

While the issues presented by this patchwork are complex and demand correspondingly complex solutions, one starting point is to increase the protection of foster children's procedural rights and access to the courts. While some commentators suggest this protection can be achieved by allowing children the individual right to file suit on their own behalf,[235] this Comment focuses primarily on (1) providing each child with the guarantee of a child-centered attorney who advocates for the child's express wishes; and (2) implementing the mature minor doctrine to better evaluate the child's decisions. While the idea of child-centered representation has been discussed by scholars in the context of abuse and neglect proceedings,[236] the following Part contends that similar representation could be applicable to other areas of decision-making in the life of the foster child, ensuring a means for the child to exercise more active rights. The child-centered attorney not only serves as a voice for the child, but also as a means of filling in the rights gap created by the foster child's

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230 *See* Fleegle, *supra* note 9, at 521 ("[T]he Court in *OFFER* apparently mapped a course of judicial restraint in this delicate and complex area by not deciding definitively whether the foster family has a liberty interest. But the Court does say that whatever interest, if any, the foster family may have is limited by the statutes which create the family, and even more limited when in direct confrontation with the natural parents' interests.").

231 *See supra* Section I.E.

232 The U.S. Supreme Court itself has said as much in its continual affirmation of parental rights when pitted against state power—parental rights win out largely because of the parents' ability to contribute to the child's moral and social formation in a way that escapes the state's own ability. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citation omitted)); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

233 Barnett, *supra* note 108, at 265 (drawing a positive correlation between learning to make rational, autonomous choices during youth and successful educational, social, and employment outcomes later in life).

234 *See supra* Part III.

235 *See, e.g.*, Robinson, *supra* note 50, at 396 ("Allowing children standing to bring actions in their own names is one part of the solution to the problems plaguing the foster care system today.").

236 *See, e.g.*, Matthews Eames, *supra* note 226, at 1474–76 (arguing for the adoption of child-centered attorneys in abuse and neglect proceedings); Teske & Carter, *supra* note 214, at 26 (same, in custody proceedings); Lauren Girard Adams, Lourdes M. Rosado & Angela C. Vigil, *What Difference Can a Quality Lawyer Make for a Child?*, 38 LITIG. 29, 35 (2011) (same, in dependency and delinquency proceedings).

uniquely vulnerable status outside the bounds of traditional parental care. The following Part offers a solution to this issue, magnifying the child's voice through increased recognition of the mature minor doctrine and the guarantee of child-centered representation.

IV. BRIDGING THE GAP: USING THE MATURE MINOR DOCTRINE AND CHILD-CENTERED REPRESENTATION TO AMPLIFY CHILDREN'S VOICES

This Part advances a practicable solution to the foster child's rights gap. It proposes a two-pronged solution that would increase existing procedural protections and would ensure the foster child's voice is heard in matters relating to their own care, activities, and custody. The first prong asserts that state and juvenile courts should adopt the mature minor doctrine and expand the doctrine beyond the medical context. This expansion would provide a framework for judges to use when assessing the wishes of the foster child who petitions the court for decision-making authority relating to their own care.

The second prong contends that states should adopt the ABA's Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings ("Model Act")[237] as a mechanism for ensuring every child has the right to a child-centered attorney. The Model Act should be expanded to (1) provide for the appointment of a child-centered attorney in proceedings where the child seeks to petition the court for decision-making authority under the mature minor doctrine; and (2) require the child-centered attorney to appoint a best-interests advocate for the child when the attorney feels the child's wishes are not in alignment with the child's best interests.

If judiciaries and legislatures adopt this two-pronged solution, the rights gap may finally start to narrow: the child can supplement their lack of parental oversight by advocating for their own wishes.

A. Changes from the Bench: Use and Expansion of the Mature Minor Doctrine

This section explains how if the first prong of this Comment's solution is adopted, judiciaries will be in a better position to help alleviate the plight of children in the foster care system. By recognizing and expanding the framework of the mature minor doctrine beyond the medical context, judges can recognize the child's authority as a viable decision-maker in situations where the child has

[237] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (AM. BAR ASS'N 2011).

proven themselves to be sufficiently mature. This affirmation of the mature child's right to decide would enable the child to exercise their autonomy to a greater degree than the system currently allows.

As discussed in Part II, the mature minor doctrine permits minors who have proven themselves sufficiently well-informed and reasonable to make medical decisions for themselves.[238] The Court itself has applied the mature minor doctrine in cases concerning a minor's right to an abortion—it combined the doctrine with use of a judicial bypass procedure that allows a judge to grant a minor's request to obtain an abortion without notifying or receiving consent from their legal parents.[239]

Though the Supreme Court has yet to weigh in on the application of the mature minor doctrine to other areas of law, lower courts have applied the doctrine in a number of situations to both affirm and deny the minor's right to give or withhold consent for medical treatment.[240] In their application of the mature minor doctrine, courts have recognized minors' capabilities to make significant decisions, even those with life-altering consequences.[241]

The crucial premise of the mature minor doctrine is that some minors *do* possess the requisite intelligence, experience, knowledge, and rational capabilities to make their own decisions, and this premise holds true even where decisions have legal repercussions.[242] This Comment further asserts that the validity of this premise should not be confined to the medical context. Rather, this notion can, and should, be expanded to other areas of a minor's life to

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[238] *See supra* Section II.A.1.

[239] *See supra* Section II.A.1.

[240] *See, e.g.*, *In re* E.G., 549 N.E.2d 322, 328 (Ill. 1989) ("[W]e find that a mature minor may exercise a common law right to consent to or refuse medical care . . . ."); Cardwell v. Bechtol, 724 S.W.2d 739, 748–49 (Tenn. 1987) (adopting the mature minor exception and designating the question of whether a minor possesses the capacity to consent to medical treatment as a question for the jury); Belcher v. Charleston Area Med. Ctr., 422 S.E.2d 827, 838 (W. Va. 1992) (recognizing the mature minor doctrine as an exception to the common law requirement of parental consent for underage patients); Baird v. Att'y Gen., 360 N.E.2d 288, 296 (Mass. 1977) (suggesting the mature minor rule might apply in situations where the best interests of the child would not be served by notifying the parents of a child's medical treatment and the minor is capable of giving consent).

[241] *See, e.g.*, *In re* Swan, 569 A.2d 1202, 1206 (Me. 1990) (upholding a minor's right to refuse life-sustaining medical treatment based on the minor's express wishes indicated prior to an accident that left him in a permanent vegetative state); *In re* Rena, 705 N.E.2d 1155, 1157 (Mass. App. Ct. 1999) (determining that a juvenile court was incorrect in failing to consider the interests of a mature minor before ordering a blood transfusion in defiance of the minor's wishes and emphasizing the need to hear testimony from the minor herself on the issue, not only that of her attorney and parents).

[242] Ikuta, *supra* note 133, at 198–99. Further, courts have recognized minors' ability to make decisions with a "mature state of mind" for years in the criminal context by allowing for the prosecution of minors as adults in certain situations. Kurt J. Pritz, *Development of the Doctrine of Mature Minority as a Defense to States' Power of* Parens Patriae, 12 J. JUV. L. 139, 140 (1991); *see also supra* note 115 and accompanying text.

provide courts a framework through which to analyze a foster child's right to make decisions. The Court's affirmation that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority" reinforces the idea that children, and particularly *mature* children, are constitutional rights-holders who have the capability to make decisions and exercise autonomy.[243]

Application of the mature minor doctrine outside the medical context provides a tried-and-true precedent that courts can apply to the reasonable decisions made by the mature youth in foster care, even in instances where a child's decisions differ from those of their caretaker or caseworker. In such instances, the child—if proven sufficiently mature and understanding of the decision at issue—could be granted the right to make those decisions for themselves by means of a judicial bypass, overriding the need for consent from a third party and affirming the child's decision.

Further, the mature minor doctrine allows courts to give serious consideration to a minor's own deeply held beliefs in a way the best interests of the child standard does not.[244] While the best interests of the child standard focuses primarily on the outcome of the decision, the mature minor doctrine vindicates the rights of the minor by turning the court's attention to the minor's own wishes, thought process, and ability to decide for themselves.[245] In the context of the foster child, the decision at stake would not always carry the same immense consequences as the medical decisions often contemplated under the mature minor doctrine,[246] but rather, may include the child's reasonable wish to increase visitation with siblings or biological family members, enroll in a new extracurricular activity, or try a different psychiatric medication with lesser side effects.

Moreover, use of the mature minor doctrine in the foster care context would alleviate some of the arbitrary nature of the age-of-majority threshold. Although the full rights and responsibilities of adulthood do not vest until an individual

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243 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

244 *See In re* E.G., 549 N.E.2d 322, 325 (Ill. 1990) (applying the mature minor doctrine and determining a seventeen-year-old minor could withhold consent for a blood transfusion based on her religious beliefs); Josh Burk, Note, *Mature Minors, Medical Choice, and the Constitutional Right to Martyrdom*, 102 VA. L. REV. 1355, 1381–82 (2016) (noting that "empowerment rights . . . improv[e] children's experiences by recognizing and remedying their powerlessness," whereas protecting children because they are vulnerable "disadvantages" them).

245 *See supra* notes 134–135 and accompanying text.

246 *See, e.g.*, *supra* note 241.

reaches eighteen,[247] the reality is that minors mature at vastly different rates,[248] often partially accelerated by early, traumatic life experiences.[249] In the case of the child in foster care, such trauma is often present due to the mere experience of being removed from their legal parent,[250] and life circumstances may force these children to grow up fast. Use of the mature minor doctrine to allow foster children to take on some measure of decision-making responsibility for themselves could help reduce the arbitrariness of this age threshold by recognizing the dignity and capability of mature minors to make decisions regarding their own care.[251]

Though the criteria for determining a minor's maturity differs among jurisdictions,[252] the standard factors—age, ability, education, training, experience, sensibility, and appreciation for the risks and consequence of the decision—would likely apply to any decision the child in foster care might wish to make.[253] Courts also could adjust the requisite showing of maturity in proportion to the gravity of the decision at stake. For instance, a foster care youth wishing to take a certain acne medication or dye their hair against the wishes of their foster parent or caseworker would require a lower showing of maturity than a similar youth wishing to undergo a sex reassignment surgery or obtain an abortion. In this way, the finality and severity of the decision at stake could inform the threshold of maturity required to grant the child a judicial bypass. Moreover, the administrative requirements and formality of the judicial bypass process would help ensure the decision was not too impulsive, but instead was a decision that was important enough to the minor that they chose to plead their case before a judge.

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247 *See, e.g.*, GA. CODE ANN. § 39-1-1(a) (2022) (setting eighteen as the age of majority in Georgia).

248 Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1115 (2012) (describing maturity as a "cultural construct" and noting individuals are shaped more by their daily lives and cultural norms than by legal thresholds).

249 Imi Lo, *Did You Have to Grow Up Too Soon?: Healing from the Trauma of Parentification*, PSYCH. TODAY (Dec. 12, 2019), https://www.psychologytoday.com/us/blog/living-emotional-intensity/201912/did-you-have-grow-too-soon (describing the effects of "parentificiation"—the phenomenon in which the child takes on the role of caring for his or her own parent, siblings, or other individuals—as often forcing the acceleration of ordinary growth cycles, thus forcing the child to "grow up too quickly").

250 *See* Wald, *supra* note 12, at 8.

251 Benston, *supra* note 136, at 14–15.

252 *Id.* at 3.

253 *See, e.g.*, Cardwell v. Bechtol, 724 S.W.2d 739, 748 (Tenn. 1987) (using these factors to determine a minor's maturity); *see also In re* Doe, 973 So. 2d 548, 553 (Fla. Dist. Ct. App. 2008) (laying out a list of factors for judges to consider when making a determination of a minor's maturity to obtain an abortion, such as: "the minor's emotional or physical needs; the possibility of intimidation, other emotional injury, or physical danger to the minor;" and others).

The considerations above demonstrate the utility of expanding the mature minor doctrine beyond its current medical confines so it may serve as a mechanism for judges to recognize and effectuate the decision-making authority of youth in foster care. Though not a complete remedy for the rights gap, implementation of the mature minor doctrine in state and juvenile courts will provide a vital forum for the foster child to plead their case. The child can prove themselves capable of making such decisions, advocate on their own behalf, and experience a sense of fairness in the process.

B. The True Child Advocate: New Standards for Child Advocacy

This section reiterates the need for a child-centered attorney in court proceedings, framing the Model Act as a viable solution to the deficient state and federal child representation laws currently in effect. It further argues for expansion of the Model Act to include legal matters outside abuse and neglect proceedings. The foster child should be granted the right to a child-centered attorney in other matters where the child may wish to petition the court for decision-making authority, thus maximizing the Model Act's potential for closing the rights gap.

In the United States, the right to an attorney has long been recognized as an integral part of fair representation before the court, at least in criminal proceedings.[254] To send a child into a proceeding where potentially life-altering decisions will be made without the protection of an attorney advocating for the child's wishes fails to comport with this long-held standard in American jurisprudence.[255] However, this scenario is the reality for thousands of children in the foster care system.[256] Despite the federal requirement that children are appointed a GAL for all abuse and neglect proceedings,[257] many states interpret this broad provision to allow for representation by a non-attorney GAL

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[254] *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 68–69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *see also In re* Gault 387 U.S. 1, 38 n.65 (1967) ("[The rights guaranteed in the Sixth Amendment] have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively." (citations omitted)).

[255] Adams, Rosado & Vigil, *supra* note 236, at 31 (describing the high stakes of child dependency proceedings and maintaining "[w]e would never tolerate an adult going into that situation without an attorney").

[256] *See* CHILD.'S ADVOC. INST. & FIRST STAR, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 10, http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf [hereinafter A CHILD'S RIGHT TO COUNSEL] ("Only 31% of states currently mandate the appointment of client-directed representation for the child [in abuse and neglect proceedings].").

[257] 42 U.S.C. § 5106a(b)(2)(B)(xiii).

advocating only for the child's best interests.[258] Such schemes not only barely scrape past the minimum requirements of federal mandates, but, more importantly, they rob the child of their right to counsel in a proceeding that has the potential to upend the child's entire life.[259]

Child advocates have long urged that a child's right to an attorney in abuse and neglect proceedings is vital to good outcomes for children in foster care and necessary to adequately safeguard the foster child's fundamental due process rights.[260] However, many state legislatures have been slow to respond to this call,[261] and federal law still requires only a GAL appointment, with few additional specifications.[262] In response to the pleas of child advocates and in hopes of prompting more state legislatures to strengthen their child representation laws, in 2011, the ABA adopted a model statute exemplifying the mechanics of child-centered representation in abuse and neglect proceedings.[263]

The Model Act consists of twelve sections addressing everything from the qualifications of a child-centered attorney to payment of attorneys' fees.[264] The Model Act defines "[a]buse and neglect proceeding[s]" broadly to encompass matters relating to abuse, neglect, dependency, voluntary placement of children in state care, termination of parental rights, permanency hearings, and post-termination of parental rights proceedings.[265] This definition extends the right to an attorney to children voluntarily given over to foster care,[266] while, in contrast,

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[258] *See, e.g.*, FLA. STAT. § 39.820(1) (2022) ("'Guardian ad litem' [is defined as] . . . a duly certified volunteer, a staff member, a staff attorney, . . . a pro bono attorney . . . ; a court-appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child . . . ."); FLA. STAT. § 39.822(1) (2022) (requiring the appointment of a GAL to represent children in abuse, abandonment, or neglect judicial proceedings).

[259] Adams, Rosado & Vigil, *supra* note 236, at 30–31.

[260] *See id.* at 35; *see also* AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, AM. BAR. ASS'N 23–24 (1996), https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/standards_abuseneglect.pdf (listing six different resolutions from 1979 to 1992 urging the adoption of statutes requiring counsel for children in abuse and neglect proceedings).

[261] *See* A CHILD'S RIGHT TO COUNSEL, *supra* note 256, at 7–8, 132–33.

[262] Beth Locker & Melissa Dorris, *A Child's Right to Legal Representation in Georgia Abuse and Neglect Proceedings*, 10 GA. BAR J. 12, 13 (2004).

[263] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (AM. BAR ASS'N 2011).

[264] *Id.* §§ 4, 9, 12.

[265] *Id.* § 1(a).

[266] *Id.* § 3(a). According to a 2020 report compiled by the Children's Bureau, 1,919 children entered the foster care system due to parental relinquishment, 4,736 entered due to the child's own drug abuse problems, and 2,147 entered due to the death of a parent. ADMIN. FOR CHILD. & FAMILIES: CHILD.'S BUREAU, THE AFCARS REPORT, *supra* note 6, at 2. Children who enter the system due to these causes—where abuse or neglect may not be an issue—are not entitled to the appointment of an attorney or even a GAL under some state schemes.

CAPTA and most state statutes only require the appointment of a child's representative for foster children who enter the system due to abuse or neglect.[267]

Moreover, though the Model Act welcomes appointment of a best-interests advocate for the child,[268] the Model Act explicitly requires the appointment of a child-centered attorney who will represent the child in accordance with "[t]he applicable rules of professional conduct and any law governing the obligations of lawyers to their clients."[269] Additionally, the Model Act's requirements extend beyond courtroom professional responsibilities. The Model Act recommends the child-centered attorney take a more active role in ensuring the child-client receives adequate care, encouraging the attorney to take "necessary legal action regarding the child's medical, mental health, social, education, and overall well-being."[270]

Further emphasizing the child-centered attorney as advocate and confidant, the Model Act requires application of attorney-client privilege to the relationship between the attorney and child,[271] with only appropriately limited exceptions if the child reveals information placing them at substantial risk of harm.[272] This confidential aspect of the relationship is key, since some children, like adults, may feel more comfortable revealing information when they are assured confidentiality. This allows the child-centered attorney to serve as a better and more informed advocate.[273]

The Model Act also addresses the attorney's role in advocating for children of "diminished capacity"—including infant and pre-verbal children—providing standards by which the attorney should make a determination of diminished capacity, and requiring them to advocate from a substituted judgment standard[274]

See ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 3(a) (AM. BAR ASS'N 2011).

[267] *See, e.g.*, 42 U.S.C. § 5106a(b)(2)(B)(xiii); FLA. STAT. §§ 39.820(1), 39.822(1) (2022).

[268] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 3(b) (AM. BAR ASS'N 2011).

[269] *Id.* § 3(d). The Model Act emphasizes the strict separation between the role of the child-centered attorney and the role of the best interests advocate, maintaining the same individual should *never* serve in both roles. *See id.* § 7(e) cmt.

[270] *Id.* § 7(b)(7).

[271] *Id.* § 8(b).

[272] *Id.* § 7(e). The Model Act is somewhat ambiguous as to whether the child-centered attorney can take such action if the child is not found to have "diminished capacity." *Id.* The Model Act should be clarified to ensure the child's lawyer may take such action regardless of the child's capacity if the lawyer feels the child is at a substantial risk of harm.

[273] *See* Adams, Rosado & Vigil, *supra* note 236, at 33.

[274] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7(d) (AM. BAR ASS'N 2011). The Model Act notes a substituted judgment standard "involves

in such situations, rather than a best interests of the child standard.[275] This provision supplies a helpful and functional framework for attorneys working with younger children or youths who may have trouble articulating their wishes due to physical or developmental issues. Moreover, the Model Act encourages the attorney to evaluate a child's ability to express their reasonable choices on an issue-by-issue basis so that the attorney can represent the child's wishes on at least some issues, even if the child is unable to make a rational decision on other matters in contention.[276]

Finally, the Model Act encourages the child's active participation and presence at all proceedings in the case,[277] requiring the child-centered attorney to explain the case and proceedings to the child and elicit the child's wishes in a developmentally appropriate manner.[278] Moreover, if the child-centered attorney disagrees with the child's stance on an issue, the attorney is to serve as counselor to them, while taking care not to "unduly influenc[e] the child['s decision]."[279]

Overall, the Model Act provides a thorough framework for robust, child-centered advocacy for youth in foster care. The presence of an attorney in these proceedings is a necessary protection for the foster child's rights, particularly given the gravity of the interests at stake.[280] Families are subject to reorganization and children run the risk of being removed from their homes with the possibility of becoming "legal strangers" to the only parents they have ever known.[281] Given the nature of these proceedings and the vulnerable position of children in foster care, a child-centered attorney is vital to ensuring the child's interests are properly represented.

This Comment further urges that the Model Act be amended to provide increased protection for the child in situations where the child-centered attorney substantially disagrees with the child-client. In such situations, the attorney

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determining what the child would decide if he or she were able to make an adequately considered decision." *Id.* § 7(d) cmt. Such determinations should be "based on objective facts and information, not personal beliefs" and should "assess the needs and interests of *this* child . . . [by] observ[ing] the child in his or her environment, and consult[ing] with experts." *Id.* (emphasis added).

275 *Id.* § 7(d).

276 *Id.* § 7(d) cmt. For instance, a child may be able to decide between two potential kinship caregivers to determine the child's preferred placement, but not about whether the child wishes to remain at their current school or be transferred to a school closer to the child's new place of residence. In such situations, the child-centered attorney should advocate for the child's wishes with regard to kinship placement but apply a substituted judgment standard when advocating for the child's school placement.

277 *Id.* § 9(a).

278 *Id.* § 7(c).

279 *Id.* § 7(c) cmt.

280 *See* Adams, Rosado & Vigil, *supra* note 236, at 30–31.

281 Locker & Dorris, *supra* note 262, at 14.

could request appointment of an additional representative to advocate for the child's best interests.[282] Though the Model Act currently allows for such an appointment,[283] it should be amended to *require* that the child-centered attorney take this step in situations where the attorney feels the child's wishes could be of ultimate harm to the child. Such a provision would further mitigate the risk of the court making a ruling that might be unintentionally harmful to the child.

Though the presence of a child-centered attorney in abuse and neglect proceedings is of primary importance, such proceedings are not the only legal processes where the child-centered attorney could be of use. While the Model Act alludes to the attorney's role beyond the abuse and neglect sphere,[284] this portion of the Model Act is unclear and should be amended to explicitly provide for continuation of the attorney's duties in judicial bypass proceedings. The Model Act could be expanded to allow the child-centered attorney to counsel and advocate for the child in situations where the child petitions the court for the right to make certain decisions regarding the child's care. These situations may include decisions such as a child's gender identity, mental health treatment, physical appearance, extracurricular activities, visitation, and numerous other issues.

Under current federal and state law, children are given varying ranges of control over such subjects, often with hard-line age thresholds for decision-making.[285] In most scenarios though, the foster parent or caseworker is given the

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[282] This scheme has already been implemented in several states and ensures greater protection for the child in situations where the child-centered attorney may feel the child's wishes are not in the child's own best interests. *E.g.*, CONN. GEN. STAT. § 46b-129(a)(2)(D) (2021) (requiring the court to appoint a best-interests advocate for the child when the child's wishes differ from what the child-centered attorney finds to be in the child's best interests and specifying the best-interests advocate need not be an attorney).

[283] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7(e) (AM. BAR ASS'N 2011).

[284] The Model Act notes that the child-centered attorney should also be involved in "investigating and taking necessary legal action regarding the child's medical, mental health, social, education, and overall well-being." *Id.* § 7(b)(7). While this provision is broad and could encompass the types of judicial bypass proceedings recommended in this Comment, such an extension of the attorney's role is not necessarily intuitive from the words of the Model Act. This provision should be clarified to ensure the attorney is involved in such matters and to formulate a process for the foster child to have increased access to the courts for judicial bypass proceedings. *See id.* § 7(b)(7) & cmt.

[285] *See, e.g.*, Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1928, § 113(a) (ensuring children in foster care age fourteen or older participate in the development of their case plans); ARIZ. REV. STAT. § 8-529(B) (2022) (granting a number of additional rights to foster children over the age of sixteen, such as the right to adult living classes, a hearing on the child's capacity to make medical decisions, and the right to receive help obtaining a driver's license with the foster parent's approval); CAL. WELF. & INST. CODE § 16001.9(a)(25) (West 2019) (granting children over the age of twelve the opportunity "to choose, when[] feasible," their own healthcare provider and "to communicate with that healthcare provider" about treatment options).

ultimate say over such decisions, leaving the child with little control over the most basic aspects of their own life.[286] The attorney's presence in such proceedings, paired with implementation of the mature minor doctrine, could allow the foster child to successfully petition the court for a judicial bypass regarding key decisions, thus providing the foster child greater autonomy.

This section has argued for adoption of the Model Act by state legislatures. The adoption of the Model Act would protect the foster child's right to counsel in abuse, neglect, and judicial bypass proceedings, thereby extending the duties of the child-centered attorney to encompass such proceedings. Moreover, the Model Act should be amended to provide explicitly for the appointment of a best-interests advocate for the child in situations where the child-centered attorney feels the child's expressed wishes substantially deviate from the child's best interests. Through adoption of this amended Model Act, states could provide robust representation for the child in foster care, guaranteeing the child an advocate for their expressed wishes and protecting the child's rights. Moreover, if jurisdictions adopt the Model Act in conjunction with expanding the mature minor doctrine outside of the medical context, the combination of these two guarantees would allow the minor not only a basis for pleading their case before the court, but adequate legal representation in the process.

V. IMPLICATIONS OF ASKING THE CHILD

This Part discusses the limitations and implications of the solution proposed above. Though the Model Act provides a well-researched and thorough scheme for child representation, and the mature minor doctrine has been successfully applied by courts for decades,[287] these solutions nonetheless have limits. Critics may express concerns about the costs of appointing child-centered attorneys, the potential drain on judicial resources, the subjectivity of the mature minor doctrine, and the possibility that giving children such a degree of autonomy may infringe upon fundamental parental rights. This Part addresses each of these concerns in turn. Such potential limitations can be overcome by careful statutory implementation and, ultimately, must fall secondary to the interests of the child at stake.

First, opponents of the proposed solution may argue that appointment of a child-centered attorney, and possibly of an additional best-interests advocate, is

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[286] *See, e.g.*, FOSTER PARENT MANUAL, *supra* note 69, at 8 (noting the foster parents' rights to be involved in decisions regarding the child and listing the foster agency's right to make placement decisions for the child; remove the child from their foster home; and "[a]rrange for the child's medical, dental, and psychological care").

[287] *See, e.g.*, *supra* note 240 and accompanying text.

unsustainably expensive. However, all states are already required by CAPTA to appoint a GAL for any child in abuse and neglect proceedings.[288] Adoption of the Model Act would not require appointment of an additional individual unless the jurisdiction provided only volunteer, non-attorney GALs, or the child-centered attorney felt the child's expressed wishes were divergent from the child's best interests. In this latter scenario, the child-centered attorney would request appointment of a best-interests advocate, who could be an attorney or a CASA volunteer. The most financially sustainable model would be to make the best-interests advocate a CASA volunteer, since many states already have well-established CASA programs[289] that could continue to operate within the framework of the Model Act, so long as they are not the child's *only* form of representation. Thus, under most states' current systems, appointment of a separate best-interests advocate will not cost the state additional funding.

Moreover, granting children in foster care the autonomy to make reasoned decisions relating to their own care and providing them a voice throughout legal proceedings would help engender a sense of dignity and agency in the child,[290] and would provide the child with much-needed continuity throughout the foster care process.[291] The child's own involvement in decision-making would likely make the child more readily able to accept the decisions made as the result of a fair and justiciable process.[292] As such, the state might actually *save* costs down the line as a result of better outcomes in foster children's care and their subsequent transition into society.[293] These delayed cost-saving opportunities

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[288] 42 U.S.C. § 5106a(b)(2)(B)(xiii).

[289] Currently, there are CASA programs in forty-nine states and the District of Columbia with over 85,000 individuals serving as CASA's in almost 1,000 programs nationwide. *Court Appointed Special Advocate/Guardian Ad Litem: Frequently Asked Questions*, CT. APPOINTED SPECIAL ADVOC.: FOR CHILD., https://casakids.net/faq/ (last visited Aug. 28, 2022). These CASAs serve over 260,000 children nationwide in abuse and neglect proceedings. *Id.*

[290] Barnett, *supra* note 108, at 267 (discussing the role of self-regulation skills through the practice of decision-making in forming adolescent autonomy).

[291] AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 260, at § D-13 cmt.

[292] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS 21 (AM. BAR ASS'N 2011); Adams, Rosado & Vigil, *supra* note 236, at 34 ("A child who knows that his or her voice has been heard will more easily live with whatever result is ultimately achieved . . . ." (internal citations omitted)).

[293] For instance, one report shows over 45% of former foster children reported receiving food stamps two to three years after aging out of foster care. A CHILD'S RIGHT TO COUNSEL, *supra* note 256, at 4–5. In the 2020 fiscal year, the government spent "$85.6 billion on the Supplemental Nutrition Assistance Program." Tracy Roof, *SNAP Benefits Cost a Total of $85.6B in the 2020 Fiscal Year Amid Heightened U.S. Poverty and Unemployment*, THE CONVERSATION (Oct. 27, 2020, 8:11 AM), https://theconversation.com/snap-benefits-cost-a-total-of-85-6b-in-the-2020-fiscal-year-amid-heightened-us-poverty-and-unemployment-148077.

will render this Comment's solution more attractive to states holding tight to their purse strings.

Second, some critics may object to the proposed solution by claiming that using the judicial bypass process in this context would effect a drain on judicial resources. However, while this solution does propose that the judiciary take a more active role in some facets of the foster child's care, the foster child seeking a judicial bypass might not always end up in the courtroom. For instance, the attorney and child may be able to sit down with the caseworker or foster parent and settle[294] these issues without involving the judge. In such scenarios, the mere prospect of defending their position before a judge might make the caseworker or foster parent more amenable to the child's request, and the presence of the attorney would help the child advocate their position more skillfully.

Furthermore, the attorney—in their role as counselor to the child—would provide an additional, and ideally trusted,[295] figure with whom the child could reason through their wishes, and perhaps the child would accept the decisions made by the child's caretaker or caseworker without needing to advocate their position before a judge.[296] In these situations, the judiciary need not be highly involved since knowledge that the child has an advocate and an opportunity to plead their case would provide sufficient incentives for both the child and the caretaker to come to a reasoned consensus without needing the judicial bypass proceeding.

Third, while some have critiqued the mature minor doctrine for the subjective nature of its criteria,[297] it is worth noting other areas of law have long applied similarly subjective tests, particularly in the context of criminal law.[298] Furthermore, the mature minor doctrine's subjectivity serves as a balance to the rigid, bright-line age of majority, which functions to indiscriminately separate legal actors from children unable to exercise many autonomous rights.[299] Thus,

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[294] ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7(b)(4) (AM. BAR ASS'N 2011) ("The duties of a child's lawyer include . . . discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state.").

[295] *See id.* § 7(c) (encouraging the child-centered attorney to form a relationship with the child to best determine the expressed wishes of the child).

[296] *See* Adams, Rosado & Vigil, *supra* note 236, at 32 (emphasizing the attorney's duty to counsel the child-client as "the most appropriate course of action" (internal quotations omitted)).

[297] *See* Derish & Heuvel, *supra* note 134, at 117 ("Reliance upon the common law leaves the mature minor doctrine highly vulnerable to a wide array of interpretations by state and federal courts.").

[298] *Id.* at 118 (pointing out that criminal law sometimes applies similar tests of a minor's maturity to determine whether a minor should be tried as an adult).

[299] Benston, *supra* note 136, at 14.

while multifactor tests such as the mature minor doctrine can be difficult to apply with consistency, such subjectivity also allows for increased flexibility.[300]

Finally, some opponents of the proposed solution may fear that granting greater autonomy to children in foster care poses a threat to the fundamental parental rights of the child's legal parent.[301] However, it is important to remember that for the child in foster care, the legal parent is already exercising reduced parental rights.[302] The potential affront to parental autonomy resulting from granting the foster child increased decision-making authority is mitigated by the fact that the parent has already either relinquished their parental authority to some degree or been adjudicated an unfit parent. Thus, such decisions ought to be made by someone with knowledge about the child's situation, continuity throughout the turmoil of foster care placement, and concern for the child's well-being. There is no reason why that figure cannot be the child themselves, if proven sufficiently mature. Parental rights can return to the status quo when, and if, the child is reunited with their legal parents.

CONCLUSION

When it comes to the child welfare system, commentators, stakeholders, and policymakers spend a majority of their time asking what is in the best interests of the child. Yet—even in the case of older, mature children—time is rarely taken to ask what decision the child believes furthers their best interests. While it is correct to assume there are some choices the child should not or cannot make, this assumption has often been conflated by the law to mean the child can *never* decide. This faulty inferential leap fails America's children.

The child in foster care is frequently left adrift without the tether of parental connection and is pulled by the tides of siloed decision-makers. The foster child is often unable to enact their own choices due to the dearth of active rights granted to children by the Supreme Court, and the failure of federal and state legislatures to recognize the child themselves as an autonomous individual. Further, no federal and only a few state laws provide the child with the explicit

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[300] Somewhat ironically, the very same flexibility and wide discretion for judges is also what has been the first response to critics of the best interests of the child standard, since such flexibility allows the standard to be used in the very factually specific inquiries frequently demanded in the realm of family law. Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD.'S LEGAL RTS. J. 2, 7 (1996).

[301] This, of course, would only be a concern if the parent's rights had not been terminated by the state.

[302] *See supra* Section I.C.

right to a child-centered attorney, even in abuse and neglect proceedings where reorganization of the child's entire familial structure is at stake.[303]

For the child in foster care, the sad reality is that the child themselves may be the only continuous individual present throughout various placements, proceedings, and personal events in the child's life. State legislatures and courts must recognize the child's right to take an active role in their own life and function as a decision-maker. The state may be required to protect the child through removal from their home; however, this removal should serve to empower, rather than silence, the one whom it seeks to defend.

KATIE CHILTON[*]

303 *See supra* notes 255–256 and accompanying text.

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