

**ARTICLE**

# The portion of goods that falleth to me: Parental rights, children's rights, and medical decisions after COVID-19

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## Abstract

The advent and perpetuation of the COVID-19 pandemic has served to highlight issues in American law that have long gone unaddressed. Prominent among them are the issues involving parents, the government, and the medical decisions of children. This article examines the current state of American law involving parental rights, children's rights, and the government's role in medical decisions of children and proposes a uniform act as a solution to the discrepancy and unpredictability in this area of American law.

## KEYWORDS

children's rights, COVID-19, *parens patriae*, healthcare, medical decisions, parental rights, vaccine

## Key points for the family court community

- American law has failed to appropriately define the contours children's rights in relation to parental rights, particularly as it relates to medical decisions
- The COVID-19 pandemic has thrust this issue into the national political spotlight with disputes over vaccinations and mask mandates for children
- Court decisions in this paramount arena vary widely among states with only a handful of states having statutes that even indirectly address the issue of children's rights in medical decisions
- Like parentage laws in the 20th century, societal evolution has outpaced the law's development in children's rights

- Courts are ill equipped to answer the question of who decides whether a child may be vaccinated in a consistent and just manner.

Needless to say, “we are living in dangerously weird times now,”<sup>1</sup> and while much can be said of the changes COVID-19 has wrought, the pandemic has also served to illuminate issues already plaguing American society. One area in which the revealing glow of COVID-19 has shined brightest is the quagmire that is American family law. In particular, the pandemic has served to further complicate an area of family law which eludes satisfactory definition: medical decisions involving parents and their children.

Just in the last several months, a mother in Illinois temporarily lost custody of her child for refusing a COVID-19 vaccination,<sup>2</sup> a mother and her children were entangled in a legal battle when the children wished to be vaccinated against their mother's wishes,<sup>3</sup> and a mother and child in a shared-custody family feared litigation from the father should the child be vaccinated against his wishes.<sup>4</sup> At first glance one might think these to be relatively new legal issues, but upon closer examination it is evident they are examples of unanswered questions the COVID-19 pandemic has simply asked with a renewed and louder voice. The pandemic aside, the irregularities in the laws of children's rights in relations to the rights of their parents in medical decisions remain arcane to say the least. The questions of when a child may override their parents' consent to medical services (and vice versa) and when the government may assume the parent's role in such matters are still inquiries which the law fails to answer with clarity.

American parents enjoy broad authority and discretion over the upbringing of their children. Generally, parents, free from government influence, have the right to custody of their children; to choose their child's means of education; to choose the religious instruction, if any, their child shall receive; to choose where the child will live; to choose with whom the child shall spend their time socially; and to choose whether to even have children at all.

Following the advent of the COVID-19 pandemic, the law surrounding children's rights in medical decisions has benefited from greater public awareness but uncertainty as to whose interests reign supreme (parents', child's, or state's) in any given case remains. Certainly, there is no silver bullet for such a monstrous quandary. Nonetheless, the persistent cloudiness in this area of the law will only serve to further divide families and have far reaching consequences in the lives of children and parents alike. To solve this legal issue, courts must initially balance two interests, the interests of the child and the interests of the parents. However, when the rights of either are at risk of infringement, the government has an interest in protecting the rights of the aggrieved party. Of paramount importance is a clearer definition of children's rights in medical decisions. American law is largely coherent in its definition of parental rights in medical decisions as well as instances where the government may take the role of the parents where a parent has abused or neglected their rights over their children. However, the lack of clarity involving children's rights has led courts to make confusing decisions when the interests of a parent and child diverge.

This paper will examine the current state of the American law involving parental rights, children's rights, and the government's role in medical decisions of children. The starting point for this examination will be a summary of the jurisprudence of American parental rights, in particular, cases interpreting these rights in the context of medical decisions for their children. Secondly, the interests of the state in children's medical decisions, as arbitrator of disputes and emergency custodian will be surveyed. Third, a synopsis of children's rights will be offered with emphasis on their rights in medical decisions. Fourth will be a case study of sorts demonstrating the opacity surrounding the

<sup>1</sup>HUNTER S. THOMPSON, KINGDOM OF FEAR 40 (2003).

<sup>2</sup>Jaclyn Peiser, *A judge asked a mother if she got the coronavirus vaccine. She said no, and he revoked custody of her son*, WASHINGTON POST, (August 30, 2021), <https://www.washingtonpost.com/nation/2021/08/30/chicago-vaccine-custody-rebecca-firliit/>.

<sup>3</sup>See *Matter of Athena Y.* (Ashleigh Z.), 161 N.Y.S.3d 335, 337 (N.Y. App. Div. 2021).

<sup>4</sup>Sarah Gibson, *What happens when divorced parents disagree on vaccinating their child?*, NATIONAL PUBLIC RADIO, (Dec. 26, 2021, 8:04 AM), <https://www.npr.org/2021/12/26/1068063571/what-happens-when-divorced-parents-disagree-on-vaccinating-their-child>.

convergences of these rights and interests and its consequences. Lastly, a uniform act will be proposed as a potential solution.

## MOTHER AND FATHER KNOW BEST: PARENTAL RIGHTS

### A brief history

Under the early common law, parents exercised expansive authority over the upbringing of their children “unfettered by governmental restraints.”<sup>5</sup> Early commentators even described children as mere chattels of their father.<sup>6</sup> Such archaic description of children and their relationship with the law has been discarded and exchanged for discourse centered on the enumeration and expansion of the rights of children.<sup>7</sup> Nonetheless, just as a child’s parents are prerequisite to his very existence, a thorough understanding of the rights of parents is the genesis of a proper understanding of the rights of children. The idea of children as chattels of their parents has long given way to more autonomous rights for children. However, in the United States, parents are still given broad, constitutionally protected, authority over the raising of their children.<sup>8</sup>

The Fourteenth Amendment of the United States Constitution guarantees freedom from deprivation of “life, liberty, or property, without due process of law.”<sup>9</sup> The Supreme Court has interpreted the 14th amendment to protect implied liberties as well as rights which are enumerated in the first amendments.<sup>10</sup> The Supreme court has found certain implied rights when the rights are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>11</sup> Among these rights the court has recognized, inter alia, the right to marriage,<sup>12</sup> as well as a general right to privacy.<sup>13</sup> Infringement on such fundamental rights is only constitutional when the restriction passes a strict scrutiny test.<sup>14</sup> In order to survive strict scrutiny the law restricting the fundamental right must be “narrowly tailored to further compelling governmental interests,<sup>15</sup> “the State [must] show that its challenged law serves a compelling interest and represents the least restrictive means for doing so.”<sup>16</sup> For example, the Supreme Court has found a state statute prohibiting minor children from selling newspapers to further a compelling government interest (the prevention of child labor) while being sufficiently narrowly tailored to further that interest (prohibited children from selling magazines).<sup>17</sup>

Among the sundry fundamental rights found to be encompassed by the 14th Amendment, the Supreme Court has recognized, in the seminal cases *Meyer v. Nebraska* and *Pierce v. Soc’y of Sisters*, the fundamental right of parents to “direct the upbringing ... of children under their control.”<sup>18</sup> Indeed, the Court has recognized “the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>19</sup> In *Meyer*, the court examined a Nebraska law which forbade the teaching of any modern language other than English. The Court, in striking down the statute, established that the 14th Amendment includes “the right of the individual ... [to] establish a home and bring up children...”<sup>20</sup> Two years later, in reliance on their

<sup>5</sup>DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 8–9 (2d ed. 2005).

<sup>6</sup>*Id.* at 8.

<sup>7</sup>*Id.* at 14.

<sup>8</sup>See *Troxel v. Granville*, 530 U.S. 57, 71 (2000).

<sup>9</sup>U.S. CONST. amend. XIV, § 1.

<sup>10</sup>E.g., *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

<sup>11</sup>*Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>12</sup>*Obergefell*, 574 U.S. at 664. (citing *Loving v. Virginia* 388 U.S. 1, 12 (1967); et al.)

<sup>13</sup>See *Grissold v. Connecticut*, 381 U.S. 479, 525 (1965).

<sup>14</sup>See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 356 (1978).

<sup>15</sup>See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>16</sup>See *Doe v. Mills*, 142 S. Ct. 17, 20. (2021).

<sup>17</sup>See *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944).

<sup>18</sup>*Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

<sup>19</sup>*Troxel*, 530 U.S. at 65.

<sup>20</sup>*Meyer*, 262 U.S. at 399.

ruling in *Meyer*, the Supreme Court similarly struck down an Oregon law which mandated parents and guardians send their school age children to public school or face misdemeanor charges.<sup>21</sup> Subsequently, the Supreme Court made numerous rulings “indicating that the government may not unreasonably interfere with ... the right to raise one’s children as one wishes;”<sup>22</sup> the right to have a child learn a foreign language; the right to enroll a child in private school; the right to use contraception; and the right to custody of one’s children have all been recognized by the Court as included in parents’ fundamental right to direct the upbringing of their children.<sup>23</sup>

## Modern parental rights in medical decisions

Generally, as reason would suggest, courts have included this fundamental right of parents to include the right of parents to make medical decisions on behalf of their children.<sup>24</sup> The 9th Circuit Court of Appeals, in *Wallis*, explicitly recognized “the right of parents to make important medical decisions for their children.”<sup>25</sup> The plaintiffs in *Wallis* brought suit after police seized the plaintiffs’ children and delivered them to the local hospital for intrusive physical examinations.<sup>26</sup> The plaintiffs’ two children were seized based on the assertions of one of the plaintiff’s siblings, then a resident of a psychiatric facility, that the plaintiffs planned on murdering their son in a cultic ritual.<sup>27</sup> In light of the allegations, the children were seized and subjected to medical examinations to ensure neither had been sexually abused.<sup>28</sup> The allegations proved false, and the court recognized the plaintiffs’ right to make medical decisions on behalf of their children.<sup>29</sup> The court made this assertion in reliance on *Parham v. J.R.*<sup>30</sup> At issue in *Parham*, was whether “a minor child whose parents or guardian seek state administered institutional mental health care for the child” is entitled to due process.<sup>31</sup> In its discussion of the issue the Supreme Court stated: “our constitutional system long ago rejected any notion that a child is ‘the mere creature of the State’ and, on the contrary, asserted that parents generally ‘have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.’”<sup>32</sup>

In a case involving a dispute over whether a child’s parents were ensuring proper medical care for the son, the Supreme Court of Utah incorporated the right to make medical decisions on behalf of one’s children into the fundamental rights guaranteed under its state constitution (whose operative language guaranteeing due process is identical to the 14th Amendment of the federal Constitution).<sup>33</sup> The court explained: “it is clear from our precedent that parents have a fundamental right to make decisions concerning the care and control of their children. And this general right necessarily encompasses the more specific right to make decisions regarding the child’s medical care.”<sup>34</sup>

Some states, such as Florida and Arizona, have codified the parental right to make medical decisions on behalf of their children.<sup>35</sup> Both state statutes, referred to in both instances as “parents’ bill of rights,” explicitly recognize several different rights of parents.<sup>36</sup> Regarding medical decisions the Florida statute reads:

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<sup>21</sup>See *Pierce*, 268 U.S. 510.

<sup>22</sup>*Black v. Beame*, 550 F.2d 815, 816 (2d Cir. 1977) (citing *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 510; *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942); *Griswold*, 381 U.S. at 495 (1965); *Stanley v. Illinois*, 405 U.S. 645, 646 (1972); *Roe v. Wade*, 410 U.S. 113, 166 (1973).

<sup>23</sup>See *id.*

<sup>24</sup>See *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000); See also *Jensen v. Cunningham*, 250 P.3d 465, 476 (Utah 2011); *Kanuszewski v. Mich. HHS*, 927 F.3d 396, 418 (6th Cir. 2019).

<sup>25</sup>*Wallis*, 202 F.3d at 1141.

<sup>26</sup>*Id.*

<sup>27</sup>See *id.* at 1131.

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

<sup>29</sup>See *id.* at 1141.

<sup>30</sup>See *id.* (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

<sup>31</sup>*Parham*, 442 U.S. at 587.

<sup>32</sup>*Id.* at 602 (citing *Pierce*, 268 U.S. at 535).

<sup>33</sup>*Jensen*, 250 P.3d at 465.

<sup>34</sup>*Id.* at 484.

<sup>35</sup>See FLA. STAT. ANN. § 1014.04 (Deering, LEXIS through 2021 legislation); ARIZ. REV. STAT. § 1–602 (Deering 2021).

<sup>36</sup>*Id.*

All parental rights are reserved to the parent of a minor child in this state without obstruction or interference from the state, any of its political subdivisions, any other governmental entity, or any other institution, including, but not limited to, all of the following rights of a parent of a minor child in this state: ... [t]he right to make health care decisions for his or her minor child, unless otherwise prohibited by law.<sup>37</sup>

The Arizona law has nearly identical language but also explicitly requires parental consent before a surgery, immunization, or a mental health screening may be administered or performed on a minor child.<sup>38</sup>

In an outlier case, indicative of the issues which arise in this area of the law, the 6th Circuit flatly refused to include child's medical decisions within the fundamental right of parents to direct the upbringing of their children.<sup>39</sup> In *Kanuszewski*, the plaintiff parents alleged violation of their substantive due process rights to control their children's medical care when the defendant, Michigan Department of Health and Human Services, collected blood samples from the plaintiffs' children to screen the children for disease without the plaintiffs' consent.<sup>40</sup> The court conceded "that the Supreme Court has recognized parents' substantive due process right to 'direct the upbringing and education of children under their control'" but refused to include medical decisions in the right: "this precedent does not address the issue of parents' right to control their children's medical care ...."<sup>41</sup> Because the court refused to recognize the right as fundamental, the court found for the defendants "solely on qualified and immunity and state sovereign immunity grounds."<sup>42</sup>

In understanding why a court could reach such an inapposite decision, the question to be answered must be the extent of children's rights in making medical decisions for themselves. While the *Kanuszewski* court evades the question and decides the issue on grounds of immunity, the vast majority of jurisprudence clearly suggest the presumptive authority of parents over the upbringing of their children (from the common law and 14th amendment due process rights) may only be overridden by the state in the most exigent of circumstances. Therefore, the fog making such decisions unclear permeates from the lack of definition of children's rights.

## PARENS PATRIAE: THE INTERESTS OF THE STATE

As broad as parents' right to direct the upbringing of their children may be, it is not an absolute right.<sup>43</sup> There are instances where the parents' right is overwhelmed by the state "[a]cting to guard the general interest in youth's well-being."<sup>44</sup> The Supreme Court listed a few of these instances in *Prince v. Massachusetts*, "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."<sup>45</sup> *Parens patriae*, interpreted "parent of the country," refers to "the sovereignty the state exercise over persons under disability, such as minors"<sup>46</sup> and is the "philosophy by which the state seeks to protect the best interests of the child."<sup>47</sup> This is not to be confused with the state merely acting as arbitrator to ensure the rights of a parent or child are not violated. Rather, this doctrine is the state acting "as protector of children from parental abuse and neglect and from the consequences of their own wayward behavior."<sup>48</sup>

<sup>37</sup>FLA. STAT. ANN. § 1014.04(1)(e).

<sup>38</sup>See ARIZ. REV. STAT. § 1-602.

<sup>39</sup>See *Kanuszewski*, 927 F.3d at 396.

<sup>40</sup>See *id.* at 403-04.

<sup>41</sup>*Id.* at 415 (citing *Pierce*, 268 U.S. at 534-35).

<sup>42</sup>*Id.* at 416.

<sup>43</sup>*Prince*, 321 U.S. at 166.

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

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

<sup>46</sup>SAMUEL M. DAVIS, *CHILDREN'S RIGHTS UNDER THE LAW* 95 n.14 (2011).

<sup>47</sup>*Id.* at 95.

<sup>48</sup>Clara Huntington and Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1381 (2020).

In *Prince v. Massachusetts*, the Supreme Court was faced with deciding whether a parent's right to raise their children superseded a state law which forbade child labor.<sup>49</sup> The appellant, the aunt and guardian of a nine-year-old girl, was charged with violating a portion of the state's child labor law which in pertinent part read:

"No boy under twelve and no girl under eighteen shall sell or offer for sale any newspapers, magazines, periodicals ... in any street or public place.... Whoever furnishes or sells to any minor any article ... with the knowledge that the minor intends to sell such article in violation [of this code] ... shall be punished by a fine ... or by imprisonment for not more than two months, or both."<sup>50</sup>

Mrs. Prince, a devout follower of the Jehovah's Witness faith, made a practice of distributing on the streets of her hometown, for a nominal fee, literature related to her faith.<sup>51</sup> Despite being previously warned, Mrs. Prince permitted her children and niece, of whom she had custody, to accompany her in the sale of literature and was subsequently arrested for violating the child labor law.<sup>52</sup> In deciding the case in favor of the state, the court pushed back against earlier jurisprudence which seemed to expand parental rights.<sup>53</sup> The court first turned to *Pierce* and conceded that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder."<sup>54</sup> Additionally, the court made explicit that the holdings in *Meyer* and *Pierce* recognized children's right to receive religious education as well as a child's right to receive teaching in foreign languages.<sup>55</sup> The court ultimately rejected Mrs. Prince's argument that the child labor law infringed on her right to raise her children explaining: "[t]he family itself is not beyond regulation in the public interest .... [and] rights of parenthood are [not] beyond limitation."<sup>56</sup>

It bears repeating that parental rights are quite expansive and government intervention into the upbringing of one's children is nearly always unjustified.<sup>57</sup> The Supreme Court reiterated this principle in *Troxel v. Granville*.<sup>58</sup> In *Troxel*, the Court was faced with determining the validity of a Washington law which permitted "'any person' to petition a superior court for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'"<sup>59</sup> The petitioner grandparents had brought such an action seeking visitation rights with their deceased son's child.<sup>60</sup> The child's mother objected as to the frequency of the visits and after extensive litigation the Supreme Court granted certiorari.<sup>61</sup> In finding for the mother, the Court reasoned:

The law's concept of the family rests on the presumption that parents possess what child lacks in maturity, experience, and capacity for judgments required for making life's difficult decisions .... historically, it has recognized that natural bonds of affection lead parents to act in the best interest of their children. Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be *no reason* for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>62</sup>

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<sup>49</sup>See *Prince*, 321 U.S. at 159–160.

<sup>50</sup>*Id.* at 160–61.

<sup>51</sup>*Id.* at 161.

<sup>52</sup>*Id.* at 163

<sup>53</sup>*Id.* at 166

<sup>54</sup>See *Prince*, 321 U.S. at 166 (quoting *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390)

<sup>55</sup>See *id.*

<sup>56</sup>*Id.*

<sup>57</sup>See *Troxel*, 530 U.S. at 68.

<sup>58</sup>See *id.*

<sup>59</sup>*Id.* at 60.

<sup>60</sup>See *id.* at 61.

<sup>61</sup>See *id.* at 62–63.

<sup>62</sup>*Id.* at 68–69 (emphasis added).

From both *Prince* and *Troxel*, it is evident that government should only interfere in parents' decisions in rearing their children in very limited circumstances.<sup>63</sup>

Despite this ostensibly clear presumption that courts should refrain from interfering in parental rights to decisions of child rearing, it has still proven difficult to determine exactly whether, in the case of medical decisions, a court should intervene as *parens patrie* or simply intervene to secure the interests of the children without substituting as the child's parents (thereby stripping the parents' rights to their child). However, this confusion is more readily attributable to the lack of definition American law affords to children's rights than it is to jurisprudence recognition of the fundamental right of parents to raise their children.

## THE PORTION OF GOODS: RIGHTS OF CHILDREN

### History

As discussed above, children were historically not thought to possess autonomous rights.

at common law.<sup>64</sup> Recent jurisprudence has greatly expanded the rights of children; yet, it cannot be said children enjoy the same rights as adults.<sup>65</sup> There are numerous reasons for this reality.<sup>66</sup> Aside from a reluctance to depart entirely from the common law's deference to parental authority, the primary reason is the immaturity of children and the recognition that their parents are best suited to make decisions on their behalf.<sup>67</sup> Additionally, for the first several years of their life, children are dependent on their parents or custodians for nearly everything essential to their life and development.<sup>68</sup> Unfortunately, the law's attempt to balance the immaturity of children against the individual rights of the child has resulted in not only the differential treatment of children and adults, but also some children being treated different than others as well as, varying treatment of the same child, depending on the circumstance. For instance, young women, included those legally considered to be children, are afforded a constitutionally protected right to contract for an abortion.<sup>69</sup> Yet, another a child of the same age (or even the same young woman who has contracted for an abortion) is considered lacking in capacity to enter a contract for goods or services.<sup>70</sup> Similarly, in certain states, such as New York, parental consent is not necessary for children to receive treatment for venereal disease, but those same children are considered lacking in capacity to make other healthcare decisions without the guidance of their parents.<sup>71</sup> Doubtless, these inconsistencies are the product of the best of intentions and they certainly involve complex arenas of law. However, their unpredictability is illustrative of the inconsistency within the law of children's rights. Consider children's rights in the realm of private law: in contract and property law children are view "as being incapable of entering into binding contracts or disposing of their property and in need or protection from more experience adults;" while in tort law, children are often held accountable for their actions when "they have caused injury to others or property damage."<sup>72</sup>

The Supreme Court has decided several cases which implicate children's rights<sup>73</sup> and much can be inferred from the jurisprudence regarding parental rights discussed at length above.<sup>74</sup> In deciding cases concerning children's rights, the Supreme Court has attempted to balance the competing interests of "increased autonomy for children

<sup>63</sup>See *Prince*, 321 U.S. at 166.

<sup>64</sup>KRAMER, *supra* note 5, at 8.

<sup>65</sup>*Id.* at 14.

<sup>66</sup>DAVIS, *supra* note 46, at 4.

<sup>67</sup>*Parham*, 442 U.S. at 602–603.

<sup>68</sup>See generally Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 251 (2010).

<sup>69</sup>DAVIS, *supra* note 46, at 5.

<sup>70</sup>*Id.*

<sup>71</sup>See N.Y. PUB. HEALTH LAW § 2305 (Deering, LEXIS through 2022 legislation).

<sup>72</sup>DAVIS, *supra* note 46, at 7.

<sup>73</sup>*Id.* at 30.

<sup>74</sup>E.g., *Pierce*, 262 U.S. at 510; *Prince*, 321 U.S. at 158.

than traditionally has been the case and ... increased parental supervision over children or increased state intervention ... to protect [children] from the perceived harms or risks.”<sup>75</sup> However, most of their jurisprudence has centered on the relationship between parents and the state, not specifically the relationship between parent and child.<sup>76</sup>

*Prince* was a decision chiefly concerned with determining when the government could override parental authority.<sup>77</sup> However, the Court devoted a substantial portion of the opinion to a discussion of children's rights.<sup>78</sup> The Court dismissed the notion that a state must treat children and adults equally due to children's greater susceptibility to danger.<sup>79</sup> Reasoning that “[a] democratic society rests ... upon the healthy, well-rounded growth of young people into full maturity as citizens” the court found that while “[i]t is true children have rights in common with older people” the dangers of “psychological or physical injury” make “[w]hat may be wholly permissible for adults not ... so for children, either with or without their parent's presence.”<sup>80</sup>

## Modern Children's rights in medical decisions

As relatively expansive as the growth of children's right has been the jurisprudence concerning children's rights to make medical decisions continues to defy clarification.<sup>81</sup> Consistent with the lack of legal autonomy then afforded to children, at common law, medical treatment of a child could only be authorized by implied or express consent of the child's parent or guardian.<sup>82</sup> However, there existed several exceptions to this general rule.<sup>83</sup> Most prominent was an exception in cases of emergencies which imminently threatened the child's life.<sup>84</sup> Exception from the parental consent rule was also recognized for mature minors and even instances where parents were unreasonable in their withholding of consent.<sup>85</sup> Reflective of the common law, modern jurisprudence also provides for exceptions to this general rule.<sup>86</sup> However, therein lies the confusion, as it remains unclear precisely how the rights of parent, child, and government converge in making medical decisions for children.

## A COVID CASE STUDY

One need not even turn on a television or glance at a smartphone screen to be confronted with the moral, political, and ethical debates surrounding the COVID-19 pandemic. Yet, as commonplace as arguments over masks, vaccines, and quarantines have become, there are tangible, legal consequences to these contemporary issues, and while the questions posed in court by masks and the like may seem cutting edge, they are merely questions whose long call for answers is now more loudly heard. In particular, the pandemic has served to echo difficult inquires as to how the law should treat parents and children when they make medical decisions.

Consider a case from late 2021 out of Albany, NY: *Matter of Athena Y. (Ashleigh Z.)*.<sup>87</sup> In August of 2020, the local Department of Social Services (DSS) brought an action alleging that Ashleigh Z. had “neglected her four children ... due to unsanitary conditions in the home, inadequate supervision, education neglect and medical neglect.”<sup>88</sup>

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<sup>75</sup>Davis, *supra* note 46, at 31.

<sup>76</sup>E.g., *Pierce* 262 U.S. at 510; *Prince*, 321 U.S. at 158.

<sup>77</sup>*Prince*, 321 U.S. at 168–69.

<sup>78</sup>*Id.* at 168.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 169–70.

<sup>81</sup>Davis, *supra* note 46, at 88.

<sup>82</sup>KRAMER, *supra* note 5, at 1046–47.

<sup>83</sup>*Id.* at 1047.

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

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 1048.

<sup>87</sup>*Matter of Athena Y. (Ashleigh Z.)*, 161 N.Y.S.3d at 335.

<sup>88</sup>*Id.*



by February of the following year, DSS removed the children and placed them in foster care.<sup>89</sup> Several months after the Family Court denied Z.'s motion for their return, the children's attorney informed the Family Court that Z.'s two oldest children, ages 13 and 15, wished to be vaccinated against COVID-19.<sup>90</sup> In response to Z. refusing to consent to her children's vaccination, the children's attorney, DSS and the children's father all submitted letters in support of allowing the vaccination of the children.<sup>91</sup> The family court found "that the children had the right to decide whether to receive the COVID-19 vaccine and ordered they ... be given the vaccine if they still consent."<sup>92</sup>

On appeal, the court was tasked with answering the difficult question of who had the final say in making the decision of whether the children should be vaccinated.<sup>93</sup> The court opened its analysis by reciting maxims relative to parental rights in such a situation:

Parents have a fundamental right to raise their children in the manner they choose, subject to the state's ability to intervene to protect children in narrow circumstances .... Under common law, parents generally have the right to make healthcare decisions for their minor children, though some exceptions exist, such as for emergency situations. Even when the state intrudes on a family by obtaining a temporary order of custody due to abuse of neglect, 'parents retain the right to make certain medical decisions for their children in foster care' up until the moment that parental rights are terminated.<sup>94</sup>

From there, the court turned its focus on the exceptions provided under New York law to the common law rule that parent's make their children's healthcare decisions.<sup>95</sup> The court seemed to reject the Family Court's analogizing the COVID-19 vaccine with state statutes which permitted children to consent (without parental notice or consent) to certain reproductive healthcare procedures, as well as the child's attorney argument that the state had "a general policy of allowing children ages twelve and older to consent to medical decisions."<sup>96</sup> The court reasoned:

Because statutes and regulations have granted minor's authorization — in contravention of the common law — to make certain types of medical decisions for themselves, courts generally should not intrude on the other two branches of government by expanding the rights of minors to make decisions in categories not included in those statutes and regulations.<sup>97</sup>

Thus, the court refused to decide the victor when parent and child are pitted against one another in making medical decisions.

The court in *Athena* enjoyed the luxury of deciding this issue in an instance where the parents did not retain full custody of their children.<sup>98</sup> By relying on this distinction the court was able to decide the case without opening the Pandora's box of children's and parental rights in medical decisions. However, what would the court have decided were the facts slightly different and DSS were not involved? Instead of a delinquent father and an apparently negligent mother, suppose the children's parents had full, unfettered custody of their children and were unified in refusing consent to their children's vaccination. What would the court's decision be in such an instance? Not every case will have a readily available means of evading the questions as does *Athena*. Furthermore, the real question left unanswered in *Athena* is not limited to COVID-19 vaccinations. One need not spend much time pondering to find other issues where a court would be similarly handicapped in its decision. Certainly, other heavily politicized issues, such as

<sup>89</sup>See *id.*

<sup>90</sup>See *id.* at 335–37.

<sup>91</sup>See *id.* at 337.

<sup>92</sup>*Id.*

<sup>93</sup>See *Matter of Athena Y. (Ashleigh Z.)*, 161 N.Y.S.3d at 337.

<sup>94</sup>*Id.* at 337–38 (citing *Matter of Matthew V [Lynette G.]*, 59 Misc. 3d. 288 (N.Y. Fam. Ct. 2017)).

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at 338.

<sup>98</sup>*Id.* at 335.

gender transition surgeries, come to mind. However, by focusing on the substance of the child's medical procedure rather than the process by which it is consented to, the law will remain unclear in application.

For instance, suppose the solution to this problem of law were based on the debate surrounding adolescent gender transitions surgeries. Some would argue allowing such deference to the rights of children as to allow an adolescent to consent to undergo such a surgery would violate parental rights as well as a government's interest in protecting its children.<sup>99</sup> Others may argue that children are individuals with a right and capacity to make such autonomous decisions and a restriction would violate children's rights.<sup>100</sup> However, determining the law of children's medical decisions on one hot button issue would lead to irregularities likely to dissatisfy both sides of the political aisle. On the first hand, drastically limiting children's rights in this area in deference to parental authority could leave children at the mercy of dysfunctional or negligent parents. This would leave children without the ability to consent to essential medical care and leave the nation's already overworked family courts as the only means of recourse. On the other hand, broadly emancipating children in such a manner as this would not only severely hamper parents' constitutional rights but would also be a departure from the common knowledge that children are often irrational and compulsive. This would likely leave them with freedom to potentially harm themselves through youthful mistakes in this and in other areas.

Family law is an area of jurisprudence rife with heightened emotions, somewhat irregular legal standards, and life transforming consequence. Reaching consistency in this area would greatly serve to unburden an already stressed system as well as protect parents and children alike. While there is admittedly no magical formula which judges may apply in any given situation, the current jurisprudence leaves much room for improvement and clarity.

## A UNIFORM SOLUTION

Several propositions can be offered to solve the mystery surrounding parents' and children's rights in making medical decisions. One solution would be a complete reversion to the common law and virtual elimination of children's rights. A solution in the opposite extreme would be to expand children's rights to the point of total autonomy, totally emancipating children from their parents as soon as children have even the most remedial capacity. In contrast to these polarizing options, a uniform law, similar to that which has greatly improved American parentage law, would prove most beneficial.

American parentage law, like the subject of this paper, was rife with uncertainty and often perplexing results as a residual effect of the early common law lagging behind modern societal change.<sup>101</sup> For instance, early common law afforded virtually no inheritance rights to children born out of wedlock.<sup>102</sup> Additionally, unwed fathers faced substantial obstacles to obtain rights to their children.<sup>103</sup> In response to changing demographics and societal norms, as well as Supreme Court precedent, the original Uniform Parentage Act (UPA) enacted in 1973, "sought to ensure that all children and all parents have equal rights with respect to each other, regardless of the marital status of the parents."<sup>104</sup> In doing so, the 1973 UPA "removed the legal status of illegitimacy and provided a series of presumptions used to determine a child's legal parentage."<sup>105</sup> The UPA has been updated twice: in 2002 to include language to determine parentage of children born using assisted reproduction technology and most recently in 2017 primarily to

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<sup>99</sup>See R. Albert Mohler, *The End of Parental Rights? A Chilling Case From Canada*, ALBERT MOHLER, Mar. 4, 2019, <https://albertmohler.com/2019/03/04/end-parental-rights-chilling-case-canada>.

<sup>100</sup>See Scottie Andrew, *This year, at least six states are trying to restrict transgender kids from getting gender reassignment treatments*, CNN POLITICS, Jan. 22, 2020, <https://www.cnn.com/2020/01/22/politics/transgender-healthcare-laws-minors-trnd/index.html>.

<sup>101</sup>JOANNA L. GROSSMAN AND LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA* 287 (2011).

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* at 293.

<sup>104</sup>JAMIE D. PEDERSEN, *The New Uniform Parentage Act of 2017*, 40 *FAM. ADVOC.* 16, 16 (2018).

<sup>105</sup>*Id.*

ensure equal treatment of same-sex couples in light of *Obergefell*.<sup>106</sup> The core principle of the UPA (providing uniform presumptions to determine parentage), however, has remained.<sup>107</sup>

The UPA is not, in the truest sense, a law.<sup>108</sup> Rather, it is an enactment of the Uniform Law Commission (ULC) promulgated as a result of the efforts of “lawyers, judges, law professors, and legislators from across the United States to craft, and work for enactment of, nonpartisan, well-conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law.”<sup>109</sup> Several states have adopted the UPA as drafted while some have merely adopted portions of the law.<sup>110</sup>

Children’s rights in medical decisions is not an issue whose solution should be based on partisan whims. While hot-button political topics (e.g. juvenile gender transition surgeries, reproductive healthcare, school mask mandates, and vaccinations) pervade this area of law, legislation passed with only partisan consideration of these specific, albeit important, issues would only serve to perpetuate uncertainty and inconsistency. Consider the jurisdictions who have passed statutes or made explicit rulings in response to these issues. Passed in the shadows of court decisions denying parent’s claims of right to overrule school mask mandates and by votes almost exclusively from the states Republican legislative majority, Florida’s “Parental Bill of Rights,” has received ample backlash for granting parents broadly enumerated discretion over the upbringing of their children, particularly from LGBTQ groups who fear the expansion of parent’s rights to children’s medical and school records could leave some children vulnerable to parents who disapprove of their sexuality.<sup>111</sup> Sponsors of the bill rebutted that the bill was passed in response to “government power ... slowly encroaching and expanding” into the realm of parental rights.<sup>112</sup> Similarly, a Canadian court was lambasted by conservative groups when it ruled a 14 year-old-child could receive testosterone injections over the objections of the child’s parents.<sup>113</sup> While this is not a decision from a U.S. court, it is not difficult to imagine a similar outcome in a more progressive state such as New York where legislation already exists allowing reproductive healthcare to be administered without parental consent. The opposition to these respective outcomes from the other side of the political aisle should not be regarded as merely partisan blather. Rather, they also serve as evidence of the detriment of prescribing a solution to this conflict in the law while only examining one symptom of the malady. The Florida statute was promulgated in light of COVID restrictions and decisions such as the one made in British Columbia are made in furtherance of LGBTQ rights. However, both emphases fail to consider the spectrum of scenarios they might influence. For instance, a broad indiscriminate expansion of parental power based on vaccine or mask mandates, such as that provided by the Florida statute, runs the risk of infringing on children’s rights as well inhibiting the state’s ability to operate as *parens patriae* in instances of parental abuse or neglect. Likewise, a broadly applied statute based solely on bolstering LGBTQ children’s rights in the instance of transition surgeries would infringe upon parents’ fundamental rights as well as potentially leave children vulnerable to make life altering medical decisions of any sort without the guidance of their guardians.

A uniform act such as the UPA would remedy the issues caused by partisanship in this area of the law in three ways. First, a uniform act would not be based on partisan ideals. The ULC is committed to non-partisan legislation.<sup>114</sup> When enacting the UPA, the ULC sought the input of a variety of legal and social professionals from family law attorneys and judges to law professors and even representatives from the medical community to offer input on the breadth of issues and scenarios the act would affect.<sup>115</sup> Similarly, a uniform act addressing parental and children’s rights in medical decisions would employ the expertise of a broad and bipartisan pool of experts who could lend their

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

<sup>107</sup>*Id.*

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

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

<sup>110</sup>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Uniform Parentage Act (2017), file:///Users/casenicole96/Downloads/UPA2017\_Final\_2019sep4.pdf.

<sup>111</sup>JACOB OGLES, *Parents’ Bill of Rights signed into law in Florida*, FLORIDA POLITICS (June 30, 2021), <https://floridapolitics.com/archives/438620-parents-bill-of-rights-signed-into-law-in-florida/>.

<sup>112</sup>CBSMIAMI.COM TEAM, *Florida Gov. DeSantis Signs Parental Rights Measure Into Law*, CBS MIAMI (June, 30, 2021), <https://miami.cbslocal.com/2021/06/30/desantis-signs-parental-measure-rights/>.

<sup>113</sup>Mohler, *supra* note 99.

<sup>114</sup>*About Us*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/aboutulc/overview> (last visited Feb. 14, 2022).

<sup>115</sup>PEDERSEN, *supra* note 104.

knowledge to pass an act ensuring greater consistency in an area of law long neglected by our nation's legal system. By allowing non-partisan legal and social science experts to draft the act, the uniform act is largely shielded from partisan biases and is drafted in consideration of the entire scope of the scenarios the act will govern.

Second, a uniform act would provide, as its name indicates, uniformity across jurisdictions. A uniform act would largely eliminate the variance in laws families are subject to as they cross state lines. Each state that enacted the uniform act would have virtually identical laws. By granting this uniformity, families would no longer face uncertainty or disparate treatment based on which state they call home.

Lastly, a uniform act would ensure the laws governing children's medical decisions would not be subject to the instability of partisan politics. Laws such as those passed in Florida would readily be repealed as soon as partisan control shifted from the Republican party. A uniform act would more greatly ensure stability and consistency despite partisan changes.

Returning to the hypotheticals discussed in the above section, the questions asked anew by such a case would be answered authoritatively by a uniform act. Instead of deciding the case through the lens of partisanship or relying on the negligence of parents to provide an easier solution, the court in a state which has adopted the act would be able to decide cases involving parents and their children's medical decision with a solid foundation of law. Regardless of the minutia detailed in the act, whether more expansive of children's rights or simply more definitive of specific instances where parental authority does not extend, it would provide consistency and awareness both to judges, attorneys, and families in an area of the law that has long escaped clarity.

## CONCLUSION

Families are the source of life's greatest joys as well as many of its greatest heartaches. They involve the conflicted interests of life's most intimate relationships where emotions are routinely strained to their utmost. Because of the family's centrality in many people's life, it is paramount the law protects the interests of families and their members. Due to the inconsistency in the law surrounding children's medical decisions, families are left in greater turmoil. No law will miraculously satisfy the competing interests of children and their parents in making consequential medical decisions. However, a uniform act would offer clarity, stability, and consistency in an area of law which often leaves the rights of either the parent or child ignored or injured.

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