PRIVACY FOR CHILDREN

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I. INTRODUCTION

There is growing concern over children’s privacy in today’s technological world. However, most of the research on children’s privacy focuses on third party threats.1 Little work has been done on children’s privacy at home and in their relationship with their parents, that is, privacy from their parents.2 This Article attempts to initiate a discussion on this timely issue. For most adults, the place where our privacy is most protected is in the home. For children, however, having privacy in their home is far from a certainty, and it is becoming ever less so. While it is true that parents have always been able to invade their children’s privacy by going through their

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schoolbags, reading their personal diaries and the like, it seems that most parents “prefer to trust their children unless given reason to do otherwise.” Reality, however, has changed, and nowadays children and youth are seen as at risk from online predators, pedophiles, cyberbullies, and other online dangers. Whereas “good parents” may have traditionally been encouraged to trust their children, today they are encouraged to safeguard their children, where this incontrovertibly involves invading their privacy in one way or another. Monitoring has become associated with good parenting, and the surveillance of children has been framed in a language of safety, protection, and care.\(^3\)

A recent *New York Times* article noted that years of headlines and horror stories in the popular media about the dangers to children online have yielded a crop of subscription services offering parents the means to monitor their children’s online activities.\(^6\) Children today are under increased surveillance at home, facilitated by Web monitoring services, Internet filters, mobile phones, and other monitoring technologies.\(^7\) The literature suggests that today’s children are “the most watched over generation in memory”\(^8\) and that

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5. Morris Williams et al., *Children and Emerging Wireless Technologies: Investigating the Potential for Spatial Practice*, in Proceedings of the SIGCHI Conference on Human Factors in Computing Systems 819, 820 (2005), available at http://portal.acm.org/citation.cfm?id=1055088 (noting that “the state in the UK can now openly question whether (urban) parents are good parents if they don’t know where their children are and what they are doing at all times and have control over them”) (emphasis in original); David Lyon, Surveillance Society: Monitoring Everyday Life 3 (2001) (discussing public perception of some types of surveillance as protection and care, which makes that surveillance palatable to the public).
the monitoring of children is seen as “a central characteristic of modern childhood.”

There is a widespread consensus that children show less concern than adults about privacy. However, very few empirical studies have demonstrated this. It seems more accurate to argue that privacy is important to children, though their conceptions of privacy and the private differ from those of adults. In relation to parental monitoring and surveillance, children express concern about their parents viewing personal information, and reproach their parents for their snooping.

To be sure, the primary role and responsibility of parents is to protect their children. This parental responsibility has been recognized as a constitutional parental right—a component of the parental right to privacy. Two presumptions underlie this parental, or parent-child relational, right. First, courts believe that a “parent possess[es] what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions.” Second,

11. See *Youth, Privacy and Reputation*, supra note 2, at 12.
12. See id. at 13.
13. See supra note 1.
14. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (invalidating a law mandating that all school language instruction be in English and discussing the parental duty to educate one’s children as “[c]orresponding to the right of control” parents possess); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925) (holding a law requiring children’s attendance at public schools unconstitutional because it interfered “with the liberty of parents . . . to direct the upbringing and education” of their children); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (holding that Amish parents could not be compelled against their religious beliefs to send their children to public school due in part to “the traditional interest of parents with respect to the religious upbringing of their children”) (citing *Pierce*, 268 U.S. at 535).
lawmakers presume that the “natural bonds of affection” lead parents to act in their children’s best interests.\(^{16}\) Since children are immature (at least until a certain age), they are in need of adult guidance, and society has delegated the task of child-raising to those most likely to perform it well.

Thus, when children’s physical or emotional safety is at stake, whatever interest in privacy they may have is outweighed by society’s interest in their protection. However, not all situations involve a child’s safety, and even when the goal is to prevent harm to the child, the harm of infringing upon the child’s privacy should also be taken into account. Nonetheless, in this context, children’s privacy is overlooked and given scant consideration, if any. The reason for this, we argue, lies in the failure to recognize a “privacy problem,” to use Daniel Solove’s terminology,\(^{17}\) in many situations that involve children. If no interest in privacy is recognized and no invasion of privacy is acknowledged, then any opposing interest will prevail, and the question of balancing privacy against that opposing interest will simply not arise.

In this Article we identify and address the difficulties in recognizing children’s privacy within their family unit. We locate two different types of difficulty. The first is connected to the privacy discourse itself, which has so far been developed almost exclusively in reference to the privacy of adults and is applied only awkwardly to the rights of children. We also note the different perceptions regarding the value and importance of privacy for adults in comparison to perceptions that undervalue children’s privacy. Where children are concerned, privacy is considered to be dangerous and inherently associated with risk. We demonstrate that theories of privacy can be adapted to include children and point to the value and significance of privacy for children.

The other difficulty in recognizing a “privacy problem” for children in their homes and family relationships concerns the nature of the parent-child relationship, as well as the general tension between the privacy of the family as a relational entity and the privacy of its individual members. Taking into consideration the implications of a notion of children’s privacy for the parent-child relationship, we point to the value and significance of individual privacy for significant family relations, including a right for children to privacy from their parents.

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16. See id.
Looking critically at the prevailing legal situation in American jurisprudence, in which privacy is recognized for adults but less so for children, and does not exist for children vis-à-vis their parents, this Article suggests a balanced children’s right to privacy from their parents. In order to build this balanced right we draw on concepts from the influential work of scholars who see privacy as dignity and respect, as well as on principles from the international arena, specifically the United Nations Convention for the Rights of the Child [hereinafter UNCRC], to argue why children’s right to privacy should be recognized in their relationship with their parents, and to what extent.

We contend that children should have an individual right for privacy against their parents, while recognizing that this right should be qualified according to the child’s age and evolving capacities. We integrate both national and international notions into a combined thesis that opens up a discussion on children’s privacy from their parents and other family members.

Section II introduces the prevailing approaches to privacy and explains why these conceptions can be applied only awkwardly to the rights of children. Section III surveys the almost non-existent recognition of children’s rights under American law, especially regarding their privacy in their relationships with their parents. We address children’s privacy vis-à-vis their parents in various contexts: abortion, education, online privacy, and wiretapping. We note that parents’ right to direct the upbringing of their children prevails over children’s right to privacy, and also direct attention to the sometimes mistaken assumption of a unity of interests between parents and children in issues that concern children’s privacy. We then consider children’s right to privacy under the UNCRC and observe that the UNCRC is particularly vague with regard to children’s privacy. Section IV moves toward a recognition of children’s privacy in the family. It explores the dilemma of intrafamilial privacy in an attempt to analyze children’s privacy within the family. It is suggested that privacy is an essential dignity interest for children and—though necessarily constrained by the limits of childhood autonomy—should be protected as a concept essential to human development, even within the realm of childhood. Section V binds the international principle of the evolving capacities of the child, presented in an

earlier section, with our call for an independent individual right for children vis-à-vis their parents, and thus presents an individual balanced right. Section VI concludes.

II. PRIVACY AND CHILDREN

A. Prevailing Understandings of Privacy and their Adaptation to Children

Neither the Constitution and the Bill of Rights, nor any of the Amendments to the Constitution, contains an express provision protecting the right of privacy. However, the Supreme Court has recognized privacy as a concept that is deeply rooted within the Constitution’s framework.\(^\text{19}\) The Court has also made it clear that this right extends, at least in some instances, to children.\(^\text{20}\) Despite its dominant position in American jurisprudence, the meaning and definition of privacy remain far from clear.\(^\text{21}\) For over a century, scholars have struggled to define privacy, and numerous essays have grappled with this question.\(^\text{22}\) The indeterminacy surrounding the

19. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (discussing the right to privacy in the marriage relationship as “a right . . . older than the Bill of Rights—older than our political parties, older than our school system”); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The makers of our Constitution . . . conferred, as against the government, the right to be let alone.”).

20. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (holding that a state “may not impose a blanket provision requiring the consent of a parent . . . as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy” in order to protect their right of privacy); Carey v. Population Servs. Int’l, 431 U.S. 622, 643 (1979) (mandating that, if a state requires parental consent for a minor’s obtaining an abortion, “it must also provide an alternative procedure whereby authorization for the abortion can be obtained”) (internal citations omitted).


22. This discussion began with Warren & Brandeis’ definition in 1890. See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890). See also text accompanying infra note 28 (discussing Warren and Brandeis’ conception of privacy). For various attempts to define privacy, see generally Edward Bloustein, Privacy as an Aspect of Human Dignity, 39 N.Y.U. L. Rev. 962 (1964); Charles Fried, Privacy, 77 Yale L.J. 475 (1968); Ruth Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421 (1980); Tom Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233 (1977); Hyman Gross, The Concept of
right to privacy is partly attributed to the inclusion of a variety of issues under this concept, including: informational privacy, physical privacy, and decisional privacy.


Informational privacy is protected under the Fifth Amendment’s limitations on compulsory disclosure and non-discrimination. See Anita L. Allen, Privacy in Health Care, 4 Encyclopedia of Bioethics 2120, 2126 (Thomas G. Post ed., 3d ed. 2004).

24. Physical privacy includes the right to seclusion and solitude, free speech and association, and involves respect for a person’s physical integrity, home, and correspondence, and the respect for one’s person and surrounding environment. See generally Gail Lasprogata et al., Regulation of Electronic Employee Monitoring: Identifying Fundamental Principles of Employee Privacy through a Comparative Study of Data Privacy Legislation in the European Union, United States and Canada, 2004 Stan. Tech. L. Rev. 4 (2004). It is thought to be protected under the First, Fourth and Fourteen Amendments. See Silverman v. United States, 365 U.S. 505, 511 (1961) (discussing Fourth Amendment protections where police officers used defendants’ heating system to eavesdrop on their conversations); Kyllo v. United States, 533 U.S. 27, 31 (2001); Allen, supra note 23, at 2126.

25. Decisional privacy is also called substantive privacy or autonomy privacy or individual autonomy. It is considered to be protected under the Fourteenth Amendment’s guarantees of liberty and due process. See Allen, supra note 23, at 2126–27. Recently, it has been considered to be protected by the First Amendment’s right of association as well. See Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984); Jessica Niezgoda, Note, Kicking Ash (Trays): Smoking Bans in Public Workplaces, Bars, and Restaurants: Current Laws, Constitutional Challenges, and Proposed Federal Regulation, 33 J. Legis. 99, 111 (2006). Thus, decisonal privacy deals with limiting “government intrusion into intimate decisions,” such as whether to smoke, use birth control, or obtain an abortion. Dennis D. Hirsch, Protecting the Inner Environment: What Privacy Regulation can Learn from Environmental Law, 41 Ga. L. Rev. 1, 12–13 (2006). See also Roe v. Wade, 410 U.S. 113 (1973).
In this Article, we do not wish to delve into the chaos of privacy jurisprudence. Rather, our aim is to direct attention to the neglected aspect of children’s privacy in the home.\textsuperscript{26} The extensive scholarly engagement with conceptualizing privacy has been written almost entirely with the adult rights-bearer in mind and has paid no special attention to the application of the concept to children in general, and vis-à-vis their parents in particular.

The concept of privacy has various definitions.\textsuperscript{27} The most famous, and still the most common, formulation of the right to privacy is Samuel D. Warren and Louis D. Brandeis’ “right to be let alone,”\textsuperscript{28} whereby privacy means the right to decide to break off contact from others and to be free of outside interference. This definition has been criticized as ambiguous, as well as both over- and under-inclusive.\textsuperscript{29} Other approaches to privacy have been construed as falling largely within one of three main camps:\textsuperscript{30} privacy as access,\textsuperscript{31} and privacy as autonomy or control.\textsuperscript{32} The privacy-as-access
approach envisions the right to privacy as the right to limit the ways in which others have access to you. Thus, under this approach, privacy includes secrecy, anonymity, and solitude. Privacy-as-control means the right to exercise control over oneself and over information about oneself. Under this approach, a person would have the right to determine what others know about him or her and how they are able to obtain such information.

It has been suggested that privacy-as-control and privacy-as-access are, in essence, quite similar, and can therefore be reconciled. The main difference is that access focuses more on interpersonal relationships, while control focuses on the individual in isolation. Be that as it may, both of these approaches have also been considered either too limited or too broad to conceptualize privacy.

Daniel Solove has recently argued for abandoning attempts to find a unitary common denominator for privacy, which, in his view, have thus far proven unsuccessful. Instead, he suggests that we understand privacy as “an umbrella term that refers to a wide and disparate group of related things.” Whether one adopts one of the abovementioned conceptions of privacy or accepts Solove’s argument that privacy should be understood in a more pluralistic way, it is clear that each of the existing understandings of privacy raises difficulties when applied to children.


32. See Laurence Lessig, Code Version 2.0 228–30 (2006); Westin, supra note 23, at 7, 171. For a critique of this approach, see Schwartz, supra note 25 at 816–17 (summarizing the author’s various critiques of approaches to understanding privacy); Sonia Livingstone, Taking Risky Opportunities in Youthful Content Creation: Teenagers’ Use of Social Networking Sites for Intimacy, Privacy and Self-Expression, 10 New Media Soc’y 393, 404 (2008).

33. See Solove, supra note 10, at 25; Charles Fried defines privacy as “the control we have over information about ourselves.” Fried, supra note 22, at 482 (emphasis in original). Therefore, for him, privacy only makes sense when intrusion is possible and we are limiting the access of others to us, not when no intrusion could possibly exist (such as on a desert island). Id. at 482–83. Privacy is therefore control over both the quality and the quantity of the information. Id. at 483. See also Michael Birnhack, Control and Consent: The Theoretical Basis of the Right to Privacy, 11 Mishpat Umimshal—Law and Government 11, 40–41 (2007) (Isr.) (discussing these two conceptions of privacy and the advantages of both).

34. Solove, supra note 10, at 20–21, 28–29.

35. See id. at 45.
The traditional understanding of privacy as the right to be left alone has been criticized, mainly by communitarian scholars, for erecting walls between individuals and depicting people as isolated, rather than connected, as well as for preferring the rights of the individual over the common good. This criticism is of particular relevance when considering children’s privacy rights in that children are inherently dependent upon and connected to others. Also, in most cases, they should not and must not be “let alone.” Indeed, if this is the only way to understand the right to privacy, then recognizing children’s right to privacy would surely have to be seen as “abandoning” them to their rights.

Understanding privacy as access or control also raises difficulties when applied to children because of their limited autonomy. Privacy-as-control assumes the possibility, whether cognitive or psychological, of individual control—an assumption that may be true for an adult but is almost certainly not in the case of a five-year-old child. This difficulty surfaces in various other contexts where society may seek to afford children rights that are equivalent or analogous to those of adults, since children do not fit the individualistic and autonomous mold that forms the basis for the traditional liberal understanding of rights.

36. See, e.g., Amitai Etzioni, The Limits of Privacy 183–84 (1999) (arguing that the traditional understanding of privacy neglects the common good in favor of individual privacy).

37. See generally Bruce C. Hafen, Children’s Liberation and the New Egalitarianism: Some Reservations about Abandoning Children to Their ‘Rights’, 1976 BYU L. Rev. 605 (critiquing the application of traditional understandings of privacy to the context of children and family life). Cf. Angela Campbell, Stretching the Limits of “Rights Talk”: Securing Health Care Entitlements for Children, 27 Vt. L. Rev. 399, 400 (2003) (arguing that the “immense physical, emotional, and psychological dependence children have on their families, their communities, and the state, makes placing them within the traditional rubric of individual rights impossible”).

38. Many children (in particular older children) want control over their lives and sometimes seek to limit access to their diaries, mobile phones and computers. Children even find ways to circumvent parental efforts at monitoring, and thus use several strategies to maintain their privacy from their parents such as, inter alia, using multiple e-mail addresses, texting to friends, and using passwords. See Livingstone, supra note 1, at 139; Youth, Privacy and Reputation, supra note 2, at 33–34.

39. See Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 Cardozo L. Rev. 1747, 1842 (1993). Woodhouse notes that the growing recognition of children as rights holders during the 20th century was viewed as a counterreaction to the historical perception of children as their father’s property. Id. at 1755–56. See also Mary Ann Mason, From
B. Perceptions of Children’s Rights

A common distinction in the scholarly literature and discourse on children’s rights is between autonomy rights and needs-based (welfare) rights, the latter emphasizing children’s dependency and need for nurturing and protection. Various scholars suggest that a needs-based framework is the proper way to understand children’s rights, as it seems to fit more easily within the established social understanding of the role of children in society. This approach predominated in the drafting of the 1959 UN Declaration on the Rights of the Child. Most children’s rights scholars, however, recognize children’s autonomy rights as well, and it was this latter approach that was adopted in the 1989 UNCRC, the definitive and most comprehensive document ever written on the rights of the child. Nonetheless, perhaps in acknowledgment of the difficulties in

Father’s Property to Children’s Rights: The History of Child Custody in the United States 6 (1994) (describing in detail views arguing that, previously, “the law regarded children as a property right, to be treated as a chattel”) (internal citation omitted). However, as Woodhouse notes, “the strategy embraced by antebellum African-Americans and early feminists of seeking rights equivalent to those of free white men provide[d] children no easy cure,” due to their limited autonomy. Woodhouse at 1842.


43. See, e.g., Buss, supra note 40, at 36 (noting that her discussion of how rights should be afforded to children focuses on autonomy rights); Martin Goggenheim, A Paradigm for Determining the Role of Counsel for Children, 64 Fordham L. Rev. 1399, 1408 (1996) (observing that “[i]n some circumstances, children possess virtually the same autonomy rights as adults”).

44. UNCRC, supra note 18.

applying autonomy-based rights to children, and especially to young children, the UNCRC also adopted a guiding principle referring to the evolving capacities of the child.46

One of the first individuals to argue for a legal recognition of children’s evolving capacities was Hillary Rodham Clinton in an oft-cited article published in 1973. 47 Though mentioned only twice in the UNCRC,48 the evolving capacities principle is one of its most important values.49 It arises, like all UNCRC articles, from an application of the principle of the child’s best interest.50 Under this principle, children should be granted rights, but in a stage-by-stage manner that accords with and pays attention to their physical and mental development and capacities.51 Needs-based rights should be recognized in children from the moment of birth. At every age a child should always be kept safe, fed, and clothed. However, autonomy rights should be granted to children in stages according to their evolving capacities. In this way, children will not be “abandoned” to their rights.52

signature obliges a State Party to refrain from acts that would defeat the object and purpose of the treaty, until the State Party declares an express intention not to become a party. Vienna Convention on the Law of Treaties, (Treaty on Treaties) art. 18(a) (opened for signature May 23, 1969) 1155 U.N.T.S. 331, 336 (entered into force Jan. 27, 1980). Furthermore, given that almost two hundred nations have ratified the convention, its ethos and principles should be taken into account; however, discussing the question whether the fact that it was signed and ratified by almost all the countries in the world constitutes customary international law is beyond the scope of this article.

46. See UNCRC, supra note 18, art. 5; see also text accompanying infra notes 47–52.


48. See UNCRC, supra note 18, arts. 5, 14.


50. See UNCRC, supra note 18, art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).


52. See supra note 37.
C. Privacy as Both an Autonomy-Based and a Needs-Based Right for Children

Children’s right to privacy is specifically recognized under Article 16 of the UNCRC, which states: “(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation; (2) The child has the right to the protection of the law against such interference or attacks.”

It is our view that the right to privacy, as articulated by the UNCRC, does not fit neatly within either the category of autonomy or that of need. While, as we noted, many common perceptions of privacy emphasize its connection with autonomy, it is also a need of every individual, including children. The fact that children need privacy from individuals and entities external to the family is well recognized, both in law and academic literature. There is a wide recognition that children need privacy to protect them against the manipulations of commercial entities, as well as against the government, child pornographers, pedophiles and others. In all

53. UNCRC, supra note 18. This provision parallels that of the general provision regarding the right to privacy found in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). See Basic Documents on Human Rights 1948, 188 (Ian Brownlie & Guy S. Goodwin-Gill eds., 4th ed. 2002) (discussing the ICCPR, opened for signature Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]). According to Article 44 of the UNCRC, the States Parties undertook to submit to the Committee periodic reports on their actions to ensure children’s rights according to the UNCRC. This Committee calls on States Parties to apply the provisions of the UNCRC by amending sections of their own law so as to harmonize with it. The Committee also supervises the progress of the States Parties in implementing the UNCRC by making recommendations in response to the states’ periodic reports. In addition, the Committee gives general comments and organizes conferences on topics related to the interpretations of provisions of the UNCRC. The Committee has interpreted this Article as granting protection against the infringement of privacy by both the state and other individuals. See Human Rights Committee, General Comment 16, reprinted in Rachel Hodgkin & Peter Newell, UNICEF, The Implementation Handbook for the Convention on the Rights of the Child 201 (1998).


55. See Susan C. Herring, Questioning the Generational Divide: Technological Exoticism and Adult Construction of Online Youth Identity, in Youth, Identity, and Digital Media 71, 80 (David Buckingham ed., 2008); Amanda Lenhart & Mary Madden, Pew Internet & Am. Life Project, Teens, Privacy and Online Social Networks 2 (2007), available
these contexts, children’s interest in and right to privacy is considered to be best protected by their parents. After all, it is parents who are obliged by law and by nature to provide for their children’s needs, and who are considered to be in the best position to do so. However, children need privacy from their parents as well.

Children 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. Children’s privacy needs include a space in the home that belongs to them and that is respected by both parents and siblings. In addition, children, even young ones, have a need for interaction management, choosing when and how to interact with others, as well as information management, choosing when to disclose information to others. This need can and should be fulfilled first and foremost in the home. However, it requires recognizing children’s right to privacy within the family, which raises a thorny dilemma.

III. THE DILEMMA OVER INTRAFAMILIAL PRIVACY

In the Supreme Court’s jurisprudence on the right to privacy, privacy in the familial context occupies a special place. Nonetheless, the focus of this jurisprudence has been on relational privacy, that is, the privacy of a relationship or relational unit, such as the marital relationship or the parent-child relationship, as against


56. For psychological literature on (even very young) children’s need for privacy, see Christine A. Readdick, Solitary Pursuits: Supporting Children’s Privacy Needs, 49 Young Children 60 (1993); Karyn D. McKinney, Space, Body, and Mind: Parental Perceptions of Children’s Privacy Needs, 19 J. Fam. Issues 75 (1998); Ellen Jacobs, The Need for Privacy and the Application of Privacy to the Day Care Setting, Paper presented at the Biennial Meeting of the Society for Research in Child Development (New Orleans, Louisiana, March 17–20, 1977). However, according to some research privacy is a by-product of self-development, meaning that children do not fully comprehend privacy and thus do not require it until they are self-conscious. McKinney at 76.

57. See McKinney, supra note 56, at 84–86.

58. See id. at 76–77.

59. See id.

60. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that a law prohibiting the use of contraceptives violated the privacy inherent in
third parties (individuals as well as the state).\textsuperscript{61} The U.S. Supreme Court has maintained that there exists “a private realm of family life which the state cannot enter.”\textsuperscript{62} Less attention has been paid to the privacy rights of the individual family members vis-à-vis one another.

Consideration of the right to privacy as operating between individual family members raises a tension between two perceptions of the family unit.\textsuperscript{63} The first is the individualistic approach, which considers the family to be a collection of individuals, each of whom has separate interests and rights. The second is the family-collectivist approach, which conceives of the family as a unit, having almost a separate legal personality.\textsuperscript{64}

On one hand, the treatment of the family as a unit upon which rights may be conferred has been heavily criticized for causing systematic harm to the most vulnerable members of the family, usually women and children.\textsuperscript{65} In recent decades, much feminist

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\item \textsuperscript{61} For discussions of the rights of parents to make determinations about their children’s education, see, for example, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). Details of these cases were discussed supra at note 14.
\item \textsuperscript{62} Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
\item \textsuperscript{64} See, e.g., Douglas E. Abrams et al., Contemporary Family Law 369 (2006) (describing courts’ historical practice of entertaining tort actions against third parties for injuries to the family unit but not for tort actions between family members); Hui, supra note 63, at 18; Ron Shor, The Significance of Religion in Advancing a Culturally Sensitive Approach towards Child Maltreatment, 79 Families Soc’y 400, 401 (1998).
\item \textsuperscript{65} See, e.g., David J. Herring, Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children, 26 Loy. U. Chi. L.J. 183, 243 (1995) (noting commentators’ criticism of Supreme Court decisions that do not make clear whether privacy rights in the family setting are individually or
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research has been devoted to exposing how the family as a “unit” or an “entity” is no more than a social construction, a fiction that “has hidden a multitude of wrongs.” This is particularly true of the concept of “the family’s privacy,” which has served as an ideological tool with which to shield the stronger members of the family (usually men, in their role as husbands and fathers) in cases of abuse of the weak (usually women and children). Feminists have thus insisted that the “private” is “public.”

On the other hand, recognizing the rights (in general, not just the right to privacy) of individual family members against each other does not seem to fully fit the family setting, where family members are believed to share some sense of collectivity, a sense “that ‘we’

family-based, when “family-based privacy rights have historically resulted in a substantial loss of individual rights, especially for women and children”); Barbara Bennett Woodhouse, The Dark Side of Family Privacy, 67 Geo. Wash. L. Rev. 1247, 1251–59 (1999) (describing the dangers of an entity-based doctrine of family, including the subjugation of a woman’s will to that of her husband, the inability of a child to exit abusive family situations, and the condoning of domestic violence).

66. Woodhouse, supra note 65, at 1252. In fact, any theoretical framework that confers upon a “unit” or an “entity” rights, in practice, bestows power on the stronger members of this entity. Id. at 1254. See also Yael Tamir, Siding With the Underdogs, in Is Multiculturalism Bad for Women? 47, 47–52 (Joshua Cohen et al. eds., 1999) (discussing similar problems in bestowing rights upon groups in order to preserve “the group’s” tradition and protect “the group’s” interests).

67. See Woodhouse, supra note 65, at 1254 (noting that “the drawing of a ‘duty free zone’ of privacy, off-limits to ‘state intervention’ except in cases of shocking acts of violence and emotional abuse, has masked, and even invited, endemic and deeply destructive abuses of power”). See also Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2151–53 (1996) (describing how courts used the concept of marital privacy to effectively immunize wife beaters from prosecution).

exist as something beyond ‘you’ and ‘me.’ Communitarian theorists have argued that the language of rights, which focuses on the personal interests of individual family members, is inappropriate for family life and might harm the sense of collectivity as well as the intimacy and loving relationships that are (or should be) an integral part of every family. Again, this fear is particularly pertinent to the right of privacy, especially if understood as the right to be left alone, which would create the image of family members as separated rather than connected.

The dilemma over the privacy of the familial relationship as against the privacy of the individual family members is particularly acute regarding parent-child relations, which are inherently characterized by dependency and connectedness. Children, especially those of a younger age, are dependent upon their parents and require an intense and intimate relationship with their parents to satisfy their physical and emotional needs. This understanding is reflected in the well-known psychological attachment theory, which emphasizes the significance of a strong and meaningful relationship with key adult figures for children’s healthy development.


70. Mary Ann Glendon criticizes the American discourse of rights that shifted the image of familial relationships “from a community of interests to an alliance of independent individuals.” Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 123 (1991). See also Michael J. Sandel, *Liberalism and the Limits of Justice* 33 (1982) (arguing that in the “more or less ideal family situation,” members of the family interact in a spirit of generosity, with genuine affection. An appeal to the rights of the individual members is seldom made in this situation, “not because injustice is rampant” but because appealing to such rights “is pre-empted by a spirit of generosity” in which the family members are rarely inclined to claim their fair share).

71. The debate surrounding the various versions of the attachment theory, and in particular whether there exists one single bond that is more critical to the child than all other attachments, or whether children need and are dependent upon a network of attachments, each of which is important to the child, is irrelevant for purposes of this paper. For discussion of this debate, see Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J. Gender L. & Pol’y 1, 16–19 (2009) (discussing the attachment theory and its critiques). See also Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. Rev. L. & Soc. Change 347 (1996) (arguing against the idea that children form a bond with a single caregiver).
recognized and protected has been long and difficult.\textsuperscript{72} Recognizing merely relational privacy as a protection of the parent-child relationship as a unit is problematic, since there is a danger that children and their interests will be obscured from view and that those interests will simply be subsumed within the unity of the family.

Obviously, this dichotomous presentation of the “entity’s rights perception” against the “individual rights perception” is somewhat distorted. Individual rights shape and create relationships, including familial relationships.\textsuperscript{73} The individual right to privacy, in particular, plays an important role in enabling, creating, and shaping intimate familial relationships. We suggest that understanding children’s privacy as a relational individual right (alongside the protection of privacy of the relationship) assists in better defining and shaping the parent-child relationship, as shall be elaborated upon later in the Article.\textsuperscript{74}

We move next to a critical examination of children’s right to privacy as recognized by the law, with a special emphasis on children’s privacy in their relationship with their parents. We demonstrate how the difficulties we raised in the above discussion—the awkward application of existing privacy discourse to children, and the difficulties in recognizing an individual right to privacy within the parent-child familial relationship—lead to an inadequate conception of children’s intra-familial privacy under the law.

IV. AN INADEQUATE CONCEPTION OF INDIVIDUAL PRIVACY FOR CHILDREN UNDER AMERICAN AND INTERNATIONAL LAW

In this section we survey American case law and legislation and point to its very limited recognition of children’s individual right

\textsuperscript{72} As an example of the relationship between feminism and children’s rights, see Minow, \textit{supra} note 41, at 3 (“[R]ights for children . . . epitomize feminist concerns about the importance of connection, care-taking, and social relationships.”); Benjamin Shmueli, \textit{What Has Feminism Got to Do with Children’s Rights? A Case Study of a Ban on Corporal Punishment}, 22 Wis. Women’s L.J. 177 (2007) (suggesting that feminism at least partially influenced the movement to ban corporal punishment but recognizing both positive and negative implications of such influence).

\textsuperscript{73} See Minow & Shanley, \textit{supra} note 63, at 99–104 (offering an account of family relations that reconciles this tension by acknowledging individual family members while recognizing their interrelationships and connections).

\textsuperscript{74} See \textit{infra} Section V.
to privacy. We demonstrate that, while children’s need for privacy has been recognized, discussion of this need for privacy has mainly referred to individuals and entities external to the family, with parents conceived as the primary guarantors of their children’s privacy. Some recognition has also been given to the evolving capacities and autonomy of children where their privacy is concerned, but again, when children’s privacy has been asserted against their parents, complex dilemmas have arisen. We look into the examples of abortion, online privacy, educational privacy, and wiretapping in order to elucidate the complications underlying the current understanding of children’s privacy. We note that either parent’s right to direct the upbringing of their children has prevailed over their children’s right to privacy or that the law assumes a unity of interests between parents and children.

Next we consider the international arena and examine children’s right to privacy under the UNCRC. We note that even under the UNCRC there is confusion as to children’s privacy in their relationship with their parents.

A. Children’s Privacy and Abortion

In 1967, in In re Gault, the Supreme Court stated what would today seem quite obvious: minors are “persons” entitled to the constitutional protection of their rights. However, in In re Gault, and later in Tinker v. Des Moines Independent Community School District, the recognition of children’s constitutional rights did not set children in opposition to their parents. Rather, in the first cases to have addressed children’s constitutional rights, the parents supported their children’s claims for constitutional protection against the state.

The first cases in which parents did not support the recognition of their children’s rights, and in which parental opposition might have been expected, were those that concerned children’s right to privacy. In 1976, in Planned Parenthood v. Danforth, the Court recognized children’s right to privacy in the

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75. 387 U.S. 1, 4 (1967).
77. See Robert B. Keiter, Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court’s Approach, 66 Minn. L. Rev. 459, 468 (1982) (“In 1976, the [Supreme] Court was confronted for the first time with the issue of whether to extend constitutional protection to children when there is no parental support for the claim and parental opposition might be expected.”).
78. Id.
context of abortion.\textsuperscript{79} A term later, in \textit{Carey v. Population Services International},\textsuperscript{80} children’s privacy was recognized in the context of access to contraceptives. In 1979, in \textit{Bellotti v. Baird}, the Court held that a Massachusetts statute requiring parental consent before a minor could obtain an abortion unconstitutionally restricted the abortion rights of minors.\textsuperscript{81}

Various scholars, among them Michael Sandel, Laurence Tribe, and Louis Henkin, have argued that the abortion and contraception cases are really about autonomy and not about privacy.\textsuperscript{82} Others, such as Anita Allen and Daniel Solove, do consider these cases to involve privacy problems,\textsuperscript{83} and point to the connection between decisional privacy (under which abortion and contraceptive cases are usually classified) and informational privacy.\textsuperscript{84} At the theoretical level, the link between decisional and informational privacy is certainly applicable in relation to abortion among minors, as well as minors’ access to contraception. Apart from a child’s interest in making the decision on her own, minors may have interests in concealing the pregnancy (and most probably the fact of their being sexually active) and the planned abortion from their parents. However, this aspect of children’s informational privacy right against their parents has not been recognized as constitutionally protected by the Supreme Court.

\textsuperscript{79} 428 U.S. 52, 74–75 (1976) (plurality opinion).
\textsuperscript{80} 431 U.S. 678, 693 (1977).
\textsuperscript{81} 443 U.S. 622, 681 (1979).
\textsuperscript{84} See Solove, supra note 10, at 166–67 (discussing, in particular, the constitutional right to information privacy developed by the Supreme Court in \textit{Whalen v. Roe}).
In *Bellotti*, it seemed that the Court was at first receptive to children's informational privacy when it held that a minor is entitled to go directly to a court to receive approval for an abortion without having to first notify her parents.\(^85\) The Court held that if a minor is found mature, a court must authorize her to act without parental consent. If she is not found mature and competent to make the decision regarding abortion on her own, it would be for the court to decide whether to permit an abortion based on her best interest.\(^86\) The Court specifically declared that parents’ interest in their minor daughter’s abortion decision does not outweigh her right to privacy.\(^87\)

*Bellotti*, however, concerned a requirement for parental consent to abortion that would give parents veto power over their daughter's decision to abort under the relevant Massachusetts law. In *H.L. v. Matheson*,\(^88\) the question of children's informational privacy right was truly at the center. In *Matheson*, the Court considered and sustained a Utah statute requiring parental notification in advance of the performance of an abortion on a minor. The Court held that “parents had an important guiding role to play in the upbringing of their children, which presumptively included counseling them on important decisions.”\(^89\) In 2006, the same Court adhered to this formulation in the *Ayotte v. Planned Parenthood of Northern New England* decision.\(^90\) *Ayotte* also concerned a statute, now repealed, requiring parental notification of a minor’s decision to have an abortion, but not parental consent.\(^91\) In acknowledging the

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\(^{85}\) 443 U.S. at 681.

\(^{86}\) *Id.* at 647–48.

\(^{87}\) *Id.*


\(^{89}\) *Id.* at 410 (internal citations omitted).


\(^{91}\) The Court also addressed the exceptions to the notification requirement provided by the statute:

The Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132:24–132:28 (Supp. 2004), allows for three circumstances in which a physician may perform an abortion without notifying the minor’s parent. First, notice is not required if the attending abortion provider certifies in the pregnant minor’s record that the abortion is necessary to prevent the minor’s death and there is insufficient time to provide the required notice. N.H. Rev. Stat. Ann. § 132:26(I)(a). Second, a person entitled to receive notice may certify that he or she has already been notified. § 132:26(I)(b). Finally, a minor may petition a judge to authorize her physician to perform an abortion without parental notification. The judge
role states can assign to parents in their minor daughter’s abortion decisions, the Court stated that “states unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their ‘strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.’” The conclusion is that children have no constitutionally protected right to conceal information from their parents.

B. Children’s Privacy and Wiretapping: The Vicarious Consent Doctrine

The vagueness over children’s privacy in their relationship with parents surfaces in case law beyond the Supreme Court as well. Though no case addresses this question directly, several cases have arisen in which a parent has eavesdropped on a telephone conversation to which the child was a party, a situation that indirectly touches upon this question.

A federal statute provides for criminal and civil liability for people engaged in electronic spying in certain situations. However, there is an exception to that prohibition when one party consents to the wiretap or recording. Although it is not written into the statute, must so authorize if he or she finds that the minor is mature and capable of giving informed consent, or that an abortion without notification is in the minor’s best interests. § 132:26(II). These judicial bypass proceedings shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay, and access to the courts shall be afforded to the pregnant minor 24 hours a day, seven days a week. § 132:26(II)(b), (c). The trial and appellate courts must each rule on bypass petitions within seven days.


94. See Daniel R. Dinger, Should Parents Be Allowed to Record a Child’s Telephone Conversations When They Believe the Child Is in Danger?: An
courts have generally applied the doctrine of “vicarious consent,” which allows a parent to consent to wiretapping on a minor child’s behalf.\textsuperscript{95} Thus, a parent can record a child’s conversation, even if she objects, because the parent consents for the child, thus implicating the rule that permits recording when one party has consented. This doctrine reflects an assumption about the unity of interests between parent and child. However, courts have not granted parents unfettered autonomy, saying instead that, in order for the vicarious consent doctrine to apply, the parent must be acting in good faith and have a reasonable belief that he is acting in the child’s best interest.\textsuperscript{96}

In 1993, the District Court of Utah became the first to make use of the doctrine of vicarious consent.\textsuperscript{97} The court noted that vicarious consent is necessary because minors cannot give consent, and parents need to be able to monitor their children’s conversations in certain situations where it is in the child’s best interest.\textsuperscript{98} Indeed, the court even noted that the parent has a statutory responsibility to act in the best interest of the child, thus hinting that parents who do not monitor their children’s conversations when it is in their best interests might not be fulfilling their legal duties of protection.\textsuperscript{99}

The vicarious consent doctrine was expanded in 1998 by the Sixth Circuit in \textit{Pollock v. Pollock}.\textsuperscript{100} The court held that parents can consent not only on behalf of small children but on behalf of older children as well, so the child’s own ability and capacity to actually consent is not mutually exclusive with the parent’s ability to consent on the child’s behalf.\textsuperscript{101} In the original vicarious consent case, \textit{Thompson}, the children were extremely young (aged three and five), a fact which was emphasized by the District Court.\textsuperscript{102} However, in \textit{Pollock}, although the child was 14 years old, the Court of Appeals still held that a parent can record a child’s conversation out of a true concern for the child, given the parent’s good faith and an objectively reasonable belief that doing so is in the child’s best interest.\textsuperscript{103} However, the Court of Appeals did stress that a parent cannot record


\textsuperscript{95} See id. at 962, 963.

\textsuperscript{96} See id. at 970.


\textsuperscript{98} Id. at 1544.

\textsuperscript{99} See Dinger, \textit{supra} note 94, at 970–71.

\textsuperscript{100} 154 F.3d 601, 610 (6th Cir. 1998).

\textsuperscript{101} See Dinger, \textit{supra} note 94, at 973–74.

\textsuperscript{102} 838 F. Supp. at 1543.

\textsuperscript{103} See Dinger, \textit{supra} note 94, at 964.
a child's conversations simply by declaring that it is in the child's best interest, but rather that the best interests of the child be viewed with the standard of objective reasonableness.\textsuperscript{104}

While a majority of courts, including criminal courts, have accepted the doctrine of vicarious consent in wiretapping situations, some courts have rejected it.\textsuperscript{105} In the criminal arena, the doctrine of vicarious consent has been used to allow the submission of recorded telephone conversations in the prosecution of an adult in charges where a child was involved. In \textit{Bishop v. State},\textsuperscript{106} the trial court adopted the view that a parent can surreptitiously tape-record a minor's telephone conversations with a third party—and do so without violating federal and state wiretap statutes—on the same basis of good faith and objective reasonableness found in the civil context.\textsuperscript{107}

These wiretapping cases open the way to a process of balancing children's right to privacy and parents' duty to protect their children. As we discuss in greater detail below, we call for recognition of the requirement of such a balance. However, we must first acknowledge that a "privacy problem" exists in children's relationships with their parents before we can attempt to find that balance. In this respect we consider the vicarious consent doctrine an improper means, because, when applied, it assumes a unity of interests between children and parents. The doctrine also does not recognize that their interests might be separate, and that, if so, the protection of the child should prevail.

\textbf{C. Children's Online Privacy Act and Educational Privacy}

The federal government enforces strict requirements regarding children's online privacy.\textsuperscript{108} In October 1998, motivated by

\begin{itemize}
\item \textsuperscript{104} See Pollock, 154 F.3d at 610 ("[w]e stress that . . . this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest'").
\item \textsuperscript{105} See Dinger, supra note 94, at 967–70. Thus far, courts in Michigan and Washington State have rejected the doctrine, but it should be noted that Washington State law requires that two parties of a conversation consent for a wiretap to be legal, thus complicating the vicarious consent issue. Id.
\item \textsuperscript{106} 526 S.E.2d 917, 918 (Ga. Ct. App. 1999).
\item \textsuperscript{107} Id. at 918.
\item \textsuperscript{108} Andrea J. S. Stanaland et al., \textit{Providing Parents with Online Privacy Information: Approaches in the US and the UK}, 43 J. Consumer Aff. 474, 479 (2009) (discussing several mechanisms through which the U.S. Federal Trade Commission mandates that web site operators disclose information about children and the
the risks of businesses collecting children’s personal information, the United States Congress passed the Children’s Online Privacy Protection Act (COPPA) to regulate the online collection of personal information from children under the age of thirteen. The Act gives parents control of their under-thirteen children’s online privacy, requiring “verifiable parental consent for the collection, use or disclosure of personal information” obtained from children. By completely entrusting children’s privacy to the hands of parents, COPPA assumes a unity of interests between children (at least children under the age of thirteen) and parents in relation to children’s on-line privacy. Another option that could have been considered is a general prohibition on collecting personal information from children under thirteen.

The assumption of a unity of interests between children and parents regarding children’s privacy is even greater in the context of children’s educational informational privacy. Thus, for example, the Family Educational Right to Privacy Act (FERPA) provides parents

109. See 15 U.S.C. § 6501(1) (2006) (defining a child as “an individual under the age of 13”); § 6502(b)(1)(A) (creating requirements for “operator[s] of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has actual knowledge that it is collecting personal information from a child”).


111. See Emmanuelle Bartoli, Children’s Data Protection vs. Marketing Companies, 23 Int’l Rev. L., Computers & Tech. 35, 39 (2009) (stating that, under COPPA, parents have the right to review and delete the data collected from their children by the websites, and noting that this provision may be problematic in cases where websites should be retaining children’s information, such as when retention could help avoid future unlawful activity or when a lawsuit is pending); Youth, Privacy and Reputation, supra note 2, at 40–41 (discussing criticisms of COPPA, including the right of parents to review and delete data collected by their children, and the requirement of “parental consent for the collection of a child’s personal information”); Seounmi Youn, Teenagers’ Perceptions of Online Privacy and Coping Behaviors: A Risk-Benefit Appraisal Approach, 49 J. Broadcasting & Electronic Media 86, 87 (2005) (discussing COPPA’s requirement that “[w]ebsite targeting children . . . require viewers to submit verifiable parental consent before collecting, using or disclosing any personal information from children under the age of 13”) (internal citations omitted).

112. In Canada, the Public Interest Advocacy Centre (PIAC) concluded that Canada’s legislative framework insufficiently protected children’s online privacy and suggested, among other amendments, a general prohibition on the collection, use, and disclosure of all personal information of children under thirteen. Youth, Privacy and Reputation, supra note 2, at 43.
with control over their children's educational information\textsuperscript{113} and does not recognize interests of children as separate from those of their parents.\textsuperscript{114} FERPA enables parents to access their children's school records, even if their children object, and provides them with control over the disclosure of these records. Unlike COPPA, FERPA does not limit parents' control over their children's informational privacy until the age of thirteen (or until they are found mature or competent enough, as in the context of abortion), but rather provides them with complete control until their children reach the age of eighteen.\textsuperscript{115} A similar approach is reflected in the Protection of Pupils Rights Amendment (PPRA).\textsuperscript{116} The policy represented by COPPA, FERPA, and PPRA concerning children's privacy rights and their parents' legal position regarding these rights has led several scholars to argue that what is actually being protected is the privacy of the parents, or at best “the family’s” privacy.\textsuperscript{117}

An entirely different approach from that of COPPA, FERPA, and PPRA is taken by the American Library Association (ALA), which recommends that “[l]ibrarians should not breach a child’s confidentiality by giving out information readily available to the parent from the child directly. Libraries should take great care to limit the extenuating circumstances in which they will release such information.”\textsuperscript{118} However, even these child-centered ALA guidelines

\textsuperscript{113} 20 U.S.C. § 1232g (2006) (amended 2010). For example, § 1232g(b)(1) prohibits funding, with certain exceptions, of programs in educational agencies or institutions that have policies allowing the release of students' educational records “without the written consent of their parents.”


\textsuperscript{117} See, e.g., id. at 1168 (discussing FERPA’s protection for family privacy but not for that of the students); Jennifer Zwick, Casting a Net Over the Net: Attempts to Protect Children in Cyberspace, 10 Seton Hall Const. L.J. 1133, 1160 (2000) (arguing that children’s informational privacy has generally been regulated not in terms of a right belonging to the child, but “as an interest of the parent or guardian”).

\textsuperscript{118} Am. Library Ass’n, Questions and Answers on Privacy and Confidentiality (Oct. 30, 2006), http://www.ala.org/Template.cfm?Section=interpretations&Template=ContentManagement/ContentDisplay.cfm&ContentID=15347. See also Amitai Etzioni, On Protecting Children from Speech,
recognize at best a duty of librarians not to disclose private information about children to their parents.

Noting that the parents can get the information from their children directly, we would like to think that parents would ask their children for it. But do parents have a duty to respect their children's privacy that limits the means they might use to obtain information regarding their children?

D. Children’s Privacy and Parents under the UNCRC

The dilemma over children's privacy within the family is also reflected in international law documents such as the UNCRC. As mentioned above, the UNCRC explicitly grants children a right to privacy. Nonetheless, it is unclear whether this right is recognized only against the state or whether it applies in the familial context as well. The doubt arises because, while trumpeting the rights of the child, the UNCRC, like other international documents on human rights, also acknowledges that the family is the most fundamental, basic, and important unit of society.\(^{119}\) It also emphasizes the importance of preserving families' autonomy, harmony, and privacy wherever possible.\(^{120}\)

A number of international conventions recognize the special status of the family in international law and the protection that society and the state should grant it.\(^{121}\) Some of these conventions

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119. See, e.g., European Social Charter art. 16, Oct. 18, 1961, E.T.S. No. 035 (describing the right of the family to social, legal, and economic protection) [hereinafter European Social Charter].

120. In several articles the UNCRC also emphasizes the importance of a child's rearing and upbringing in a family framework, and the efforts that every State Party should make to guarantee it. See UNCRC, supra note 18, arts. 10, 20. See also id. pmbl. (discussing the family as "the fundamental group of society").

strongly emphasize the dignity that society must accord the family unit, the child’s need for recognized family relations without unlawful state interference as a part of her identity, and the general need of the family to be free from arbitrary interference in its affairs, unless that interference is compatible with democratic law and the need to defend the interests of society and the state.

Thus, this section demonstrates that both in American jurisprudence and international documents children’s privacy interests against their parents are rarely recognized. We argue that this failure to recognize a privacy interest among children is inappropriate, especially in the modern era.


122. See European Convention, supra note 121, art. 8(1).

123. See UNCRC, supra note 18, art. 8. Article 9 calls on the States Parties to ensure that a child shall not be separated from his or her parents against their will, except in certain judicial decisions. Id. Article 16 states that “no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence . . . .” See id. Article 20(1) deals with alternative care, stating that “[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” Id.

124. UDHR, supra note 121, art. 12.

125. See European Convention, supra note 121, arts. 8(2), 12; Protocol of San Salvador, supra note 121, art. 15(2). Article 16 of the European Social Charter emphasizes the family’s right to appropriate social, legal, and economic protection to ensure its full development. European Social Charter, supra note 119, art. 16. Article 18(2) of the African Charter on Human and Peoples’ Rights even states that “[t]he state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.” African Charter, supra note 121, art. 18(2). This Charter emphasizes, in Article 27(1), the obligation of every family member (and not only that of the state and society) towards the family unit, which includes, in Article 29(1), the obligation “to preserve the harmonious development of the family.” Id.
V. TOWARDS THE RECOGNITION OF CHILDREN’S PRIVACY IN THE FAMILY

A. The Significance of Intrafamilial Privacy for Children

As noted in the Introduction, the common perception is that privacy is of little concern and consequence for children. This is far from accurate. Children tend to define privacy and the private differently from adults. However, because research on children and privacy has been based on adults’ perspectives and perceptions of privacy, children’s concerns about privacy have been overlooked.\(^{126}\) While children may indeed blog about their personal lives and share intimate details online, for them the Internet is a private place where they can socialize with friends, gossip, and share secrets.\(^{127}\) Children mostly communicate online with people they already know, and information sharing, which to adults may seem like privacy-clueless behavior, is aimed mainly at reinforcing existing relationships with peers.\(^{128}\) The family, and especially parents, is excluded from this sphere, and children generally do not want their parents to view the information they share online.\(^{129}\) Parents who attempt to monitor and check their children’s social networks and activities online are regarded as controlling and invasive. Indeed, ample research demonstrates children’s resentment of “snooping,” whether it takes traditional forms, such as searching through schoolbags, reading diaries, and listening to phone calls, or has a more technological style, such as Internet monitoring, keylogging, and checking social networks and Internet surfing history.\(^{130}\)

\(^{126}\) See Herring, supra note 55, at 71.

\(^{127}\) See generally Steve Jones et al., Everyday Life, Online: U.S. College Students’ Use of the Internet, 14 First Monday, no. 10 (2009) http://www.uic.edu/hbin/cgiwrap/bin/ojs/index.php/fm/article/view/26492301 (discussing these behaviors in college students).


\(^{130}\) See, e.g., Livingstone, supra note 1, at 139 (noting that young people in focus groups analogized their dislike of internet snooping to their dislike of more traditional snooping); Ito et al., supra note 1, at 19 (noting that teens generally view parental monitoring of their internet behavior as an invasion of privacy); Grant, supra note 1, at 7 (noting that issues of privacy provoked strong reactions from adolescents).
We also noted that individual privacy in the home and within intrafamilial relationships is significant for children’s personal development. Limiting or tracking surfing may seriously harm the child’s social popularity and socialization, and thus prevent her from attaining certain social benefits.¹³¹ Studies even show that it may turn children into isolated young people or objects of suspicion.¹³² This may be particularly true regarding isolated youth, such as gay, lesbian, bisexual or transgender teenagers, especially if their parents do not know about their sexual orientation.¹³³

B. Privacy as Dignity and Respect

One of the most interesting and influential approaches to the value of privacy is Charles Fried’s view on the connection between privacy and intimacy.¹³⁴ Fried’s approach explains and brings together both relational privacy and the privacy of individual members. Fried’s approach also clarifies why individual privacy is a necessary component of a loving and caring relationship. Without privacy, Fried argues, there can be no respect, love, friendship, or trust, which is why any threat to it threatens our integrity as

¹³¹ See Ellison et al., supra note 31, at 1161 (finding that Facebook’s social networking function helped users to create and maintain social capital).

¹³² See Youth, Privacy and Reputation, supra note 2, at 16–17 (discussing the frequency with which children, particularly in Europe, are monitored and the resulting suspicion with which they are viewed in public places). See generally Henry A. Giroux, Racial Injustice and Disposable Youth in the Age of Zero Tolerance, 16 Int’l J. of Qualitative Stud. Educ. 553 (2003) (examining the social costs of repressive policies regarding young people, including those that increase surveillance of youth).


¹³⁴ See Fried, supra note 22, at 484 (by giving people the right not to share information or emotions, “privacy creates the moral capital which we spend in [the intimacy of] friendship and love”). See also generally Stanley I. Benn, Privacy, Freedom, and Respect for Persons, in Philosophical Dimensions of Privacy: An Anthology 223 (Ferdinand David Schoeman ed., 1984) (discussing privacy as a derivative of human dignity); Bloustein, supra note 22 (same); Gavison, supra note 22 (same); Neil M. Richards & Daniel J. Solove, Privacy’s Other Path: Recovering the Law of Confidentiality, 96 Geo. L.J. 123 (2007) (discussing the English conception of privacy as emanating from trust in relationships); James Q. Whitman, The Two Western Cultures of Privacy: Dignity versus Liberty, 113 Yale L.J. 1151 (2004) (presenting a comparative study of dignity as a basis for privacy in Europe, as opposed to the American conception of privacy as liberty).
persons and our mutual relations as human beings. This view is particularly relevant to parents’ respect for their children’s privacy. According to Fried, “there can be no trust where there is no possibility of error.” Indeed, trust could easily be replaced by monitoring and surveillance. Parents may easily track their children’s cell phones, cars, or internet surfing history; they may even place cameras all around the home, allowing them to remotely observe, and thus control, their children. However, if we value trust for its own sake, we should generally choose not to resort to such means and take the risk the unknown. Where there is monitoring and surveillance, and there is no doubt as to what the other is doing, there can be no trust.

Parental surveillance and intensive supervision remove the child from the realm of human interactions, making real trust and real intimate relationships impossible. If we want children to forge meaningful human connections, we must allow them the ability to be trusted. A parent who intensively tracks his child denies him trust and the ability to be trusted, which is a basic building block of all human interactions. For children to know they are trusted, they should be able to act without their parents’ constant monitoring; they must know that they can betray their parents’ trust. Children’s right to privacy with respect to their parents confers upon them this entitlement. We should also remember that trust is reciprocal. Thus, if children are not trusted, they will not learn to trust.

As we note in greater detail in the following section, occasionally parents may have good reasons to inspect and monitor their children. We emphasize, however, that surveillance of children should not be understood as an inherent or standard practice of good parenting, but rather as the exception. The significance of trust and the negative implications of surveillance form the basis of Justice O’Connor’s dissent in Vernonia School District v. Acton:

Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise. As James Acton’s father said on the witness stand, “[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they’re

135. See Fried, supra note 22, at 477–78.
136. Id. at 486.
137. See id. at 486 (discussing this concept in relationships generally).
138. See id.
139. See id.
innocent . . . and I think that kind of sets a bad tone for citizenship.”

In this respect we consider the current equation of surveillance with good parenting to be utterly misguided. Monitoring children, especially in today’s digital era, can be linked with two opposite versions of parenting that are both inadequate. The first is remote-control parenting. Current monitoring devices enable even uninvolved and absent parents to track their children and feel that by so doing they satisfactorily fulfill their parental role. The second is over- or intensive-parenting, which can disrupt the healthy psychological development of the child.

C. Balancing Children’s Right to Privacy

Unfortunately, current literature on privacy (especially online privacy) and children focuses only on risks, and pays very little attention to the significance and value for children of privacy from their parents. In this Article we have pointed to the value of children’s privacy not only for children themselves but also for the parent-child relationship. It is our hope that by demonstrating the value of children’s intrafamilial privacy it will be recognized that there is indeed a “privacy problem” in the parent-child relationship.

While we have pointed to the significance of trust in the parent-child relationship, we also acknowledge that taking the risk of error in trusting children might entail detrimental outcomes for them. Pedophiles, child pornographers, and commercial predators are indeed lurking online. Nor can offline risks, such as alcohol consumption and drug abuse, be ignored.

It should be noted, however, that some literature suggests that these dangers are overstated. Moreover, while risk is usually


143. See Youth, Privacy and Reputation, supra note 2, at 10.

144. See John Holmes, Myths and Missed Opportunities: Young People’s Not So Risky Use of Online Communication, 12 Info., Comm. & Soc’y 1174, 1185 (2009) (arguing, following a review of the literature, that the risks to children online are “grossly overstated”).
associated with children’s privacy, risk and danger are almost inexorably linked with privacy, even that of adults. As Joseph Pulitzer stated: “There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy.”145 And yet, adults’ privacy is guaranteed and balanced against such risks (to which children, of course, could also fall victim).

Allowing children some time and space alone does not imply abandoning them. Thus, alongside our call for recognizing children’s privacy in their relationship with their parents, we argue that this right should be balanced against children’s right to protection, nurture, and care. Alan Westin’s observation that “either too much or too little privacy can create imbalances which seriously jeopardize the individual’s well-being” is as true for children as it is for adults.146

How children’s privacy should be weighed and balanced against other interests—whether the interests of the child herself, a parent, the family, or social interests—should be determined in each specific context. We do, however, wish to make two points in this regard. First, we note that while the need and justification for recognizing a right to privacy increases as the child matures, so does the need to protect her. Thus, on the one hand, the notion of the evolving capacities of the child suggests that, as children mature, greater recognition should be given to their right to privacy. On the other hand, the risks entailed by privacy are much higher for youth than for younger children.147 Second, and even more importantly, when parents’ obligation to respect their children’s privacy conflicts with their primary duty to protect and care for their children, the latter should obviously prevail.148 However, recognizing that children are entitled to privacy entails that there must be prior consideration as to whether protecting a child necessitates an invasion of her privacy, and whether an invasion of privacy would advance the child’s safety. Compromise solutions might be found, if they are looked for, such that both children’s privacy and their safety are guaranteed.

145. Solove, supra note 10, at 81.
146. See Westin, supra note 23, at 40.
147. Like the old saying: small kids, small problems, bigger kids, bigger problems.
It must also be admitted, though, that not all cases of parents violating their children’s privacy are motivated by a need to protect the child. Parents can be motivated to invade their children’s privacy out of sheer curiosity or a desire to know what is going on in their children’s lives, when the children themselves refuse to share this information with them. In this article we have focused mainly on surveillance, but it should be noted that the issue of children’s privacy vis-à-vis their parents surfaces in other contexts as well, where children’s safety is of no concern. Thus, for example, parents may blog about their children, 149 participate in reality shows, such as Super Nanny or Little Angels, and publicly reveal and expose intimate information about their children—information that, if given the chance, the children themselves might prefer to keep private. 150


150. It must be admitted, though, that even adults’ privacy is not protected under American case law against disclosure by family members when the latter share their own stories and experiences, thereby revealing intimate information about spouses, ex-spouses and other family members. Thus, for example, in Bonome v. Kaysen, No. 032767, 2004 WL 1194731 (Mass. Mar. 3, 2004), a man filed an invasion of privacy suit against his former girlfriend for revealing intimate details about their sexual relations in an autobiographical book chronicling her coping with a seemingly undiagnosable vaginal pain. Although the author’s story inextricably involved her former boyfriend in an intimate way, the court ruled in favor of her right to publish it, while at the same time acknowledging the boyfriend’s injury and personal humiliation. Solove recognizes a similar motivation underlying Haynes v. Alfred A. Knopf, Inc, 8 F.3d 1222 (7th Cir. 1993), where an ex-husband sued for damages for violation of his privacy in a book containing his ex-wife’s story, where she described his alcoholism, as well as his irresponsible and egocentric behavior. Solove, supra note 10, at 27.

Bonome and Haynes both raise doubts as to whether, under American privacy jurisprudence, children have legitimate claims against their parents for revealing intimate information about them that they themselves would rather keep secret. We argue, though, that the case of children is stronger than the claim of adults in this respect. Adults choose the relationships they enter into and the individuals they trust (even if these individuals later break that trust). Children have no such choice, certainly not with their parents. Theoretically, the relationship of trust between parents and children might render disclosure of information about their children a breach of confidentiality. The latter, unlike the tort of public disclosure of private facts, does not require that the information disclosed be “highly offensive.” However, the American version of this tort applies only in a few narrow contexts that include physicians, bankers, and other
This issue, however, is beyond the scope of the current article and merits a separate discussion.

Ultimately, we point to a clear need for privacy for children from their parents, a need that derives, *inter alia*, from the notion of privacy as dignity and respect. As such, parents should respect their children’s privacy. But it is not an overall and absolute right. Privacy should be granted to children from their parents according to their age and capacity, always bearing in mind the necessity of at least some private spaces for children where they can socialize away from the prying eyes of their parents.¹⁵¹

Thus, we say it loud and clear: children need privacy, in their homes, and from their parents. Even the UNCRC, which is the most comprehensive legal document ever written on children’s rights, and which brought more than twenty countries around the world to adopt a ban on parental corporal punishment¹⁵² and to grant a plethora of children’s rights, has not clarified this children’s right. The need to watch over children’s steps and to safeguard them from all kinds of danger, both online and offline, should sometimes qualify this right. The correct balance should be sought in each case according to its circumstances, the (real) best interest of the child, the nature of the danger, the age of the child, and her capacities.

VI. CONCLUSION

There is no clear answer to the question of how to protect children’s privacy vis-à-vis their parents in the contemporary digital era.¹⁵³ The balanced right proposed in this Article offers solutions to parent-child privacy conflicts both in the traditional “offline” world and the digital online world.

Having called for children’s interest in privacy in their relationship with their parents to be recognized, and having argued that there is a privacy problem when parents monitor their children, we are left with the thorny question of whether a recognition of children’s privacy should be translated into the legal system, and if so, how. On one hand, a right without a remedy has no value, as the

¹⁵¹ Youth, Privacy and Reputation, supra note 2, at 4.
¹⁵³ See Palfrey & Gasser, supra note 10, at 6.
saying goes.154 On the other hand, the notion of children appealing to a court for injunctions against the installation of tracking devices, or filing civil actions seeking tort compensation for invasions of their privacy, raises justified unease.155 Indeed, a strict application of the right against a family member may destroy familial tranquility and harmony and make the appellant an enemy of the family and responsible for its collapse.156 Legal intervention, especially in intrafamilial relations, must be very delicate.157 We thus leave open for future development the discussion of such questions as whether violations of the right should constitute grounds for the child to file a civil action for compensation or to appeal for an injunction.

It is our view that the right itself has a value independent of the remedy that accompanies it.158 In many respects, rights are self-executing, because most individuals are law abiding and tend to


155. A good example is how some countries in Europe handle the question of corporal punishment for children. All Scandinavian countries, Germany, Austria and a few other countries have chosen to grant a civil/human right to the child not to be subjected to corporal punishment, rather than criminalizing the parent. The emphasis is on the right rather than on the forbidden act, and to enact the norm and bring it to the attention of citizens—not necessarily to enforce it. See Susan H. Bitensky, Corporal Punishment of Children: A Human Rights Violation 154–92 (2006) (explaining the efforts of 15 countries to delegitimate all corporal punishment of children); Shmueli, supra note 63, at 108–23 (arguing that the approach of Scandanavian countries creates an appropriate balance between ex ante and ex poste approaches that conforms well to the needs of the modern family). See generally Benjamin Shmueli, Love and the Law, Children Against Mothers and Fathers: Or, What’s Love Got to Do with It? 17 Duke J. Gender L. & Pol’y 131 (2010) (calling for an intermediate and delicate treatment towards a civil action taken by a child against his parent).

156. See generally William E. McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930) (discussing family harmony and its unique role in blocking tort actions against a spouse); Note, Litigation Between Husband and Wife, 79 Harv. L. Rev. 1650 (1966) (same); Benjamin Shmueli, Tort Litigation Between Spouses: Let’s Meet Somewhere in the Middle, 15 Harv. Negot. L. Rev. 201 (2010) (examining the parent-child and spousal immunity in the United States and the importance of the family tranquility and harmony, enumerating considerations in favor of and against the immunity, and suggesting new ideas and balances that enable in principle civil action against spouses and parents, but especially in cases of a broken family, where there is no chance of restoring family harmony and tranquility).

157. See supra text accompanying note 155.

follow the law, even if it is not enforced. We believe in the law’s expressive power and its ability to affect social (and parental) norms. Thus, the significant point in our view lies in the law’s expressive message regarding children’s entitlement to privacy from their parents, even if this right is not absolute but balanced. At the same time, there is also an evident need to educate parents, not only about the risks that privacy may entail for their children, but also about its value and benefits for both parents and children alike.

159. Id. 75 (discussing the self-executing rights embodied in the First and Fourth Amendments).

160. Solove provides interesting examples of the ways that law has established privacy in communication in his detailed history of communication privacy. See Solove, supra note 10, at 61–64.