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Emily Gold Waldman

Elisabeth Haub School of Law at Pace University

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Show and Tell?: Students' Personal Lives, Schools, and Parents

EMILY GOLD WALDMAN

Public schools learn about their students' personal lives in many ways. Some are passive: a teacher observes a student kissing someone, or overhears a conversation among friends. But schools also engage in more active information-gathering about students' personal lives, through surveys and informal conversations between students and teachers, administrators, school psychologists, counselors, coaches, and other personnel. This Article explores the competing privacy considerations that result from such encounters. Once schools have learned highly personal information about their students, does it violate those students' privacy rights to disclose that information to their parents? Or does keeping the information secret violate the parents' constitutional right to direct the upbringing of their children, often framed as a privacy right of its own? And what are the limits on schools' ability to probe for such information in the first place?

This Article brings together the parallel lines of cases addressing these questions, showing how students' and parents' privacy interests converge in the context of schools' extraction of students' personal information, only to be pitted against each other regarding the disclosure of such information. Moreover, it explores the underlying normative question that links the extraction and disclosure issues: how should schools approach their—to some extent, inevitable—role in students' personal and family lives? This Article argues that recognizing stronger limitations on schools' ability to probe into students' personal lives, while giving schools broad discretion as to how to handle such information provided that it has been legitimately obtained, is not only consistent with both of the constitutional privacy interests at stake, but also good policy.

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Show and Tell?: Students' Personal Lives, Schools, and Parents

EMILY GOLD WALDMAN*

I. INTRODUCTION

Charlene Nguon was a sixteen-year-old high school junior when her principal told her mother that she was being suspended for engaging in “inappropriate public displays of affection” with her girlfriend, thereby informing her mother that she was gay.¹ “My mom picked me up from school and her eyes were all watery,” Charlene later recalled. “I just went to my room and cried. We didn’t talk about it for about a week.”² Later, however, Charlene and her mother not only spoke but took action. Charlene, through her mother, sued her principal, alleging that he had violated her constitutionally protected right to privacy by disclosing her sexual orientation to her mother.³ After a bench trial, a California district court ultimately ruled against Charlene’s claim.⁴

During the very same week that Charlene lost her case, another sixteen-year-old girl located across the country also lost her legal challenge to the way the state had handled information about her sexual behavior. Her claim, however, came from the opposite perspective. Melissa Anspach, who had gone to a public health center for the morning-after pill, alleged that the center’s employees had violated her constitutional rights to bodily integrity and parental guidance by giving her the tablets *without* first apprising her parents of the situation.⁵ Melissa’s parents, through whom she brought the lawsuit, also brought their own claim, alleging that their familial privacy rights—i.e., their right to direct the upbringing of

* Professor of Law, Pace University School of Law. J.D., Harvard Law School, 2002; B.A., Yale University, 1999. This paper was the official selection from the “Call for Papers” held by the Association of American Law Schools Section on Defamation and Privacy in connection with its program, entitled “Under the Parental Gaze in the 21st Century: Children’s Privacy Rights Against Their Parents,” at the January 2014 Annual Meeting of the Association of American Law Schools. I thank the other speakers at this program—Gaia Bernstein, Ayelet Blecher-Prigat, Pamela Laufer-Ukeles, Andrea Matwyshyn, Paul Ohm, and Laura Rosenbury—for their helpful and thought-provoking comments during the event.

¹ *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1181–83, 1192 (C.D. Cal. 2007).

² Tamar Lewin, *Openly Gay Student’s Lawsuit Over Privacy Will Proceed*, N.Y. TIMES, Dec. 2, 2005, at A21.

³ *Nguon*, 517 F. Supp. 2d at 1179.

⁴ *Id.* at 1198–99.

⁵ *Anspach v. City of Phila. Dep’t of Pub. Health*, 503 F.3d 256, 258–60 (3d Cir. 2007).

their daughter—had been infringed by the center’s behavior.⁶ The Third Circuit, however, rejected the Anspachs’ case in full.⁷

These two lawsuits, taken in juxtaposition, illustrate some difficult questions raised when government entities—most often, but not exclusively, public schools—learn highly personal information about minors, particularly adolescents. Does disclosing such information to their parents violate the minors’ privacy rights? Or does keeping it secret violate the parents’ constitutional right to direct the upbringing of their children, often framed as a privacy right of its own? In both of the above cases, the state ultimately won, suggesting that government entities have a fair degree of discretion when deciding whether to disclose personal information or not. But what are the limits of that discretion? When does disclosing—or not disclosing—a minor’s personal information to his or her parents violate the Constitution? And what are the limits on the state’s ability to probe for such information in the first place?

This Article explores the ways that minors’ and parents’ constitutional privacy interests converge and diverge across these questions, focusing on public schools’ extraction (through surveys, informal questioning, and other means) and disclosure of information about students’ personal lives. The extraction and disclosure issues, while separately analyzed by scholars, have rarely been considered together, especially from a constitutional perspective.⁸ But stepping back to consider how the extraction and disclosure questions relate to each other is illuminating, for several reasons.

First, on a practical level, the same school-student interaction surrounding a student’s personal information can raise issues of both extraction and disclosure. For example, the Fifth Circuit recently

⁶ *Id.* at 258–59.

⁷ *Id.* at 274.

⁸ Regarding schools’ extraction of information, see generally Kathleen Conn, *Counterpoint: Parents’ Right to Direct Their Children’s Education and Student Sex Surveys*, 38 J.L. & EDUC. 139 (2009); Tara Dahl, *Surveys in America’s Classrooms: How Much Do Parents Really Know?* 37 J.L. & EDUC. 143 (2008); Maxine Eichner, *Counterpoint and Rebuttal: School Surveys and Children’s Education: The Argument for Shared Authority Between Parents and the States*, 38 J.L. & EDUC. 459 (2009). On schools’ disclosure of such information, see, e.g., Caitlin M. Cullitan, *Please Don’t Tell My Mom: A Minor’s Right to Informational Privacy*, 40 J.L. & EDUC. 417 (2011); Adam J. Kretz, *The Right to Sexual Orientation Privacy: Strengthening Protections for Minors Who Are ‘Outed’ in Schools*, 42 J.L. & EDUC. 381 (2013); Melissa Prober, Note, *Please Don’t Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student’s Pregnancy*, 71 BROOKLYN L. REV. 557 (2005). A few scholars have looked at both extraction and disclosure issues regarding students’ personal information in the context of various federal statutes, including the Family Educational Rights and Privacy Act and the Protection of Pupil Rights Amendment, but they have largely focused on the statutory rather than the constitutional issues. See generally Lynn M. Daggett, *Student Privacy and the Protection of Pupil Rights Act as Amended by No Child Left Behind*, 12 U.C. DAVIS J. JUV. L. & POL’Y 51 (2008); Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158 (2006).

rejected—in a two to one split—a student's claim that her public school coaches violated her constitutional rights by interrogating her about her sexual orientation and then "outing" her to her mother.⁹

Second, at a doctrinal level, the extraction and disclosure issues each implicate the same two constitutional interests, both of which stem from Fourteenth Amendment substantive due process and are usually framed in privacy terms: (1) the interest in avoiding disclosure of personal matters (often referred to as the right to informational privacy)¹⁰ and (2) the parental interest in directing the upbringing of one's children (often referred to as the right to "familial" privacy).¹¹ What is striking is that these two privacy rights generally dovetail when it comes to schools' extraction of students' personal information—which can infringe both students' informational privacy and their parents' familial privacy—only to be pitted against each other regarding the disclosure of that information to parents. Looking at the extraction and disclosure questions together, then, is a useful lens for considering the scope and relationship of these two privacy rights. I suggest that where the two privacy rights converge, as is often the case in the context of extracting students' personal information, the constitutional limitations on schools should be strong. By contrast, where the two privacy interests diverge, as in the disclosure context, schools should have more room to exercise their own discretion, and constitutional liability for disclosure or non-disclosure to a student's parents should attach only in extreme circumstances.

Finally, the extraction and disclosure issues raise a common core of normative concerns. What links them is the underlying question of how schools should approach their role in students' personal and family lives. Recognizing clearer limitations on schools' ability to extract students' personal non-academic information, while giving them broad discretion as to how to handle such information provided that it has been legitimately obtained, is not only consistent with both of the constitutional privacy interests at stake, but is also good policy.

This Article proceeds in three main parts. Part II discusses schools' *extraction* of students' personal non-academic information. Such information can conceivably relate to a wide range of topics, but in practice, it most often involves students' attitudes and behaviors regarding sex and drugs. Although there is a federal statute regarding schools' ability to extract such personal information through surveys and other evaluations—the Protection of Pupil Rights Amendment¹²—this statute does not include an express private right of action and has not been held

⁹ *Wyatt v. Fletcher*, 718 F.3d 496, 499–501, 510 (5th Cir. 2013).

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part II.B.

¹² 20 U.S.C. § 1232h(b) (2012).

enforceable under Section 1983.¹³ The litigation in this area has therefore centered on the constitutional front. I examine the privacy-based challenges to schools' extraction of this sort of information, exploring how they can be framed in both informational privacy and familial privacy terms, and arguing that although there are certain tensions within each formulation, they generally converge in a way that points toward strong protection.

Part III then addresses schools' *disclosure* of students' personal information to their parents. Here, the two constitutional privacy interests are starker, but typically point in opposite directions. Analogizing to the space for "play in the joints" between the mandates imposed by the Establishment Clause and the Free Exercise Clause, I argue that there should be similar room for "play in the joints" here: in most situations, schools should be able to use their best judgment as to whether to disclose students' personal information to parents, provided that they have legitimately obtained the information and are not motivated by malice, without fearing liability under an informational privacy theory if they disclose or under a parental privacy theory if they do not.

Part IV explores the regime that my proposed approach would create. I suggest that it will beneficially reduce the potential for schools to forcefully insert themselves into the family dynamic and disrupt the parent-child relationship.

II. EXTRACTION OF STUDENTS' INFORMATION

Schools learn students' personal information in many ways. Some are simply passive: a teacher observes a student kissing someone, or overhears a conversation among friends. But schools also engage in more active information-gathering about students' personal lives, through both surveys and more informal encounters between students and teachers, administrators, school psychologists, counselors, coaches, and other personnel. The federal Protection of Pupil Rights Amendment (PPRA), originally passed in 1974 and most recently amended in 2002 as part of the No Child Left Behind Act, states that students should not be "required" to "submit to a survey, analysis, or evaluation that reveals information" concerning the student's or family's political beliefs, family problems, sex behavior or attitudes, and other personal matters, without prior parental

¹³ See, e.g., *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 171 (3d Cir. 2005) (explaining that the parties had dismissed their Protection of Pupil Rights Amendment claim in light of the Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that the analogous Family Educational Records Privacy Act was not enforceable); see also Daggett, *supra* note 8, at 108–09 (explaining that in light of *Gonzaga*, "it seems clear that PPRA claims are similarly non-actionable under Section 1983" and adding that "the administrative enforcement option is fairly toothless").

consent.¹⁴ Yet the PPRA has played a minimal role in cases challenging schools' extraction of students' personal information. Not only is it unclear whether the PPRA's reference to surveys, analyses, and evaluations encompasses school personnel's informal interactions with students,¹⁵ but the PPRA has also been interpreted to lack any private means of enforcement.¹⁶

Accordingly, students' and parents' challenges to schools' extraction of their information have centered on constitutional claims. Such lawsuits sound in an informational privacy theory, a familial privacy theory, or both. But both of these privacy rights are notoriously murky—and neither is perfectly on point here.

A. Informational Privacy

1. *The Informational Privacy Right: An Overview*

The first key challenge to a public school's extraction of a student's personal information is an informational privacy claim, typically brought by parents on the minor student's behalf. The concept of an informational privacy right stems from the Supreme Court's 1977 decision in *Whalen v.*

¹⁴ 20 U.S.C. § 1232h(b) (2012). The exact language covers information concerning

(1) political affiliations or beliefs of the student or the student's parent; (2) mental or psychological problems of the student or the student's family; (3) sex behavior or attitudes; (4) illegal, anti-social, self-incriminating, or demeaning behavior; (5) critical appraisals of other individuals with whom respondents have close family relationships; (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; (7) religious practices, affiliations, or beliefs of the student or student's parent; or (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

Id. §§ 1232h(b)(1)–(8). In addition to stating that prior parental consent is needed for “required” surveys, *id.* § 1232h(b), the PPRA goes on to provide notice and opt-out rights for parents with respect to all surveys that address the topics above. *Id.* at §§ 1232h(c)(2)(A)–(C). As Daggett describes, the PPRA does not make clear precisely what counts as a “required” survey. Daggett, *supra* note 8, at 122–23.

¹⁵ See, e.g., Daggett, *supra* note 8, at 91 (“It seems clear that use of a formal instrument qualifies as a survey or evaluation. What about an interview of a student by a guidance counselor to help identify causes of a student's academic difficulty?”).

¹⁶ See *C.N.*, 430 F.3d at 171 n.13 (explaining that parties dropped their Protection of Pupil Rights Amendment claims in light of the decision that no right to private action exists under the Family Educational Rights and Privacy Act). Nor does the better-known Family Educational Rights and Privacy Act (FERPA) play a role here. In addition to lacking a private right of action, FERPA does not focus on the *collection* of information from students, but rather on the *confidentiality* of educational records. 20 U.S.C. § 1232g (2012); see also Daggett, *supra* note 8, at 61 (“FERPA requires schools to keep what they know about students confidential; PPRA keeps schools from learning certain information about students in the first place.”). For purposes of this Article, which focuses on K-12 public education, FERPA is also not relevant to Part III—disclosure—because it does not grant any privacy rights to children under the age of eighteen.

Roe.¹⁷ There, the Court observed:

The cases sometimes characterized as protecting “privacy” have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.¹⁸

The latter privacy strand, sometimes captured by the term “decisional privacy,” encompasses familiar issues including contraception, abortion, refusal of medical treatment, and—as discussed further below—childrearing.¹⁹ But the former strand, now often referred to as “informational privacy,” has been much less developed by the Supreme Court. The *Whalen* Court seemed to endorse the concept that some sort of constitutional right to informational privacy exists, but the Court never described it in detail or articulated a standard for determining whether it had been violated. Instead, the Court simply held that the challenged governmental action—New York’s practice of keeping a centralized database with information about prescription drug-users—did not violate this right because there were safeguards against further public disclosure, and because requiring the disclosure of private information to the New York Department of Health itself was not “meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care.”²⁰

Since *Whalen*, the Supreme Court has directly addressed the informational privacy concept in just two cases: *Nixon v. Administrator of General Services*²¹ and *NASA v. Nelson*.²² The *Nixon* Court easily rejected former President Nixon’s claim that his constitutional right to privacy was violated by the requirement of the Presidential Recordings and Materials Preservation Act that he release his presidential papers and tape recordings for archival review and screening.²³ The Court explained that Nixon’s privacy interest was “weaker than that found wanting in . . . *Whalen*” and was outweighed by the public interest in preservation of presidential materials.²⁴ In *NASA*, decided in 2011, the Court returned to the informational privacy concept, but again declined to develop it—or even to explicitly endorse it. Instead, the Court simply “assume[d], without deciding, that the Constitution protects a privacy right of the sort

¹⁷ 429 U.S. 589 (1977).

¹⁸ *Id.* at 598–600 (internal footnotes omitted).

¹⁹ DANIEL J. SOLOVE ET AL., INFORMATION PRIVACY LAW 1 (2d ed. 2006).

²⁰ *Whalen*, 429 U.S. at 601–04.

²¹ 433 U.S. 425 (1977).

²² 131 S. Ct. 746 (2011).

²³ *Nixon*, 433 U.S. at 455–57, 465.

²⁴ *Id.* at 458–59.

mentioned in *Whalen* and *Nixon*.²⁵ It then concluded that the government action at issue—conducting background checks of NASA contract employees—did not violate that right.²⁶

Given the Supreme Court's lack of elaboration as to the informational privacy right, lower courts have fleshed it out on their own. As the *NASA* Court noted, "[s]tate and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon* over the years."²⁷ Every circuit except for the D.C. Circuit has now recognized a constitutional right to informational privacy, but the scope of protection varies. While the Sixth Circuit has held that any such right should only apply to information relating to those rights "that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'"²⁸ most other circuits have adopted broader views. The Tenth Circuit, for instance, has described the informational privacy right as generally "protect[ing] the individual from governmental inquiry into matters in which it does not have a legitimate and proper interest."²⁹ The Third Circuit has also taken a more "encompassing view,"³⁰ looking at whether the information is "within an individual's reasonable expectations of confidentiality."³¹

The circuits also differ as to how they measure infringement of the informational privacy right. They generally use a sort of balancing test, weighing the governmental justification for the invasion against the strength of the privacy interest at stake, in various formulations. The Tenth Circuit, for instance, requires the state to show a "compelling state interest" for the privacy invasion,³² and the Seventh Circuit has held that the informational privacy right "is defeasible only upon proof of a strong public interest in access to or dissemination of the information."³³ The Third Circuit has adopted a multi-factor balancing test that looks at

the type of record requested, the information it does or might contain, the potential for harm in any subsequent

²⁵ *NASA*, 131 S. Ct. at 751.

²⁶ *Id.*

²⁷ *Id.* at 756 n.9.

²⁸ *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 260 (6th Cir. 2011) (quoting *J. P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 574 (6th Cir. 2002) (quoting *J. P.*, 653 F.2d at 1090).

²⁹ *Eastwood v. Dep't of Corrections*, 846 F.2d 627, 631 (10th Cir. 1988).

³⁰ *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000).

³¹ *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 112 (3d Cir. 1987). The Seventh Circuit has used similar language, describing the informational privacy right as encompassing "medical, sexual, financial, and perhaps other categories of highly personal information—information that most people are reluctant to disclose to strangers." *Wolfe v. Schaefer*, 619 F.3d 782, 785 (7th Cir. 2010).

³² *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (quoting *Sheets v. Salt Lake Cnty.*, 45 F.3d 1383, 1387 (10th Cir. 1995)).

³³ *Wolfe*, 619 F.3d at 785.

nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.³⁴

Courts similarly have varying approaches as to whether minors possess informational privacy rights. All three circuits that have explicitly addressed the issue—the Third, Ninth, and Tenth Circuits—concluded that minors have such rights, but the scope of protection varies by circuit.³⁵ The Third and Ninth Circuits essentially use the same balancing framework for analyzing informational privacy claims regardless of whether the claimant is an adult or minor.³⁶ The Tenth Circuit, by contrast, has adopted a different test for analyzing minors’ informational privacy claims. Instead of applying the “compelling state interest” standard that it uses for adults’ informational privacy claims, it looks at whether the government action “serve[s] ‘any significant state interest . . . that is not present in the case of an adult.’”³⁷

Finally, the case law is also murky as to whether the informational privacy right applies to governmental *acquisition* of personal information or whether it solely covers the further *disclosure* of such information—a crucial question when it comes to public schools’ extraction of students’ personal information, as discussed below.³⁸ The Supreme Court’s brief

³⁴ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980). The Ninth Circuit has followed this approach. See *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002) (analyzing privacy rights using the same multi-factor balancing test).

³⁵ For a thorough discussion of this topic, see Helen L. Gilbert, Comment, *Minors’ Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1382–88 (2007) (explaining the circuit courts’ different approaches to assessing minors’ informational privacy claims and arguing that each of these approaches fail to protect “minors’ particular vulnerabilities”).

³⁶ See *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 179–80 (3d Cir. 2005) (holding that the constitutional right to privacy extends to minors, but is subject to the same limitations as the privacy right of adults); *Planned Parenthood of S. Ariz.*, 307 F.3d at 789–90 (refusing to overturn Arizona’s parental consent abortion statute by reasoning that the statute reasonably preserve’s a pregnant minor’s confidential information). Of course, the age of the plaintiff may be taken into account in conducting the balancing inquiry, which is very fact-specific.

³⁷ *Aid for Women*, 441 F.3d at 1119 (alteration in original) (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 (1977)).

³⁸ For a discussion of this distinction in the related context of privacy-based torts, the availability of which vary by state, see Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2012, 2032–33 (2010). Strahilevitz describes and largely rejects the distinction drawn by William Prosser between the torts of “intrusion upon seclusion” (which is acquisition-based) and “public disclosure of private facts” (which is disclosure-based). “There is no reason why the torts for intrusion upon seclusion and public disclosure of private facts should look different from each other,” Strahilevitz argues. *Id.* at 2032. “The keys to each tort are whether the defendant’s actions intruded upon private information and whether the defendant’s conduct violated existing norms of social

discussions of informational privacy have focused on the disclosure context. When the Supreme Court first articulated the privacy right at stake in *Whalen*, it framed it as the “individual interest in avoiding *disclosure* of personal matters.”³⁹ And the *Whalen* Court relied on a distinction between governmental acquisition and disclosure of personal information in its holding, emphasizing that the patient information in question would only be received by a state agency and not shared with the public.⁴⁰ Similarly, in *NASA*, the Supreme Court stated that one weakness of the plaintiffs’ informational privacy claim was that they were “attack[ing] only the Government’s *collection* of information,” without pointing to a genuine threat of further disclosure.⁴¹

Lower courts, however, have sometimes been receptive to informational privacy claims that are based on governmental information-acquisition alone. In *Thorne v. City of El Segundo*,⁴² for example, the Ninth Circuit allowed an informational privacy claim to proceed when it stemmed solely from the governments’ extraction of a municipal employee’s sexual history (through polygraph questioning).⁴³ Indeed, the Ninth Circuit has stated that the informational privacy right covers situations where an individual does not want to “disclose highly sensitive information to the government.”⁴⁴ Similarly, in *Eastwood v. Department of Corrections*,⁴⁵ the Tenth Circuit approved an informational privacy claim brought by a government employee whose employers extensively questioned her about her sexual history, explaining that the privacy right “is implicated when an individual is forced to disclose information [to the government] regarding personal sexual matters.”⁴⁶

2. *The Informational Privacy Right: Public Schools’ Extraction of Students’ Personal Information*

The informational privacy construct becomes even more complicated when applied to public schools’ extraction of students’ personal information. Not only do the basic questions remain about the scope of this right and whether it covers governmental acquisition as well as disclosure

conduct—in other words, whether the conduct was highly offensive to a reasonable person.” *Id.* I return to this distinction *infra* pages 715–16 and 725.

³⁹ *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (emphasis added).

⁴⁰ *Id.* at 594, 601–02.

⁴¹ *NASA v. Nelson*, 131 S. Ct. 746, 762 (2011).

⁴² 726 F.2d 459 (9th Cir. 1983).

⁴³ *Id.* at 470.

⁴⁴ *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789–90 (2002) (stating that the informational privacy right “applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public”).

⁴⁵ 846 F.2d 627 (10th Cir. 1988).

⁴⁶ *Id.* at 629, 631.

of information, but the unique relationship between schools and their students adds another layer of complexity. The Supreme Court has repeatedly set the level of protection for students' constitutional rights differently from the baseline standard, often ratcheting protection down⁴⁷ and occasionally ratcheting it up.⁴⁸ Given the Supreme Court's scant attention to the informational privacy right altogether, the Court has said nothing about how this right should play out in schools. Lower courts, in turn, have not articulated a clear framework for whether, and when, students can have a viable informational privacy claim arising solely from schools' extraction of their information.

A pair of Third Circuit cases—both involving informational privacy-based challenges to schools' extraction of students' information, but reaching opposite results—illustrates the key issues here. In the first case, *Gruenke v. Seip*,⁴⁹ seventeen-year-old Leah Gruenke and her mother sued the school's varsity swim coach who, after suspecting that Leah was pregnant, swung into action.⁵⁰ The coach asked his female assistant to approach Leah about whether she was pregnant, followed up himself with Leah to try to discuss sex and pregnancy with her, and urged the school guidance counselor and nurse to talk to her.⁵¹ Throughout these interactions, Leah denied being pregnant.⁵² The coach also discussed whether Leah might be pregnant with the mothers of fellow swim team members and allegedly encouraged swim team members to convince Leah to take a pregnancy test, possibly even suggesting that Leah would be

⁴⁷ In the contexts of students' First Amendment speech rights, Fourth Amendment rights against unreasonable searches and seizures, and Fourteenth Amendment procedural due process rights, the Supreme Court has developed tests that provide less protection for minors than that accorded to the general population. The Supreme Court's student speech framework, comprising *Morse v. Frederick*, 551 U.S. 393 (2007), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), allows schools to restrict speech that would otherwise be protected, such as speech that is plainly offensive or that could reasonably be interpreted as encouraging illegal drug use. Similarly, for illustrations of this ratcheting-down in the Fourth and Fourteenth Amendment contexts, see *New Jersey v. T.L.O.*, 469 U.S. 325, 332–34, 340–41 (1985) (holding that the Fourth Amendment applies to school authorities' searches of students, but that such searches—rather than requiring probable cause and a warrant—need only satisfy the Fourth Amendment's "fundamental command" of reasonableness, because "the school setting requires some easing of the restrictions"), and *Goss v. Lopez*, 419 U.S. 565, 581, 583 (1975) (holding that school suspensions implicate students' procedural due process rights, but that only the rudimentary aspects of due process—notice and an informal hearing—are required, because "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process").

⁴⁸ In the Establishment Clause context, the Supreme Court has suggested that students' youth and impressionability can heighten the potential for a violation. See *infra* p. 716.

⁴⁹ 225 F.3d 290 (3d Cir. 2000).

⁵⁰ *Id.* at 290.

⁵¹ *Id.* at 296.

⁵² *Id.*

removed from certain swim events if she did not.⁵³ Leah ultimately agreed to take a test, which was positive (though later that same day, she took two additional tests, both of which were negative).⁵⁴ She then informed her mother—with whom the coach had never communicated—about what was happening.⁵⁵ Her mother scheduled her for a doctor's appointment, at which point Leah learned that she was actually almost six months pregnant.⁵⁶

In their lawsuit, Leah and her mother claimed that the coach's actions had violated both Leah's right to informational privacy and their collective right to family privacy, along with her Fourth Amendment right to be free from illegal searches (here, the administration of a pregnancy test).⁵⁷ Although their familial privacy claim failed, as discussed below,⁵⁸ the Third Circuit allowed Leah's closely linked Fourth Amendment and informational privacy claims to go forward.⁵⁹ "[A] school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion," the court wrote, explaining its Fourth Amendment ruling.⁶⁰ Moreover, the circumstances surrounding the coach's extraction of Leah's information—such as having her teammates administer the test and discussing it with his assistant coaches—meant that Leah's claim "[f]ell squarely within the contours of the recognized right of one to be free from disclosure of personal matters," i.e., the informational privacy right.⁶¹ The *Gruenke* court thus left open whether, had the coach not involved anyone else in his attempt to determine Leah's pregnancy status but had only questioned her himself—that is, had there been solely extraction of information, without any disclosure—she still would have had a viable informational privacy claim against him.

In the subsequent case of *C.N. v. Ridgewood Board of Education*,⁶² the Third Circuit again left open whether students can ever have cognizable informational privacy claims arising solely from public schools' extraction

⁵³ *Id.* Leah alleged that her teammates told her that the coach would take her off the relay team unless she took the pregnancy test, although the teammates and coach denied this. *Id.*

⁵⁴ *Id.* at 296–97.

⁵⁵ *Id.* at 297.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *infra* Part II.B.2 (providing an overview of parental interests in the right to familial privacy and addressing familial privacy rights in relation to public schools' extraction of students' personal information).

⁵⁹ *Gruenke*, 225 F.3d at 295.

⁶⁰ *Id.* at 301.

⁶¹ *Id.* at 302–03.

⁶² 430 F.3d 159, 178 (3d Cir. 2005).

of information.⁶³ There, the school district administered a survey entitled “Profiles of Student Life: Attitudes and Behaviors” to students in the seventh through twelfth grades.⁶⁴ The survey, which was supposed to be voluntary and anonymous, asked students extremely personal questions about drug and alcohol use, sexual activity, experience with physical violence, suicide attempts, personal associations and relationships, and their views on matters of public interest.⁶⁵ The 156 questions included, for instance, whether the student had ever had sex, whether they liked and felt proud of themselves, whether their parents would be upset if they drank alcohol, and whether the student agreed or disagreed with the statement “my parents often tell me they love me.”⁶⁶ After doubt emerged as to whether the survey had actually been administered in a voluntary and anonymous manner, three parents filed suit on behalf of themselves and their children, alleging informational and familial privacy violations.⁶⁷

Even though the Third Circuit concluded that “[a] myriad of direct and indirect evidence coalesces to support the reasonable inference that the survey, as actually administered, was involuntary,” it still rejected the plaintiffs’ informational privacy claim.⁶⁸ In so doing, the court applied its basic balancing test for informational privacy claims, weighing the governmental interest in the survey against the students’ privacy interests at stake.⁶⁹ The court described the survey as “an attempt to obtain information directly related to the understanding and prevention of the social problems confronting today’s youth—a laudable goal, apparently pursued with the youths’ best interest in mind.”⁷⁰ Meanwhile, “the privacy side of the balance” was lessened given the lack of evidence that the survey was not anonymous or that the school ever disclosed individual student’s personal information.⁷¹ Indeed, the survey results, “while publicly disclosed, w[ere] revealed only in the aggregate, in a format that did not permit individual identification.”⁷² Thus, while the *C.N.* court ruled against the informational privacy claim here, it left open whether the outcome might have been different had the school extracted students’

⁶³ *Id.* at 190 (finding no constitutional violation of the right to privacy and granting summary judgment in favor of a public school district that administered surveys as a means of collecting information to introduce social programs).

⁶⁴ *Id.* at 161.

⁶⁵ *Id.* at 161, 168–70.

⁶⁶ *Id.* at 167–69.

⁶⁷ *Id.* at 161, 175–77.

⁶⁸ *Id.* at 175, 181–82.

⁶⁹ *Id.* at 179–80.

⁷⁰ *Id.* at 181–82.

⁷¹ *Id.* at 181. The court did find, however, that “the survey, as actually administered, was involuntary.” *Id.* at 174.

⁷² *Id.* at 181.

information non-anonymously.⁷³ Similarly, the court implied that had it been less clear that the school was extracting this information with the students' "best interests in mind," it might have let the claim go forward.⁷⁴

Should students ever have viable informational privacy claims arising solely from schools' extraction of their personal information? Especially given the uncertainty over whether the informational privacy right generally protects information-acquisition alone, there are arguments that they should not. After all, even well-established constitutional rights, such as freedom of speech and freedom from unreasonable searches and seizures, are often ratcheted down in the school setting.⁷⁵ This ratcheting-down has generally stemmed from the Supreme Court's desire to preserve the core of students' constitutional protections while also responding to schools' needs to maintain safe and effective learning environments.⁷⁶ Such school needs are often at stake when public schools seek to extract students' personal information. After all, public schools both educate students about numerous personal topics (including sex and drugs) and play an important role in protecting students' health and safety. Information-extraction can be useful and important in performing these functions.

Indeed, both *Gruenke* and *C.N.* can be viewed through this lens. In *Gruenke*, for instance, the swim coach's concern that Leah was pregnant stemmed from Leah's own complaints of nausea and low energy, combined with the coach's observations that Leah frequently left swim practice to go to the bathroom and that her body was rapidly changing.⁷⁷ There is nothing to suggest that the coach's interest was prurient; indeed, the coach's first reaction was to have the female assistant coach speak with her and he also asked a doctor whether it would be safe for Leah to continue swimming competitively if she were pregnant.⁷⁸ Similarly, nothing in *C.N.* suggests that the Ridgewood School District's motives for administering the student life survey were improper. In fact, the survey was conducted at the behest of a group comprised of social service agencies that wanted to "survey Ridgewood's student population to better understand their needs, attitudes and behavior patterns in order to use the

⁷³ Indeed, in *Rhoades v. Penn-Harris-Madison Sch. Corp.*, 574 F. Supp. 2d 888, 899 (N.D. Ind. 2008), the district court denied summary judgment to a school that administered a psychological assessment to high school students in a non-anonymous fashion.

⁷⁴ *C.N.*, 430 F.3d at 181–82.

⁷⁵ *Supra* note 47.

⁷⁶ See *New Jersey v. T.L.O.*, 469 U.S. 325, 332–34, 340–41 (1985) (balancing students' Fourth Amendment privacy protections with the need for schools to maintain order and security, as well as an effective learning environment).

⁷⁷ *Gruenke v. Seip*, 225 F.3d 290, 295–96 (3d Cir. 2000).

⁷⁸ *Id.* at 296–97.

town's programs and resources more effectively."⁷⁹ Education professor Kathleen Conn has pointed to cases like *C.N.* to argue that "[p]ublic school educators acting *in loco parentis* have a right and a responsibility to determine the sexual awareness of their students so that they can adopt curricula that teaches healthy ways of dealing with sexual language, information, and impulses."⁸⁰

Of course, educators' motives in extracting students' personal information are not always so benign. In *Wyatt v. Fletcher*,⁸¹ a Fifth Circuit case decided in May of 2013, a student alleged that her softball coaches, prompted by animosity toward her, interrogated her about her sexual orientation, accused her of being in a sexual relationship with another female, and threatened the student by not allowing her to play softball until she told her mother about the relationship.⁸² There, allegations of malice were prominent.

But even assuming that in most cases, educators *are* well-intentioned when they probe for students' personal information, there are still reasons to recognize a countervailing privacy interest on students' part. Indeed, informational privacy concerns can be heightened in the public school setting precisely because of students' youthfulness and school personnel's power and influence over them. When school officials seek to extract information from students, students may not feel free to refuse to provide it, even if the questioning is theoretically voluntary. Here, too, *Gruenke* and *C.N.* are illustrative. Leah repeatedly refused to take a pregnancy test, even writing a letter to her coach denying that she could be pregnant, but she finally gave in and took the test.⁸³ Similarly, in *C.N.*, several students reported having the impression—accurately or not—that they would “receive a cut” if they did not fill out the survey.⁸⁴

Relatedly, when schools want students to provide information, they may not be motivated to emphasize that students can decline to do so. In *C.N.*, although the principal did tell the school officials administering the survey that it was voluntary, the administrators spent much of their time instead focusing on “how best to get the students to take the survey seriously.”⁸⁵ Tellingly, the survey instructions themselves did not even explicitly state that the survey was voluntary. Rather, they told the students:

⁷⁹ *C.N.*, 430 F.3d at 162.

⁸⁰ Conn, *supra*, note 8, at 150.

⁸¹ 718 F.3d 496, 499–501, 510 (5th Cir. 2013).

⁸² *Id.* at 510–11; *Wyatt v. Kilgore Indep. Sch. Dist.*, No. 6:10–cv–674, 2011 WL 6016467, at *1–2 (E.D. Tex. Nov. 30, 2011).

⁸³ *Gruenke*, 225 F.3d at 296.

⁸⁴ *C.N.*, 430 F.3d at 167.

⁸⁵ *Id.* at 165.

Today, during this period, you have an opportunity to express your views This survey should take 45 minutes to complete. Please take advantage of the full amount of time, since we will be using the entire period for this purpose. Please make no identifying marks on your survey. Please begin.⁸⁶

Such language, as the *C.N.* court noted, “echo[ed] what students might hear before mandatory state testing.”⁸⁷

Additionally, even when students *do* decline to provide information in response to school officials’ questioning, they still may feel that their privacy has been infringed by the encounter. In *A Taxonomy of Privacy*, Daniel Solove describes “information collection” as a distinct type of privacy invasion, and describes a particular practice of such collection—“interrogation”—that has particular resonance for the public school context.⁸⁸ Solove writes:

Interrogation is the pressuring of individuals to divulge information. Interrogation has many benefits; it is useful for ferreting out information that others want to know.

However, interrogation can create harm. Part of this harm arises from the degree of coerciveness involved. The Fifth Amendment privilege protects against highly coercive interrogation about matters with enormous personal stakes for the examined subject. However, for interrogation generally, the compulsion need not be direct; nor must it rise to the level of outright coercion. . . . Interrogation forces people to be concerned about how they will explain themselves or *how their refusal to answer* will appear to others. . . .

Like disclosure, interrogation often involves the divulging of concealed information; unlike disclosure, interrogation can create discomfort even if the information is barely disseminated.⁸⁹

Not only are students likely to be concerned about how their refusal to answer will appear to school personnel, but the substance of the questions

⁸⁶ *Id.* at 167.

⁸⁷ *Id.* at 175.

⁸⁸ See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 491–501 (2006) (discussing the harms of interrogation and its invasive nature in the face of excessively prying questions); see also Strahilevitz, *supra* note 38, at 2033 (defining “invasion of privacy” as an infringement on private facts in a way that is objectively unreasonable, and acts to “engender[] social harms that exceed the associated social benefits”).

⁸⁹ Solove, *supra* note 88, at 500–01 (emphasis added) (footnote omitted).

themselves, particularly if they are explicit, may themselves also infringe students' sense of personal privacy.

The ways in which students' particular sensitivities can heighten the informational privacy concerns raised by schools' probing for their information suggest that perhaps, rather than ratcheting down the constitutional protection, courts should heighten it. Although the ratcheting-down model is certainly more common in the public school context, there is at least one arguable precedent for ratcheting-up: the treatment of Establishment Clause issues in public schools. The Supreme Court has suggested that public school students' youth, impressionability, and susceptibility to pressure from the school community can increase the likelihood of an Establishment Clause violation. "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," the Supreme Court wrote in *Edwards v. Aguillard*.⁹⁰ "Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."⁹¹ Such concerns can easily translate over to situations in which public schools probe for their students' personal information, and deserve to be weighed against the justifications for such school behavior.

Given the general uncertainty over whether the informational privacy right covers information-acquisition alone—along with the particular questions about how the right should apply in the public school setting—the informational privacy construct, while important, is certainly not a perfect stand-alone method for challenging public schools' extraction of students' personal information. Yet it rarely does stand alone. In almost all cases where such school behavior is challenged, another privacy-based claim is brought as well: that the school has violated not only the rights of the student, but also the rights of his or her parents. Accordingly, I now turn to this category of claims in Part II.B, and then look at the two species of privacy claims together in Part II.C to analyze the synergy between them.

⁹⁰ 482 U.S. 578, 583–84 (1987).

⁹¹ *Id.* at 584 (citations omitted). Similarly, in *Lee v. Weisman*, the Court emphasized the special characteristics of kindergarten through twelfth grade students in ruling that a middle school had violated the Establishment Clause by having a rabbi deliver the graduation ceremony's invocation and benediction. 505 U.S. 577, 593 (1992) ("[W]e think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure . . .").

B. Familial Privacy

1. The Familial Privacy Right: An Overview

In contrast to the informational privacy right's fairly recent lineage, the notion that parents have a fundamental due process right to control the upbringing of their children dates back nearly a century. In the Supreme Court's most recent discussion of this right—*Troxel v. Granville*⁹²—the Court observed:

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”⁹³

This parental interest is often described as a privacy right of its own: a right to familial privacy. The First Circuit, for instance, has stated that “[t]he due process right of parental autonomy might be considered a subset of a broader substantive due process right of familial privacy.”⁹⁴ Other courts have used similar terminology.⁹⁵

Despite the long history of the parental autonomy right, its contours remain somewhat murky. In *Troxel*, although the Court referred to this right as “fundamental,”⁹⁶ its plurality opinion did not employ the traditional strict scrutiny test for claims involving infringements of fundamental rights, instead simply striking down the challenged Washington statute for non-parental visitation as “breathtakingly broad.”⁹⁷ Justice Thomas, while concurring, wrote separately to critique the plurality for its failure to articulate the standard of review, emphasizing that he would apply strict scrutiny here.⁹⁸

This omission was not an anomaly. Rather, the question about which

⁹² 530 U.S. 57 (2000).

⁹³ *Id.* at 65 (internal citations omitted) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

⁹⁴ *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008).

⁹⁵ *See, e.g., Fyfe v. Curlee*, 902 F.2d 401, 403 (5th Cir. 1990) (stating that the plaintiff had the right to choose private-school educations for her child under “the penumbra of familial privacy rights”).

⁹⁶ *Troxel*, 530 U.S. at 66.

⁹⁷ *Id.* at 67.

⁹⁸ *Id.* at 80 (Thomas, J., concurring).

standard of review to apply connects with underlying questions about what the right protects in the first place. As David Meyer has written:

In large part, the Court's parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing because they rest uncomfortably upon two competing and as-yet-unreconciled metaphors: the family as a "private refuge" from a brutal or indifferent community and the state as "protector" of children from a brutal or indifferent family

Subsequent cases have made it clear that the Court regards some form of heightened scrutiny as appropriate whenever the state intrudes significantly upon a parent's basic decision concerning child rearing. In recent decades, the Court has stated repeatedly that a parent has a "fundamental liberty interest" in "the companionship, care, custody, and management of his or her children." And yet the Court in those cases, still torn between the competing metaphors of family as haven and as hell, stops short of embracing strict scrutiny as the governing standard.

The Court has used the familiar language of strict scrutiny—"compelling" interests and "narrow tailoring"—in only a few of its cases dealing with the rights of parents. . . . In a much greater number of cases, the Court seems to apply a more free-form "reasonableness" test to government actions that impede a parent's child-rearing authority, implicitly calibrating the level of scrutiny in each case to match the particular degree of intrusion upon the parents' interests.⁹⁹

Meyer's observation about reasonableness review certainly tracks courts' approach to what is probably the most frequent conflict between parental autonomy and public schools: situations in which parents object to aspects of the school curriculum, and assert that their parental due process rights entitle them to opt their children out. (Such claims are often coupled with a free exercise objection to the challenged portion of the curriculum.)¹⁰⁰ Although the Supreme Court has not decided a case like this, lower courts have consistently held that the parental autonomy right—

⁹⁹ David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 545–46 (2000) (footnotes omitted).

¹⁰⁰ See, e.g., *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008) (claiming violations of rights under the Free Exercise Clause and substantive parental and privacy due process rights where the student was presented with two books that portrayed parents of the same gender).

whether on its own or in combination with the free exercise right—only entitles parents to opt out of the public schools altogether, not to send their children to public school but then handpick the aspects of the experience to which they will be exposed. The Second Circuit rejected a father's claim that he should be entitled to exempt his son from health education, stating that "*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."¹⁰¹ Other courts have framed the issue in similar terms.¹⁰²

Courts have likewise rejected parents' constitutional challenges to other aspects of public school policies, such as attendance, dress, or community service requirements.¹⁰³ As the Sixth Circuit broadly reasoned in *Blau v. Fort Thomas Public School District*¹⁰⁴:

Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally "committed to the control of state and local authorities."¹⁰⁵

Indeed, having found that no fundamental right is implicated by these conflicts, courts regularly apply rational basis review.

Such reasoning has also usually been fatal to parental rights claims involving public schools' extraction of students' personal information, to which I now turn.

2. *The Familial Privacy Right: Public Schools' Extraction of Students' Personal Information*

The familial privacy right has, so far, been an even weaker anchor for challenges to public schools' extraction of students' personal information

¹⁰¹ *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003).

¹⁰² The First Circuit recently held out the possibility that if a school actually tried to *indoctrinate* students into a certain viewpoint—as opposed to simply exposing them to materials and perhaps trying to influence their views—that that could violate parental autonomy, the Free Exercise Clause, or both. However, it has never actually recognized a valid indoctrination claim, nor has any other court. *Parker*, 514 F.3d at 105.

¹⁰³ *See, e.g., Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 385 (6th Cir. 2005) (rejecting a father's claim that a middle school's dress code was unconstitutional); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 279 (5th Cir. 2001) (affirming the district court's grant of summary judgment in favor of the school district where students and parents alleged that the district's mandatory school uniform policy was unconstitutional); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 694–95 (10th Cir. 1998) (rejecting the argument that the school's refusal to allow students to attend classes part time violated students' rights under the Free Exercise Clause, parents' constitutional right to direct their child's education, and students' rights under state law).

¹⁰⁴ 401 F.3d 381 (6th Cir. 2005).

¹⁰⁵ *Id.* at 395–96 (quoting *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).

than has the informational privacy right. In *Fields v. Palmdale School District*,¹⁰⁶ for instance, the Ninth Circuit flatly rejected several parents' claims that an elementary school had violated their familial privacy rights by conducting a psychological assessment of first, third, and fifth graders.¹⁰⁷ The assessment, comprising four questionnaires, asked students to rate how often they experienced things like "[w]anting to yell at people," "[c]an't stop thinking about something bad that happened to me," "[k]nown anyone who has or is being abused," "[h]aving sex feelings in my body" and "[c]an't stop thinking about sex."¹⁰⁸ Although the school had sought parental consent for the survey, the consent form did not indicate the sexual nature of the survey.¹⁰⁹ The consent letter simply described the survey as having the goal of "establish[ing] a community baseline measure of children's exposure to early trauma."¹¹⁰ The parents argued that had they known of the "true nature" of the survey, they never would have consented to their children's involvement, and that the survey had infringed their parental autonomy rights to decide how to expose their children to these sensitive topics.¹¹¹

The *Fields* court, however, used the curriculum-dispute cases described above to rule against the parents, stating that parents "have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so."¹¹² The parents did not bring a separate informational privacy claim on their children's behalf, and the court did not consider the merits of such a claim.¹¹³ The court also did not consider whether familial privacy might have been infringed by the school's asking of these questions because the case solely proceeded as a challenge to the school's information-provision. Nor did the court consider whether familial privacy might have been infringed by the school's *asking* of these questions. The case solely proceeded as a challenge to the school's *information-provision*.¹¹⁴

The *C.N.* court rejected the Ridgewood parents' familial privacy claims on similar grounds. The court characterized the parents as solely objecting to the questionnaire's provision of information to their children:

We recognize that introducing a child to sensitive topics

¹⁰⁶ 427 F.3d 1197 (9th Cir. 2005).

¹⁰⁷ *Id.* at 1200.

¹⁰⁸ *Id.* at 1201–02, 1201 n.3.

¹⁰⁹ *Id.* at 1201.

¹¹⁰ *Id.* at 1200 n.1.

¹¹¹ *Id.* at 1202.

¹¹² *Id.* at 1206.

¹¹³ *See id.* at 1207 n.8. ("No claim is asserted that either the childrens' or the parent's rights were violated because the children were compelled to disclose personal or sensitive information.").

¹¹⁴ *Id.* at 1203.

before a parent might have done so herself can complicate and even undermine parental authority [But] [a] parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials. School Defendants in no way indoctrinated the students in any particular outlook on these sensitive topics; at most, they may have introduced a few topics unknown to certain individuals. We thus conclude that the survey's interference with parental decision-making authority did not amount to a constitutional violation.¹¹⁵

The court's analysis was thus indistinguishable from the reasoning used in the curriculum-dispute cases. The court did not consider whether any additional family privacy interests are raised when the school is actually *inquiring* into students' own personal and family lives.¹¹⁶

The decision that came closest to exploring this question is *Gruenke*, where, in addition to raising an informational privacy claim on her daughter's behalf, the student's mother argued that the swim coach had violated her own familial privacy rights by trying so aggressively to ascertain whether her daughter was pregnant, without involving her in the process.¹¹⁷ The mother claimed that had the coach stayed out of the situation and allowed the family to handle it, they would have quietly sent Leah to live with her sister out-of-state, but the coach's involvement precluded this by making "the family's dilemma a topic of conversation for the school community."¹¹⁸ Interestingly, two members of the three-judge panel were sympathetic to this claim, writing that "[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution."¹¹⁹ This reasoning echoed, and cited, the 1973 conclusion of a Pennsylvania district court that a school's drug prevention program, which included administering a questionnaire to students that asked them about their family relationships, infringed familial

¹¹⁵ *C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005).

¹¹⁶ Unlike *Fields*, in which no informational privacy claim had been brought, *Fields v. Palmdale School District*, 427 F.3d 1197, 1203 (9th Cir. 2005), the informational privacy issue was squarely presented here. *C.N.*, 430 F.3d at 184–85. The *C.N.* court, however, apparently viewed the extraction-based arguments as solely implicating the students' interests, and did not discuss how the extraction of such information might also infringe upon familial privacy. It is not clear whether the plaintiffs tried to make a separate argument along those lines.

¹¹⁷ *Gruenke v. Seip*, 225 F.3d 290, 306 (3d Cir. 2000).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 307.

privacy.¹²⁰ The *Gruenke* court ultimately concluded, however, that this family privacy right was not clearly established enough to overcome the coach's qualified immunity.¹²¹

This aspect of the *Gruenke* majority's approach, however, has not gained much traction. In describing *Gruenke* five years later, the Third Circuit in *C.N.* characterized the mother as having argued "that the swim coach's action deprived [her] of [her] right to make decisions concerning [her] child."¹²² This incomplete description—which left out the *Gruenke* majority's suggestion that school prying into private family activities can *itself* be problematic—helped the *C.N.* court to conclude that the Ridgewood survey had not violated familial privacy, because it had not seriously infringed upon parents' authority to make decisions regarding their children.¹²³

Fields and *C.N.* have generated critical commentary from scholars arguing that the decisions insufficiently protected parental rights.¹²⁴

¹²⁰ *Id.* (citing *Merriken v. Cressman*, 364 F. Supp. 913, 922 (E.D. Pa. 1973)).

¹²¹ *Id.* Meanwhile, the third judge disagreed that there had been a familial privacy violation in the first place, writing that the claim here was simply that the coach's

discussion of Leah's pregnancy with others and his failure to inform the Gruenkes of the pregnancy merely complicated the Gruenkes' ability to make decisions concerning the pregnancy. . . . [But] the Gruenkes were free at all times to make whatever decision they pleased as to the outcome of Leah's pregnancy, even after [the coach] discussed her condition with other parents or swim team members.

Id. at 310 (Roth, J., concurring). Part of the divide here stems from a difference in the characterization of the mother's familial privacy claim. The concurrence viewed it as a challenge to the coach's failure to *disclose* the information about Leah to her parents—a type of claim discussed in Part II, and to which the author is similarly unreceptive in most circumstances. But the majority recognized that the mother's claim also implicitly included a challenge to the coach's probing for this information in the first place—an extraction-based claim that, as I argue further below, requires more solicitude. *Id.* at 303, 306.

¹²² *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005).

¹²³ *Id.* at 184–85 (citing *Gruenke*, 225 F.3d at 309).

¹²⁴ See, e.g., Dahl, *Surveys in America's Classroom*, *supra* note 8, at 143–44, 191 ("The effect of the Ninth Circuit's decision in *Fields v. Palmdale* was a virtual relinquishment of a parent's ability to have a voice in what his or her child would be exposed to"); Tara Dahl, *Surveys in America's Classrooms? How Much Do Parents Really Know? Some Further Perspectives*, 38 J.L. & EDUC. 473, 477–78 (2009) [hereinafter Dahl, *Some Further Perspectives*] ("[T]he *Fields* court failed to address the parents' primary concern, that a nonacademic, sexually explicit survey was administered to very young students without parents informed consent."); Elliott Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), 29 HARV. J.L. & PUB. POL'Y 1133, 1134 (2006) (stating that *Fields* "ignores parental interests"); Beth Garrison, "Children Are not Second Class Citizens": Can Parents Stop Public Schools from Treating Their Children Like Guinea Pigs?, 39 VAL. U. L. REV. 147, 199 (2004) (claiming that *Fields* demonstrates that the Protection of Pupil Rights Act will be ignored by courts); Jesse Fu, Note, *The Researcher's Second Laboratory: Protecting Our Children from Social Surveys in Public Schools in Light of Fields v. Palmdale School District*, 80 S. CAL. L. REV. 589, 603–09 (2007) ("[T]he Ninth Circuit's opinions in *Fields* contained analytical flaws. . . . Specifically, though the court recognized that the claims are grounded in the Fourteenth Amendment's Substantive Due Process Clause, it failed to recognize the privacy claims under the

Commentators have not focused on the familial privacy concerns about, as the *Gruenke* court put it, “pry[ing] into private family activities,”¹²⁵ much less the informational privacy aspects of the cases. Instead, the critiques either (1) proceed from the information-*provision* perspective in the *Fields* and *C.N.* decisions and then argue that surveying students about sex violates parental rights to decide how to expose their children to such information,¹²⁶ or (2) focus on the argument that these children were improperly used as social research subjects without proper safeguards.¹²⁷ I suggest, however, that the overlap between the informational and familial privacy rights in this context provides a useful additional lens for analyzing these cases. The next section explores this approach.

C. Harnessing the Synergy Between the Informational and Familial Privacy Rights

Neither the informational privacy right nor the familial privacy right, standing alone, has been an ideal basis for challenging public schools’ extraction of their students’ information. The informational privacy claims bump up against the unresolved question of whether the right is violated when the government is only acquiring information for its own use without disclosing it further. The familial privacy claims run into the challenge of explaining precisely how schools infringe parents’ childrearing authority by asking their children personal questions, a difficulty heightened by the adverse precedents in the curriculum-dispute cases.

Even though neither of these privacy rights fits perfectly on its own, they converge in an illuminating way when schools probe for information about students’ personal and family lives. Such probing strikes right at the intersection of informational and familial privacy, raising the potential for both students and their parents to feel that the school is intruding on, as the Supreme Court put it in *Prince*, the “private realm of family life.”¹²⁸ Emily Buss has forcefully argued against Justice William Douglas’ famous dissent in *Wisconsin v. Yoder*,¹²⁹ in which he asserted that before Amish

Amendment—which are fundamental rights—are substantive due process rights.”); *id.* at 620–21 (stating *C.N.* stands for the proposition that schools may evade statutory prohibitions by claiming a survey is voluntary).

¹²⁵ *Gruenke*, 225 F.3d at 307.

¹²⁶ See, e.g., Dahl, *Surveys in America’s Classroom*, *supra* note 8, at 186 (“The court basically indicated that greater administrative efficiency allowed diminished parental rights.”); Dahl, *Some Further Perspectives*, *supra* note 124, at 478–79 (“[N]ot only does the *Fields* decision ‘affirm the right of the Palmdale School Districts to survey its students, but rather, it affirms the broad power of public schools to provide students with information they decide is educationally appropriate’ . . . [and] to determine curriculum. . . . But this may be too broad a power.”).

¹²⁷ See, e.g., Fu, *supra* note 124, at 608–09 (noting that children are being used as human “research subjects” without proper protections).

¹²⁸ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹²⁹ 406 U.S. 205 (1972).

parents were permitted to remove their adolescent children from school, the state should ask the children themselves what they wanted.¹³⁰ Buss states that “[a]rguably, the very asking of the question—‘Do you share your parents’ beliefs, Frieda?’—imposes some harm.”¹³¹ Specifically, “[s]uch a question raises the prospect of intra-family division”¹³² An even stronger version of this critique can be made against the questioning that occurred in *C.N.*, where the school not only inquired into the details of students’ family lives, but also implied that there was a right way for family members to relate to one another, asking students to indicate whether they agreed that “my parents often tell me they love me,” “if I break one of my parents’ rules, I usually get punished,” and querying how many times a week the student’s family ate dinner together.¹³³ Such questions not only raise the *prospect* of intra-family division, as Buss feared, but indeed seem likely to prompt students to question whether their family life is up to par.

Even when schools are not explicitly asking about students’ home life, their probing into other aspects of students’ personal lives—romantic, recreational, and so on—still has the potential to encroach on students’ sense of personal privacy, their parents’ sense of autonomy in guiding their development, and the evolving parent-child relationship itself. Charles Fried has eloquently described the interconnectedness of informational privacy and intimacy, observing:

[P]rivacy . . . is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. . . . [P]rivacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion. . . . [I]ntimacy is the sharing of information about one’s actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love. . . . Privacy grants the control over information which enables us to maintain degrees of intimacy.¹³⁴

¹³⁰ See Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 53 (1999) (“While I share Douglas’s view that the *Yoder* decision is deficient in its account of children’s rights, I think Douglas’s cure is worse than the disease.”).

¹³¹ *Id.* at 69.

¹³² *Id.*

¹³³ *C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 159, 169 (3d Cir. 2005).

¹³⁴ Charles Fried, *Privacy*, 77 YALE L.J. 475, 477–78, 484–85 (1968).

In extracting personal information from students and infringing upon their own sense of privacy, schools may undermine the intimacy of the parent-child relationship as well, influencing the decisions that students make about whether and how to discuss these matters with their parents.

Indeed, Fried's account suggests that there is a synergy between the informational privacy and familial privacy challenges typically brought against schools' extraction of students' information—that, although courts tend to view the two claims in isolation, they are in fact intertwined and mutually reinforcing. Arguably, there is something of a hybrid right here: a right of informational privacy surrounding the family *as a unit*, as opposed to solely the individual student. Neil Richards has also more broadly articulated the potential overlap between informational and decisional privacy, arguing that “the informational/decisional binary is at best a fuzzy means of categorizing two quite related interests” in autonomy.¹³⁵ Daggett also notes, in the related Protection of Pupil Rights Amendment context, that the PPRA can be viewed as protecting both students' informational privacy and their parents' familial and decisional privacy.¹³⁶

Focusing on the synergy between students' informational privacy claims and their parents' familial privacy claims also dovetails with another argument made by several family law scholars: that where children's and parents' interests converge as to a particular issue, the state should tread particularly lightly. Emily Buss, for instance, has written that in conflicts regarding the allocation of developmental control over children (such as decisions over whether a child will attend school or have regular visitation with grandparents), “[w]here the child's views align with either the parents' or the state's, the child's position should have special developmental force.”¹³⁷ David Meyer similarly argues that “[t]he state's power to intrude upon family life should be more narrowly confined when the state seeks to assert its values upon a family that is unified in its resistance.”¹³⁸

The convergence of the informational and familial privacy rights here suggest that schools should be particularly cautious when extracting personal information from students. When administering broad surveys, schools should be more cognizant of the potential privacy-based concerns.

¹³⁵ Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1093, 1106–07 (2006) (describing how, for example, certain seminal “decisional privacy” cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), can also be read as informational privacy cases).

¹³⁶ Daggett, *supra* note 8, at 63. She writes that “[m]any . . . clearly view the PPRA as providing substantive parenting rights. . . . [Others] suggest[] that the statute in fact protects a sort of student privacy; namely protection from government collection of certain information. . . . This Article assumes that protecting both family privacy and student privacy are goals of the PPRA.” *Id.*

¹³⁷ Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 44.

¹³⁸ Meyer, *supra* note 99, at 580.

The PPRA provides an important starting point in requiring parental consent and/or notice and opt-out rights for such surveys, depending on whether the survey is “required.”¹³⁹ But not only does the PPRA lack a provision for meaningful enforcement, it does not sufficiently protect the constitutional privacy interests here. It does not make clear when a survey counts as being “required,” and even when a survey *is* clearly required, there is still no obligation for the school to send a copy of it to each family, as opposed to (as in *C.N.*) just making it available for inspection at the school.¹⁴⁰

Meanwhile, at the individual level, which is not covered by the PPRA at all, schools certainly should not shy away from trying to acquire information when they feel that a student is being abused or neglected at home, or is otherwise facing a real threat to her well-being and safety. Similarly, in situations where students are in emotional distress and either they or their parents *solicit* the assistance of a school counselor or psychologist, it is unlikely that informational and familial privacy concerns will be simultaneously present. Under these circumstances, either the student or the student’s parents will be aligned with the public school. But in situations where both informational and familial privacy concerns are salient, and where there is no counter-veiling student-specific need to extract the information in question, schools should avoid probing for students’ personal information. Indeed, on top of the constitutional concerns that extracting such information can raise, schools that acquire such information can end up in a new quandary: what to do with it.

III. DISCLOSURE OF STUDENTS’ INFORMATION

Once schools have learned sensitive personal information about a student—whether or not by their own affirmative steps—they must decide whether to share that news with the students’ parents. Here, the above-described convergence between students’ informational privacy rights and their parents’ familial privacy rights breaks down, replaced by a divergence that puts schools in a bind: while disclosure risks infringing a student’s informational privacy, non-disclosure risks undermining the parents’ ability to direct the upbringing of their child.

A. *Informational Privacy*

In some ways, the informational privacy questions surrounding public

¹³⁹ See Daggett, *supra* note 8, at 59, 61. (“The bulk of PPRA gives parents consent of opting out rights to keep their child from child from participating in certain school activities, such as certain surveys and physical exams, which could generate sensitive information.”).

¹⁴⁰ See *C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 159, 164 (3d Cir. 2005) (stating that prior to the administration of the survey, the school made a copy of it available for parents to review).

schools' treatment of students' personal information become simpler upon moving from the extraction to the disclosure context. This situation maps more neatly onto the initial Supreme Court conception of informational privacy as protecting individuals from the government's unauthorized *disclosure* of their personal matters. But this scenario also raises a new, vexing question of its own: do minors *have* any informational privacy rights regarding governmental disclosures to their parents?

Courts have not reached consensus on this issue. In 2000, the Third Circuit endorsed the viability of an informational privacy claim regarding a police officer's threat to disclose an eighteen-year-old man's sexual orientation to his grandfather.¹⁴¹ This is distinguishable, however, not only because the man was an adult, but also because grandparents do not have the constitutionally-protected interest in childrearing that parents possess.¹⁴² Indeed, at least in the abortion context, the Supreme Court has specifically upheld parental notification and consent requirements out of deference to the importance of the parental role.¹⁴³

Additionally, some states require, or at least explicitly permit, healthcare providers to disclose information to a minor's parents about the minor's contraction of a sexually transmitted infection, alcohol or drug dependency, or need for mental health services.¹⁴⁴ Such statutes tend to

¹⁴¹ *Sterling v. Borough of Minersville*, 232 F.3d 190, 192–93, 198 (3d Cir. 2000).

¹⁴² *See Troxel v. Granville*, 530 U.S. 57, 70 (2000) (stating that courts should give significant deference to parents' decisions regarding their children's relationships with their grandparents).

¹⁴³ *See, e.g., H.L. v. Matheson*, 450 U.S. 398, 405 (1981) (upholding the constitutionality of a Utah statute that requires a physician to notify, if possible, the parents of a dependent, unmarried, minor female before performing an abortion). The Court emphasized the importance of the parental role, stating that "parents have an important 'guiding role' to play in the upbringing of their children, which presumptively includes counseling them on important decisions." *Id.* at 410 (internal citations omitted). The Court has never ruled that a judicial bypass option is necessary for statutes requiring parental notification, although it has held it necessary for statutes requiring parental consent. *See Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510–11 (1990) ("[A]lthough our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. . . . We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures. H.B. 319's bypass procedure meets the requirements . . . for parental consent statutes . . .").

¹⁴⁴ *See, e.g., ARK. CODE ANN. § 20-16-508* (West 2014) (stating that when a minor seeks medical care for a sexually transmitted disease, "a physician or member of a medical staff may inform the spouse, parent, or guardian of any minor as to the treatment given or needed but shall not be obligated to do so. The information may be given to or withheld from the spouse, parent, or guardian without the consent and over the express objection of the minor"); *CAL. HEALTH & SAFETY CODE § 124260* (West 2014) (stating that minors, who are at least twelve years old, may consent to mental health treatment depending on their maturity level, as determined by a physician, but "the mental health treatment or counseling of a minor authorized by this section shall include involvement of the minor's parent or guardian, unless the professional person who is treating or counseling the minor, after consulting with the minor, determines that the involvement would be inappropriate"); *410 ILL. COMP. STAT. ANN. 210/5* (West 2014) ("Any physician, advanced practice nurse, or physician assistant . . . who provides counseling to a minor patient who has come into contact with any sexually transmitted disease . . . may, but shall not be obligated to, inform the parent, parents, or guardian of the minor as to the treatment

place decision-making discretion in the hands of healthcare providers, not minors. These laws undermine the notion of a robust informational privacy right for minors vis-à-vis their parents.

That said, numerous commentators have argued that minors should have a protected realm of informational privacy even with regard to their parents. Caitlin Cullitan, for example, has argued that strict scrutiny should apply whenever the state discloses (or requires others to disclose) information to a minor's parents on sex-related issues, reasoning that "[r]efraining from disclosing a minor's private information to a parent actually maintains the status quo in families, instead of impeding upon parents' autonomy."¹⁴⁵

Adam Kretz likewise argues that the Constitution should prevent schools from disclosing students' sexual orientation to their parents.¹⁴⁶ Holning Lau similarly advocates a "categorical rule unique to children: the government should not out gay and lesbian youth unless the government shows that doing so prevents cognizable harms."¹⁴⁷ Indeed, Cullitan, Kretz, and Lau all argue that given the intensity of identity-development during adolescence, minors' informational privacy rights should be stronger than those possessed by adults.¹⁴⁸ "[A] special right is sometimes necessary for childhood contexts," Lau reasons.¹⁴⁹ Helen Gilbert similarly suggests that "minors are particularly vulnerable to the threat of disclosure of their personal information," and that the informational privacy framework should take this into account.¹⁵⁰ Benjamin Shmueli and Ayelet Blecher-Prigat likewise emphasize the need for intra-family privacy, drawing upon domestic and international conceptions of privacy to argue that "children should have an individual right for privacy against their parents."¹⁵¹

So far, however, no court has actually ruled in favor of a minor claiming that her privacy rights were violated by a governmental disclosure to her parents. The closest a court came to doing so was in *Nguon v.*

given or needed."); see Kimberly M. Mutcherson, *Whose Body Is it Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251, 260 (2005) ("Rather than determining competence, healthcare providers have a responsibility for evaluating a patient's decision-making capacity prior to obtaining valid informed consent.").

¹⁴⁵ Cullitan, *supra* note 8, at 459.

¹⁴⁶ Kretz, *supra* note 8, at 408–16.

¹⁴⁷ Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 371 (2007).

¹⁴⁸ Cullitan, *supra* note 8, at 446, 450; Kretz, *supra* note 8, at 409–411; Lau, *supra* note 147, at 370–71.

¹⁴⁹ Lau, *supra* note 147, at 370.

¹⁵⁰ Gilbert, *supra* note 35, at 1400–01. Like Cullitan and Lau, Gilbert also emphasizes that "minors' identities are not fixed, but are instead malleable and subject to influence," suggesting that society needs to give them room for independence. *Id.* at 1401.

¹⁵¹ Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 763 (2011).

Wolf,¹⁵² where a California district court held that the student had a “[c]onstitutionally protected privacy right with respect to disclosure of her sexual orientation” to her parents.”¹⁵³ But the court ultimately concluded that this right had not been violated here because the school principal was justified in telling the mother that the student had been physically demonstrative with another girl to explain why the student had been suspended for inappropriate displays of public affection on school grounds.¹⁵⁴ The court added that “[i]f Charlene’s expressions of her sexuality had not risen to the level of IPDA, clearly [Principal] Wolf could not have gratuitously told her parents that she was gay or that she was engaging in displays of affection, within appropriate bounds, with another girl.”¹⁵⁵

Other courts have been less sympathetic to such claims. In *Port Washington Teachers Association v. Board of Education*,¹⁵⁶ a district court in New York rejected the argument that a school policy to disclose students’ pregnancies to their parents violated the students’ constitutional rights.¹⁵⁷ “No Court has created such a right to privacy for minors, and the Court here declines to do so as well,” wrote the court.¹⁵⁸ The court reasoned that parental notification of pregnancy differed from parental notification of abortion, and added that courts in “parental notification cases have found that notification of abortion is far less burdensome than the consent to abortion situation.”¹⁵⁹ It is unclear, however, whether the plaintiffs explicitly challenged the policy in *informational* privacy terms, or only framed their opposition as an abortion-specific decisional privacy claim.¹⁶⁰

The clearest defeat for the argument that minors have informational privacy rights against their parents came this past summer, in *Wyatt v. Fletcher*.¹⁶¹ In a two to one split, the Fifth Circuit rejected the argument that a student’s privacy rights were infringed when her coaches disclosed

¹⁵² 517 F. Supp. 2d 1177 (C.D. Cal. 2007).

¹⁵³ *Id.* at 1191.

¹⁵⁴ *Id.* at 1177, 1194.

¹⁵⁵ *Id.* at 1195.

¹⁵⁶ No. 04-CV1357TCPWDW, 2009 WL 47447 (E.D.N.Y. Jan. 4, 2006).

¹⁵⁷ *Id.* at *7.

¹⁵⁸ *Id.* at *6.

¹⁵⁹ *Id.* at *7.

¹⁶⁰ The Second Circuit affirmed the dismissal of the case, but solely on the alternative grounds (also reached by the district court) that the plaintiffs lacked standing. *Port Wash. Teachers’ Ass’n v. Bd. of Educ. of Port Wash. Union Free Sch. Dist.*, 478 F.3d 494, 502 (2d Cir. 2007). The court noted that “the remaining portions of [the district court’s] opinion turn out to have been unnecessary to its decision and may therefore be characterized as dicta.” *Id.* For a detailed critique of the district court’s decision, see Prober, *supra* note 8, at 559.

¹⁶¹ *Wyatt v. Fletcher*, 718 F.3d 496, 496–97 (5th Cir. 2013).

her sexual orientation to her mother.¹⁶² A magistrate judge had let her case go forward, denying summary judgment on the grounds that the Fifth Circuit protected informational privacy, that the student had a reasonable expectation of privacy in her sexual orientation, and that there was a factual dispute as to whether her coaches had a legitimate interest in revealing her sexual orientation to her mother.¹⁶³ Indeed, the lower court thought that the student's rights were clearly established and that there was the potential to pierce the school officials' qualified immunity.¹⁶⁴ But the Fifth Circuit majority disagreed, ruling that there was "no clearly established law holding that a student in a public secondary school has a privacy right under the Fourteenth Amendment that precludes school officials from discussing *with a parent* the student's private matters, including matters relating to sexual activity of the student."¹⁶⁵ The court found that "the 'disclosure' here was only to the student's mother; it was not discussed with other coaches, teachers, or students."¹⁶⁶

The *Wyatt* dissent, by contrast, echoed the lower court's argument that the student had alleged a violation of her clearly established constitutional rights.¹⁶⁷ The dissent argued that the Fifth Circuit had recognized the concept of informational privacy, that this privacy right included sexual orientation, and that precedent compelled its extension to high school students.¹⁶⁸ It concluded that the key question was "whether the coaches had a legitimate interest which outweighed [the student's] right to privacy."¹⁶⁹

Interestingly, the *Wyatt* majority seemed slightly open to the idea that it mattered whether the school officials had a legitimate interest in disclosing this information. After first rejecting the idea that the student had an informational privacy right vis-à-vis her mother, the majority nonetheless argued that "disclosure of [the student's] relationship was in the interest of the student and became necessary only after [the student], allegedly influenced by [the older student with whom she was involved], violated team rules and policy, which were in place for the benefit and safety of students."¹⁷⁰ That the majority bothered to mention this indicates at least some sympathy with the idea that truly gratuitous disclosures would be problematic.

¹⁶² *Id.*

¹⁶³ *Wyatt v. Kilgore Indep. Sch. Dist.*, No. 6:10-cv-674, 2011 WL 6016467, at *4, *5-6, *13,*14 (E.D. Tex. Nov. 30, 2011).

¹⁶⁴ *Id.* at *13-14.

¹⁶⁵ *Wyatt*, 718 F.3d at 499.

¹⁶⁶ *Id.* at 508.

¹⁶⁷ *Id.* at 510, 518 (Graves, J., dissenting).

¹⁶⁸ *Id.* at 513-14, 518.

¹⁶⁹ *Id.* at 514.

¹⁷⁰ *Id.* at 508.

Both *Nguon* and even *Wyatt* thus implicitly sketch out an approach that I develop further below: that the motivation and justification for the school's disclosure should be an important part of the informational privacy analysis. Neither decision, however, discussed how students' informational privacy rights should co-exist with parents' own rights to direct their children's upbringing—the other piece of the puzzle, to which I now turn.

B. *Familial Privacy*

Schools that choose not to disclose students' sensitive personal information to their parents certainly avoid any potential informational privacy claims on their students' behalf. But in doing so, they open themselves to another risk: claims brought by parents alleging that the school's secrecy interfered with their own rights as parents, thus violating their own familial privacy.

The high-water mark for such claims is *Arnold v. Board of Education*,¹⁷¹ in which two sets of parents whose minor son and daughter conceived a child filed a lawsuit alleging that two school officials had coerced their children to seek an abortion and to keep the plan secret from their parents.¹⁷² The Eleventh Circuit agreed that “a parent’s constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision,” concluding that the complaint “sufficiently state[d] a cause of action for invasion in the familial right to privacy.”¹⁷³ The court explained that the school's actions here, at least as described in the complaint, had interfered with parental authority by depriving the parents of the opportunity to instill their own values in their children.¹⁷⁴ But the court emphasized that it was not requiring school officials to disclose students' sensitive personal information to their parents; instead, it was merely prohibiting schools from “coerc[ing] minors to refrain from communicating with their parents.”¹⁷⁵

The Third Circuit picked up this thread in *Gruenke*, suggesting that the school swim coach had violated Leah's mother's familial privacy rights not only by “pry[ing] into private family activities”¹⁷⁶ (as discussed above in Part II.B), but also by not notifying the mother about his concerns

¹⁷¹ 880 F.2d 305 (11th Cir. 1989).

¹⁷² *Id.* at 308–09.

¹⁷³ *Id.* at 312 (“[A] parent’s constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision . . .”).

¹⁷⁴ *Id.* at 313.

¹⁷⁵ *Id.* at 314.

¹⁷⁶ *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000).

regarding Leah's possible pregnancy.¹⁷⁷ The court observed that the case presented "another example of the arrogation of the parental role by a school similar to, although not as egregious as, *Arnold*," strikingly adding that it had "considerable doubt about [school counselors'] right to withhold information of this nature from the parents."¹⁷⁸

The Third Circuit ruled more decisively against the parents in *Anspach v. City of Philadelphia*,¹⁷⁹ in which the parents of a 16-year-old girl sued after a public health center gave their daughter the morning-after pill without notifying them.¹⁸⁰ Their claim was accompanied by one brought by their daughter herself, who claimed that the defendants had violated her own rights to "parental guidance."¹⁸¹ The court was unconvinced, writing that imposing a constitutional requirement on state actors to contact parents in such situations "would undermine the minor's right to privacy and exceed the scope of the familial liberty interest protected under the Constitution."¹⁸² Acknowledging its suggestion in *Gruenke* that school officials there should have consulted with the parents, the court pointed out that here, unlike in *Gruenke*, the minor had acted on her own initiative to seek out the center's services.¹⁸³ The plaintiffs had failed to plead any facts suggesting that the center "inserted itself" into the daughter's decision or interfered with the parent-child relationship.¹⁸⁴ "The real problem alleged by [the] [p]laintiffs [was] not that the state actors *interfered* with the Anspachs as parents; rather, it [was] that the state actors did not *assist* the Anspachs as parents or affirmatively *foster* the parent/child relationship," the court explained.¹⁸⁵ "However, the Anspachs are not entitled to that assistance under the Due Process Clause."¹⁸⁶

Thus, just as no student has prevailed in claiming that a school violated her informational privacy rights by disclosing her sensitive personal information to her parents, no parent has prevailed in arguing that a school violated her familial privacy rights by *not* disclosing such information.¹⁸⁷

¹⁷⁷ *Id.* at 306. As discussed above, however, the Third Circuit ultimately held that there was no "clearly established" right here, and so qualified immunity still applied. *Id.* at 307; *see supra* note 106 and accompanying text (stating the court's decision that the "family privacy right was not clearly established enough to overcome the coach's qualified immunity").

¹⁷⁸ *Id.* at 306–07.

¹⁷⁹ 503 F.3d 256, 258 (3d Cir. 2007).

¹⁸⁰ *Id.* at 258.

¹⁸¹ *Id.* at 260.

¹⁸² *Id.* at 262.

¹⁸³ *Id.* at 270–71.

¹⁸⁴ *Id.* at 271.

¹⁸⁵ *Id.* at 266 (emphasis in original).

¹⁸⁶ *Id.*

¹⁸⁷ However, *Arnold* falls into a different category because the parents were not merely challenging the school's non-disclosure, but also their affirmative efforts at concealment. *Arnold v. Bd. of Educ.*, 880 F.2d 305, 309 (11th Cir. 1989).

Does the difficulty of winning such claims—in either direction—make sense? Below, I argue that it does, but that clearer guideposts, stemming from a clearer underlying rationale, are needed.

C. *Reconciling the Tension Between the Informational and Familial Privacy Rights*

The informational and familial privacy rights point in opposite directions when it comes to public schools' disclosure of students' personal information. Strong versions of both rights cannot co-exist here. Otherwise, disclosure to parents would simultaneously be prohibited and required. But the above discussion points toward a path for reconciling these two competing privacy interests: providing schools with broad discretion to use their own best judgment as to whether to disclose students' personal information to their parents, with that discretion bounded by the students' informational privacy right on one end and the familial privacy right on the other.

Such an approach is analogous to the balance that the Supreme Court has struck in navigating the competing currents of the Free Exercise and Establishment Clauses. Like the informational and familial privacy rights, these two constitutional protections sometimes converge but sometimes come into tension.¹⁸⁸ The Supreme Court has held that although both the Free Exercise and Establishment Clauses impose certain prohibitions, “there is room for play in the joints’ between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.”¹⁸⁹ Within this space—which the Court has termed the “corridor between the Religion Clauses”¹⁹⁰—the state can exercise its discretion.

Similarly, the informational and familial privacy rights each impose limitations on how schools should handle students' personal information. On the one hand, students' informational privacy rights should prevent schools from disclosing their sensitive personal information to their parents

¹⁸⁸ As Erwin Chemerinsky explains,

To a large extent, the establishment and free exercise clauses are complementary. Both protect freedom of religious belief and actions. Many government actions would simultaneously violate both of these provisions. . . . Yet, there also is often a tension between the establishment and free exercise clauses. Government actions to facilitate free exercise might be challenged as impermissible establishments, and government efforts to refrain from establishing religion might be objected to as denying the free exercise of religion.

ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1182–83 (3d ed. 2006) (footnotes omitted).

¹⁸⁹ *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (citations omitted) (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970)).

¹⁹⁰ *Id.* at 720.

without any legitimate justification. Even if minors' informational privacy rights are weaker than those of adults, and even if such rights are further limited in the context of parental disclosure, minors should still be protected from truly arbitrary or malicious governmental disclosures of their sensitive personal information to their parents.

This is where the Fifth Circuit's recent decision in *Wyatt* fell short. It is hard to counter the majority's conclusion that the privacy right invoked by the student was not "clearly established" in the Fifth Circuit at the time of the incident, as required to overcome the school officials' qualified immunity.¹⁹¹ The dissent, in arguing to the contrary, did not address the lack of any precedent involving disclosure to a minor's own parents, nor did it acknowledge the special issues raised by such a case.¹⁹² But the majority should have taken the opportunity to clarify the scope of this right going forward. Instead, it danced around the issue, first suggesting that this was an open-and-shut case and then briefly adding that the school officials' disclosure seemed justified anyway.¹⁹³ This latter conclusion, however, was based on one particular reading of heavily disputed facts: although the coaches claimed that they disclosed the information because the student was violating team rules and policies (due to her girlfriend's influence), the student disputed all of this and claimed that the coaches were actually motivated by personal animosity toward her.¹⁹⁴ The majority should instead have ruled that although there was no clearly established right *at the time the coaches acted*, thus dooming this particular claim, it was heretofore recognizing an informational privacy right on students' part to be free from governmental disclosures of their sensitive personal information to any other individuals, including their parents, without a legitimate justification. The existence of such a legitimate justification should be a fact-specific inquiry.

On the other hand, the family privacy right should prevent schools from encouraging—let alone coercing—students to keep secrets from their parents. The *Arnold* and *Gruenke* courts agreed that as a "matter of common sense," if not constitutional duty, school personnel should encourage communication between students and their parents.¹⁹⁵ While schools may not be required to "*foster* the parent/child relationship," as the

¹⁹¹ *Wyatt v. Fletcher*, 718 F.3d 496, 510 (5th Cir. 2013).

¹⁹² *Id.* at 510–18 (Graves, J., dissenting).

¹⁹³ *See id.* at 508 (majority opinion) ("[T]here is no controlling Fifth Circuit authority . . . showing a clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students' interests, even when private matters of sex are involved.").

¹⁹⁴ *Id.* at 514–15 (Graves, J. dissenting).

¹⁹⁵ *Gruenke v. Seip*, 225 F.3d 290, 306–07 (3d Cir. 2000) (citing *Arnold v. Bd. of Educ.*, 880 F.2d 305, 314 (11th Cir. 1989)); *Arnold*, 880 F.2d at 314.

Anspach court noted,¹⁹⁶ the familial privacy right should prevent schools from inhibiting it. Such allegations—just like allegations that a school disclosed a student's sensitive personal information without a legitimate justification—should trigger a fact-specific inquiry.

This approach leaves significant room for “play in the joints” between the informational privacy and familial privacy rights. Provided that schools are not disclosing students' personal information to their parents without a legitimate justification, nor influencing them to keep such information secret from their parents, they should be free to exercise their pedagogical discretion as to how to handle each individual situation, at least without fearing liability from a constitutional perspective.

Such a discretion-maximizing approach to disclosure decisions is not only analogous to the balance that the Supreme Court has struck in the religion context, but is also good policy. In these sorts of cases, the “right” resolution—the one that best serves the interests of the student and his or her family—is going to vary tremendously depending on family dynamics, the student's own personality and inclinations, and the underlying information involved. Indeed, recent psychological research on adolescent privacy indicates how complex this topic is. Researchers have found that “[a]dolescents whose parents know relatively more about their day-to-day lives show lower levels of drug and alcohol use, delinquency, school problems, . . . depressed mood . . . higher self-esteem[,] and better school performance.”¹⁹⁷ But it is unclear whether adolescents reap such benefits when their parents receive that information from others, or whether it is the child-parent sharing itself (as the result of a well-functioning relationship) that is particularly helpful.¹⁹⁸ If the former explanation is correct, then schools' disclosures of students' personal information should often be beneficial, by providing parents with information that helps them “respond adequately to their child's needs.”¹⁹⁹ If, however, the latter explanation is more accurate—that sharing information with one's parents increases and/or reflects a child's sense of “belongingness”—then school disclosures could potentially undermine the parent/child relationship by depriving

¹⁹⁶ *Anspach v. City of Philadelphia*, 503 F.3d 256, 266 (3d Cir. 2007) (emphasis in original).

¹⁹⁷ Nancy Darling et al., *Predictors of Adolescents' Disclosure to Parents and Perceived Parental Knowledge: Between—and Within—Person Differences*, 35 J. YOUTH & ADOLESCENCE 667, 667 (2006). By the same token, “[k]eeping secrets from parents was associated with physical complaints and depressive mood in adolescence.” Catrin Finkenauer et al., *Keeping Secrets from Parents: Advantages and Disadvantages of Secrecy in Adolescence*, 31 J. YOUTH & ADOLESCENCE 123, 132 (2002) [hereinafter Finkenauer et al., *Keeping Secrets*].

¹⁹⁸ See Catrin Finkenauer et al., *Perceiving Concealment in Relationships Between Parents and Adolescents: Links with Parental Behavior*, 12 PERS. RELATIONSHIPS 387, 389 (2005) [hereinafter Finkenauer et al., *Perceiving Concealment*] (describing the lack of research that investigates “concealment from the perspectives” of both parents and children).

¹⁹⁹ *Id.*

students of the chance to share information on their own terms²⁰⁰ and by making parents aware that their child is concealing information from them.²⁰¹

Moreover, researchers consider *some* degree of adolescent secrecy to be functional and developmentally appropriate.²⁰² Not surprisingly, school counselors have identified “[t]he complexity of navigating a collaborative relationship with parents while respecting their responsibilities and honoring student confidentiality” as the most common, challenging dilemma that they face.²⁰³ By providing schools with a broad “corridor” between the informational and familial privacy rights, courts can encourage schools to take a student-specific approach, informed by the pedagogical discretion and expertise, when deciding whether and how to disclose information to parents.

IV. A NEW APPROACH TO PREVENT SCHOOL DISRUPTION OF THE FAMILY DYNAMIC

Having looked separately at schools’ extraction and disclosure of students’ personal information, it is illuminating to step back and consider them together. For one thing, the two phenomena can be factually linked. The disclosure question sometimes comes up precisely because the school has sought out the information in the first place, as in *Gruenke* and

²⁰⁰ Some researchers have emphasized the importance of adolescents’ sense of control over which what sensitive information they want to share with their parents. *See, e.g.*, Skyler T. Hawk et al., *Adolescents’ Perceptions of Privacy Invasion in Reaction to Parental Solicitation and Control*, 28 J. EARLY ADOLESCENCE 583, 605 (2008) (“Parents who trust their adolescents to disclose voluntarily and responsibly might consider making this good faith explicitly known, and contemplate the use of information-gathering strategies that afford teenagers a sense of control in sharing aspects of their personal lives.”). Relatedly, research suggests that “secrecy in adolescence may be a mixed blessing. It may facilitate the accomplishment of developmental tasks by enhancing adolescents’ emotional autonomy and independence, but at the same time, it may exert a prize in the form of physical complaints and depressive mood.” Finkenauer et al., *Keeping Secrets*, *supra* note 197, at 133.

²⁰¹ *See* Finkenauer et al., *Perceiving Concealment*, *supra* note 198, at 401 (“[P]arents’ perception of child concealment is associated with poorer parenting behavior toward their child.”).

²⁰² *See* Finkenauer et al., *Keeping Secrets*, *supra* note 197, at 124 (describing secrecy as helping “to facilitate the second individuation process, a developmental task that is at the core of adolescence”—namely, relinquishing dependence on one’s parents and becoming emotionally autonomous); Skyler T. Hawk et al., *Mind Your Own Business! Longitudinal Relations Between Perceived Privacy Invasion and Adolescent-Parent Conflict*, 23 J. FAM. PSYCHOL. 511, 517–18 (2009) (“[A]dolescents’ own, increasing sense of empowerment contributes to their willingness to deal directly with privacy boundary turbulence. . . . It is important for parents, adolescents, and professionals assisting families to keep in mind that conflict over privacy should not be viewed as entirely negative. Instead, it likely plays an important role in openly negotiating changing social expectations for adolescents.” (citation omitted)).

²⁰³ Nancy Bodenhorn, *Exploratory Study of Common and Challenging Ethical Dilemmas Experienced by Professional School Counselors*, 10 PROF. SCH. COUNSELING 195, 200 (2006).

Wyatt.²⁰⁴ The more information that schools extract, the more disclosure quandaries they will face.

But the phenomena are also linked in a deeper way. Both raise core questions about how schools should approach their role in students' personal and family lives. Indeed, both extraction and disclosure place pressure on the sense of the family as a private sphere. As discussed above, schools' probing for students' personal information—certainly when the requested information specifically touches on their parental relationships, but sometimes even when it relates to other aspects of their “outside school” lives—has the potential to undermine familial intimacy. And once the school has such information, both possible routes—disclosure and non-disclosure—have the potential to alter the family dynamic as well. Either the school and the student share a secret of which the parent is unaware, or the school is acting as the intermediary between the student and his or her parents.

Taken as a whole, the regime proposed by this Article seeks to minimize the potential for schools to insert themselves into familial relationships and distort the family dynamic. On the extraction front, under this Article's approach, schools would refrain from probing for students' sensitive personal information—whether by surveys or direct questioning—unless (1) they believe that a student is facing an actual threat to her well-being or (2) their involvement has been solicited by the student or parent. In the case of larger surveys, this second showing could be made by providing parents and students with an advance copy of the survey and requesting (in language making clear that they have a real choice) their affirmative consent for participation. Such restraint would further the overlapping informational and familial privacy rights implicated here.

When it comes to disclosure, meanwhile, *some* distortion of the parent-child relationship is inevitable. Schools should thus be able to make a case-by-case analysis of which course best serves the student and familial interests here, provided that they have properly obtained the information in the first place (under the above-described standard), and they are neither influencing students to keep secrets from their parents nor disclosing such information without any legitimate reason for doing so.

With these principles in mind, it is helpful to apply some of the cases discussed above. In the information-extraction context, *Gruenke* stands out as being fairly consistent with this Article's approach, while *Fields* and *C.N.* fall short. The *Gruenke* court, while framing the issue slightly differently, did recognize that pressuring a student into taking a pregnancy

²⁰⁴ In both cases, the school administrators took affirmative action to question students after suspicions of pregnancy or homosexuality arose. *Wyatt v. Fletcher*, 718 F.3d 496, 500–01 (5th Cir. 2013); *Gruenke v. Seip*, 225 F.3d 290, 296 (3d Cir. 2000).

test (a form of information-extraction) and “pry[ing] into private family activities” placed a serious imposition upon the privacy interests of the student and her parents.²⁰⁵ This Article’s approach would similarly find a valid informational privacy claim here, because (1) there was insufficient evidence that the student was facing an actual threat to her well-being; and (2) the coach’s involvement was not solicited by either the student or her parent. Although the second point is obvious, the first point is a closer one, given the strong advisability of medical care during pregnancy. It is certainly possible to imagine a situation where a school official genuinely fears that a student has no idea that she is pregnant and is concerned for her (and her potential child’s) health and safety. In such circumstances, it would be permissible under this Article’s approach for the school official to raise the possibility with the student in a non-probing manner. (Indeed, the official could likely do this without directly prying for answers, in which case there may be no actual information-extraction at all.) Here, however, the coach went far beyond mentioning the possibility to the student. He tried to discuss sex and pregnancy with her, and even pressured her into taking an actual pregnancy test, not to mention the disclosure of his concerns to other teammates and their parents.²⁰⁶ The Third Circuit correctly ruled in favor of the student’s informational privacy claim.²⁰⁷

By contrast, both *Fields* and *C.N.* did not give sufficient consideration to the informational privacy interests implicated by the way in which the defendant school districts conducted the respective surveys about extremely intimate topics. (To be fair, in *Fields*, the plaintiffs themselves failed to bring an informational privacy claim.)²⁰⁸ Under this Article’s approach, there would be a valid informational privacy claim against both school districts because (1) there was no evidence of a particularized threat to any student’s well-being and (2) neither the students nor the parents solicited the schools’ involvement in these very personal topics. In these cases, while the first point is incontestable, the second point is at least slightly closer, given this Article’s suggestion that with appropriate notice and consent, school surveys can be permissible. But here, neither survey met that bar. The notice itself was insufficient under this Article’s standard. In *Fields*, parents were not provided with copies of the surveys (or even given a full description of what they entailed);²⁰⁹ in *C.N.*, the only way for parents to see them was to review a copy in the school offices, an inconvenient option used by a very small percentage of the parents.²¹⁰ The

²⁰⁵ *Gruenke*, 225 F.3d at 307.

²⁰⁶ *Id.* at 296.

²⁰⁷ *Id.* at 308.

²⁰⁸ *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 n.8. (9th Cir. 2005).

²⁰⁹ *Id.* at 1200–01.

²¹⁰ *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 164–65 (3d Cir. 2005).

consent arrangements were also lacking: in *Fields*, the consent was not meaningful (given the incomplete description of the survey),²¹¹ and in *C.N.*, no consent form was distributed to parents, and the students were made to feel that the survey was mandatory.²¹²

In the information-disclosure context, meanwhile, the courts' rulings in favor of the defendants in both *Nguon* and *Anspach*—despite the opposite fact patterns in these cases—are both consistent with this Article's proposed approach. *Nguon* challenged the disclosure of a student's personal information to her parents,²¹³ while *Anspach* challenged the non-disclosure²¹⁴—but in both cases, the state officials acted within the broad zone of discretion identified by this Article: they did not disclose information without any legitimate reason for doing so, nor did they influence minors to withhold this information from their parents. And, in both cases, there had been no improper extraction of the information in the first place: Charlene Nguon was observed engaging in public displays of affection with her girlfriend,²¹⁵ and Melissa Anspach asked for the morning-after pill itself.²¹⁶ Accordingly, both cases “played in the joints” between the informational and familial privacy rights. *Wyatt*, by contrast, is the more troubling case here, both because the school coaches allegedly extracted the information about her sexual orientation improperly (interrogating her about her relationship with another woman) and because the Fifth Circuit suggested that there may be no limits on schools' ability to disclose students' personal information to their parents.²¹⁷ *Wyatt* did, however, include some language suggesting that the reasons for a school's disclosure may be relevant, and future courts should expand on this point.²¹⁸

V. CONCLUSION

There is no way for schools to shield themselves from learning about students' personal and family lives. Students simply spend too much time at school, and develop too many relationships there, for schools to remain unaware of anything beyond pure academic performance. Nor would such unawareness even be desirable. We want schools to ask questions when they believe that a student is facing a real threat to her well-being, or when a student—or her parent—initiates the school's involvement. In other

²¹¹ *Fields*, 427 F.3d at 1201.

²¹² *C.N.*, 430 F.3d at 175–76.

²¹³ *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007).

²¹⁴ *Anspach v. City of Philadelphia*, 503 F.3d 256, 260 (3d Cir. 2007).

²¹⁵ *Nguon*, 517 F. Supp. 2d at 1182–85.

²¹⁶ *Anspach*, 503 F.3d at 259.

²¹⁷ *Wyatt v. Fletcher*, 718 F.3d 496, 509–10 (5th Cir. 2013).

²¹⁸ *Id.*

circumstances, however, the overlapping informational and familial privacy concerns should prompt more restraint on schools' part to avoid inserting themselves into the delicate family dynamic. Provided that schools exercise this restraint, they should have a wide zone of discretion to decide whether to disclose students' personal information to their parents, as long as they remain within the corridor of neither pressuring students to keep secrets from their parents nor disclosing students' personal information without a legitimate reason for doing so. Taken as a whole, this Article's proposed regime will best further the alternately converging and diverging informational and familial privacy rights, and reduce the potential for school distortion of the family dynamic.