

# CHILDREN SEEN BUT NOT HEARD

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*Children are expected to abide by the will of their parents. In the last 200 years, American jurisprudence has given parents the ability to control their children's upbringing with few exceptions. The principle governing this norm is that parents know best and will use their better knowledge to protect their children's welfare.*

*The COVID-19 pandemic, public school rules, and children's privacy laws offer modern examples of regulations in which the interests of parents and children may not align. Minors may want access to vaccines, despite a parent's refusal to sign a consent form. Minors may want to talk to their teachers about their sexual orientation, despite laws limiting discussions about gender and sexuality in public schools. Minors may want to privately explore the internet, despite young people having no legally recognized expectation of privacy from their parents.*

*This Article offers a comprehensive legal analysis of how parent, child, and state rights collide in the modern era. This Article examines how COVID-19 vaccine decisions, recent parental rights legislation, and attention on children's online safety have illuminated young people's lack of independent rights. It argues that young people have a right to grow and thrive as individuals, even when doing so may exist outside of the shade of their parents' long-held values and beliefs.*

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### INTRODUCTION

*The apple doesn’t fall far from the tree.*

-Proverb, unknown origin<sup>1</sup>

Parents hope their children will grow up to share in their values; however, young people today face novel opportunities and stressors that influence their perspectives in ways unimaginable to past generations. Alongside this new terrain is the reality that youths may embrace beliefs that diverge from those of their parents. Despite this change, our current legal system leaves little room for young people to challenge the ideas of their parents and lead lives that are outside the bounds of their elders’ viewpoints. Instead, the law supports parents who want their children to grow up in their own image, limiting opportunities for young people.

For example, consider Charlene: a gay teenager in California who wanted to walk a path that differed from that of her parents.<sup>2</sup> Charlene hid her sexual identity from her parents but shared it publicly while away from home.<sup>3</sup> She did not try to hide it from peers or teachers at her public high school and was repeatedly seen engaging in public displays of affection (“PDA”) with her girlfriend.<sup>4</sup>

At the school, PDA was a punishable offense regardless of sexual orientation.<sup>5</sup> School faculty caught Charlene and her girlfriend kissing, and the principal disciplined them.<sup>6</sup> Charlene was willing to accept the subsequent suspension, but she believed she had a reasonable expectation of privacy regarding her sexual orientation as her “home was an insular environment, and . . . her activities . . . at school were unlikely to be known to her parents unless they were

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1. Although the exact origin of this oft-used adage is unknown, it most likely originated as a German proverb as early as the sixteenth century. *See The Apple Doesn’t Fall Far from the Tree*, KNOW YOUR PHRASE, <https://knowyourphrase.com/apple-does-not-fall-far-from-tree> [<https://perma.cc/VP44-TG62>] (last visited Jan. 24, 2023).

2. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1180 (C.D. Cal. 2007).

3. *Id.*

4. *Id.*

5. *See id.* at 1182.

6. *Id.* at 1183–85.

expressly informed.”<sup>7</sup> The school asserted that her parents needed to know that she engaged in PDA with another female to protect her right to challenge the school’s punishment.<sup>8</sup>

Charlene fought back against the school’s decision to tell her parents by arguing in court that she had a right to privacy regarding her sexual orientation.<sup>9</sup> While the court was sympathetic to Charlene’s plight and agreed that she had a right to privacy, the court held that the school’s greater interest was preserving her due process right to challenge the suspension.<sup>10</sup> The court held that by revealing to Charlene’s mother that she had been kissing another female student, the school did not violate Charlene’s privacy rights.<sup>11</sup>

Charlene was a troubled teenager, already engaging in self-harm behaviors and struggling to find peace in the difficult process of growing up.<sup>12</sup> Acknowledging that this decision might make her life harder, the court nevertheless concluded that California law held little room for her preferences.<sup>13</sup>

Charlene’s experience is not rare.<sup>14</sup> In fact, an increasing number of young people are at the precipice of embracing values and beliefs that differ from those of their parents.<sup>15</sup> Within the context of these differences, this Article examines the intersection of parent, child, and state rights. It asserts that the law must listen to the voices of young people and suggests that the state is well-positioned to offer children support when they fail to receive it from their parents.

This Article will proceed in three Parts. Part I outlines the history of state involvement in family matters, recognizing that a parent’s interest is usually

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7. *See id.* at 1191.

8. *See id.* at 1194–95.

9. *Id.* at 1179.

10. *Id.* at 1195 (“The Court has held that Charlene had a protected privacy interest in the non-disclosure of her sexual orientation within her home. If Charlene’s expressions of her sexuality had not risen to the level of IPDA, clearly Wolf could not have gratuitously told her parents that she was gay or that she was engaging in displays of affection, within appropriate bounds, with another girl. And he did not do that. Wolf made his factually accurate disclosure in the context of discipline.”).

11. *Id.*

12. *Id.* at 1199.

13. *Id.*

14. Another, more high-profile example includes Texas Senator Ted Cruz’s daughter, Caroline, who has expressed disagreement with her family’s views through social media and has participated in self-harming behaviors. *See* Jami Ganz, *Ted Cruz’s Daughter Addresses Speculation After Self-Inflicted Stab Wounds: ‘I’m Not Suicidal’*, YAHOO (Dec. 8, 2022), <https://www.yahoo.com/entertainment/ted-cruz-daughter-addresses-speculation-173900925.html> [<https://perma.cc/K2EX-P6D2>].

15. *See generally* Te-Erica Patterson, *Do Children Just Take their Parents’ Political Beliefs? It’s Not that Simple*, THE ATLANTIC (May 1, 2014) <https://www.theatlantic.com/politics/archive/2014/05/parents-political-beliefs/361462/> [<https://perma.cc/K8AG-K7QT>].

considered to be in alignment with the child's interest.<sup>16</sup> This rich body of case law finds its origin in common law, where children were considered merely the chattel of their parents.<sup>17</sup> While courts have embraced children's rights in the context of criminal law,<sup>18</sup> the judiciary has been slow to do so in matters related to family privacy. Our legal system continues to give strong deference to parental autonomy, reaffirming that parents are best suited to direct the upbringing of their children with almost unfettered control.<sup>19</sup>

Part II explores how modern examples such as the COVID-19 pandemic, curriculum mandates in public schools, and revelations about the impact of social media on adolescent health have driven a wedge between the viewpoints of parents and their children. This Part also explores whether parents should be able to fully monitor teens online regardless of their age.<sup>20</sup> These respective debates often situate child against parent. Under the current legal structure, a fit parent's wishes will almost always control without the state mediating the conflict.<sup>21</sup>

Part III contends that young people have a right to be heard by courts and legislatures, especially when their viewpoints diverge from those of their parents.<sup>22</sup> Pulling from case law, academic research, and commentary in public spaces, this Part recognizes the importance of including young people in conversations centered

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16. See, e.g., *State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004) ("Minors possess constitutional rights under both the federal and Florida constitutions."); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion) ("With respect to [minors' claims to constitutional protection against deprivations of liberty or property interests by the state], we have concluded that the child's right is virtually coextensive with that of an adult."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."). See generally *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (equating the parent's interest in educating the child with the child's interest in obtaining an education).

17. Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 *CARDOZO L. REV.* 225, 237 (2010).

18. See, e.g., *In re Gault*, 387 U.S. 1, 12 (1967) (first case granting due process rights to juveniles accused of criminal conduct).

19. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

20. Courts have often tried to protect children by regulating parents. This may come at a cost to a child's rights in other contexts. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944) (establishing that state interest in the physical safety of children outweighs parental discretion).

21. See *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) ("[S]o 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.").

22. See Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 *DUKE L.J.* 75, 142–43 (2021) [hereinafter Dailey & Rosenbury, *The New Parental Rights*]; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448, 1534 (2018) [hereinafter Dailey & Rosenbury, *The New Law of the Child*].

on the limits of parental rights.<sup>23</sup> This Part concludes by recommending a series of best practices for courts and legislatures to consider and providing model statutory language for state and federal lawmakers to adopt to better the lives of young people within their jurisdictions.

### I. THE TRADITIONAL PARENT, CHILD, AND STATE TRIAD

When scholars consider the intersections of parent, child, and state rights, they often explore the places where these rights are most likely to exist in tension with one another. Children are rarely outside the direct control of their parents; when they are, it is often because they are at school or work or because the state believes they are victims of their parents' abuse or potential abuse. As such, case law centered on parent, child, and state rights most often exists in areas of education law, labor law, and child abuse and neglect proceedings.

For centuries, the United States has shown deference to parents in the context of family life.<sup>24</sup> The Supreme Court has repeatedly prioritized the rights of parents to direct the upbringing of their children, limited the state from interfering in family autonomy, and given parents almost unfettered control of their children's physical and mental welfare.<sup>25</sup> Even when courts have afforded children rights, it is often in the context of states' rights or parents' rights.<sup>26</sup>

#### A. Parent, Child, and State Rights in the Context of Education

Conflicts between parents, children, and the state have long existed in American jurisprudence. In past cases involving these topics, courts have often viewed parents' rights as encompassing the interests of their children, but this is not always the paradigm. Children often have viewpoints that diverge from those of their parents, and the law leaves little room for children to assert those interests.<sup>27</sup>

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23. See Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1318 (1994) ("Our legal regime purports to respect children but generally disempowers them. Accordingly, we rely on a system of [fi]duciary arrangements to protect children's interests, assigning power over children to those whom we believe deserve this trust.").

24. See generally *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

25. See generally *Pierce*, 268 U.S. 510; *Yoder*, 406 U.S. 205; *Meyer*, 262 U.S. 390.

26. *Pierce*, 268 U.S. at 534–35 ("[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); *Yoder*, 406 U.S. at 230–31 ("[O]ur holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent."); *Meyer*, 262 U.S. at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.").

27. See generally Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2011).

Even when those interests are asserted, courts generally hold parental rights in higher esteem than those of their children.<sup>28</sup>

For example, while most children attend public schools, parents have the right to choose *not* to send children to public school and instead educate them at home, in private schools, or across a combination of settings.<sup>29</sup> Parents don't only dictate *where* a child learns but also *what* a child learns, assuming the learning takes place in a private setting.<sup>30</sup> The seminal case exploring this right is the 1923 Supreme Court case of *Meyer v. Nebraska*.<sup>31</sup> In *Meyer*, the Court struck down a Nebraska statute that banned the teaching of German to children.<sup>32</sup> The statute's ratification rested on the legislature's belief that it had seen the "baneful effects" of immigrants who took advantage of their right to direct their children's upbringing.<sup>33</sup> At the time of the statute's enactment, the United States was in a period of ethnocentric ideology following World War I.<sup>34</sup> The Supreme Court examined whether "the statute as construed and applied unreasonably infringe[d] [on] the liberty guaranteed . . . by the Fourteenth Amendment."<sup>35</sup> Holding that it is the "natural duty of the parent to give his children education suitable to their station in life," the Court ruled that it was the parent, not the state, that should dictate what a child learns.<sup>36</sup> While this case has been hailed as a victory for families' rights, scholars have argued that perhaps there is another accounting that should be less celebrated. Professor Barbara Bennett Woodhouse suggested that

[a] critical examination of the historical context, the events and personalities that shaped the cases, and the testimony of contemporaries, suggests this account is incomplete. . . . [T]hey were animated, as well, by another set of values—a conservative

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28. See, e.g., *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1193–94 (C.D. Cal. 2007).

29. See generally Aaron Hirsh, *The Changing Landscape of Homeschooling in the United States*, CTR. ON REINVENTING PUB. EDUC. 1, 3 (July 2019), [https://crpe.org/wp-content/uploads/homeschooling\\_brief\\_final.pdf](https://crpe.org/wp-content/uploads/homeschooling_brief_final.pdf) [<https://perma.cc/E2Q3-B89M>] ("A combination of technology and evolving state policy has changed the nature of how parents choose schooling for their children. They may now customize their level of involvement with other parents and public schools.").

30. See *Meyer*, 262 U.S. at 403.

31. *Id.* at 390.

32. *Id.* at 403.

33. *Id.* at 397–98 (quoting *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922)) ("The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land.").

34. See generally William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 126 (1988).

35. *Meyer*, 262 U.S. at 399.

36. *Id.* at 400. See also Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 292–93 (2010). In his article, Shulman cites to the oral arguments from the *Meyer* opinion: "On behalf of the defendants opposing the language prohibition, attorney Arthur F. Mullen portrayed the case as one about 'the power of a legislative majority to take the child from the parent.'" *Id.* In *Meyer*, the parent had decided to educate the child in a private school, not a public one. See *Meyer*, 187 N.W. at 101. By making this choice, the role of deciding what to teach within the school was left to the teacher and parent, not the state. See *Meyer*, 262 U.S. at 400. The Court noted that had the school been public instead of private, the case may have turned out differently. See *id.* at 402.

attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor. Along with protecting religious liberty and intellectual freedom, [the cases] constitutionalized a narrow, tradition-bound vision of the child as essentially private property. This vision continues to distort our family law and national family policy, so that we fail as lawmakers to respect children and fail as a nation to recognize and legitimate all American children as our own.<sup>37</sup>

This decision also paid deference to the state's *parens patriae* interest in a child's education. While it empowered parents in that it permitted them to contract with private teachers and schools to educate their children as they see fit,<sup>38</sup> it also recognized the autonomy of the public school system.<sup>39</sup> As explained in *A Moral Panic, Banning Books, and the Constitution: The Right to Direct the Upbringing and the Right to Receive Information in A Time of Inflection*, "[t]he High Court found that parents had the right to contract for teaching services that they wanted for their children. Parents' rights were upheld but so were the rights of the State to establish its public-school curriculum and to compel students to attend school."<sup>40</sup>

It is clearly the parent, not the state, who "owns" the child.<sup>41</sup> States cannot compel parents to send children to public schools.<sup>42</sup> "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," explained the Court in *Pierce v. Society of Sisters*.<sup>43</sup> In *Pierce*, a case decided only two years after *Meyer*, the relevant inquiry focused on a parent's right to control a child's upbringing more generally, as a private school challenged the authority of the state to require all children to attend *public* school, even over a parent's objection.<sup>44</sup>

While this case was brought by private schools concerned that the state was depriving the corporations of profits without due process of law, the plaintiffs also alleged that the law at issue (requiring that children be educated in public schools) unfairly interfered with the rights of parents.<sup>45</sup> The Court held that parents should direct their children's upbringing. This included determining where the child would

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37. Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

38. Todd A. DeMitchell et al., *A Moral Panic, Banning Books, and the Constitution: The Right to Direct the Upbringing and the Right to Receive Information in a Time of Inflection*, 397 ED. L. REP. 905, 916 (2022).

39. *Id.*

40. *Id.*

41. *See generally* Woodhouse, *supra* note 37.

42. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 530 (1925).

43. *Id.* at 535.

44. *Id.*

45. *Id.* *See generally* DeMitchell et al., *supra* note 38.

attend school.<sup>46</sup> The state certainly had broad powers to *direct* public schools, but the state could not order a child to *attend* a public school.<sup>47</sup>

There have been many additional cases further articulating the state's right in dictating what children learn in public schools.<sup>48</sup> "The lower courts have made clear that parents' right to direct the upbringing of their children does not mean that parents can dictate the school curriculum," explained Todd DeMitchell, Richard Fossey, and Terri DeMitchell.<sup>49</sup> "Parents have the autonomy to rear their children in accordance with the parents' values and the constitutional right to send their children to private schools. However, they have never been entitled to 'suspend all rules imposed by social institutions if those rules are at odds with the parents' preferences.'"<sup>50</sup>

Many parents homeschool their children, eliminating the influence of all state actors in their child's academic experience.<sup>51</sup> Parents are not required to send their children to structured school settings *at all* if they are able to show their children are being educated in other ways that more congruously fit their lifestyles and practices.<sup>52</sup> This right was articulated by the Supreme Court in 1972 in *Wisconsin v. Yoder*.<sup>53</sup> Amish families in Massachusetts routinely took their children out of school after eighth grade, their parents instead providing them with more informal educational experiences to prepare them for life as adults in their community.<sup>54</sup> Members of two Amish congregations were found to be in violation

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46. *Pierce*, 268 U.S. at 535.

47. *Id.*

48. DeMitchell et al., *supra* note 38, at 922–28.

49. *Id.* at 918.

50. *Id.*

51. *See generally* Hirsh, *supra* note 29.

52. *See Wisconsin v. Yoder*, 406 U.S. 205, 210–14 (1972) (citing *Pierce*, 268 U.S. at 534) ("Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was . . . made to yield to the right of parents to provide an equivalent education in a privately operated system.")

53. *Id.* at 219.

54. *Id.* at 211–12. In so holding, the Court utilized the following reasoning:

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these tra[it]s, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school



of a Wisconsin law that required children to attend school until the age of 16.<sup>55</sup> While the Court recognized the state's power to educate its citizens, it also recognized from earlier cases<sup>56</sup> that this responsibility must "be made to yield to the right of parents to provide an equivalent education in a privately operated system."<sup>57</sup> The Court took this precedent further.<sup>58</sup> Resting its decision on not only the parents' right to direct the upbringing of their children but also on Amish children's rights to freely exercise their religion, the Court overturned the convictions.<sup>59</sup> The Court recognized both that the state had a compelling interest in educating its citizens and that the Amish

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attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community.

*Id.*

55. *Id.* at 207–08, 207 n. 2. Further, the Court noted:  
[The statute] provides in pertinent part: "118.15 Compulsory school attendance "(1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age. "(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school. "(4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside. "(5) Whoever violates this section . . . may be fined not less than \$5 nor more than \$50 or imprisoned not more than 3 months or both." Section 118.15(1)(b) requires attendance to age 18 in a school district containing a "vocational, technical and adult education school," but this section is concededly inapplicable in this case, for there is no such school in the district involved.

*Id.* (quoting WIS. STAT. § 118.15 (1969)).

56. *Id.* at 213–14 (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923); *cf. Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 738 (1970) (rejecting the argument that a vendor has a constitutional right to send unwanted material into the home of another, stating "the householder [does not] have to risk that offensive material come into the hands of his children before it can be stopped").

57. *Yoder*, 406 U.S. at 213.

58. *Id.* at 214.

59. *Id.* at 207, 234.

way of educating children outside of traditional norms provided them with the education they would need to live in their Amish communities.<sup>60</sup>

This area of law shows us the jurisprudential fusion of children's free exercise rights with parental rights over a child's upbringing. In reaching its decision, the Court applied the *Sherbert* test.<sup>61</sup> The Court noted that the Amish beliefs at issue were clearly sincere, the law placed a substantial burden on Amish families, and the asserted state interest was not compelling enough to mandate that Amish children remain in school.<sup>62</sup> The Court further opined that any Amish children who leave the faith would be prepared to succeed in modern societies<sup>63</sup> and acknowledged that compulsory education was a new phenomenon, while living an Amish lifestyle had existed for more than 200 years.<sup>64</sup> The justices limited their holding to the facts of the case, noting that children were not parties to the litigation.<sup>65</sup> If the children had wished to attend secondary school, the Court suggested, the case might have been resolved differently.<sup>66</sup>

As noted in *Yoder*, the case could have played out differently if an Amish child *wanted* to attend secondary school.<sup>67</sup> Yet we do not truly know what the *Yoder* children wanted, as they were not parties to the case.<sup>68</sup> Children rarely have agency to express their beliefs when they are inconsistent with the beliefs and practices of their parents.<sup>69</sup> This could be because children do not believe they are *at liberty* to oppose their parent's stated viewpoint, because children are not given the *opportunity* to oppose their parent's stated viewpoint, or perhaps because children

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60. *Id.* at 223–24 (“There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’ A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”).

61. *Id.* at 221 (“We turn, then, to the State’s broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.” (first citing *Sherbert v. Verner*, 374 U.S. 398 (1963); then citing *Martin v. City of Struthers*, 319 U.S. 141 (1943), and then citing *Schneider v. New Jersey*, 308 U.S. 147 (1939))).

62. *See id.* at 221–24.

63. *Id.* at 224–25.

64. *Id.* at 226–28.

65. *Id.* at 230–31.

66. *Id.* at 231 (“The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation.”).

67. *Id.*

68. *Id.*

69. For a detailed discussion on the definition of agency, see Dailey & Rosenbury, *The New Parental Rights*, *supra* note 22, at 100–01 (“[C]hildren have agency interests, that is, the capacity from the earliest age to express their will, engage with others, and be active in the world.”).

have not been given the opportunity to *form a viewpoint* separate and apart from their parents.<sup>70</sup>

As seen in the Supreme Court cases centered on the parental freedom to direct the upbringing of children, parents have almost unfettered control over what children learn and in what environment they learn it.<sup>71</sup> This may prohibit them from seeing the world through any lens other than the one shown to them by their parents.<sup>72</sup>

The law is well-settled that parents are not required to educate their children in the mainstream public-school setting.<sup>73</sup> They can educate them at home, in a private setting, or in many instances, not at all.<sup>74</sup> But the question that remains is whether parents can choose what their children learn when they choose to entrust public educators with their child's academic achievement.

### ***B. Parent, Child, and State Rights in the Context of Harm***

Courts have struggled to balance parent, child, and state rights when children are at risk of *harm*, either due to a caregiver's own acts or failures to act when their children are endangered. In *Meyer*, *Pierce*, and *Yoder*, the majority of the Court could hardly imagine a situation where a parent and child's stated wishes would not be in alignment.<sup>75</sup> These cases also suggest that the Court would be hard-pressed to find a situation where a parent would not look out for what the parent believed would be in a child's best interest from a physical safety perspective. However, in *Prince*, another case attempting to balance the rights of children, parents, and the state, the Court separated what a caregiver's stated wish might have been from what the state believed was best for the child.<sup>76</sup> Even then, the child's stated wish was absent from the decision.<sup>77</sup>

The *Prince* decision takes our analysis away from the education arena but remains squarely situated at the intersection of these rights.<sup>78</sup> In *Prince*, the defendant, Ms. Prince, was the legal custodian of a young child named Betty M.

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70. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 868 (2017) [hereinafter Steinberg, *Sharenting*] ("Children have little to no recourse . . . for many reasons. First, children are expected to abide by the will of their parents. Second, children might lack opportunity to express their disdain or other feelings, such as embarrassment, humiliation, anger, or hurt. Finally, children might lack an understanding of the implications of their parents' . . . conduct.").

71. See *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925); *Yoder*, 406 U.S. at 231–233; *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

72. See generally Shulman, *supra* note 36, at 296.

73. See *Pierce*, 268 U.S. at 535; *Yoder*, 406 U.S. at 213; *Meyer*, 262 U.S. at 402.

74. See *Pierce*, 268 U.S. at 535; *Yoder*, 406 U.S. at 235; *Meyer*, 262 U.S. at 402.

75. See *Meyer*, 262 U.S. at 398; *Pierce*, 268 U.S. at 534; *Yoder*, 406 U.S. at 243 (Douglas, J., dissenting in part).

76. *Prince v. Massachusetts*, 321 U.S. 158, 166, 169–70 (1944).

77. See *id.* at 165.

78. See *id.*

Simmons.<sup>79</sup> Ms. Prince and Betty were Jehovah's Witnesses, and Ms. Prince was convicted of violating child labor laws by allowing Betty to pass out religious flyers on the street.<sup>80</sup> *Prince* positions itself as important precedent not only as to the rights of parents (in this case, a legal guardian) and the rights of the state to legislate labor conditions but also the rights of families to freely practice their religion and the rights of the state to legislate the time, place, and manner of that practice.<sup>81</sup> The Court noted in its decision that the state should not infringe on a parent's right to control the upbringing of their child except in the most limited of circumstances.<sup>82</sup> The right of the parent to provide religious training to their children is central to the steering of children toward adulthood.<sup>83</sup> This, the Court explains, is "the private realm of family life which the state cannot enter."<sup>84</sup>

Despite this recognition, the Court held that it *could* regulate issues related to the health and welfare of the child under *parens patriae*.<sup>85</sup> This would include issues related to child labor, which served as the basis for Ms. Simmons's conviction.<sup>86</sup> The Court in *Prince* recognized that, like adults, children have rights, including the right to use the streets and highways.<sup>87</sup> A child would not be permitted to be alone on a highway, the Court seemed to suggest, as this would be very dangerous.<sup>88</sup> However, should children be permitted to be on a highway passing out flyers when accompanied by a guardian?<sup>89</sup> "Parents," the Court answered, "may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."<sup>90</sup>

The Court compared this sort of regulation to the right of the state to create vaccine mandates and address other critical health issues, highlighting that they

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79. *Id.* at 159. The child, like all children of the time, was likely considered an infant, which to the Author seems like a descriptive term for a group of individuals able to have opinions that perhaps should have been recognized.

80. *Id.* at 162 ("That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children 'to engage in the preaching work with her upon the sidewalks.' That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passersby to see, copies of 'Watch Tower' and 'Consolation.' From her shoulder hung the usual canvas magazine bag, on which was printed 'Watchtower and Consolation 5¢ per copy.' No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.").

81. *Id.* at 165.

82. *Id.* at 169–70.

83. *Id.* at 165.

84. *Id.* at 166.

85. *Id.* at 166–67.

86. *Id.* at 166 ("But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty." (first citing *Reynolds v. United States*, 98 U.S. 145 (1878); then *Davis v. Beason*, 133 U.S. 333 (1890))).

87. *See id.* at 169.

88. *Id.*

89. *Id.*

90. *Id.* at 170.

would uphold those mandates even over religious objections.<sup>91</sup> As Professor Katherine Drabiak points out in her article *Disentangling Dicta: Prince v. Massachusetts, Police Power and Childhood Vaccine Policy*, the *Prince* decision rested on Court precedent involving both vaccine mandates and the right of a parent to refuse medical treatment for a critically ill child.<sup>92</sup> That case held that “religion did not constitute a defense to provide the child with the basic necessities of life, such as food, clothing, shelter, and medical attendance when it became reasonable to see that the child’s life-threatening condition required medical care.”<sup>93</sup>

Most state labor laws do not regulate the conditions in which children can work when they are working for their parents.<sup>94</sup> Children can work long hours in a family business or at the family farm, often at the risk of serious injury.<sup>95</sup> This, again, is one realm of family life that courts have generally refused to allow states to enter.<sup>96</sup> And a discussion on the boundaries of child labor law and parents’ rights would not be complete without mentioning the new ways that children work with their parents—on the internet.<sup>97</sup> As influencer culture grows, so too does the market for family vlogs and other forms of family online sharing.<sup>98</sup> Children whose parents earn financial and social capital online through their social media feeds have not traditionally been protected by any state labor laws.<sup>99</sup> Even Coogan’s Law, a law in

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91. *Id.* at 166–67 (citations omitted) (“[H]e cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”).

92. Katherine Drabiak, *Disentangling Dicta: Prince v. Massachusetts, Police Power and Childhood Vaccine Policy*, 29 ANNALS HEALTH LIFE SCI. 173, 181–82 (2020); *People v. Pierson*, 68 N.E. 243, 247 (N.Y. 1903).

93. Drabiak, *supra* note 92, at 182.

94. See generally Barbara Marlenga et al., *Changing the Child Labor Laws for Agriculture: Impact on Injury*, 97 AM. J. PUB. HEALTH 198, 276, 282 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1781414/pdf/0970276.pdf> [<https://perma.cc/5XXY-5R7Z>].

95. *Id.* at 276, 278–79 (citations omitted) (“Children working in agriculture continue to have the highest rate of fatal work injuries compared with children in other work environments, with the preponderance of these fatal injuries occurring on farms that are family owned and operated. Protection from physical harm is a fundamental human right for children, and it is well recognized that children require higher standards of protection than adults. These facts are not recognized in existing occupational health and safety legislation aimed at family farms, which is perplexing given the magnitude of the pediatric farm injury problem. Given these observations and in light of our research findings, there is a clear need for at least minimum safety standards to protect children from harm on family farms.”).

96. See *id.* at 276.

97. Danya Hajjaji, *YouTube Lets Parents Exploit Their Kids for Clicks*, NEWSWEEK MAG. (Oct. 04, 2021, 9:00 PM), <https://www.newsweek.com/youtube-lets-lawless-lucrative-sharenting-industry-put-kids-mercy-internet-1635112> [<https://perma.cc/D6RE-MYVM>].

98. *Id.*

99. See generally Shayne J. Heller, *The Price of Celebrity: When a Child’s Star-Studded Career Amounts to Nothing*, 10 DEPAUL J. ART, TECH. & INTELL. PROP. L. 161 (1999), <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1284&context=jatip> [<https://perma.cc/D6K4-WGK3>].

California aimed at protecting child actors, does not apply to families who put their children to work by unboxing toys on YouTube.<sup>100</sup>

Undeniably, the United States Constitution does not protect children from harm caused by their parents—even the most egregious forms of physical harm.<sup>101</sup> While most states have created affirmative obligations on the part of state agencies to investigate child abuse and neglect, our Constitution does not require states to do so.<sup>102</sup> For example, in *DeShaney v. Winnebago*, the Supreme Court explored the boundaries of child, parent, and state rights, this time in a case involving egregious child abuse.<sup>103</sup> In *DeShaney*, a child named Joshua was beaten by his father.<sup>104</sup> The mother filed suit against the state, alleging that the state had notice that the child was at risk but failed to protect him.<sup>105</sup> The mother alleged that the state violated Joshua's due process rights, guaranteed by the Fourteenth Amendment, by failing to intervene despite knowing that he was at risk, causing tragic injuries to the boy.<sup>106</sup>

In this case, the state likely knew that Joshua was at risk for future abuse.<sup>107</sup> The Department of Social Services had been called out to the hospital for injuries suspected to be the result of child abuse.<sup>108</sup> The caseworker made monthly visits to Joshua's home, noting suspicious marks on the child.<sup>109</sup> Despite the warning signs, the caseworker did not remove Joshua from his father's care.<sup>110</sup>

The Court, while very sympathetic to Joshua's plight, held that the state had not violated Joshua's constitutional rights by not stepping in to protect the child

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100. *See id.* at 167 (citations omitted) (“The California Coogan Law has not been updated since its enactment in the late 1930s, except to broaden the scope of contracts that may be approved by the superior court to include not only child actors, but also other child performers, artists, dancers, and athletes. After Jackie Coogan's case, the court was given the power to establish trust funds or savings accounts before approving minor's contracts and jurisdiction to manage these funds . . . [T]he Coogan Law did not supersede the Federal Labor Standards Act preventing child performers from disaffirming contracts; instead, it protected the industry and not the children.”).

101. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989).

102. *Id.*

103. *Id.*

104. *Id.* at 193.

105. *Id.* The facts of this case are egregious and extremely sad. The Court summarizes them as follows:

In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution . . . . Randy DeShaney was subsequently tried and convicted of child abuse.

*Id.*

106. *Id.*

107. *Id.* at 197.

108. *Id.* at 192.

109. *Id.* at 192–93.

110. *Id.* at 193.

from his father.<sup>111</sup> Holding that the Fourteenth Amendment does not place an affirmative obligation on the state to intervene, the Court noted that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”<sup>112</sup> The mother (through her attorneys) argued that even if the state does not have a general affirmative duty to protect its citizens from private actors, one was created by special circumstances, such as the circumstances that preceded Joshua’s injuries—specifically, that the state had at least minimally investigated the abuse allegations.<sup>113</sup> But the Court disagreed, noting that perhaps Joshua would have a remedy under state tort law for the state failing to take action to protect Joshua, but he did not have a remedy under federal constitutional law.<sup>114</sup> In this case, the Court seems to draw a line between the constitutional rights of children actually in state custody and children merely under observation by state child welfare agencies.<sup>115</sup> The state is required to protect children (even from their parents) post-removal.<sup>116</sup> However, prior to removal, the state is under no obligation to offer that same level of protection.<sup>117</sup>

It is important to note, though, that there are many examples of states being held liable for breaching their duties of care to children at risk of abuse or neglect.<sup>118</sup> States can (and often do) create affirmative obligations for state actors to protect children once the state is made aware of abuse or neglect.<sup>119</sup> For example, a jury in Florida recently ruled that the Department of Children and Families (“DCF”) negligently failed to remove a six-year-old child from her mentally unstable

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111. *Id.* at 195.

112. *Id.*

113. The mother’s attorney asserted that a “special relationship” had been formed between Joshua and the state as a result of the caseworker’s involvement in his life. *Id.* at 197.

114. *Id.* at 203 (“The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court’s expansion of the Due Process Clause of the Fourteenth Amendment.”). *See also* Timothy Arcaro, *Florida’s Foster Care System Fails its Children*, 25 NOVA L. REV. 641, 676–77 (2001). Professor Timothy Arcaro notes in his article that in *DeShaney*, the Court drew a line between children in the state’s custody and children outside of the state’s custody. *Id.* at 677.

115. *See id.*

116. *DeShaney*, 489 U.S. at 199–200 (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982))).

117. *See id.* at 195, 203 (“[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”).

118. *See e.g.*, FLA. STAT. ANN. § 30.201; § 39.205 (“A person who knowingly and willfully fails to report to the central abuse hotline known or suspected child abuse, abandonment, or neglect, or who knowingly and willfully prevents another person from doing so, commits a felony of the third degree.”).

119. § 39.301 (detailing requirements for the “[i]nitiation of protective investigations”).

mother.<sup>120</sup> Hours after DCF decided against removal, the mother stabbed the child 14 times and also tried to drown her.<sup>121</sup> This case shows how, had the state in *DeShaney* chosen to create “a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one,”<sup>122</sup> there could have been a state law remedy for Joshua.<sup>123</sup> And as demonstrated in *Prince*, the state perhaps has greater authority to regulate parents when children’s physical health is on the line, but perhaps, as *DeShaney* shows us, it has no obligation to do so under the U.S. Constitution.<sup>124</sup>

### C. Parent, Child, and State Rights in the Context of Online Privacy

It is difficult to imagine the United States legislature creating laws limiting what parents can share about children online.<sup>125</sup> But children need privacy from their parents at times, and some states are beginning to limit the extent to which parents can profit from sharing about their children online.<sup>126</sup>

But at least one other country, France, has taken steps to penalize parents who overshare about their children on social media and YouTube.<sup>127</sup> As influencer

120. Jesse Mendoza, *Jury Rules Against Florida DCF: Agency Failed to Intervene, Then 6-Year-Old Was Brutally Attacked*, SARASOTA HERALD-TRIBUNE (Mar. 14, 2022, 5:11 PM), <https://www.heraldtribune.com/story/news/courts/2022/03/14/florida-department-child-ren-families-fault-leaving-child-with-mother-girl-brutally-attacked/7034579001/> [<https://perma.cc/6729-QHWL>].

121. *Id.*

122. *DeShaney*, 489 U.S. at 203.

123. *Id.* (“They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process.”).

124. *Id.*; see *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

125. See Neyza L. Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD & FAM. L.J. 85, 99 (2020), <https://lawpublications.barry.edu/cflj/vol8/iss1/4> [<https://perma.cc/L3ZM-BV5F>] (“Florida is one of the thirty-two states which have enacted specific laws to protect a child actor engaged in the entertainment industry, however, these laws have not been extended to include child video bloggers on YouTube and other similar social media providers.”).

126. For example, California passed a bill granting minor children a right to delete posts from online forums when the minor is a registered user of that forum. CAL. BUS. & PROF. CODE § 22581. However, there are still limitations in California regarding a minor’s right to delete posts that were made by a third party. See § 22581(b)(1)–(5). Illinois passed a law that will entitle child influencers to a percentage of their earnings. ILL. PUB. ACT 103-0556 (2023). And Washington has proposed a bill protecting the interests of minor children featured in for-profit family vlogs. H.B. 1627, 68th Leg., Reg. Sess. (Wash. 2023), <https://app.leg.wa.gov/billsummary?BillNumber=1627&Year=2023&Initiative=false> [<https://perma.cc/6BW8-AGME>]. See generally Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 U. PA. L. REV. 577 (2021).

127. Rosie Hopegood, *The Perils of ‘Sharenting’: The Parents Who Share Too Much*, AL JAZEERA (Oct. 11, 2020), <https://www.aljazeera.com/features/2020/10/11/facing-the-music-the-parents-who-share-too-much> [<https://perma.cc/Z5SB-6E4X>]; Anne Marie Tomchak, *Are You Guilty of ‘Sharenting’? Why There’s Now a Shocking Rise of Children Suing Their Parents for Documenting Their Lives on Social Media*, GLAMOUR (Jan. 7, 2021), <https://www.glamourmagazine.co.uk/article/child-privacy-social-media-risks> [<https://perma.cc/AXE7-E53V>].



culture continues to gain ground, it has become hard to ignore the harms children face when they grow up having their day-to-day lives constantly shared online.<sup>128</sup> While it may be perfectly appropriate for parents to share some details about their children's lives online, oversharing can be harmful.<sup>129</sup>

Children whose parents share online are at risk of identity theft. In fact, Barclays predicts that, by 2030, "sharenting" will account for over two-thirds of all identity theft.<sup>130</sup> Additionally, there are risks that pedophiles can download images that parents share and use them for illicit purposes.<sup>131</sup> A former e-safety commissioner in Australia reported that over half of the images he had discovered that had been shared on pedophile image-sharing sites had originated on social media and family blogs.<sup>132</sup> There is also a risk that the images can be turned into "deep fakes," something more commonly known as morphed child pornography.<sup>133</sup> While federal courts have found that these sorts of images are illegal to create and share, many states do not yet have their own laws criminalizing these images as child pornography, which could add another layer of enforcement and potentially add resources to minimize the risk of harm.<sup>134</sup>

Like in the context of sharenting, courts generally will not substitute their best judgment for that of a parent, especially when the children are not at risk of grave harm. In *Troxel v. Granville*, paternal grandparents petitioned their state court for visitation of their grandchildren after their son, the children's father, passed away.<sup>135</sup> The children's mother allowed the grandparents to see the children, but the grandparents argued they wanted more time than the mother would permit.<sup>136</sup> The state had a broad statute permitting anyone to petition the court for visitation with children, which gave judges the authority to order visitation whenever the judge

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128. See generally Steinberg, *Sharenting*, *supra* note 70, at 854–55.

129. *Id.*

130. Sean Coughlan, 'Sharenting' Puts Young at Risk of Online Fraud, BBC NEWS (May 28, 2018, 7:12 AM), <https://www.bbc.com/news/education-44153754> [<https://perma.cc/8ERY-B273>].

131. See generally Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909 (2019) [hereinafter Steinberg, *Changing Faces*].

132. Lucy Battersby, *Millions of Social Media Photos Found on Child Exploitation Sharing Sites*, SYDNEY MORNING HERALD (Sept. 30, 2015, 9:14 AM), <http://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-20150929-gjxe55.html> [<https://perma.cc/9Q2E-Y727>].

133. Steinberg, *Changing Faces*, *supra* note 131, at 911; see also Bradley Waldstreicher, *Deeply Fake, Deeply Disturbing, Deeply Constitutional: Why the First Amendment Likely Protects the Creation of Pornographic Deepfakes*, 42 CARDOZO L. REV. 729, 732–34 (2021) ("Deepfakes are distorted yet highly convincing artificial intelligence-created video, audio, and text that can make it look like something that did not occur actually transpired. . . . This technology learns peoples' facial expressions and movements by extracting information from millions of data points. Then the algorithm seamlessly positions that person's expressions onto somebody else's body, making it look like a person said or did something that they did not actually do.").

134. Steinberg, *Changing Faces*, *supra* note 131, at 924.

135. *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000).

136. *Id.*

believed it to be in the children’s best interest.<sup>137</sup> The state court granted the grandparents extensive visitation rights over the mother’s objection, but eventually the U.S. Supreme Court overturned the visitation order and held the statute unconstitutional as applied.<sup>138</sup> The Court explained that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>139</sup>

Drawing the line between what the state can and cannot regulate is a daunting and often imprecise task.<sup>140</sup> Putting together the holdings from the cases referenced in this Part, one can assume that the Court accepts intrusions into parents’ fundamental rights to control the upbringing of their children when there are physical health and safety risks (such as in the realm of vaccines and dangerous working conditions), but less so when there are risks to the children’s emotional growth and development (such as non-compulsory attendance in public school or oversharing online).<sup>141</sup> Courts generally will not substitute their best judgment for that of a fit parent, and courts are reluctant to place affirmative obligations on states to intervene into family life, even when children are endangered. The cases cited in this Part involved scenarios with underlying factual issues not in dispute. It is unclear how courts will balance the rights of parents, children, and states in an era when even basic scientific principles are subject to debate amongst lawmakers.

## II. THE THREE C’S: COVID-19, CURRICULUM, AND COPPA

Many of the cases cited in the preceding Part were decided long before we entered the twenty-first century. It was an era before COVID-19 (though there were other pandemics),<sup>142</sup> before the current fights over elementary school curriculum (though there were cases centered on what children learn),<sup>143</sup> and before children’s privacy was acknowledged as a concern under the Children’s Online Privacy Protection Act<sup>144</sup> (“COPPA”) (though there were cases at the intersection of

137. *Id.* at 60.

138. *Id.* at 69 (“The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville’s determination of her daughters’ best interests.”).

139. *Id.* at 72–73.

140. *Id.*

141. *See* *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 430 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

142. *See generally* Amy W. Forbes, *Covid-19 in Historical Context: Creating a Practical Past*, 33 HEC FORUM. 7, 8 (Neth.) (2021).

143. *See, e.g., Pierce*, 268 U.S. at 529–30; *Yoder*, 406 U.S. at 212–13; *Meyer*, 262 U.S. at 397–98.

144. *See* 15 U.S.C. §§ 6501–6505. “COPPA imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age.” FED. TRADE COMM’N, CHILDREN’S ONLINE PRIVACY PROTECTION RULE (“COPPA”), <https://www.ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa> [<https://perma.cc/4N53-9URR>] (last visited Jan. 19, 2024).

children's privacy and its often contentious relationship with parental autonomy).<sup>145</sup> These current events have caused an explosion of energy centered at the intersection of parent, child, and state rights.

The international community has increasingly emphasized children's rights generally,<sup>146</sup> and the United States has recognized children's rights in many criminal law and delinquency-related proceedings.<sup>147</sup> But the U.S. Supreme Court and federal lawmakers have generally refused to recognize children's rights when they conflict with the rights of their parents,<sup>148</sup> except in the most limited of circumstances.<sup>149</sup>

#### A. *Balancing Rights during the COVID-19 Pandemic*

On March 13, 2020, the world as we knew it changed.<sup>150</sup> Schools were closed, cities ordered residents to stay home, and hospitals in some parts of the world were exploding with very sick patients.<sup>151</sup> Children, parents, and the state had prepared for school shooters and fire emergencies, but most had not prepared for what was beginning to appear on the horizon.<sup>152</sup> "Fifteen Days to Slow the Spread"<sup>153</sup> quickly expanded through the end of the school year, as teachers rushed to create online classrooms and parents tried to figure out how they could both work and supervise their kids at the same time.<sup>154</sup> Many families rushed to stock up on masks and hand sanitizer (and toilet paper), while others insisted mass hysteria had

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145. See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

146. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 27531, [https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf) [https://perma.cc/67GK-QKEX].

147. *In re Gault*, 387 U.S. 1, 55 (1967).

148. See Shmueli & Blecher-Prigat, *supra* note 27, at 780.

149. *Bellotti v. Baird*, 443 U.S. 622, 626–27, 637–42 (1979).

150. Proclamation No. 9994, 85 Fed. Reg. 15, 337 (Mar. 18, 2020) ("On March 13, 2020, by Proclamation 9994, the President declared a national emergency concerning the coronavirus disease 2019 (COVID-19) pandemic. The COVID-19 pandemic continues to cause significant risk to the public health and safety of the Nation.").

151. See generally Nicole Zviedrite et al., *COVID-19-Related School Closures, United States, July 27, 2020–June 30, 2022*, 30 EMERGING INFECTIOUS DISEASES 58 (2024); Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198 (2020); Juliet Bedford et al., *COVID-19: Towards Controlling of a Pandemic*, 395 THE LANCET 1015 (2020).

152. For an example of how schools prepared for emergencies before the COVID-19 pandemic, see *School Risk Management Planning*, N.C. STATE EMERGENCY RESPONSE APPLICATION, <https://sera.nc.gov/srmp/> [https://perma.cc/38KX-SWPQ] (last visited Mar. 1, 2024).

153. *The President's Coronavirus Guidelines for America*, U.S. DEP'T OF JUST. <https://www.justice.gov/doj/page/file/1258511/download> [https://perma.cc/ND7B-B63Z] (last visited Jan. 19, 2024).

154. For examples of how schools coped (and the challenges they faced) in the early stages of the COVID pandemic, see generally Hani Morgan, *Best Practices for Implementing Remote Learning During a Pandemic*, 93 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 135 (2020).

taken over their communities and that the threat simply did not exist.<sup>155</sup> As doctors got to work saving lives, many lawyers started to analyze how the state would go about protecting children, how parents would react to state mandates, and how children would fare as agency over their lives quickly evaporated.<sup>156</sup>

One of the first large-scale debates over the limits of *parens patriae* and parents' rights during the pandemic was the debate over whether to open schools in the fall of 2020 and whether masks would be required on campuses.<sup>157</sup> For some parents, the evidence was clear—despite the risks, schools served a necessary function in society, and it was critical that they reopen with as many safeguards as possible in place, such as social distancing and mask wearing.<sup>158</sup> Other parents objected to their children being required to wear masks, insisting that mask mandates did not effectively prevent the spread of COVID-19 and hindered childhood development.<sup>159</sup> These parents argued that it was their right as parents to decide whether to cover their children's noses and mouths with masks, rather than the school board's right, as an arm of the state, to override parental decision-making and require the safety measure.<sup>160</sup>

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155. Steven Taylor, *Understanding and Managing Pandemic-Related Panic Buying*, 78 J. ANXIETY DISORDERS 1, 4–5 (2021), <https://www.sciencedirect.com/science/article/pii/S0887618521000116> [<https://perma.cc/ZXG7-PYPB>].

156. See generally Lisa Grumet, *Co-Parenting During Lockdown: COVID-19 and Child Custody Cases Before the Vaccine*, 55 FAM. L.Q. 173 (2022).

157. David T. Marshall & Martha Bradley-Dorsey, *Reopening America's Schools: A Descriptive Look at How States and Large School Districts are Navigating Fall 2020*, 14 J. SCH. CHOICE 533, 536–38 (2020), <https://www.tandfonline.com/doi/epdf/10.1080/15582159.2020.1822731?needAccess=true> [<https://perma.cc/D4MK-M3R4>]; Brystana G. Kaufman et al., *Factors Associated with Initial Public School Reopening Plans During the US COVID-19 Pandemic: A Retrospective Study*, 36 J. GEN. INTERNAL MED. 852, 852 (2021) (citations omitted) (“Because of the novel coronavirus disease 2019 (COVID-19), all 50 states closed public schools by April 2020 for the remainder of the academic year to mitigate COVID-19 transmission. School reopening decisions for the 2020–2021 academic year were delegated to states and local districts. Reopening options include full on-site learning, hybrid approaches with mixed remote and in-person learning, and remote-only learning. Lacking robust evidence, decision-makers weighed the risks of exposing students and staff to COVID-19 with the benefits of in-person school, including superior academic outcomes and the provision of essential services, such as nutrition and childcare.”).

158. See Anya Kamenetz, *Are The Risks Of Reopening Schools Exaggerated?*, NPR: ALL THINGS CONSIDERED (Oct. 21, 2020, 7:05 AM), <https://www.npr.org/2020/10/21/925794511/were-the-risks-of-reopening-schools-exaggerated> [<https://perma.cc/XBQ2-6SBV>] (“Any decision made on school reopening, [Dr. Rainu Kaushal of Weill Cornell Medicine] said, has to focus on equity as well as safety. There are no easy trade-offs here.”).

159. See, e.g., Zack Weissmueller, *Should Kids Have to Wear Masks at School? And, If So, For How Long?*, MOMS FOR LIBERTY (Dec. 28, 2021, 7:31 PM), <https://portal.momsforliberty.org/news/should-kids-have-to-wear-masks/> [<https://perma.cc/3LYG-BNP5>].

160. *Id.* (“‘We support parental choice in masking, always,’ [says Tina Descovich, parent and co-founder of Moms for Liberty] . . . ‘We believe a parent has the ultimate authority . . . the fundamental right to guide and direct the upbringing, the medical care and the education of their children.’”).

The country was already polarized, but debates over mask mandates increased polarization dramatically.<sup>161</sup> Families could feel the impact of their state's majority political party every day—dictating issues from whether masks would be required to whether local school boards would be financially supported by their states or the federal government to offer online options for families who weren't ready to send their children back to the brick-and-mortar classroom.<sup>162</sup> For children of separated parents, the tension sometimes left them caught in the middle of disagreements over what safety measures were necessary and what precautions each parent chose to follow.<sup>163</sup>

In late 2020 vaccines offered new promise to millions of individuals, but they also caused the polarization to grow. Lawsuits ensued.<sup>164</sup> For parents strenuously opposed to their children wearing masks, it did not matter that the CDC published multiple studies showing that masks in classrooms reduced the spread of COVID-19.<sup>165</sup> These parents believed that the reduction in transmission was

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161. See generally Julie Jiang et al., *Political Polarization Drives Online Conversations About COVID-19 in the United States*, 2 HUM. BEHAV. & EMERGING TECH. 200 (2020); Hannah Natanson et al., *A Few Schools Mandated Masks. Conservatives Hit Back Hard*, WASH. POST, <https://www.washingtonpost.com/education/2023/09/06/school-mask-mandate-politics/> [<https://perma.cc/T8X7-F3QG>] (Sept. 7, 2023, 2:09 PM) (“The nation’s embrace or rejection of mask-wearing soon split along political lines. Republican governors largely eschewed mask requirements after the first year of the pandemic . . . State and local health officials in heavily Democratic areas were slower to discard mask-wearing.”). See also Deepa Shivaram, *The Topic of Masks In Schools Is Polarizing Some Parents To The Point Of Violence*, NPR: BACK TO SCHOOL (Aug. 20, 2021, 6:00 AM), <https://www.npr.org/sections/back-to-school-live-updates/2021/08/20/1028841279/mask-mandates-school-protests-teachers> [<https://perma.cc/KX4P-A68J>]. In this opinion piece, a parent discusses how disagreements over masks are creating issues amongst friends. *Id.*; see also Kerry Lester Kapster, *We Disagree About Masks. Can We Still be Friends?*, CHI. TRIB. (Feb. 16, 2022, 2:35 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-covid-19-masking-difference-friendship-20220216-66g7kjqinhhrh4ymnfayzxxka-story.html> [<https://perma.cc/H953-GJA3>].

162. Jiang et al., *supra* note 161, at 205; BENJAMIN OLNECK-BROWN, NAT’L CONF. OF STATE LEGS., PUBLIC EDUCATION’S RESPONSE TO THE CORONAVIRUS (COVID-19) PANDEMIC, <https://www.ncsl.org/education/public-educations-response-to-the-coronavirus-covid-19-pandemic> [<https://perma.cc/GV5J-6AZT>] (Mar. 15, 2021).

163. See, e.g., Catherine E. Shoichet, *How Covid is Making Divorce Cases More Complicated*, CNN, <https://www.cnn.com/2022/01/30/us/child-custody-battles-covid-cec/index.html> [<https://perma.cc/9ND4-24AL>] (Jan. 20, 2022, 10:28 AM).

164. Katie Reilly, *School Masking Mandates Are Going to Court. Here’s Why the Issue Is So Complicated*, TIME (Oct. 1, 2021, 10:40 AM), <https://time.com/6103134/parents-fight-school-mask-mandates/> [<https://perma.cc/X533-53YA>] (citing Complaint, *Hien ex rel. J.H. & M.H. v. Williamson Cnty. Sch. Bd. Educ.*, No. 03-21 0733, 2021 WL 4317754 (M.D. Tenn. Sept. 22, 2021), *dismissed* (Nov. 23, 2021); see, e.g., *J.W. v. Beam*, 268 A.3d 1131 (Pa. Commw. Ct. 2021)).

165. See generally Benjamin Abbott et al., *Making Sense of the Research on COVID-19 and Masks*, BYU: COLLEGE OF LIFE, <https://pws.byu.edu/covid-19-and-masks> [<https://perma.cc/F7NB-JVBZ>] (Aug. 21, 2020) (“There are several studies that are widely cited on social media that misinterpret the medical evidence about masks. For example, a small trial of surgical masks among surgeons showed a slight decrease in blood oxygen.”)

minimal or claimed that the risk of the disease was very low for children.<sup>166</sup> They believed that masks made kids sicker<sup>167</sup> or that masks negatively impacted their children's communication and social skills.<sup>168</sup>

Courts were in new territory, and legal experts were split. Quoted in *Time*, Professor Suzanne Eckes explained, “[p]arental rights in the public school context have never been absolute. Certainly parents can direct the upbringing of their own children and make medical decisions and education decisions. They have the right to send their children to private school or to home school . . . .”<sup>169</sup> In the same article, Professor Claire Raj explained that schools have always been able to enforce rules, even ones that parents disagree with. She used the example of dress code policies.<sup>170</sup> Professor Raj also highlighted that states had an affirmative obligation to keep immunocompromised children safe under the Americans with Disabilities Act.<sup>171</sup>

Some school districts were punished by their state departments of education for enforcing mask mandates.<sup>172</sup> In Alachua County, Florida, for example, the school board voted to keep a mask mandate in place into the fall 2021 school year.<sup>173</sup> The State's Department of Education withheld funding to the school

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(citing A. Beder et al., *Preliminary Report on Surgical Mask Induced Deoxygenation During Major Surgery*, 19 NEUROCIROGÍA 121 (2008) (Spain)).

166. See generally Rick Rouan, *Fact Check: Study Falsely Claiming Face Masks are Harmful, Ineffective is not Linked to Stanford*, USA TODAY, <https://www.usatoday.com/story/news/factcheck/2021/04/24/fact-check-study-falsely-claiming-masks-harmful-isnt-stanford/7353629002/> [<https://perma.cc/UM83-74HV>] (Apr. 26, 2021, 9:48 AM) (“Debunked claims about the danger of masks and their effectiveness in preventing the spread of COVID-19 again are circulating after a journal published an article from an author purportedly affiliated with Stanford University. Stanford has denied any current connection to the author, but the article gives voice to claims that face masks are ineffective at reducing transmission of the coronavirus and cause harmful oxygen deprivation.”).

167. See *id.*

168. Jon Hamilton, *Do Masks in School Affect Kids' Speech and Social Skills?*, NPR: HEALTH NEWS (Mar. 15, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/03/15/1086537324/schools-masks-kids-learning-speech-development> [<https://perma.cc/GCX9-DNFT>] (“Some parents express worry that masks might interfere with children's ability to learn or to socialize. Other parents fear that unmasking will lead to more COVID-19 cases. Amid the debate, a small but growing body of research is offering hints that masks do not have a significant impact on speech or social skills.”).

169. Katie Reilly, *School Masking Mandates Are Going to Court. Here's Why the Issue Is So Complicated*, TIME (Oct. 1, 2021, 9:40 AM), <https://time.com/6103134/parents-fight-school-mask-mandates/> [<https://perma.cc/6MHC-2MJ8>] (internal quotations omitted).

170. *Id.*

171. See *id.*

172. E.g., Fla. Exec. Order No. 21-175 (July 20, 2021), <https://www.flgov.com/2021/07/30/governor-desantis-issues-an-executive-order-ensuring-parents-freedom-to-choose/> [<https://perma.cc/6ESV-LYLM>].

173. See generally *Mandatory Face Coverings During COVID-19 Emergency*, ALCHULA CNTY. PUB. SCHS., <http://www.healthyllearningacademy.com/wp-content/uploads/2020/09/Emergency-Policy-0121ER-2020V2-Adopted-9-15-20-2.pdf> [<https://perma.cc/G7L8-9JAY>] (Sept. 15, 2020); Gerson Harrell, *Alchula County School Board Approves Two-Week Mask Mandate for Students*, GAINESVILLE SUN (Aug. 4, 2021, 11:09 AM),

board.<sup>174</sup> In New York City, one judge granted a request to keep a mask mandate for young children in place during the pendency of litigation challenging the City's requirement that preschoolers and young elementary school children wear masks.<sup>175</sup> The City's mayor intended to allow the mask mandate to expire on April 4, 2022,<sup>176</sup> but due to rising infection levels, kept the mandate in place past that date.<sup>177</sup>

The next frontier in the battle to balance parent and state rights will likely center on vaccine mandates for children.<sup>178</sup> In some states, the COVID-19 vaccine is already required for children to take part in school-related activities.<sup>179</sup> For example, in New York City, students at Queens High School were required to be vaccinated to attend prom.<sup>180</sup> Many public colleges require students to be vaccinated to attend class.<sup>181</sup> This may impact teens, as college often commences through dual enrollment programs or when teens enroll just shy of their 18th birthdays.<sup>182</sup>

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<https://www.gainesville.com/story/news/education/2021/08/04/alachua-county-school-board-approves-two-week-mask-mandate/5480600001/> [<https://perma.cc/7S26-CRYN>].

174. Recently, the Governor of Florida stated that Alachua County would not be penalized due to mask mandates. See Gershon Harrell, *Alachua County Public Schools Not at Risk of Losing Funding Due to Masking*, GAINESVILLE SUN (June 5, 2022, 9:46 PM), <https://www.gainesville.com/story/news/education/2022/06/05/desantis-decides-not-penalize-alachua-public-schools-masking/7497351001/> [<https://perma.cc/XNJ4-TCWX>].

175. Emma G. Fitzsimmons, *New York City Keeps Mask Mandate for Kids Under 5 as Cases Rise*, N.Y. TIMES, <https://www.nytimes.com/2022/04/01/nyregion/eric-adams-mask-mandate-children.html> [<https://perma.cc/BKG5-MJ7Q>] (Apr. 4, 2022).

176. Emma G. Fitzsimmons, *Preschoolers Can Shed Their Masks, Mayor Adams Says*, N.Y. TIMES (Mar. 22, 2022), <https://www.nytimes.com/2022/03/22/nyregion/mask-mandate-children-nyc.html> [<https://perma.cc/TL3H-CCQE>].

177. Lisa Rozner & Christina Fan, *New York City Keeping Mask Mandate for Kids 2-4 in Schools, Day Care Centers amid New COVID Infection Surge*, CBS NEWS (Apr. 3, 2022, 11:44 PM), <https://www.cbsnews.com/newyork/news/nyc-school-mask-mandate-kids-2-4-omicron-covid-surge-eric-adams-aswin-vasan/> [<https://perma.cc/4LCS-2LDE>].

178. See generally James Colgrove, *Parents Were Fine with Sweeping School Vaccination Mandates Five Decades Ago – But COVID-19 May Be a Different Story*, THE CONVERSATION (Oct. 22, 2021, 8:39 AM), <https://theconversation.com/parents-were-fine-with-sweeping-school-vaccination-mandates-five-decades-ago-but-covid-19-may-be-a-different-story-168899> [<https://perma.cc/WS8Y-NLQY>].

179. Carolyn Gusoff, *Queens High School Student Says NYC Requiring Vaccine to Attend Prom is Unfair Double Standard*, CBS NEW YORK (Apr. 5, 2022, 6:48 PM), <https://www.cbsnews.com/newyork/news/queens-high-school-student-says-nyc-requiring-vaccine-to-attend-prom-is-unfair-double-standard/> [<https://perma.cc/BYW6-72EP>].

180. *Id.*

181. See, e.g., Justin Jouvenal et al., *Virginia's Public Colleges and Universities Can't Require Coronavirus Vaccine, New GOP Attorney General Finds*, WASH. POST (Jan. 28, 2022, 10:47 AM), <https://www.washingtonpost.com/education/2022/01/28/colleges-virginia-vaccine-covid-19/> [<https://perma.cc/GQ83-57RY>]. While Virginia public colleges require students to be vaccinated against “measles, tetanus and four other diseases” to enroll, vaccination against Covid-19 is not required. *Id.* The Virginia attorney general asserts that public colleges and universities cannot mandate vaccines. *Id.*

182. For a discussion on vaccine mandates on college campuses, see generally Dorit R. Reiss & John Dipaolo, *Covid-19 Vaccine Mandates for University Students*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2021).

The *Prince* decision, explained in the preceding Part, addressed the right of states to mandate vaccines.<sup>183</sup> All states require public schoolchildren to receive vaccines; however, some states provide a path for parents to get exemptions based on medical or religious grounds.<sup>184</sup> As Professors Dorit Rubinstein Reiss and Lois A. Weithorn explained in their article *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*,<sup>185</sup> debates over vaccine mandates usually begin with *Jacobson v. Massachusetts*.<sup>186</sup> While this case involved an adult wishing to opt out of a state-mandated vaccine, the Court held that states could mandate vaccines for their citizens under their police powers.<sup>187</sup> Reiss and Weithorn note that the outcome in *Jacobson* was largely determined by the facts of that case.<sup>188</sup> The vaccine at issue protected “an easily-transmitted disease with a high fatality rate during an epidemic.”<sup>189</sup>

In many instances, young people may lack agency to consent or object to medical treatment.<sup>190</sup> Children considered mature may be able to make some medical decisions for themselves, and in many jurisdictions, competent children over a certain age are permitted to seek medical care and get medical advice without

183. See *supra* Section I.B.; *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” (citing *People v. Pierson*, 68 N.E. 243 (N.Y. 1903))).

184. See 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, 915–31 (2015).

185. *Id.*

186. *Id.* at 894 (“Most analyses of the legal justification for mandatory childhood vaccination policies begin with *Jacobson v. Massachusetts*.”); see also *Jacobson v. Massachusetts*, 197 U.S. 11, 27–28 (1905).

187. See Reiss & Weithorn, *supra* note 184, at 894–95 (“The Court in *Jacobson* grounded the state’s authority in the police power, which it determined to be potent enough to outweigh the liberty interests cited by Mr. Jacobson. The Court emphasized that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.’” (citing *Jacobson*, 197 U.S. at 26))).

188. See *id.*; *Jacobson*, 197 U.S. at 39.

189. Reiss & Weithorn, *supra* note 184, at 901.

190. See generally Jillian Kornblatt, *The Ashley Treatment: The Current Legal Framework Protects the Wrong Rights*, 10 MINN. J.L. SCI. & TECH. 773 (2009). This note explores a case involving a six-year-old girl who was sterilized at the request of her parents. *Id.* at 774–76. While her parents seemed to have made the decision believing it was in the child’s best interest (and with approval from the hospital’s ethics committee), the situation sparked outrage, with many arguing that Ashley’s constitutional rights had been violated. *Id.* at 775–79. See also *Newmark v. Williams*, 588 A.2d 1108, 1118 (Del. 1991). In *Newmark*, a court denied the state’s petition to require a minor to receive medical treatment over the objection of his parents. 588 A.2d at 1110, 1118 (“Applying the foregoing considerations to the ‘best interests standard’ here, the State’s petition must be denied. The egregious facts of this case indicate that [the child]’s proposed medical treatment was highly invasive, painful, involved terrible temporary and potentially permanent side effects, posed an unacceptably low chance of success, and a high risk that the treatment itself would cause his death. The State’s authority to intervene in this case, therefore, cannot outweigh the Newmarks’ parental prerogative and Colin’s inherent right to enjoy at least a modicum of human dignity in the short time that was left to him.”).



the consent of their parents.<sup>191</sup> At times, parents may only have access to some medical records for their teens—other records are kept separate, restricted from parental view.<sup>192</sup>

In some states, public health laws have applied equally to students enrolled in public *and* private schools.<sup>193</sup> In 1922, the Supreme Court dismissed a suit challenging a city mandate that required children receive vaccines prior to entry in public and private schools.<sup>194</sup> In *Zucht*, a child was denied entry into a public school after not presenting a vaccination certificate.<sup>195</sup> She was then denied entry into a private school for the same reason.<sup>196</sup> Using similar reasoning to that employed in *Jacobson*, the Court held that the state could, pursuant to its police powers, mandate vaccines for *all* school children, regardless of whether they attended a public or private institution.<sup>197</sup>

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191. See FLA. STAT. ANN. § 743.015 (“A circuit court has jurisdiction to remove the disabilities of nonage of a minor age 16 or older residing in this state upon a petition filed . . . [t]he judgment shall be recorded in the county in which the minor resides, and a certified copy shall be received as evidence of the removal of disabilities of nonage for *all matters* in all courts.”); § 743.06 (“Any minor who has reached the age of 17 years may give consent to the donation, without compensation therefor, of her or his blood and to the penetration of tissue which is necessary to accomplish such donation.”); § 743.065(1), (2) (authorizing consent by unwed pregnant minors and unwed minor mothers for her child); § 384.30 (“The consent of the parents or guardians of a minor is not a prerequisite for an examination or treatment [of sexually transmitted diseases].”); § 397.601(4)(a) (“The disability of minority for persons under 18 years of age is removed solely for the purpose of obtaining voluntary substance abuse impairment services from a licensed service provider, and consent to such services by a minor has the same force and effect as if executed by an individual who has reached the age of majority.”). Terminating a pregnancy is a special procedure that allows access without consent or notice only in certain circumstances. See § 390.01114 (“Parental Notice of and Consent for Abortion Act”).

192. *Does the HIPAA Privacy Rule Allow Parents the Right to See Their Children’s Medical Records?*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Dec. 19, 2002), <https://www.hhs.gov/hipaa/for-professionals/faq/227/can-i-access-medical-record-if-i-have-power-of-attorney/index.html> [<https://perma.cc/7FNR-LSF6>]. HIPAA also gives parents the right to access their minor child’s medical records in all but a few enumerated exceptions, specifically

[w]hen the minor is the one who consents to care and the consent of the parent is not required under State or other applicable law; [w]hen the minor obtains care at the direction of a court or a person appointed by the court; and [w]hen, and to the extent that, the parent agrees that the minor and the health care provider may have a confidential relationship.

*Id.* Until recently, parents could not access parts of their teens’ medical records in Florida. However, Florida’s Parents’ Bill of Rights, enacted in 2021, gives parents the ability to access all of their minor children’s medical records. See H.B. 0241, 2021 Leg., Reg. Sess. (Fla. 2021).

193. See, e.g., *Zucht v. King*, 260 U.S. 174, 175 (1922) (“Ordinances of the city of San Antonio, Texas, provide[d] that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination.”).

194. *Id.* at 177.

195. *Id.* at 175.

196. *Id.*

197. *Id.* at 176–77.

While precedent shows parents do not have a federal constitutional right to receive vaccine exemptions for their children, some states have allowed parents to opt out of school-entry vaccinations under limited circumstances.<sup>198</sup> Other states, like New York, did not allow parents to opt out of school-entry required vaccinations following measles outbreaks in communities with low vaccination rates.<sup>199</sup> Laws there required the vaccination not only for children in public schools but also for children in some private schools.<sup>200</sup>

During the earliest phase of the COVID-19 pandemic, parents may have disagreed over how to handle safety protocols, but these disagreements rarely made their way to court.<sup>201</sup> That said, one can imagine scenarios where lawyers and courts were tasked with handling disagreements between parents and children. For example, family lawyers recognized early in the pandemic that co-parenting during a pandemic could prove extremely challenging.<sup>202</sup> Parents who worked in medical fields were not as available to care for children as parents able to work from home.<sup>203</sup> Immunocompromised parents often did not feel safe allowing co-parents to exercise their visitation rights.<sup>204</sup> Despite the state's attempt to remove them from their

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198. Reiss & Weithorn, *supra* note 184, at 953 (“It also appears that religious exemptions to school-entry vaccination requirements are not constitutionally mandated. Yet, many states retain such exemptions because doing so serves certain other policy goals.”). The authors dive deeper into these issues, exploring the policy reasons why vaccine mandates may not be in society’s best interest. *Id.* at 892. They also explore potential consequences for parents who do not send their children to school because of vaccine mandates. *Id.* at 967 n.322, 972–75 (citing *Cude v. State*, 377 S.W.2d 816 (Ark. 1964)).

199. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 66-1.10 (2019), <https://regs.health.ny.gov/content/section-66-110-exclusion-event-disease-outbreak> [<https://perma.cc/HP39-ZHW4>].

200. See Emma G. Fitzsimmons et al., *New York Religious Schools Face a Vaccine Mandate. Will They Fight It?*, N.Y. TIMES, <https://www.nytimes.com/2021/12/06/nyregion/vaccine-mandate-religious-yeshiva.html> [<https://perma.cc/3YMK-MFXD>] (Dec. 9, 2021); see also Tyler Pager & Jeffery C. Mays, *New York Declares Measles Emergency, Requiring Vaccinations in Parts of Brooklyn*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/nyregion/measles-vaccination-williamsburg.html> [<https://perma.cc/FAW4-ZWL7>].

201. See Marcia Zug, *Co-Parenting in the Coronavirus Pandemic: A Family Law Scholar’s Advice*, THE CONVERSATION (Mar. 24, 2020, 5:46 PM), <https://theconversation.com/co-parenting-in-the-coronavirus-pandemic-a-family-law-scholars-advice-134093> [<https://perma.cc/DWM2-X2ZL>] (“With many family courts closed, divorced or separated parents will have to make up arrangements as they go along.”).

202. *Id.* (“Already, family lawyers around the country are being inundated with calls from anxious parents worried about returning children to co-parents who are not willing to practice social distancing. They are contemplating keeping their child away from the other parent, in violation of a shared-custody agreement – but wonder how courts will react.”); see also Ron Deal, *Better Safe than Sorry: Co-Parenting in the Age of Social Distancing*, U.S. NEWS & WORLD REPS. (Apr. 24, 2020, 7:15 AM), <https://health.usnews.com/wellness/for-parents/articles/co-parenting-during-the-coronavirus-pandemic> [<https://perma.cc/7E3C-PVA6>] (describing ten ways co-parents can improve cooperation during the pandemic).

203. See Deal, *supra* note 202 (warning against using a co-parents occupation as a medical provider as legal leverage).

204. See, e.g., Madison McBratney, Comment, *How to Stay-at-Home When You Have Two Homes: COVID-19’s Effect on Co-Parenting and Child Custody*, 33 J. AM. ACAD. MATRIMONIAL L. 225, 235 (2020).

parents' care, children who were alleged to be abused or neglected often wanted to remain home, away from those who might have been exposed to COVID. Other children perhaps were being seriously abused and should have been removed, but due to schools being closed were out of sight of teachers and other community members who might have been more likely to protect them by alerting authorities that the child was in danger.<sup>205</sup> Some co-parents disagreed over whether their shared child should receive the vaccine.<sup>206</sup> These cases at times were brought to family court. In these instances, a child's vaccine status could remain in limbo for months, as courts are backlogged and getting a court date takes time.<sup>207</sup>

In dependency court, many foster children were unable to visit with parents and siblings due to strict social distancing measures put into place by state agency officials.<sup>208</sup> Other foster children could not attend therapy or were unable to attend

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205. E. Jason Baron et al., *Suffering in Silence: How COVID-19 School Closures Inhibit the Reporting of Child Maltreatment*, 190 J. PUB. ECON. 1, 9 (2020) ("Our findings suggest that a vulnerable population—children at risk of maltreatment—are separated from a valuable resource when schools close, and this separation manifests as a reduction in maltreatment allegations. When schools are not in session, cases of child maltreatment are more likely to go unnoticed and unreported."); Elizabeth Swedo et al., *Trends in U.S. Emergency Department Visits Related to Suspected or Confirmed Child Abuse and Neglect Among Children and Adolescents Aged < 18 Years Before and During the COVID-19 Pandemic—United States, January 2019–September 2020*, 69 MORBIDITY & MORTALITY WKLY REP. 1841, 1841–42 (2020) (citations omitted) ("Despite known risk for child abuse and neglect during pandemics and preliminary reports of increased severity of child abuse and neglect in some facilities, official reports to child protection agencies have declined across the United States by 20%–70%, attributed to decreased in-person contact between children and mandated reporters (e.g., teachers, social workers, and physicians)."). *But see* Robert Sege & Allison Stephens, *Child Physical Abuse Did Not Increase During the Pandemic*, 176 J. AM. MED. ASS'N PEDIATRICS 338, 339 (2022) ("Recognizing the paradox of declining rates amid increased risks points to important lessons for prevention: perhaps a combination of family strengths, community resources, and government assistance has prevented many cases of child maltreatment.").

206. *See, e.g.*, Nina Feldman, *She Wants to Vaccinate Their Kids. He Didn't. A Judge Had to Decide*, WHYY (Mar. 21, 2022), <https://whyy.org/articles/divorced-parents-in-pennsylvania-taking-kids-covid-vaccine-disputes-to-court/> [<https://perma.cc/WH46-YJGN>] ("In Pennsylvania, decisions about children's health must be made jointly by parents with shared legal custody, so the dispute went to court. And Heather and Norm weren't the only ones who couldn't come to an agreement on their own. In the months since the vaccine was approved for children, family court judges across the commonwealth have seen skyrocketing numbers of similar cases: Divorced parents who can't agree on what to do.").

207. NAT'L CTR. FOR STATE CTS., CHILDREN, FAMILY AND ELDERS OVERVIEW: ADDRESSING BACKLOG AND NEW FILINGS 1 (2020), <https://nationalcenterforstatecourts.app.box.com/s/ti3w35ca7ba9dm79b17qnmdfbbmutfbs> [<https://perma.cc/Q52J-ASCU>].

208. *See* FLA. DEP'T. OF CHILD. & FAMS., COVID-19: METHODS FOR 30-DAY VISITS FOR CHILDREN, YOUTH, YOUNG ADULTS PLACED IN-STATE CARE 1 (2020), <https://web.archive.org/web/20210608000957/https://www.myflfamilies.com/general-information/dcf-training/docs/Final-COVID19-Guidance-Methods%20for%2030%20Day%20Visits.pdf> [<https://perma.cc/9QWV-N5G4>] ("[Case workers] should conduct a risk assessment . . . to determine cases that can be safely assessed using [remote] interviews to conduct face-to-face visits to meet the current 30-day visit requirement. Additionally, where there are concerns for the

court, despite having a statutory right to do so.<sup>209</sup> In delinquency court, some children were unable to get court dates to resolve their cases or had difficulty meeting with their attorneys.<sup>210</sup>

Children's rights were also implicated when teens wanted to get a COVID-19 vaccine over a parent's objection.<sup>211</sup> Laws regarding a young person's right to get a vaccine over a parent's objection vary from state to state.<sup>212</sup> Oregon allows teens over 15 to receive vaccines without parental consent.<sup>213</sup> Other states lower the age to 12 in certain circumstances.<sup>214</sup> And while 18 is generally considered the age of majority, in Alabama, young people under age 19 need parental consent to receive a COVID-19 vaccine.<sup>215</sup>

Writing for JAMA Pediatrics, Larissa Morgan, Jason L. Schwartz, and Dominic A. Sisti recommend that children older than nine with underlying medical conditions be able to consent to their own COVID-19 vaccination after an

contraction of COVID-19 from the caregiver, child, or parent, and/or the case manager, the department authorizes alternative means to conduct in-person face-to-face visits to meet the current 30-day visit requirement.”). *See generally* Abbie E. Goldberg et al., *The Impact of Covid-19 on Child Welfare-Involved Families: Implications for Parent-Child Reunification and Child Welfare Professionals*, 3 DEVELOPMENTAL CHILD WELFARE 203 (2021).

209. *See, e.g.*, FLA. STAT. ANN. § 394.4784 (“Minors; access to outpatient crisis intervention services and treatment.”).

210. *See generally* NAT'L JUV. DEF. CTR., DUE PROCESS IN THE TIME OF COVID: DEFENDERS AS FIRST RESPONDERS IN A JUVENILE COURT SYSTEM STRUGGLING WITH THE COVID-19 PANDEMIC (Mar. 2021), <https://www.defendyouthrights.org/wp-content/uploads/Due-Process-in-the-Time-of-COVID-19.pdf> [<https://perma.cc/K2DG-KETL>].

211. *See generally* Tara Haelle, *Can Teens Get Vaccinated if Their Parents Object*, NAT'L GEOGRAPHIC?, (2021), <https://www.nationalgeographic.com/science/article/can-teens-get-vaccinated-if-their-parents-object> [<https://perma.cc/JD3G-5CXJ>] (“The first answer depends on the state. But the second raises a host of thorny issues at the intersection of bioethics, the law, individual risk of disease, public health, and community responsibility. And it's an issue that potentially millions of teens may face.”).

212. *Id.*

213. OR. HEALTH AUTH., MINOR RIGHTS: ACCESS AND CONSENT TO HEALTH CARE 2 (2016), [https://www.portlandpediatric.com/wp-content/uploads/2021/06/MinorRights\\_OHA.pdf](https://www.portlandpediatric.com/wp-content/uploads/2021/06/MinorRights_OHA.pdf) [<https://perma.cc/MV4K-Z2YS>].

214. *See, e.g.*, Nina Feldman, *This 16-Year-Old Wanted to Get His COVID Vaccine. He Had to Hide It from His Parents*, NPR (2022), <https://www.npr.org/sections/health-shots/2022/02/16/1074191656/this-16-year-old-wanted-to-get-the-covid-vaccine-he-had-to-hide-it-from-his-pare> [<https://perma.cc/C3US-VCKD>] (California and Delaware allow children twelve and older to get “vaccines related to sexually transmitted infections”).

215. *Id.*; *see also* Susanna McGrew & Holly A. Taylor, *Adolescents, Parents, and Covid-19 Vaccination — Who Should Decide?*, 386 NEW ENG. J. MED. e2(1), e2(1)–e2(2) (citations omitted) (“Nine states and the District of Columbia, however, allow younger adolescents who are capable of giving informed consent to make general medical decisions on their own behalf. Four states and the District of Columbia have age thresholds that are lower than 18 years, whereas the other half don't specify a minimum age for independent medical decision making. Complicating matters further, some local jurisdictions have established their own regulations — San Francisco, for example, allows children as young as 12 to consent to receiving Covid-19 vaccines.”). For a complete listing of vaccination laws by state, *see Minor Consent Laws by State*, VAXTEEN, <https://www.vaxteen.org/consent-laws-by-state> [<https://perma.cc/8QKG-VKJ4>] (Jan. 21, 2024).

affirmative evaluation determining their competency.<sup>216</sup> Minors aged 12–14, the authors suggest, should be able to consent “without parental approval with support and facilitation from their clinicians and other trusted adult figures.”<sup>217</sup> The authors recommend that older youth (ages 15–17) be able to consent to vaccines without parental approval or notification.<sup>218</sup> Other public officials have taken similar positions.<sup>219</sup>

Legislators in the District of Columbia enacted a law allowing teens to get vaccinated without their parents’ knowledge;<sup>220</sup> however, a federal judge temporarily blocked the law, which “was initially aimed at allowing teenagers to have access to the HPV vaccine and the meningitis vaccine, as it was passed prior to COVID-19 vaccines becoming available. The law applies only to vaccines that are approved by the Food and Drug Administration.”<sup>221</sup> One of the parents challenging the D.C. law argued that the school was using manipulative tactics to get children to agree to accept vaccines over parental objections.<sup>222</sup> These parents objected to the vaccine for various reasons, including medical concerns and religious reasons.<sup>223</sup>

### ***B. Balancing Rights in the Classroom***

The explosion of conflict between parent, child, and state rights is not limited to issues related to the COVID-19 pandemic. It’s likely that a more pervasive cultural shift has taken place. One place where this cultural shift is apparent is in school districts, which are facing challenges to their curriculum materials and library collections. Just as parents are suggesting that states are intruding on their right to control the upbringing of their children in the context of COVID safety protocols, school boards are also facing pressure to adjust school curriculums to give parents more control over what children learn in the classroom.<sup>224</sup> In Florida, Governor

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216. Larissa Morgan et al., *COVID-19 Vaccination of Minors Without Parental Consent: Respecting Emerging Autonomy and Advancing Public Health*, 175 J. AM. MED. ASS’N PEDIATRICS 995, 995–96 (2021).

217. *Id.* at 996 (“In such cases, clinicians should notify minors’ parents of their immunization unless notification might pose a risk to the minor. In such cases, weighing the risk of parental retribution or the loss of the therapeutic relationship against the risk of minors contracting the virus would require a careful case-by-case determination.”).

218. *Id.*

219. *E.g.*, Nathaniel Weixel, *Federal Judge Blocks DC Law Allowing Kids to Get Vaccinated Without Parental Consent*, THE HILL (Mar. 21, 2022, 6:25 PM), <https://thehill.com/policy/healthcare/599111-federal-judge-blocks-dc-law-allowing-kids-to-get-vaccinated-without/> [<https://perma.cc/7YDF-5EBJ>].

220. *Id.*

221. *Id.*

222. *Id.* (“One lawsuit, brought by the father of a teenager at a public charter school, alleged that the District created a ‘pressure-cooker environment, enticing and psychologically manipulating’ their child to ‘defy their parents and take vaccinations against their parents’ wills.”).

223. *Id.*

224. *See, e.g.*, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022). Although H.B. 1557 was enacted into Florida state law, part of it is under injunction and further litigation is pending. *See* Complaint at 1, *Donovan ex rel. Parnell v. Sch. Bd. of Lake Cnty.*, No.

DeSantis signed a bill into law that will prohibit teachers from teaching, mentioning, or even acknowledging sexual orientation and identity to children in early grades.<sup>225</sup> The bill limits these conversations in other grades if they are “in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”<sup>226</sup> The bill also impacts how schools can talk to children about sexuality and gender issues in counseling and limits what schools can discuss with children privately.<sup>227</sup> The bill allows parents to bring forth a private cause of action if they believe the school has violated the law.<sup>228</sup> At least ten other states have since passed similar bills or have similar bills pending in their legislatures.<sup>229</sup>

Many states are also banning certain books from public school libraries.<sup>230</sup> Others are requiring schools to post their library catalogs online and give parents an opportunity to challenge the inclusion of books listed therein.<sup>231</sup> As Hannah Natanson wrote in the *Washington Post*:

PEN America, a nonprofit that advocates for freedom of expression, found there have been 1,586 book bans in schools over the past nine months. The bans targeted 1,145 unique books by more than 800 authors, and a plurality of the books—41 percent—featured prominent characters who are people of color. Thirty-three percent of the banned books, meanwhile, included LGBTQ themes, protagonists or strong secondary characters, and 22 percent “directly address issues of race and racism.”<sup>232</sup>

In a plurality opinion, the Supreme Court has held that local school boards cannot remove books from school libraries “simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”<sup>233</sup> In *Island Trees Union Free School District v. Pico*, the Court analyzed the specific

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5:23CV00381, 2023 WL 4090187 (M.D. Fla. 2023) (challenging the constitutionality of 2022 H.B. 1557 and 2023 H.B. 1069 and requesting preliminary and permanent injunctive relief and declaratory relief).

225. H.B. 1557 at 1, 4.

226. *Id.* at 4.

227. *See id.* at 1 (“[P]rohibiting school district personnel from discouraging or prohibiting parental notification and involvement in critical decisions affecting a student’s mental, emotional, or physical well-being; providing construction; prohibiting classroom discussion about sexual orientation or gender identity in certain grade levels or in a *specified manner*.” (emphasis added)).

228. *Id.* at 6–7.

229. Dustin Jones & Jonathan Franklin, *Not Just Florida. More Than a Dozen States Propose So-Called ‘Don’t Say Gay’ Bills*, NPR (Apr. 10, 2022, 7:01 AM), <https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills> [<https://perma.cc/H8J2-9QZK>].

230. Hannah Natanson, *More Books are Banned Than Ever Before, as Congress Takes on the Issue*, WASH. POST (Apr. 7, 2022, 1:13 PM), <https://www.washingtonpost.com/education/2022/04/07/book-bans-congress-student-library/> [<https://perma.cc/5B78-TLLP>].

231. H.B. 1467, 2022 Leg., Reg. Sess. (Fla. 2022).

232. Natanson, *supra* note 230.

233. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (quoting *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

circumstances that led to the removal of books from the school library.<sup>234</sup> In looking at the facts, it was clear that the school board did not follow the previously prescribed process for reviewing library materials.<sup>235</sup> “[T]he Board disregarded the Superintendent’s advice [to follow the existing policy], and instead resorted to the extraordinary procedure of appointing a Book Review Committee—the advice of which was later rejected without explanation,” the Court explained. “In sum, respondents’ allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners’ removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners’ motivations.”<sup>236</sup>

Based on the ad hoc nature of the removals, the Court found that there was a genuine issue of material fact regarding whether removal of the books was based on “constitutionally valid concerns” or was inappropriately ideologically motivated.<sup>237</sup> The Court remanded.<sup>238</sup>

*Pico* rests on a test that considered the free speech rights of students in school settings.<sup>239</sup> Citing *West Virginia Board of Education v. Barnette*, the Court held that “students’ liberty of conscience could not be infringed in the name of ‘national unity’ or ‘patriotism.’”<sup>240</sup> The Court noted that students had a right to individual self-expression and that they must be afforded “public access to discussion, debate, and the dissemination of information and ideas.”<sup>241</sup> These opportunities were minimized when the school board removed books from the school library.<sup>242</sup> And while the school board did have some discretion to determine which books were available to the students (based on, for example, educational suitability),<sup>243</sup> this discretion could not be motivated by the board’s desire to limit the students’ access to ideas with which they disagreed.<sup>244</sup>

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234. *See id.* 856–59.

235. *Id.* at 857 (“[T]he [School] Board appointed a ‘Book Review Committee,’ consisting of four Island Trees parents and four members of the Island Trees schools staff, to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books’ ‘educational suitability,’ ‘good taste,’ ‘relevance,’ and ‘appropriateness to age and grade level.’”).

236. *Id.* at 863.

237. *Id.* at 875.

238. *Id.*

239. *Id.* at 865 (“The nature of students’ First Amendment rights in the context of this case requires further examination.”).

240. *Id.* at 875 (citing *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624 640–41 (1943)).

241. *Id.* at 866.

242. *Id.* at 870.

243. *Id.* at 868 (“In rejecting petitioners’ claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content.”).

244. *Id.* at 870–71. The Court noted:

With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a

It is important to situate these issues with *Pierce*, *Meyer*, and *Yoder*.<sup>245</sup> In those cases, the Supreme Court recognized parents' rights to, for instance, add on to their children's curriculum by arranging instruction in a foreign language, send their children to a private school, and remove their children from formal schooling upon finishing eighth grade.<sup>246</sup> The Court granted parents the right to control these aspects of their children's educational journeys. But these cases can be distinguished from current debates in that the parents in *Pierce*, *Meyer*, and *Yoder* did not seek to change the mainstream state-sponsored curriculum.<sup>247</sup> In those cases, parents ultimately wanted to excuse their children from a portion of the state's educational system, but they did not seek to infringe upon the rights of teachers to teach the material or other students to learn the material approved by the local school authorities.<sup>248</sup> Indeed, these cases differ drastically from the challenges being brought forth by parents seeking to change public school curriculums today; these challenges instead seem to mirror the issues that *Pico* addressed.

Cases at the intersection of parent, child, and state rights usually place the state and the parents at opposite sides of the courtroom, assuming children will proverbially sit alongside their parents. As lawmakers enact legislation that

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narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question, then their removal would be 'perfectly permissible.' In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

*Id.* (citations omitted).

245. See generally *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

246. *Pierce*, 268 U.S. at 534–35; *Yoder*, 406 U.S. at 234; *Meyer*, 262 U.S. at 400.

247. *Pierce*, 268 U.S. at 532; *Yoder*, 406 U.S. at 212; *Meyer*, 262 U.S. at 398–99.

248. *Pierce*, 268 U.S. at 533; *Yoder*, 406 U.S. at 208–09; *Meyer*, 262 U.S. at 399.



strengthens parents' rights over what some parents deem to be the overreach of local government and teachers, perhaps the new battles in this arena will position children opposite their parents, with certain state actors sitting alongside the children. As legislatures strengthen parents' rights, children may find themselves yearning for guidance from courts and state officials (like teachers and counselors) when they disagree with their parents. However, since children are expected to abide by the will of their parents, it is unlikely that we will see children receiving that support. In fact, lawmakers may choose to preclude children from the conversation, instead deferring to the parents to speak for them.<sup>249</sup> And while this may be appropriate for younger children, it is questionable when applied to young people on the verge of adulthood.

### C. *Balancing Rights Online*

The conflicts between the rights of parents and children are not limited to the brick-and-mortar world. Conflicts often exist when children engage online without parental permission or in ways with which a parent disagrees.<sup>250</sup> Interestingly, most American families would not even recognize this as a conflict worth discussing because parents in the United States see parental oversight into teen online behavior as something to celebrate, not limit.<sup>251</sup> However, other countries see this issue differently.<sup>252</sup>

It is undisputed that social media and technology pose a multitude of risks to children.<sup>253</sup> Yet children receive very little protection from federal lawmakers.<sup>254</sup> COPPA was initially enacted in 1998 and has not been updated since 2013.<sup>255</sup>

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249. We see this when children wish to speak to teachers about gender and sexuality issues. In some jurisdictions, teachers can no longer have these conversations without first getting permission from parents. *See, e.g.*, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

250. *See generally* Steinberg, *Sharenting*, *supra* note 70.

251. *See generally* Monica Anderson, *How Parents Monitor Their Teen's Digital Behavior*, PEW RSCH. CTR. (Jan. 7, 2016), <https://www.pewresearch.org/internet/2016/01/07/how-parents-monitor-their-teens-digital-behavior/> [<https://perma.cc/MC4W-WFKX>].

252. Steinberg, *Sharenting*, *supra* note 70, at 863–64 (explaining that the international community recognizes a limited right to privacy for children consistent with their ages and abilities).

253. *See generally* Adina Farrukh et al., *Youth Internet Safety: Risks, Responses, and Research Recommendations*, CTR. FOR TECH. INNOVATION AT BROOKINGS (Oct. 21, 2014), <https://www.brookings.edu/research/youth-internet-safety-risks-responses-and-research-recommendations/> [<https://perma.cc/DHQ8-DKNE>].

254. *See generally* Lauren A. Matecki, *Update: COPPA Is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J. L. & SOC. POL'Y 369 (2010).

255. Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified 15 U.S.C. §§ 6501–05 (2012)); *see also* FED. TRADE COMM'N, FTC PROPOSES STRENGTHENING CHILDREN'S PRIVACY RULE TO FURTHER LIMIT COMPANIES' ABILITY TO MONETIZE CHILDREN'S DATA (Dec. 20 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-proposes-strengthening-childrens-privacy-rule-further-limit-companies-ability-monetize-childrens> [<https://perma.cc/5A8N-VAWZ>] (“The FTC last made changes to the COPPA Rule in 2013 to reflect the increasing use of mobile devices and social networking by, among other things, expanding the definition of personal

Lawmakers have proposed at least four updates to COPPA since 2021.<sup>256</sup> These bills have received widespread accolades from child safety experts and parents.<sup>257</sup>

These potential legislative updates will likely take away autonomy from young people.<sup>258</sup> Children have a right to privacy from their parents under the United Nations Convention on the Rights of the Child (“UNCRC”).<sup>259</sup> However, unlike all other United Nations member countries, the United States has signed but not ratified the UNCRC.<sup>260</sup> The UNCRC recently enacted Comment 25, which recognizes that children have rights in the digital world.<sup>261</sup> This document recognizes the need for children to be able to explore and engage online in a manner consistent with their general development and abilities.<sup>262</sup> Moreover, Comment 25 recognizes that

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information to include persistent identifiers such as cookies that track a child’s activity online, as well as geolocation information, photos, videos, and audio recordings.”).

256. See, e.g., Press Release, United States Representative Kathy Castor, Rep. Castor Reintroduces Landmark Kids PRIVCY Act to Strengthen COPPA (July 29, 2021), <https://castor.house.gov/news/documentsingle.aspx?DocumentID=403677> [<https://perma.cc/F2F4-A35E>].

257. *Id.*

258. For a discussion on proposed amendments to COPPA, see *House Subcommittee Discusses COPPA Updates, Teen Privacy*, COVINGTON (Oct. 6, 2011), <https://www.insideprivacy.com/advertising-marketing/house-subcommittee-discusses-coppa-updates-teen-privacy/> [<https://perma.cc/429W-W6LF>]. However, this does not discuss teens needing privacy from their parents. See also Shmueli & Blecher-Prigat, *supra* note 27, at 787–93.

259. See generally Convention on the Rights of the Child, *supra* note 146.

260. *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=_en) [<https://perma.cc/R22Q-FL6Z>] (last visited Jan. 23, 2024). For a discussion as to why the United States has not ratified the UNCRC, see Karen Attiah, *Why Won’t the U.S. Ratify the U.N.’s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 4:12 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/> [<https://perma.cc/MH3M-UB44>].

261. Gen. Comm. No. 25 (2021) on Children’s Rights in Relation to the Digital Environment, Comm. on the Rights of the Child. on its Seventy-Sixth Session, U.N. Doc. CRC/C/CG/25 (2021), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation#:~:text=In%20this%20general%20comment%2C%20the,the%20Optional%20Protocols%20thereto%20in> [<https://perma.cc/2Z29-RWX7>].

262. *Id.* at 2–4 (“In the present general comment, the Committee explains how States parties should implement the Convention in relation to the digital environment and provides guidance on relevant legislative, policy and other measures to ensure full compliance with their obligations under the Convention and the Optional Protocols thereto in the light of the opportunities, risks and challenges in promoting, respecting, protecting and fulfilling all children’s rights in the digital environment.”). See also *id.* at 4 (“States parties should respect the evolving capacities of the child as an enabling principle that addresses the process of their gradual acquisition of competencies, understanding and agency. That process has particular significance in the digital environment, where children can engage more independently from supervision by parents and caregivers. The risks and opportunities associated with children’s engagement in the digital environment change depending on their age and stage of development. They should be guided by those considerations whenever they are designing

parents and children may disagree at times on issues pertaining to the digital world, and it calls for states to ensure that children's rights are protected, even against unwanted intrusions by their parents.<sup>263</sup>

Scholars have argued that children should have the right to privacy from their parents online.<sup>264</sup> Kay Mathiesen argues in the *Journal of Ethics and Information Technology* that “it is ethically inappropriate to advise parents to monitor [online behavior], because, when children engage in informational exchanges with others, their privacy ought to be respected—even by their parents.”<sup>265</sup> Law Professors Benjamin Shmueli and Ayelet Blecher-Prigat suggest that children in the United States do not have a legally recognized right to privacy from their parents.<sup>266</sup> However, they argue that children *should* have this right, consistent with their evolving capacities and needs.<sup>267</sup> As many U.S. cases have noted, children have constitutional rights—the challenge is figuring out how they apply while also respecting a parent's right to control the child's upbringing.

Parents infringe upon their children's privacy in many ways.<sup>268</sup> They invade their children's privacy when they read their text messages or check their browsing histories. Parents also risk invading their children's privacy when they share about children online.<sup>269</sup> Parents are both the gatekeepers and gate openers of their children's personal information.<sup>270</sup> When parents share personal details about their children's lives with friends and family—no matter how small the audience—they take away children's ability to narrate their lives on their own terms.<sup>271</sup> Tracking apps like Life360 also allow parents to monitor children through GPS.<sup>272</sup> This is certainly useful for some children, and perhaps necessary for others. Scholars have argued that if parents do intend to monitor their teens online, they should be required to tell their children before doing so.<sup>273</sup> But even with disclosure,

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measures to protect children in, or facilitate their access to, that environment. The design of age-appropriate measures should be informed by the best and most up-to-date research available, from a range of disciplines.” (citations omitted).

263. *See id.* at 13.

264. *See generally* Shmueli & Blecher-Prigat, *supra* note 27. *See also* Kay Mathiesen, *The Internet, Children, and Privacy: The Case Against Parents Monitoring*, 15 ETHICS & INFO. TECH. 263, 265–67 (2013).

265. Mathiesen, *supra* note 264, at 264–69.

266. *See generally* Shmueli & Blecher-Prigat, *supra* note 27.

267. *Id.* at 787–95.

268. *See generally* Steinberg, *Sharenting*, *supra* note 70.

269. *Id.* at 846–55.

270. *Id.* at 842–44.

271. *Id.* at 842.

272. Christina Nguyen, *Monitoring Your Teenagers' Online Activity: Why Consent or Disclosure Should be Required*, 15 SEATTLE J. FOR SOC. JUST. 261, 270–77 (2016), <https://digitalcommons.law.seattleu.edu/sjsj/vol15/iss1/15> [<https://perma.cc/F2QQ-AADF>].

273. *Id.* at 265, 278–79 (citations omitted) (“First, hiding this type of monitoring from teens could result in major negative impacts to teens generally, such as stunting trust development and effective familial communication. Second, parents hiding the monitoring of their teens may also result in negative impacts to LGBTQ+ teens in particular, including narrowing the limited safe spaces that LGBTQ+ teens have and potentially causing a forced

monitoring still could be harmful.<sup>274</sup> Professors Shmueli and Bletcher-Pregat explain that “[c]hildren need physical privacy in order to develop their individuality, their independence and their self-reliance, as well as for the sake of their creativity and other attributes important to personal development.”<sup>275</sup>

It is outside the bounds of this Article to discuss whether such monitoring is appropriate. Instead, this Article suggests that our legal structures miss an opportunity for lawmakers and courts to engage in an objective debate centered on the limits of parental autonomy when older teens engage online.

### III. HEARING KIDS

Children have long been absent from discussions centered around parents’ rights. Cases that stand for parental empowerment, such as *Troxel*,<sup>276</sup> all but make a child’s agency invisible in court decisions. Even when a court does recognize that children may have rights that differ from their parents, courts in the United States have been reluctant to grant children rights within the family sphere.<sup>277</sup> This is likely due to longstanding notions that parents will almost always do what is best for their children.<sup>278</sup>

Many law schools offer a course titled Parent, Child, and the State. These three entities each represent one point of an inverted triangle.<sup>279</sup> In this relationship, the child is often at the bottom, controlled by the state and the parent.<sup>280</sup> As Dean Laura Rosenbury posits in her article *Between Home and School*:

This authority often is illustrated by inverting family law’s triangle image and positioning parents and the state at the top two points and children at the bottom point. This orientation of the triangle emphasizes that children are rarely given power to control their own destinies, but rather are subject to the decisions of either their parents or the state.<sup>281</sup>

In most cases, the child is not merely subject to the decisions of parents and state actors but is often unheard by courts considering how to best balance these interests.

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coming out. Finally, parents hiding their teen monitoring may heighten the risk of teens generally—and LGBTQ+ teens specifically—experiencing mental health issues and violence when those teens discover they are being monitored.”).

274. Shmueli & Blecher-Prigat, *supra* note 27, at 787–90.

275. *Id.* at 722.

276. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“The liberty interest at issue in this case—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.”).

277. See generally Steinberg, *Sharenting*, *supra* note 70, at 856; see also Shmueli & Blecher-Prigat, *supra* note 27, at 277–85.

278. See generally Steinberg, *Sharenting*, *supra* note 70, at 862.

279. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 839–41 (2007).

280. *Id.* at 839–40.

281. *Id.* at 839 (citing Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1318 (1994)).

This is apparent in protests about mask mandates and vaccines. Media attention has focused on parents protesting outside of school board meetings and state governments disagreeing with county and federal authorities.<sup>282</sup> Children may protest alongside their parents, but they are rarely seen protesting *against* them. Children are expected to abide by the will of those in charge: either their parents (at home) or their teachers (at school).<sup>283</sup> Children often disagree with both parents and teachers, but their opinions and positions on various matters are shaped by both, as well as by outside influences in their lives.<sup>284</sup>

#### A. Putting Children First

Many scholars, recognizing the critically important role parents play in a child's life, suggest that it is not only parents' rights but also relational rights that must be considered when deciding what is "best" for children.<sup>285</sup> These scholars suggest that, while parents can protect a child's broader interests, they should not "automatically trump the interests of all others—most importantly, those of children themselves."<sup>286</sup> Had *DeShaney* applied this standard, the state would have been found liable for Joshua's death, as the parent *and* the state shared a responsibility to keep him safe.<sup>287</sup> Similarly, this shift would likely change the outcome in other cases mentioned earlier in this Article, such as *Prince* and *Yoder*.<sup>288</sup>

Other countries take a view more consistent with this model. This view is reflected in the UNCRC and in legislation in many European countries.<sup>289</sup> For

282. Tim Craig, *Florida Legislature Passes Bill to Restrict LGBTQ Topics in Elementary School*, WASH. POST (Mar. 8, 2022, 11:47 AM), <https://www.washingtonpost.com/nation/2022/03/08/florida-bill-lgbtq-schools/> [<https://perma.cc/M5LE-W9YZ>].

283. Rosenbury, *supra* note 279, at 833–34, 839 (“[C]hildren are rarely given power to control their own destinies, but rather are subject to the decisions of either their parents or the state.”).

284. Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 743, 748–49 (2016) (citations omitted) (“The accepted position in case law and scholarship is that children’s interests are a separate, individualistic inquiry, and that they regularly compete and conflict with parental rights and state interests. Children’s lives, however, are not individualistic, but rather relationship-based, and sociological and psychological studies support the centrality of relationships to children’s well-being and development.”).

285. *Id.* at 748–49.

286. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 22, at 1452–53 (“Our approach instead redefines the best interests standard in light of five broad interests—generous in scope and rich in content—that serve as fundamental, practical guides for judicial, administrative, and legislative decision-making across all domains of children’s lives. Under a best interests standard explicitly oriented around children’s broader interests, decisionmakers will be equipped to weigh children’s interests in a transparent, coherent, and consistent way in the domains of family, school, juvenile justice, immigration, and other arenas, always with an eye toward maximizing their present and future well-being.”).

287. *Id.* at 1529 (“Under our framework, *DeShaney* was wrongly decided.”).

288. *Id.* at 1454–56.

289. See generally Convention on the Rights of the Child, *supra* note 146; see, e.g., Regulation 2016/679, of the European Parliament and of the Council of Apr. 27 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data and Repealing Directive 95/46/EC (General Data Protection

example, the United Kingdom enacted the Age Appropriate Design Code, geared at ensuring digital platforms consider children's input throughout all stages of development and usage regarding their products.<sup>290</sup> The Code sets forth standards for online services, geared to not only protect but also empower children to have more agency over their online experiences.<sup>291</sup>

The Code recognizes that there will be times when a parent's right to access a child's information may need to yield to a child's right to privacy.<sup>292</sup> Parental controls not only help protect children but

they also impact on the child's right to privacy as recognized by Article 16 of the same convention and on their rights to association, play, access to information and freedom of expression. Children who are subject to persistent parental monitoring may have a diminished sense of their own private space which may affect the development of their sense of their own identity. This is particularly the case as the child matures and their expectation of privacy increases.<sup>293</sup>

These principles are supported widely by the international community and offer a balance that resituates children on the top of the child, parent, and state pyramid.<sup>294</sup>

Dean Laura A. Rosenbury and Professor Anne C. Dailey recently offered courts a cogent path toward reimagining parental rights.<sup>295</sup> This new model creates stronger family bonds while also allowing children to experience the world through their own lenses.<sup>296</sup> It presumes parents will act in their children's best interest and calls "for strict scrutiny of any state action that threatens the separation of parent and child."<sup>297</sup> Rosenbury and Dailey advocate for a lower intermediate scrutiny standard of review for all other laws affecting children in order to permit the state to further children's agency and other interests, which become increasingly strong as children age.<sup>298</sup>

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Regulation), art. 8(1), 2016 O.J (L 119) 1, 37 ("The processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.").

290. See generally INFO. COMM'R OFF., AGE APPROPRIATE DESIGN: A CODE OF PRACTICE FOR ONLINE SERVICES (Oct. 17, 2022), <https://ico.org.uk/media/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf> [<https://perma.cc/H2SB-7CSR>].

291. *Id.* at 9–14.

292. *Id.* at 61–63.

293. *Id.* at 61. See also Convention on the Rights of the Child, *supra* note 146, at art. 12(1), 16(1).

294. See generally AGE APPROPRIATE DESIGN, *supra* note 290. The UNCRC recognizes that children "need special safeguards and care in all aspects of their life. There is agreement at international level and within the UK that much more needs to be done to create a safer online space for them to learn, explore and play." *Id.* at 5.

295. See generally Dailey & Rosenburg, *The New Parental Rights*, *supra* note 22.

296. See *id.* at 121–23.

297. *Id.* at 115, 120.

298. *Id.* at 111–17.

*B. Counsel for Children: Ensuring Young People are Heard in Court*

Children want to be heard. Just before Governor DeSantis signed the Florida Parental Rights in Education law, many students across the State walked out of class to protest the Bill.<sup>299</sup> These young people were concerned that, if passed, the law would be harmful to themselves and their peers.<sup>300</sup> The author’s son estimates that three-fourths of his high school walked out of class in protest.<sup>301</sup> He was quoted by the Washington Post as saying that “[t]his bill would not affect me directly, but I have many LGBTQ+ friends who would be impacted significantly . . . . People who were not directly affected by the bill walked out because they care about their friends, and will do whatever they can to make them feel safe.”<sup>302</sup>

These bills are enacted under the presumption that, because the laws would enhance parents’ rights, they ultimately enhance children’s lives as well because parents are presumed to look after the best interests of their children.<sup>303</sup> Yet the children protesting in Florida disagree. There, the new bill has been interpreted to suggest that children would not be able to speak confidentially to teachers regarding issues related to gender or sexual orientation.<sup>304</sup> They would not be able to receive counseling regarding these issues without parental consent.<sup>305</sup> Children recognize that this is against their stated interests. It is up to policymakers to determine whether this benefits children or is harmful to their well-being.<sup>306</sup>

State lawmakers are also trying to give parents more control over the curriculum presented to children and the books available in public school libraries.<sup>307</sup> Legislatures at the federal level have suggested that perhaps these measures violate children’s rights.<sup>308</sup> The House Committee on Oversight and Reform recently held a hearing regarding “the ongoing efforts across the country to

299. See Craig, *supra* note 282.

300. *Id.*

301. *Id.*

302. *Id.*

303. See generally *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

304. Casey Chapter, *Leon County School Board Approves LGBTQ Guide After Fierce Debate*, TALLAHASSEE DEMOCRAT (June 29, 2022, 3:37 PM), <https://www.tallahassee.com/story/news/education/2022/06/29/leon-county-school-board-approves-lgbtq-guide-dont-say-gay-moms-for-liberty-parental-rights/7765205001/> [<https://perma.cc/5RRJ-JHCV>] (noting that “[w]hat drew the most debate was a provision that a school will notify parents — by form — if a student who is ‘open about their gender identity’ is in a physical education class or on an overnight trip. Some teachers and students during the Tuesday night meeting said the policy will ‘out’ LGBTQ+ students — revealing their sexual orientation or gender identity without their permission.”).

305. See James Call, *Florida Legislature Passes ‘Don’t Say Gay’ Bill, Sends to Gov. DeSantis for Signature*, TALLAHASSEE DEMOCRAT, <https://www.tallahassee.com/story/news/politics/2022/03/08/dont-say-gay-bill-passed-florida-lawmakers-heads-gov-ron-desantis-lgbtq-youth-public-schools/9422420002/> [<https://perma.cc/F97Y-MGJX>] (Mar. 8, 2022, 1:50 PM).

306. See *id.*

307. Natanson, *supra* note 230.

308. *Id.*

ban books from schools and public libraries.”<sup>309</sup> At the hearing, the Committee heard from high school students who objected to the measures.<sup>310</sup>

Children are also finding ways to receive vaccines over parental objection. Websites such as [www.vaxteen.org](http://www.vaxteen.org) (created by a 16-year-old) provide information on vaccine consent laws in individual states.<sup>311</sup> The website also gives teens tools to talk to parents about vaccine hesitancy and addresses common misconceptions about vaccines.<sup>312</sup> At the same time, some young people may oppose getting vaccinated but can be required to do so at their parents’ insistence.

Young people have many tools to be able to express their concerns; however, many state laws limit children’s ability to learn from diverse audiences and embrace values different from those of their parents.<sup>313</sup> And while our legal system has long given parents the right to direct a child’s upbringing in ways that exclude these varied perspectives, our legal system has also long given state actors the right *and the responsibility* to offer, in state-sanctioned school settings, many points of view.

Courts are now faced with the challenge of determining the limits of state actors’ discretion in dictating a child’s education in public schools; courts must also consider the question of children consenting to their own COVID vaccinations, and they may soon decide how to balance a child’s right to privacy with a parent’s right to supervise and control the child’s upbringing.<sup>314</sup> As courts embark on solving these problems, they could feasibly allow children (through their assigned attorneys) a seat at the counsel table. Instead of litigating issues between parents and states as a two-way debate, courts can insist on hearing from children as essential parties.

Models already exist to hear from children when courts are attempting to balance the rights of parents, children, and states. For example, many states require the appointment of an attorney *ad litem* in cases of suspected child abuse or neglect.<sup>315</sup> These attorneys appear in court not to represent a child’s best interest but to represent a child’s stated interest and to ensure the court hears from the child in a developmentally appropriate manner.<sup>316</sup> This appointment is generally not geared at changing court *outcomes*, which are meant to follow the child’s best interest, but

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309. *Id.*

310. *Id.*

311. VAXTEEN, [www.vaxteen.org](http://www.vaxteen.org) (last visited Dec. 2, 2023) (“Young people taking responsibility for their own health to put an end to preventable disease.”).

312. *How to Talk to Your Parents About Vaccination*, VAXTEEN, <https://www.vaxteen.org/how-to-talk-to-your-parents> [<https://perma.cc/9N8Q-V44T>] (last visited Dec. 2, 2023) (providing a ‘Conversation Coach’ to simulate a real chat and provide accurate talking points); *Common Vaccine Myths*, VAXTEEN, <https://www.vaxteen.org/comm-on-vaccine-myths> [<https://perma.cc/4C2P-CF2Q>] (last visited Jan. 23, 2024).

313. *See generally* Shulman, *supra* note 36.

314. *See* Associated Press, *Utah’s New Social Media Means Children Will Need Approval from Parents*, NPR (Mar. 24, 2023, 2:20 AM), <https://www.npr.org/2023/03/24/1165764450/utahs-new-social-media-law-means-children-will-need-approval-from-parents> [<https://perma.cc/73HH-EW23>].

315. *E.g.*, FLA. STAT. ANN. § 39.01305(3)(e).

316. *See* § 39.01305(1)(b).



instead geared at changing the court *process*, recognizing that young people benefit when they are heard in matters concerning their lives.

There are also models for courts to hear from young people when they disagree with their parents. In *Bellotti v. Baird*, the Supreme Court provided teens with a judicial bypass mechanism when they wished to receive abortions over parental objection.<sup>317</sup> However, in the aftermath of *Dobbs*,<sup>318</sup> legislatures may create laws seeking to overturn the constitutional right to a judicial bypass mechanism as currently protected by *Bellotti*.<sup>319</sup>

Courts can increase opportunities for young people to be heard by enacting the following best practices in their jurisdictions:

Create a court-appointed counsel list of attorneys willing to represent children in court proceedings other than those in dependency and delinquency court. Seek funding to pay these attorneys for their service. Work with law schools to create opportunities for law students to work with pro bono attorneys representing children.

Consider whether, and to what extent, a court decision will impact young people. If there are young people named in the proceeding, provide them with court-appointed counsel. If there are no young people named in the proceeding, create a mechanism to provide children's rights organizations an opportunity to be heard on behalf of the children impacted by the decision. This mechanism could be a website that summarizes the proceeding at issue, a state bar listserv, or perhaps a new statewide policy organization that stands ready to gather information from young people impacted by court decisions.

Make courtrooms child-friendly to the extent necessary to ensure young people feel comfortable within the courtroom space. Hold hearings outside of school hours, make docket lines easily accessible, and offer mentors to students looking to better understand legal processes.

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317. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (“We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.”).

318. Jackson Women's Health Org. v. Dobbs, 587 U.S. 215 (2022).

319. See Janine Jackson, *They Will Find the Outcome That They Are Looking for and Work the Law Backwards to Make It Fit*, FAIR (July 19, 2022), <https://fair.org/slider/they-will-find-the-outcome-that-they-are-looking-for-and-work-the-law-backwards-to-make-it-fit/> [<https://perma.cc/R7FP-55SH>] (“And so that creates the pathway for what's called judicial bypass. And now there is a real push to not only upend judicial bypass and mandate parental consent, sometimes two-parent consent. But, for example, in the state of Texas, the Republican platform there is suggesting that if people stay on their parents' insurance as is allowed under the Affordable Care Act until they're 26, that their parents have to consent to a whole host of these kinds of procedures. So this is an attack on the autonomy of young people in really disturbing ways. And you put that in line with the decision that the Supreme Court released at the end of this term, the *Bruen* decision on guns, and we're functionally telling young people in this country that they have no right to feel secure in their bodies.”).

While not all court proceedings are substantively appropriate for young people, many are and simply need to be made procedurally accessible. Chief judges are often able to create rules of procedure in their circuits, and bar associations can encourage all state courts to ensure these procedures are followed.

***C. When the Constituent is a Child: Ensuring Young People are Heard by Legislatures***

Lawmakers could consider adopting the following best practices when writing laws focused on the rights of children, parents, and states. These best practices reflect international norms and values<sup>320</sup> and offer a cogent, child-centered path forward that could harmonize relationships central to a child's life. The value of young people in the legislative process cannot be understated, and it is recognized by child advocates worldwide.

Early in the legislative process, invite children to be heard by policymakers.

Create civics opportunities for youth that encourage them to understand and exercise their rights.<sup>321</sup> Fund these programs and ensure children are exposed to a diversity of viewpoints. Invite parents to attend the programs and foster dialog between children, parents, and teachers.

Consider adopting a new best interest standard as defined by Article 3 of the UNCRC.<sup>322</sup> This highlights the importance of “access to information, association with others, and play in supporting the child's development.”<sup>323</sup>

Recognize that children have interests in privacy that exist outside of the parent-child relationship.<sup>324</sup> Consider these interests in a separate analysis from the interests of the state and the parents.<sup>325</sup>

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320. JOINING FORCES, CHILDREN'S RIGHT TO BE HEARD: WE'RE TALKING; ARE YOU LISTENING? 2 (2021), [https://joining-forces.org/wp-content/uploads/2021/01/policy\\_brief-We\\_re\\_Talking-Are\\_You\\_Listening-EN.pdf](https://joining-forces.org/wp-content/uploads/2021/01/policy_brief-We_re_Talking-Are_You_Listening-EN.pdf) [<https://perma.cc/7BQ6-6429>] (“Children have the right to participate in decisions affecting their lives and to expect that decision makers will listen to and consider their views. The UN Convention on the Rights of the Child, adopted in 1989, and other subsequent legal and normative standards have reinforced and built upon this right.”).

321. There are many potential resources available for schools and teachers to help young people understand how to become active citizens and why it is important to have their voice heard. See, e.g., *Classroom Resource Library*, NAT'L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/we-the-civics-kids> [<https://perma.cc/LS4A-LDFV>] (last visited Jan. 24, 2024).

322. See Ursula Kilkelly, *The Best Interests of the Child: A Gateway to Children's Rights?*, in IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BEST INTERESTS, WELFARE AND WELL-BEING 51–66 (Elaine E. Sutherland & Lesley-Anne Barnes Macfarlane eds., 2016).

323. *Id.*

324. Shmueli & Blecher-Prigat, *supra* note 27, at 772.

325. *Id.*

Adopt laws that go beyond protecting children to include giving children ways to have agency over their own lives. The line between childhood and adulthood is arbitrary and does not sufficiently serve either children or adults.<sup>326</sup>

We can consider high school student Shreya Nallamotheu as an example.<sup>327</sup> Shreya spent her time working on an independent study focused on helping child influencers, with an end goal of influencing future legislation.<sup>328</sup> She wrote a legal memo which was sent to Illinois state Senator Dave Koehler.<sup>329</sup> From there, Shreya was able to communicate with Senator Koehler about a bill aimed at compensating child vloggers, a group that is not protected by Illinois's child labor laws.<sup>330</sup> "A lot of the time (the child influencers) are being forced by their parents to appear in videos, but then because they're a minor they don't have access to any of that money," said Shreya.<sup>331</sup> The bill passed unanimously in the Illinois Senate in March and is now awaiting a hearing in the Illinois House.<sup>332</sup>

Lawmakers and courts can listen to young people *and* still find that what they want is not in their best interest. This requires those in charge to listen to young people and meaningfully consider their positions. This will improve current lawmaking and decision-making processes and lead to more just outcomes.

### CONCLUSION

The old proverb *the apple doesn't fall far from the tree* suggests that children grow up to be similar to their parents. This may be what most parents hope for, but it is often not the case. It wasn't the case for Charlene, the teenager at the beginning of this Article who did not think her parent would be supportive of her same-sex relationship.<sup>333</sup>

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326. See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3–9, 24 (1986) ("Debating whether children should be treated like adults for one purpose but not for another misses these points. So does debating whether children are entitled to liberty or custody, although both of these norms contain hints of an important line of inquiry. That inquiry addresses the interrelationships and tensions between rights for children that constrain abuses of power by their parents and by the state, and rights for children that promote their abilities to form relationships of trust, meaning, and affection with people in their daily lives and their broader communities." (citing Elizabeth M. Schneider, *The Dialect of Rights and Politics: Perspective from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986))).

327. Emily Bollinger, *U-High Student Gets Bill Passed to Protect Child Influencers Online*, WGLT (Apr. 11, 2023, 4:04 PM), <https://www.wgl.org/local-news/2023-04-11/u-high-student-gets-bill-passed-to-protect-child-influencers-online> [<https://perma.cc/9CW3-K7XQ>].

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1195, 1199 (C.D. Cal. 2007) ("The Court has held that Charlene had a protected privacy interest in the non-disclosure of her sexual orientation within her home. If Charlene's expressions of her sexuality had not risen to the level of IPDA, clearly [the principal] could not have gratuitously told her parents that

In dicta, the court in Charlene's case made additional observations:

There is no doubt that Charlene's junior and senior years were very difficult times for her, and that dealing with her sexuality and her relationship [with her partner] took a heavy emotional and psychological toll. The self-imposed scars on Charlene's arm which she revealed at trial were very real; the fact that she considered suicide her senior year was very real. Virtually all teenagers have difficult times as they pass into adulthood. The record makes clear that passage is even more difficult for gay students.<sup>334</sup>

Here, the apple fell far from the tree. Charlene did not share a belief system with her parents. The state did not help her explore her own identity, nor did it try to mediate the conflict between a parent and a child who was less than a year away from legal adulthood.

Our legal systems try to protect those who cannot protect themselves, and many children need that protection. However, as children grow, our legal systems fail to embrace their growing independence and often make laws in the name of child protection that go against children's stated wishes. Those stated wishes all too often go unheard. This Article offers a model for how lawmakers and judges can invite young people into policy conversations and courtrooms, creating outcomes that are not only in the young person's best interest, but also consistent with our democratic ideals of liberty and justice for all.

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she was gay or that she was engaging in displays of affection, within appropriate bounds, with another girl. And he did not do that. [The principal] made his factually accurate disclosure in the context of discipline.”).

334. *Id.* at 1199.