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Minors and Privacy: Are Legal and Psychological Concepts Compatible?

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Minors and Privacy: Are Legal and Psychological Concepts Compatible?

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With the development of environmental psychology, psychologists have paid increasing attention to the importance of privacy and the means of attaining it. The concept of privacy is also of significance in other social science disciplines, notably, cultural an-

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1. Environmental psychology is the subdiscipline of psychology concerned with the relationship between behavior and the physical environment. Psychological studies of privacy thus developed from an analysis of people's experience of private spaces and of intrusions into that privacy. See, e.g., Altman, Privacy: A Conceptual Analysis, 8 ENV'T & BEHAV. 7 (1976); Kelving, A Social-Psychological Examination of Privacy, 12 BRIT. J. SOC. & CLINICAL PSYCHOLOGY 248 (1973); Privacy as a Behavioral Phenomenon, 33(3) J. SOC. ISSUES 5 (S. Margulis ed. 1977); Proshansky, Ittelson, & Rivlin, Freedom of Choice and Behavior in a Physical Setting in ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 173 (H. Proshansky, W. Ittelson, & L. Rivlin eds. 1970).
throphology, sociology, and architecture. Indeed, an entire monograph developed with support from the National Science Foundation's Law and Social Science Programs was devoted to a bibliography of social science research related to privacy. At the same time, however, there has been minimal consideration given to the potential integration of this literature with legal doctrines related to privacy.

This Article is intended to facilitate such an integration with respect to the privacy interests of minors. Such an emphasis is particularly timely in view of contemporary efforts to explore the psychological assumptions underlying legal and philosophical analyses of the nature of children's rights. Indeed, the cases reviewed in this Article suggest that the jurisprudence of privacy in childhood and adolescence has also relied on psychological assumptions, although generally not assumptions concerning the psychology of privacy. The thesis of this Article is that a more systematic examination of the significance of privacy for minors, both psychologically and ethically, would result in a more coherent and more humane policy of respect for children's personhood. Before considering such a focus in detail, however, it is necessary to discuss in general terms the nature of privacy.

I. THE NATURE OF PRIVACY

A. Privacy as a Psychological Concept

The relative lack of attention devoted to an integration of psychological and legal concepts of privacy can probably be attributed

2. For example, see the studies cited in Altman, Privacy Regulation: Culturally Universal or Culturally Specific? 33(3) J. Soc. Issues 66 (1977).
6. There have been several notable exceptions to this general lack of attention. See A. Westin, Privacy and Freedom (1967) (implications of technological developments enabling greater physical and psychological surveillance); Levin & Askin, Privacy in the Courts: Law and Social Reality, 33(3) J. Soc. Issues 138 (1977) (an analysis of social facts raised in litigation on privacy issues, particularly with respect to fourth amendment claims); Ruehhausen & Brim, Privacy and Behavioral Research, 65 Colum. L. Rev. 1184 (1965) (privacy issues raised in personality testing and personality research).
to two factors: (1) the narrowness of legal topics in which psychologists have been interested, and (2) the complexity of the concept, both psychologically and legally. Psychologists have tended to focus their work in a few legal areas (e.g., mental health law, juries, and criminal law). Those who might venture into the psychological analysis of privacy interests are likely to find a confusing array of issues.

Even as a psychological concept alone, privacy entails a complex set of phenomena. At a minimum, three broad and rather disparate concerns (i.e., bodily privacy, management of access to personal space, and management of access to personal information) are subsumed under the rubric of privacy. Moreover, each of these concerns has both negative and positive dimensions, analogous to the general concepts of negative and positive rights. That is, each type of privacy concern involves an interest in both freedom from invasion of privacy and freedom to exercise privacy. Furthermore, in neither case is the expression of privacy necessarily a conscious act. In both instances, people may often actively experience privacy only when it is in danger, although at other times individuals may make active, conscious efforts to induce and maintain privacy (e.g., going somewhere to be alone or locking a letter in a file drawer). Thus, there are at least three types of privacy concerns, each with positive ("freedom to") and negative ("freedom from") aspects, which may or may not involve self-conscious behavior and experience.


10. The conceptualization of privacy presented here is based on the nature of the "zones" or interests of privacy protected: body, territory, and information. A somewhat different conceptualization has been offered by Laufer and Wolfe. See Laufer & Wolfe, Privacy as a Concept and a Social Issue: A Multidimensional Developmental Theory, 33(3) J. Soc. Issues 22 (1977). They describe three dimensions of privacy which they believe may vary systematically across privacy experiences: self-ego dimension (privacy in the context of personal individuation), id. at 26; environmental dimension (elements of the social context, including "cultural meanings, the interaction between the social arrangements and the physical settings, and the stage of the life cycle"), id. at 28; and interpersonal dimension ("[p]rivacy, in whatever form, presupposes the existence of others and the possibility of a relationship with them"), id. at 33.

The Laufer/Wolfe conceptualization is useful as a theoretical framework for the analysis of the elements—both situational and phenomenological—of various privacy experiences. While perhaps not as rich, the three-part concept of privacy interests presented here probably has more potential for analysis of psychological aspects of various legal doctrines of privacy. To the
The first concern to be discussed is bodily privacy, including privacy of mind.11 As noted above, this privacy interest includes both negative and positive freedoms: respectively, (1) protection from intrusion into one's body and into the privacy of one's thoughts; and (2) control of decision making concerning one's body and mind. In the former case, there is a negative interest in maintaining freedom from intrusions into one's physical self. In the latter case, there is a positive interest in maintaining freedom to do what one wishes with one's body. The basic notion in both instances is that respect for the integrity of the person demands protection of personal control over the physical boundaries of the body. Privacy in this context is reflected in cultural (and legal) norms with respect to privacy governing the expression of sexuality and physical intimacy.

Second, privacy entails management of the physical space over which one feels actual or legitimate control. This form of privacy is reflected in the now well-established concept of personal space.12 Management of personal space also has positive and negative aspects: (1) the freedom to establish territorial boundaries; and (2) protection from intrusion into the territorial zones over which one feels legitimate control.

Third, privacy includes management of access to information about oneself. Society recognizes certain contexts (e.g., psychotherapy or a personal diary) and content (e.g., details of one's sexual behavior or one's personal income) which are legitimately private; that is, in which cultural norms—and sometimes legal extent that these interests are analogous to foci of legal protection, research on a specific interest might be more easily applied to the law.

11. Privacy of the mind was articulated in Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980) (involuntarily committed patients have a right to refuse "mind-affecting" antipsychotic drugs), remanded on other grounds sub nom. Mills v. Rogers, 102 S. Ct. 2442 (1982), although the Court could not determine its exact origin:

We begin our analysis with what seems to us to be an intuitively obvious proposition: a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs. The precise textual source in the Constitution of the protection of this interest is unclear, and the authorities directly supportive of the proposition itself are surprisingly few. Nevertheless, we are convinced that the proposition is correct and that a source in the Due Process Clause of the Fourteenth Amendment for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security.

634 F.2d at 653.

norms—proscribe violation of personal control over information. Here again there are positive and negative freedoms involved: (1) the maintenance of active decisional control over the disclosure of personal information contained in documents or known by other parties; and (2) protection from nonconsensual examination of such information.

Complicating the concept of privacy further is the fact that, besides involving widely disparate behaviors and contexts, privacy is both interpersonal and phenomenological. On the one hand, privacy in all of its forms involves interpersonal transactions in which norms of privacy apply. Thus, privacy can be defined in terms of social situations. Of particular importance in the present discussion is that normative expectations of privacy vary not only with physical and social setting but also with social status. Clearly the dependent status of children leaves them especially vulnerable to restricted norms of privacy.

Psychological concepts of privacy must also take into account its experiential (phenomenological) aspects. While situations may be more or less reflective of a social consensus that privacy should exist, this situational/normative definition may not correspond with the individual’s experience or intent. This discrepancy may be particularly common for children, because (1) the perception may require complex social discriminations, and (2) adults in control may restrict children’s opportunities for privacy. Indeed, the experience of privacy—as well as social definitions of private situations—is likely to differ appreciably for children from that of adults. For example, as Professors Laufer and Wolfe have noted, aloneness for young children is often not volitional (i.e., the result of an active exclusionary process), but it may nonetheless come to signify privacy.\(^{13}\) Besides experiencing physical separation from others (perhaps a precursor to individuation), “the child, left alone, has the opportunity to experience privacy in ways other than physical aloneness, that is, as quiet, as thinking alone, as being able to do what he/she wants.”\(^{14}\)

Notwithstanding the complexity of the psychological concept of privacy, even as applied only to adults, it should be noted that there are certain commonalities across types of privacy. Professor Altman, for example, has conceptualized privacy as the “selective control [desired or achieved] of access to the self or to one’s group.”\(^{15}\) Privacy also involves management of interpersonal transactions in order “to enhance autonomy and/or to minimize

\(^{13}\) Laufer & Wolfe, supra note 10, at 27.
\(^{14}\) Id.
\(^{15}\) Altman, supra note 1, at 8.
vulnerability,” as Professor Margulis has noted.\textsuperscript{16} While Margulis’s definition fails to differentiate adequately between privacy and liberty as existential phenomena, his conceptualization does imply the common ethical basis of various forms of privacy.

Whether the control is over one’s physical self, one’s physical territory and possessions, or one’s sensitive concerns and experiences, privacy is predicated on respect for the integrity of the person. Without respect for the boundaries of a person (both physical and psychological), there can be little recognition of the existence of the individual as an autonomous member of the community.

In conceptualizing privacy (or perhaps the lack thereof) in childhood, it is important to keep this underlying ethical theme in mind. It is reasonable to hypothesize that definitions of psychological and physical zones or privacy for children would vary with the degree to which children are consensually defined as autonomous members of the community,\textsuperscript{17} a social classification which has been both historically and culturally relative\textsuperscript{18} and about which there has been great ambivalence in law.\textsuperscript{19} Analyses of the psychology of privacy in childhood may be facilitated, therefore, by consideration of the roles and status of children in various contexts and of the interaction of such expectations with the “true” maturational level of the child.

B. Privacy as a Legal Concept

Given the diverse situations in which claims of privacy (as that term is used colloquially and as it is used by psychologists) may be raised, it is hardly surprising that there is not a direct correspondence between psychological and legal concepts of privacy. One legal commentator has even gone so far as to distinguish privacy “as an existential condition” from its legal counterpart: “privacy per se remains primarily a nonpolitical and nonlegal concept.”\textsuperscript{20} Even the most casual observer of the law need only leaf through Professor Latin’s bibliography of social science research on privacy\textsuperscript{21} to discern the substantially broader scope of psychological than of legal concepts of privacy. Professor Latin includes, for

\textsuperscript{18} G. Melton, supra note 7, ch. 9.
\textsuperscript{19} Melton, Children’s Competence to Consent: A Problem in Law and Social Science, in CHILDREN’S COMPETENCE TO CONSENT 1-11 (1983); see generally R. Mnookin, CHILD, FAMILY, AND STATE (1978).
\textsuperscript{20} D. O’Brien, PRIVACY, LAW, AND PUBLIC POLICY 25 (1979).
\textsuperscript{21} H. Latin, supra note 5.
example, studies of population density, self-disclosure as a personality trait, and "experimentally aroused feelings of undistinctiveness." Such topics, while perhaps being highly relevant to an understanding of the dynamics of privacy, are at most vaguely tangential to the law of privacy and indeed are properly beyond the scope of legal regulation, at least on privacy grounds alone.

Even within the narrower confines of legal privacy, the three broad concerns identified previously (i.e., bodily privacy, management of personal space, and management of access to personal information) are engulfed in a complicated web of legal doctrines. Privacy interests are implicated, at a minimum, in the fourth, fifth, and first amendments, in a variously-derived constitutional right to privacy per se, and in various statutes and common-law doctrines governing the control of information. The relationships among these doctrines are not altogether clear.

Nonetheless, the legal philosopher need not strain very hard to find a common underlying principle. Analogous to the ethical/psychological principle of respect for the integrity of the person or the self, legal privacy seems predicated on protection of the individual from state interference in his or her life where such intervention is not based on compelling (or at least rational) justification. This principle was eloquently articulated by Warren and Brandeis nearly a century ago and reiterated in Justice Brandeis' oft-cited

22. Id. at 20.
23. The fourth amendment protects people from "unreasonable searches and seizures" and therefore guards legitimate expectations of privacy from government intrusion. See infra notes 119-29 and accompanying text.
24. "Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses . . . . That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing. This is his prerogative, not the State's." Warden v. Hayden, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting) (footnote omitted).
25. See generally O'BRIEN, supra note 20, ch. 4.
26. See infra notes 37-45 and 101 and accompanying text.
29. The relationship between the fourth and fifth amendments is one such unsettled topic. See, e.g., O'BRIEN, supra note 20, at 105-10.
dissent in Olmstead v. United States 32 almost three decades later:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. 33

While Justice Brandeis' view may have lacked elegance as a judicial construction, 34 his view does reflect the ideals of privacy embodied in the American political system for adults. However, for those for whom autonomy is not assumed, interests in "being let alone" must be balanced against their presumed need for care and protection. Consequently, while "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," 35 it is well established that the state as parens patriae may intervene in the affairs of children in ways that would be clearly unconstitutional for adults. 36

Indeed, some may argue that the key privacy interests for children are those involved in family privacy. 37 Professors Goldstein, Freud, and Solnit, for example, have contended that children have a primary interest in noninterference in parental decision making and the preservation of the sanctity of the family based on the children's supposed need for seemingly omnipotent parents and the state's lack of effectiveness as a surrogate parent. 38 While this view is certainly arguable, 39 the point is that for some commentators, minors' privacy interests are interchangeable with the parents' privacy interests. It is parents, they argue, who should be let alone; parents in turn should be able to rear their children as they

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32. 277 U.S. 438 (1928).
33. Id. at 478 (Brandeis, J., dissenting) (emphasis added).
34. Cf. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960) (tort of invasion of privacy is actually several independent torts in a "state of bewildered confusion").
36. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968); id. at 673 (Fortas, J., dissenting); Prince v. Massachusetts, 321 U.S. 158 (1944).
see fit, short of gross abuse and neglect. Therefore, the independ-
ent privacy interests of children and, accordingly, the legally rele-
vant psychological issues may be quite limited. In discerning the
points at which psychological analyses may be useful in under-
standing minors' privacy, it is important to examine the privacy
erights of minors which have in fact been given judicial
consideration.

II. JUDICIAL CONSIDERATION OF PRIVACY
IN CHILDHOOD

A. Bodily Privacy

A constitutional right to privacy was first recognized by the
Supreme Court in *Griswold v. Connecticut*. In overturning a
Connecticut statute prohibiting the use of contraceptive devices
and the distribution of information concerning their use, the Court
found a right to privacy in the "pennumbras" of express constitu-
tional guarantees. Writing for the majority, Justice Douglas traced
the right of privacy as a fundamental right implicit in several of the
Bill of Rights:

[Previous] cases suggest that specific guarantees in the Bill of Rights have
pennumbras, formed by emanations from those guarantees that help give
them life and substance . . . . Various guarantees create zones of privacy.
The right of association contained in the pennumbra of the First Amend-
ment is one . . . . The Third Amendment in its prohibition against the
quarthing of soldiers "in any house" in time of peace without the consent
of the owner is another facet of that privacy. The Fourth Amendment ex-
plcitly affirms the "right of the people to be secure in their persons,
houses, papers, and effects, against unreasonable searches and seizures." The
Fifth Amendment in its Self-Incrimination Clause enables the citizen
to create a zone of privacy which government may not force him to surren-
der to his detriment. The Ninth Amendment provides: "The enumeration
in the Constitution, of certain rights, shall not be construed to deny or
disparage others retained by the people."

In later cases, the Supreme Court further explicated the right to
privacy as applying particularly in matters related to reproduction.
In *Eisenstadt v. Baird*, the Court invalidated a Massachusetts
statute that made it illegal for single persons, but not married per-
sons, to obtain contraceptives. In his opinion for the Court, Justice
Brennan emphasized that, "[i]f the right of privacy means any-
things, it is the right of the *individual*, married or single, to be free
from unwarranted governmental intrusion into matters so funda-
mentally affecting a person as the decision whether to bear or be-

40. 381 U.S. 479 (1965).
41. Id. at 484 (citations omitted).
42. 405 U.S. 438 (1972).
get a child." Similarly, in *Roe v. Wade*, the Supreme Court sustained a constitutional challenge to a Texas law, making the procurement or performance of abortion a crime. However, in the opinion for the Court, Justice Blackmun did little to clarify the nature of the right to privacy. He noted merely that it has "some extension" to matters of marriage, reproduction, and family relationships and that the right could be founded in the concept of personal liberty embedded in the fourteenth amendment. He made no effort to distinguish "privacy" and "liberty" and consequently made no distinction between privacy analysis and the more traditional substantive due-process analysis.

Thus, while the origin of the right to privacy remains somewhat unclear, it is clear that it does exist. Furthermore, in cases concerning minors' rights of access to abortion and contraceptives, the Court has had the occasion to consider the applicability of this right of privacy to minors. The first such case was *Planned Parenthood of Central Missouri v. Danforth*, in which the Court considered the constitutionality of a Missouri statute requiring parental consent before a minor could obtain an abortion. Writing for a sharply divided Court, Justice Blackmun concluded that state interests in the protection of the family and parental autonomy were outweighed by the minor's privacy interests:

It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the [minor daughter's] pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

There were two important qualifications in Justice Blackmun's

43. *Id.* at 453. Justice Brennan's explication of the substantive nature of privacy may have been dicta. The key issue in the case was with respect to the application of the equal protection clause.
44. 410 U.S. at 113.
45. *Id.* at 152-53.
47. Justice Stewart, joined by Justice Powell, wrote separately to indicate that they would find statutory provisions for parental consultation acceptable, provided that parental approval were not an *absolute* condition for a minor obtaining an abortion. In separate dissents, Justices Stevens and White, the latter joined by Chief Justice Burger and Justice Rehnquist, suggested that parental consent requirements were justifiable means of protecting minors from what the dissenters felt were likely to be "immature and improvident decisions." 428 U.S. at 95 (White, J., dissenting).
48. 428 U.S. at 75.
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analysis, however. First, it was implied that the standard to be used in determining whether limitations on minors' privacy rights are permissible is less stringent than the "compelling state interest" standard normally used when fundamental rights are infringed for state purposes.\textsuperscript{49} The issue in \textit{Danforth} appeared to be merely whether a "significant state interest" was supported by the parental consent requirement.\textsuperscript{50} Second, the Court noted that its holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."\textsuperscript{51} Thus, the \textit{Danforth} decision left open the possibility of establishing requirements of involvement, short of absolute veto, by parents or other third parties in minors' abortion decisions, provided that the state could provide significant justification for such limitations on minors' privacy. Moreover, the Court expressly established a mature minor rule\textsuperscript{52} without providing guidance as to the elements of "maturity."\textsuperscript{53}

These points have been reiterated in a series of Supreme Court cases concerning the extent to which states may limit minors' privacy when dealing with abortion and contraception. For example, in \textit{H.L. v. Matheson},\textsuperscript{54} the Court held that states may constitutionally require physicians to notify parents if their daughter requests an abortion, at least insofar as such a law is applied to immature, unemancipated minors living with and dependent on their parents.\textsuperscript{55} In the opinion for the Court, Chief Justice Burger argued that such a statute serves the legitimate state purposes of preservation of family integrity, protection of adolescents, and "providing an opportunity for parents to supply essential medical and other information to a physician."\textsuperscript{56} The dissenters in \textit{Matheson} correctly noted that it is unclear what relevant information the patient's parents could provide that she could not.\textsuperscript{57}

\textsuperscript{51} 428 U.S. at 75.
\textsuperscript{53} See Melton, \textit{supra} note 19, for more extensive discussion of these points.
\textsuperscript{54} 450 U.S. 398 (1981).
\textsuperscript{55} The Supreme Court has since made clear in dicta that a parental notice requirement applied to mature minors seeking abortions would be unconstitutional. City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2499 n.31 (1983).
\textsuperscript{56} 450 U.S. at 411.
\textsuperscript{57} Id. at 443 (Marshall, J., dissenting) (dissent joined by Brennan and Blackmun, JJ.).
The Chief Justice's opinion rested on a series of empirical assumptions, some of them of dubious validity on their face. Starting from a premise of unity of interests between parents and child, Burger contended that parental consultation may be necessary to provide the minor with guidance in "a decision that has potentially traumatic and permanent consequences." He further asserted that there are grave risks associated with abortions in adolescence; risks which he contended do not exist in pregnancies carried to term:

The medical, emotional, and psychological consequences of an abortion are serious and can be lasting, this is particularly so when the patient is immature.

. . . . If the pregnant girl elects to carry her child to term, the medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

Little or no evidence was given to support these assumptions. Indeed, it appears that Chief Justice Burger would be unable to find empirical evidence to support his assumptions.

1. Psychological Questions

As Chief Justice Burger's opinion in Matheson illustrates, the Supreme Court's emphasis on maturity and the accompanying low threshold (i.e., significant state interest standard) for permissible qualifications of minor's privacy rights in abortion and contraception decisions have made psychological harm a key concern in adolescent abortion cases. Indeed, Danforth and its progeny raise several specific psychological questions:

(a) How competent are adolescents in making decisions about abortion? The majority of the Supreme Court have made clear their belief that pregnant adolescents are likely to arrive at poorly

58. Id. at 409-10.
59. Id. at 412.
60. Id. at 411-13 (footnote omitted).
61. Similar issues are raised when considering the effects of restrictions on minors' access to contraceptives. In considering such issues, the Supreme Court has failed to find evidence supporting the existence of legitimate state purposes in banning sales of contraceptives to minors under age 16. Carey v. Population Services Int'l, 431 U.S. 678, 695-96 (1977).

reasoned decisions about abortion. At the same time, however, there is research suggesting that adolescents are no less competent than adults in making decisions about health care matters.

Without citing such research, Justice Marshall in his dissent in Matheson asserted that the "undoubted social reality" is that "some minors, in some circumstances, have the capacity and need to determine their health care needs without involving their parents." Arguably, though, the abortion decision is sufficiently unusual in its social and moral dimensions as to make such general observations of adolescent decision making in health care inapplicable. In the only study to examine specifically the decision making of minors regarding abortion, Catherine C. Lewis found little difference between the rationale given by minors and adults for their decision to have or not to have an abortion. The differences which did exist (i.e., minors' greater reliance on others' opinions) were reflective of the differences in situations in which minors and adults are likely to find themselves. While this study tends to show that minors are relatively competent to make decisions concerning abortion, further research is needed in this area, even though such research is inherently difficult to perform.

64. 450 U.S. at 453 (Marshall, J., dissenting) (dissent joined by Brennan and Blackmun, JJ.).
66. Such research by its nature presents ethical dilemmas which are difficult to resolve. Given the sensitive nature of such research and the stress which the minors are presumed to be under at the time, it would be important to have safeguards to ensure that the research does not add additional stress. At the same time, it would violate privacy further to seek parental consent for the research. The problem may be resolved by permitting minors to consent to research concerning conditions for which they could legally seek medical or psychological attention without parental consent. See Additional Protections For Children Involved as Subjects in Research, 45 C.F.R. § 46(D) (1983).

In view of Justice Powell's concern about minors' ability to exercise good judgment in choosing a physician, Bellotti v. Baird, 443 U.S. 622, 640 (1979), any future research on maturity or competence in decision making about abortion should include this aspect of the process as well as reasoning about the abortion decision itself.
(b) Can "maturity" be reliably and validly assessed? By its reliance on a mature minor standard, the Supreme Court has implicitly concluded that such a standard is a practical one. If professionals responsible for counseling adolescents about abortions are unable to differentiate adequately between mature and immature minors, the distinction made by the Court is useless. The meaningfulness of research on the question is dubious until the Court clarifies factors to be considered in calculating maturity. In any case, no research on the assessment of maturity in abortion cases is available at this point in time.

(c) What are the psychological effects of abortion on adolescents, and how do they compare with the effects of carrying a pregnancy to term? Available evidence concerning medical risks of pregnancies carried to term indicates that the Chief Justice's sanguine view of the latter is clearly misplaced. Teenagers are no more likely than older women to suffer complications as a result of abortion. Moreover, the risk of death from pregnancy continuation is five times higher for teenagers than the mortality rate associated with abortion.

The data on psychological risks are less clear and less extensive.

67. Reliability (the stability of measurement) and validity (the accuracy of measurement) are cornerstones of psychometric evaluation. See A. Anastasi, Psychological Testing (1976); Green, A Primer of Testing, 36 Am. Psychologist 1001 (1981).

68. In its most recent abortion cases, the Supreme Court again failed to provide much guidance as to the meaning of "mature." The case of City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983), suggests that a purely age-graded rule is insufficient; rather, a case-by-case determination is necessary. The majority indicated that, "it is clear that Akron may not make a blanket determination that all minors under the age of 15 are too immature to make this decision . . . ." Id. at 2498. The companion case of Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517 (1983), does little to clarify the issue. In Ashcroft, at issue was a Missouri statute which provides that a minor may "self consent" if the judge finds that she is mature, based on evidence of "the emotional development, maturity, intellect, and understanding of the minor." Id. at 2526. Although the Court upheld the statute, it did not indicate why this inquiry satisfies the constitutional requirement of protecting the privacy of mature minors.

The ambiguity which now exists as to the elements of the mature minor standard leaves physicians and counselors with an uncomfortable dilemma in states with a parental-notice requirement. On the one hand, they may be subject to criminal penalties for failing to notify an immature minor's parents of their daughter's request for an abortion. On the other hand, the state may not constitutionally require parental notice if the minor is mature, and the health professional is given no clear guidance as to how to determine maturity. See supra notes 54-55 and accompanying text.

because of attrition rates in follow-up studies, inconsistencies of definition, and other methodological flaws.\textsuperscript{70} In any case, there is no evidence to support the Chief Justice's contention in \textit{Matheson} that psychological consequences of abortion are "markedly more severe" for adolescents than for adults.\textsuperscript{71} One of the two articles cited by the Chief Justice to support his assertion was in fact an account of psychoanalytic impressions of thirty cases of teenage pregnancy.\textsuperscript{72} Besides lacking methodological rigor, that report had nothing to do with cases of abortion. The more valid studies show that severe emotional responses to abortion are very rare. For example, a recent analysis of health registry data in Denmark for 1975 found only five admissions to psychiatric hospitals of females aged nineteen or under who had had an abortion within the past three months, compared with a total of 4375 young women who had had an abortion.\textsuperscript{73}

In terms of short-term psychological sequelae of abortion, most researchers have reported the predominant response to be happiness and relief.\textsuperscript{74} Such a reaction was observed, for example, in a recovery-room study of 489 patients at a New York clinic who had undergone an abortion.\textsuperscript{75} Although that study did find younger women to have significantly less positive reactions to the abortion, age accounted for less than eight percent of the variance.\textsuperscript{76}

In short, while more and better-designed research is needed, there is little evidence to support the Chief Justice's assumption of serious negative emotional effects of abortion on adolescents. Indeed, the evidence points in the opposite direction, particularly when the stresses associated with unwanted parenthood are considered.

\textbf{(d) Whom do adolescents typically consult in making abortion decisions?} Data are lacking on this question at least insofar as studies of girls who actually obtain abortions are concerned.


\textsuperscript{71} 450 U.S. at 411, n.20.


\textsuperscript{73} David, supra note 70, at 89.


\textsuperscript{76} Id. at 156-59.
Among girls who carry pregnancy to term, however, parents are among the last confidants to be informed of the pregnancy; rather, boyfriends are preferred sources of advice and support. Minors are less likely than adults to include professionals as persons whom they expect to consult.

(e) Does a parental notice requirement change the paths of consultation which pregnant adolescents follow? Does a parental notice requirement result in more or less reasoned abortion decisions? A parental notice or consultation requirement is supportable only if it actually results in parental involvement. Moreover, unless the requirement is defensible solely as support for the family as a unit, such a requirement would be constitutional only if it also results in more reasoned abortion decisions. Otherwise no significant state purpose is served.

The majority of the Supreme Court assumes such a positive effect (at least for immature, unemancipated minors). There are as yet no outcome data on the impact of statutes such as the one involved in Matheson. However, there is reason to hypothesize that parental notice requirements will have the effect of lowering the probability of minors carefully weighing the risks and benefits of an abortion.

First, adolescents already tend to delay decisions concerning abortions, such that the decision to abort, if ultimately made, will be accompanied by greater risks. In fact, the decision may be delayed until a full-term pregnancy is accomplished regardless of whether it would be in the minor's best interests. It is reasonable to predict that parental notice requirements will make it more likely that pregnant teenagers will delay their decisions (rather than inform their parents) to the point where a decision has effectively been made without any real consideration.

Second, given evidence that mother-daughter discussions of sexual matters are still far from universal, it seems likely that even assuming the intended parental consultation takes place, decisions—whether for or against an abortion—will often be made impulsively without real discussion. It has already been noted that pregnant teenagers tend to avoid talking with their parents.

78. Lewis, supra note 65, at 448.
79. See supra note 62.
82. See infra note 84 and accompanying text.
when they learn or suspect they are pregnant. Furthermore, this avoidance is not unique to the pregnancy itself. Only sixty-one percent of mothers of pregnant adolescents and forty-five percent of pregnant adolescents themselves report having had a mother-daughter discussion of birth control. Studies of mother-daughter communication among general samples of nonpregnant adolescents and their parents are even less encouraging. Among a stratified random sample of mothers of ten- to eighteen-year-olds in Cincinnati, only 31.5% reported giving their daughters reading material about sex, while 36.7% reported having explained intercourse, and only half had discussed birth control. Not surprisingly, therefore, children indicated that they received most of their knowledge about sex from friends and teachers. It would be surprising to find that this view of sex as a forbidden topic should suddenly turn toward open and detailed discussion of the options available to a pregnant adolescent.

2. Conclusions

It is clear that the limits of privacy rights in abortion decisions for minors have been predicated on a series of empirical assumptions, most of them psychological. Moreover, the low standard of judging the constitutionality of abridgment of these rights ensures that psychological risk-benefit analysis will be a continuing feature of adolescent abortion cases. However, it is noteworthy that the abortion cases have been remarkably free of psychological assumptions about privacy per se. The question of whether a reproductive privacy right is applicable to minors is a “legal” issue, which does not require an analysis of whether minors experience privacy (in a phenomenological sense) or even if they regard such an experience as desirable or important. Such an analysis might conceivably have some legal relevance, but only as a mediating step. There might be interest in privacy per se if the maintenance of privacy qua privacy could be shown to have positive effects (e.g., decrease the probability of depression) or if intrusion into privacy could be shown to have negative effects (e.g., increase the probability of depression). Regardless, it is clear that the legal concept of privacy in reproductive decisions does not necessitate any relationship with psychological privacy, except insofar as a social consensus is necessary to place the topic within a zone of private or sensitive matters.

It is also clear that much of the psychological discussion which

has taken place in adolescent abortion cases has focused on the decision-making process. This is not surprising in view of the fact that the Supreme Court has emphasized the importance of reproductive autonomy and privacy in decisions about abortion and contraception. While perhaps implicit, there has been little discussion of protection from intrusions into bodily privacy.

This discrepancy is probably a result of the way in which cases are typically framed. Abortion cases almost invariably arise as the result of an attempt to limit access to abortions rather than as the result of an attempt to compel an abortion against the wishes of the patient. Therefore, there has typically been a positive rather than a negative interest at stake. Nonetheless, until the Supreme Court clearly differentiates reproductive privacy from decisional autonomy, only the minor’s interests in the decision itself (including perhaps a non sequitur that autonomy, hence such an interest, flows from competence) will likely be the focus of analysis.

B. Informational Privacy

Besides reproductive privacy, a constitutional right to privacy for minors has also been asserted with regard to control over personal information, particularly vis-a-vis state authorities. This question was considered in Merriken v. Cressman, a federal district court case which has stimulated unusually wide commentary because of the important but seldom litigated issues it raised.

90. Besides raising important questions about privacy of family and child, the authority of school officials, the ethics of early intervention programs, and requirements for consent to evaluation, Merriken is perhaps unique as a discoverable case of “malresearch” in the behavioral sciences. See Keith-Spie-
Merriken developed from attempts by the Norristown, Pennsylvania, Area School District to institute a drug-abuse prevention program called Critical Period of Intervention (CPI) in the junior high school. CPI was planned as a two-step program: (1) administration of a personality test purported to identify potential drug abusers; and (2) compulsory intervention, including confrontational group therapy programs, for students identified as potential drug abusers. The personality test included:

such personal and private questions as the family religion, the race or skin color of the student... the family composition, including the reason for the absence of one or both parents, and whether one or both parents “hugged and kissed me good night when I was small,” “tell me how much they love me,” “enjoyed talking about current events with me,” and “make me feel unloved.”

Students and teachers were also encouraged to identify students whose behavior they perceived to be inappropriate.

CPI intended to use this data to form, by its own admission, a “massive data bank” with dissemination of personal information about specific students to a host of school personnel, including “superintendents, principals, guidance counselors, athletic coaches, social workers, PTA officers, and school board members.” Moreover, as the district court observed, there was no guarantee that the information could be kept secret from community authorities (like “an enterprising district attorney”) who have subpoena power. Taking note of the expert testimony by two child psychiatrists, the court also described the risks of a self-fulfilling prophecy of drug use by “potential drug users” and of scapegoating by peers of students who refused to take the CPI test or who obtained a user’s profile.

While the scientific merit of CPI was questionable, the most glaring problem with the program was the inadequacy of the consent procedures. When the program was first instituted, the school officials planned merely a “book-of-the-month-club” solicitation in which silence was interpreted as consent. After the suit was filed, the format was changed to obtain “affirmative written parental consent,” but without providing any information about the risks associated with the CPI program. Initially, there was no provi-
sion at all for consent from students. After litigation began, the test was modified to allow students to return a blank questionnaire, but no provision was made for affirmative informed consent.\textsuperscript{98}

In analyzing the case, the district court judge, John Morgan Davis, made it clear that “[t]he fact that the students are juveniles does not in any way invalidate their Constitutional right to privacy.”\textsuperscript{99} Indeed, he went further and asserted that “the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech.”\textsuperscript{100} The court also found that the “highly personal” nature of the information sought by the CPI came within the range of concerns protected by the right to privacy:

These questions go directly to an individual's family relationship and his rearing. There probably is no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child. This Court can look upon any invasion of that relationship as a direct violation of one's Constitutional right to privacy.\textsuperscript{101}

However, after recognizing a constitutional right to privacy for minors and implying a violation thereof, Judge Davis stopped short of holding that the lack of the students' consent to the invasion of their privacy would invalidate the program. The court expressly avoided the question of whether parents may waive their children's right to privacy.\textsuperscript{102} Moreover, the court also declined to rule on what was really a second issue: whether the lack of consent by the child was sufficient to render the CPI program constitutionally infirm. (What would have been the result if, for example, Mrs. Merriken supported the program but her son objected to the invasion of his personal privacy?). Instead, the court concentrated on the parents' personal interests:

In the case at Bar, the children are never given the opportunity to consent to invasion of their privacy; only the opportunity to refuse to consent by returning a blank questionnaire. Whether this procedure is Constitutional is questionable, but the Court does not have to face that issue because the facts presented show that the parents could not have been properly informed about the CPI Program and as a result could not have given informed consent for their children to take the CPI test.\textsuperscript{103}

In the final analysis, psychological issues played a great part in deciding whether the Norristown schools should be enjoined from proceeding with the CPI program. Judge Davis reasoned that if

\textsuperscript{98} Id.
\textsuperscript{99} Id. at 918.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 919.
\textsuperscript{103} Id.
the public need for the program was great and the invasion of individual privacy was minimal, then the program might still pass constitutional muster. However, in *Merriken*, the school officials failed to substantiate the effectiveness of the CPI program in meeting state purposes:

The Court, in balancing the right of an individual to privacy and the right of the Government to invade that privacy for the sake of public interest, strikes the balance in favor of the individual in the circumstances shown in this case. In short, the reasons for this are that the test itself and the surrounding results of that test are not sufficiently presented to both the child and the parents, as well as the Court, as to its authenticity and credibility in fighting the drug problem in this country. There is too much of a chance that the wrong people for the wrong reasons will be singled out and counselled in the wrong manner.

Thus, having previously found a substantial invasion of Mrs. Merriken's privacy, the court ultimately rested its judgment on an empirical psychological question: whether the program resulted in a decrease in student drug use, without identifying students falsely. The lack of evidence as to the psychometric validity of the test and the effectiveness of the interventions planned for students who were identified as potential users removed any question as to the program's unconstitutionality. As in abortion cases, the weight given the right to privacy in *Merriken* was decided in part on psychological assumptions, but not assumptions having to do with the psychology of privacy.

A second case concerning government intrusion into the informational privacy of youth is *Paton v. La Prade*. Although *Paton* is based on different legal doctrines than *Merriken*, it is particularly noteworthy in the present context because counsel for the plaintiff, Professor Askin of the Rutgers Constitutional Litigation Clinic, introduced psychological evidence to substantiate harm of invasion of privacy.

In *Paton*, the plaintiff, Lori Paton, was a sixteen-year-old high school student enrolled in a social studies course called "Left to Right" which examined contemporary political ideologies. As part of an assignment for the course, Paton wrote a letter to the Socialist Labor Party in order to obtain information about its platform.
However, she inadvertently addressed the letter to the Socialist Workers Party (SWP). On orders from the director of the FBI, the Postal Service had placed a mail cover upon the headquarters of the SWP in New York City. Accordingly, a postal employee recorded Paton's name and address and forwarded her name to the New York FBI office. The New York FBI office informed the Newark office that Paton had been in “contact” with the SWP. Lacking any further information about Paton, the Newark office assigned an agent to investigate her. The agent pursued information about the Paton family through the local credit bureau and the local chief of police and eventually interviewed the principal and vice-principal of Paton's school and learned of the reason for the letter. The agent then wrote a memorandum recommending that the investigation be closed because “she is not believed to be involved in subversive matters.”

The FBI visit to the school became widely known through an article in the school newspaper, and when the FBI refused to acknowledge that an investigation had taken place, Paton filed a civil action seeking damages from several FBI officials for violation of her first amendment and other civil rights and a declaratory judgment as to the unconstitutionality of mail covers. She also sought expungement of her file with the FBI.

While ordering expungement, the district court granted summary judgment to the defendants on the other matters on the ground that Paton had suffered no legally cognizable injury. Both parties appealed to the Third Circuit Court of Appeals. The court of appeals, while finding that Paton had standing to challenge the existence of her file, held that the trial court had insufficient evidence of the FBI's interests in the file to order expungement summarily. More significantly, however, the court also ruled that there was sufficient evidence of harm to Paton to require full consideration of her claims for damages, in view of the legitimacy of private causes of action for deprivation of first amendment rights.

108. 524 F.2d at 865.
109. Id.
110. Id. at 865-66.
111. The incident was also reported in the community and national press. Id. at 870, nn.12-13.
112. Id. at 866.
113. Id.
115. Id.
116. 524 F.2d at 868.
117. Id. at 869.
118. Id. at 871-72.
119. Id. at 869-70.
The circuit court made several findings of potential injury to Paton.\footnote{Id. at 870-71.} First, it was noted that the existence of a file marked “SM-SWP” (Subversive Material-Socialist Workers Party) might diminish Paton’s possibilities for future employment by the government. Second, the notoriety precipitated by the widespread publicity given to the investigation might adversely affect Paton’s standing in the community. Third, the possibility of psychological harm of invasion of privacy had been verified by three social scientists who had submitted affidavits concerning the types of injuries which might be suffered by someone in Paton’s position.\footnote{See also Levin & Askin, supra note 6, at 151-52.}

The court seemed unimpressed by the psychological evidence presented, but it found the evidence adequate for the purpose for which it was intended (i.e., to show sufficient evidence of harm to deny a motion for summary judgment based on a ground that there was none). The view of the court was as follows:

The possibility of . . . injury is confirmed by the affidavits of three social scientists submitted by Paton in opposition to defendants’ motion for summary judgment. These experts submitted opinions on the basis of facts, supplied by Paton’s counsel, that Paton had suffered or might suffer in the future the types of injury alleged in her complaint: stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her. These affidavits may not have much substantive weight but they may not be disregarded on a motion for summary judgment.\footnote{524 F.2d at 870-71.}

Although the court did not elaborate on its skepticism as to the “substantive weight” of the social science affidavits, it apparently found the experts’ opinions relevant to the issue of injuries. Therefore, by implication the court concluded that, as a matter of law, expert evidence of psychological harm is relevant to private claims of deprivation of first amendment rights to associational privacy and political expression. Presumably then, the court’s skepticism turned on the validity of foundations of the experts’ opinions rather than the relevance of the opinions. It is not clear whether the court was specifically concerned with the scientific weight of the opinions presented or with their probative value in the instant case. It is noteworthy that the experts all responded to hypotheticals. Thus, they gave opinions as to the probability of certain reactions by someone in Lori Paton’s position, not as to Paton’s actual state of mind. Their testimony was related to whether harm might have existed, not as to whether it did. Thus, while highly relevant to the motion for a summary judgment, general research on effects
of invasion of privacy would probably be insufficient to establish harm in a private civil rights action. The function of such research, assuming scientific validity, would be more likely to be corroborative. Whether there is sufficient specialized knowledge about the psychology of privacy in youth to assist the factfinder in a civil case will be discussed later in this Article.

C. Territorial Privacy

The sanctity of the home and one's possessions is the most well-developed principle of privacy in Anglo-American law. It is specifically embedded in the fourth amendment which protects "people" from "unreasonable searches and seizures" and thus guarantees "security in their persons, houses, papers, and effects."123 The fourth amendment creates zones (e.g., the home as a castle or bastion) which, except in cases of "reasonable" state need, remain inviolate. In some sense, it provides boundaries of the individual which the state normally cannot pierce.

The amendment's underlying rationale was eloquently articulated by Circuit Judge Jerome Frank in his dissenting opinion in United States v. On Lee:124

The "sanctity of a man's house and the privacies of life" still remain protected from the uninvited intrusion of physical means by which words within the house are secretly communicated to a person on the outside. A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.125

Thus, the fourth amendment goes beyond mere protection of property interests to a broader protection of personal privacy. This principle was firmly established in Katz v. United States,126 in which the Supreme Court held that the fourth amendment prohibited electronically eavesdropping on a conversation in a public telephone booth:

One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

... The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifia-

123. U.S. CONsT. amend. IV.
124. 193 F.2d 306 (2d Cir. 1951).
125. Id. at 315-16 (Frank, J., dissenting).
bly relied while using the telephone booth and thus constituted a “search
and seizure” within the meaning of the Fourth Amendment.\textsuperscript{127}

The Supreme Court emphasized in \textit{Katz} that “the Fourth
Amendment protects people, not places.”\textsuperscript{128} It announced that the
standard to be used in determining the scope of the fourth amend-
ment was not the nature of the property searched or seized but
whether the individual possessed a justifiable expectation of pri-
vacy. In the majority opinion, Justice Stewart seemed to establish
a purely subjective standard: “What a person seeks to preserve as
private even in an area accessible to the public, may be constitu-
tionally protected.”\textsuperscript{129} However, Justice Harlan’s concurring opin-
ion amplifying and clarifying the majority opinion has become the
prevailing rule. He said:

My understanding of the rule that has emerged from prior decisions is
that there is a twofold requirement, first that a person have exhibited an
actual (subjective) expectation of privacy and, second, that the expecta-
tion be one that society is prepared to recognize as “reasonable.” Thus a
man’s home is, for most purposes, a place where he expects privacy, but
objects, activities, or statements that he exposes to the “plain view” of out-
siders are not “protected” because no intention to keep them to himself
has been exhibited.\textsuperscript{130}

Subjective expectations of privacy are insufficient, therefore, to in-
volve the fourth amendment; they must also be reasonable.

The double meanings of key phrases in the standards set forth
by Justice Harlan are troublesome in attempting to discern their
import. “Expectations of privacy” may, for example, refer to a sub-
jective sense that privacy is likely to be accorded or to a normative
view that one may legitimately claim privacy. Obviously, these
two “expectations” are not necessarily coextensive. Similarly, an
expectation of privacy “that society is prepared to recognize as
‘reasonable’” may mean an empirical condition (i.e., if a survey
were conducted, most people would recognize the situation as one
in which privacy is or should be accorded) or an ethical judgment
that society ought to recognize privacy in that situation as reason-
able.\textsuperscript{131} Additional difficulties arise in identifying subjective ex-

\textsuperscript{127} Id. at 352-53.
\textsuperscript{128} Id. at 351.
\textsuperscript{129} Id. at 351-52.
\textsuperscript{130} Id. at 361 (Harlan, J., concurring). Justice Harlan later had second thoughts
about the first (subjective) prong of the standard. United States v. White, 401
U.S. 745, 786 (Harlan, J., dissenting).
\textsuperscript{131} Writing for a five member majority in Rakas v. Illinois, 439 U.S. 128 (1978),
Justice Rehnquist appeared to adopt both meanings of “reasonable” in his
explication of a standard of “legitimate expectation of privacy”: “Legitima-
tion of expectations of privacy by law must have a source outside of the
Fourth Amendment, either by reference to concepts of real or personal prop-
erty law or to understandings that are recognized and permitted by society.”
Id. at 144, n.12 (emphasis added). The latter prong may be read to corre-
expectations of privacy. There is good reason to doubt the wisdom of a purely subjective definition of expectations of privacy. Such a definition allows privacy expectations to be easily extinguished. If, for example, one believed that police were going to engage in drag-net searches, including, potentially, one’s own home, the subjective expectation of privacy would be effectively diminished. Nonetheless, the fourth amendment, in its plain meaning, would prohibit such activity. Or, to use the facts of Katz, presumably the police could destroy subjective expectations of privacy by announcing that they were embarking on a program of general surveillance of telephone booths. Such a result would clearly contravene the history and spirit of the fourth amendment.

To the extent, though, that a subjective standard is embedded in definitions either of “expectations” or of “reasonable,” psychology obviously becomes relevant. Presumably a clinical approach to the individual’s thoughts in guarding/not guarding privacy would be relevant to psychological “expectations.” Perhaps more defensibly, psychological research might illuminate social consensus concerning the situations which are or “reasonably” should be private. However, as Professors Levin and Askin have pointed out, the Supreme Court has tended to ignore behavioral-science research about the “social facts” underlying its analyses of the application of the fourth amendment. The one exception identified by Levin and Askin was Terry v. Ohio, in which the Court held that police may stop, question, and frisk individuals who the officer reasonably suspects may be armed and dangerous. Parties on both sides had presented evidence on the relevant social facts which were: the social needs for stop-and-frisk options (e.g., the dangers of the police job and the effectiveness of precautionary frisks) and the psychosocial impact (e.g., community hostility towards the police engendered by invasions of privacy). The Court took those factors into account in constructing a rule designed to balance the need for personal privacy with the need to maintain

\[132.\] Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 384 (1974).
\[133.\] Levin & Askin, supra note 6, at 140-42.
\[134.\] 392 U.S. 1 (1967).
police officers' own safety. However, in view of the fact that only two extralegal sources were cited in Terry, Levin and Askin may be overly generous in describing the weight actually given the empirical evidence by the Supreme Court in that case.

I. Cases Involving Minors

Because of the ambiguity of the fourth amendment standards, the question of what privacy interests are within the scope of the amendment is a notoriously difficult one which has resulted in particularly hoary rules. Midst this general complexity, the question of the circumstances under which minors are protected by the fourth amendment adds the dimension of who as well as what is to be protected. The Supreme Court has yet to rule on the applicability of the fourth amendment to school children, and state courts have resolved the question with differing results.

The question of the scope of the fourth amendment for minors has been most starkly raised in two recent cases concerning the use of trained dogs in blanket searches of public school students to detect odors of illicit drugs. These cases involve invasions of both the privacy of the person (i.e., bodily privacy) and privacy of space (e.g., lockers and purses). They are discussed here because of the nature of the issues raised with regard to students' expectations of privacy under the fourth amendment; the key psycholegal issue in consideration of privacy of place and possessions.

135. Id. at 14-15 n.11 (citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967) (noting the tendency of field investigations to aggravate police/minority-group relations); id. at 24 n.21 (citing Federal Bureau of Investigation Uniform Crime Reports for the United States 1966 (providing statistics on deaths of police in the line of duty)).


137. Gardner, Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope, 74 Nw. L. Rev. 803, 804 (1980).

138. See id. at 811-31.


The first of these cases, *Doe v. Renfrow*, involved the surprise canine inspection of all the junior and senior high school students in the Highland, Indiana School District. The doors to the school were locked, and "students were instructed to sit quietly in their seats with their hands and any purses to be placed upon their desk tops while the dog handler introduced the dog and led it up and down the desk aisles." The dog "alerted to" approximately fifty students, who were asked to empty their pockets or purse. What happened next exceeded the "bounds of reason" by two and a half country miles:

School and police authorities removed five high school students—three girls and two boys—from their classrooms and subjected them to personal interrogations and thorough, but not nude, searches. None was found to be in possession of any contraband. Three or four junior high students were similarly treated and cleared. Four junior high students—all girls—were removed from their classroom, stripped nude, and interrogated. Not one of them was found to possess any illicit material.

Diane Doe was one of the students subjected to a nude search. The dog had apparently "alerted to" her because she had played with her own dog that morning, which was in heat.

To heighten what Circuit Judge Swygert termed an "extraordinary atmosphere," the dog handler was accompanied by police officers and representatives of the press. Nonetheless, in an opinion joined for the most part by the majority of the appellate court, District Judge Sharp made an incredible finding of "fact" that "[n]o incidents of disruption occurred in the classrooms because of the presence of the dogs or the teams." Regarding the psychological impact of the canine inspections as minimal, Judge Sharp concluded that the dog "was only an aide to... [a school] official's observation of students" within the official's duty to maintain order in the school. He asserted that students have no expectations of privacy while they are in school:

Students are exposed to various intrusions into their classroom environment. The presence of the canine team for several minutes was a minimal

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141. 475 F. Supp. 1012 (N.D. Ind. 1979), aff'd in part, remanded in part, 631 F.2d 91 (7th Cir. 1980), reh'g and reh'g en banc denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981).
142. 475 F. Supp. at 1017.
143. id. at 1016.
144. id. at 1017.
145. 631 F.2d at 93.
146. Id. at 94 (Swygert, J., dissenting from the denial of rehearing).
147. 475 F. Supp. at 1017.
148. 631 F.2d at 93 (Swygert, J., dissenting from the denial of rehearing).
149. Id.
150. Id. at 92.
151. 475 F. Supp. at 1017.
152. Id. at 1019.
intrusion at best and not so serious as to invoke the protections of the
Fourth Amendment . . .

[T]he students did not have a justifiable expectation of privacy that
would preclude a school administrator from sniffing the air around the
desks with the aid of a trained drug detecting canine. The use of the dog
in this operation was an aid to the school administrator and as such its use
is not considered a search. Moreover, plaintiff as well as other students in
a public school, does not fall within the meaning of Katz because of the
very nature of public school education. Any expectation of privacy neces-
sarily diminishes in light of a student’s constant supervision while in
school. Because of the constant interaction among student, faculty and
school administrators, a public school student cannot be said to enjoy any
absolute expectation of privacy while in the classroom setting. 153

Judge Sharp did find the nude search to be an unreasonable
invasion of privacy, 154 but he denied damages on the ground that
the school officials had acted in good faith. 155 The Judge felt that to
suggest that the search was a “gestapo-like effort run by gestapo-
like people . . . is to do an extreme disservice to a group of dedi-
cated people who carry heavy legal and moral obligations for pub-
elication.” 156 The Seventh Circuit reversed only with respect
to the holding of good-faith immunity. 157 A petition for certiorari
was denied by the Supreme Court, with only Justice Brennan
dissenting. 158

Renfrow has been cited in support of the premise that school
children are only entitled to greatly circumscribed fourth amend-
ment protection in cases involving school bathroom surveillance 159

153. Id. at 1020, 1022 (citation omitted).
154. Id. at 1024.
155. Id. at 1028.
156. Id. at 1026.
157. 631 F.2d at 92.
158. 451 U.S. at 1022. In his dissent, Justice Brennan emphasized that the gross
invasion of privacy was inconsistent with the school’s socializing function:

"We do not know what class petitioner was attending when the po-
lice and dogs burst in, but the lesson the school authorities taught
her that day will undoubtedly make a greater impression than the
one her teacher had hoped to convey. I would grant certiorari to
teach petitioner another lesson: that the Fourth Amendment pro-
tects, ‘[t]he right of the people to be secure in their persons, houses,
papers, and effects, against unreasonable searches and seizures,’
and that before police and local officers are permitted to conduct dog-
assisted dragnet inspections of public school students, they must ob-
tain a warrant based on sufficient particularized evidence to estab-
lish probable cause to believe a crime has been or is being
committed. Schools cannot expect their students to learn the lessons
of good citizenship when the school authorities themselves disregard
the fundamental principles underpinning our constitutional
freedoms."

Id. at 1027-28.
and school policies permitting searches of students’ lockers. However, in a case involving facts similar to those in *Renfrow*, *Jones v. Latexo Independent School District*, District Judge Justice argued that the *Renfrow* holding was misguided for reasons similar to those posited by Justice Brennan in *Renfrow*.

In *Jones*, Latexo school officials announced that they would be periodically performing dragnet canine searches to ferret out illicit drugs. The school officials kept their pledge. A trained dog sniffed each child in the school district. Children to whom the dog “alerted” were taken aside for a search of their pockets. The dog then was taken to the school parking lot for a sniff-search of the students’ automobiles. This procedure was repeated on several occasions.

Judge Justice’s analysis of the *Jones* case differed in three key respects from that of Judge Sharp and the Seventh Circuit in *Renfrow*. First, he held that the canine sniff-search was in fact a “search” within the meaning of the fourth amendment. As Judge Justice correctly noted, the use of a sniffer dog to sniff the person of the students does not come within the scope of the “plain view” doctrine. Specifically, Justice wrote: “The dog . . . replaced, rather than enhanced, the perceptive abilities of school officials.” Also, it can hardly be denied that a dog’s sniffing—in fact “slobbering”—on the individual in a search for contraband is indeed an intrusive search. It is arguably even more intrusive for children than it would be for adults. Second, while acknowledging that the standard for “reasonableness” of a search may be relaxed in the public schools, Judge Justice made it clear that children do have legitimate expectations of privacy, expectations that cannot be eliminated simply by announcing that blanket searches will occur. Third, unlike Judge Sharp’s view of dragnet canine searches of students as benign at worst, Judge Justice ar-

162. See supra note 158.
163. 499 F. Supp. at 228.
164. id.
165. id.
166. id. at 229.
169. Id. at 233-34.
170. “Such a tool of surveillance could prove both intimidating and frightening, particularly to the children, some as young as kindergarten age, enrolled at Latexo.” Id.
171. Id. at 236.
172. Id.
173. Id. at 234.
argued that such a rampant invasion of privacy rights is in fact a threat to the purposes of public education: "State-operated schools may not operate as enclaves of totalitarianism where students are searched at the caprice of school officials . . . . Students look to teachers, school administrators, and others in positions of authority as models for their own behavior and development into responsible adults." Accordingly, Judge Justice enjoined the School District from using canine-sniffing in the absence of reasonable cause to believe that the subjects are in possession of forbidden contraband.

2. Psychological Issues

The analysis in the dog-search cases need not rest on psychological concerns. It would be sufficient to conclude the following, for example, as a matter of law:

(a) Sniff-searches are "searches" within the scope of the Fourth Amendment.
(b) Children are "people" with fourth amendment rights which are not left at the schoolhouse door.
(c) Searches without a particularized cause are per se unreasonable, absent compelling state need.
(d) Dragnet searches of schoolchildren are, therefore, violative of the fourth amendment.

Such a syllogism is attractive both in its clarity and in the respect implicit for the dignity of children as human beings. However, such straightforward judicial analysis is unlikely in view of the law's historic ambivalence about the status of children. Given a relatively low standard for state need sufficient to abridge minors' rights, a balancing test seems likely in consideration of the protection of school children from unreasonable searches. The child's privacy interests are likely to be balanced by the traditional need for protection and care of the child and accompanying emphasis on

174. Id. at 237.
175. Id. at 236, 239.
177. See Terry v. Ohio, 392 U.S. 1, 21 n.18 ("demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"); Gardner, supra note 137, at 844-85 (people have a right to be free from unjust suspicion and indecent intrusion).
178. See, e.g., In re Gault, 387 U.S. 1, 10-11 (1967) (although juveniles are possessed of fundamental due process rights, they do not necessarily have all of the rights available to adults); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (juveniles lack right to trial by jury).
maintenance of authority of parents and those who act in loco parentis. Consequently, there is a need for empirical evidence as to age factors in the salience of various forms of privacy and as to the psychosocial effects of honoring/not honoring the privacy of children at various ages.

In Renfrow, for example, Judge Sharp implied a belief that privacy is subjectively unimportant to adolescents and that the effects of gross intrusions into their privacy are negligible. He also implied that the socioemotional climate of the school would actually improve as a result of the dragnet search; the atmosphere during the search was described as "light" and "relaxed," and the search was assumed to have an effect on a disruptive drug problem. While Judge Sharp's views defy common sense, "hard data" as to the embarrassment and anxiety engendered by the canine searches might have proved persuasive. Moreover, while the absence of subjective expectations of privacy should not be controlling, specific data as to their presence might indicate generally acknowledged zones of privacy and, therefore, better identify core privacy interests which justifiably require protection. These data should be collected for both adults and children of various ages and backgrounds.

III. THE PSYCHOLOGY OF PRIVACY IN CHILDHOOD

Consideration has been given thus far to psychological issues raised in claims of privacy for minors under three constitutional doctrines (penumbral/fourteenth amendment right to privacy, first amendment right to associational privacy, and fourth amendment right to security from unreasonable searches and seizures), pertaining to privacy of body, information, and territory or possessions. In order to put these issues in context, it is now necessary to evaluate the state of knowledge as to the psychology of privacy in childhood.

The available literature on developmental factors in privacy per se is quite sparse. The most comprehensive analysis was performed by Professor Wolfe, who relied in large part on research

179. 475 F. Supp. at 1026.
180. "[This Court] finds no fault with the school administrators using their own senses and the sense of properly trained outside personnel and dogs to detect serious conditions that are patently adverse to the proper administration of a public school." Id. at 1027.
181. Cf. Levin & Askin, supra note 6, at 147-49 (analysis of psychological issues in Supreme Court decisions on privacy).
which she had performed with Professor Laufer and others.\textsuperscript{183} Much of Wolfe's work in this respect has been purely theoretical. She has applied general principles of the development of peer relations and personal differentiation and independence, especially as understood by ego-analytic theorists,\textsuperscript{184} to a developmental theory of privacy.\textsuperscript{185} This theoretical analysis has been enriched by data from an interview study by Professor Wolfe and Laufer of 900 children and adolescents, ages five to seventeen, about their concepts of privacy, the only such general study of privacy in childhood.\textsuperscript{186} Professor Wolfe and colleagues have also examined the psychology of privacy of children in a few special settings, such as a psychiatric hospital.\textsuperscript{187} The only other study specifically of privacy in childhood was of territorial privacy practices in the homes of a sample of middle-class children.\textsuperscript{188}

In her theoretical formulation, Wolfe paid special attention to the significance of privacy in the differentiation in integration of the self in relation to society:

[T]hrough their daily experiences children and adolescents develop an understanding of the uses and limits of interaction and information management in everyday life. They develop a sense of themselves as separate from and connected to other, an understanding of the conditions under which to see physical and psychological aloneness or interaction, and understanding of the possible range of such experience, and the uses of each of these for selfenhancement or regrouping. At the same time, these experiences give children and adolescents a view of societal norms with respect to certain behaviors and activities and provide a way of interpreting these as valued or not valued, good or bad. In this way children's experiences with privacy feed back into their sense of self-esteem and help define the ranges, limits, and consequences of individual autonomy within our society.\textsuperscript{189}

Particularly for young children, privacy or the lack of it, is sel-

\textsuperscript{183} E.g., Laufer & Wolfe, \textit{supra} note 10.

\textsuperscript{184} Ego-analytic theorists emphasize the development of adaptive mechanisms in the child. They posit innate "conflict-free" structures which are important in the development of the rational self. \textit{See}, e.g., E. ERICKSON, \textit{CHILDHOOD AND SOCIETY} (2d ed. 1963); E. ERICKSON, \textit{INSIGHT AND RESPONSIBILITY} (1964); H. HARTMANN, \textit{EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION} (1956) (originally published 1939).

\textsuperscript{185} \textit{See} Laufer & Wolfe, \textit{supra} note 10; Wolfe, \textit{supra} note 182, at 181-90.

\textsuperscript{186} Wolfe, \textit{supra} note 182, at 190-202.


\textsuperscript{189} Wolfe, \textit{supra} note 182, at 189.
dom volitional. To the extent that children are perceived as dependent, they are subject to intrusions at the whim of their caretaker into “private” places (e.g., one’s bedroom), personal associations (e.g., where and with whom the child has been), and information about “private” concerns and behavior. Only as children become older does privacy take on a meaning of active choice in the management of interaction and information. Accordingly, as children approach adolescence, privacy becomes important as a marker of independence and self-differentiation. Threats to the privacy of school-aged children may be reasonably hypothesized to be, therefore, functionally threats to self-esteem. Golan found, for example, that children in single-occupancy bedrooms in psychiatric hospitals were more likely than children in multiple-occupancy rooms to experience chosen aloneness and that they had higher self-esteem, even though staff rated the two groups as comparable in levels of mental disorder and social involvement. Such a result is consistent with the literature suggesting that both children and adults tend to be better adjusted when they experience personal control.

Professor Wolfe’s interview data suggest that privacy is salient even for primary schoolchildren, although, as might be expected, the psychological components of privacy change as children become older and experience a broader range of situations of personal control. For school children of all ages, “aloneness” is the most commonly mentioned element of privacy, although it takes on more significance as children move into late elementary school years and experience less surveillance and a greater range of physical movement. Emphasis on control of access to place has a curvilinear relationship with age; that is, it is more salient to late elementary schoolchildren than to primary schoolchildren (who typically do not possess such privacy) or to adolescents (who may feel relatively secure in protection of private places). On the other hand, significance of privacy as a reflection of autonomy is linearly related to age, as is significance of informational privacy.

As the facts of Merriken and Paton suggest, control over personal information clearly has special meaning to adolescents. Such control denotes respect for the dignity and personhood of the adolescent; it provides the opportunity for the development of inti-

mate relationships and recognition that the adolescent now faces decisions which in our culture are marked as "private" and belonging to the individual. At the same time, informational privacy for adolescents raises a dilemma. Protection of adolescents' privacy shields them from scrutiny of illicit behavior. Professor Wolfe has lucidly described the information which is thus protected:

Our respondents' descriptions of invasion experiences . . . change with age, with the interruption of activities being cited less often as the child enters adolescence. More of the adolescents, as compared to children 12 and younger, describe being questioned about their behavior and/or having someone find out something they did not want known. And compared to younger children, when adolescents describe these invasion experiences, the information they have not been able to manage is more likely to be related to sex, smoking, and drugs—all "deviant" activities.194

Similarly, Melton found that adolescents often advocated minors being able to seek psychotherapy independently of parental consent because of the nature of the information to be discussed.195 The response of one seventh-grade girl was exemplary: "If he has some problems and he can't talk with his mother, he should be able to go to a doctor . . . . When you're 13 you start hanging around in gangs and smoking pot an stuff. And you can't tell your mother that!"196

Thus, there is danger that protection of adolescents' privacy will permit their continued involvement in behavior which their parents or society (as reflected in criminal or juvenile law) finds objectionable. This risk is one which we gladly take in the case of adults. Application of privacy rights (e.g., the fourth amendment) ensures that the guilty will avoid justice in some instances, but we are willing as a society to take that risk in order to protect individual privacy and autonomy. On the other hand, minors are not necessarily recognized as autonomous, and both parents and the state have been accorded considerable authority to "protect" adolescents from themselves.

Consequently, the sort of psychological evidence on which recognition of privacy rights for adolescents turns, may often be more general evidence as to the level of responsibility or competence which adolescents exercise in making private, independent decisions.197 Recognition of privacy rights for juveniles is likely to rest on a balancing test between the assumed benefits of privacy—both ethical (i.e., respect for individual dignity) and psychological (e.g.,

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194. Wolfe, supra note 182, at 199.
196. Id. at 201.
197. See generally CHILDREN'S COMPETENCE TO CONSENT, supra note 7.
increased self-esteem; enhanced legal socialization—and the potential harm of misbehavior which is protected by a shroud of privacy of information and space. Thus, the psychological assumptions may be focused on the effects of the decisions themselves (as exemplified by the abortion cases) rather than either the fundamental ethical and legal issues or even the psychology of privacy per se.

There is one subset of privacy research which may have direct application to legal issues, however. That research has to do with developmental factors in the maintenance of territorial privacy. While research thus far has been limited to the home, information on both attempts by children to maintain privacy (e.g., circumstances under which children close the door) and respect by adults for their privacy (e.g., circumstances under which parents knock before entering children's rooms) would be useful in defining expectations of privacy, at least insofar as social practices are reflected in that concept. Similar research could be performed concerning other settings, like schools and interpersonal situations, to determine developmental sequences in the establishment of expectation of privacy of space and possessions.

The principal findings from research on territorial privacy in the home by Parke and Sawin, and Wolfe and colleagues are, for the most part, unsurprising. For example, it is of no surprise to learn that parents are more likely to knock on the children's bedroom and bathroom doors as they get older. The norms of when such changes occur are also unsurprising (in this instance, the occurrence of puberty being especially significant). However, some of the findings are more complicated. The variables which are significant (e.g., sex) in determining respect for privacy may be ones which should be excluded from consideration for policy reasons. Other variables require an "ecological" approach in interpretation for which expert social scientists may be useful. For example, house-related places are much more commonly cited as "private places" by urban than by rural children, presumably because of the decreased alternatives of places to be alone. Similarly, as house size decreases and family size increases, "being alone" becomes less significant as an indicant of privacy. The

198. See Melton, supra note 91, at 31-34.
199. E.g., Parke & Sawin, supra note 188.
200. See, e.g., Laufer & Wolfe, supra note 10; Parke & Sawin, supra note 188; Wolfe, supra note 182.
201. Parke & Sawin, supra note 188, at 92-93.
202. Id.
203. Id. at 93-94; Wolfe, supra note 182, at 203-07.
205. Parke & Sawin, supra note 188, at 96-97.
implication is that, as options for privacy decrease, spaces which suburban, middle-class people may regard as public may take on meaning as "private" places for inner-city, lower-class children. Consequently, expectations of privacy are likely to vary with social and physical environments. Their definition on a practical level will require analysis of the social meaning of the possible attempt to maintain a zone of privacy.

Another application this line of research may have is in cases involving the fourth amendment rights of adults. In fact it may be very significant in those cases where children have consented to searches which uncovered evidence incriminating parents or other adults. In considering whether the consent of another party is valid, the Supreme Court has stated as the rule that "consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." The question obviously arises as to whether children can have "common authority" over the dwelling or some part of it. Professor Weinreb has argued that children should be presumed to lack such authority:

Reference to the privacy that one has rather than to the property that one owns gives answers which we instinctively feel are correct. We should not be surprised if a homeowner consented to a search of his living room in the absence of a weekend guest, but it would violate our ordinary understanding of their temporary living arrangement if the guest admitted strangers in the absence of his host. It does not startle us that a parent's consent to a search of the living room in the absence of his minor child is given effect; but we should not allow the police to rely on the consent of the child to bind the parent. The common sense of the matter is that the host or parent has not surrendered his privacy of place in the living room to the discretion of the guest or child; rather, the latter have privacy of place there in the discretion of the former.

Professor Weinreb's conclusion may be inconsistent, however, with the actual practices of families, in which, as he recognizes, the home may be divided into sections which are considered communal or, conversely, "belonging" to individual members. The prevailing law also recognizes that, under some circumstances, minor children may retain common authority. Under such a rule, the sort of research in which Professors Parke and Sawin have engaged could be informative in distinguishing situations in which minors might be likely to retain common authority from those in which they cannot. Such research might also illuminate circum-

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208. Weinreb, supra note 136, at 60.
209. Id. at 60-61.
stances under which children functionally have sole authority and in which other family members cannot validly consent to a search, although courts may prefer to recognize parental authority regardless of the de facto distribution of authority over place.

IV. CONCLUSION

Although most of the major privacy cases have rested at least in part on psychological assumptions, these assumptions have often been on issues other than the psychology of privacy. This relative lack of concern with phenomenology of privacy per se is perhaps unsurprising. “Privacy” is a complex concept, both psychologically and legally, and its application in a particular context may more properly rely on logical than empirical analysis. There are however, two types of cases in which direct consideration of subjective privacy may be useful: determination of expectations of privacy under the fourth amendment (e.g., Renfrow and Jones), and determination of damages in private claims arising from violation of privacy rights (e.g., Paton).

It should be noted, though, that regardless of whether the psychological assumptions made by judges were concerned with privacy per se, there was generally no systematic attempt to discern the empirical validity of the assumptions (Paton being an exception). While this reliance on intuition and the “pages of human experience” is by no means limited to this line of cases, judicial decision making would be improved by attention to the relevant research, where the analysis is dependent upon psychological assumptions.

The utility of considering the psychological research available is obvious with respect to the specific psychological assumptions asserted in the cases described throughout this Article. Insofar as those assumptions really underlie judicial reasoning, systematic examinations of empirical data would be substantially more reliable in discerning the validity of relevant social facts than reliance on intuition or a notion of how the world should be. Perhaps more subtly, psychology might contribute to an understanding of policy.

bases which are so fundamental as to remain largely implicit. First, psychology may help to delineate the meaning of privacy to minors (and to adults, too). Such analysis may be useful in examination of the question of whether privacy law really adds anything to substantive due process analysis. Is there something special about "privacy" (distinguished from "liberty") that is particularly meaningful and significant in consensual assessments of requirements for human dignity? If so, what are its parameters? Second, the tenuous application of privacy rights to minors is apparently based on doubts that they really are autonomous persons whose physical and psychological integrity is worthy of protection. Such ambivalence about minors' personhood is based further on assumptions that minors are typically incompetent decision makers who are incapable of free choice and who consequently are not full members of the moral community. Consequently, general developmental research may ultimately be significant in determining the application of privacy to minors. In that regard, it is important to note that, at least for adolescents, available psychological research does not support a diminution of rights on the basis of competence alone.\footnote{See generally Melton, Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy, 38 Am. Psychologist 99 (1983).}

Ironically, then, if attention were given to the basic psychological assumptions underlying policies regarding minors' privacy, psychology might eventually be relatively insignificant in privacy analysis. Rather, low standards for state infringement of minors' rights would be abandoned, and attention would be given primarily to the requisites for protection of human dignity. However, in view of the fact that ambivalence about minors' personhood is likely to persist, so too are balancing tests concerning potential risks and benefits of recognition of minors' privacy. Hence, the psychological assumptions about specific harms or benefits in various contexts are likely to remain most salient in judicial analyses, even if those assumptions are seldom critically examined.

In either case, there is ample reason to pursue a more systematic integration of the psychology and the law of privacy, particularly with respect to minors. It is possible that the law can work to inform psychology as well as the converse. It is noteworthy that the work of Professor Wolfe and her colleagues was directly stimulated by a study group of social scientists organized to provide consultation on privacy to the Rutgers Constitutional Litigation Clinic. Such interchange may make for more informed legal decision making on questions of policy affecting minors and for more attention by developmental scholars to the real-life concerns of children and youth as well.