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ADOLESCENT CONFIDENTIALITY AND FAMILY PRIVACY

FERDINAND SCHOEMAN*

Egeus: Full of vexation come I with complaint
Against my child, my daughter Hermia.
Stand forth, Demetrius. My noble lord,
This man hath my consent to marry her.
Stand forth, Lysander. And, my gracious Duke,
This man has bewitched the bosom of my child [. . .]
With cunning has thou filched my daughter's heart,
Turned her obedience, which is due to me
To stubborn harshness. And, my gracious Duke,
Be it so she will not here before your Grace
Consent to marry with Demetrius,
I beg the ancient privilege of Athens,
As she is mine, I may dispose of her—
Which shall be either to this gentleman
Or to her death, according to our law
Immediately provided in that case.

Theseus: What say you, Hermia? Be advised, fair maid,
To your father you as a god,
One that composed your beauties—yea, and one
To whom you are but as a form in wax
By him imprinted and within his power
To leave the figure or disfigure it.[1]

Philosophy too has its trends. These days it is derigueur to treat recognition of rights as inimical to intimacy and community. Because rights emphasize boundaries of agents, it is contended, they are suited to relate strangers, not friends. But isn't it a virtue of

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1. W. SHAKESPEARE, MIDSUMMER NIGHT'S DREAM, act 1, sc. 1.

friendship to honor the independence and separateness of the other as well as to take an uncommon interest in seeing the other respected? We regard it as worse to transgress the rights of a friend than those of a stranger. Even though it is romantic to think about love as something that removes all barriers and distinctions between souls, people who do not respect the separateness of those they cherish are oppressive. The separateness of others is not something that stands in the way of perfect friendship, but a fact of life that calls into play particular virtues.[2] Love involves a commitment to recognizing and promoting the other's good. This good is in need of structure, and this structure is informed by our sense of the rights of others. Intimacy will characteristically require adjustments in, not a scrapping of, ordinary expectations and practices. In this paper I will examine some conflicts that arise within the parent-child relationship, using these as a means of illustrating the interplay—even the interdependence—of rights and intimacy.

We picture a decent parent as a person who feels connected with her child. This sense of connectedness manifests itself potently when the child faces a serious problem, like pregnancy or overbearing depression. The more critical the situation, the more the parent both wants and feels entitled to reassurance that the ultimate authority for its resolution will rest with her, or minimally that she should be advised and involved in its resolution. Several factors underlie this expectation: (1) Because parents are responsible for their children's welfare, they must be afforded discretion as to what contributes to this end. (2) We recognize and respect parents' interests and investments in creating an environment in which their personal values structure their domestic relations.[3]

It is characteristic of adolescence that the more critical the situation, the more likely the child will experience the urgency for privacy, vis a vis her parents, in dealing with it. This attitude is likewise grounded in several commonsense considerations: (1) Individuals within the family unit are more than sub-units of a family. They are persons in their own right, and as such have some rights to act or seek counsel from sources they reasonably deem fitting. (2) Developmentally, exercises in autonomy are important learning experiences contributing to the emergence of a responsible and mature self. (3) Furthermore, parents frequently lack objectivity in addressing their children's problems, and consequently are as likely to intensify as defuse the problem.

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2. *See* Schoeman, *Aristotle on the Good of Friendship*, 63 AUSTRALASIAN J. OF PHILOSOPHY 269 (1985).
3. *See* Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916).

Just as we appreciate that respect for families requires according them the right to realize their own ideals, so too respect for persons requires according members of the family a measure of freedom from surveillance, interference, and control by other family members. If it is part of the parents' ideal to impart certain values to the children and enforce these, and it invariably is, requirements of family privacy and individual privacy collide.

An example of the type of conflict that can arise may help direct attention to the issue. Suppose that a thirteen year old girl has become pregnant and has told her parents. She also informs them that she wants to consult with a psychologist about her situation. Her parents may find this route to problem resolution both corrupting and repugnant for any of a number of reasons and forbid their daughter to consult with anyone but themselves and others they specifically approve. The daughter intends to see the psychologist, despite her parents' disapproval. The parents, discovering this, seek state support in enforcing their control over their daughter's course of dealing with her pregnancy. The parents maintain that they have a right to a certain kind of influence over their daughter because she is a minor. Their daughter, in turn, maintains that she has the right to consult with whomever she wants as part of her own deliberative process, and consequently neither her parents nor any state agency is entitled to limit her in this way.

These claims conflict. But more significant than conflicting claims is the conflicting moral pictures the daughter's and the parents' claims represent. The parents see themselves as a part of a family that should function according to their values. When it fails to do so, at the parents' request, the state should step in to support the parents without first making a judgment about the wisdom of the parents' values. The state, by enforcing the parents' control, offers its endorsement to the family as an independent unit. To the parents, this is what deference to parents and families requires. If the state only guaranteed parental authority after investigating and passing judgment on the wisdom of their practices, it would be the state as a unit and its values, and that were being promoted by the intervention. Furthermore, the parents regard emphasis on the individual rights of family members as inappropriate in a family context where intimacy, interdependence and connectedness should be the basis for resolving disagreements.

The daughter's claim might be seen as offering another interpretation of family integrity. It is by *not* intervening that the state pays deference to the family as an autonomous and independent unit. Additionally, the daughter regards her parents restrictions as a failure to treat her as a person with a point of view and rights.

These competing ideals and interpretations of family integrity

is the focus of this paper. I will argue that the parent's interpretation of family integrity, as just presented, is misguided but nevertheless revealing of something morally estimable about parent-child relationships. In teasing this out, I will show that liberal principles governing legitimation of authority are consistent with respect for intimacy as exemplified in family relationships.

It will be useful to begin by developing some distinctions. We can differentiate two kinds of rights claimed on behalf of families. One of these, *a family privacy rights*, is a right to be free from surveillance and interference with the internal workings of a family. The state or another agent may be motivated to interfere within the family. Family privacy rights are claimed as a basis for preventing this interference.

In contrast to the assertion of a family privacy right is the claim a family member initiates to bring the state or some other extrafamilial unit in to manage an issue that the party believes threatens the family order from within. This kind of claim is called *a family integrity claim.* When it is specifically directed at maintaining parental authority over children this is called *a parental-role claim.* In the illustration cited above, the parents' claim that the state should help enforce their demand that their daughter not consult with a psychologist would qualify as a parental-role claim.

Distinguishable from these two types of family-rights claims is the claim asserted by an individual within the family seeking extrafamilial assistance in protecting individual interests or rights. This kind of claim is called an *individual rights claim.*

In our illustration, the daughter's claim that her parents should not be afforded state help in enforcing their strictures on her, she could be grounding her position on either an individual rights claim or on a family privacy claim. She could be claiming that she, as an individual, has a right to seek counselling or she could be claiming that no one else has the right to intervene within her family to force a resolution of the family's problems.

The discussion thus far points to two meanings that respect for the privacy of institutions can take: active intervention and enforcement of internal rules of the institution on the one hand, and deference or even refusal to be an agent of intervention on the other. Since families are extended both forms of respect from the state, the kinds of privacy afforded families cannot be interpreted as resulting merely from the autonomy of each individual. If the state only refused to intervene into family affairs so long as no members of the family called for protection, that would be one matter. But the state does not treat members of families as if they were just random groupings of autonomous individuals without special responsibilities

for and relationships to one another. The state precludes itself from managing disagreements between family members that it allows itself between persons not related by family bonds. For instance civil suits between family members are nearly impossible. There are diverse reasons for this policy, but one at least relates to a recognition that for a family to fill the kind of role people expect of it, families must not be accessible to or constantly judged in terms of the larger social perspective. The rules within an intimate context must reflect the personalities of the individuals involved and serve the particular meanings that intimacy has for them. Their intimacy is for their sake, and not for the purpose of promoting social goals a majority can agree upon. This means that outsiders should be very hesitant to assess right and wrong, permissible and impermissible for the parties intimately situated. This hesitancy is reflected in higher thresholds required for intervention. This threshold accounts for why the law is slow to intervene: it treats errors of unwarranted intervention as more detrimental than errors of non-intervention when intervention would have been helpful. It is thought that unwarranted intervention precludes the kinds of intimacy, meaning, and mutual accommodation that characteristically evolves in family life. This threshold also makes it rather easy for intimate contexts to be abused and become oppressive. Whether it will in fact be abused is dependent in part on what rights—more specifically on what kind of rights—members of a family regard themselves as entitled to.

Since I want to focus on privacy claims that adolescents can make against their families, and the correlated confidentiality claims they can make in communicating with and seeking services from outsiders, it is important to analyze the different grounds there are for permitting and recognizing parental control over children. Two come readily to mind—one is the position that the child is protected from the harmful consequences of his own immaturity by being put under the authority of a caring, mature parent. If we differentiate a child's rights to welfare from a child's autonomy rights, we could say that in general, child's welfare rights are taken as more important to promote than the child's autonomy rights. The other is the position that it is the right of parents to create a home that reflects their values and impart to their children the values that they deem important.

These different rationales of parental authority imply distinct sorts of discretion on the part of the parent. The rationale relating to the child's welfare suggests that any rights the parent has to control her child stem from a trust or duty to use her authority to promote the child's well-being. In promoting this, the parent has at best a kind of *weak discretion*—the discretion requisite to actually bring about the conditions to assure some threshold level of well-being for

the child. The rationale for parental control relating to the parents' right to create a microenvironment that reflects and imparts their values suggests something more positive and open-ended. Here the discretion is *strong* in the sense that the particular guiding objective is not defined for them. Their discretion is to be used to reflect what they see as important, and not something that has been independently assigned to them to promote. Parents may not see themselves as having strong discretion in so far as they think that the principles they follow are not freely chosen. For instance, they may think that God or custom or morality requires a particular direction. From the state's perspective, however, these values are themselves discretionary since the state does not mandate what these principles are.

The issue of whether these rationales for authority and discretion—the child's welfare and the parents' ideals—can conflict is often obscured because it is assumed that when parents limit their children in ways directed to the fashioning of a certain character in the child and a certain relationship between the parent and the child, the parent naturally believes that doing this will promote the child's welfare. Still, a distinction can be drawn between these two rationales even in the eyes of the parent. When we consider our own case, we recognize the difference between what is morally or religiously or legally required on the one hand, and what will benefit us on the other. Why should we think that this contrast between welfare and relevant norms does not apply in cases where we take responsibility for another?

Furthermore, we recognize that besides promoting their children's welfare, parents can and do seek to promote certain cultural, political, religious, or moral values that may contribute little to or even diminish the child's welfare. For instance, suppose that a child is born to a couple that is half Cherokee. The parents may realize that by bringing up their child among the Cherokee, the child is much less likely to flourish than if brought up in the culture of the non-Cherokee parent. Still, we think it legitimate for parents to take such risks for the sake of cultural preservation. The parents need *not* think that Cherokee life is better than the alternative life for them to be willing to take this risk. They may just think that if they and others like them do not, a rich tradition will be lost to the world. The parents may take cultural preservation as the dominating objective, not to be purchased at all costs, but something that does have its risks. Promoting personal values and promoting a child's welfare constitute distinct rationales that can recognizably conflict in both principle and practice.

If one looks at the parental authority cases the United States Supreme Court has decided, some generalizations can be drawn by using the distinctions introduced above. When the Court upholds

parental authority *on the grounds of the parents' interest in family life*, it is in situations where the state, and not the child, is challenging parental discretion. Here the family is claiming *family privacy rights* to preclude state involvement in an issue that does not stem from domestic controversy. These are not contexts where children are claiming rights on their own behalf not to be subject to parental authority. The court rarely upholds state intervention to enforce parental control over children except when such intervention is deemed requisite to protect the child's welfare. The rationale of parents having a right to structure a family as they see fit has never provided a decisive reason for state support of parental authority over an objecting child. This is to say that family integrity claims or parental role claims are only enforced by the state when the rationale for according the parents discretion is the child's welfare. The parent's interest in family life does not provide a legal basis here for intervention to preserve parental role rights. Whatever enforceable rights a parent has over her children are regarded by the state as conditioned on the presumed objective of promoting the immature child's welfare. Whatever enforceable discretion the state accords to parents must be seen to be the *weak discretion* requisite to protect the child's welfare, and not the *strong discretion* involved in creating a family according to one's own ideals. Creating a family according to one's own ideals, in so far as this is a matter of parental right, is treated as a family privacy right, which is to say a liberty to structure family life with minimal state supervision.

This in itself should seem quite surprising since we would think that if a parent has a right to raise his child in a certain way and to organize his household along certain lines of authority, that this claim should have some weight against the child's wishes as well as against the state's. The courts have been very hesitant to interfere with family privacy rights, and only under certain narrow conditions will intervene to support a family integrity claim. Family privacy rights pit the family against the state. Family integrity rights pit the parents against the children. The state is unlikely to enforce the parents' conception of right order against the child just on the ground that that is what having a family is all about. Parents are afforded wide latitude to run their families as they see fit. This is what is included under family privacy rights—that no one outside the family may direct the inner-workings of a family. But that amounts to a liberty, and not an enforceable right, when challenged by a family member. Having such a liberty does not assure success in the domestic setting, only deference by extra-familial bodies.[4]

4. Burt, *The Constitution of the Family*, in THE SUPREME COURT REVIEW, 1979 (P. Kurland & G. Casper ed. 1979). The author puts forward a different interpretation of the Court's handling of parent/child disputes. Burt maintains that (the con-

There are times when the state steps in to enforce parental authority over children, but characteristically these are cases where the child is not merely disagreeing with his parents over life's priorities, but rather where the child has behaved illegally or otherwise gotten himself into a lot of trouble by harming others or endangering himself, often as a result of special needs or disabilities. When the courts or laws require children to involve parents in their affairs, it is with the understanding that the parents are situated and motivated to provide for their welfare, and with the possibility of locating a substitute authority if the child can establish that it will not be in her interest to involve her parents in a particular urgent matter.[5] It is important to differentiate state intervention where the issue is the child's welfare from intervention into a family when the issue is a parent's capacity to impose his conception of family integrity on the children. The Court will permit the former type of intervention, but not the latter.

Reiterating, the *strong discretion* to construct a family observant of the parent's values does not derive from the state. It receives deference from the state, but no active support. *Family privacy rights* attend it, but not *family integrity claims* or *parental-role rights*. The *weak discretion* parents exercise over their children is bolstered by state authority because it is designed to protect and promote children's welfare. To assist parents in achieving this end, the state does recognize *parental-role claims*. The virtues that are involved in state regulation of families emerge in limiting its own discretion with respect to families to those cases where some threshold of minimum welfare has not been met. The virtues of the family,

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servative block on) the Court does not back parental control as such but only successful authoritarian exercises of parental control. Burt's account lacks the elegance of the principles described here.

Burt's major thesis in this article is interesting. He argues that in a range of cases, including some involving family law issues, the Supreme Court has circumvented the process by which communities redefine themselves by politically addressing issues that divide them. Burt argues that the Court should act more as guardians of this community reforming process than as a body that imposes its own solutions on the community. The Court is lured into this misconception of its role, according to Burt, by its expectation that it can resolve disputes to the satisfaction of *all* the parties involved, once its deliberations are made public. Instead the Court should recognize that some conflicts are not resolvable within the terms by which people define themselves. What is required for resolution in cases like this is an endogenous reconception, not a court engineered solution. *Id.*

Burt develops this position in the context of his discussion of Parham v. J.R., 442 U.S. 584 (1979), in which the Supreme Court overturned a lower court opinion that would have required, or given a child access to, a formal adversarial hearing to determine the propriety of institutionalization, even if his parents or legal guardian and the professional institutional staff, after evaluation of the child, agreed upon the need for such treatment.

5. *See* H.L. v. Matheson, 450 U.S. 398 (1981); Parham v. J.R., 442 U.S. 584 (1979).

in contrast, are involved in much more robust and creative efforts at making a life and finding meaning together in accord with values regarded as worth pursuing.

To say that family integrity rights and parental-role rights do not derive from state authority is not to say that the values embodied in these claims are not important. Arguably they are the most important things in the lives of the members of the family, and surely it is largely the idiosyncratic values that emerge from the particular personalities that makes family life intimate and meaningful for its members. Nevertheless, they are not within the competence of the liberal state to actively promote. Think of the analogy with religion. The state can regard religion as of supreme importance to its citizens and even as essential to the social bonds that make civilized life possible, and yet regard itself as not competent to actively promote the legitimate claims people make on its behalf.

It is noteworhty that the state has been hesitant, at times shockingly so, to present itself as an instrument by which children can assert independence from their parents. So, though the state is hesitant to enforce parental authority for the parent's benefit, it does preclude itself from being used as an instrument that would or could undermine this authority. As a matter of state policy, children are precluded from suing their parents for many kinds of acts that would be tortious or criminal when performed on someone outside the family. In the case of *Roller v. Roller*,[6] a girl was prevented from recovering for damages caused by her father raping her on the grounds that permitting such a recovery would violate intrafamily harmony in this and other cases. Furthermore, if a child tried to assert certain constitutional rights of privacy against his parents, such as the right to have personal effects like diaries or letters or purses unexamined except when search was reasonable under the circumstances, there is every reason to think that the court would turn a deaf ear toward such a claim. The greater the special relationship there is between an authority and a child, the greater the discretion there is as to what counts as reasonable.[7]

We can further refine our understanding of parent-child relationships, vis a vis the state, by considering issues that arise in the area of confidential medical treatment. In obtaining medical services, the state generally requires that parents approve of any medical services provided. Is this consistent with the analysis offered? Isn't it forcing the authority of parents on their children, rather than just leaving parents free to exercise whatever authority they can, provided that the consequences of this hands off policy do not

6. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).
7. New Jersey v. T.L.O., 469 U.S. 325, 348 (1984) (Powell, J., concurring).

threaten the child's basic welfare? I think not, because generally matters of medicine are judged to relate critically to the maintenance of a threshold level of welfare.[8]

The decision with respect to medical treatment is conceived very differently than is the decision with respect to something like religion. The parents have family privacy rights with respect to religion, not because they are thought to be in the best position to choose a religion helpful to their children but because we think that no one else is entitled to intrude into the family's religious practices. The issue of the child's achieving or falling below the threshold welfare level exclusively because of religious training or practices never arises as far as the state is concerned. It is not that the state gives parents rights to indoctrinate their children religiously. Here it is just a matter of there being only limited state authority to interfere with what parents are inclined very strongly to do on their own. But in the case of medical treatment, the state invests parents with authority, that is, it requires that parents approve of medical procedures, because this is regarded as centrally connected with maintaining the child's welfare above the threshold. Here the parent's authority stems from the duty to protect her children.

The parent's authority with respect to his child's cultural, religious, political and moral training is really the fallout of everyone else's no-right to interfere, of the family privacy right. In contrast, a parent's rights with respect to medical treatment derives not directly from a family privacy claim but from the parent's duty to assure her child's minimal welfare. Here the state does exercise its authority to promote parental discretion as such, but with the objective of facilitating the parent's carrying out her duties of promoting the child's welfare. The type of discretion parents have here is weak discretion, meaning that the authority they have must be used to promote a fixed end—the child's health. The parents have no comparable duty when it comes to religious, political, or moral training imparted in the home. Hence in these latter domains, par-

8. A minor is, in general, not capable of giving a valid consent to medical treatment. Several rationales are cited to support this rule. In one sense it is a means of societal protection for minors who, as a group, are considered immature and unable to make wise decisions. This view underlies the supposition that a minor cannot understand the nature or consequences of medical procedures. The parental consent requirement, furthermore, protects children from adult providers who might otherwise take advantage of their immaturity. The requirement also provides financial protection to parents who, because they will be liable for medical costs, are given authority to control the decision to obtain care. Moreover, because parents are legally responsible for support and maintenance of their children and legally entitled to their children's services, it is argued that they should be able to control those factors which may deprive them of such services for short or extended periods, or which may otherwise increase the cost of child rearing. J. WILSON, THE RIGHTS OF ADOLESCENTS IN THE MENTAL HEALTH SYSTEM 123 (1978).

ents have strong discretion, but no claim on outside assistance to help promote their private visions if their children prove resistant.

There are two special factors that complicate the situation I have been considering, especially as it relates to adolescents and medical decisions. The first issue is maturity. The second issue is privacy. The easier issue to deal with is maturity. Though children in general are not of mature capacities, adolescents are getting close to having mature capacities for making decisions about themselves. If they could be assumed to have mature capacities, then the state could not intervene to enforce parental authority over them. But mature capacities are at best developing during adolescence.

An aspect of the maturity factor that entangles the situation is the recognition that we have no clear standard of how much maturity is adequate to make critical decisions. There are some studies that suggest that children who are seriously ill have a more realistic and mature understanding of their situation than do their parents. In one study,[9] it is reported that children dying of cancer are thrust by their parents and their attending doctors into the role of pretending that they do not know about their prognosis and that hope for recovery to normalcy is warranted.[10]

The second and more complex factor relates to privacy. As people mature, their sense of themselves emerges, as do the number and kinds of phenomena they may come to experience as intensely private and personal. These phenomena stimulate, call into question, and reform what the person feels belongs to his innermost self. We understand that even in the closest of relationships, there are matters that individuals both legitimately and rightly keep to themselves. The experiences that are highly emotionally charged as well as those that confront individuals with new or unanticipated aspects of themselves and the world are the raw materials out of which character and personal substance evolve. We think it important that we refrain from meddling and especially from forcing an individual to give an account, designed to satisfy others, of what is going on within himself or herself when struggling to incorporate unsettling aspects of life.

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9. M. Bluebond Langer, The Private Worlds of Dying Children (1979).

10. This is because the adults cannot bear facing the fact that no effective treatment is available. In a context where the children, even rather young ones, demonstrate more competence than their guardians, there would be some basis in the law for treating the children as mature minors and affording them the autonomy and privacy any competent but sick adult would be granted. We should recognize that even in the case of an adult that is gravely ill, physicians presumably involve close family members in questions about treatment recognizing not the temporary immaturity of the adult but the intimate bonds that are presumed to lie between persons and their families. Involving parents in decisions relating to gravely sick children then would not be unlike treatment of adults under similar circumstances.

Adolescents experience many things intensely, and like the rest of us, have to develop resources for coming to terms with emerging parts of themselves. They come to realize the limitations of their parents, the adult world in general and its sacred institutions, and they discover themselves as having new emotional and sexual needs. Taking responsibility for features of their own character, for restructuring their own selves requires some distancing from their parents and authorities in general.[11] Although one can incorporate values without examining them, part of what it is to take responsibility for oneself as a moral agent involves assessing one's values. What one is and will become as a person is at stake. One reason a person may not want certain others to be a central part of this process is that their involvement may limit or distort the kinds of reorganizational strategies and perspectives available. Others will generally have a fixed and settled view of what one is, and of how one can or should adapt. Since what is put into question involves those individuals closest to one, these relationships are also open to reevaluation. This process gets further entangled because this testing occurs in a context in which adolescents must maintain intimate and dependent connections with their parents. Hence the feeling that the internal drama must occur on an internal stage and not in the more public, familial setting.

It is best not to think about the whole range of issues that arise between adolescents and their parents as if there were a single standard case, from which we extrapolate to all cases. Appreciating this may encourage us to consider two domains of medical decision-making in a special light. The two domains include the psychiatric and the sexual. Both domains bring the child in special contrast to, though not necessarily in conflict with, his parents. The child's emotional and sexual changes are part of the normal experiences through which the child sees himself as developing in a way that is only partially dependent upon his parents' relationship to him. Even those ways in which the child's development is a function of his parents' influence, the direction of the influence may be unwelcome.

Before discussing what the law should be in cases involving adolescent confidentiality and requirements for parental involvement and approval, we will explore how parental virtues are ideally articulated differently for different kinds of cases. In so far as we think

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11. According to Aristotle, as we get older, we confront greater difficulties in being effective at changing our character. ARISTOTLE, NICHOMACHEAN ETHICS, book III, ch. 5 (T.K.K. Thompson trans. 1955). He said that both the disciplined and the self-indulgent person may not longer be able to restructure their ways of thinking and acting, even though at an earlier stage in their lives they encountered real options. The reason we can be held responsible for our behavior, even though we can no longer change our habits, is that we were once positioned to change it, and can now be held accountable for what we did then. *Id.*

that parental authority is conditional on promoting the best interest of the child, we would expect parents to treat adolescent children differently from smaller children when it comes to medical procedures in general, especially when it comes to situations requiring hard decisions. Analogously, if the child kept a diary that he assumed his parents did not read, we would think that a much stronger reason would be required to invade the child's privacy by reading the diary when he was older than when he was younger. In part this is because smaller children require more direction than do older children. But in large part it is also because of the different vulnerabilities of older and younger children. Privacy matters more to older children and is more central to their development and integrity than it is to younger children; consequently the intrusion both *is* and is *experienced* as more violative of the older child than by the younger child. This is not just because older children have greater expectations of privacy than do younger children. It is because privacy plays a bigger role in their development than it does in younger children's lives, and intrusions would have much greater impact on parent-child relationships in the case of older children, for reasons recited two paragraphs back. Older children have more to contend with than do their younger counterparts: older children have more factors to balance because they have greater responsibility for both personal and familial well-being. Privacy is a major managing instrument in this close context. The required parental virtue in this context would involve recognizing the difference between the privacy needs of their older and their younger children. A recognition of this difference is expressed in a recent case involving an immature child's right to have an abortion without notifying both parents:[12]

> Second, a minor's desire to maintain a measure of privacy of information about her personal matters is an important indication of individuation, a principal developmental task of adolescence. Indeed, defendants' witness Dr. Vincent Rue testified that teenagers in the early stage of adolescence are much more likely to discuss a pregnancy than are teenagers in the mid-phase of adolescence who typically would desire more privacy, and teenagers in the later stages of adolescence who would be the most private, and insist upon confidentiality. Adult women, in Dr. Rue's view, would be most insistent upon maintaining the confidentiality of their decision. Therefore, . . . some relationship does exist between the decision to abort in privacy and the capacity for mature judgment concerning the wisdom of this decision.

We should observe that the privacy virtues now being discussed take into account only the perspective of the parent-as-guardian-for-the-child, and do not fully include the perspective of the parent-as-

12. Hodgson v. Minnesota, 648 F. Supp. 756, 767 (D. Minn. 1986).

promoter-of-a-certain-conception-of-family-order. I will return to this observation later.

In most cases of medical decision-making, there would not be serious potential for conflict between the child's conception of his good and his parents' conception. Nor would most of these situations be ones in which we think that the child's personality or integrity as such is at issue. In the psychiatric and sexual domains, however, we presume that there will be divergence and conflict between the child's and the parents' views. To observe this is not to say how it is to be settled.

We expect good parents to treat the sexual and psychological domains more cautiously than they would other dimensions of the child's life. While adolescents are very vulnerable sexually and emotionally, it is not so clear that parents are equipped to help children through what seems most traumatic here. What we would think of as ideal parental virtue here, again assuming the stance of a guardian of the child's welfare, would be something like this: parents offer their adolescent children whatever direct help they can, but, realizing their own limitations, also offer the child the option of dealing directly with an expert whose job it would then be to take the child's best interest into account. This expert then must also make an assessment about the maturity of the child. If the child seems to be above some threshold of maturity, then the child will be responsible for the ultimate decision. If the child is not deemed adequately mature, the expert makes the decision with the child, but it is the expert's decision that is decisive in cases of conflict, and the expert informs the parent of the outcome, unless the expert thinks that informing the parent would be seriously detrimental to the child. At least in the abstract, it would seem as if parental virtue included making such an option available.

We now introduce the perspective of the expert the child goes to for consultation or treatment. Since, in this ideal situation, the parent, in one of her roles, seeks the promotion of the child's welfare, and since the parent herself regards the confidential care of her child to be in the child's interest, the expert would not feel torn between helping the child on the one hand and respecting parental authority or control on the other. In acting for the child's benefit, the expert *is* acting to promote one of the parent's interests too. But what about interests of the parents independent of the welfare of their children—their interests in structuring a home life according to their own ideals? Does the expert's awareness that promoting the child's welfare might conflict with parental ideals introduce a cause for conflict in the expert's conception of his role? In aiding the child, is the expert the parent's agent or the child's agent? Is the expert, like the state, only entitled to help the parent carry out his role

when doing so benefits the child? Or may the expert take a more active interest in promoting other familial interests when these conflict with the child's benefit? While it is understandable why experts will feel torn in cases where the familial interests and the child's interests conflict, it is anything but clear how the expert can feel he has authority to act on the basis of these other, conflicting interests.[13]

The issue of confidentiality between an adolescent and his doctor when the adolescent does not want his parents to be involved either as ultimate authority or as advisor does not fall within the domain of a family privacy claim but rather a family integrity claim, and we have said that the state only regards itself as competent to intervene in this context when the child's welfare would otherwise be seriously compromised for failure to heed parental demands. A law structured along such lines would accord well with our antecedent notions of parental virtues as we just discussed them, and would take into account the requisite social, psychological and moral developmental factors.

What would this mean about the adolescent-doctor confidential communication privilege vis a vis parents? It would first of all mean differentiating intensely private patient-doctor relationships from those that are not. Included in the category of the intensely private is treatment for sexual and psychological matters. Second, it would require differentiating those cases in which mature or nearly mature children are involved in treatment, from cases in which clearly immature children are involved. Third, it would require differentiating those cases in which parental involvement would itself cause serious risks for the child from those where it would not. Fourth, it would involve differentiating those cases where serious risks attended either the procedure or the lack of procedure from those where no such risks are likely. Fifth, it would involve differentiating those therapeutic relationships involving professions that have high professional standards from those involving professions that did not have especially high standards.

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13. Though generally children could not be thought to validly consent to something detrimental to themselves, I think that there should be recognized situations where parents legitimately endanger one child's welfare for the sake of saving the life of another child in the family. Here would be a case where the state would permit harm to befall a child, where the harm is not necessarily outweighed by expected benefits to him. The state would recognize an authority of parents over their children that does not necessarily presume that this authority is exercised to protect or promote the welfare of the child. *See generally* Schoeman, *Parental Discretion and Children's Rights: Background and Implications for Medical Decision-making*, 10 J. MED. & PHILOSOPHY 312 (1985) (discussing cases of parental authority endangering their child's welfare); Schoeman, *Childhood Competence and Authority*, 12 J. LEGAL STUD. 267 (1983) (discussing courts' rationales in such cases).

At one extreme, we have a situation with the following factors present: the adolescent is mature; the issue is sexual or psychological; the situation, though weighty, is not life threatening or the emotional analogue of life threatening; parental involvement would be harmful for the adolescent as the child and the physician see it; and in the physician's judgment what she would be helping the child with is something for which there would be a strong measure of social support.[14] This would provide the best case for respecting adolescent-physician confidentiality, vis a vis the parents. As a matter of law, I think it fair to say that receiving medical attention for this kind of situation without the consent or knowledge of a parent would be legal, and laws precluding this would be declared unconstitutional.[15]

At the other extreme, we have a situation with these factors: the adolescent is immature; the issue is not generally thought to be one of intense privacy; even though the child may desire confidentiality, parental involvement would be helpful for the child; the situation is one of serious risk for the child; and what the child wants is something that in the physician's judgment is morally troublesome. This would be the worst case for according adolescent-doctor confidentiality. Here, the physician would probably be guilty of malpractice were she to provide services for the child without the consent of the parents.

Suppose that a child is seeing a therapist or physician either with parental knowledge of the visits but without awareness of the specifics or without parental knowledge. Suppose further that the professional has reason to fear that the child will seriously endanger herself or commit suicide. Is it then appropriate to breach the privilege of confidential communication? Unless the professional knows that parental involvement in the treatment would be detrimental, the professional should seek parental involvement. If the professional has reasonable grounds for thinking that parental involvement in the treatment would be detrimental, the professional should seek a court order to find some other adult or agency that can serve as a guardian until the crisis is resolved.

Problems for legal and social policy can be easily listed. First of all, how can the physician tell if the child is mature enough to make an informed decision in the particular case at hand? Second, how

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14. There being such a measure of support is compatible with there being a strong measure of condemnation.

15. As recently expressed by Judge Alsop, "But even the State's interest in encouraging parental involvement in their minor children's decision to have an abortion must give way to the constitutional right of a mature minor or an immature minor whose best interests are contrary to parental involvement." Hodgson v. Minnesota, 648 F. Supp. 756, 772 (D. Minn. 1986).

can the physician tell if parental involvement threatens the child's well-bring? This problem would be aggravated when the scenario involves the child going to a clinic where neither the child nor the parents are known and where the relationship cannot be assessed. Third, would the potential for having a confidential relationship outside the family encourage adolescents to invest less in trying to gain the understanding of their parents and thus work toward weakened family ties? Other problems abound.

Two factors contribute to an obscure picture of the law relating to adolescent-doctor confidentiality. One factor, emphasized by Franklin Zimring[16] is that there can be reasons for recognizing rights for children that have nothing to do with an assessment of their maturity or their place in the family. We might take the treatment for drug addiction, venereal disease, and access to abortion and birth control services as examples. Generally, children are accorded rights to these services independent of their parent's awareness or consent. Since a right to such services under conditions of confidentiality is thought to be the best way to minimize the serious risks associated with adolescent life, acknowledging these rights does not necessarily reflect anything but a concession to practical urgency. This recognition should not be exploited to uncover the law's attitude toward a child's legal status or children-parent relationships in general.

The other factor related to an obscure legal picture of adolescent-doctor confidentiality is the dearth of cases that have come before courts and have generated rules. This state of affairs leads to differing assessments of what the state of adolescent-doctor confidentiality actually is.

According to one treatise, the courts tend not to require parental consent or involvement in medical matters, leaving it up to families to fare as best they can without the involvement of the law. The law neither requires the parent to consent to medical services the child can obtain, nor does it prohibit the child from seeking aid on his own. Furthermore, there is little or no differentiation between physician-adult confidentiality privileges on the one hand and physician-adolescent confidentiality privileges on the other. This means in effect that if a minor can find a physician or psychiatrist for consultation or treatment, the law will not generally require disclosure to parents of the fact of interaction, let alone the details of the treatment.[17]

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16. F. ZIMRING, THE CHANGING LEGAL WORLD OF THE ADOLESCENT 100 (1982).

17. This is the picture presented in Angela Holder's book, LEGAL ISSUES IN PEDIATRICS AND ADOLESCENT MEDICINE 156, 241 (1977):

> [T]he normal exceptions to confidentiality, contagious disease, and danger to life that would apply to an adult patient would seem to apply equally to a minor patient. On the other hand, it would be extremely difficult to argue that

Another treatise expresses less confidence in ascribing to children, even ones in adolescence, the same legal rights that adults enjoy to independently seek and obtain medical services, and to confidentiality within the relationship, outside the areas of treatment for venereal disease or drug addiction, and to obtain birth control or abortion services. Despite recognition of major trends in the law and in social thinking to make children more autonomous in obtaining medical and psychological attention, the author emphasizes as fundamental to our understanding of this area of the law that children are not competent to give valid consent to medical treatment.[18] This author catalogues and critically considers various strategies that might be used to hold a physician liable for civil or criminal penalties resulting from treatment that has not been approved by a parent.[19]

Despite this author's reluctance to pronounce the child's rights here equal to those of an adult, he does end up dismissing each of these bases as not being really very threatening, at least in the context of responsible psychiatric care of a child whose parents would not consent to the treatment if apprised of it. And when assessing the confidential communication privilege as it applies to adolescent-doctor relationships, he states: "Generally, a physician has an ethical duty to maintain the confidentiality of information obtained in the course of his professional employment."[20] He also states:

> In 1828, New York passed the first physician-patient privileged communication law, and since then over two-thirds of the states have enacted similar legislation. These statutes prohibit the physician from disclosing information of a confidential nature acquired while attending a patient in a professional capacity . . . Most of these statutes contain a common clause which prohibits the disclosure of communication which arises in the course of the professional relationship. If the minor is formally seeking medical aid, he or she should be deemed

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confidentiality does not exist in the case of a minor patient who has been accepted for treatment without parental consent to the same extent as would be allowed to an adult patient. . . . Analogizing again to the law of medical treatment, there have not been any cases in recent years in which psychiatrist or any other physician or surgeon has been liable for proper, nonnegligent treatment of a minor 15 years old or older without parental consent. In addition, most states have passed minor treatment statutes that allow minors to consent to medical treatment. No case law indicates whether this would include psychotherapy. However, in the absence of a specific restriction to the contrary in any particular statute, it would seem that a psychiatrist who is a licensed physician would also be covered by the treatment statutes.

18. J. WILSON, *supra* note 9.

19. Several theories of liability have been advanced for possible use against a person who provides services to an adolescent without parental consent. Those theories include battery, failure to obtain informed consent, intentional and negligent infliction of emotional harm, child enticement, and contributing to the ungovernability of a child. *Id.* at 130.

20. *Id.* at 258.

to have established such a relationship.[21]

This review of the law suggests that what we considered to be the policy expressive of parental virtues as they relate to parent-adolescent relationship is in fact captured by legal policy.

According to Joan Lovett and Michael Wald: "Thirty states and the District of Columbia have laws requiring that physicians give confidential care when treating adolescents for certain conditions, usually those related to contraception, abortion, venereal disease, and drug abuse. However, other states require parental notification before a minor can receive abortion or contraceptive services."[22] In their interesting study of pediatricians' responses to cases in which the issue of respecting confidentiality for adolescents seeking medical attention for sex-related or drug-related problems, Lovett and Wald found that physicians "strongly support confidential care for adolescents." Their abstract of their study summarizes their findings:

> We examined factors that determine whether pediatricians will grant confidential care to adolescents. Through four vignettes, in which adolescents of different ages and maturity requested confidential care, we assessed the willingness of physicians to give such care for four problems: request for contraceptive, diagnosis of gonorrhea, intrauterine device found incidentally on x-ray study, and illicit drug use . . . . Overall, physicians agreed to give confidentiality in cases involving sexual activity. They supported confidential care for 87% of patients requesting contraceptives, but for only 54% reporting illicit drug use. The proportion of physicians supporting confidentiality increased with age and maturity of the minors. Seventeen-year-old mature adolescents seeking contraceptives were given confidentiality by 97% of physicians. Thus physician responses to vignettes indicated that they strongly support confidential care for adolescents as represented in the clinical vignettes.[23]

Since children typically are not in a position to pay for medical services out of their own resources, many adolescents would find it difficult to secure the services of a doctor without their parents' knowledge and consent. But again, this is the result of the law's restraint with respect to interfamilial conflict. The lack of assistance for children who want certain medical services combined with confidentiality regarding their parents, reflects the attitude not that children have enforceable rights to these services, but instead the view that no one else has the right to prevent children from obtaining services; they are at liberty. This means that their parents are also at liberty to try to maintain their authority over their children. In

21. *Id.*
22. Lovett & Wald, *Physician Attitudes Toward Confidential Care for Adolescents*, 106 J. PEDIATRICS 517-21 (1985).
23. *Id.* at 517.

effect, the situation for adolescents is not very different from the situation for financially dependent spouses.

The foregoing analysis, it should be realized, accounts for only one of the parental interests in childrearing—namely the parent's interest in promoting the child's welfare. This is the only basis for enforcing parental authority over the child that the state recognizes in practice. Still, parents have other legitimate interests in their children besides promoting their welfare. Although parents have no enforceable rights to the satisfaction of these other interests, we can appreciate how important these are to the self-conception of the parents, and consequently how frustrated parents will feel if their interest in their children living according to their (the parents') standards is unrealized. To the extent that parents have privacy interests in their children being certain sorts of persons having certain sorts of relationships to them, the liberal and legal standards will seem wanting. These standards recognize only the welfare interest of the child, and not the parental authority that involves the exercise of strong discretion to create a home environment that meets the parents' ideals. In the area where parents have strong discretion, the rights involved are really liberties and as such are not enforceable against their children. These privacy concerns are morally appreciable even though not legally cognizable. Such privacy concerns, included within what Robert Gerstein labels 'the right to a private life,'[24] must in general remain liberties, not enforceable rights against others. Were it to be treated as an enforceable right that could be used to require participation by others, one person's right to a private life could be used to deprive another of similar privacy interests.

Does the moral and legal picture presented here interfere with or undermine the intimacy of parent-child relationships? I do not think so. Indeed, the less the parent thinks that his children must live their lives as she wants them to because of her enforceable rights to their obedience, the more everyone will realize that what motivates them to share life and values the way they do is their caring for their lives together and their love for one another. If this basis for sharing life is inadequate for some, one has to question whether what is felt as missing is the concern for intimacy that occasioned the search in the first place. Recognition of the types of rights one has, even in an intimate setting, helps reform abusive social practices that are perpetuated by misconstrued moral assessments.

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24. Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385 (1982).