VACCINATION AND THE CHILD'S RIGHT TO AN OPEN FUTURE

by
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States commonly require the vaccination of children through their parens patriae *and police powers. But many states also allow parents to opt for non-medical exemptions from these vaccination requirements, contributing to the emergence of a national vaccine hesitancy crisis. By permitting parents not to vaccinate their children, do states that grant these exemptions violate children's rights? This Article posits that children may indeed have a right to be vaccinated and thus protected against contracting a disease for which there is a scientifically proven vaccine.*

This Article examines this question through the lens of Joel Feinberg's theory of the child's "right to an open future." This theoretical framework distinguishes this Article from other contemporary child-rights scholarship by providing a cohesive liberal approach to discourse surrounding vaccine exemptions. Building from Feinberg's theory, this Article reconciles constitutional jurisprudence, liberal conceptions of individual rights, and the rights of future adults to choose from among a reasonable range of life plans.

This Article begins by examining the conflicting legal rights related to a child's right to be vaccinated—the parents' right to raise their children under the Fourteenth Amendment versus the state's interest in protecting children from harmful diseases. The Article then explains why a child's right to be vaccinated may exist as an extension of a child's "right to an open future" under Feinberg's theory. The Article next addresses potential legal and ethical objections to its thesis and explains how each is unavailing.

I. Introduction 210
II. Parental Rights, Vaccination, and the Vaccination Hesitancy Crisis 213
A. Parental Rights 213

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B. Vaccination and the Vaccine Hesitancy Crisis 218
III. The Child's Right to an Open Future 223
IV. A Child's Right to Vaccination 240
A. Objection 1 243
B. Objection 2 245
C. Objection 3 248
V. Conclusion 249

I. INTRODUCTION

There is global expert consensus that vaccines are both safe and effective.[1] The vaccines most commonly given to children—vaccines for measles, mumps and rubella (MMR), polio, and hepatitis B[2]—provide almost complete protection against these diseases.[3] Thanks to their effectiveness, vaccines save an estimated two to three million lives every year worldwide, and an additional 1.5 million deaths could be avoided with more complete vaccine coverage.[4] Nevertheless, parental opposition to vaccination (also known as "vaccine hesitancy") has grown increasingly common throughout the world in recent years, causing a public health crisis that threatens to

[1] Lois A. Weithorn & Dorit Rubinstein Reiss, *Providing Adolescents with Independent and Confidential Access to Childhood Vaccines: A Proposal to Lower the Age of Consent*, 52 CONN. L. REV 771, 780 (2020) ("Indeed, there is a global expert consensus that vaccines are both safe and effective. This is, of course, a generalization: nothing is 100% safe or 100% effective (and no 'consensus' is 100%). It does, however, mean that vaccines' benefits are substantial, vaccines' risks are low, and that the benefits far outweigh the risks."); *see also Vaccines are Safe*, NAT'L ACADEMIES SCI. ENGINEERING & MED., https://sites.nationalacademies.org/BasedOnScience/vaccines-are-safe/index.htm (last visited Feb 23, 2021) (concluding that vaccines "have many health benefits and few side effects").

[2] The Advisory Committee on Immunization Practices ("ACIP") currently recommends that children under two receive vaccinations for diphtheria, *haemophilus influenzae* type b, hepatitis A, hepatitis B, influenza, measles, mumps, pertussis, pneumococcal disease, polio, rotavirus, rubella, and varicella (chicken pox). *See Recommended Child and Adolescent Immunization Schedule*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 29, 2020), https://www.cdc.gov/vaccines/schedules/downloads/child/0-18yrs-child-combined-schedule.pdf. States generally require some subset of those vaccines recommended by ACIP as part of their vaccination mandates. Weithorn & Reiss, *supra* note 1, at 779.

[3] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 218 (Jennifer Hamborsky et al. eds., 13th ed. 2015) ("Studies indicate that more than 99% of persons who receive two doses of measles vaccine (with the first dose administered no earlier than the first birthday) develop serologic evidence of measles immunity."). The Centers for Disease Control and Prevention ("CDC") estimates that 95% of people who received three doses of inactivated polio vaccine are immune. *Id.* at 303. Hepatitis B vaccine is 95% effective in children but is slightly less effective in adults. *Id.* at 159.

[4] *Immunization*, WORLD HEALTH ORG. [WHO] (Dec. 5, 2019), https://www.who.int/news-room/facts-in-pictures/detail/immunization.

undo much of the progress vaccination has enabled over time.[5] The problem is so serious that in 2019, the World Health Organization labeled vaccine hesitancy as one of the year's leading threats to global health.[6] Given the importance of vaccines to the health of young children in particular, the vaccine hesitancy crisis primarily threatens the health and wellbeing of children.

American law approaches vaccination by weighing parental rights to control the upbringing of children against the potential impact the exercise of these rights will have on the interests of children themselves. Although states may compel childhood vaccination under their *parens patriae* and police powers, states are not obligated to mandate vaccination, and many provide non-medical exemptions to parents who do not wish to vaccinate their children.[7] While the law may recognize the right of children not to be negligently infected by other children,[8] it recognizes no affirmative right to immunization that imposes upon the state or parent an obligation to ensure children are vaccinated. As a result, children whose parents receive religious or philosophical exemptions to vaccination mandates remain unvaccinated and suffer a substantially heightened risk of contracting communicable diseases that can result in death or permanent disability. This Article departs from this notion and asks: do children have *some* right that states violate by providing parents with non-medical exemptions to vaccination mandates?

This is not an entirely novel question. James Dwyer, for example, has argued that religious exemptions may violate the Fourteenth Amendment's Equal Protection Clause.[9] This Article does not propose that children have a right to vaccination under any existing law, but instead proposes that a possible right of that kind may be a logical extension of the child's "right to an open future," as conceived by the philosopher Joel Feinberg. In *The Child's Right to an Open Future*, Feinberg fa-

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[5] For example, measles had been declared eliminated in the U.S. in 2000, but the U.S. is now in danger of losing its elimination status as an outbreak of measles led to over 1,000 cases in the first five months of 2019. *See* Jeffrey Kluger, *'They're Chipping Away.' Inside the Grassroots Effort to Fight Mandatory Vaccines*, TIME (June 13, 2019, 6:18 AM), https://time.com/5606250/measles-cases-rise-fighting-vaccines/. Mumps is also resurging with over 1,000 cases in 2019, as is whooping cough. *Id.* Although part of the whooping cough spread is attributable to mutated bacterium, other outbreaks in recent years have been tied to personal-belief exemptions from vaccination. *Id.*

[6] *Id.*

[7] *See infra* notes 78–79.

[8] *See* Dorit Rubinstein Reiss, *Compensating the Victims of Failure to Vaccinate: What Are the Options?*, 23 CORNELL J.L. & PUB. POL'Y 595, 605–06 (2014).

[9] James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1385–86 (1996) (arguing that religious exemptions "explicitly deny a particular subgroup of children—those whose parents have a particular set of religious beliefs—the benefit of compulsory immunization").

mously proposed that children have a present right to the preservation of those autonomy rights that they will receive upon attaining maturity in adulthood, protecting them against having important life choices determined by others before they have the ability to make them for themselves.[10] Since Feinberg first proposed this "right to an open future," the right has been cited as a basis for potential derivative rights in the contexts of genetic engineering,[11] female circumcision,[12] male circumcision,[13] medical operations generally,[14] cloning,[15] digital media,[16] cochlear implants,[17] nicotine use,[18] cosmetic "eye-shaping" procedures,[19] cystic fibrosis,[20] and even "godliness."[21] This Article follows this line of scholarship and argues that a child's right to an open future may entail a right of children to be vaccinated, or at least a right not to be exempted from receiving vaccinations on account of their parents' religious or philosophical objections.

Because immature children lack many legal rights and exist under the control of their parents, the constitutional rights of children have been examined only in the context of parental rights. In Part II.A, this Article surveys the historical development of the parental right to raise children, a fundamental constitutional liberty protected by the Fourteenth Amendment's Due Process Clause. Parental rights must

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[10] Joel Feinberg, *The Child's Right to an Open Future*, *in* ETHICAL PRINCIPLES FOR SOCIAL POLICY 97, 100–02 (John Howie ed., 1983).

[11] R. Alta Charo, *Germline Engineering and Human Rights*, 112 AJIL UNBOUND 344, 346 (2018); Jenny I. Krutzinna, *Beyond an Open Future: Cognitive Enhancement and the Welfare of Children*, 26 CAMBRIDGE Q. HEALTHCARE ETHICS 313, 314–16 (2017); Toby Schonfeld, *Parents of Unhappy Poets: Fiduciary Responsibility and Genetic Enhancements*, 12 CAMBRIDGE Q. HEALTHCARE ETHICS 411, 412–16 (2003).

[12] Dena S. Davis, *The Child's Right to an Open Future:* Yoder *and Beyond*, 26 CAP. U. L. REV. 93, 94, 98–101 (1997).

[13] Robert J.L. Darby, *The Child's Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?*, 39 J. MED. ETHICS 463, 464–67 (2013).

[14] *See* Jade Michelle Ferguson, *Children Under the Knife: Current Interests, Future Interests or Parental Interests?*, 2 CAMBRIDGE L. REV. 226, 226 (2017).

[15] Dena S. Davis, *What's Wrong with Cloning?*, 38 JURIMETRICS 83, 87–89 (1997).

[16] *See* Monika Sziron & Elisabeth Hildt, *Digital Media, the Right to an Open Future, and Children 0–5*, FRONTIERS PSYCHOL., Nov. 2018, at 1, 1–3 (2018).

[17] Alicia Ouellette, *Hearing the Deaf: Cochlear Implants, the Deaf Community, and Bioethical Analysis*, 45 VAL. U. L. REV. 1247, 1265–68 (2011).

[18] *See* A. Hasman & Søren Holm, *Nicotine Conjugate Vaccine: Is There a Right to a Smoking Future?*, 30 J. MED. ETHICS 344, 345 (2004).

[19] Alicia Ouellette, *Eyes Wide Open: Surgery to Westernize the Eyes of an Asian Child*, HASTINGS CTR. REP., Jan.–Feb. 2009, at 15, 17.

[20] Gabriel T. Bosslet, *Parental Procreative Obligation and the Categorisation of Disease: The Case of Cystic Fibrosis*, 37 J. MED. ETHICS 280, 281–84 (2011).

[21] Rex Ahdar, *The Child's Right to a Godly Future*, 10 INT'L J. CHILD. RTS. 89, 105–06 (2002) (reviewing JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998)).

give way to state regulation when the state determines, as *parens patriae*, that a parental decision may "jeopardize the health or safety of the child, or have a potential for significant social burdens."[22] Although parental rights jurisprudence has left the relative strength or weakness of this standard generally unclear, one context where its weakness is clear is childhood vaccination. As this Article explains in Part II.B, the law recognizes the state's interest in protecting children from communicable diseases as sufficiently substantial to override any parental objections grounded in any liberty interest. Although children have no affirmative legal entitlement to immunization, such protection may be necessary if children have a right to an open future that gives them a present interest in their future autonomy rights.

As this Article will detail in Part III, the right to an open future can be construed with varying degrees of strength, but Joseph Millum's "moderate interpretation" is the most sensible reading of the right because it is most consistent with its liberal underpinnings. Thus, this Article will interpret this right as requiring that future adults have a reasonable range of potential life plans to choose from in pursuit of their own conceptions of the good.

Working from this interpretation, this Article concludes in Part IV that the right to an open future may require at least a right of non-interference with vaccination that precludes non-medical exemptions and, perhaps, even an affirmative right to immunization. Such rights follow from the child's right to an open future because of how the failure to vaccinate children exposes them to a significantly heightened risk of death or permanent disability. This Article will then anticipate and respond to three possible objections: (1) that the right to an open future does not entail a right to vaccination because it is not meant to include dangers that only expose one to the *risk* of a rights violation; (2) that overriding parental preferences undermines pluralism in a way that is itself illiberal; and (3) that it is reasonable to assume children would follow even the idiosyncratic preferences of their parents if parents influence the development of their children's preferences. Although each objection raises valid concerns, none ultimately succeed in defeating the claim that children have some right to greater protection of their access to vaccines than currently exists through Feinberg's right to an open future (or at least through a similar liberal theory).

II. PARENTAL RIGHTS, VACCINATION, AND THE VACCINATION HESITANCY CRISIS

A. Parental Rights

American constitutional law's treatment of children's rights is often criticized for its focus on the rights of parents to control their children rather than the rights

[22] Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972).

of children themselves.[23] But, given this orientation, understanding the rights of children under American law requires understanding the parental right to control the upbringing of one's children and how this right interacts with the state's role as *parens patriae*. This Part briefly surveys the historical evolution of this right, which is helpful to understanding the legal treatment of childhood vaccination.

American law generally involves a relationship based in rights and obligations between a right-holding person and a sovereign state. But in the United States, child law involves not two but *three* distinct groups of right-holders: children, parents, and the state.[24] Until relatively recently, in both the United States and elsewhere, this was not the case. Children had no rights in the common law, and fathers had a property-like ownership over their children that was virtually without constraint.[25] Yet, "[s]omewhat paradoxically, law prior to the late nineteenth century viewed children as autonomous beings, still under the control of their parents but not significantly different from adults."[26] In the late nineteenth century, attitudes toward children began to shift. The law no longer viewed children as simultaneously autonomous and property-like, but instead as "innocent, dependent beings different from adults and in need of special protection and care."[27] That period also saw another paradoxical development: as the family became an increasingly private sphere of life,[28] the state began to play a greater role in supervising the welfare of children as *parens patriae*.[29] This cultural shift brought about a wave of labor, education, and criminal justice reforms that reflected children's changed cultural status.[30]

This cultural shift was soon followed by a legal shift: the dawn of the *Lochner* era and the emergence of substantive due process. At the turn of the century, the Supreme Court began interpreting the Fourteenth Amendment to give "practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes."[31] Until 1937, the

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[23] Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1470–72 (2018).

[24] Dailey and Rosenbury similarly describe child law as resting on "the foundational question of who has authority over children's lives—parents, the state, or (less frequently) children themselves." *Id.* at 1456.

[25] *See id.* at 1457–58; *see also* BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 70–71 (2008); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 313–15 (1998).

[26] Dailey & Rosenbury, *supra* note 23, at 1458.

[27] *Id.* at 1459.

[28] *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 964–72 (1993).

[29] Dailey & Rosenbury, *supra* note 23, at 1458–59.

[30] *Id.* at 1459.

[31] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting). In the

Court primarily used "substantive due process" review to strike down state economic regulations that restricted the right of individuals to freely contract.[32] Although the Supreme Court would eventually repudiate *Lochner*'s fundamental right to contract, the *Lochner* Court's conception of substantive due process "would outlive the economic orthodoxy that provided its first occasion."[33]

In fact, it was through the *Lochner*-era fundamental right to contract that the fundamental right of privacy underlying parental-rights jurisprudence first gained recognition.[34] The first parental-rights case was *Meyer v. Nebraska*, in which the Supreme Court struck down a state statute prohibiting schools from teaching in any language other than English for interfering with "the power of parents to control the education of their own."[35] As Anne Dailey explains, "[a]lthough the [*Meyer*] Court clarified that parents have the right to enter into this educational contract, this was a right they possessed *as parents*."[36] In *Pierce v. Society of Sisters*, the Supreme Court relied on *Meyer* to strike down a statute requiring parents to send their children to public schools for "unreasonably interfer[ing] with the liberty of parents . . . to direct the upbringing and education of children under their control."[37] The Court explained:

Slaughter-House Cases, the Supreme Court held that a Louisiana law granting a monopoly on the slaughtering business did not violate the rights of the plaintiff-butchers under the Fourteenth Amendment. To hold otherwise, Justice Samuel F. Miller wrote for the majority, "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights." *Id.* at 78. Writing in dissent, Justice Stephen J. Field proposed the interpretation cited above: that the Fourteenth Amendment was intended to protect the fundamental and unenumerated rights of citizens. *Id.* at 105. Although the Court rejected Field's interpretation in the *Slaughter-House Cases*, "[b]y the turn of the century, American constitutional law began to unfold as Field had hoped and Miller feared." MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 40 (1996).

[32] The most notable of these cases was *Lochner v. New York*, in which the Supreme Court recognized that a "general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment." Lochner v. New York, 198 U.S. 45, 45 (1905). The Supreme Court's recognition of such a right would stifle hundreds of state and federal regulations until Franklin Roosevelt's court-packing threat forced the Court to reconsider this doctrine. In 1937, the Court would repudiate the fundamental right to contract in W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–92 (1937), drawing to a close the so-called "*Lochner* era." *See* Noam Gidron & Yotam Kaplan, *Institutional Gardening: The Supreme Court in Economic Liberalization*, 21 LEWIS & CLARK L. REV. 685, 695–98 (2017) (discussing the *Lochner* era); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2169–70 (1999) (discussing the proverbial "switch in time").

[33] SANDEL, *supra* note 31, at 42.

[34] Dailey, *supra* note 28, at 971–72.

[35] Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

[36] Dailey, *supra* note 28, at 971.

[37] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[38]

Although the Supreme Court continued to recognize the privacy of the family after the *Lochner* era ended, it began to delineate the boundaries of this right. In *Prince v. Massachusetts*, the Court acknowledged that, despite the fundamental right to familial privacy:

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . . .[39]

This was the first time that the Supreme Court had curtailed the exercise of parental rights in the name of child welfare, protecting child welfare by treating it as a compelling state interest.[40]

Nearly 30 years after *Prince*, the Supreme Court further limited the scope of parental rights in *Wisconsin v. Yoder*.[41] *Yoder* involved a First Amendment Free Exercise Clause challenge to a Wisconsin compulsory school attendance law by Amish Mennonites, who asserted that mandatory high school education posed an existential threat to the Amish religion and way of life.[42] The Court reaffirmed the power of states to curtail fundamental liberty interests in the name of child welfare, writing that parental power, "even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health

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[38] *Id.* at 535.

[39] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation omitted).

[40] It should be noted, however, that the Court does not expressly treat child wellbeing as a compelling state interest, even though the rights at issue are considered fundamental and would otherwise receive strict scrutiny review. In practice, the Supreme Court has applied an intermediate scrutiny standard. *See* Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 29–30 (2020) ("A careful academic analysis of all the Court's cases involving conflicting parent and child interests concludes that the Court regularly balances the interests, effectively applying an intermediate scrutiny standard."); *see also* Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 908–09 (2015).

[41] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[42] *Id.* at 212–13 (citing one Dr. John Hostetler, who testified that compulsory school attendance would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States").

or safety of the child, or have a potential for significant social burdens."[43] Although the Supreme Court ruled in favor of the Amish after determining that exempting Amish children from the statute was insufficiently harmful to state interests to curtail the religious and parental rights of Amish parents,[44] the Court broadened *Prince* by empowering states to curtail parental liberties where they either "hinder a child's eventual participation in the broader political community" or "interfere with community traditions consistent with our broader political ideals."[45]

Yoder left an ambiguous legacy that resulted in inconsistent treatment of parental rights in future cases, where "[s]ometimes, parental rights are characterized as robust, but at other times are characterized as readily overridden."[46] Following *Yoder*, the Supreme Court recognized in *Bellotti v. Baird* the right of mature minors to make medical decisions without parental consent,[47] but in the very same year upheld a statute in *Parham v. J.R.* which allowed parents to commit their children to a state mental hospital without affording them a right to a hearing.[48] This ambiguity persisted into the twenty-first century with *Troxel v. Granville*,[49] another landmark case "illustrat[ing] the confused state of the Court's constitutional jurisprudence respecting children in families."[50] *Troxel* involved a Washington statute authorizing non-parent visitation rights whenever "visitation may serve the best interest of the child," under which the petitioner-grandparents had sought to secure visitation rights with their grandchildren against the wishes of the respondent-mother.[51] Although the *Troxel* Court upheld the mother's parental rights against the visitation statute, it "scrupulously avoid[ed] any strong endorsement of parental rights" and "concluded that the Due Process Clause entitled parents' decisions about their children's associations and activities" to merely "at least some special weight."[52] In the two decades since *Troxel*, the applicable constitutional standard has remained unclear.[53]

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[43] *Id.* at 233–34.

[44] The Court reasoned that the petitioners failed to show "that upon leaving the Amish community[,] Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings." *Id.* at 224. The Court seemed to give particular weight to the fact that "the Amish ha[d] an excellent record as law-abiding and generally self-sufficient members of society." *Id.* at 212–13.

[45] *See* Dailey, *supra* note 28, at 1026; *supra* note 22 and accompanying text.

[46] Mark Strasser, Yoder*'s Legacy*, 47 HOFSTRA L. REV. 1335, 1348 (2019).

[47] Bellotti v. Baird, 443 U.S. 622, 643–44 (1979).

[48] *See* Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 369 n.150 (2002) (citing Parham v. J.R., 422 U.S. 584, 620 (1979)).

[49] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[50] Dolgin, *supra* note 48, at 369.

[51] *Troxel*, 530 U.S. at 60 (citing WASH. REV. CODE § 26.10.160(3) (2019)).

[52] Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 639 (2002) (citations omitted).

[53] *See* Bartholet, *supra* note 40, at 32 ("However, the Supreme Court has not made the

B. Vaccination and the Vaccine Hesitancy Crisis

Unclear as the general constitutional standard for reviewing curtailments of parental rights may be, the legal status of compulsory childhood vaccination is quite clear: states indisputably have the power to mandate vaccination of children against objections grounded in both religious freedom and parental rights. This Part will explain how constitutional objections to mandatory childhood vaccination have been altogether rejected, empowering states to mandate immunization as they see fit. However, states may also choose *not* to mandate childhood vaccination, and this greater power includes the lesser power to grant non-medical exemptions from those vaccine mandates they do impose. States that grant non-medical exemptions risk exposing the children of vaccine-hesitant parents to whatever health risks may come from growing up without immunization to infectious diseases. This is the issue this Article is primarily concerned with addressing.

It is well-settled law that states may constitutionally mandate vaccination for children and adults alike.[54] The authority of states to mandate *childhood* vaccination in particular springs from two "inextricably intertwined"[55] common-law sources: the state's *parens patriae* authority and its police power.[56] The state's *parens patriae* authority is its paternalistic authority to regulate the lives of children and other vulnerable groups for their protection and the promotion of their welfare.[57] The state's police power, on the other hand, is a broader authority "to regulate the conduct of individuals in order to promote the general welfare . . . [of] society as a whole."[58] It

applicable constitutional standard entirely clear.").

[54] Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 595 (2016) ("There is no doubt that compulsory vaccination is constitutional."). The authority of states to mandate vaccination is broad but not totally free of constitutional limits. In *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905), the Supreme Court recognized that this authority is subject to four constraints: first, police powers must be based on the necessity of the case and must extend only to the extent it is reasonably required. Second, there must be a reasonable relationship between the public health intervention and the achievement of the legitimate public health objective. *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 856–57 (2001–02). Third, the police power must be exerted in proportion to the public health threat and can be unconstitutional if gratuitously onerous or unfair. *Id.* And fourth, the measure itself should not pose a health risk to its subject. *Id.*; *see also* McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (noting that, "[i]t has long been settled that individual rights must be subordinated to the compelling state interest of protecting society against the spread of disease").

[55] Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 218–19 (2017).

[56] Weithorn & Reiss, *supra* note 1, at 797–802.

[57] *Id.* at 797–98.

[58] *Id.* at 797.

was in terms of police power that the Supreme Court first upheld the constitutionality of a municipal ordinance mandating vaccination in *Jacobson v. Massachusetts*, reasoning that "all rights [including liberty] are subject to such reasonable conditions . . . essential to the safety, health, peace, good order and morals of the community."[59] The Court used police power, not *parens patriae*, in *Jacobson* because the petitioner was a competent adult and the state's justification for its authority to mandate a smallpox vaccination was grounded exclusively in its communal welfare interest.[60] Nevertheless, *parens patriae* has since played a more prominent role in justifications for mandatory vaccination policies affecting children.[61] Mandatory childhood vaccination policies are thus unique among health care regulations in their relevance to both police power and *parens patriae* authorities.[62]

As discussed in Part II.A, weighing against these powers are parents' First Amendment right of free religious exercise and their Fourteenth Amendment right to direct the upbringing of their children.[63] The Supreme Court established in *Parham v. J.R.* that fundamental parental rights include a right to make medical decisions for one's children.[64] But, by the time the Court had begun developing its substantive due process jurisprudence, the state's interest in immunizing its population from communicable diseases had long been recognized by the Court as a substantial one. In fact, the Court pointed to vaccination in *Prince* as a paradigmatic example of an interest that may allow a state to override fundamental liberties: "[a parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religions freely does not include liberty to expose the community or the child to communicable disease or the latter

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[59] *Jacobson*, 197 U.S. at 26 (citing Crowley v. Christensen, 137 U.S. 86, 89 (1890)). Elsewhere in the opinion, the Court expressly recognizes the State exercise of police power, writing "[t]he police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25.

[60] Reiss & Weithorn, *supra* note 40, at 907.

[61] *Id.*

[62] *Id.* at 907, 928.

[63] *Cf.* Meyer v. Nebraska, 262 U.S. 390, 396–98 (1923).

[64] Despite the highly intimate nature of medical decisions, parents are empowered to make these decisions for their immature children because the law presumes that they are both fit to make important decisions and to act in their child's best interests. Regarding parent fitness, the Supreme Court explains that the law's conception of the family "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." Parham v. J.R., 422 U.S. 584, 602 (1979). And regarding the identity of interests between parent and child, the Court wrote that the child's interest "is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns." *Id.* at 600.

to ill health or death."[65] Although the Supreme Court has not expressly disaffirmed a right to a belief-based exemption from vaccination, it is the wide consensus of legal scholars that parents have no such right given the government's interest in protecting children from communicable diseases and its "breathtakingly broad authority to override parental decisionmaking"[66] through its police and *parens patriae* powers.[67]

Exercising these powers, all 50 states have enacted legislation requiring specified vaccines for children who attend public schools.[68] Some states also require that parents vaccinate home-schooled children.[69] The rationale behind these requirements is twofold: first, the state has an interest in protecting the children of vaccine-hesitant parents from communicable diseases, and the penalty of exclusion from school has historically proven successful at ensuring that parents vaccinate their children.[70] Second, the state has an interest in protecting *other* children from communicable diseases through the maintenance of "herd immunity," which allows eradication of a disease from a population if most, but not all, members are vaccinated.[71] To achieve herd immunity for most diseases, vaccination rates of 85% to 95% are necessary.[72] Herd immunity is particularly important for children who are too young to be vaccinated and children who are unable to be vaccinated because they

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[65] Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

[66] Reiss & Weithorn, *supra* note 40, at 912.

[67] *See* Chemerinsky & Goodwin, *supra* note 54, at 604 (stating that people who believe parents have a constitutional right to refuse to vaccinate their children "are wrong. No such constitutional right exists. In fact, every court to consider challenges to compulsory vaccination laws has upheld the statutes."); Allan J. Jacobs, *Needles and Notebooks: The Limits of Requiring Immunization for School Attendance*, 33 HAMLINE L. REV. 171, 184 (2010) ("A litigant seeking exemptions from a compulsory vaccination requirement on the basis of the Free Exercise or Establishment Clause likely will lose. These issues have been extensively adjudicated . . . ."); Michael Poreda, *Reforming New Jersey's Vaccination Policy: The Case for the Conscientious Exemption Bill*, 41 SETON HALL L. REV. 765, 784 (2011) ("While the Supreme Court has never ruled explicitly on the right to a belief-based exemption from vaccination, its case law strongly indicates that it would find no such right.").

[68] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. ST. LEGISLATURES (June 26, 2020), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx. The Supreme Court upheld the constitutionality of such regulations in *Zucht v. King* where, relying on *Jacobson*, it held that state police power permitted a state to make vaccination a condition of attending public or private school. Zucht v. King, 260 U.S. 174, 176–77 (1922).

[69] *E.g.*, Donya Khalili & Arthur Caplan, *Off the Grid: Vaccinations Among Homeschooled Children*, 35 J.L. MED. & ETHICS 471, 473–75 (2007).

[70] *See* Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (2001).

[71] Jacobs, *supra* note 67, at 176.

[72] Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 446 (2011).

"tend to be 'more susceptible to the complications of infectious diseases than the general population of children.'"[73] To ensure the safety of these children, states mandate vaccination for children who can be vaccinated to keep immunization levels above the herd immunity threshold.

Although states may lawfully mandate childhood vaccination, they are not required to do so. At present, states grant three kinds of exemptions to these requirements: medical exemptions, religious exemptions, and philosophical exemptions. The Supreme Court has not clarified whether medical exemptions are constitutionally required, but all 50 states already grant them.[74] However, just five states—Maine, New York, Mississippi, West Virginia, and California—allow only medical exemptions.[75] Forty-five states and Washington D.C. grant religious exemptions as well.[76] As for "philosophical" exemptions—which are sought by those who object to immunizations because of personal, moral, or other non-religious beliefs[77]—15 states also provide these exemptions.[78]

In states that provide both philosophical and religious exemptions, there are far more philosophical exemptions granted than religious and medical exemptions combined.[79] This may be in part due to the fact that philosophical exemptions generally require a lower burden of proof than do religious exemptions.[80] However, numerous studies have found that, when explaining their vaccine hesitancy, parents cite much more frequently to secular reasons than religious reasons. For example, one study surveyed anti-vaccination websites and found that only 25% of websites argued against vaccination on religious tenets.[81] In contrast, *all* websites examined

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[73] Kylie Barnhart, *Taking One for the Herd: Eliminating Non-Medical Exemptions to Compulsory Vaccination Laws to Protect Immunocompromised Children*, 119 W. VA. L. REV. 749, 759 (2016) (citing Parkins, *supra* note 72, at 448).

[74] *See States with Religious and Philosophical Exemptions*, *supra* note 68.

[75] *See id.*

[76] These states include: Alabama, Alaska, Connecticut, Delaware, Georgia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wyoming. *See States with Religious and Philosophical Exemptions*, *supra* note 68.

[77] Reiss & Weithorn, *supra* note 40, at 918–19.

[78] The states that allow both religious and secular objections include: Arizona, Arkansas, Colorado, Idaho, Louisiana, Michigan, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, and Wisconsin. *States with Religious and Philosophical Exemptions*, *supra* note 68.

[79] Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 284 (2003).

[80] *See id.*

[81] Anna Kata, *A Postmodern Pandora's Box: Anti-Vaccination Misinformation on the Internet*, 28 VACCINE 1709, 1713 (2010).

in this study "claimed vaccines are poisonous and cause idiopathic illnesses,"[82] and most promoted both alternative medicine and conspiracy theories as well.[83] Another study, conducted by Catherine Helps, interviewed vaccine-skeptical parents and also found that philosophical objections predominated. These objections conformed to particular themes: specifically, parents who developed a skepticism of vaccines commonly perceived "that health in general is deteriorating in western societies," and commonly reported either a concrete personal experience that introduced doubt about vaccination or a general preference for a lifestyle with minimal medical intervention.[84] This study only found that a minority were guided by an intuitive decision-making process,[85] which contrasts with the conclusion Jennifer Reich drew in her book *Calling the Shots*—that vaccine-skeptical parents commonly appeal to intuition.[86] But Helps, like Reich, found that vaccine-skeptical parents "saw themselves as the central expert and the person most qualified to make decisions and take responsibility for their child's health, including decisions regarding vaccination."[87] Overall, these studies suggest that parents reject vaccines for various reasons, but philosophical reasons predominate over religious ones. As for the particulars of these philosophical reasons, parents consistently exhibit a distrust of medical professionals and Western medicine generally, and instead defer to their own independent research and judgment.[88]

Considering the purely philosophical nature of most vaccine hesitancy, one may wonder how vaccine hesitancy could have ever brought about a public health crisis while having virtually no constitutional protections. States can repeal religious and philosophical objections at any moment, and many scholars have urged them to do that without delay.[89] Others warn of a risk that this coercion will trigger a

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[82] *Id.* at 1711.

[83] *Id.* at 1712.

[84] Catherine Helps et al., *Understanding Non-Vaccinating Parents' Views to Inform and Improve Clinical Encounters: A Qualitative Study in an Australian Community*, BMJ OPEN, May 2019, at 1, 3 (2019).

[85] *Id.* at 10.

[86] JENNIFER A. REICH, CALLING THE SHOTS: WHY PARENTS REJECT VACCINES 70 (2016).

[87] Helps, *supra* note 84, at 10.

[88] *See id.*

[89] *See, e.g.*, Chemerinsky & Goodwin, *supra* note 54, at 595 ("In other words, there should be no exception to the compulsory vaccination requirement on account of the parents' religion or conscience or for any reason other than medical necessity."); Barnhart, *supra* note 73, at 753–54 ("This Note argues that states should eliminate religious and philosophical exemptions to compulsory vaccination laws . . . to protect immunocompromised children."); Megan Gibson, *Competing Concerns: Can Religious Exemptions to Mandatory Childhood Vaccinations and Public Health Successfully Coexist?*, 54 U. LOUISVILLE L. REV. 527, 549–50 (2016) ("Allowing religious exemptions to state mandated vaccination policies for matriculation into public school systems is inherently problematic from a public health standpoint . . . .").

backlash that could mobilize anti-vaccination advocacy[90] and spur non-compliance.[91] Scholars have also argued that these exemptions are valuable in their own right as "an important part of the balance of public health and personal liberty."[92] Avoiding these issues and ensuring that children are vaccinated to the greatest extent possible may require addressing distrust of medical institutions and the spread of misinformation online that seem to be fueling anti-vaccination sentiments among parents. Nevertheless, the fact remains that vaccine hesitancy poses a serious and growing threat that places children at an increasingly greater risk of contracting communicable diseases once on the verge of eradication. To the extent states allow vaccination rates to decline, it is not because of any legal obstacle but rather a lack of political will to override parental or religious liberties. But it cannot be forgotten that the burden of this political choice falls on children, a segment of the population with no political voice whatsoever.

The question this Article asks is this: should children have some affirmative right to vaccination, or at least to greater protection of existing access to vaccination in spite of parental objections? A possible right of this kind may be a logical extension of the child's "right to an open future" conceptualized by the philosopher Joel Feinberg. This Article will introduce this conceptual right in Part III and argue for its extension to childhood vaccination in Part IV.

III. THE CHILD'S RIGHT TO AN OPEN FUTURE

Although the law defers to the state interest in protecting children's health and wellbeing, children remain at risk of going unvaccinated and suffering heightened exposure to dangerous and preventable diseases in states that grant non-medical exemptions. This Article proposes that if one accepts Joel Feinberg's theory that children have a right to an "open future," one must understand children as entitled to greater vaccination access than they have in such states. Before explaining why this is the case in Part IV, this Article will introduce Feinberg's "right to an open future," examining the different potential interpretations of this right and settling on the right's "moderate" interpretation: that the right to an open future requires only that a future adult be able to choose among a reasonable range of life plans. This Article merely assumes for its purposes that a child has a right to an open future rather than arguing that Feinberg's theory is necessarily correct, but it concludes by discussing

[90] *See* Alicia Novak, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1106–07 (2005).

[91] For example, when California revoked all non-medical exemptions, the state saw an increase in the number of medical exemptions sought. *See* Salini Mohanty et al., *Experiences with Medical Exemptions After a Change in Vaccine Exemption Policy in California*, PEDIATRICS, Nov. 1, 2018, at 1, 2 (2018) (suggesting that parents who previously had non-medical exemptions exploited medical exemptions when non-medical ones were repealed).

[92] Poreda, *supra* note 67, at 780.

the extent to which the right is consistent with both constitutional jurisprudence and the liberal conception of rights that underlies it. [93]

In *The Child's Right to an Open Future*, Joel Feinberg conceives of three broad species of rights that can be held by people as adults or children: first, there are rights that both adults and children enjoy in equal measure ("A-C–rights"),[94] including those negative rights people have to not be directly harmed by other people.[95] Second, there are rights that belong only to adults ("A–rights"), which include both legal rights (such as voting or drinking alcohol) and autonomy rights that cannot apply to small children (such as the right of free exercise of one's religion, "which presupposes that one has religious convictions or preferences in the first place").[96] And third, there are rights that are generally characteristic only of children (and are possessed by adults only in unusual circumstances), which Feinberg calls "C–rights." There are two kinds of C–rights: one kind is "dependency-rights," which children derive from their dependence upon others for the basic instrumental goods of life (such as food, shelter, and protection).[97] The other is "rights-in-trust," which are similar to adult autonomy rights except that children are not yet capable of exercising them. Feinberg explains:

> When sophisticated autonomy rights are attributed to children who are clearly not yet capable of exercising them, their names refer to rights that are to be saved for the child until he is an adult, but which can be violated in advance, so to speak, before the child is even in a position to exercise them. Violations guarantee now that when the child is an autonomous adult, certain key options will already be closed to him. While he is still a child, he has the right to have these future options kept open until he is a fully formed self-determining agent capable of deciding among them.[98]

Feinberg expressly leaves unspecified those derivative rights that this right to an open future might entail.[99] Indeed, it is unclear whether this right is even a positive or a negative right. Daniela Cutas characterizes Feinberg's right as definitively

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[93] This is not the first article that has argued that vaccination is required by liberal principles. *See* ALBERTO GIUBILINI, *Fairness, Compulsory Vaccination, and Conscientious Objection*, *in* THE ETHICS OF VACCINATION 95–123 (2019); Alexandria Shinaut, The Moral Obligation We Have to Our Community to Be Vaccinated 1, 31–36 (Apr. 29, 2016) (unpublished undergraduate thesis, Carroll College) (on file with Carroll College). This Article makes a different claim in arguing that children in particular are entitled to immunization by virtue of their right to an open future.

[94] Feinberg, *supra* note 10, at 97.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 97–98.

[98] *Id.* at 98.

[99] *Id.* (writing that "rights-in-trust can be summed up as the single 'right to an open future,' but of course that vague formula simply describes the form of the particular rights in question and

"negative in nature, rather than positive, and concern[ing] mostly what parents ought *not to do* to their children, rather than what they should do to them for the sake of their own future."[100] Joseph Millum, in contrast, says the right can be understood as either negative or positive, and may even embody both negative and positive elements.[101] The nature of the right as negative or positive is critical for defining the right's exact scope because it determines whether children have an affirmative right to receive vaccines, or just a right not to be interfered with in their receipt of them. This, in turn, determines the nature and scope of those obligations the state and parents have toward children as well.

Surveying Feinberg's writing and subsequent literature, Millum articulates three possible interpretations of the right's scope: first, the "strong interpretation" of the right requires that "all the options that might permissibly be chosen by the autonomous adult that a child could grow into must be protected, within the constraints of feasibility."[102] The "moderate interpretation" of the right requires only "that the future adult be able to choose among some, perhaps particularly important, set of options."[103] And lastly, the "weak interpretation" of the right simply protects the child's development of her capabilities, but only insofar as validating children's claims to develop into autonomous agents while saying nothing about what obligations others have to help realize this autonomy.[104]

As Millum notes, philosophers who cite Feinberg's theory generally adopt the moderate interpretation for the right to an open future.[105] This Article will also adopt the moderate interpretation because it honors the strength of Feinberg's lan-

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not their specific content. It is plausible to ascribe to children a right to an open future only in some, not all respects, and the simple formula leaves those respects unspecified.").

[100] Daniela Cutas, *Should Parents Take Active Steps to Preserve Their Children's Fertility?*, *in* PARENTAL RESPONSIBILITY IN THE CONTEXT OF NEUROSCIENCE AND GENETICS 189, 195 (Kristien Hens et al. eds., 2017).

[101] Joseph Millum, *The Foundation of the Child's Right to an Open Future*, 45 J. SOC. PHIL. 522, 524 (2014) ("First, the right to an open future could be a negative or a positive right, or, plausibly, there could be both negative and positive aspects to it . . . .").

[102] *Id.* at 525.

[103] *Id.*

[104] *Id.*

[105] *See, e.g.*, ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 170–75 (2000) ("Parents must foster and leave the child with a range of opportunities for choice of his or her own plan of life, with the abilities and skills necessary to pursue a reasonable range of those opportunities and alternatives, and with the capacities for practical reasoning and judgment that enable the individual to engage in reasoned and critical deliberation about those choices."); Mianna Lotz, *Feinberg, Mills, and the Child's Right to an Open Future*, 37 J. SOC. PHIL. 537, 547 (2006) (arguing that parents have "a duty to provide for their child's *agent-internal* conditions by seeking to develop in their child the skills and capacities for information seeking, critical reflection, deliberative independence, and the like").

guage while avoiding some of the strong interpretation's pitfalls. Given how Feinberg identifies even activities like walking down a public sidewalk as a child's right-in-trust,[106] the right to an open future tempts one to adopt a broad interpretation requiring "the greatest range of reasonable choice . . . as adults."[107] However, there are problems raised by such a conception. As Robert Noggle argues, parents have limited information about a child's future self and cannot know which interests to protect and promote among all possible interests.[108] But the issue goes deeper than this, for it is not as though a child is born with a set number of predetermined future interests that his parents are merely ignorant of; rather, "[w]hether a certain sort of life would please a child often depends upon how he has been socialized" by his parents.[109] Feinberg also acknowledges this "paradox of self-determination,"[110] but answers that this is an over-simplification. In reality, he explains, the child has his own innate character and is always developing this character to an increasing degree as he ages. Thus:

> In the continuous development of the relative-adult out of the relative-child there is no point before which the child himself has no part in his own shaping, and after which he is the sole responsible maker of his own character and life plan. . . . I think we can avoid or at least weaken the paradoxes if we remember that the child can contribute towards the making of his own self and circumstances in ever-increasing degree.[111]

Feinberg qualifies his position slightly here but does not fully solve the practical problem facing parents in trying to anticipate which of their child's skills and talents they must allocate limited resources toward cultivating to fulfill their obligations as trustees of the child's autonomy rights. A child cannot master every language, sport, instrument, and every other possible activity by the time they reach adulthood, and there will inevitably be some life plans that are closed to the child. For example, a child may receive abundant opportunities to develop a wide range of skills but, if he

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[106] Feinberg, *supra* note 10, at 99.

[107] *See* Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 341 (1980); *see also* Robert Noggle, *Special Agents: Children's Autonomy and Parental Authority*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 97, 107 (David Archard & Colin M. Macleod eds., 2002).

[108] Bernard G. Prusak, *Not Good Enough Parenting: What's Wrong with the Child's Right to an "Open Future"*, 34 SOC. THEORY & PRACTICE 271, 275 (2008) ("[P]arents have only limited information about the future self of the child whose interests they are charged to protect and promote, for who knows what projects, values, and commitments he or she will come to have[?]") (citing Noggle, *supra* note 107, at 106).

[109] Kenneth Henley, *The Authority to Educate*, *in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 254, 256 (Onora O'Neill & William Ruddick eds., 1979) (emphasis omitted).

[110] Feinberg, *supra* note 10, at 118.

[111] *Id.* at 120–21.

discovers a love of ice hockey too late, he will never have enough time to become skilled enough to play in the National Hockey League. This issue is particularly problematic if one interprets the right to an open future as a positive right; it would entail, to return to the previous example, that a child has some entitlement to play professional hockey if he so wishes, and that his parents have failed to honor some obligation by failing to ensure that outcome. This objection illustrates the danger of taking an overly broad reading of Feinberg's right to an open future.

As for the weak interpretation, it is implausible that Feinberg envisioned children having some right with *no* corresponding obligations. Fundamental to American law is the notion that rights, whether *in personam* or *in rem*, have correlative duties.[112] Scholars have argued that one can justify imposing additional obligations without granting additional rights,[113] but to the author's knowledge none have argued the converse. It is highly doubtful that Feinberg intended to eschew this theoretical convention for his right to an open future, and his theory makes little sense under that interpretation anyway. Millum writes this interpretation off almost immediately,[114] and this Article will do the same.

The moderate interpretation also makes the most sense when one views Feinberg's theory in its liberal philosophical context.[115] As Bernard Prusak explains,

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[112] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717–18 (1917).

[113] *See* William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1722 (2001) ("Individual rights, without more, are a thin way to express or normalize the relationship of the individual to the community. Jewish law provides a different focus. When the Jewish child moves into adulthood by becoming a *bar* or *bat mitzvah*, he or she gains no greater rights than before but instead assumes more obligations, and this assumption of responsibility is what separates the full member of the community from the child or the outsider. This conception provides a richer understanding of the relationship between the individual and the community than does liberal theory.").

[114] *See* Millum, *supra* note 101, at 525–26.

[115] Liberalism is widely regarded as the philosophy underlying political thought in the United States and across the Western world. *See, e.g.*, SANDEL, *supra* note 31, at 5 ("The public philosophy of contemporary American politics is a version of this liberal tradition of thought, and most of our debates proceed within its terms."); Thomas Nagel, *Rawls and Liberalism*, *in* THE CAMBRIDGE COMPANION TO RAWLS 62, 62 (Samuel Freeman ed., 2003) ("It is a significant fact about our age that most political argument in the Western world now goes on between different branches of [the liberal] tradition."). And yet, exactly *what* defines liberalism is a deceptively challenging question. *See generally* Duncan Bell, *What is Liberalism?*, 42 POL. THEORY 682 (2014). On a most basic level, liberalism involves a belief in the fundamental autonomy rights of persons *qua* persons. As Stephen Holmes has observed, "[t]he best place to begin, if we wish to cut to the core of liberalism, is with Locke." STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 15 (1995). John Locke wrote that "a state of perfect freedom" and equality are the natural conditions of persons, and people may order their lives as they see fit so long as they do not violate the rights of others. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690). Although

Feinberg's theory of children's rights is just one manifestation of what Amy Gutmann terms the "liberal argument,"[116] which conceives the concept of the right as

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Immanuel Kant later placed dignity at the heart of his own theory of human rights, "the conception of dignity most closely associated with Kant is the idea of dignity as autonomy . . . to treat people with dignity is to treat them as autonomous individuals able to choose their own destiny." Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 659–60 (2008). The precise nature of these rights is the subject of the first great ideological rift in liberal philosophy, dividing utilitarian liberals and Kantian liberals (or rather, between consequentialist and deontologist liberals). John Stuart Mill, a utilitarian, understood rights as foundational to morality because of their crucial contribution to the social good. *See* JOHN STUART MILL, UTILITARIANISM (1863), *reprinted in* THE UTILITARIANS 401, 459–60 (Anchor Press 1973). In contrast, Immanuel Kant understood the principles of justice to be independently derived from those of goodness, such that rights are justified in a way that does not depend on any particular vision of the good. *See* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 65 (Lewis White Beck trans., Liberal Arts Press 1956) (1788). The core thesis of Kantian liberalism is that:

> [S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it.

MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1 (1982). Modern liberal thought is "indebted to Kant for much of its philosophical foundation," *id.*, and it is within the Kantian framework that a second great ideological rift in liberal philosophy between egalitarian and libertarian liberals emerged. Kant's conception of rights clearly underlies the egalitarian philosophy of John Rawls, who wrote that "[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . [T]he rights secured by justice are not subject to political bargaining or to the calculus of social interests." JOHN RAWLS, A THEORY OF JUSTICE 3–4 (1971). Yet Rawls conceives of justice more broadly than merely constituting Lockean natural rights, offering a comprehensive theory of *social* justice relating to the assignment of rights and duties in the basic institutions of society and the appropriate distribution of the benefits and burdens of social cooperation. *Id.* at 4. Opposing Rawls was Robert Nozick, who also held a Kantian conception of fundamental Lockean rights but did not believe that a respect for those rights could be squared with redistribution of the kind Rawls promoted. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–231 (1974). Rawls' theory has proven the more influential of the two, for in recent decades "[p]hilosophical liberalism became synonymous with Rawls . . . . By the late twentieth century, Anglophone political theorists operated in the shadow of justice theory." KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY x (2019). Thus, this Article can fairly make two generalizations about modern liberalism: first, theoretically speaking, modern liberalism can be generalized as having a Kantian understanding of Lockean fundamental human rights, as well as a Rawlsian conception of social justice. And second, John Rawls can be generalized as the paradigmatic modern liberal philosopher, and this Article will make certain points by treating him as such.

[116] Prusak, *supra* note 108, at 275–76 (citing Gutmann, *supra* note 107, at 341).

prior to the concept of the good.[117] In particular, Gutmann argues, Feinberg's "open future" largely derives from John Rawls' liberal theory of justice,[118] which conceives of a moral entitlement people have to "primary goods" that "normally have a use whatever a person's rational plan in life."[119] Consistent with the moderate interpretation, a Rawlsian entitlement to primary goods does not ensure a *maximally* open future, but rather a future sufficiently open to allow for a reasonable range of opportunities. Although Feinberg does not couch his theory in Rawlsian terms, philosophers who have interpreted Feinberg's right to an open future have frequently done so.[120] Indeed, solving the problem described above involving the limited knowledge of parents about their children's future interests is precisely the aim of primary goods. As Rawls writes:

> Paternalistic decisions are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods. As we know less and less about a person, we [should] act for him as we would act for ourselves from the standpoint of the original position.[121]

Thus, ensuring that children enjoy "certain key options" upon reaching adulthood, as required by Feinberg's theory,[122] is to provide them with Rawlsian primary goods.[123] These parallels do not seem coincidental given the strongly liberal character of Feinberg's philosophy more generally, and the most sensible interpretation of Feinberg's right to an open future is as a liberal theory of child rights.

But the question still remains: is the right to an open future positive or negative? The moderate interpretation, Millum explains, is susceptible to both interpretations. If the right were negative, it "might require allowing the child to acquire certain skills and ensuring that certain options" are not foreclosed.[124] On the other hand, if the right were positive, it "would require [actively] helping the child to develop key skills and providing her with the resources to choose among a reasonable

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[117] Prusak, *supra* note 108, at 272 (quoting JOHN RAWLS, POLITICAL LIBERALISM 174 (1996)) ("In justice as fairness the priority of right means that the principles of political justice impose limits on permissible ways of life; and hence the claims citizens make to pursue ends that transgress those limits have no weight.").

[118] *Id.* at 277 ("For Gutmann, what is really at stake is justice to children; her basic theory of justice is Rawls's.").

[119] RAWLS, *supra* note 115, at 62.

[120] *See, e.g.*, Gabriel T. Bosslet, *Parental Procreative Obligation and the Categorisation of Disease: The Case of Cystic Fibrosis*, 37 J. MED. ETHICS 280, 281–82 (2011) (interpreting the "open future" as one where individuals can pursue "a reasonable range of life options (regarding family, career, etc.) in forming their overall 'life plan'").

[121] RAWLS, *supra* note 115, at 249.

[122] Feinberg, *supra* note 10, at 98.

[123] Gutmann, *supra* note 107, at 340–41.

[124] Millum, *supra* note 101, at 525.

range" of options.[125] As this Article will explain in Part IV, if children have a right to an open future, they are entitled to greater access to vaccination regardless of whether this right is positive or negative. Thus, although understanding the nature of this right as positive or negative is crucial to delineating its contours, this Article need not resolve this question to show that children are entitled to at least some greater access to vaccination than they currently have.

There are, of course, objections one can raise against a liberal conception of rights, and against Feinberg's conception in particular. American constitutional law has a distinctly libertarian character to it,[126] and this character may be inconsistent with adopting a Rawlsian notion of primary goods in delineating children's rights. For its limited purposes, this Article will merely assume that children have a right to an open future and consider whether this right requires greater assurance of immunization. Nevertheless, American constitutional law could actually be quite hospitable to Feinberg's right to an open future. To start, there are interesting similarities between Feinberg's theory and the views numerous Supreme Court justices have expressed in dissenting opinions of parental rights cases. Feinberg writes that, when C–rights-in-trust conflict with parental rights, the state must defend children's future autonomy rights as *parens patriae*.[127] To support this claim, he points to the language in *Prince* recognizing the state's interest not only in the "immediate health and welfare of children but also with 'the healthy, well-rounded growth of young people into full maturity as citizens with all that implies [in a democracy].'"[128] Feinberg also echoes Justice White's concurrence in *Yoder*, which articulates the state's interest "not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past."[129] Perhaps an even more supportive passage unquoted by Feinberg is found in Justice Douglas' dissenting opinion in *Yoder*:

> It is the future of the student . . . that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or

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[125] *Id.*

[126] *See, e.g.*, Dailey & Rosenbury, *supra* note 23, at 1453 ("In a direct departure from existing constitutional law, the new law of the child would recognize children's affirmative rights as children to certain goods and services essential to furthering their broader interests."); Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 26 (2014) ("Negative liberty, as important as it is, is insufficient for justice. We can imagine . . . constitutional interpretations that convey positive rights.").

[127] Feinberg, *supra* note 10, at 100–02.

[128] *Id.* at 102 (citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

[129] Wisconsin v. Yoder, 406 U.S. 205, 240 (1972) (White, J., concurring).

he may rebel.[130]

The statements of both Justice White and Justice Douglas support the notion that children are done a *present* harm when limited in their future abilities to, as Douglas phrases it, "be masters of their own destiny."[131] They leave unclear whether this harm is due to a rights violation or merely an interests violation, though the latter interpretation seems more likely given such language.

Nevertheless, a rights-based reading would not be wholly out-of-place in a constitutional jurisprudence that has increasingly reflected a liberal conception of rights. As Michael J. Sandel details in *Democracy's Discontent*, "[t]he version of liberalism that puts the right before the good finds its clearest expression in constitutional law," a deviation from the civic republicanism that guided the Constitution's drafters.[132] This evolution largely tracked the substantive due process revolution, following the ratification of an amendment which, to again quote Justice Field's *Slaughter-House* dissent, was intended to protect those moral rights "which the law does not confer, but only recognizes."[133] Unsurprisingly, the Fourteenth Amendment's Due Process Clause led to a fundamental-rights jurisprudence with a distinctly liberal character. Ronald Dworkin even went so far as to expressly invoke Rawls' theory of justice as a fitting guide for the "fusion of constitutional law and moral theory."[134] The liberalization of constitutional law has its discontents,[135] but it is hard to deny that a liberal conception of rights animates substantive due process jurisprudence. At least conceptually, it is not a far-fetched counterfactual that the court might have recognized the child's equitable interest in her future autonomy rights as a fundamental liberty protected by the Fourteenth Amendment's Due Process Clause.[136] To say

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[130] *Id.* at 245 (Douglas, J., dissenting).

[131] *Id.*

[132] SANDEL, *supra* note 31, at 28–30.

[133] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 105 (1872) (Field, J., dissenting).

[134] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977). Regarding Rawls, Dworkin writes "Professor Rawls of Harvard . . . has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore." *Id.*

[135] Michael J. Sandel laments the shift in constitutional law from a civic republicanism that embodies a certain conception of the good to a liberal "procedural republic" that does not, writing that "[a] procedural republic cannot contain the moral energies of a vital democratic life" and "fails to cultivate the qualities of character that equip citizens to share in self-rule." SANDEL, *supra* note 31, at 24. John Hart Ely objects generally to judges reading fundamental moral rights into the Constitution, and more specifically to judges consulting moral philosophy to that end. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 56–68 (1980).

[136] It is worth distinguishing between two different ways people commonly use the term "interest" in this context, one pertinent to goodness and the other pertinent to justice. Colloquially, a person has an interest in something that is good for them. This can include things one is entitled to and things one is not. For example, it is in my interest both to receive due process of law and to win the lottery; I have a right to the former, but no right to the latter. However, in the legal context, the term "interest" is used to denote a claim of legal right. Lawyers will often

this is not to say that Feinberg's right to an open future is in fact protected by this clause, or even that it should be protected by it; rather, it is only to say that applying a liberal theory of moral rights does not require a radical re-imagining of our law's conceptual underpinnings.

One also finds that a liberal theory of child rights is largely (though not entirely) consistent with the four policy justifications commonly offered in support of the existence of parental rights: first, that vesting discretion in parents protects against governmental overreaching into family matters and fosters pluralism by guarding the free exercise of substantive liberties such as political ideology or religious belief.[137] Second, that parental rights "may be viewed as a form of reciprocity for satisfying the legally enforceable duties of parenthood."[138] Third, that the law presumes that parents act in their children's best interests, and that there is an "identity of interests" between parent and child that allows the parent to render the decision that the child would have made had the child been mature enough to decide for herself.[139] And fourth, that children need the watchful guidance of a parent to properly develop into functioning adults.[140]

The second justification—parental rights as reciprocity for satisfying parental duties—is admittedly hard to square with a liberal conception of human rights. The state may well have an interest in incentivizing child-rearing, but granting parents powers over children to promote these ends is a two-way transaction between parents and the state lacking any consent from the child herself. As Samantha Godwin argues, treatment of this kind essentially gives parents quasi-property rights in other human beings in a manner "incompatible with liberal and egalitarian commitments to the equality of persons."[141] In truth, given the liberal focus on rational independent actors, the founders of liberal rights theory perceived children as altogether outside the scope of their philosophies.[142] As Tamar Ezer writes:

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specify that something is a *liberty* interest or a *property* interest to denote an interest's rights-based nature, but not always. It is common, for example, to discuss present or future interests in property without needing to clarify the claim's right-based nature. This Article uses the colloquial meaning of "interest" to denote something that is good for somebody but not necessarily something she is entitled to, thus distinguishing it from a "right" that necessarily gives its holder an entitlement. The sole exception is in the above text describing the right to an open future as a child's "equitable interest in her future autonomy rights." This usage aims to describe rights-in-trust as one would describe a beneficiary's interest in a legal trust, which is a legal right bestowing certain entitlements.

[137] Weithorn & Reiss, *supra* note 1, at 792.

[138] *Id.* at 792–93 (citing Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2440 (1995)).

[139] *Id.* at 793–94.

[140] *Id.* at 794 (citing Weithorn, *supra* note 55, at 226–27).

[141] Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS L. REV. 1, 5 (2015).

[142] Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 2 (2004). Ezer writes that Locke, for example, believed that, "[a]s children were not rational

> Children are an anomaly in the liberal legal order. Conceptualizations that work in other areas of human rights break down in the context of children. Children defy the conventional view of rights as implying fully rational, autonomous individuals who can exercise free choice and require freedom from governmental interference.[143]

Despite the views of some child liberationists, it is generally uncontroversial that children are treated paternalistically on account of their immaturity and dependency.[144] To be fair to Godwin, there is something undeniably illiberal about the state rewarding parents with rights over another human being for their performance of a socially important activity. But, if this treatment is illiberal, the reason is that it offends the fundamental dignity of a person when "owned" by another in a property-like manner, rather than simply being "controlled."[145] Without exploring this issue any further, it suffices to say that the liberality of this justification is questionable.

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individuals who could freely give their consent to civil government, children could not be parties to the social contract or rights-holding citizens of the state." *Id.* (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 57, at 305 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

[143] Ezer, *supra* note 142, at 1.

[144] Child liberationists John Holt and Richard Farson both advocated for children having equal rights to adults. *See* JOHN HOLT, ESCAPE FROM CHILDHOOD 18–19 (1974); RICHARD FARSON, BIRTHRIGHTS 26–27 (1974). For a comprehensive discussion of the child liberation movement, *see* NOAM PELEG, THE CHILD'S RIGHT TO DEVELOPMENT 44–53 (2019).

[145] As mentioned briefly in footnote 115, *supra*, both autonomy and dignity are deemed fundamental to the liberal conception of human rights, but the two are interrelated. As Giovanni Bognetti explains, Kant viewed man as "a morally autonomous being, who as such deserves respect and must never be treated, in general and especially by the law, as only a means to contingent ends but always (also) as an end unto himself." Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, *in* EUROPEAN AND US CONSTITUTIONALISM 85, 89 (Georg Nolte ed., 2005). Even more specifically, Kant understood moral rights as grounded in what is distinctly human, i.e. reason, which is essential to engaging in morally significant conduct; it is from this capacity that Kant discerns the person's autonomous nature, which in turn entitles him to dignified treatment. *See* G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171, 174–78 (1984). Dignity has continued to play an important role in the human rights theories of contemporary liberal philosophers. *See generally* DIGNITY IN THE LEGAL AND POLITICAL PHILOSOPHY OF RONALD DWORKIN (Salman Khurshid et al. eds., 2018). Legal scholars have also looked to dignity as a fundamental aspect of their own theories of child rights. *See* Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1392 (2020) ("My overarching claim is that equality must be defined as including equality, equity, and dignity as integral components."); WOODHOUSE, *supra* note 25, at 35 ("Recognition of human dignity calls on us to acknowledge that the child, despite his or her lack of present autonomy, does have rights based on present humanity as well as the potential for autonomy."). How much dignity a non-autonomous person has is outside this Article's scope. But, at a glance, there does seem to be a serious dignitary issue in giving quasi-property rights in a human child, independent of the child's actual autonomy.

In contrast, the other three justifications are manifestly consistent with a liberal conception of children as right-holders. Although the first justification—that parental rights promote pluralism—may be vulnerable to the same criticisms as the second justification, pluralism holds a privileged position as an important liberal value in its own right. There is a "deep conflict" in liberalism between its dual commitments to autonomy and diversity.[146] As William Galston explains, "the decision to throw state power behind the promotion of individual autonomy can weaken or undermine individuals and groups that do not and cannot organize their affairs in accordance with that principle without undermining the deepest sources of their identity."[147] The paradoxical consequence of this conflict is that, if actively promoting the greatest number of choices for the greatest number of individuals requires repressing "narrow-choice communities" like the Amish, becoming Amish will cease to be a possible choice and the overall number of choices will be limited.[148] Of course, there are limits to the pluralism of views a liberal society is willing to accept. To use Rawls again as the paradigmatic liberal theorist, Rawls maintained that "a basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions."[149] There exists an overlapping consensus of reasonable comprehensive doctrines that support "reasonable" conceptions of justice that all involve those "constitutional essentials" and matters of "basic justice" fundamental to liberal democracy.[150] This, too, finds a corollary in constitutional jurisprudence. In *Yoder*, the Court ruled in favor of the Amish parents after observing that the Amish did not need a high school education to "participate effectively and intelligently in our democratic process," or to fulfill "the social and political responsibilities of citizenship."[151] What *Yoder* thus reflects, according to Anne Dailey, is how the doctrine of family privacy "serves a political function in furthering the constitutional liberty of developing individuals and in sustaining the liberal democratic state itself."[152]

As for the third and fourth justifications—"identity of interests" and the need for parental supervision to help children develop properly—both empower parents

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[146] Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, HASTINGS CTR. REP., Mar.–Apr. 1997, at 7, 10.

[147] *Id.* (quoting William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 521 (1995)).

[148] *Id.* at 10–11.

[149] JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* COLLECTED PAPERS 573, 573 (Samuel Freeman ed., 2001).

[150] James R. Steiner-Dillon, *Sticking Points: Epistemic Pluralism in Legal Challenges to Mandatory Vaccination Policies*, 88 U. CIN. L. REV. 169, 176 (2019) (citing RAWLS, *supra* note 117, at 214, 227).

[151] Wisconsin v. Yoder, 406 U.S. 205, 225 (1972).

[152] Dailey, *supra* note 28, at 991.

to make decisions for their children only insofar as the children are incapable of making informed decisions on their own and both place the interests and rights of the child in a privileged position relative to those of the parents. As Weithorn and Reiss explain, "[e]mbedded in the presumption that parents act in their children's best interests is the notion that the interests of parents and children typically align or are coextensive."[153] Thus, "to the extent that there is evidence that the interests of a parent and minor are not aligned, the appropriateness of relying on parental decisionmaking is questionable."[154] When the interests of the child and the parents diverge and the parents threaten to act against the child's best interests, the state steps in as *parens patriae* to ensure the child's best interests are protected.[155] This kind of paternalism is exactly what liberal theory calls for; as Rawls writes, parents have the right and responsibility to "choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally."[156]

With respect to the proper-development justification, its liberality depends on how one interprets it. One could interpret this as a purely utilitarian consideration, as Weithorn and Reiss seem to do when they cite in support of this justification an earlier Weithorn article that discusses children as undergoing cognitive development that is highly sensitive to influences and exposures.[157] The point of this discussion seems to be that both children and society are better off when children are exposed to healthy influences and guarded from unhealthy ones as they develop, which sounds in "best-interests" utilitarianism. But one could also interpret this justification as Feinberg does: parents may control the upbringing of their children because this promotes healthy development *to the end that this protects the autonomy rights of these children as future adults*. It is in this way that Feinberg justifies allowing parents to treat their children paternalistically: paternalism by both parents and the state, he explains, is wholly proper where a child "cannot know his own interest . . . [and]

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[153] Weithorn & Reiss, *supra* note 1, at 794. However, Samantha Godwin has argued that the notion that parents have a privileged understanding of their children's individual interest is "highly questionable." Godwin, *supra* note 141, at 26.

[154] Weithorn & Reiss, *supra* note 1, at 794. The Supreme Court noted in *Parham* that the law only presumes that parents act in their children's best interests and recognized that some parents' interests "may at times be acting against the interests of their children." Parham v. J.R., 422 U.S. 584, 602 (1979) (citing Bartley v. Kremens, 402 F. Supp. 1039, 1047–48 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1977)).

[155] *See* Schall v. Martin, 467 U.S. 253, 265 (1984) (noting that children are "assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*").

[156] RAWLS, *supra* note 115, at 209.

[157] *See* Weithorn & Reiss, *supra* note 1, at 905 (citing Weithorn, *supra* note 55, at 226–28).

must be protected from his own immature and uninformed judgment."[158] For Feinberg, the "best interests" of a child are not justified on their own, but by the child's rights as a dependent person and future adult.[159]

Analyzing a potential entitlement of children to greater access to vaccines need not necessarily be done in terms of Feinberg's right to an open future, but doing so is fitting because there is a meaningful degree of compatibility between Feinberg's theory and how children's rights are currently understood under the law. Indeed, having a possible negative interpretation makes the right to an open future more compatible with a libertarian jurisprudence than many liberal theories, and this is just with respect to American *constitutional* law; it is commonplace for legislative bodies, both state and federal, to create positive statutory rights. In this light, a legal reform recognizing a child's right to an open future is well within the realm of possibility.

Lastly, it is worth noting that this Article's application of a liberal theory of rights to the area of child law is more consistent with contemporary child-rights scholarship than one might initially believe. Much of this scholarship is even more Rawlsian than Feinberg's theory in the sense that it embodies not only a conception of inviolable autonomy-based human rights but also those reciprocity-based rights that Rawls understands as stemming from a fair system of cooperation. Nancy Dowd, for example, maintains that children are entitled not just to a reasonable range of life options, but rather are entitled to develop to the fullest potential extent. She writes in *Children's Equality Rights* that children have an affirmative right to the support

> necessary to maximize their developmental capacity and opportunity. The child's right is not to a minimum or adequate level of support to reach average capacity, but rather to a fair opportunity to reach their full developmental potential. This is an individualized right . . . to an equal chance in life: full support during childhood to maximize developmental capacity to the threshold of adulthood.[160]

Although Dowd's conception of child rights is far from Lockean in nature,[161] it does

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[158] Feinberg, *supra* note 10, at 113.

[159] *See id.* at 97–98, 107.

[160] Dowd, *supra* note 145, at 1371–72.

[161] Dowd identifies four discrete reasons for recognizing child equality rights:

> First, [children] are unique because they are dependent on adults for their development. Their needs give them an affirmative claim on social resources to ensure their developmental success. Second, they are vulnerable because of their lack of development, vulnerability that changes over time and must be balanced with their evolving capacities. It is an essential positive characteristic of development that is the foundation for their being and for their evolution. Third, they are valued and valuable because they are children. Their perspectives and understandings are unique; they are not simply becoming adults, or mini adults; they are themselves, in their own right. Their humanity is precious and valuable. Finally, they are our

embody the interest in fairness fundamental to Rawls' liberal-egalitarian political philosophy. As Tommie Shelby explains:

> Rawls has suggested that if we were to conceive of society as a *system of social cooperation over time* and took an impartial view of what the distribution of benefits and burdens of participating in this scheme ought to be, we could arrive at conclusions about what social justice requires that warrant our rational assent. The idea of society as a fair system of cooperation is a moral notion to be used in the evaluation of institutional arrangements. Social justice is constituted by the legitimate claims and responsibilities individuals have within a fair overall social arrangement. Thought about in this way, justice is a matter of *reciprocity* between persons who regard each other as equals.[162]

With respect to children, what social justice requires is distinct from what the individual autonomy rights of children require: a basic structure that ensures that "children are cared for and taught what they need to know so that they might eventually become equal participants in the system of social cooperation."[163] Thus, within liberal-egalitarian thought, two children of the same ability and same motivation should expect to accumulate roughly the same amount of wealth over their lives, regardless of what race or social class they were born into.[164] Dowd's concern with providing children a "fair opportunity to reach their full developmental potential" makes far more sense when understood as a Rawlsian right to fair equality of

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> future; they join society and democracy, their neighborhoods and communities, as full social citizens when they reach adulthood. Their future role makes their development and their equality socially essential.

Id. at 1416. Her first reason is similar to the "dependency rights" Feinberg identifies but broader in scope, covering not just the bare necessities for survival but also, more generally, a successful development into adulthood. As explained above, this reason is better understood through Rawls' egalitarian concept of justice as fairness. Her second reason could be read similarly to the right to an open future, identifying the fact that successful development in the future requires adequate support in the present to extend the child's claim of the former to the latter as well. But this is susceptible to Lockean, utilitarian, or egalitarian interpretations. Her third reason is that children are intrinsically valuable, and their development is intrinsically good, independent of any rights children have to exist and develop. The force underlying this reason is more similar to Kant's notion of dignity discussed in footnote 145, *supra*, or to Ronald Dworkin's similar notion of sanctity, see, for example, RONALD DWORKIN, LIFE'S DOMINION 68–101 (1993), than to a Lockean autonomy right. Dowd's fourth reason can be characterized as utilitarian and, more specifically, civic republican: child equality makes for better citizens who can better ensure the welfare of the American democratic republic.

[162] TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 20 (2016).

[163] *Id.*

[164] *Id.* at 36 ("[O]ne should be able to expect that one's income and wealth, over a lifetime, will be similar to that of anyone else who has similar abilities and the same willingness to develop and use them, regardless of the social class one has been born into.").

opportunity than as a Lockean autonomy-based right.[165]

Other scholars similarly view children's rights as moral rights, liberal or otherwise. Barbara Bennett Woodhouse offers an "ecogenerism" model of children's rights that, like Dowd's model, finds a liberal grounding in both autonomy[166] and fairness.[167] Noam Peleg offers a model of child rights that is not quite liberal but is nonetheless "based on a moral claim with regard to children and human rights."[168] Peleg appeals to international human rights law as the origin of that moral claim: "Under the [UN Convention on the Rights of the Child], children's rights already exist, and the question is how to interpret them."[169] Although it is unclear whether the UNCRC is making a metaphysical claim about moral rights that children already have or whether it merely purports to identify fundamental human interests and legally enshrine them as "human rights," commentators clearly seem to favor the former,[170] and one can understand Peleg as doing the same. Although these moral accounts have no clear corollary in liberal philosophy, they similarly make metaphysical claims about those fundamental rights that humans have *as a matter of*

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[165] Dowd, *supra* note 145, at 1371–72.

[166] WOODHOUSE, *supra* note 25, at 30, 35 ("Recognition of human dignity calls on us to acknowledge that the child, despite his or her lack of present autonomy, does have rights based on present humanity as well as the potential for autonomy.").

[167] *Id.* at 39 ("One facet of equality is the idea of equality of opportunity. This principle seems especially important in the lives of children, who inherit at birth the inequalities that shaped their parents' lives. Applying the twin measures of children's needs and their capacities for autonomy to equality rights for children would refocus our sights on creating an environment for children that supports their capacities for growth and achievement of their natural potential.").

[168] PELEG, *supra* note 144, at 196.

[169] *Id.* at 195.

[170] In Chapter 4 of *The Child's Right to Development*, Peleg provides a comprehensive survey of how the UNCRC has been interpreted over time. *See id.* at 144–85. As he details, the 1986 Declaration "defines the terms 'human development' and the 'right to development' as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'" *Id.* at 148–49; Arjun Sengupta, *Implementing the Right to Development*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE 341, 342–43 (Nico Schrijver & Friedl Weiss eds., 2004). Arjun Sengupta, the former UN independent expert on the right to development, suggests that the right to development derives its moral strength from a human right to autonomy and self-actualization. *Id.* (citing G.A. Res 41/128, Declaration on the Right to Development, art. 1(2) (Dec. 4, 1986) (proclaiming that development "also implies the full realization of the right of peoples to self-determination, which includes . . . their inalienable right to full sovereignty over all their natural wealth and resources")). This has an undeniably Lockean ring to it, but the right to development may also rest on what is a more complex picture of fundamental moral rights than what Locke envisioned. Sengupta also claims that the right to development could be understood as a vector by which humans can enjoy all of their other natural rights. *See* Arjun Sengupta, *The Human Right to Development*, 32 OXFORD DEV. STUD. 179, 183 (2004).

(moral) fact.

To be sure, not all scholars have embraced a liberal conception of child rights, or even a moral-rights-based conception of child welfare. In *Conceptualizing Legal Childhood in the Twenty-First Century*, Clare Huntington and Elizabeth S. Scott offer a "Child Wellbeing" framework for developing child law that relies on welfare concerns rather than human rights to advance children's interests.[171] One could also characterize Anne Dailey and Laura Rosenbury's "new law of the child" in a similar way, given the proposal's focus on non-right "fundamental interests" that "best capture children's experience in the here and now."[172] Indeed, Dailey and Rosenbury view autonomy as not being a right at all but merely one interest (albeit an important one) among others,[173] as Peleg has independently recognized.[174] Thus, Dowd's, Woodhouse's, and Peleg's models stand apart from those of Dailey, Rosenbury, Huntington, and Scott in this significant way: Dowd, Woodhouse, and Peleg approach child rights (at least in part) by identifying the *moral rights* of children and arguing that the law should enforce those moral rights with legal rights; on the other hand, Dailey, Rosenbury, Huntington, and Scott approach child rights by identifying the *interests* of children and arguing that the law should promote those interests with legal rights.

Despite its substantial similarities to liberal philosophy and the rights-based approach that characterizes it, contemporary legal scholarship also deviates from the liberal tradition by eschewing the traditional liberal interest in rational, independent actors. As Peleg points out, Feinberg's paternalistic attitude towards children makes his theory more of a manifestation of the "human becomings" approach than the "human beings" approach.[175] In this way, Feinberg's right to an open future is at odds with contemporary theories that emphasize children having *present* autonomy, either as an important interest or fully by right.[176] But specifics aside, applying a

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[171] *See generally* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020). To the extent the authors discuss child rights, it is only regarding children's legal rights rather than moral rights. *See, e.g.*, *id.* at 1392–94. However, they also distinguish their approach from the traditional "best interests" approach, in that the former aims to promote child wellbeing through regulation *ex ante*, rather than intervening in family disputes once issues have already arisen. *Id.* at 1388–90.

[172] Dailey & Rosenbury, *supra* note 23, at 1478. The authors identify five interests as fundamental: "children's interests in (1) parental and nonparental relationships; (2) exposure to new ideas; (3) expressions of identity; (4) personal integrity and privacy; and (5) participation in civic life." *See id.*

[173] *See, e.g.*, *id.* at 1481 (discussing children's "*interest* in becoming future adults") (emphasis added).

[174] PELEG, *supra* note 144, at 195 ("Dailey and Rosenbury identify children's interests and needs and translate those into a claim for rights, which are nonetheless 'rooted' in children's interests.").

[175] *Id.* at 50–52.

[176] *Id.* at 51.

moral-rights theory to child law is an essential characteristic this Article shares with much of today's child rights scholarship.

All of this background is collateral to the question of whether a Feinbergian right to an open future entails access to vaccination, but it helps situate this Article in the greater landscape of liberal philosophy, American law, and child rights scholarship. This Article is somewhat out-of-step with the current debate in child rights scholarship, assuming the correctness of Feinberg's account without defending it against those who would find fault in its paternalistic "human becomings" attitude toward children.[177] At the same time, moral-rights-based accounts are very much still in vogue, especially a liberal recognition of both Lockean autonomy rights and Rawlsian fairness rights. Outside of the academy, American constitutional law also embodies a liberal conception of human rights, but in a more libertarian, negative-rights-based form than called for by a Rawlsian account. Although Feinberg's right of a child to an open future, at least as interpreted by subsequent scholars, embodies the liberal notion of a human right to enjoy a reasonable range of life plans which also plays an important role in Rawls' famous theory of justice, Feinberg's theory is at heart more libertarian than Rawlsian. To Feinberg, although children have affirmative claims on others to developmental assistance, those claims act only upon parents and other trustees of children's Lockean autonomy rights. Furthermore, the right to a reasonable range of life plans may be a more limited right than the right to fair equality of opportunity. In these ways, Feinberg's theory is more consistent with the liberal philosophy underlying current constitutional jurisprudence than the Rawlsian accounts favored by some child-rights scholars. Thus, while this Article offers a theoretical position contrary to existing constitutional law, this position is consistent with the American law's jurisprudential foundations and should be regarded as a serious critique of the law's existing tolerance of non-medical vaccine exemptions.

IV. A CHILD'S RIGHT TO VACCINATION

In Part III, this Article introduced Joel Feinberg's right of a child to an open future. Although it provided reasons for why this theory of child rights is an attractive one, it merely assumed that a child does have such a right for the sake of arguing that this right implies a right of greater access to vaccination for children. In truth, however, this Article has assumed away its greatest obstacle. For once it is established that a child has a right to an open future (as this Article has interpreted it), it follows that a child also has at most a positive right to vaccination, and at least a negative right not to have her parents exempt her from state-mandated vaccination. This is because of the overwhelming evidence indicating that failure to vaccinate children exposes them to a high risk of death or permanent disability, both of which threaten

[177] *Id.*

serious limitations on a child's future inconsistent with that child's future autonomy rights. If imposing a significant threat against future autonomy rights is enough to violate them, then inhibiting access to vaccination clearly violates those rights.

It is appropriate to apply Feinberg's right to an open future in the childhood vaccination context because childhood immunization generally occurs at an age when children are too young and therefore incompetent to make their own medical decisions. A look at the CDC's 2020 recommended child immunization schedule reveals that nearly all vaccines are meant to be given by the time a child is 18 months old.[178] Although scholars are understandably troubled when parents prevent mature adolescents from receiving vaccinations against their informed desires,[179] most vaccination decisions must be made when the child is many years away from being even a "mature minor."[180] This immunization schedule reflects the fact that children of this age are significantly more vulnerable to contracting many communicable diseases than people who are older.[181]

Norman Daniels has argued that health generally is a Rawlsian primary good that is necessary for a person to realize her rational life plans,[182] and a narrow version of this argument could be applied to childhood vaccination. Inability to receive vaccines limits a child's future by subjecting her to a significant risk of death and permanent disability. As mentioned in the Introduction, immunization "prevents between 2–3 million deaths every year,"[183] and an additional 1.5 million deaths per year would be prevented if all children who could receive vaccines did so.[184] Regarding disability: measles can cause permanent brain damage,[185] blindness, and deaf-

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[178] *See Recommended Child and Adolescent Immunization Schedule*, *supra* note 2.

[179] *See, e.g.*, Weithorn & Reiss, *supra* note 1, at 807.

[180] *Id.* at 810.

[181] *See, e.g.*, *More than 140,000 Die from Measles as Cases Surge Worldwide*, WHO (Dec. 5, 2019), https://www.who.int/news-room/detail/05-12-2019-more-than-140-000-die-from-measles-as-cases-surge-worldwide ("Babies and very young children are at greatest risk from measles infections."); *Mumps in Children*, CEDARS SINAI, https://www.cedars-sinai.org/health-library/diseases-and-conditions—-pediatrics/m/mumps-in-children.html (last visited Feb. 23, 2021) ("Mumps usually occurs in childhood, but can occur at any age."); *Are You at Risk?: Who Is at Risk from Meningitis and Septicaemia?*, MENINGITIS RES. FOUND., https://www.meningitis.org/meningitis/are-you-at-risk (last visited Feb. 23, 2021) ("In general, young children are at the highest risk of getting bacterial meningitis and septicaemia.").

[182] NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY 29 (2008).

[183] *1 in 10 Infants Worldwide Did Not Receive Any Vaccinations in 2016*, WHO (July 17, 2017), https://www.who.int/mediacentre/news/releases/2017/infants-worldwide-vaccinations/en/.

[184] Jean-Marie Okwo-Bele, *Together We Can Close the Immunization Gap*, WHO (Apr. 22, 2015), https://www.who.int/mediacentre/commentaries/vaccine-preventable-diseases/en/.

[185] *When Parents Choose Not to Vaccinate: Risks and Responsibilities*, CANADIAN PAEDIATRIC SOC'Y (Aug. 2016), https://www.caringforkids.cps.ca/handouts/when-parents-choose-not-to-vaccinate-risks-and-responsibilities.

ness;[186] mumps can cause permanent deafness;[187] meningitis can lead to both permanent deafness and brain damage;[188] polio can cause permanent paralysis,[189] and pertussis ("whooping cough") can lead to permanent brain damage.[190] Because children are particularly vulnerable to these diseases, it is children who constitute the majority of those suffering from this death and disability. For example, of the 140,000 people who died of measles in 2018 worldwide, most were children under the age of five.[191] Whatever it means to ensure that a child has a reasonable range of future options to pursue, this future autonomy is undoubtedly impaired by death or by a permanent disability like deafness, blindness, or paralysis.

The right to an open future calls for greater access to vaccination regardless of whether or not the law recognizes positive rights. If there were a positive right to an open future that required affirmatively helping children develop their skills and providing them with the resources needed to choose among a reasonable range of life plans, this right would certainly entail an affirmative right to vaccination. But even if there were only a negative right to an open future, parents would be forbidden from preventing children from receiving vaccines, and states would be forbidden from allowing parents to do so by means of an exemption. In effect, the difference between the positive and negative interpretations is that if the state does not actively seek to provide children with vaccines, parents who oppose vaccines would have no affirmative duty to vaccinate their children independently. That is why this Article claims that where only negative rights exist, the right to an open future entails only some greater provision of vaccines to those children of vaccine-hesitant parents when the state seeks to provide children with vaccines that the child could accept if she were competent to do so. But, at the very least, the negative right would preclude non-medical exemptions to vaccine mandates.

There are three possible objections one could raise against extending Feinberg's right to an open future to prohibit non-medical exemptions: (1) that the right to an open future does not include vaccination because it is not meant to include things that only expose one to *risk* of a rights violations; (2) that overriding parental preferences undermines pluralism in a way that is itself illiberal; and (3) that it is reasonable to assume that children would follow even the idiosyncratic preferences of their parents if parents influence the preferences of their children. The first offers

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[186] *See More than 140,000 Die from Measles as Cases Surge Worldwide*, WHO (Dec. 5, 2019), https://www.who.int/news-room/detail/05-12-2019-more-than-140-000-die-from-measles-as-cases-surge-worldwide.

[187] *When Parents Choose Not to Vaccinate*, *supra* note 185.

[188] *Id.*

[189] *Id.*

[190] *What If You Don't Vaccinate Your Child?*, IMMUNIZATION ACTION COALITION (Aug. 2020), https://www.immunize.org/catg.d/p4017.pdf.

[191] *More than 140,000 Die from Measles as Cases Surge Worldwide*, *supra* note 186.

the most potent challenge of the three because, if accurate, it highlights a serious conceptual issue plaguing Feinberg's theory generally. However, none of these objections ultimately succeed in defeating the claim that children have some right to greater protection of their access to vaccines through Feinberg's right to an open future or through a similar liberal theory.

A. Objection 1

First, one might argue that the right to an open future is not meant to include actions that expose one to risk of losing future autonomy rights, but rather only actions that make such loss certain. Feinberg himself writes that violations of the right to an open future will "guarantee" that certain options will be closed to a child.[192] This poses an issue for the argument that vaccination is required for an open future because the harms of going unvaccinated are contingent rather than necessary. The "harm" of not being vaccinated is having a greater chance of contracting communicable diseases, which may or may not translate into actual death or disability. Thus, violation of future autonomy rights is not *guaranteed* when a child goes unvaccinated. By its own terms, Feinberg's theory would seem to exclude a right to vaccination of any kind.

If Feinberg's right to an open future is properly understood to have a requirement of certainty, then his theory is seriously underinclusive. In many cases, if not most, one cannot say with certainty that a particular future will be foreclosed. Even in the paradigmatic case Feinberg provides to illustrate his right to an open future—where one violates a child's future autonomy right to walk down a sidewalk by cutting off his leg[193]—a second look reveals that even cutting off a child's leg does not necessarily deprive him of the ability to walk forever. One could say, for example, that the child may still be able to exercise his autonomy right to walk down a sidewalk if he is fortunate enough to have an effective prosthetic limb. This reasoning applies *a fortiori* for cases where the harm is even more contingent. For example, Feinberg maintains that the fourteen-year-old Amish child in *Yoder* suffered "an invasion of his rights-in-trust" when his parents withdrew him from school, even though the harms of not having the opportunity to work as a professional outside of the Amish community are dependent on the child's future self both desiring those kinds of opportunities and being unable to secure them because of the parental decision not to send the child to high school.[194]

Feinberg himself seems aware that his philosophical conception of the right to an open future applies a bit bluntly when it comes to the marginal differences one

[192] Feinberg, *supra* note 10, at 98.

[193] *Id.* at 99.

[194] *Id.* at 109.

finds in reality. Feinberg writes that the Amish child in *Yoder* had his future autonomy rights violated "[f]rom the philosophical standpoint," though from a practical standpoint:

> The difference between a mere eight years of elementary education and a mere ten years of mostly elementary education seems so trivial in the technologically complex modern world, that it is hard to maintain that a child who has only the former is barred from many possible careers while the child who has only the latter is not.[195]

This statement, read alongside Feinberg's statement about the "paradoxes of self-determination," suggest that Feinberg is aware that raising a child while preserving that child's open future is an endeavor that defies, in his words, "sharp line[s]."[196] But this call for a nuanced approach is inconsistent with the binary, on-off approach Feinberg seems to take when understanding the right to an open future from a philosophical standpoint. The trouble with grounding a present right in a future occurrence is that whether the right is violated is unknown and essentially undetermined until the future time when the contingency does or does not occur.

That is not to say that there is no merit to the right to an open future. Everything above can be true and fully consistent with the belief that children are entitled to those things they need to grow up into adults with access to a range of reasonable life plans from which to choose. Exactly what a more nuanced theory might look like is beyond this Article's scope, but it would need to center the right to an open future on probability rather than certainty. In many cases even the most limiting of parental actions does not necessarily foreclose a certain possible future, but they certainly can make possible futures less likely to occur. Preventing an Amish child from attending high school may make it significantly more unlikely that he will eventually become a marine biologist than would be the case under different circumstances, but this does not mean that this outcome is altogether impossible. Even actions that are more clearly violative of a right to an open future—suppose, for example, that a parent raised his child at home but never taught her how to read or write—makes having a wide range of life plans even less likely while still not impossible. But, practically speaking, how meaningful of a difference is there between virtual certainty and absolute certainty? Opportunities for certain future outcomes are merely a matter of degree, and, to the extent a child's right to an open future has any intuitive resonance at all, it must allow for the right to be violated in situations where the probability of reasonable life opportunities are one-in-a-million, slim but nonetheless existent.

The harm of refusing to immunize children makes a great deal more sense from

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[195] *Id.*

[196] *Id.* at 119–20.

this frame of reference. It is not enough to say that the parent who refuses to vaccinate her child has only violated the child's rights once the child actually contracts polio and becomes paralyzed. If the right to an open future is a right that can be violated by present actions, the harm must be the loss of chance for an open future, not the necessary preclusion of it. Rather, the parent who refuses to vaccinate her child exposes the child to a significantly higher risk of death or permanent disability, and this loss-of-chance is itself the unjust injury.

This does not answer how much risk will violate such a right. After all, every time a parent drives her child to soccer practice, the parent is creating a risk that the child will be killed or disabled in a car crash. Surely it is not the case that the very act of driving the child to soccer practice alone violates the child's right to an open future. But how can one meaningfully distinguish between the risk of not vaccinating a child and the risk of driving the child to soccer practice? The answer is the law's answer to many questions: the former is a reasonable risk and the latter is not. This may be an unsatisfying, because-I-say-so answer, but the law is built on these kinds of judgments. There is empirical support for the notion that failing to vaccinate one's child exposes them to a significant degree of risk, but how much risk is reasonable is not so easily quantifiable. There is more to be said on this subject but doing so would take this Article too far afield.

B. Objection 2

The second objection is whether refusing to vaccinate children because of a distrust of medical professionals and Western medicine must be tolerated out of a liberal commitment to pluralism. As previously discussed, the vast majority of nonmedical exemptions sought by parents are philosophical, not religious or cultural, in nature. In fact, no major religion in the world formally opposes vaccination.[197] Even Christian Scientists, who believe illness is illusory[198] and who played an important role in establishing religious vaccine exemptions,[199] do not presently advocate that church members refrain from vaccinating their children.[200] Although communicable disease outbreaks are common in religious communities, "ostensibly

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[197] Julia Belluz, *Religion and Vaccine Refusal Are Linked. We Have to Talk About It.*, VOX (June 19, 2019, 10:40 AM), https://www.vox.com/2019/6/19/18681930/religion-vaccine-refusal.

[198] *See* Austen Metcalfe, *Patient v. God: Determining the Standard of Care for Christian Science Practitioners in Medical Negligence Cases*, 27 DALHOUSIE J. LEGAL STUD. 137, 142 (2018).

[199] *See* Douglas S. Diekema, *Personal Belief Exemptions from School Vaccination Requirements*, 35 ANN. REV. PUB. HEALTH 275, 278–79 (2014).

[200] Aleksandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccinations—but Most States Retain It*, PEW RES. CTR. (June 28, 2019), https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/; *A Christian Science Perspective on Vaccination and Public Health*, CHRISTIAN SCI., https://www.christianscience.com/press-room/a-christian-science-perspective-on-vaccination-

religious reasons to decline immunization actually reflect[] concerns about vaccine safety or personal beliefs among a social network of people organized around a faith community, rather than theologically based objections per se."[201] This can be observed in the recent outbreaks of measles in ultra-orthodox Jewish communities. Although people in these communities frequently seek religious exemptions from vaccination, their objections are grounded not in religious doctrine but instead in the kind of misinformation that commonly underlies "philosophical" objections.[202]

In *Sticking Points*, James Steiner-Dillon provides a compelling argument for why these objections should not be tolerated: just as liberal democracies need a *normative* public reason within which different conceptions of the good should be tolerated, so too should liberal democracies have an *epistemic* "principle of public reason" that relates to how citizens disagree about empirical facts.[203] As Steiner-Dillon explains, there is an epistemic background culture committed to the notion that "[a]n epistemic viewpoint that rejects scientific empiricism is unreasonable" and therefore undeserving of state deference.[204] This is precisely the kind of viewpoint that underlies vaccine hesitancy, a reflection of how "the circumvention of gatekeeping institutions has contributed to an epistemic flattening, facilitating a culture of skepticism toward claims of epistemic authority, expertise, and even the epistemological *methodologies* of the former gatekeepers."[205] To accommodate objections to childhood vaccination that reject scientific consensus is to allow for conceptions of truth that are not grounded in empirical knowledge to guide legal decision-making. While cases like *Yoder* demonstrate how the Supreme Court accommodates objections grounded in normative pluralism, cases like *Jacobson* reflect how the Court has refused to similarly accommodate objections grounded in epistemic pluralism.[206] Thus, the law rejects philosophical objections to vaccines that lie outside of America's epistemic public reason and need not be accommodated in the name of pluralism.

The question would be more complicated if there were a group that opposed vaccination on genuinely religious grounds. This is due to one significant drawback

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and-public-health (last visited Feb. 23, 2021).

[201] John D. Grabenstein, *What the World's Religions Teach, Applied to Vaccines and Immune Globulins*, 31 VACCINE 2011, 2011 (2013).

[202] Julia Belluz, *New York's Orthodox Jewish Community Is Battling Measles Outbreaks. Vaccine Deniers Are to Blame.*, VOX (Apr. 10, 2019, 1:22 PM), https://www.vox.com/science-and-health/2018/11/9/18068036/measles-new-york-orthodox-jewish-community-vaccines.

[203] Steiner-Dillon, *supra* note 150, at 176–79.

[204] *Id.* at 228.

[205] *Id.* at 188.

[206] *Id.* at 224 ("[C]ourts have reinforced the normative/epistemic divide in the structure of statutory exemptions and further entrenched the law's tacit commitment to accommodation of objections to generally applicable legal requirements grounded in normative principle and concomitant lack of accommodation to objections grounded in epistemic pluralism.").

of the epistemic public reason argument: many Americans have deeply held religious or spiritual beliefs that are not grounded in empirical reasons. In fact, *most* Americans—a full 90%—believe in God or some other higher power.[207] If this is the case, it is inaccurate to say that American society tolerates only beliefs grounded in empirical reasons. Yet, if faith-based viewpoints must be accommodated in a pluralistic society, what principled basis is there for not accommodating viewpoints based in intuition, "junk science," or some reason for belief that is neither empirical nor religious? In other words, should religious objections be privileged over philosophical ones, and, if not, does this cut in favor of accommodating both or neither?

As a matter of fact, the two are treated disparately. As the Supreme Court noted in *Yoder*, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."[208] The first and most obvious explanation for this disparate treatment is that religious practice is protected by the Free Exercise Clause of the First Amendment,[209] whereas adherence to non-religious philosophical belief is not constitutionally protected; in other words, it is just a matter of constitutional custom. A fuller explanation may be that a court of law is more competent to judge the validity of a philosophical viewpoint than a religious one. The Supreme Court has long been expressly unwilling to rule on the basis of religious doctrine, instead applying "neutral principles of law" to resolve legal disputes involving religious institutions.[210] To do otherwise, the Court has found, is state interference with religious practice that violates the First Amendment.[211] It is for this reason that the Court, though competent to say whether a particular religious practice is harmful or not, is incompetent to say whether that practice is factually correct or not. The Supreme Court suggested so much in *Yoder*, noting that "[t]here can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'"[212] On the other hand, objections made on the basis of distrust in conventional medical practice are fully within the competence of civil courts to evaluate because they rest on claims that can be verified or refuted through empirical analysis. Thus, a parental objection based on the belief that vaccines cause autism can be rejected by a court on the basis that this belief is factually baseless. Even philosophical beliefs that are not obviously refutable—for example, that even the smallest risk of harm from a

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[207] Dalia Fahmy, *Key Findings About Americans' Belief in God*, PEW RES. CTR. (Apr. 25, 2018), https://www.pewresearch.org/fact-tank/2018/04/25/key-findings-about-americans-belief-in-god/.

[208] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[209] U.S. CONST. amend. I.

[210] *See* Jones v. Wolf, 443 U.S. 595, 604 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Prebyterian Church, 393 U.S. 440, 449 (1969).

[211] *See Presbyterian Church*, 393 U.S. at 449–51.

[212] *Yoder*, 406 U.S. at 223–24.

vaccine is enough to reject vaccination altogether—need not receive the kind of deference courts will show to religious beliefs, for it is well within the competency of a court to dismiss such a factually baseless view as unreasonable. Because religious beliefs cannot similarly be deemed unreasonable, they cannot be said to lie outside of society's normative or epistemic public reasons.

One may answer honestly, then, that there is a sensible argument for accommodating religious objections toward the end of promoting pluralism. Ultimately, however, this disparate treatment between religious and philosophical objections is of no consequence as to whether the state can enforce a child's right to an open future against any non-medical objection because of the primacy of the right in liberal theory. If vaccinations are necessary for an open future because not being vaccinated can cause death or serious and permanent disability, parents have no right to interfere with the state's provision of vaccines (and, if this right is positive, parents have an affirmative obligation to vaccinate their children). Pluralism may be good, but where right is prior to good, pluralistic interests must give way to the rights of children.

C. Objection 3

A third possible objection is related to the "paradox of self-determination" discussed in Part III: if parents influence the preferences of their children, is it not reasonable to assume that children would follow even the idiosyncratic beliefs or practices of their parents? This position may have merit where a choice must be made at a time when a child is too young to express an individual preference and where certain idiosyncratic practices derive their appeal from connection to a particular culture or tradition in a way that makes them reasonable within those contexts. For example, deaf parents deciding whether to give their deaf child cochlear implants must grapple with a difficult choice: to either give the child the capacity to hear and all of the opportunity that entails over the course of the child's development, or to keep the child deaf and allow the child to access "a rich cultural heritage built around the various residential schools, a growing body of drama, poetry, and other artistic traditions, and . . . American Sign Language" that the parents and child can commonly share.[213] This deaf child may have no innate desire to be deaf, and choosing to be deaf may fairly be characterized as idiosyncratic. But, by living with deaf parents or within a deaf community, she may come to appreciate being deaf because it enables her to relate to her parents or her community in a way that she otherwise would not if she were not deaf. One could make a similar point about children raised in Amish communities, like the one in *Yoder*, who risk losing their connection to their families and communities by doing things that, for most non-Amish, are standard aspects of growing into adulthood. This is not to say that every

[213] Davis, *supra* note 146, at 12.

deaf child will prioritize deaf culture over hearing, or that every Amish child will prioritize Amish family and culture over the opportunities of non-Amish life. But these examples illustrate how parental decisions that may seem unreasonable in most contexts can seem reasonable in certain, specific contexts.

Can the same be said for a child whose parents believe that vaccines cause death or disability? What makes this a challenging question is that, as with the first objection, the answer lies in a reasonableness determination that is self-validating. To the extent one is sympathetic to the parents in the previous examples but not the current one, this is because one could conceive of a reasonable person choosing the idiosyncratic options in the former but not the latter. But this is a fact-specific inquiry, and how "reasonable" each of these choices seem may vary from reader to reader. As with the previous objection, the task may be easier where a position rests on beliefs about the world that are demonstrably incorrect. The overwhelming confidence medical experts have in the wisdom of vaccination, which the law recognizes as a compelling epistemic reason to believe the truth of a particular factual claim, makes it easier to judge vaccine skepticism as unreasonable. Where strong reasons of this kind predominate, it is difficult to find dissenting perspectives to be reasonable. In contrast, where the weight of epistemic authority indicates no clear course of action, other kinds of considerations can have a place even in the medical decision-making context. In fact, courts will often defer to a parent's religiously-based objection to standard medical treatment where "the treatment is more likely to fail than succeed."[214] Reasonableness is to a great extent an intuitive assessment, and there comes a point at which arguing the point ceases to be informative. It cannot be definitively proven that philosophical objections to vaccination are unreasonable, but they are generally considered unreasonable in the United States. This is reason enough not to give any deference to them the way one might give deference in the other examples provided above.

V. CONCLUSION

This Article has argued that children are entitled to at least some greater degree of access to vaccinations than they currently have in states that grant vaccine-hesitant parents non-medical exemptions. This conclusion is grounded in the premise that children have a Feinbergian right to an open future, which involves a child's present interest in those future autonomy rights necessary to choose among a reasonable range of potential life plans. Parents who exempt their children from vaccination violate these "rights-in-trust" by exposing their children to an unreasonable risk of death or permanent disability in a manner inconsistent with the parent's role as a trustee of her child's future autonomy rights.

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[214] Lee Black, *Limiting Parents' Rights in Medical Decision Making*, 8 AM. MED. ASS'N. J. ETHICS 676, 679 (2006).

Children's rights is a deceptively complicated subject. Some of the difficulty one encounters when analyzing these rights is inherent to translating rights from the realm of the ideal into that of the non-ideal. When basing legal policy arguments on moral rights, it is as much of a challenge to pin down the nature of a relevant right as it is to apply it. In applying Feinberg's right to an open future to the context of childhood vaccination, this Article opens the door to a host of philosophical issues that complicate the translation of this moral right into a legal one. As this Article suggests in Parts III and IV, Feinberg's right to an open future is an effective conceptual model for understanding a child's right to greater protection from communicable diseases, but it may be an imperfect one. This Article asserts that a right to vaccination (negative or positive) is within the purview of Feinberg's right to an open future, but Feinberg's theory may also be a starting point for some other theory of rights that conceptualizes children's rights even more effectively. Underlying this Article is an intuition that such a right does exist in some form or another.

Although this Article uses liberal ideology as its moral lodestar, a large portion of the difficulty one encounters when discussing child rights stems from how children fit imperfectly into the liberal model of individual rights. Liberalism envisions rational and autonomous rights-holders,[215] and young children are neither rational nor autonomous. Young children may still have certain Lockean rights by virtue of their humanity, but they are not "persons" in the political sense.[216] However, unlike other political non-persons, children will predictably become political persons in the relatively near future. There is therefore a tension between viewing children as present non-persons and recognizing that actions taken in the present will inevitably affect the life prospects of children as future persons toward potentially unjust ends. Feinberg's theory helpfully brings the future right-interests of children into the present, but even his theory struggles to fully flesh out the mechanics of how rights relate to present causes and future effects. The evolution of children over time makes it difficult to analyze child rights within the framework of liberalism's present-oriented conception of rights.

Child rights are challenging to analyze because they also fit imperfectly within American jurisprudence. Under the U.S. Constitution, parents have a right to control their children's upbringing that is essential to the orderly pursuit of happiness by free persons. Although this is a right long recognized at common law, it is a relic of a time before Americans began viewing children as persons with essential human

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[215] Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 23 (1994) (citing RAWLS, *supra* note 115, at 142–50, 433–46, 513–20).

[216] RAWLS, *supra* note 115, at 504–12 (describing moral persons as being "capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree").

rights. America was conceived by liberal thinkers and American law has since its founding embodied liberal ideals, so it is unsurprising that American law has also struggled with the personhood of children. But the law's sin is its *illiberal* treatment of children. Parental rights are more than just a delegation of responsibility by the state to care for and raise the incompetent into competency; rather, parents are *entitled* to direct the upbringing of their children. The notion that parents have a fundamental right to control another human is inconsistent with the Lockean conception of human rights that underlies liberal theory, even if children are not full "political persons." The unjust institution of parental rights is an obstacle to any legal scheme grounded in a liberal conception of rights.[217]

Lastly, analyzing children's rights is challenging because of the difficulty an adjudicator faces in determining what an incompetent child would prefer if she were competent. The law considers the "best interests" of the child because it assumes that competent people will do what they believe is in their best interests. The challenge of a "best interests" analysis comes from balancing a commitment to reasonableness against the possibility of idiosyncrasy. The law cannot function without the capacity of an adjudicator to distinguish between truth and fiction, reasonableness and unreasonableness, and the interests of justice are best served by a dogmatic dedication to empiricism. This is particularly true where the rights of children are concerned. As recent decades have seen a general "empiricization of [the] law," empirical analysis has assumed particular importance in the resolution of family law disputes.[218] Today, family law decisionmakers "regularly draw on sociology, psychology, neuroscience, data analytics, and related social and hard sciences to make critical choices about the legal regulation of families."[219] The role of empiricism is not just limited to its functional value in ensuring positive outcomes for families. Rather, a state's ability to determine factual truth is essential to its role as *parens patriae* in deciding when a parent's control over her children has faltered and the child requires

[217] Inconsistency with a liberal conception of rights does not necessarily make for poor jurisprudence, and parental rights do have their notable defenders. Emily Buss, for example, argues that "[p]arents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances." Buss, *supra* note 52, at 647. Other influential legal scholars who have endorsed robust parental rights are Stephen Gilles, Elizabeth Scott, and Robert Scott. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1001–03 (1996); Scott & Scott, *supra* note 138, at 2414–18.

[218] Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 240 (2018) ("[E]mpirical analysis in family law is now widespread. This trend is consistent with the empiricization of law generally, but it also responds to a particular demand in family law. In the last part of the twentieth century, the Supreme Court largely rejected traditional morality and dominant norms as acceptable justifications for family law.").

[219] *Id.* at 229.

the state's intervention.[220] Justice thus requires a steadfast commitment to objective truth.

However, verifiable truths are not the only guides of human behavior. A robust commitment to autonomy requires allowing some to conduct their lives in accordance with religious or cultural values that others may not share or understand. And, because children's beliefs and desires are largely shaped by the environments they grow up in, preferences that may seem idiosyncratic to many can and do pass from one generation to the next. Assessing when a child is "harmed" is more difficult given the possibility (indeed, inevitability) of pluralistic variations among reasonable people.

Children are far too young to make reasoned medical decisions at the age when they must receive most vaccinations, but the decisions made for them at that time have potentially life-long consequences. Of course, this is not dissimilar to many decisions that parents must make for children of this age. Parents will inevitably shape their children's futures through everyday parenting decisions, affecting to some extent who their children will be in adulthood. The right to an open future does not demand the impossible of parents. All it requires is that parents ensure children have enough autonomy upon reaching adulthood to choose among a reasonable range of life plans and fulfill their own conceptions of the good life.

[220] Schall v. Martin, 467 U.S. 253, 265 (1984) (noting that children are "assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*").