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Neglect of Children's Health: Too Many Irons in the Fire

John E.B. Myers

Medical neglect occurs when parents decline to provide their child with essential medical treatment. When physicians cannot persuade parents to provide such treatment, the physicians must decide whether to file a report of medical neglect with child protective services. When a report is filed, social workers investigate and, in appropriate circumstances, file a petition in juvenile court seeking an order overriding the parents' refusal of treatment.

The law in all states authorizes court intervention in medical neglect. The issue is not whether states have authority to override parental medical decisions, but the circumstances under which such intervention should occur. This essay grapples with this issue.

I. THE PREVAILING APPROACH IN MEDICAL NEGLECT CASES: BALANCING THREE SETS OF INTERESTS

The judge in a medical neglect case balances three sets of interests. First, the right of parents to make medical decisions for their minor children. Second, the state's interests. Finally, the child's interests.

The right of parents to the custody of their child includes the right to make medical decisions on the child's behalf. Since young children lack capacity to
give informed consent to most forms of treatment, statutes and a long line of court decisions bestow on parents the authority to consent. In addition, parental decision making is supported by U.S. Supreme Court decisions upholding parental rights.

The state has two interests in medical neglect cases. First, the state has an interest in preserving life. Second, the state has parens patriae authority to protect children.

cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder.

4 See Dan B. Dobbs, The Law of Torts § 98, at 227 (2000) ("It is usually said that minors as a class lack legal capacity. Consequently, minors cannot consent to, say, medical procedures. Instead, parents or guardians must consent on their behalf."); *Newmark*, 588 A.2d at 1115 ("Parental authority to make fundamental decisions for minor children is also a recognized common law principle."). Adolescents who are sufficiently mature are permitted to make medical decisions. *See In re E.G.*, 549 N.E.2d 322, 327-28 (Ill. 1989).

5 See *e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972) (holding state cannot compel Amish parents to enroll their children if children have graduated from the eighth grade). But *see Prince*, 321 U.S. at 166 (holding parents must comply with child labor laws despite religious motivation for encouraging children to sell pamphlets).

6 See *People v. Rippberger*, 283 Cal. Rptr. Ill, 124 (Cal. Ct. App. 1991) ("[T]he state's interest in protecting and preserving the lives and health of children was sufficiently compelling to justify the inevitable infringement on Christian Science beliefs."); *ex rel. a Minor*, 379 N.E.2d at 1066 (describing a state "interest in protecting the ethical integrity of the medical profession, and in allowing hospitals the full opportunity to care for people under their control"); *State v. Hays*, 964 P.2d 1042, 1047 (Or. Ct. App. 1998) ("Protecting the lives and welfare of children is unquestionably a compelling state interest.").

7 *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261 (1990) (balancing state interest in preservation of human life with liberty interest); *In re a Minor*, 379 N.E.2d at 1066 ("[T]he State has an interest in the preservation of life.").

8 See *Hermanson v. State*, 570 So. 2d 322, 332 (Fla. Dist. Ct. App. 1990) ("The state, as parens patriae, has the responsibility to intervene between parent and child when there is demonstrated physical harm occurring to the child that puts a reasonable person on notice that medical intervention is necessary for the sake of the child's life."); rev'd on other grounds, 604 So. 2d 775 (emphasis added); *In re Karwath*, 199 N.W.2d 147, 150 (Iowa 1972) ("The State has a duty to see children receive proper care and treatment."); *Newmark*, 588 A.2d at 1116 ("The parens patriae doctrine is a derivation of the common law giving the State the right to act on behalf of minor children in certain property and marital disputes. More recently, courts have accepted the doctrine of parens patriae to justify State intervention in cases of parental religious objections to medical treatment of minor children's life threatening conditions." (citation omitted)); *ex rel. a Minor*, 379 N.E.2d at 1066 ("[T]he State has a long-standing interest in protecting the welfare of children living within its borders."); *State v. Perricone*, 181 A.2d 751 (1962); *In re Hudson*, 126 P.2d 765, 777 (Wash. 1942) ("The justification for the power to take a child away from depraved parents derives
As for the child, the rights and interests of children are murky. It is unclear to many Americans the extent to which children have “rights” when that word is defined as the authority to make autonomous decisions. Many adults believe children have “needs” not “rights.” Children need nurturance, love, guidance, education, and discipline so they can gradually achieve the maturity that is a precondition for the exercise of rights.

Given the disagreement and ambivalence about children’s rights, it is difficult in medical neglect cases to define precisely the child’s rights and/or interests. To complicate matters further, the focus on the child’s rights and interests is easily lost in the clash between parental rights and state interests. Although judges do not intentionally ignore children, the cacophony over parental rights and state interests drowns out the voice of the child.

With three sets of rights and interests before it—parent, state, child—the court balances the rights/interests to determine whether medical care should be authorized over parental objection. Each case is unique, and no two balancing processes are the same. Yet, there is a discernable pattern. When medical treatment is essential to save a child’s life, and treatment is likely to be effective and without serious or painful side effects, judges nearly always order treatment. On the other hand, if the treatment needed to save a child’s life is experimental, or if the treatment has a relatively low probability of curing the child’s condition, judges often defer to parents.

When medical treatment is important but not essential to preserve life, outcomes are unpredictable. The result turns on the facts of the case, with the odds favoring parents. In non-life threatening cases, judges consider the seriousness of the medical condition and the likelihood proposed treatment will be effective.

from the old chancery jurisdiction, exercised as parens patriae, which in former times was invoked chiefly for children with property or in connection with matrimonial decrees. While this ancient chancery doctrine is today turned to wider service on behalf of infants suffering from poverty, vice and neglect, this power is not unlimited.

See Newmark, 588 A.2d at 1117 (“The linchpin in all cases discussing the ‘best interests of a child,’ when a parent refuses to authorize medical care, is an evaluation of the risk of the procedure compared to its potential success.”); ex rel. a Minor, 379 N.E.2d at 1061–62; see also Donald C. Bross, Medical Care Neglect, 6 CHILD ABUSE & NEGLECT 375, 375–81 (1982).

See Newmark, 588 A.2d at 1117 (“Accordingly, courts are reluctant to authorize medical care over parental objection when the child is not suffering a life threatening or potential life threatening illness.”).

See Bross, supra note 9, at 377 (“Even if the outcome is not certain death, courts have ordered treatment where failure to treat carried only an incidental chance of death but imminent danger of brain damage. These cases lend support to an argument that not only death, but such substantial and unavoidable impairments as paralysis, blindness, retardation, deafness or crippling as well as brain damage, would justify court intervention over parental wishes.”).
II. FAULT LINES IN THE PREVAILING APPROACH TO MEDICAL NEGLECT DECISION MAKING

Is the prevailing approach to medical neglect optimal? For the reasons outlined below, I believe the answer is no. The disadvantages of the prevailing approach outweigh the benefits.

A. Legitimate Parental Rights and Illegitimate Parental Advantages

Under the prevailing approach to medical neglect, judges balance the interests of parents, child, and state.12 In theory, the interests should be roughly equal. In reality, parental rights receive the lion’s share of attention and deference. There are legitimate reasons to focus on parents. First, parents are the natural decision makers for their children. The love that runs from parent to child is instinctive and without parallel, making deference to parental choice reasonable in most cases.13 Second, respect for parental autonomy and family privacy run deep in our culture. Third, the long line of U.S. Supreme Court decisions affirming the sanctity of parental rights ensures a focus on parents. Given the entrenched and intuitively sensible belief that parents are normally the correct decision makers for children, it is not surprising that parental rights take center stage in medical neglect cases. The instinctive, cultural, and constitutional foundation for parental rights is settled and sensible.

In three respects, however, parents have illegitimate advantages in medical neglect litigation. First, the rights of parents are clear, whereas the interests of the child and the state are poorly defined, making it too easy to quickly defer to parents. Second, the U.S. Supreme Court has placed parental rights on such a high pedestal that parental rights tend to dominate other interests. Third, parents are present in court to assert their rights and to bring media and political pressure to bear. The child, by contrast, is silent—too young to formulate and defend a position in court. When these illegitimate parental advantages—which are seldom acknowledged in judicial opinions—are added to parents’ legitimate rights, the scales tip too far toward parents.

The right of parents to make medical decisions for their child is clear and legitimate, but when parental decisions seriously jeopardize a child’s health, the traditional balancing approach yields too much to parents. To achieve greater fairness for children, parental rights should be pulled off the pedestal

12 See ex rel. a Minor, 379 N.E.2d at 1061–62.
13 See Blackstone, Commentaries, supra note 1, at 446–47 ("The next, and the most universal relation in nature . . . being that between parent and child . . . . The municipal laws of all well-regulated states have taken care to enforce this duty; though Providence has done it more effectively than any laws, by implanting in the breast of every parent that . . . insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.").
and accorded less deference. This is not to downplay the importance of parental rights. Nor is the argument that the state is a better decision maker than parents. The point is that inflating the importance of parental rights distorts decision making.

B. Parental Religious Belief

In many medical neglect cases, parental refusal to consent to medical treatment for a child is based on the parents’ religious beliefs. Parents have the right to raise their children in a particular religious tradition. In the context of medical neglect, however, courts tend to give too much deference to parental religious belief. Affording undue deference to parental religious belief shifts attention away from what is best for the child. A focus on parental religious beliefs tips the balance inappropriately toward parents. The fact that parents base their decision on religion gives them an undeserved, religion-related advantage vis-à-vis similarly situated parents whose decisions are not predicated on religion. Consider two families. A child in each family has the identical medical condition, and both sets of parents refuse treatment considered necessary by doctors. One child’s parents refuse treatment for religious reasons, while the other parents refuse treatment for non-religious reasons. Parents asserting a religious objection should not have an advantage in court over non-religiously motivated parents. In reality, however, parents who play the “religion card” have a decided advantage and are more likely to prevail than parents who cannot play this trump card. It is wrong to treat equally situated parents differently simply because one set of parents is religious and the other is not.

C. State Interests Are Child Interests

In the traditional approach to medical neglect, the state’s interests are weighed in the balance along with the interests of the child and the parents. The state has parens patriae authority coupled with an interest in life. Upon close examination, however, the state’s interests are really no more than a reflection of the child’s interests. The state’s true interest in medical neglect cases is leveling the playing field to give children an equal voice. Unlike parents, who are competent to assert their rights, children are incompetent, and depend on the state to articulate their interests. It is the child’s future that is at stake.

As long as medical neglect cases are conceptualized as a balancing of interests, it should be acknowledged that the state does not have interests that

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are independent from the child. The state's interest is the child. A judge deciding a medical neglect case should balance two sets of interests—the child's and the parents'—not three. Otherwise, medical neglect cases have too many irons in the fire. Decision making in medical neglect cases is clarified by recognizing that the dispute is not between parents, state, and child, but between child and parents. The role of the state is two-fold: To provide a neutral forum to resolve the dispute; and, to articulate the child's interests.

The traditional balancing approach to medical neglect is unsatisfactory. Parental rights receive too much deference, and the interests of children receive too little. The state does not have interests apart from the child, and efforts to assign discrete interests to the state simply clouds proper analysis. Given the faults of the traditional approach, a new approach is needed to medical neglect.

III. A NEW APPROACH TO MEDICAL NEGLECT CASES

The traditional decision making process in medical neglect cases is faulty. Parental rights receive too much deference. Exaggerated attention on parental rights pulls the spotlight away from the child. As a result, children are sometimes denied medical treatment that will materially benefit them and, in some cases, save their lives.\(^{15}\)

An additional flaw in the traditional balancing process is confusion over state interests. The state does not have interests that are separate and distinct from the child. Efforts to factor so-called state interests into the balance have the undesirable effect of further shifting attention away from the child. In sum, the traditional approach is ineffective because parents receive too much deference, the state receives unwarranted attention, and children are left out in the cold.

Therefore, the traditional approach should be replaced with a presumption that parental medical decisions are entitled to respect. However, the presumption of deference to parental decisions should be rebuttable with evidence from two or more qualified physicians that a parental decision is more likely than not to cause serious harm to the child.\(^{16}\) Under such a test, probable death of the child would certainly be included within the definition of serious harm. Thus, when parents refuse medical treatment needed to preserve their child's life, the presumption is rebutted and parental rights are no longer part of the analysis. Once the presumption is rebutted, the court focuses entirely on the child's best interests.

\(^{15}\) See In re Phillip B., 156 Cal. Rptr. 48 (Cal. Ct. App. 1979).

\(^{16}\) The physicians who provide evidence of harm to a child should be appointed by the court and should be protected by absolute judicial immunity. In addition, a statute should be enacted to afford absolute immunity to all persons—professional and lay—who bring medical neglect cases to a court's attention, and who participate in the investigation or litigation of such matters.
In non-life threatening cases, serious harm occurs when parents refuse medical treatment that is more likely than not to cure, alleviate, or prevent an illness, condition, or injury that may deprive a child of normal or near normal development. As with life-and-death cases, when the presumption favoring parental decision making is rebutted in non-life threatening cases, parental wishes are no longer controlling, and the court determines the child’s best interest.

To determine the outcome that is best for a child, the judge considers the same factors employed in the traditional balancing approach but without the counterproductive rhetoric of balancing. In life-and-death cases, the judge considers the probability the child will die without recommended treatment, the likelihood treatment will save the child, and the side effects and length of treatment. In all but the most extraordinary cases, the judge should order treatment needed to save a child’s life. There may be cases where death for a child is preferable to life, but such cases are rare. 17

What is in a child’s best interest in a non-life threatening case? Case-by-case assessment is required, with the focus on the child’s condition, the proposed treatment, the harm suffered without treatment, the likelihood of successful treatment, and the side effects of treatment. In the final analysis, the judge asks, “What is best for this child?” 18 The focus is entirely on the child.

Even if the parental presumption is rebutted, a judge does not have to override the parents’ decision. After examining what is best for a child, a judge’s decision may often mirror parental wishes because the parents’ decision, usually, is best for the child.

IV. CONCLUSION

When children need medical treatment, parents are typically eager to consent. In the uncommon scenario where parents balk at treatment, negotiation between doctors and parents usually overcomes initial resistance. In the uncommon instance where doctors and parents are at odds, and doctors believe treatment is essential, the state intervenes through the court. Under the traditional approach to medical neglect, judges balance the rights and interests

17 An elderly individual with a terminal illness has had the sweetest gift life offers, life itself, and plenty of it. For a dying elder, it may be wise to decline treatment and allow nature to take its course. For a child, however, forgoing life-saving treatment deprives the child of everything that matters—the future. Thus, under a best interest of the child approach to medical neglect, judges should nearly always order treatment needed to save a child’s life.

18 See Newmark v. William, 588 A.2d 1108, 1116 (Del. 1991) (“All children indisputably have the right to enjoy a full and healthy life.”); In re Seiferth, 127 N.E.2d 820, 823 (N.Y. 1955) (Fuld, J., dissenting) (“Every child has a right, so far as is possible, to lead a normal life and, if his parents, through viciousness or ignorance, act in such a way as to endanger that right, the courts should, as the legislature had provided, act on his behalf.”).