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# No Access, No Choice: Foster Care Youth, Abortion, and State Removal of Children

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# NO ACCESS, NO CHOICE: FOSTER CARE YOUTH, ABORTION, AND STATE REMOVAL OF CHILDREN

*Kara Sheli Wallis*<sup>†</sup>

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## INTRODUCTION

In 2013, an anti-abortion judge garnered national attention when the Nebraska Supreme Court upheld his decision to deny a pregnant foster youth access to an abortion.<sup>1</sup> Known as Anonymous 5, the sixteen-year-old petitioner sought a judicial bypass of

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<sup>1</sup> *In re* Petition of Anonymous 5, 838 N.W.2d 226, 229 (Neb. 2013); George Chidi, *Nebraska Supreme Court rules 16-year-old ‘not mature enough’ for abortion*, THE RAW STORY (October 5, 2013), <http://www.rawstory.com/rs/2013/10/05/nebraska/> (“The district court judge, Peter C. Batallion, appears to have served in the 1980s on the com-

the Nebraska law that requires a minor to obtain parental consent before accessing abortion services.<sup>2</sup> At a confidential hearing, she told the judge that she was not in a position to financially support a child and that she could not “be the right mom that [she] would like to be right now.”<sup>3</sup> She also testified that her foster parents might resent her and her child because of their strong religious beliefs about sexuality and abortion.<sup>4</sup> She worried they would tell her young siblings, her only biological family left, that she was a “bad person.”<sup>5</sup> She indicated she and her child might become homeless if she were required to tell her conservative foster parents about her pregnancy.<sup>6</sup>

In response to these concerns, the judge asked Anonymous 5 if she would rather “kill the child inside [her]” than “risk problems with the foster care people,”<sup>7</sup> and ultimately denied her request, ruling she was “not sufficiently mature and well-informed” to choose on her own to end her pregnancy.<sup>8</sup> On appeal, the Nebraska Supreme Court upheld the ruling, a decision that incurred a plethora of public comment.<sup>9</sup> Many critics poignantly emphasized that finding a minor too immature for an abortion simultane-

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mittee for Metro Right to Life, an Omaha anti-abortion group, the *Houston Chronicle* reported.”).

<sup>2</sup> *Anonymous 5*, 838 N.W.2d at 231.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Anonymous 5*, 838 N.W.2d at 231.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Hilary Hanson, *Nebraska Court Rules Teen Too Immature for Abortion*, HUFFINGTON POST (Oct. 9, 2013), [http://www.huffingtonpost.com/2013/10/09/teen-too-immature-abortion\\_n\\_4072321.html](http://www.huffingtonpost.com/2013/10/09/teen-too-immature-abortion_n_4072321.html); Nina Liss-Schultz, *Nebraska Court Decides 16-Year-Old Is Too Immature for an Abortion, But Motherhood's Okay*, MOTHER JONES (Oct. 8, 2013), <http://www.motherjones.com/mojo/2013/10/parental-consent-laws-nebraska-abortion-courts> (describing the *Anonymous 5* court as “essentially finding [the minor] mature enough to carry a baby she doesn’t want but too immature to consent to her own abortion”); Katy Waldman, *Nebraska Court Rules Teen Too Immature for an Abortion, Fine to Raise a Kid*, SLATE (Oct. 7, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/10/07/nebraska\\_supreme\\_court\\_rules\\_that\\_a\\_16\\_year\\_old\\_in\\_foster\\_care\\_is\\_not\\_mature.html](http://www.slate.com/blogs/xx_factor/2013/10/07/nebraska_supreme_court_rules_that_a_16_year_old_in_foster_care_is_not_mature.html) (“The Nebraska Supreme Court denied a 16-year-old foster child’s request for an abortion on Friday because she was ‘not sufficiently mature’ to make the decision herself. So instead, this immature young woman who does not want a baby will become a mother. Everyone wins.”); Dan Arel, *Nebraska Court Rules 16-year-old Girl not Mature Enough for Abortion*, EXAMINER (Oct. 8, 2013), <http://www.examiner.com/article/nebraska-court-rules-16-year-old-girl-not-mature-enough-for-abortion> (“A 16-year-old Nebraskan girl who had to petition the Nebraska Supreme Court for her federally protected right to an abortion was denied when the judge ruled she was not mature enough to have an abortion. Oddly enough, they believe she is mature enough to be a mother.”).

ously deems her mature enough to parent.<sup>10</sup> Across news sites, reporters began stories with quips highlighting this paradox, including *Slate's* article *Nebraska Court Rules Teen Too Immature for an Abortion, Fine to Raise a Kid*.<sup>11</sup>

Although clever, the headline seriously understates the extraordinary barriers to reproductive justice that pregnant and parenting foster youth face. When a foster minor like Anonymous 5 is denied access to abortion, she may also be unable to parent her child because of the significant rate of state removal of children from mothers in foster care.<sup>12</sup> As a result, for many pregnant and parenting youth in foster care, the quip horrifyingly becomes “too immature for an abortion and too immature for motherhood.”<sup>13</sup>

Across the reproductive spectrum, the state fails to provide foster youth with the resources, rights, and support necessary to choose whether to get pregnant, give birth, or parent a child.<sup>14</sup> At the start, without access to adequate sex education and reproductive health services, a foster minor may lack real autonomy in choosing to become pregnant and carry her pregnancy to term. Upon giving birth, she may be coerced into adoption by a caseworker or foster parents who do not wish to accommodate the newborn. If she retains custody, the new parent may likely also face accusations of abuse or neglect in a defective child welfare system inundated with systemic prejudice against the poor that consistently fails to provide for its wards.<sup>15</sup> As a result of system failure, a disadvantaged mother in foster care, who very likely did not have much choice in becoming a parent, might also face such lack of

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<sup>10</sup> See sources cited *supra* note 9.

<sup>11</sup> Waldman, *supra* note 9.

<sup>12</sup> WASH. STATE DEP'T OF SOC. & HEALTH SERVS., PREGNANT AND PARENTING YOUTH IN FOSTER CARE IN WASH. STATE: COMPARISON TO OTHER TEENS AND YOUNG WOMEN WHO GAVE BIRTH 10 (2014), available at <http://www.dshs.wa.gov/pdf/ms/rda/research/11/202.pdf> (finding that the “rate of out of home placement for children born to Foster Youth (7%) was more than 10 times higher than the rates for Medicaid Teens (0.5%) and Medicaid Young Adults (0.6%) and nearly 25 times higher than the rate for Non-Medicaid Teens (0.3%)”); Amy Dworsky & Jan DeCoursey, *Pregnant and Parenting Foster Youth: Their Needs, Their Experiences*, CHAPIN HALL AT THE UNIVERSITY OF CHICAGO 34 (2009), available at [http://www.chapinhall.org/sites/default/files/Pregnant\\_Foster\\_Youth\\_final\\_081109.pdf](http://www.chapinhall.org/sites/default/files/Pregnant_Foster_Youth_final_081109.pdf) (finding that of the population of foster youth mothers they surveyed, “11 percent had a child placed in foster care”).

<sup>13</sup> Jennifer Bladell, *Mother May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 AM. U.J. GENDER SOC. POL'Y & L. 287, 300 (2002).

<sup>14</sup> See generally SCHUYLER CENTER FOR ANALYSIS AND ADVOCACY, *Risking Their Future: Understanding the Health Behaviors of Foster Youth*, (2009), available at [http://www.scaany.org/resources/documents/risking\\_their\\_future\\_report\\_000.pdf](http://www.scaany.org/resources/documents/risking_their_future_report_000.pdf).

<sup>15</sup> See Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 25 (2006).

choice in remaining one.<sup>16</sup>

This comment tracks the reproductive life course of a foster youth and the various legal and policy-based obstacles she may face, beginning with pre-pregnancy and entry into foster care, and ending with state removal of children.<sup>17</sup> Part I provides an overview of the child welfare system and its failure to achieve the goals upon which it is premised. Part II generally discusses the regulatory scheme and the role of increasing privatization in denying foster youth adequate sex education and reproductive health services. Part III focuses on judicial bypass as applied to foster youth, which creates legal absurdities and significant risks to minors' health and safety. Part IV discusses risks that a pregnant or parenting foster youth faces: lack of prenatal care, unwarranted scrutiny and judgment, and a high risk of state removal of her child—not because of conventional understandings of abuse or neglect, but because the state fails to provide her the resources to parent. Finally, Part V recommends various practical interventions to improve outcomes for foster youth, including major shifts in the way the system approaches child welfare, teen sexuality, and reproductive health.<sup>18</sup>

## I. ENTERING THE SYSTEM: THE CHILD WELFARE LEGAL SCHEME

To begin, this section analyzes the legal scheme of the child welfare system, focusing on how youth end up in state care. Family law is typically decided by each state.<sup>19</sup> But when it comes to child welfare, each state conforms to federal requirements in order to receive funding for its child welfare system. In 1996, these federal requirements underwent an extreme revision, changing the focus from keeping youth in their communities to a more “child protective” stance, purportedly designed to protect minors from harm and promoting adoption as a means of securing stable placements

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<sup>16</sup> See *id.* at 2.

<sup>17</sup> This comment assumes the following definition of reproductive justice: “Reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence.” LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *Motivation* (2013), available at <http://lsrj.org/motivation/>.

<sup>18</sup> Recognizing the importance of language, this comment uses “children” when discussing the private familial context, “minors” when referring to the legal system, and “youth” when referencing greater social concerns regarding the population in foster care.

<sup>19</sup> “[R]egulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’” *United States v. Windsor*, 133 S.Ct. 2675, 2680 (2013) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

in families.<sup>20</sup>

Known as the Adoption and Safe Families Act (“ASFA”), the law was designed to secure “permanency” for a foster minor by promoting adoption rather than reunification with the family of origin.<sup>21</sup> Signed into law by then-President Clinton, the legislation was a response to high-profile child abuse cases making national news because of their horrific facts and child deaths.<sup>22</sup> Sadly, these news stories produced an erroneous concern that agencies were reunifying families at the expense of child safety,<sup>23</sup> when in fact, most of those tragedies were a result of administrative failure, not because an agency prioritized family unity over removal of a child.<sup>24</sup>

For instance, J.W. was a child who died in his mother’s care while an agency was investigating her for abuse.<sup>25</sup> The tragedy made national news with legislators framing it as a “casualty of the federal law.”<sup>26</sup> Backers of ASFA used the death to say the old law required the agency to make too many efforts to keep families together at the expense of children’s safety.<sup>27</sup> In reality, however, J.W. remained in the home because the agency lost his records, not because the law required the agency to keep him with his mother.<sup>28</sup> Regardless, politicians used such high-profile tragedies to pass ASFA—an agency now only needs to make reasonable efforts (as opposed to the previous “diligent efforts”) to keep families together.<sup>29</sup>

Consequently, more children are unnecessarily removed from their families and placed into stranger foster care because of poverty-related issues rather than intentional maltreatment that is typically associated with abuse and neglect.<sup>30</sup> With legal neglect

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<sup>20</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

<sup>21</sup> *Id.* § 305(b)(2) (limiting family reunification to a “15-month period” beginning “on the date that the child, pursuant to section 475(5)(F), is considered to have entered foster care”).

<sup>22</sup> See Will Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 273-74 (2003).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 274.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

<sup>27</sup> Crossley, *supra* note 22, at 274.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 271-74; In order for an agency to show substantial conformity with federal law to determine eligibility for federal funding, it must achieve the outcome that “children are, first and foremost, protected from abuse and neglect [and] children are safely maintained in their own homes whenever possible and appropriate.” 45 C.F.R. § 1355.34(b)(1)(i).

<sup>30</sup> Ann Cammett, *Introduction to The Rights of Parents with Children in Foster Care:*

making up more than seventy five percent of child welfare investigations,<sup>31</sup> a state's safety concern that justifies removal of a child is often more closely linked to poverty than to someone being a "bad parent."<sup>32</sup>

For example, an agency may include in the basis for removing a child that the mother has too much take-out and fast food in the refrigerator despite lack of local access to affordable healthy groceries; or for her not visiting the child enough in the hospital despite her inability to pay for transportation; or for her son's truancy from school while she balances two full-time jobs.<sup>33</sup> Relying on high-profile abuse cases for its passage, ASFA made it easier for an agency to take away a parent's custody of her child, rather than address the underlying socioeconomic causes of the problem, because of the reduced efforts required by the agency to keep the family intact.

Similarly, horror stories about minors languishing in the foster care system resulted in a push for adoption over traditional family unity.<sup>34</sup> Federal law now requires states to file a petition to terminate a parent's rights when her child has been in state custody for fifteen of the most recent twenty-two months, or if the parent commits a certain crime against the minor.<sup>35</sup> ASFA also includes that for every successful termination of parental rights and adoption of

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*Removals Arising from Economic Hardship and the Predicative Power of Race Association of the Bar of the City of New York*, 6 N.Y. CITY L.REV. 61, 62 (2003) ("The policy directive, absorbed and implemented by agency officials and caseworkers alike, is crudely referred to as 'when in doubt, yank them out.' As a practical matter, the agency failed to make a distinction between cases of child abuse and severe parental neglect—which constitute a small percentage of indicated cases—and child neglect arising from poverty.").

<sup>31</sup> Michelle Healy, *Child Neglect Accounts for 75% of Reported Abuse Cases*, USA TODAY (Sept. 12, 2013), <http://www.usatoday.com/story/news/nation/2013/09/12/child-abuse-neglect/2803099/>.

<sup>32</sup> See Cammett, *supra* note 30; Emma Ketteringham, *Lighting a Candle is Not Abuse*, HUFFINGTON POST (Nov. 27, 2013), [http://www.huffingtonpost.com/emma-s-ketteringham/lighting-a-candle-is-not\\_b\\_4349689.html](http://www.huffingtonpost.com/emma-s-ketteringham/lighting-a-candle-is-not_b_4349689.html); Nanette Schorr, *Foster Care and the Politics of Compassion*, TIKKUN, May 1992, 118-121 available at <http://www.spiritlawpolitics.org/sites/default/files/Foster-Care-And-Politics-Of-Compassion.pdf>.

<sup>33</sup> Examples based on cases the author witnessed while observing abuse and neglect proceedings in Bronx County Family Court during Summer of 2013, and Brooklyn County Family Court in Fall of 2014. See also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 26-29 (2002); Kamala D. Harris, *In School On Track: Attorney General's 2013 Report on California's Elementary School Truancy & Absenteeism Crisis*, CALIFORNIA ATTORNEY GENERAL (2013), available at <https://oag.ca.gov/truancy/2013/ch5>.

<sup>34</sup> Crossley, *supra* note 22, at 271-273.

<sup>35</sup> 42 U.S.C.A. § 675(5)(E) (West, Westlaw through P.L. 113-163 (excluding P.L. 113-128)).



a minor, foster care agencies receive a substantial financial reward.<sup>36</sup> So, while an agency is responsible for making reasonable efforts to reunify a child with her parent, that same agency also has major financial incentive to see the minor remain in care so that the parent's rights are terminated and the minor is successfully adopted.<sup>37</sup> The financial incentives have been touted as successes, with the prerogative given to adoption rather than a minor's return to her parents or community, regardless of the context in which she entered or remained in state care.<sup>38</sup>

When a state has jurisdiction over a minor, because she is in care or otherwise, a court must hold a yearly hearing.<sup>39</sup> During this hearing, a court decides her permanent living arrangement, determining a range of issues such as: (1) whether the child should return to her parents; (2) whether parents' rights should be terminated and the minor placed for adoption; (3) whether another person should obtain legal guardianship; or (4) whether the child should be placed with a family member or in another arrangement that is in the minor's best interests.<sup>40</sup>

After the court determines the minor's permanency plan, the agency must make reasonable efforts towards this end.<sup>41</sup> States determine whether to prioritize children being placed with family members because no priority is given in ASFA. However, even when kinship care is prioritized by statute, a low-income or non-traditional family member will likely not meet the arduous requirements of a "fit and willing relative," and the minor will be placed in stranger foster care.<sup>42</sup>

For example, New York City denies family member requests to foster their kin because of arbitrary rules regarding the family's

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<sup>36</sup> Adoption and Safe Families Act of 1997, *supra* note 20; *How the Adoption Incentives Program can Incentivize Adoptions*, CONG. COAL. ON ADOPTION INST. (Feb. 27, 2013), <http://ccainstituteblog.org/2013/02/27/how-the-adoption-incentive-program-can-incentivize-adoptions/> ("Originally created in 1997 as part of the Adoption and Safe Families Act, the *Adoption Incentives Program* has delivered a total of \$375 million in bonuses to states that were successful in increasing the number of children adopted out of foster care.").

<sup>37</sup> See Crossley, *supra* note 22, at 271-73; Schorr, *supra* note 32, at 120 ("Now, foster parents and foster care administrators have an economic incentive to perpetuate the institutionalized practice of child removal and placement.").

<sup>38</sup> CONG. COAL. ON ADOPTION INST., *supra* note 36.

<sup>39</sup> Adoption and Safe Families Act of 1997, *supra* note 20.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 42 U.S.C.A. § 675(1)(E) (West 2011); Cammett, *supra* note 30; See also Katherine Moore, *Pregnant In Foster Care: Prenatal Care, Abortion, And The Consequences For Foster Families*, 23 COLUM. J. GENDER & L. 29, 33-36 (2012).

home. Low-income families might only have one- or two-bedroom apartments, but to foster their nieces, nephews, or grandchildren, families must have separate bedrooms for opposite sex children over seven years old.<sup>43</sup> No more than three people can occupy a bedroom where children sleep.<sup>44</sup> An adult may not sleep in the same room with a child of the opposite sex who is over the age of three.<sup>45</sup> No child may sleep in the same bed as an adult, even if that adult is her grandmother.<sup>46</sup> Additional rules require *all* members in the household to undergo intensive background checks.<sup>47</sup> The home will be denied foster care status because of someone's stale criminal conviction or an abuse or neglect registry report, even if a court has found the report unsubstantiated or that such a history would not pose any risk to the child.<sup>48</sup> For families living in poverty, these requirements can be impossible to meet.

When in stranger foster care, minors may still enjoy visits with their parents, who often maintain significant legal rights to parent their children.<sup>49</sup> But for low-income parents, visitation is often difficult to maintain because of agencies' inflexible visitation hours and low standard of accommodation for work conflicts, transportation, or other special needs. A parent might also struggle to complete the time-consuming regime of services mandated by the court. These unwanted and unhelpful programs are typically not tailored to meet the parent's individual needs and can instead be overly burdensome and negatively impact the family unit as a whole.<sup>50</sup>

Indeed, the current system "substitutes costly, poorly tailored interventions—few of which have been shown to improve the care of children—for systemic and lasting investment in our poor com-

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<sup>43</sup> 18 N.Y.C.R.R. § 443.3(a).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 18 N.Y.C.R.R. § 443.3(a).

<sup>49</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State"); *see also* *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 821 (1977); *see, e.g., In re Lyle A.*, 14 Misc. 3d 842, 850 (Fam. Ct. 2006) ("A parent whose child is in foster care has the right to make the decision regarding whether or not his or her child will be given psychotropic drugs.")

<sup>50</sup> *See* Schorr, *supra* note 32. A court may not exercise jurisdictional control over a parent until after a trial and finding of abuse or neglect. However, even without a finding of abuse or neglect, a parent often must participate in court-mandated services to enjoy visits with her child, and to show a willingness to cooperate with the court.

munities.”<sup>51</sup> For example, the court typically assigns all parents accused of abuse and neglect to parenting classes. But the support a fifteen-year-old parenting foster minor needs is much different from what a forty-five-year-old mother of four needs—yet the two are assigned to the same two-hour mandatory parenting skills lecture.<sup>52</sup> For allegations involving drug or alcohol use, burdensome programs may be mandatory, even when such programs are ineffective and non-responsive to the individual’s needs or supposed risk to the minor.<sup>53</sup>

Additionally, overworked and undertrained caseworkers determine what “good” parenting is through subjective value judgments, often colored by prejudice and cultural assumptions. Take, for example, a mother’s plight recently profiled by *The New Yorker*—a caseworker took an Egyptian mother’s shyness for shiftiness and mysteriousness, ultimately forbidding her from speaking in Arabic to her son.<sup>54</sup> A caseworker’s prejudice and bias often shape the standard for what is deemed acceptable parenting and who is ultimately accused of abuse and neglect.<sup>55</sup> Such room for personal and

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<sup>51</sup> Leaving your children? Go to a parental skills class. No need to consider that what you really need is some day-care assistance, or someone to watch the little ones while you take the older children to the store or the doctor or simply for a walk. You’ve sexually abused your child? Go to a sex-offenders clinic, where you will get behavioral modification therapy. No need to explore the physical or emotional violence you experienced as a child or your own lack of self-esteem and sense of alienation. Abusing drugs or alcohol? Have your urine tested regularly and exercise greater self-discipline. No need to say that you feel narcotics may be the best thing going, given the conditions under which you’re living. This does not mean that these behaviors should not be controlled; indeed, they must be. But in the absence of a real commitment to addressing the isolation and degradation from which abuse and neglect follow, they will only continue.

Schorr, *supra* note 32, at 121; *see also* Ketteringham *supra* note 32.

<sup>52</sup> Example from Judge Maria Arias, New York City Family Court, Kings County, Panel Speaker at the City University of New York (CUNY) Law Students for Reproductive Justice Spring Panel: Youth, Gender, and Social Justice Lawyering in Family Court (April 3, 2014).

<sup>53</sup> *Id.*

<sup>54</sup> Rachel Aviv, *Where Is Your Mother?*, THE NEW YORKER, Dec. 2, 2013, at 52, available at <http://www.newyorker.com/magazine/2013/12/02/where-is-your-mother>.

<sup>55</sup> ROBERTS, *supra* note 33, at 17 (“A national study of child protective services by the U.S. Department of Health and Human Services reported that ‘minority children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, *even when they have the same problems and characteristics as white children.*’ . . . Government authorities appear to believe that maltreatment of Black children results from pathologies intrinsic to their homes and that helping them requires dislocating them from their families. Child welfare for Black children usually means shattering the bonds with their parents.”).

systemic biases partly accounts for the gross racial disproportionality of children of color in the child welfare system and the disparate treatment they receive while in care.<sup>56</sup>

Federal law also sets the goals of the foster care programs.<sup>57</sup> In order to receive funding, an agency is evaluated on its ability to meet various outcomes, including that the minors in its care receive appropriate educational, physical, and mental health services.<sup>58</sup> States, however, rarely actualize these goals, adversely impacting for life the almost half a million youth in foster care; yet states and the private independent agencies they contract with still receive funding.<sup>59</sup>

Indeed, the growing trend of privatizing foster care agencies has worsened the outcomes for foster youth—independent non-governmental organizations are left alone to interpret and fulfill the already-vague federal requirements for achieving the health and well being of minors. This includes religious agencies that may have other priorities or sectarian beliefs regarding what is best for the minor. Of additional worry are agencies that function on a for-profit model when they receive federal monies for every termination of parental rights and private monies for successful adoption of a child—a model that commodifies children, rather than encourages entities to act in children’s best interests.<sup>60</sup>

Foster youth often find themselves separated from their communities for the first time, heightening the high risks that minors

<sup>56</sup> *Id.* at 16-25 (“Not only do Black children enter the system in disproportionate numbers and for longer periods of time, but they also receive lower-quality services once they get there.” “Black children are less likely than white children to either be returned home or adopted.”).

<sup>57</sup> 45 C.F.R. §§ 1355, 1356, 1357 (2014).

<sup>58</sup> The federal government tracks and measures state outcomes in relation to the requirements set out in this highly complex and opaque funding scheme. 45 C.F.R. § 1355.34(b)(iii) (2012); Gail Chang Bohr, *For the Well-Being of Minnesota’s Foster Children: What Federal Legislation Requires*, 31 WM. MITCHELL L. REV. 897, 899 (2005) (discussing 42 U.S.C. § 677 (2002)).

<sup>59</sup> Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts To Improve Consequences of Aging Out*, 17 CUNY L. REV. 145, 151-157 (2013); U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, THE AFCRS REPORT (July 2012), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>.

<sup>60</sup> See Crossley, *supra* note 22, at 271-73; For a background on problems associated with privatizing traditional government functions and the for-profit functioning of non-profits, see James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303, 306 (2006) (“Nonprofits are far from independent of private enterprise or government. There is an extraordinary degree of interface between government and nonprofits today. Nonprofits mimic for-profit firms, and the private sector plays an enormous role in the nonprofit sector. Many nonprofits engage substantially, if not excessively, in regular business activity.”).

in foster care already face. For example, as compared to their peers, foster care youth are more likely to drop out of high school,<sup>61</sup> face homelessness,<sup>62</sup> get inconsistent health care (if any),<sup>63</sup> and experience trauma, including the trauma of being separated from their parents.<sup>64</sup> Foster youth also have increased rates of incarceration and interaction with the juvenile criminal system,<sup>65</sup> repeated pregnancy,<sup>66</sup> teen parenting,<sup>67</sup> joblessness,<sup>68</sup> and extreme poverty.<sup>69</sup>

Already disadvantaged by the system, foster care youth then face complete abandonment when they “age out” of the system.<sup>70</sup> Federal law requires an agency to plan for supporting youth as they transition out of care.<sup>71</sup> However, the plan requirement is vague

<sup>61</sup> Dworsky & Decoursey, *supra* note 12, at 34 (“[F]oster youth were more likely to drop out (or, in the case of males, become incarcerated) than to graduate.”).

<sup>62</sup> Mark E. Courtney, et. al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at age 23 and 24*, CHAPIN HILL AT THE UNIVERSITY OF CHICAGO, 10 2010, available at [http://www.chapinhill.org/sites/default/files/Midwest\\_Study\\_Age\\_23\\_24.pdf](http://www.chapinhill.org/sites/default/files/Midwest_Study_Age_23_24.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> COMMITTEE ON EARLY CHILDHOOD, ADOPTION, AND DEPENDENT CARE, *Health Care of Young Children in Foster Care*, 109 PEDIATRICS 536, 539 (2002), available at <http://pediatrics.aappublications.org/content/109/3/536.full.pdfhtml> (“Certainly, even brief separation from parental care is an unfortunate and usually traumatic event for children.”); Karen Baynes-Dunning & Karen Worthington, Responding to the Needs of Adolescent Girls in Foster Care, 20 GEO. J. ON POVERTY L. & POL’Y 321, 343 (2013) (describing “the emotional trauma that is caused simply by a family’s involvement with the child welfare system.”).

<sup>65</sup> Children in child welfare systems are at a higher risk of involvement with the juvenile criminal justice system as compared to their peers. The reasons for this vary, but include the fact that children in the child welfare system are often low-income and of color, making them a target for the criminal justice system. Additionally, child welfare agencies will often report the youth in their custody for various crimes. The rate of interaction between these two systems is incredibly apparent such that one advocate recommends that agencies, in addition to making the legally required reasonable efforts to reunite families, should make reasonable efforts to keep children in their care from becoming targets of the juvenile criminal justice system, which would include not reporting on their wards to law enforcement. Baynes-Dunning & Worthington, *supra* note 64 at 325; Claudette Brown, *Crossing over: From Child Welfare to Juvenile Justice*, MD. BAR J. 22, 18 (2003).

<sup>66</sup> Dworsky & Decoursey, *supra* note 12 at 33.

<sup>67</sup> *Id.*

<sup>68</sup> Kasarabada, *supra* note 59.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* Each state varies on how long a youth can remain in foster care, typically ranging between eighteen and twenty-one years old, with some states allowing longer periods when the youth is employed or enrolled in school.

<sup>71</sup> 42 U.S.C.A. § 675(5)(H) (During the ninety-days before the child ends care, “a caseworker on the staff of the State agency, and, as appropriate, other representatives of the child provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, includes specific options on

and the agency is not required to take steps to actually implement the plan or provide the minor with support.<sup>72</sup> This leaves the minor virtually alone and without any resources, exacerbating the disadvantages she may already face.<sup>73</sup> The state's failure to provide for foster youth as they age out is so egregious that it may likely violate the basic tenets of human rights and various international laws.<sup>74</sup>

## II. PREVENTING PREGNANCY: THE SYSTEM'S FAILURE TO PROVIDE SUPPORT AND ACCESS TO RESOURCES

The systemic failure of the state to provide for foster youth is exemplified by a lack of pre-pregnancy education and access to resources available to foster youth. Generally, American teens are uninformed about sex, pregnancy, and pregnancy prevention because of a national failure to educate our youth, partially resulting from state policies that place political and religious ideology above the health, safety, and future of youth.<sup>75</sup> Foster youth are

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housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services, includes information about the importance of designating another individual to make health care treatment decisions on behalf of the child if the child becomes unable to participate in such decisions and the child does not have, or does not want, a relative who would otherwise be authorized under State law to make such decisions, and provides the child with the option to execute a health care power of attorney, health care proxy, or other similar document recognized under State law, and is as detailed as the child may elect.”)

<sup>72</sup> *Id.*; Kasarabada, *supra* note 59.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (Arguing that the state's failure to provide for foster youth when they age out violates the Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3.).

<sup>75</sup> American youth are undereducated and misinformed about sex, pregnancy, and pregnancy prevention. Only twenty-two states plus the District of Columbia mandate sex education. Of those states, only twelve of them require that information be medically accurate. Additionally, the majority of states require that if sex education is given, then abstinence from sex must be stressed or covered. The majority of states have this policy, despite many studies proving that these models be ineffective, dangerous for youth, and result in higher rates of unwanted teen pregnancy and Sexually Transmitted Infections (STIs). The increase of the influence of religious ideologies in state policies is partially responsible for the prevalence of these harmful policies. THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *Magical Thinking: Young Adults' Attitudes and Beliefs about Sex, Conception, and Unplanned Pregnancy, Results from a Public Opinion Survey* (2008), available at <http://www.thenationalcampaign.org/resources/pdf/pubs/MagicalThinking.pdf>; *Sex and HIV Education, State Policies in Brief as of November 1, 2013*, GUTTMACHER INSTITUTE, 3-4 (2013) available at [http://www.guttmacher.org/statecenter/spibs/spib\\_SE.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf); *Policy Brief: Abstinence-Only-Until-Marriage Programs: Ineffective, Unethical, and Poor Public Health*, ADVOCATES FOR YOUTH (July 2007), available at <http://www.advocatesforyouth.org/storage/advfy/documents/pba>

especially susceptible to under-education and misinformation about sex and reproductive health and are more likely to get pregnant than their peers.<sup>76</sup> Advocates attribute this to inconsistent education,<sup>77</sup> frequent moving between placements, overloaded and mismanaged agencies, and a lack of agency policies to adequately educate foster youth.<sup>78</sup>

Indeed, despite federal goals to educate foster youth, many child welfare workers and foster parents feel inadequately trained to provide general sex education for foster youth.<sup>79</sup> One study of seventeen- and eighteen-year-olds in foster care found that only forty-five percent were given information about pregnancy prevention and only fifteen percent received information about family planning services.<sup>80</sup> Worsening the matter, foster youth also often do not have access to traditional forms of sex education via family and community sources, often assumed to be a primary source of information about sex, reproduction, and pregnancy.<sup>81</sup> Experts conclude that lack of sex education is responsible for the high

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bonly.pdf; John Santelli, *Medical Accuracy in Sexuality Education: Ideology and the Scientific Process*, 98 AM. J. PUB. HEALTH 1786, 1788-1791 (2008).

<sup>76</sup> *Why it Matters: Teen Pregnancy and Children Welfare*, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY (Aug. 2010), available at <http://centerforchildwelfare2.fmh.usf.edu/kb/resource/ItsYourResponsibility.pdf> (“Nearly three out of four young women in foster care report being pregnant at age 21 compared to only one-third of young women not in foster care. Repeat pregnancies are common with almost two-thirds of the young women in foster care experiencing more than one pregnancy by age 21,” citing COURTNEY, *supra* note 62).

<sup>77</sup> Inconsistent education is compounded by a drastic increase of public schools using suspension and expulsion as an institutional response to disciplinary and behavioral problems; such policies often disproportionately impact foster youth. Brown, *supra* note 65, at 22 (“Disciplinary problems in school resulting in suspension or expulsion have increased dramatically in the U.S., from 1.7 million in 1974 to 3.1 million in 1997.”).

<sup>78</sup> Taylor Dudley, *Bearing Injustice: Foster Care, Pregnancy Prevention, and the Law*, 28 BERKELEY J. GENDER L. & JUST. 77, 110–112 (2013); Amy Sullivan, *Teen Pregnancy: An Epidemic in Foster Care*, TIME MAG., (July 22, 2009) (“‘You’re so busy being transferred from home to home,’ says Alixes Rosado, who has been in foster care in Connecticut since he was 6 years old. ‘You don’t have a lot of stable connections.’ The 20-year-old estimates that he has worked with a different social worker every year for the past 10. ‘And not a single one talked about sex.’”).

<sup>79</sup> Heather Boonstra, *Teen Pregnancy Among Young Women In Foster Care: A Primer*, 14 n.2 Guttmacher Policy Review 12 (Spring 2011), available at <http://www.guttmacher.org/pubs/gpr/14/2/gpr140208.html#9>.

<sup>80</sup> Amy Dworsky, Research Fellow, Chapin Hall, Remarks for a Congressional Roundtable with Senator Mary Landrieu at the Russell Senate Office Building: Preventing Pregnancy among Youth in Foster Care (July 16, 2009) available at <http://www.chapinhall.org/sites/default/files/DworskyFosterPregnancy-7-16-09.pdf>.

<sup>81</sup> Sullivan, *supra* note 78 (“Perhaps the most important asset teenagers need to avoid early parenthood is a strong relationship with parents or other adults in their lives.”); see also Baynes-Dunning & Worthington, *supra* note 64, at 341.

rates of teen pregnancy and sexually transmitted infections (STIs) among foster youth.<sup>82</sup>

Even when foster care youth do receive education about sex and pregnancy prevention, it is often “too little, too late.”<sup>83</sup> Youth misunderstand how to effectively protect themselves,<sup>84</sup> because of prevalent misinformation and stigma surrounding sex and reproductive health.<sup>85</sup> Such misinformation and stigma are often a result of the widespread use of ineffective and unethical abstinence-only models of sex education.<sup>86</sup> Indeed, there are no standard guidelines for what constitutes adequate sex and reproductive health education, and private agencies, often sectarian in nature, are left to their own judgment and expertise, or lack thereof.<sup>87</sup>

Equally problematic is that youth in foster care often do not feel safe or even know whom to turn to for help if help were available. Trepidation to approach a caseworker or foster parent may be compounded by the agency’s or foster parent’s particular religious orientation, whether or not that concern is founded. Alarming, one study found that queer youth in foster care feel more comfortable being homeless than in foster care because of the agency’s or foster parents’ private religious beliefs.<sup>88</sup> Youth may have similar fears of approaching the agency or foster parents with politically charged problems like abortion or sexual health.

For example, in *In re petition of Anonymous 5*, the minor sought a judicial bypass of the parental consent law out of fear that if her foster parents found out about her pregnancy, then they would no longer let her live there and would tell her siblings she was a “bad person.”<sup>89</sup> She feared that, if she carried her pregnancy to term, her foster parents would “harbor resentment toward her” and that “it would also be taken out on [her] child.”<sup>90</sup> These concerns

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<sup>82</sup> Dworsky, *supra* note 80, at 2.

<sup>83</sup> *Id.* at 3.

<sup>84</sup> *Id.*

<sup>85</sup> See THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 75.

<sup>86</sup> ADVOCATES FOR YOUTH, *Abstinence-Only-Until-Marriage Programs*, *supra* note 75.

<sup>87</sup> For example, one researcher found that foster care youth were not receiving any education about sexually transmitted infections, despite receiving education about birth control. Kym R. Ahrens, *Laboratory Diagnosed Sexually Transmitted Infections In Former Foster Youth Compared With Peers*, 126 PEDIATRICS 97, 101 (2010).

<sup>88</sup> Baynes-Dunning & Worthington, *supra* note 64, at 343; See Mimi Laver & Andrea Khoury, *Opening Doors For LGBTQ Youth In Foster Care: A Guide For Lawyers And Judges*, AMERICAN BAR ASSOCIATION 9 (2008), available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/2008\\_Openingdoors\\_Text.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/2008_Openingdoors_Text.auth_checkdam.pdf).

<sup>89</sup> *In re* Petition of Anonymous 5, 286 Neb. 226, 231 (2013).

<sup>90</sup> *Id.*



stemmed from her foster parents' "strong religious beliefs about abortion" and the obvious failure to create an environment of support in the placement.<sup>91</sup>

Unfortunately, Anonymous 5's fears might be very common given compounding factors, including the high rate of unplanned pregnancies of foster care youth,<sup>92</sup> a trend of privatizing foster care without adequate government oversight,<sup>93</sup> and no standard training for agency workers and foster parents.<sup>94</sup> Many foster youth do not feel comfortable approaching adults in their lives with questions or requests for help,<sup>95</sup> and agencies and foster parents are often ill-equipped and untrained to support a pregnant minor in their care.<sup>96</sup> Indeed, "child welfare workers feel unprepared to talk with foster youth about sex and contraception,"<sup>97</sup> and the lack of policies leads to confusion on how to best help the minor.<sup>98</sup>

An additional risk to a minor's health is that most agencies suffer from poor care management because of frequent turnover, extremely high caseloads,<sup>99</sup> and a lack of adequate training for staff.<sup>100</sup> For example, in Pennsylvania in 2003, a foster care minor was initially denied an abortion because agency staff were confused about "whether the department would pay for the procedure."<sup>101</sup> Delays like this could put a minor at risk for missing crucial steps to

<sup>91</sup> *Id.*

<sup>92</sup> Sullivan, *supra* note 78 (labeling the rate of teen pregnancy in foster care as an "epidemic" and citing a University of Chicago study that "found that nearly half of girls who had spent time in the foster-care system had been pregnant at least once by the time they were 19 years old").

<sup>93</sup> Madelyn Freundlich & Sarah Gerstenzang, *Privatization of Child Welfare Services: Challenges and Successes Executive Summary*, CHILDREN'S RIGHTS (last accessed December 2, 2014), available at [http://www.childrensrights.org/wp-content/uploads/2008/06/privatization\\_of\\_child\\_welfare\\_services\\_exec\\_sum.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/privatization_of_child_welfare_services_exec_sum.pdf).

<sup>94</sup> Baynes-Dunning & Worthington, *supra* note 64, at 343-344.

<sup>95</sup> Dworsky, *supra* note 80, at 2-3.

<sup>96</sup> Moore, *supra* note 42, at 52-55 (surveying several policies that either do not address or minimally address pregnant youth).

<sup>97</sup> Other adults in a minor's life also do not get the training necessary to speak with youth about pregnancy prevention, including how to create an atmosphere where the minor feels comfortable approaching them with questions or requests for help. Dworsky, *supra* note 80, at 2-3.

<sup>98</sup> Moore, *supra* note 42, at 52-55 (surveying several policies that either do not address or minimally address pregnant youth).

<sup>99</sup> Dudley, *supra* note 78, at 92 (the recommended number of cases is twelve to fifteen, while many places expect caseworkers "to handle upwards of fifty cases"); NAT'L ASS'N OF SOC. WORKERS, CASE MGMT. STANDARDS WORK GRP. . *NASW Standards for Social Work Case Management* (June 1992), [www.naswdc.org/practice/standards/sw\\_case\\_mgmt.asp#9](http://www.naswdc.org/practice/standards/sw_case_mgmt.asp#9).

<sup>100</sup> Dudley, *supra* note 78, at 92.

<sup>101</sup> *In re L.D.F.*, 820 A.2d 714, 715 (2003).

securing a legal abortion.<sup>102</sup> Lack of policies and case mismanagement such as this often cause foster youth to be overlooked and to not receive access to needed health services.<sup>103</sup>

As privatization of foster care increases, an agency also may have its own agenda as to what constitutes appropriate reproductive health care, regardless of objective medical standards. Caseworkers and foster parents may conscientiously object to providing a minor with information and resources about abortion and pregnancy prevention, even if there are policies in place,<sup>104</sup> because these private agencies likely receive little oversight from the government departments with whom they contract.<sup>105</sup> As one scholar notes, an agency may “provid[e] as much as or as little help as they see fit”<sup>106</sup> to a pregnant minor, which may include a referral to deceptive crisis pregnancy centers.

In New York City, for example, foster care is predominantly privatized—rather than the City providing foster care services directly, it contracts with over thirty non-profit agencies, many of which are religiously affiliated.<sup>107</sup> In the 1980s, a lawsuit over this structure resulted in a settlement requiring an agency to give the City access to the minors in foster care so that it could provide them with reproductive health services and education.<sup>108</sup> Thus, the agency itself need not educate or directly give minors in care access to reproductive health services.<sup>109</sup> But in 1998, the settlement was vacated, and until 2014, “no policy [was] in place to ensure that children placed with Catholic agencies—or any other agency for that matter—have meaningful access to contraceptive and abortion services.”<sup>110</sup> In 2014, New York City’s Administration for Children Services introduced a policy to address this issue, explicitly stating that “provider agency staff must not impose their personal, organizational, and/or religious beliefs regarding sexual and reproductive health care services on youth in foster care.”<sup>111</sup> At this time,

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<sup>102</sup> See *id.*

<sup>103</sup> See Dudley, *supra* note 78, at 92.

<sup>104</sup> *Id.* at 94.

<sup>105</sup> Moore, *supra* note 42, at 53.

<sup>106</sup> *Id.*

<sup>107</sup> Stotland & Godsoe, *supra* note 15, at 53.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> City of N.Y. Admin. for Children Servs., *Sexual and Reproductive Health Care for Youth in Foster Care*, Policy and Procedure #2014/9, 13 (on file with CUNY Law Review).

however, the implementation, enforcement, and formal legal challenges to the policy have yet to be seen.

But even when adequate policies are in place, the onus is often on the pregnant minor to find resources and navigate barriers without help.<sup>112</sup> Formal rights to abortion and adequate education are essentially meaningless if a minor does not have a way to effectuate those rights and put her knowledge into action. Indeed, all minors must navigate various barriers to receive services, and they often are unsuccessful.<sup>113</sup> In addition to parental-involvement laws discussed at length below, a minor may face various laws and regulations designed to restrict access to abortion, including waiting periods, traveling long distances, or undergoing unwarranted and excessive medical examinations and procedures, to name a few.<sup>114</sup> For foster care youth, these impediments may be more pronounced given agencies' failure to provide adequate sex and reproductive health education, and lack of guidance and resources.<sup>115</sup>

Moreover, despite having significantly higher rates of pregnancy than their peers,<sup>116</sup> foster care youth have lower rates of abortion because barriers to abortion services are "compounded by poverty and Medicaid provisions."<sup>117</sup> The average cost for a first-trimester procedure in 2009 was \$470.00,<sup>118</sup> and for foster care youth, who rely on the state for health care services, funds for abortion are often non-existent.<sup>119</sup> Though ninety-nine percent of foster children are eligible for Medicaid, foster care youth do not get needed care in general.<sup>120</sup> Making matters worse, the Hyde Amendment prevents federal funds from being used for abortion services, except in cases of rape, incest, or to save the person's

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<sup>112</sup> Moore, *supra* note 42, at 53–54.

<sup>113</sup> See *id.* at 41.

<sup>114</sup> GUTTMACHER INSTITUTE, *Laws Affecting Reproductive Health and Rights: 2012 State Policy Review* (2012), available at <http://www.guttmacher.org/statecenter/updates/2012/statetrends42012.html>.

<sup>115</sup> As compared to their peers, minors in foster care might not have access to transportation or may have trouble finding services on their own because of a lack of access to information streams like the internet or school. Moore, *supra* note 42, at 41 (also noting that foster youth are particularly susceptible to deceptive anti-choice medical office fronts).

<sup>116</sup> Dudley, *supra* note 78, at 80 (noting that foster care youth are 2.5 times more likely to get pregnant than their peers).

<sup>117</sup> Moore, *supra* note 42, at 41.

<sup>118</sup> R.K. Jones & K. Kooistra, *Abortion Incidence and Access To Services In The United States*, 43 n.1 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, 41–50 (2011), available at <http://www.guttmacher.org/pubs/psrh/full/4304111.pdf>.

<sup>119</sup> See Moore, *supra* note 42, at 47–50 (discussing the lack of funding for abortion available to low-income persons who rely on state programs).

<sup>120</sup> Moore, *supra* note 42, at 37–38.

life.<sup>121</sup>

Thus, to receive adequate reproductive health care, foster youth must rely on state funding, which varies by state.<sup>122</sup> Disturbingly, only seventeen states currently fund all abortions or those deemed medically necessary.<sup>123</sup> Such limited funding for abortion has wide-reaching adverse effects on a young person's life, maternal and fetal health,<sup>124</sup> and families in general. Without such funds, a minor in foster care has no realistic ability to terminate her pregnancy, regardless of right, need, or desire.<sup>125</sup>

### III. TERMINATING A PREGNANCY: FOSTER YOUTH'S RIGHTS AND RESTRICTIONS

#### A. *Background of the Legal Landscape of Abortion*

Moving from pre-pregnancy sex education and lack of access to resources for foster youth, this section will discuss the legal possibilities a pregnant foster might face when she seeks to terminate her pregnancy. In the 1973 landmark case of *Roe v. Wade*, the Supreme Court ruled that the U.S. Constitution protects a woman's right to privacy when she seeks to terminate her pregnancy.<sup>126</sup> The Court found that the Due Process Clause of the 14th Amendment forbids a state from completely denying a person an abortion.<sup>127</sup> However, the Court also held that the state has a legitimate interest in protecting the health of pregnant persons and their pregnancies, an interest that increases along the trimester framework.<sup>128</sup> Thus, a person has a qualified right to abortion—one that

<sup>121</sup> Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519, 18 U.S.C.A. § 3006A; Moore, *supra* note 42, at 49.

<sup>122</sup> Over half of abortions are paid out of pocket because of lack of insurance. *Characteristics of U.S. Abortion Patients, 2008*, GUTTMACHER INSTITUTE (May 2010), available at <http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf>.

<sup>123</sup> *Id.*; State Policies in Brief as of November 1, 2013, *State Funding of Abortion Under Medicaid*, GUTTMACHER INSTITUTE (2013), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_SFAM.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf).

<sup>124</sup> Jon F. Merz et al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967-1994*, 17 WOMEN'S RTS. L. REP. 1, 2 (1995) ("Perhaps because women are carrying to term children who are unwanted and because such women may be less likely to get proper prenatal care - placing them and their fetuses at increased risk (but which may not qualify them for financial assistance, even if an abortion is medically indicated) - restrictive Medicaid funding has been found to be associated with lower birth weights and increased neonatal mortality.").

<sup>125</sup> Moore, *supra* note 42, at 41 (noting limited funding and programs that exist to help low-income women obtain abortion services who would otherwise be unable to do so).

<sup>126</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 150.

can be curtailed by the state to further maternal and fetal health as the state determines it.

The political reaction to *Roe* was enormous, creating a progeny of state laws and cases that scaled back the breadth and force of the right originally announced in *Roe*.<sup>129</sup> Decided in 1992, one such case, *Planned Parenthood v. Casey*, reaffirms the major holding of *Roe* but redefines how a state can curb a person's right to abortion.<sup>130</sup> *Casey* bars a state from placing an undue interference on "a woman's right to choose to have an abortion before fetal viability," because the state's interest in the previability pregnancy is not sufficient to prohibit or impose "substantial obstacles" on a person's choice to terminate her pregnancy.<sup>131</sup> Yet *Casey* notes the state's interest in maternal and fetal health from the outset of the pregnancy and gives the state power to restrict abortions after viability, as long as there are exceptions for circumstances where prohibiting an abortion would endanger the life or health of the pregnant person.<sup>132</sup> Ultimately, the *Casey* plurality opines that a law is invalid if it creates an undue burden that creates a "substantial obstacle to the woman's effective right to elect the [abortion] procedure."<sup>133</sup>

Applying this "undue burden" test in *Gonzales v. Carhart*, the Court upheld a federal law that criminalizes doctors who perform late term abortions through a procedure known as intact dilation and extraction.<sup>134</sup> Though *Gonzales* recognizes there is uncertainty on whether banning the procedure creates health risks to women, the Court held that "medical uncertainty does not foreclose the exercise of legislative power in the abortion context," especially when alternatives to the procedure are available.<sup>135</sup> The state has "wide discretion to pass legislation in areas where there is medical and scientific uncertainty" and should be left to its own devices to balance risks without judicial interference.<sup>136</sup> In *Gonzales's* wake, it

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<sup>129</sup> MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 224-235 (2005).

<sup>130</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 833-834 (1992); Sandra Lynne Tholen & Lisa Baird, *Con Law Is As Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 977-978 (1995).

<sup>131</sup> *Casey*, 505 U.S. at 834.

<sup>132</sup> *Id.* (adding "[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," and confirming the "State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health . . .").

<sup>133</sup> *Id.* at 846.

<sup>134</sup> *Gonzales v. Carhart*, 550 U.S. 124, 125 (2007).

<sup>135</sup> *Id.* at 164.

<sup>136</sup> *Id.* at 163.

is unclear what constitutes an “undue burden” on a person’s legal ability to choose an abortion. Indeed, many laws that significantly foreclose access to and criminalize abortion have been found constitutional.<sup>137</sup>

*B. Judicial Bypass: Preventing Minors from Access to Abortion*

*For better or worse, politics has placed the Court at the center of the debate about pregnant teens. Legislatures have proven themselves incapable of separating public health concerns from more ideological battles over the issue of abortion.*<sup>138</sup>

In the aftermath of *Roe*, there “was a rush by opponents of abortion to the legislatures to enact laws placing as many roadblocks to abortion as possible.”<sup>139</sup> This resulted in a plethora of laws across the states that inject parents into a minor’s decision to obtain reproductive health services. Despite the prevalence of these laws, the Supreme Court has only addressed the rights of pregnant minors, or lack thereof, ten times since *Roe*, which is silent on the issue of minors and abortion.<sup>140</sup>

In the cases that follow *Roe*, the Court has held that a state cannot “give a third party an absolute, and possibly arbitrary, veto” over a minor’s decision to terminate her pregnancy.<sup>141</sup> However, the Court did not leave state legislatures empty-handed in their ability to interject parents into youth decision-making. *Bellotti v. Baird* provides a solution for a state to make parental notification and consent laws constitutional: a state must give certain categories of minors a judicial bypass from the parental notification and consent requirements.<sup>142</sup> Under *Bellotti*, a law is constitutional if the minor can petition a judge to determine whether she is sufficiently mature and informed about the abortion procedure or that it is in her best interest to bypass the parental notification or consent requirements of the law.<sup>143</sup> Additionally, the bypass procedure must

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<sup>137</sup> See, e.g., *Planned Parenthood of Greater Texas Surgical Health Servs. v. Gregory Abbott, Attorney Gen. of Texas*, 134 S. Ct. 506, 508 (2013) (failing to vacate a stay on a lower federal court’s decision to uphold a Texas law, requiring a physician performing an abortion to have admitting privileges at a hospital within thirty miles which forced “women who were planning to receive abortions . . . to go elsewhere—in some cases 100 or more—to obtain a safe abortion, or else not to obtain one at all.”) (Breyer, J., dissenting).

<sup>138</sup> GUGGENHEIM, *supra* note 129, at 235.

<sup>139</sup> *Id.* at 218.

<sup>140</sup> *Id.* at 213-216.

<sup>141</sup> *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

<sup>142</sup> *Bellotti v. Baird*, 443 U.S. 622, 642-644 (1979).

<sup>143</sup> *Id.* at 643-44 (“A pregnant minor is entitled in such a proceeding to show either:

“be completed with anonymity” and give sufficient time for the minor to obtain a legal abortion.<sup>144</sup>

In accordance with *Bellotti*'s guidance, states adapted their bypass schemes, with most failing to define ‘sufficiently mature’ or ‘best interest of the minor’—this is left to the judge, ideally functioning as an independent decision-maker.<sup>145</sup> Throughout the process, the burden is on the pregnant minor to seek the bypass and then prove she is sufficiently mature or that it is in her best interests to receive the bypass.<sup>146</sup> Despite *Bellotti*'s promise that the process be expedited, the Supreme Court later held that a bypass procedure that takes almost three weeks to complete is constitutional.<sup>147</sup> Indeed, legal challenges to the *Bellotti* framework have been generally unsuccessful, except under some state constitutions that afford greater protections for a minor's right to privacy and medical decision-making than the Supreme Court has found in the federal constitution.<sup>148</sup>

Of course, it is up to each state to determine the confines of their parental involvement and bypass laws,<sup>149</sup> which can often en-

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(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests . . . In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the ‘absolute, and possibly arbitrary, veto’ that was found impermissible in *Danforth*.”)

<sup>144</sup> *Id.* at 644.

<sup>145</sup> *Id.* at 651.

<sup>146</sup> See Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of the Law*, 18 COLUM. J. GENDER & L. 409 (2009).

<sup>147</sup> The three-week time frame is particularly alarming given that many persons may not realize they are pregnant until later in their pregnancy, compounded with the shortening time periods during which a person may obtain a legal abortion. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990).

<sup>148</sup> Arguments that the bypass procedure violates the Equal Protection Clause of the 14th Amendment have been unsuccessful. Courts have consistently rejected the argument that judicial bypass procedures to the parental consent law place an undue burden on minors seeking abortion services in violation of the U.S. Constitution. Some state constitutions do provide relief, affording greater protections for the minor's right to privacy. See, e.g., *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); cf. *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998). But even at the state level, challenges regarding the vagueness of statutes concerning who is emancipated and not subject to the law, as well as who constitutes a parent for the purposes of the statute, have been met with varying success. 77 A.L.R.5th 1 (originally published in 2000).

<sup>149</sup> For example, states can require one or both parents to be involved, and can require consent or notification. *State Policies in Brief as of October 1, 2014 An Overview of Minors' Consent Law*, GUTTMACHER INSTITUTE, (Oct. 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OMCL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf); *State Policies in Brief as of October 1, 2014 Parental Involvement in Minors' Abortions*, GUTTMACHER INSTITUTE (Oct. 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf).

compass access to other reproductive health services such as contraception.<sup>150</sup> To date, only two states and the District of Columbia explicitly give a minor the affirmative right to consent to an abortion,<sup>151</sup> while thirty-nine states require parental involvement in the decision-making process,<sup>152</sup> eight of which go so far as to require the parental consent to be notarized before allowing a minor access to reproductive health services.<sup>153</sup>

Additionally, some states have adopted a heightened standard of “clear and convincing” evidence for judicial bypass proceedings, making it all the more difficult for a minor to prove her maturity with arbitrarily-related evidence, such as high school grades, work experience, or anything else an individual judge might find, or not find, sufficient.<sup>154</sup> Indeed, the judicial bypass procedure can be a difficult experience for a minor, placing the burden on her to prove her maturity and that she is well-informed about the procedure in a court of law, all with the knowledge that if she fails, she may have to carry an unwanted pregnancy to term.<sup>155</sup> In addition to this stress, the wide discretion left to an individual judge can create space for bias and exposes the minor to humiliation.<sup>156</sup>

For example, in *Anonymous 5*, the presiding judge had previously served on a committee of a very active Nebraska anti-abortion group.<sup>157</sup> Such political affiliations and hostility towards abortion beamed bright when he questioned the minor in open court, asking whether she would “kill the child inside [her rather] than risk problems with the foster care people,”<sup>158</sup> an inquiry that the Nebraska Supreme Court found permissible on appeal.<sup>159</sup>

Judges’ wide discretion not only allows questionable inquiries riddled with bias and pre-judgment, but can also make the whole process futile.<sup>160</sup> Indeed, for some judges, “all minors who would

<sup>150</sup> GUTTMACHER INSTITUTE, *Minors’ Consent Law*, *supra* note 149 (discussing consent laws for various other reproductive health services, including for minors to access contraceptive services, STI services, prenatal care, and adoption).

<sup>151</sup> *Id.*

<sup>152</sup> GUTTMACHER INSTITUTE, *Parental Involvement in Minors’ Abortions*, *supra* note 149.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Moore, *supra* note 40, at 46.

<sup>156</sup> *Id.*; GUGGENHEIM, *supra* note 129, at 242–243; Sanger, *supra* note 146, at 492–493.

<sup>157</sup> Chidi, *supra* note 1.

<sup>158</sup> *In re* Petition of *Anonymous 5*, 838 N.W.2d 226, 230 (Neb. 2013).

<sup>159</sup> *Id.*

<sup>160</sup> Sanger, *supra* note 146, at 492–493 (“Judicial opposition to abortion has also colored how these hearings are conducted. Judges have questioned petitioners as though abortion’s legality was unresolved, as though the only measure of a petitioner’s maturity was the decision not to abort, and as though the hearing offered a



use the bypass procedure are by definition immature,”<sup>161</sup> and there have been multiple reports of “anti-abortion judges using the bypass process to harass the girls who come before them.”<sup>162</sup> Advocates report judges “torment[ing] pregnant minors in their courtroom” by requiring minors to undergo unscientific anti-abortion education, “assign[ing] anti-abortion lawyers to represent them in court,” or even appointing a lawyer for the fetus.<sup>163</sup> When a judge’s private feelings on abortion inundate the courtroom and the proceedings, he is far from the neutral decision-maker imagined in *Bellotti*,<sup>164</sup> but unfortunately this is all too common among bypass proceedings.<sup>165</sup>

But even with an impartial judge on the bench, the process can produce humiliation, confusion, and harm a person’s dignity.<sup>166</sup> Testifying for a challenge to Minnesota’s parental consent law, one judge said that a minor’s level of apprehension during the bypass proceeding is twice what he saw during other proceedings—

“You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office.”<sup>167</sup>

Another family court judge testified that going to court alone “was ‘absolutely’ traumatic for minors. ‘You know, it was just—it was just another thing at a very, very difficult time in their lives.’”<sup>168</sup>

Yet, as noted, the framework in *Bellotti* puts the burden entirely on the minor and gives her no support, leaving her to rebut the presumption that she is too immature and it is not in her best interest to receive the bypass. But how is she to prove she is mature? Most likely she will offer evidence of her high school grades,

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chance to remonstrate against it. They have asked petitioning minors whether they understand that abortion is murder, whether they would kill their own three-year-old child, whether they change their mind about abortion if they knew their baby would go to a loving adoptive family or if they were given \$2000. Bypass denials have been sprinkled with pro-life sentiment: ‘This is a capital case. It involves the question whether [the minor’s] unborn child should live or die.’ And some judges refuse to hear bypass cases at all.”).

<sup>161</sup> GUGGENHEIM, *supra* note 129, at 242.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 242–243.

<sup>164</sup> *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

<sup>165</sup> GUGGENHEIM, *supra* note 129, at 242–243; Sanger, *supra* note 146, at 492–493.

<sup>166</sup> *See* Sanger, *supra* note 146, at 484–486; Moore, *supra* note 42, at 46.

<sup>167</sup> *Hodgson v. State of Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986) (testimony of Honorable William Sweeney).

<sup>168</sup> *Id.* (testimony of Mr. Paul Garrity, former Massachusetts judge).

work experience, how she articulates herself, or her knowledge about the procedure, but the judge is ultimately left to find connections between these questionably relevant facts and what he deems mature or immature. Although proving maturity in court may be empowering for some young people, the arbitrary process creates yet another barrier that hampers a young person from exercising autonomy over her body, from having control over her own medical decision-making and reproductive freedom.

*C. Judicial Bypass and Foster Youth: Exceptions, Legal Quandaries, and Risk of Harm*

In *Bellotti*, the Court recognized the risk of leaving the abortion decision outside the hands of the pregnant minor, but this concern was ultimately outweighed by conveniently placed parental rights rhetoric, pitting a minor's right against that of her parents.<sup>169</sup> This resulted in a process that removes the private medical decision from the minor and her physician, and places it in the hands of a judge or the minor's parent.<sup>170</sup> In doing so, the judicial bypass procedure created by *Bellotti* does little to avoid risks for the minor's well being, but instead often engenders serious problems for a minor's health and safety.<sup>171</sup>

This is especially true for a minor in foster care, whose relationship with her parents might be broken because of unnecessary state intervention or otherwise. In deriving a constitutional framework from an imagined world of the ideal parent-child relationship, the Court created quandaries for minors whose family structures do not meet the contours of the law, yet are still bound by them (e.g., minors in foster care who do not have parents to seek consent from).<sup>172</sup> The framework also creates real risks of harm for minors whose parental relationships do not meet the ide-

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<sup>169</sup> See *Bellotti*, 443 U.S. at 639-645; see also GUGGENHEIM, *supra* note 129.

<sup>170</sup> Moore, *supra* note 42, at 45 (discussing *Bellotti*, 443 U.S. at 643).

<sup>171</sup> *Id.* at 46.

<sup>172</sup> *Id.* at 57 ("There are many categories of girls for whom parental notification or consent laws simply do not fit. Foster girls . . . are one such group. Other groups of girls include, but are by no means limited to, those who have never met one of their parents, girls whose parent(s) are incarcerated in prison or held in a mental health facility or rehabilitation center, girls who do not wish to be in contact with a parent because of sexual or physical abuse, and girls who do not know where one or both parents live. It is not uncommon for girls in such situations to still live under the legal guardianship of such parents, even when they are unavailable, cannot be found, or pose a physical or psychological risk to their daughter. Such girls are stuck when courts refuse to be flexible in interpreting parental notification and consent statutes.").

als imagined in *Bellotti* (e.g., when the minor's father might also be the putative father of her pregnancy).<sup>173</sup> The minor is then left with the onus to prove her maturity in an infantilizing and arbitrary process, which presumes her to be immature and non-autonomous from the start.

Mindful that the *Bellotti* structure can be dangerous to youth, sixteen states have exceptions to parental consent laws for minors who are abused or neglected.<sup>174</sup> Yet the exception is often unhelpful to protect minors put at risk by the bypass procedure because it is narrowly applied and courts often require a nexus between the person who must consent and the finding of abuse.<sup>175</sup>

For example, the Nebraska law at issue in *Anonymous 5* provides an exception from parental consent if the minor is adjudicated abused or neglected within the meaning of Nebraska's child protection law.<sup>176</sup> The minor was in state custody pursuant to the state's abuse and neglect law and her biological parents' formal legal rights had been terminated two years earlier.<sup>177</sup> However, the court found that she did not meet the exception because in order to meet the abuse or neglect exception, "the pregnant woman must establish that a parent or guardian, who fills that role at the time she files her petition, has abused or neglected her."<sup>178</sup>

Under these narrow nexus requirements, a minor who suffers trauma will often not meet the exception. A minor's abuse or neglect will not be sufficient for the exception if someone other than her parents abused her, including when a pregnancy is a result of the abuse, or if the abuse is ongoing. Additionally, the burden is on the minor to prove that she is or has been a victim of abuse in court,<sup>179</sup> an experience that can re-victimize the minor and prevent her from exercising her legal rights to terminate her pregnancy.

In the remaining thirty-four states without the exception, a de-

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<sup>173</sup> *Id.*

<sup>174</sup> GUTTMACHER INSTITUTE, *Parental Involvement in Minors' Abortions*, *supra* note 149.

<sup>175</sup> *Ohio v. Akron*, 497 U.S. 507, 519-520 (1990) (finding no undue burden for a minor in judicial bypass proceedings when the minor could prove maturity, that she was a victim of abuse, or that it was in her best interests to have the bypass); *see also In re* Petition of *Anonymous 5*, 838 N.W.2d 226, 232 (Neb. 2013). The exception does not apply in circumstances where a minor is in state custody, but a court finding of abuse or neglect has not yet been made, which can often take years to decide because of over-burdened courts and the failings of ASFA.

<sup>176</sup> *See Anonymous 5*, 838 N.W.2d at 232.

<sup>177</sup> *Id.* at 231.

<sup>178</sup> *Id.* at 233.

<sup>179</sup> *See, e.g., id.* ("Petitioner did not meet her burden to show that she is a victim of such abuse or neglect.").

nial of the bypass requires the foster youth to receive her parents' consent or notify them if their rights have not been formally terminated.<sup>180</sup> When parental rights have been legally terminated or significantly hampered, however, it is ambiguous whether the agencies' or foster parents' consent is required,<sup>181</sup> because of the "diffusion of authority and responsibility among parents," agencies, and the state.<sup>182</sup>

In the 1970s, the Supreme Court decided that foster parents do not have the same rights as natural birth parents and cannot consent to most medical procedures for youth without agency approval—yet in the abortion context with parental consent laws, it seems a foster parent's consent is required for foster youth.<sup>183</sup> In *Anonymous 5*, the dissenting justices recognize this problem,

"The petitioner has no legal parents; the juvenile court terminated their parental rights. Her legal guardian, the Department—by regulation—will not give her consent. And although the district court has required her to get her foster parents' consent to obtain an abortion, their consent would be meaningless under the law because they are neither parents nor guardians. She is in a legal limbo—a quandary of the Legislature's making."<sup>184</sup>

Equally problematic is requiring an agency's consent because political pressures may dictate action, or in some cases, inaction—effec-

<sup>180</sup> See, e.g., *In re P.R.*, 497 N.E.2d 1070 (Ind. 1986) (finding that a child being remanded to state care did not obviate the natural mother's consent as required by state statute).

<sup>181</sup> See, e.g., *In re T.H.*, 484 N.E.2d 568, 569 (Ind. 1985) (finding a minor required the Director of the Department of Public Welfare's consent to receive an abortion, rather than the foster parents with whom the minor was placed. The Director refused consent; instead, "they would handle all arrangements for her, including placement for adoption.").

<sup>182</sup> See Moore, *supra* note 42, at 44, 57; See generally *Addressing Barriers*, AMERICAN ACADEMY OF PEDIATRICS, HEALTH FOSTER CARE AMERICA (2013), <http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Pages/Addressing-Barriers.aspx#sthash.QMQTEN1h.dpuf>.

<sup>183</sup> Foster parents also often need agency permission to immunize a youth and only may obtain routine medical care for foster youth. See, *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 828 n.20 (1977) ("[A]though the agency usually obtains legal custody in foster family care, the child still legally 'belongs' to the parent and the parent retains guardianship. This means that, for some crucial aspects of the child's life, the agency has no authority to act. Only the parent can consent to surgery for the child, or consent to his marriage, or permit his enlistment in the armed forces, or represent him at law"); see, e.g., *In re Petition of Anonymous 5*, 838 N.W.2d 226, 239-240 (Neb. 2013) ("The Department authorizes foster parents to obtain only routine immunizations and medical care for a foster child, under a caseworker's supervision and direction."). See also

<sup>184</sup> *Anonymous 5*, 838 N.W.2d at 238.

tively denying a minor an abortion by withholding consent as in *Anonymous 5*. Moreover, when a child is placed with a private agency, whose religious ideology opposes abortion, refusing consent becomes significantly poignant for religious freedom considerations. Of final note, and perhaps highlighting the legal absurdity of parental consent laws, a legal conundrum arises when a parenting foster minor is able to consent to her child's medical procedures, but not to her own abortion.<sup>185</sup>

Regardless of the legal quandaries, practical safety concerns for youth also trouble the wisdom of parental consent laws: forcing a minor to tell adults whom she otherwise feels uncomfortable telling about her pregnancy, or her desires to terminate it, exposes her to risks of verbal assault, physical violence, and homelessness.<sup>186</sup> For a foster minor, an agency or foster placement's disapproval of her sexuality, sexual activity, pregnancy, or desire for an abortion may heighten risks of homelessness and instability.<sup>187</sup>

Privacy around pregnancy is vital for youth; yet judicial bypass hearings place a minor at risk of public exposure, which can have severe consequences for a foster youth's well being and the stability of her placement.<sup>188</sup> Anonymity may be easily compromised in areas where the community is insular and foster placements are in greater shortage, but for all minors, anonymity is difficult to achieve when she enters a public courtroom known for bypass hearings. Unfortunately, "foster youth frequently run away from their placement once it is discovered that they are pregnant, and finding them is often difficult."<sup>189</sup> By placing their pregnancies in public view, bypass laws increase a risk of homelessness and lack of resources for pregnant minors in foster care.

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<sup>185</sup> Stotland & Godsoe, *supra* note 15.

<sup>186</sup> Moore, *supra* note 42, at 45 ("There can be significant problems for minors who desire to obtain an abortion in states that require parental consent or notification. Girls may face verbal or physical abuse if they tell a parent about their pregnancy or their desire for an abortion, and many girls risk being kicked out of their homes if they come home pregnant"); HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 13 (2007) ("[T]he AMA has concluded that some minors would experience serious physical and emotional injury under a blanket parental involvement provision"); Miriam Gerace, *Should Doctors Have to Notify Parents Before a Minor Receives an Abortion?*, L.A. TIMES (October 22, 2008), <http://www.latimes.com/news/opinion/la-oe-w-gerace-short22-2008oct22,0,7048163.story> ("There is a significant risk of violence, abuse and rejection in families when parents are informed of a pregnancy.").

<sup>187</sup> The risk of homelessness is increased for older minors or minors wishing to carry the pregnancy to term, because of lack of alternative or accommodating placements. Moore, *supra* note 42, at 47.

<sup>188</sup> *Id.*

<sup>189</sup> Dworsky & DeCoursey, *supra* note 12, at 38.

#### IV. MINOR PARENTS IN FOSTER CARE: THE RISK OF LOSING A CHILD

With such large barriers to autonomous decision-making in becoming pregnant or terminating a pregnancy, foster youth also face serious injustice when they remain pregnant and give birth in state care. Though there is currently no national tracking of pregnancy and parenting rates of youth in foster care, it is undisputed that pregnant and parenting minors make up a significant portion of the foster youth population.<sup>190</sup> This is not surprising considering foster youth's higher pregnancy rate, lower rate of abortion, and increased chances of repeat pregnancy than their non-foster peers.<sup>191</sup> A report from the New York City Public Advocate estimates that one in six girls in foster care are either pregnant or parenting.<sup>192</sup> Yet despite these high, and perhaps more importantly, known numbers, child welfare systems continue to fail to provide support and health services to minors who wish to carry pregnancies to term and parent their children.

Though special placements sometimes exist for some foster care youth who want to carry their pregnancies to term, the space is severely limited and often requires youth to be moved from their current placement, increasing instability for the minor.<sup>193</sup> Pregnant foster youth are also at risk for running away or being expelled from their placements, especially because placements typically do not receive additional funds for housing pregnant or parenting minors.<sup>194</sup>

Of significant concern is that across the board, pregnant foster youth do not receive adequate prenatal care or health screen-

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<sup>190</sup> Stotland & Godsoe, *supra* note 15, at 5-6.

<sup>191</sup> Dworsky & DeCoursey, *supra* note 12, at 33.

<sup>192</sup> Jill E. Sheppard, Mark A. Woltman The Public Advocate for the City of New York, *The Public Advocate for the City of New York, Children Raising Children: City Fails to Adequately Assist Pregnant and Parenting Youth in Foster Care* 7 (May 2005), available at [http://www.nyc.gov/html/records/pdf/govpub/2708children\\_raising\\_children.pdf](http://www.nyc.gov/html/records/pdf/govpub/2708children_raising_children.pdf).

<sup>193</sup> Moore, *supra* note 42, at 60-61; Dworsky & DeCoursey, *supra* note 12, at 40 ("Interviewees also noted that there is a shortage of group homes for parenting wards. Currently, these youth must wait 3 to 4 months to be placed.").

<sup>194</sup> Dworsky & DeCoursey, *supra* note 12, at 40 ("Interviewees pointed out that relatively few TPSN clients live in traditional foster homes and suggested that one reason for this situation may be that foster parents are reluctant to accept pregnant and parenting youth for whom the board rate is no higher. They recommended categorizing pregnant or parenting youth as needing 'specialized' care, which in turn would make their foster parents eligible for higher board rates. Interviewees also noted that there is a shortage of group homes for parenting wards. Currently, these youth must wait 3 to 4 months to be placed.").

ings.<sup>195</sup> One study in Washington State found that pregnant foster youth's birth outcomes are far worse than those of their peers—foster youth have the highest rate of premature births, low birth weights, and infant mortality because of various factors, including poverty and lack of resources for medical and mental health care.<sup>196</sup>

Most disturbing, when a foster youth does successfully carry a pregnancy to term, she faces a significant risk that her child will be immediately removed from care due to increased scrutiny from child protective services and lack of resources provided to her to parent her child.<sup>197</sup> Compared to their peers, parents in foster care are much more likely to become subjects of state investigation and have their children removed from them.<sup>198</sup> In the Washington State study, not only were the rates of referrals to child welfare specialists ten times higher for foster youth, but horrifyingly children of parenting foster youth were placed in stranger foster care at a rate nearly twenty-five times higher than parenting youth not relying on government resources.<sup>199</sup>

The circumstances of the removal of foster youth's children are often caused by a failure of the state to provide resources for newly parenting wards in their care.<sup>200</sup> Additionally, higher rates of removal from foster youth are the result of a foster youth being subject to intense scrutiny by child welfare agencies by virtue of being their wards. Suspicious caseworkers and foster parents may view a new mother as damaged, disturbed, or unable to parent because of her own placement in care, rather than because of actual concerns of neglect or abuse—

<sup>195</sup> *Id.* at 38; WASH. STATE DEP'T OF SOC. & HEALTH SERVS., *supra* note 12, at 10 (“Foster Youth had the lowest rates of first trimester entry into prenatal care; the rates of first trimester prenatal care were similar for those whose stay in foster care include the prenatal period and for those who entered foster care at the end of pregnancy or later.”).

<sup>196</sup> WASH. STATE DEP'T OF SOC. & HEALTH SERVS., *supra* note 12 at 7-8 (“Foster Youth had the highest rate of premature births, with sixteen percent of their babies born before 37 weeks gestational age.” “Foster Youth had the highest rate of low birth weight, with eight percent of their babies born at less than 5.5 pounds.” “16.6 per 1000 of [foster youth's] liveborn infants died before their first birthday.”).

<sup>197</sup> *See, e.g.*, Stotland & Godsoe, *supra* note 15, at 24; Dworsky & DeCoursey, *supra* note 12, at 34.

<sup>198</sup> Dworsky & DeCoursey, *supra* note 12, at 34. (“Twenty-two percent of the TPSN mothers were investigated for child abuse or neglect and 11 percent had a child placed in foster care. Most of their children were very young when they were placed, and while some of their placements were very short-term, many had not achieved permanency even after 2 years.”).

<sup>199</sup> WASH. ST. DEP'T OF SOC. AND HEALTH SERVS, *supra* note 12, at 9-10.

<sup>200</sup> Stotland & Godsoe, *supra* note 15, at 61.

“Advocates across the country report that states and counties frequently violate parenting wards’ due process rights by coercing teens into ‘voluntarily’ placing their child in government custody, separating wards from their children absent proper judicial findings, and threatening to remove infants from the ward’s care based on infractions which do not pose an imminent risk of harm to the baby.”<sup>201</sup>

Indeed, parenting youth are penalized with the removal of their children because of a lack of resources and access to necessary services that the state has failed to provide, despite being responsible for the health and well-being of youth entrusted to its care.<sup>202</sup>

For example, New York State law mandates that child welfare departments provide “financial support to minor parents in foster care, personal counseling and support services to ensure stability, and assistance in achieving the highest possible degree of economic independence.”<sup>203</sup> But a study done by the City’s Public Advocate found that in every area, there were alarming insufficiencies in needed services to support pregnant and parenting foster youth.<sup>204</sup> These insufficiencies were primarily responsible for increased rates of neglect and abuse findings against parenting foster youth and the removal of their children.<sup>205</sup>

Additionally, when a minor is charged with abuse or neglect, the state acts both as prosecutor and caretaker of its wards—a ludicrous contradiction.<sup>206</sup> The parenting minor’s attorney may also face a conflict of interest. Indeed, “many organizations representing children see the representation of parents—even minor parents—as conflicting with the fundamental mission of their agency.”<sup>207</sup>

This is an absurd and destructive result of the unnecessary adversarial process of current child welfare law—the state prosecutes the parent with the goal of finding abuse or neglect, rather than acting in the family’s best interest.<sup>208</sup> Children’s rights are unnecessarily pitted against parents’ rights, a mechanism that harms all

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> BETSY GOTBAUM, JILL E. SHEPPARD, MARK A. WOLTMAN, THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CHILDREN RAISING CHILDREN: CITY FAILS TO ADEQUATELY ASSIST PREGNANT AND PARENTING YOUTH IN FOSTERCARE 4 (2005), [http://www.nyc.gov/html/records/pdf/govpub/2708children\\_raising\\_children.pdf](http://www.nyc.gov/html/records/pdf/govpub/2708children_raising_children.pdf).

<sup>204</sup> *Id.* at 7-8.

<sup>205</sup> *See id.*

<sup>206</sup> Stotland & Godsoe, *supra* note 15, at 42-43.

<sup>207</sup> *Id.* at 32.

<sup>208</sup> *Id.* at 42-46; *see generally*, GUGGENHEIM, *supra* note 129.



members of the family unit because children's and parents' interests are typically aligned, and the majority of children are better off when they remain with their parents.<sup>209</sup>

## V. A BETTER SYSTEM: CONCEPTUAL CHANGE AND NEW PREMISES

States entrusted with the health of foster youth fail, repeatedly and on all counts. First, necessary sex and reproductive health education and resources to prevent pregnancy are not provided. After pregnancy occurs, the state erects barriers to deny a minor the legal right and resources she needs to terminate her pregnancy. After not receiving adequate health care and support while pregnant, she likely will then give birth without access to needed resources and support to parent her child, which often results in the unwarranted and destructive state removal of her child.

Given the evidence that the state severely fails to meet the health and educational needs of foster youth, a plethora of changes must be implemented to significantly improve outcomes for foster care youth. Better data collection to assess the needs of pregnant and parenting foster youth,<sup>210</sup> adequate training for caseworkers and foster parents,<sup>211</sup> privileging and supporting kinship care,<sup>212</sup> treating foster youth as emancipated for the purpose of bypass procedures,<sup>213</sup> reducing crossover with the juvenile justice system,<sup>214</sup> and other various concrete suggestions exist to address the myriad of problems facing foster youth.<sup>215</sup> Yet, despite a laundry list of concrete suggestions from advocates, researchers, and policy makers, these fixable problems remain persistent and

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<sup>209</sup> Emma Ketteringham, *Test and Report: Bad for Children and Families*, HUFFINGTON POST (April 25, 2014), [http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families\\_b\\_5175106.html](http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families_b_5175106.html) ("Former foster children are far more likely to drop out of school, be imprisoned, enter the homeless population, join welfare or have substance abuse problems of their own when compared to children similarly neglected, but who remained with their families"); Joseph Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97(5) AM. ECON. REV. 1583 (2007) (finding that similarly situated youth who remain with their parents have better outcomes than those who are placed in stranger foster care); Schorr, *supra* note 32, at 21 ("A compassionate response to children must include an equally compassionate response to their parents.").

<sup>210</sup> Dudley, *supra* note 78, at 80.

<sup>211</sup> Baynes-Dunning & Worthington, *supra* note 64, at 337.

<sup>212</sup> ROBERTS, *supra* note 33, at 24-25 (discussing generally the problems with and improvements needed to be made to kinship care policies).

<sup>213</sup> Moore, *supra* note 42, at 61.

<sup>214</sup> Baynes-Dunning & Worthington, *supra* note 64, at 346.

<sup>215</sup> *Id.*; Dudley, *supra* note 78; Moore, *supra* note 42.

prevalent because of the system's flawed approach to the health of families and youth.

To engender change, child welfare law must be fundamentally rethought and goals reframed to acknowledge current realities. Although these recommendations are not an exhaustive list of the necessary conceptual changes, our system must recognize that poverty is the greatest risk to youth's health, that youth are sexually active, and that youth can be trusted to make autonomous decisions when provided with sufficient support and education. These are starting points to ensure that the health of youth and families are privileged above ideology and politics.

First, the current system ignores poverty as the number one threat to child safety, including a lack of safe housing and necessary resources, such as food, education, and health care.<sup>216</sup> Unnecessary and prolonged removal of children from their parents is damaging to the continuity that children need, while "restraint in intervention advances the child's best interests."<sup>217</sup> State interventions should be "to the degree necessary to ensure the child's safety," yet removal is almost the first resort in many cases.<sup>218</sup>

Rather than parent-blaming, a system premised on the realities of poverty would reduce the number of harmful and unnecessary state interventions that are almost automatic in the current system.<sup>219</sup> Moving away from a complex system of caseworkers, lawyers, and questionable privately-run court-mandated services would allow states to focus efforts on improving access to housing, health care, and necessities.<sup>220</sup> In doing so, states could truly protect children and families, providing them with the support necessary for them to maintain agency and control over their bodies and their lives.<sup>221</sup>

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<sup>216</sup> NATIONAL CENTER FOR CHILDREN IN POVERTY, *Child Poverty* (last visited May 2, 2014), <http://www.nccp.org/topics/childpoverty.html>; see also Ketteringham, *supra* note 32; ROBERTS, *supra* note 33, at 26-29.

<sup>217</sup> See Crossley, *supra* note 22, at 266.

<sup>218</sup> *Id.*

<sup>219</sup> Ketteringham, *supra* note 32 ("Blaming poor parents for what are the predictable consequences of poverty is not just unfair. It allows the rest of us to ignore that economic inequality led to the tragedy. It permits state officials to appear to be helping to keep children safe, while ignoring the well-understood threats to our children's well-being, such as unsafe housing, dangerous neighborhoods, and the other deficits in poor communities which poor children routinely are forced to endure—such as having to light candles to avoid living in a dark apartment.").

<sup>220</sup> It is not practically possible to charge the state bureaucracies, and private agencies, to take on the responsibility of raising whole communities of children. GUGGENHEIM, *supra* note 129, at 248;

<sup>221</sup> Ketteringham, *supra* note 32 ("Instead of paying tens of thousands of dollars to

Second, legislatures, judges, and other adults who are in minors' lives as workers or family need to accept that minors have sex. Avoidance of sex education and reliance on abstinence-only models neither delays sexual activity nor reduces the number of sex partners one has nor lowers sexually transmitted infections and pregnancy rates.<sup>222</sup> In addition to denying the reality that youth have sex, such policies frame sex as shameful and wrong, exacerbating the difficulties that youth already have when approaching resources to ask questions or ask for help.<sup>223</sup> Indeed, minors have sex whether they receive sex education or not. Deplorably many policies fail to recognize the fact that teens are sexually active regardless of their level of sex education. Such inadequate policies remain in place at the expense of health, and affected youth are left without the tools needed to protect their health and make informed decisions about their bodies.<sup>224</sup>

The state must protect the health and safety of youth by requiring and implementing effective comprehensive sex education. Comprehensive sex education does not encourage or sanction teen sex, and research shows that youth who receive such education do not have more sex than those who receive ineffective abstinence-only education.<sup>225</sup> Youth who receive sex education are also healthier and safer when they do engage in sexual behaviors.<sup>226</sup> Importantly, adequate education requires not only teaching youth their rights but also how to access resources to effectuate those rights. With a system premised on the fact that youth are sexually active, policies can be implemented to give youth the education needed to support their autonomy and protect their short-term and long-term health.

Third, youth need a system that trusts them rather than infantilizes them. From parental consent laws to intensified scrutiny of parenting foster youth, the current legal system is predicated on

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involve dozens of caseworkers and lawyers in the family's lives, New York City could be footing the bills that might really help: access to safe housing and assistance with the utility bill.”).

<sup>222</sup> ADVOCATES FOR YOUTH, *Comprehensive Sex Education: Research and Results* (2009), available at <http://www.advocatesforyouth.org/storage/advfy/documents/fscse.pdf> (“no abstinence-only program has yet been proven through rigorous evaluation to help youth delay sex for a significant period of time, help youth decrease their number of sex partners, or reduce STI or pregnancy rates among teens.”); ADVOCATES FOR YOUTH, *Effective Sex Education* (2006), available at <http://www.advocatesforyouth.org/storage/advfy/documents/fssexcur.pdf>.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

youth having a lack of autonomy. However, if youth are given education and adequate support, youth can be and should be entrusted with the decisions that will determine their lives and reproductive health.

Putting policies in place that require an agency to provide resources and promote access will free minors like Anonymous 5 from the legal limbo that leaves them parentless, pregnant, and in poverty, lacking needed resources and support to make meaningful choices about the future. Unfortunately, as advocates and commentators have documented, agencies and policy makers often allow political pressures, or desire to avoid divisive topics, to trump giving youth education and resources to make autonomous decisions about their lives.<sup>227</sup>

In doing so, the health and well-being of foster youth suffer at the hands of those who are charged with providing for youth, reinforcing systems of poverty and violence that plague and punish impoverished communities. With a system whose goal is to secure autonomy for youth, through education, support, and access to resources, youth can be empowered to make informed decisions about their own bodies and secure reproductive justice.

#### CONCLUSION

The United States is in a crisis when it comes to child welfare—it has created a system that punishes impoverished communities and sets up youth in foster care to fail. In particular, foster youth are given inadequate access to services, education, and support to exercise reproductive decision-making. They are then robbed of the chance to actually parent their own children. With fundamental changes in the premises of the child welfare system—1) recognizing poverty as the major risk to health, 2) accepting that youth are sexually active, and 3) empowering youth through education and access to resources—the system can better achieve its goals: providing for and promoting the health and wellbeing of families and their children.

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<sup>227</sup> Dudley, *supra* 78, at 94–95; BRONWYN MAYDEN, SEXUALITY EDUCATION FOR YOUTHS IN CARE 19–20 (1996) (showing that child welfare agencies make “conscious decisions not to develop written policies” and ignore sex education out of concern over the political ramifications).