

Minors' Constitutional Right to Informational Privacy

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INTRODUCTION

The contours of the constitutional right to privacy have eluded courts since the Supreme Court first announced this distinct right in *Griswold v Connecticut*.¹ Likely in a failed attempt to clear up this doctrine, the Court in *Whalen v Roe*² declared that the right to privacy encompasses two separate interests: security of personal information and autonomy in making important decisions.³ While the Supreme Court has revisited the second strand—often deemed “decisional privacy”—many times since *Whalen*,⁴ it has reexamined the first strand, “informational privacy,” only once, and in the same year it decided *Whalen*. Yet in this case, *Nixon v Administrator of General Services*,⁵ the Court did little to clarify the scope of informational privacy rights, leaving the courts of appeals to build a framework for evaluating informational privacy claims.

Every circuit court but the D.C. Circuit recognizes *Whalen* as establishing a separate constitutional right to informational privacy.⁶ These courts have created a conceptually diverse but relatively stable framework for evaluating informational privacy claims. However, this framework was built on the informational privacy claims of adults. Recently, courts have been asked to assess similar claims brought by minors and have responded in two ways.⁷ The Third and Ninth Circuits have applied their informational privacy analysis to minors with

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¹ 381 US 479, 484 (1965) (holding that penumbras surrounding the First, Third, Fourth, Fifth, and Ninth Amendments create the right to privacy).

² 429 US 589 (1977).

³ *Id.* at 598–600 (“The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”).

⁴ See, for example, *Lawrence v Texas*, 539 US 558, 578 (2003) (holding that individuals have a right to privacy in their intimate sexual conduct); *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 901 (1992) (upholding the right to an abortion as part of the constitutional right to privacy).

⁵ 433 US 425 (1977).

⁶ See Part I.B.

⁷ See generally, for example, *Aid for Women v Foulston*, 441 F3d 1101 (10th Cir 2006); *C.N. v Ridgewood Board of Education*, 430 F3d 159 (3d Cir 2005).

no modification,⁸ while the Tenth Circuit has drastically altered the level of scrutiny for assessing minors' informational privacy claims.⁹

Unfortunately, both approaches are insufficient. When determining the scope of minors' constitutional rights, courts must consider minors' particular vulnerabilities.¹⁰ Yet whether employing the age-blind approach of the Third and Ninth Circuits or the Tenth Circuit's lower level of scrutiny, all three circuits fail to protect these vulnerabilities, particularly the deterrent effect that threats of disclosure of personal information have on minors' decisions to seek necessary health care. Additionally, the Tenth Circuit's deferential scrutiny of minors' informational privacy claims unjustifiably limits the scope of minors' constitutional rights.

This Comment proposes a modified framework for assessing minors' informational privacy rights. First, courts should reject the Tenth Circuit's analysis and not vary their level of scrutiny based on the age of the individual bringing an informational privacy claim. In *Bellotti v Baird (Bellotti II)*,¹¹ the Court delineated the three reasons to limit the scope of minors' constitutional rights: their particular vulnerabilities, their lesser ability to make good decisions, and the parental role in childrearing.¹² While these differences have led the Court to restrict the scope of minors' decisional privacy, they do not justify universally limiting the scope of minors' informational privacy. Second, when weighing minors' informational privacy interests against the state's desire for disclosure, courts should assess the potential for harm arising from the mere *threat* of disclosure. Currently, courts consider the possibility that an individual will be harmed by a future nonconsensual disclosure of his private information when determining if the state has violated an individual's right to informational privacy.¹³ But they fail to take into account the negative behavioral changes that can result from the threat of this future disclosure. Research indicates that minors are particularly susceptible to such threats, and are more likely to be deterred from seeking health care if they fear that their personal

⁸ See *Ridgewood*, 430 F3d at 179–81; *Planned Parenthood of Southern Arizona v Lawall*, 307 F3d 783, 789–90 (9th Cir 2002).

⁹ See *Aid for Women*, 441 F3d at 1119 (stating that a statute does not violate minors' informational privacy rights when it serves a significant state interest that would not be present for an adult).

¹⁰ See *Bellotti v Baird (Bellotti II)*, 443 US 622, 634 (1979) (citing children's "peculiar vulnerabilities" as one of three reasons that their constitutional rights are not equal to those of adults).

¹¹ 443 US 622 (1979).

¹² *Id.* at 634.

¹³ See, for example, *United States v Westinghouse Electric Co*, 638 F2d 570, 578 (3d Cir 1980) (including "the potential for harm in any subsequent nonconsensual disclosure" in a multifaceted test to apply when weighing competing interests in information disclosure).

information will not remain confidential.¹⁴ In order to account for this particular vulnerability, courts should weigh the deterrent effect of threatened disclosures on minors' behavior.

Part I of this Comment lays the informational privacy groundwork, analyzing the constitutional foundations of this right and presenting a short taxonomy of informational privacy in the lower courts. Part II begins the discussion of the right's application to minors: first describing their constitutional privacy rights generally, then more specifically addressing how courts of appeals have split in the assessment of their informational privacy rights. Part III explains why the current methods of reviewing minors' informational privacy rights are unsatisfactory and proposes a modified framework that protects minors, given their particular vulnerabilities, without unnecessarily limiting the scope of their informational privacy rights.

I. INFORMATIONAL PRIVACY FRAMEWORK

Before attempting to understand how minors fit into the current informational privacy framework, it is important to examine how courts treat informational privacy claims brought by adults. This Part analyzes the origins of the right to informational privacy in the Supreme Court's jurisprudence, then describes the general framework circuit courts use to evaluate these claims.

A. Supreme Court Foundations

The Due Process Clause of the Fourteenth Amendment prohibits "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law."¹⁵ The Supreme Court has interpreted this clause to protect "zones of privacy" deemed "'fundamental' or 'implicit in the concept of ordered liberty'"¹⁶ and "deeply rooted in this Nation's history and tradition."¹⁷ Over time, the Court has determined that this right to privacy¹⁸ protects matters related to "marriage, pro-

¹⁴ See note 186.

¹⁵ US Const Amend XIV, § 1.

¹⁶ *Roe v Wade*, 410 US 113, 152–53 (1973), quoting *Palko v Connecticut*, 302 US 319, 325 (1937). The Supreme Court first announced this right to privacy in *Griswold*, rooted in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendment. 381 US at 484. In *Roe v Wade*, the Court grounded the right to privacy in the "Fourteenth Amendment's concept of personal liberty." 410 US at 153. See also *Whalen*, 429 US at 600 n 23 (quoting *Roe* and finding a right to privacy in the Fourteenth Amendment).

¹⁷ *Moore v City of East Cleveland*, 431 US 494, 503 (1977).

¹⁸ For a succinct overview of the development of privacy law, see Judge Posner's description in *Anderson v Romero*, 72 F3d 518, 521–22 (7th Cir 1995).

creation, contraception, family relationships, child rearing, [] education”¹⁹ and “certain intimate conduct.”²⁰

In 1977, the Supreme Court delineated two strands of privacy in its jurisprudence. In *Whalen*, a group of patients and doctors challenged a New York statute requiring the collection and centralized storage in a computer database of all patients prescribed Schedule II drugs.²¹ Some patients objected, fearing that this information would be disclosed, thereby causing them to be stigmatized as drug addicts.²² Additionally, the patients claimed that their fear of disclosure would cause them to avoid using drugs covered in the statute, even where necessary for their health.²³

The Court separated these privacy claims into two categories: “The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”²⁴ The interest in avoiding disclosure is now commonly called *informational privacy*, or the confidentiality branch of the right to privacy.²⁵ The interest in making certain important decisions is better known as *decisional privacy*, or the autonomy branch.²⁶ While the Court determined that the New York statute violated neither the plaintiffs’ informational nor decisional privacy, it analyzed the plaintiffs’ claims under this rubric, and balanced their privacy interests against the needs of the state. The Court found that the risk of information disclosure was quite low—particularly because the statute harshly proscribed the disclosure of patient information²⁷—and that the effect of the collection system on patients’ ability to make deci-

¹⁹ *Lawrence v Texas*, 539 US 558, 573–74 (2003). See also *Loving v Virginia*, 388 US 1, 2 (1967) (marriage); *Zablocki v Redhail*, 434 US 374, 396 (1978) (same); *Skinner v Williamson*, 316 US 535, 543 (1942) (procreation); *Eisenstadt v Baird*, 405 US 438, 454–55 (1972) (contraception); *Griswold*, 381 US at 479 (same); *Troxel v Granville*, 530 US 57, 75 (2000) (family relationships); *Moore*, 431 US at 494 (same); *Pierce v Society of the Sisters*, 268 US 510, 536 (1925) (child rearing and education); *Meyer v Nebraska*, 262 US 390, 403 (1923) (same).

²⁰ *Lawrence*, 539 US at 562.

²¹ 429 US at 593–95. Schedule II drugs have a medical purposes but also high abuse rates.

²² *Id.* at 595, 600.

²³ *Id.* (detailing evidence demonstrating that patients have declined necessary treatment because of the possibility of stigmatization).

²⁴ *Id.* at 599–600. While this statement could be interpreted as mere dicta, all but one court of appeals have construed this distinction as a constitutional holding. See Part I.B.

²⁵ See, for example, *Aid for Women v Foulston*, 441 F3d 1101, 1116 (10th Cir 2006) (“The first interest [in *Whalen*] is often termed ‘informational privacy.’”).

²⁶ See, for example, *Borucki v Ryan*, 827 F2d 836, 840 (1st Cir 1987) (“The two kinds of privacy interests identified in this quotation from *Whalen* may be characterized as the ‘confidentiality’ and ‘autonomy’ branches of the constitutional right of privacy.”).

²⁷ *Whalen*, 429 US at 600–02.

sions was negligible at best.²⁸ Although it upheld the constitutionality of the statute, the Court recognized “the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files” and left open the possibility that other statutes without “comparable security precautions” might violate individuals’ informational privacy.²⁹

The Court returned to informational privacy later that year in *Nixon v Administrator of General Services*.³⁰ Former President Richard Nixon claimed that the process for screening his presidential papers violated his informational privacy.³¹ In spite of recognizing Nixon’s legitimate expectation of privacy in his personal records, the Court held that the process did not violate his right to informational privacy.³² Given his status as a public figure and the great public interest in preserving his presidential records, Nixon’s privacy interest was comparatively weak.³³

The Court’s informational privacy jurisprudence is puzzling. While *Whalen* and *Nixon* clearly recognize informational privacy and evaluate such claims by weighing an individual’s interest in nondisclosure against the state’s interest in disclosure, neither case held that this right had been violated,³⁴ and no majority opinion has returned to informational privacy since. Some lower courts have addressed this issue by reading *Whalen* and *Nixon* narrowly³⁵ in light of *Paul v Davis*,³⁶ an

²⁸ Id at 602–03 (reasoning that no “individual has been deprived the right to decide independently, with the advice of his physician, to acquire and to use needed medication”).

²⁹ Id at 605–06.

³⁰ 433 US 425 (1977).

³¹ Id at 455.

³² Id.

³³ Id. Some courts have interpreted *Nixon* as a Fourth Amendment case. See *Borucki*, 827 F2d at 844 (“[T]he discussion of privacy in *Nixon* arose in a fourth amendment context.”); *J.P. v DeSanti*, 653 F2d 1080, 1089 n 4 (6th Cir 1981) (“[The Court’s] analysis of the privacy issue in *Nixon* appears to be based on the fourth amendment’s requirement that all searches and seizures be reasonable, not on the scope of a general constitutional right to privacy.”). Yet the Court explicitly roots its analysis in *Whalen*’s informational privacy prong, even determining the strength of Nixon’s claim by comparing his situation to that of the patients in *Whalen*. *Nixon*, 433 US at 457–58 (“[T]he privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen v. Roe*.”). Bruce Falby’s read is likely the most accurate: “[T]he Court in *Nixon* seemed to confuse fourth amendment and fourteenth amendment privacy protection by building on a fourteenth amendment privacy interest to establish a privacy interest protected by the fourth amendment.” Bruce E. Falby, Comment, *A Constitutional Right to Avoid Disclosure of Personal Matters: Perfecting Privacy Analysis in J.P. v. DeSanti*, 71 Georgetown L J 219, 234 (1982).

³⁴ See *Nixon*, 433 US at 465 (holding that, despite the President’s privacy interest in his communications, his claim was without merit due to countervailing factors such as the limited nature of the intrusion); *Whalen*, 429 US at 605 (finding that the state had enacted sufficient safeguards against disclosure of private information).

³⁵ See, for example, *Borucki*, 827 F2d at 841–42 (viewing the scope of *Whalen* as unclear); *DeSanti*, 653 F2d at 1088–89 (“We do not view the discussion of confidentiality in *Whalen v. Roe*

earlier case where the Court held that publicly posting the “record of an official act such as an arrest” does not violate an individual’s right to privacy.³⁷ Instead, the Court suggested in dicta that individuals may only have a privacy interest in information that implicates the “zones of privacy” established by “more specific constitutional guarantees,” — such as the Fourth Amendment’s prohibition against unreasonable searches— or by implied fundamental rights precedent.³⁸

Yet it is difficult to square the Court’s narrow holding in *Paul* with its broad statements in *Whalen* and *Nixon*. After *Paul*, one would have expected the Court to begin its analysis in *Whalen* and *Nixon* by determining whether the information in question implicated other constitutional guarantees or zones of privacy. Instead, it first determined whether the plaintiff had a legitimate expectation of privacy in his information.³⁹ Then the Court found that privacy protection extends to personal communications—information that does not implicate other constitutional guarantees or zones of privacy.⁴⁰ And in *Whalen*, the Court stated quite broadly that the right to privacy protects the disclosure of “personal matters,” without explicitly limiting this protection to personal matters that implicate other constitutional rights.⁴¹ As a result, lower courts have struggled to define the scope of informational privacy:

[I]t is not clear from *Whalen* whether, to be constitutionally protected by a right of nondisclosure, personal information must concern an area of life itself protected by either the autonomy branch of the right of privacy or by other fundamental rights or whether, to the contrary, the right of confidentiality protects a broader array of information than that implicated by the autonomy branch of the right of pri-

as overruling *Paul v. Davis* and creating a constitutional right to have all government action weighed against the resulting breach of confidentiality.”). Some scholars are critical of these courts’ reading of *Paul*. See, for example, Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 BU L Rev 133, 149 (1991) (arguing that *DeSanti*’s reliance on *Paul* is “misplaced” because unlike *Whalen*, *Paul* involved the dissemination of official information); Falby, 71 Georgetown L J at 223–24 (cited in note 33) (criticizing the *DeSanti* court’s determination that the disclosure of nonpublic social histories collected during juvenile justice proceedings is “indistinguishable” from disclosing the public fact of arrest).

³⁶ 424 US 693 (1976).

³⁷ *Id.* at 713. A photograph and the name of the petitioner had been included in a flyer of “active shoplifters.”

³⁸ *Id.* at 712–13 (“The activities detailed as being within this definition [of the right to privacy] were ones very different from that for which [the petitioner] claims constitutional protection—matters related to marriage, procreation, contraception, family relationships, and child rearing and education.”).

³⁹ See *Nixon*, 433 US at 465.

⁴⁰ *Id.*

⁴¹ See *Whalen*, 429 US at 598–600.

vacy.⁴² The following Part describes circuit courts' attempts to reconcile this puzzling doctrine.

B. *Whalen's* and *Nixon's* Progeny in the Circuit Courts

Because the Supreme Court has done nothing to clarify the "murky"⁴³ scope of the constitutional right to informational privacy since *Nixon*, federal appellate courts are required to fill in its contours. Every circuit court except for the D.C. Circuit recognizes the constitutional right to informational privacy.⁴⁴ While there are considerable variations across circuits,⁴⁵ this Part lays out the general framework that courts use to evaluate informational privacy claims.

⁴² *Borucki*, 827 F2d at 841.

⁴³ *Scheetz v The Morning Call, Inc.*, 946 F2d 202, 206 (3d Cir 1991).

⁴⁴ See *Vega-Rodriguez v Puerto Rico Telephone Co.*, 110 F3d 174, 182–83 (1st Cir 1997) (“[S]pecific [constitutional] guarantees may create protectable zones of privacy”); *Powell v Schriver*, 175 F3d 107, 111 (2d Cir 1999) (holding that a transsexual inmate had a privacy right of confidentiality in his medical records); *Sterling v Borough of Minersville*, 232 F3d 190, 195 (3d Cir 2000) (ruling that an officer’s threat to disclose an arrestee’s suspected homosexuality violated the arrestee’s constitutional right to privacy); *Taylor v Best*, 746 F2d 220, 225 (4th Cir 1984) (recognizing that the right to privacy includes avoiding disclosure of personal facts); *Zaffuto v City of Hammond*, 308 F3d 485, 489 (5th Cir 2002) (deeming that an employer’s recording of an employee’s phone call and disclosing that phone call to the employee’s spouse violated a constitutional right to privacy); *Flaskamp v Dearborn Public Schools*, 385 F3d 935, 945 (6th Cir 2004) (applying a two-part test in assessing a privacy claim); *Denius v Dunlap*, 209 F3d 944, 955 (7th Cir 2000) (affirming that the Fourteenth Amendment protects against disclosure of private matters); *Cooksey v Boyer*, 289 F3d 513, 515–16 (8th Cir 2002) (noting that disclosure of personal information might violate the right to privacy); *Tucson Woman’s Clinic v Eden*, 379 F3d 531, 551 (9th Cir 2004) (holding that a statutory provision enabling the state to access abortion clinic patients’ medical records violated patients’ right to informational privacy); *Anderson v Blake*, 469 F3d 910, 914 (10th Cir 2006) (acknowledging the right to informational privacy); *James v City of Douglas*, 941 F3d 1539, 1543 (11th Cir 1991) (recognizing the confidentiality branch of the right to privacy). But see *American Federation of Government Employees, AFL-CIO v Department of Housing & Urban Development*, 118 F3d 786, 791, 793 (DC Cir 1997) (expressing “grave doubts as to the existence” of the right to informational privacy and declining to “enter the fray” by neither confirming nor denying this right).

⁴⁵ These many variations constitute a number of circuit splits. While describing the different ways courts analyze informational privacy claims will help determine how such analysis should be modified to integrate minors, resolving these differences within the current framework is beyond the scope of this Comment. For more in-depth analysis of these circuit splits, see Chlapowski, 71 BU L Rev at 133 (cited in note 35) (arguing that the right to informational privacy should be constitutionally protected using intermediate scrutiny); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 NIU L Rev 479 (1990) (discussing the incipient right of privacy regarding government dissemination of personal information); Falby, 71 Georgetown L J 219 (cited in note 33) (arguing that *Whalen* recognized the constitutional right to informational privacy and describing the scope of that right).

1. What information triggers privacy protection?

Lower courts differ most considerably in defining the scope of the right to informational privacy.⁴⁶ The Sixth Circuit, and probably the First Circuit, construe this right narrowly, only recognizing it when the privacy invasion implicates “a fundamental right or one implicit in the concept of ordered liberty.”⁴⁷ These two circuits read *Paul* as limiting *Whalen* and *Nixon* to protect only personal information that has a “constitutional dimension,”⁴⁸ because it implicates either specific constitutional guarantees or decisional privacy rights.⁴⁹ The Sixth Circuit has only found informational privacy violations in two cases, both of which implicated fundamental liberty interests.⁵⁰

The other circuits interpret the constitutional right to informational privacy more broadly, holding that it protects personal information that need not implicate fundamental liberties.⁵¹ These courts first decide if the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question. They then determine if the information is personal enough to warrant privacy protection.⁵² Different circuits hold that informational privacy covers medical information⁵³ (particularly HIV status⁵⁴), financial information,⁵⁵

⁴⁶ For an early prescriptive analysis of what information should receive privacy protection, see Falby, 71 Georgetown L.J. at 237–41 (cited in note 33).

⁴⁷ See *Bloch v Ribar*, 156 F.3d 673, 684 (6th Cir. 1998). The First Circuit has yet to define the scope of the right to informational privacy but appears sympathetic to the Sixth Circuit’s narrow interpretation. See *Vega-Rodriguez*, 110 F.3d at 183 (“[Prior First Circuit precedent] suggest[s] that the right of confidentiality protects only information relating to matters within the scope of the right to autonomy.”).

⁴⁸ *Overstreet v Lexington-Fayette Urban County Government*, 305 F.3d 566, 574 (6th Cir. 2002).

⁴⁹ These circuits use informational privacy as a means to reach violations of other constitutional rights. One could interpret this use of informational privacy as a refusal to recognize the right to informational privacy altogether. However, a better reading of these cases, and one the courts themselves advocate, is that informational privacy is a separate right, but one grounded in fundamental liberty.

⁵⁰ See *Bloch*, 156 F.3d at 685–86 (finding that the disclosure of “confidential and intimate details of a rape” implicated fundamental rights and therefore violated the rape victim’s right to informational privacy); *Kallstrom v City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) (holding that the disclosure of undercover police officers’ personnel files to counsel for alleged drug conspirators the officers helped investigate implicated fundamental liberty interests, such as the right to life).

⁵¹ See, for example, *Fadjo v Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981) (“*Paul* must be read in light of subsequent Supreme Court cases such as *Whalen* and *Nixon* where the privacy interest in confidentiality was found to extend beyond the ‘matters relating to [decisional privacy]’ noted in *Paul*.”).

⁵² See, for example, *Fadjo*, 633 F.2d at 1175–76; *Bloch*, 156 F.3d at 683–86; *Kallstrom*, 136 F.3d at 1060–63.

⁵³ See *Schachter v Whalen*, 581 F.2d 35, 37 (2d Cir. 1978); *Doe v Southeastern Pennsylvania Transportation Authority (SEPTA)*, 72 F.3d 1133, 1137 (3d Cir. 1995); *Denius*, 209 F.3d at 944; *Tucson Woman’s Clinic*, 379 F.3d at 531; *Douglas v Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005). See generally Alison M. Jean, Note, *Personal Health and Medical Information: The Need for More Strin-*

sexual information⁵⁶ (including sexual orientation⁵⁷), and other personal information,⁵⁸ such as social security numbers.⁵⁹

The Eighth Circuit sits somewhere in the middle, finding that the right to informational privacy protects not only “matters deemed to be fundamental rights” but also matters “address[ing] highly personal medical or financial information.”⁶⁰ Yet only information that implicates “the most intimate aspects of human affairs” is protected.⁶¹ Under this narrower standard the Eighth Circuit has rejected privacy protection for information that other circuits protect, such as clinical mental health records.⁶²

Every circuit follows the narrow factual holding of *Paul*⁶³ and refuses to grant privacy protections for information in the public record, as individuals have no legitimate expectation that this information will remain confidential.⁶⁴ This refusal to grant privacy protection particu-

gent Constitutional Privacy Protection, 37 Suffolk U L Rev 1151 (2004) (describing constitutional protections for personal medical information and advocating for increased protection).

⁵⁴ See *Powell*, 175 F3d at 107; *SEPTA*, 72 F3d at 1133; *Watson v Lowcountry Red Cross*, 974 F2d 482, 487 (4th Cir 1992); *Roe v Sherry*, 91 F3d 1270, 1274 (9th Cir 1996); *Herring v Keenan*, 218 F3d 1171, 1175 (10th Cir 2000).

⁵⁵ See *In re McVane*, 44 F3d 1127, 1136–37 (2d Cir 1995); *Fraternal Order of Police, Lodge No 5 v City of Philadelphia*, 812 F2d 105, 115 (3d Cir 1987); *Walls v City of Petersburg*, 895 F2d 188, 194 (4th Cir 1990); *Duplantier v United States*, 606 F2d 654, 670 (5th Cir 1979); *Denius*, 209 F3d at 944.

⁵⁶ See *Thorne v City of El Segundo*, 726 F2d 459, 468 (9th Cir 1983); *Eastwood v Department of Corrections of Oklahoma*, 846 F2d 627, 631 (10th Cir 1988). In light of *Lawrence v Texas*, sexual information may also be protected by circuits that only extend informational privacy rights to information that implicates fundamental rights or other constitutional guarantees.

⁵⁷ See *Powell*, 175 F3d at 107; *Sterling*, 232 F3d at 190.

⁵⁸ See *Fraternal Order of Police*, 812 F2d at 116 (“gambling and alcohol consumption”); *Fadjo*, 633 F2d at 1172 (“the most private details of [one’s] life”); *Sheets v Salt Lake County*, 45 F3d 1383, 1388 (10th Cir 1995) (dead wife’s diary); *Blake*, 469 F3d at 910 (video of victim being raped).

⁵⁹ See *In re Crawford*, 194 F3d 954, 958 (9th Cir 1999) (“[T]he indiscriminate public disclosure of SSNs . . . may implicate the constitutional right to informational privacy.”).

⁶⁰ *Alexander v Peffer*, 993 F2d 1348, 1350–51 (8th Cir 1993).

⁶¹ *Eagle v Morgan*, 88 F3d 620, 625 (8th Cir 1996), quoting *Wade v Goodwin*, 843 F2d 1150, 1153 (8th Cir 1988).

⁶² Compare *Cooksey*, 289 F3d at 518 (rejecting privacy protection for disclosure of mental health treatment) with *F.E.R. v Valdez*, 58 F3d 1530, 1535 (10th Cir 1995) (analyzing the disclosure of psychiatric records under the informational privacy framework). The court held that the records did deserve privacy protection generally, but that the patients’ privacy rights were not violated in this case. *Id.* at 1536.

⁶³ See *Paul*, 424 US at 713 (refusing to protect the “record of an official act such as an arrest”).

⁶⁴ See, for example, *Walls*, 895 F2d at 193–94 (4th Cir 1990) (refusing to protect information about marital status and children because it was freely available to the public).

larly includes criminal records,⁶⁵ even when expunged.⁶⁶ Courts do, however, protect some sensitive information about crime victims.⁶⁷

2. How do individuals bring informational privacy claims?

Whalen only mentions the constitutional right to avoid “disclosure” of personal information. Courts, however, interpret this term to include both the acquisition and disclosure of certain information by the state.⁶⁸ Acquisition describes the government’s collection of an individual’s information and disclosure describes the sharing of an individual’s information by the government with an outside, usually public, party.⁶⁹ Individuals tend to challenge this acquisition or disclosure in three different ways. First, as in *Whalen*, individuals will challenge a statute, regulation, or policy that authorizes government acquisition of their personal information or allows the government to disclose this information to the public.⁷⁰ Some cases blur the line between governmental acquisition and disclosure. For instance, some individuals may seek to keep the government from acquiring their personal information in a way that makes the information broadly accessible to many government employees.⁷¹ Second, parties will challenge court orders to produce certain personal information. Sometimes the party will assert the informational right to privacy for his or her own information,⁷² and other times for a third party’s information.⁷³ For example, a doctor being investigated for misconduct may be subpoenaed for his patients’ medical records; he will challenge the

⁶⁵ See *Scheetz*, 946 F2d at 206 (police report); *Walls*, 895 F2d at 194 (arrests or convictions of family members).

⁶⁶ See *Eagle*, 88 F3d at 626 (“An expunged arrest and/or conviction is never truly removed from the public record and thus is not entitled to privacy protection.”); *Nilson v Layton City*, 45 F3d 369, 372 (10th Cir 1995) (“An expungement order does not privatize criminal activity.”).

⁶⁷ See, for example, *Blake*, 469 F3d at 914 (finding that an alleged rape victim has a constitutionally protected privacy interest in the video of her alleged rape).

⁶⁸ See, for example, *Lawall*, 307 F3d at 790 (“[I]nformational privacy’ applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public.”).

⁶⁹ *Id.*

⁷⁰ See, for example, *Barry v City of New York*, 712 F2d 1554, 1556–57 (2d Cir 1983) (assessing a New York City statute that required officials to file personal financial information about themselves and their spouses that would be available to the public on request).

⁷¹ See, for example, *Lawall*, 307 F3d at 787 (challenging a statute that allowed court and public agency employees to access the closed court records of minors who participate in judicial bypass proceedings to obtain abortions).

⁷² See, for example, *In re McVane*, 44 F3d at 1130–31 (upholding an FDIC subpoena for personal financial information from directors of a failed bank, but striking the same request for financial information about the directors’ family members).

⁷³ See, for example, *Watson*, 974 F2d at 487–88 (appealing the grant of an order to compel discovery from the Red Cross about an anonymous HIV-positive blood donor).

subpoena on the grounds of his patients' privacy rights.⁷⁴ In these settings, the constitutional right to informational privacy serves as a non-absolute testimonial or evidentiary privilege.⁷⁵

The final category of cases are § 1983⁷⁶ or *Bivens*⁷⁷ suits brought by individuals seeking damages for informational privacy violations that have already occurred.⁷⁸ While courts assessing these claims tend to find informational privacy violations more commonly, qualified immunity frequently bars damage awards for plaintiffs because of the ambiguous scope of informational privacy protections.⁷⁹ Yet on the whole, this last group of cases has been more successful for individual litigants. Because, as shown below, informational privacy violations are determined on a case-by-case basis, courts may be more likely to find for individuals who have shown egregious government violations than they are to restrict government action for fear of future violations.

3. What level of scrutiny do courts apply to informational privacy invasions?

All circuits recognizing informational privacy hold that this right is not absolute⁸⁰ and therefore balance individuals' informational privacy interests against the state's interest in acquiring or disclosing this

⁷⁴ See *In re Zuniga*, 714 F2d 632, 641–42 (6th Cir 1983) (quashing a psychotherapist's challenge to a grand jury subpoena for his patients' medical records in an investigation of health insurance fraud).

⁷⁵ See Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out the Hard and Easy Cases*, 34 Vill L Rev 871, 898–902 (1989) (discussing cases in which doctors challenged the disclosure of identities of HIV-positive patients and arguing that strong privacy interests may trump the interests of truth-seeking, particularly when the interests of truth-seeking may be furthered by alternative means).

⁷⁶ 42 USC § 1983 (2000) supplies plaintiffs with a cause of action when individuals acting under the color of state law violate others' constitutional rights.

⁷⁷ In *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court gave plaintiffs the right to bring § 1983-type suits against federal officials. 403 US 388, 397 (1971).

⁷⁸ See, for example, *Herring*, 218 F3d at 1173 (holding a probation officer liable for violating his probationer's informational privacy by revealing probationer's HIV-positive status to the probationer's sister and employer); *Borucki*, 827 F2d at 837 (examining a claim made against a district attorney who told the press about the contents of a suspect's psychiatric records).

⁷⁹ See, for example, *Powell*, 175 F3d at 114 (recognizing the violation of a prisoner's privacy in her HIV status and sexual orientation but protecting the offending prison officials from liability under qualified immunity, given the unclear state of the law). However, as each circuit clarifies its scope of informational privacy protections, state or federal officials may be less likely to prove that the right to informational privacy is not clearly established, and therefore will be unable to claim qualified immunity.

⁸⁰ See, for example, *Westinghouse*, 638 F2d at 578 (noting that "courts and legislatures have determined that public health or other public concerns may support access to facts an individual might otherwise choose to withhold," citing "venereal disease, child abuse, injuries caused by deadly weapons and certification of fetal death" as examples).

information. But circuits differ in the level of deference they give to the state's interest.

The Fourth, Sixth, and Tenth Circuits apply strict scrutiny to government invasions of informational privacy.⁸¹ The Sixth Circuit only recognizes informational privacy violations that implicate fundamental rights.⁸² Therefore it requires the government to show a compelling interest, narrowly drawn, for invading these fundamental rights through the disclosure or acquisition of information.⁸³ The Tenth Circuit recognizes privacy interests in a much broader range of information.⁸⁴ It requires the state to justify any invasion of protected information—whether implicating fundamental rights or not—by providing a “compelling interest” and ensuring that disclosure is made in the “least intrusive manner.”⁸⁵ Similarly, the Fourth Circuit employs strict scrutiny to evaluate state infringement of information that does not implicate fundamental rights.⁸⁶

The majority of circuits have adopted some form of intermediate scrutiny, requiring the government to show a “substantial” interest for invading individuals' right to confidentiality in their personal information.⁸⁷ These circuits then balance the state's substantial interest in disclosure against the individual's interest in confidentiality. Some circuits balance these interests ad hoc, but the Third Circuit employs a

⁸¹ See *Walls*, 895 F2d at 192 (requiring the government to demonstrate a compelling state interest narrowly drawn); *Kallstrom*, 136 F3d at 1064 (“Where state action infringes upon a fundamental right, such action will be upheld . . . only where [it] furthers a compelling state interest, and is narrowly drawn to further that state interest.”); *Blake*, 469 F3d at 915 (“[P]rivate information that otherwise would be protected by the right to privacy may nevertheless be disclosed if the government can demonstrate a compelling interest and if it uses the least intrusive means of disclosure.”).

⁸² See *Bloch*, 156 F3d at 686 (balancing an individual's privacy interest against the state's interest in disclosure, and allowing the state to prevail only where the disclosure furthers a compelling interest).

⁸³ *Id.*

⁸⁴ See Part I.B.

⁸⁵ *Blake*, 469 F3d at 915.

⁸⁶ See *Walls*, 895 F2d at 194–95 (applying strict scrutiny to a request for personal financial information from potential police employees).

⁸⁷ See *Daury v Smith*, 842 F2d 9, 13 (1st Cir 1988) (holding that the public interest trumped an underperforming school principal's right to informational privacy); *Doe v City of New York*, 15 F3d 264, 269 (2d Cir 1994) (“[T]he city's interest in disseminating information . . . must be ‘substantial’ and must be balanced against Doe's right to confidentiality.”); *Westinghouse*, 638 F2d at 578 (stating that public health or other public concerns may demand access to private facts); *Plante v Gonzalez*, 575 F2d 1119, 1134 (5th Cir 1978) (preferring a balancing test to strict scrutiny when evaluating invasion of privacy claims); *Denius*, 209 F3d at 956 (requiring “a sufficiently strong state interest” to overcome privacy rights); *Hester v City of Milledgeville*, 777 F2d 1492, 1497 (11th Cir 1985) (assessing privacy rights by balancing the interests they serve and inhibit). The Ninth Circuit applies a slightly higher level of scrutiny, requiring the state to show that “its use of the [individual's] information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.” See *Crawford*, 194 F3d at 959.

more detailed balancing test developed in *United States v Westinghouse*.⁸⁸ This test has been adopted in varying degrees by other circuits.⁸⁹ The *Westinghouse* test balances the following factors: (1) the type of record requested; (2) the potential for harm in any subsequent nonconsensual disclosure; (3) the adequacy of safeguards to prevent unauthorized disclosure; (4) the degree of need for access; and (5) the presence of an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.⁹⁰ This test may best track the Supreme Court's balancing of factors in both *Whalen* and *Nixon*.⁹¹

In his *Whalen* concurrence, Justice Brennan cautioned that more intrusive violations of individuals' rights to informational privacy should be reviewed more closely: "Broad dissemination by state officials of [medical] information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."⁹² The Third and Ninth Circuits have implemented his suggestion and employ a sliding scale of scrutiny, applying heightened scrutiny for more severe privacy invasions or invasions implicating fundamental rights.⁹³

The Eighth Circuit defers the most to state interests, requiring that "to violate [a] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of [an individual] to further some specific state interest, or a flagrant breach of a pledge of confidentiality which was instrumental in

⁸⁸ 638 F2d 570 (3d Cir 1980).

⁸⁹ The Ninth Circuit has adopted the *Westinghouse* test as its own. See, for example, *Tucson Woman's Clinic*, 379 F3d at 551. Other circuits employ different factors depending on the nature of the case. See, for example, *National Treasury Employees Union v United States Department of the Treasury*, 25 F3d 237, 244 (5th Cir 1994) (considering *Westinghouse*'s "potential harm for subsequent disclosure" factor); *Walls*, 895 F2d at 194 (using *Westinghouse*'s "adequacy of safeguards to prevent unauthorized disclosure" factor to determine whether the government's acquisition of financial information was narrowly tailored). See also *Denius*, 209 F3d at 956 n 7 (noting the influence of the *Westinghouse* test on other circuits).

⁹⁰ The *Westinghouse* court originally formulated seven factors, which courts later boiled down to the main five. See 638 F2d at 578.

⁹¹ See *Denius*, 209 F3d at 956 n 7 (comparing factors used to weigh informational privacy claims in *Whalen*, *Nixon*, and *Westinghouse*); *Barry*, 712 F2d at 1559 ("The Supreme Court itself appeared to use a balancing test in *Nixon*.").

⁹² *Whalen*, 429 US at 606 (Brennan concurring).

⁹³ See *SEPTA*, 72 F3d at 1139-40 ("[T]he more stringent 'compelling interest analysis' [is] used when the intrusion on an individual's privacy [is] severe."); *Thorne*, 726 F2d at 469 (applying strict scrutiny to police department questions about an employee's sex life because they implicated her decisional privacy and free association rights). The Sixth Circuit similarly subjects government actions that invade personal information implicating fundamental rights to strict scrutiny. See note 82.

obtaining the personal information.”⁹⁴ This deferential standard, combined with the circuit’s limitations on the type of information protected,⁹⁵ has made it difficult to challenge informational privacy invasions.⁹⁶ Indeed, the court has yet to find such a violation.⁹⁷

II. MINORS AND THE RIGHT TO INFORMATIONAL PRIVACY

The Supreme Court has declared that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁹⁸ While the Court has yet to address explicitly minors’ informational privacy rights, it has recognized minors’ right to decisional privacy⁹⁹ and their right to keep these decisions confidential.¹⁰⁰ And all three of the courts of appeals that have been asked to evaluate minors’ informational privacy rights have held that minors indeed possess the right to keep certain personal information confidential.¹⁰¹ However, these three circuits differ dramatically in the way they address minors’ right to informational privacy. Both the Third and Ninth Circuits acknowledge no difference in the informational privacy rights of minors and adults; they simply apply their informational privacy jurisprudence to minors with little thought to minors’ special status.¹⁰² On the other end of the spectrum, the Tenth Circuit treats minors’ informational privacy

⁹⁴ *Alexander*, 993 F2d at 1350. In contrast, the Tenth Circuit holds that “information need not be embarrassing to be personal.” *Sheets*, 45 F3d at 1388.

⁹⁵ See Part I.B.1.

⁹⁶ See *Cooksey*, 289 F3d at 516 (“The standards elucidated in [this court’s jurisprudence] set a high bar and implicitly hold that many disclosures, regardless of their nature, will not reach the level of a constitutional violation.”).

⁹⁷ See, for example, *id.* at 516–17 (holding that the disclosure of city officials’ discussions of a police chief’s mental health did not constitute a violation of privacy); *Riley v. St. Louis County of Missouri*, 153 F3d 627, 631 (8th Cir 1998) (holding that the display of police photos of a man’s corpse did not violate his mother’s right to privacy); *Alexander*, 993 F2d at 1350–51.

⁹⁸ *Application of Gault*, 387 US 1, 13 (1967). See also *Bellotti II*, 443 US at 633 (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”); *Planned Parenthood of Central Missouri v. Danforth*, 428 US 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).

⁹⁹ See *Bellotti II*, 443 US at 643 (recognizing minors’ right to an abortion); *Carey v. Population Services, International*, 431 US 678, 692–93 (1977) (recognizing minors’ right to contraception).

¹⁰⁰ See *Bellotti II*, 443 US at 644–45 (“[Confidentiality is a] concern[] that require[s] special treatment of a minor’s abortion decision.”); *Carey*, 431 US at 693 (noting minors’ right to keep their decisions affecting procreation private). See also *Wynn v. Carey*, 582 F2d 1375, 1389 (7th Cir 1978) (“[I]f the right to privacy means anything, it means that the minor should be free to make her decision without fear that the decision she makes will be exposed to public scrutiny.”).

¹⁰¹ See *Aid for Women v. Foulston*, 441 F3d 1101, 1116 (10th Cir 2006); *C.N. v. Ridgewood Board of Education*, 430 F3d 159, 179 (3d Cir 2005); *Planned Parenthood of Southern Arizona v. Lawall*, 307 F3d 783, 789–90 (9th Cir 2002).

¹⁰² See *Ridgewood*, 430 F3d at 179–81 (“The constitutional right to privacy extends to minors.”); *Lawall*, 307 F3d at 789–90 (“[W]e must consider whether the confidentiality exception on its face reasonably preserves a pregnant minor’s confidential information. We hold that it does.”).

claims quite differently than similar claims brought by adults—it holds minors' rights to a less rigorous level of scrutiny.¹⁰³ Each recent attempt to define the scope of minors' informational privacy rights is reviewed in turn.

A. Third and Ninth Circuits: Minors' Rights Are Coextensive with Adults' Rights

The Third and Ninth Circuits draw no distinction between minors' and adults' constitutional right to informational privacy.¹⁰⁴ The Third Circuit reads *Whalen's* confidentiality privacy strain quite broadly.¹⁰⁵ It has found a privacy interest in financial¹⁰⁶ and medical¹⁰⁷ information, sexual orientation,¹⁰⁸ and probably HIV status.¹⁰⁹ After determining whether the information in question is eligible for privacy protection, the Third Circuit employs its *Westinghouse* balancing test.¹¹⁰ The court weighs the individual's interest in nondisclosure against the government's interest in acquiring or disclosing the information.¹¹¹ If the privacy invasion is particularly severe, the Third Circuit will apply a "more stringent compelling interest analysis."¹¹²

The Third Circuit does not alter this framework when evaluating minors' informational privacy claims. In *Gruenke v Seip*,¹¹³ a public high school student sued her high school swim coach for forcing her to disclose her pregnancy and then sharing this private information with other school officials.¹¹⁴ The court barely mentions that the plaintiff is a minor, and evaluates her claim as it does any other: first, determining that pregnancy status falls within the scope of the right to privacy¹¹⁵ and second, finding that the student's privacy interest outweighs the

¹⁰³ See *Aid for Women*, 441 F3d at 1119 (endorsing a different test for minors' privacy claims that acknowledges the state's significant interest in protecting children).

¹⁰⁴ See *Ridgewood*, 430 F3d at 179–81; *Lawall*, 307 F3d at 789–90.

¹⁰⁵ See *Ridgewood*, 430 F3d at 179 (“[O]ur jurisprudence takes an encompassing view of [the] information entitled to a protected right to privacy.”).

¹⁰⁶ See *Fraternal Order of Police, Lodge No 5 v City of Philadelphia*, 812 F2d 105, 115 (3d Cir 1986).

¹⁰⁷ See *Doe v Southeastern Pennsylvania Transportation Authority (SEPTA)*, 72 F3d 1133, 1137 (3d Cir 1995).

¹⁰⁸ See *Sterling v Borough of Minersville*, 232 F3d 190, 196 (3d Cir 2000).

¹⁰⁹ In *SEPTA*, an employee challenged his employer's access to his prescription drug records, which, based on the medications he was taking, revealed his HIV-positive status. While the court broadly held that medical information is afforded constitutional protection, the employee's HIV status played a key role in the court's weighing of interests. See *SEPTA*, 72 F3d at 1140.

¹¹⁰ See *Westinghouse*, 638 F2d at 578.

¹¹¹ See, for example, *SEPTA*, 72 F3d at 1139–43 (applying the *Westinghouse* test).

¹¹² See *id.* at 1139–40 (quotation marks omitted).

¹¹³ 225 F3d 290 (3d Cir 2000).

¹¹⁴ *Id.* at 295–97.

¹¹⁵ *Id.* at 302–03.

state's interest in disclosure.¹¹⁶ The Third Circuit took the same approach in *C.N. v Ridgewood Board of Education*.¹¹⁷ But there the court found that the state's interest in collecting private information outweighed the minors' interest in nondisclosure. Students sued their public school district for administering a voluntary, anonymous survey about drug and alcohol use, sexual activity, and personal relationships.¹¹⁸ The court recognized that "the [students'] privacy expectation is great."¹¹⁹ It found for the school district, however, because the district had a "laudable goal" of understanding and preventing youths' social problems.¹²⁰ Also, the district adequately safeguarded the students' personal information and reported it in aggregated form.¹²¹ While the plaintiffs' minor status supplied the school district with an adequate justification for surveying its students, this justification seems no different from other state interests in collecting personal information. Overall, the Third Circuit changes neither the privacy protection afforded certain *types* of information nor the *standard* employed to balance individual and state interests because the plaintiffs are minors.

The Ninth Circuit also interprets *Whalen* broadly, finding that individuals have a protected privacy interest in medical¹²² and sexual information,¹²³ HIV status,¹²⁴ and even social security numbers.¹²⁵ Like the Third Circuit, the court applies a sliding scale balancing test, where "[t]he more sensitive the information, the stronger the state's interest must be."¹²⁶ However, the Ninth Circuit's background standard is stricter than the Third Circuit's, requiring the state to show that "its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest."¹²⁷

In *Planned Parenthood of Southern Arizona v Lawall*,¹²⁸ the Ninth Circuit applied this framework to minors' informational privacy

¹¹⁶ The court merely notes that, "while the preservation of this right must be balanced with factors such as concerns for public health in the work environment, [the student's] version of the facts satisfies this test." *Id.* at 303.

¹¹⁷ 430 F3d 159 (3d Cir 2005).

¹¹⁸ *Id.* at 161.

¹¹⁹ *Id.* at 181.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *Norman-Bloodsaw v Lawrence Berkeley Laboratory*, 135 F3d 1260, 1269–70 (9th Cir 1998).

¹²³ See *Thorne v City of El Segundo*, 726 F2d 459, 468 (9th Cir 1983).

¹²⁴ See *Roe v Sherry*, 91 F3d 1270, 1274 (9th Cir 1996).

¹²⁵ See *In re Crawford*, 194 F3d 954, 958 (9th Cir 1999) ("[T]he indiscriminate public disclosure of [social security numbers], especially when accompanied by names and addresses, may implicate the constitutional right to informational privacy.")

¹²⁶ *Doe v Attorney General*, 941 F2d 780, 796 (9th Cir 1991).

¹²⁷ *In re Crawford*, 194 F3d at 959.

¹²⁸ 307 F3d 783 (9th Cir 2002).

rights.¹²⁹ Planned Parenthood, on behalf of its minor patients, challenged the constitutionality of Arizona's parental consent statute.¹³⁰ The statute requires that a minor either receive parental consent or use the prescribed judicial bypass procedure before obtaining an abortion.¹³¹ A decade earlier, the Supreme Court had declared that, among other requirements, judicial bypass procedures must ensure minors' anonymity.¹³² Parental involvement statutes that do not meet these requirements create an "undue burden" on a minor's right to obtain an abortion, therefore violating their decisional privacy rights.¹³³ Planned Parenthood argued that because the Arizona statute allowed court and public agency employees to access minors' judicial bypass records, the bypass provision did not meet the anonymity requirement.¹³⁴ As a result, both minors' informational and decisional privacy rights would be violated.¹³⁵ In assessing the plaintiff's informational privacy claim, the Ninth Circuit applied the same standard used in adult privacy cases. First, it determined that the information in a judicial bypass proceeding warrants some level of privacy protection.¹³⁶ Second, it balanced the minors' privacy interest against the state's interest in disclosure, requiring the state to prove that "its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest."¹³⁷ Although ultimately holding that the statute did not impermissibly invade minors' right to informational privacy, the court did not alter its analysis based on age.¹³⁸

¹²⁹ *Id.* at 789–90.

¹³⁰ *Id.* at 786.

¹³¹ *Id.* at 785.

¹³² See *Ohio v Akron Center for Reproductive Health (Akron II)*, 497 US 502, 511–12 (1990) (discussing the *Bellotti* decision's requirement that bypass procedures must guarantee minors' anonymity).

¹³³ See *Bellotti II*, 443 US at 647 (reasoning that "[i]t would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most").

¹³⁴ See *Lawall*, 307 F3d at 784.

¹³⁵ *Id.*

¹³⁶ *Id.* at 790 ("It is undisputed that a court receives sensitive private information in a judicial bypass proceeding that is worthy of constitutional protection.").

¹³⁷ *Id.*, quoting *Crawford*, 194 F2d at 959.

¹³⁸ The court determined that the state's interest in "permitting authorized personnel to handle closed court records" and its adequate protection of these records justified this invasion of privacy. *Lawall*, 307 F3d at 790. While the fact that these court records belonged to minors may have been a factor in the court's decision, it was not given as a reason to limit minors' right to informational privacy in all cases. Instead, even if the court implicitly considered minority, it was as one factor among many for allowing the state's interests to trump those of minors', not an automatic pass for reducing minors' rights.

B. Tenth Circuit: Holding Minors' Rights to a Different Standard

Like the Third and Ninth Circuits, the Tenth Circuit interprets *Whalen* and *Nixon* broadly. Historically, this circuit has been the most disposed to hold government officials accountable for confidentiality violations,¹³⁹ likely due to its heightened review in informational privacy cases. First, like its sister circuits, the court requires the individual claiming a privacy invasion to show that she has a legitimate expectation of privacy in the information in question.¹⁴⁰ Next, instead of applying the typical balancing test, the court requires the state to prove that the disclosure of the individual's information advances a "compelling state interest . . . accomplished in the least intrusive manner."¹⁴¹ Unlike the Third and Ninth Circuits, the Tenth Circuit does not vary its level of scrutiny based on the severity of the privacy invasion, but applies a consistently rigorous standard to any state acquisition or disclosure of protected information.¹⁴² Such protected information includes medical information,¹⁴³ HIV status,¹⁴⁴ sexual information,¹⁴⁵ and other highly personal matters.¹⁴⁶

In *Aid for Women v Foulston*,¹⁴⁷ the Tenth Circuit evaluated minors' right to confidentiality in their sexual information.¹⁴⁸ The Attorney General of Kansas issued an interpretive opinion of the state child abuse statute,¹⁴⁹ declaring that any sexual activity by a minor younger

¹³⁹ See *Anderson v Blake*, 469 F3d 910, 912 (10th Cir 2006) (affirming the dismissal of a police officer's motion for qualified immunity for releasing a videotape of an alleged rape to the media); *Sheets v Salt Lake County*, 45 F3d 1383, 1388–89 (10th Cir 1995) (upholding the jury verdict for a plaintiff whose privacy was violated when a police officer shared excerpts from his dead wife's diary with the press); *Lankford v City of Hobart*, 27 F3d 477, 479–80 (10th Cir 1994) (affirming the denial of summary judgment for a police officer who obtained his employee's medical records without her consent); *A.L.A. v West Valley City*, 26 F3d 989, 990–91 (10th Cir 1994) (reversing the dismissal of an action against a police officer for violating an arrestee's privacy by disclosing his HIV-positive status to others); *Eastwood v Department of Corrections of Oklahoma*, 846 F2d 627, 632 (10th Cir 1988) (holding that a Department of Corrections employee violated another employee's right to informational privacy by asking her irrelevant questions about her sexual history).

¹⁴⁰ See, for example, *Blake*, 469 F3d at 914 (holding that the legitimacy of an expectation of privacy depends in part upon the intimate or personal nature of the information).

¹⁴¹ *Mangels v Pena*, 789 F2d 836, 839 (10th Cir 1986).

¹⁴² *Id.* at 839 ("Information is constitutionally protected when a legitimate expectation exists that it will remain confidential while in the state's possession.").

¹⁴³ See *Lankford*, 27 F3d at 479.

¹⁴⁴ See *Herring v Keenan*, 218 F3d 1171, 1177 (10th Cir 2000).

¹⁴⁵ See *Eastwood*, 846 F2d at 631.

¹⁴⁶ See *Blake*, 469 F3d at 914 (holding that a rape victim had a legitimate expectation of privacy in a videotape recording of the rape); *Sheets*, 45 F3d at 1388–89 (finding that a husband had a legitimate expectation of privacy in his dead wife's diary).

¹⁴⁷ 441 F3d 1101 (10th Cir 2006).

¹⁴⁸ *Id.* at 1117–20.

¹⁴⁹ Kan Stat Ann § 38-1522 (2006).

than sixteen is per se injurious, and therefore sexually abusive.¹⁵⁰ Kansas's child abuse statute requires a certain class of professionals, including doctors, nurses, psychologists, social workers, and teachers, to notify the state government if they have "reason to suspect" injury to a minor from sexual abuse.¹⁵¹ A group of these professionals brought suit, alleging that the reporting requirements violated minors' right to informational privacy in their consensual sexual activity.

In evaluating the district court's order to preliminarily enjoin the interpretive rule, the Tenth Circuit found that the plaintiffs were likely to lose on their informational privacy claim.¹⁵² The court explicitly recognized minors' right to informational privacy¹⁵³ but noted that "the state has somewhat broader authority to regulate the conduct of children than that of adults."¹⁵⁴ Perhaps based on this general presumption, the court proceeded to alter its informational privacy framework as applied to minors. The court acknowledged that minors do have a legitimate expectation of privacy in their sexual information.¹⁵⁵ Still, it held that this expectation should be less protected when asserted by minors: "Minors' privacy rights in personal sexual activity are not as strong as adults' rights would be."¹⁵⁶ The state did not need to show a compelling interest for disclosure accomplished in the least invasive manner.¹⁵⁷ Instead, the court adopted the lower *Carey v Population Services International*¹⁵⁸ standard, which is often used to evaluate minors' right to *decisional* privacy.¹⁵⁹ Under this rubric, the state is required to show only that the disclosure "serve[s] any significant state interest . . . that is not present in the case of an adult."¹⁶⁰ The court determined that the reporting statute served three significant state interests—enforcing criminal laws, protecting minors' best interests through the state's role as *parens patriae*, and promoting public health¹⁶¹—and was therefore unlikely to violate minors' constitutional rights.¹⁶²

¹⁵⁰ Kan Attorney General Opinion No 2003-17, 2003 WL 21492493. See also *Aid for Women*, 441 F3d at 1108.

¹⁵¹ Kan Stat Ann § 38-1522.

¹⁵² *Aid for Women*, 441 F3d at 1106.

¹⁵³ Id at 1116 ("[M]inors do possess a right to informational privacy.").

¹⁵⁴ Id at 1117 n 17, quoting *Doe v Irwin*, 615 F2d 1162, 1166 (6th Cir 1980).

¹⁵⁵ *Aid for Women*, 441 F3d at 1120.

¹⁵⁶ Id.

¹⁵⁷ Id at 1119 (applying the *Carey* test and ruling instead that "the question is whether the reporting statute serves any significant state interest . . . that is not present in the case of an adult") (citations and quotation marks omitted).

¹⁵⁸ 431 US 678 (1977).

¹⁵⁹ *Aid for Women*, 441 F3d at 1119 (applying the *Carey* test).

¹⁶⁰ *Carey*, 431 US at 693 (citations omitted).

¹⁶¹ See *Aid for Women*, 441 F3d at 1119 (acknowledging these interests as substantial and in furtherance of protecting children).

¹⁶² See id at 1120 (noting also the diminished rights of minors in their sexual privacy).

No circuit court has ignored minority when weighing minors' interests in nondisclosure of personal information against the state's interest in disclosure. The Third and Ninth Circuits' approach, however, differs significantly from that of the Tenth Circuit. Both the Third and Ninth Circuit may weigh minority as one of many legitimate reasons the state can present for invading a minor's right to informational privacy. For these circuits, minority status is not outcome determinative but is instead considered on a case-by-case basis. Yet in the Tenth Circuit, a minor's age automatically limits that individual's right to informational privacy. This circuit assumes that the state always has a good reason to invade minors' privacy, regardless of the type of information the state wishes to access or its reasons for doing so.

III. FITTING MINORS INTO THE FRAMEWORK

While minors do enjoy robust constitutional protections, their rights are not completely coextensive with those of adults—and with good reason. These limitations on constitutional rights are configured to protect minors and recognize their uniquely vulnerable places in society.¹⁶³ Yet the current approaches to minors' constitutional right to informational privacy fail on both counts. They neither protect minors from their particular vulnerabilities nor allow minors to enjoy the privacy guarantees of the Fourteenth Amendment. All three circuits that have confronted this issue ignore concerns unique to minors' interest in confidentiality. Minors are affected acutely by the threat of disclosure of their personal matters, as they are less likely to seek medical attention and other assistance if they fear that their personal information will not remain confidential.¹⁶⁴ Also, when the Tenth Circuit reviews minors' informational privacy claims using a standard more deferential to the state, it reduces minors' privacy protections without an appropriate justification. While the court attempts to derive this standard from decisional privacy cases, this precedent is not apposite to informational privacy rights. This Comment proposes that courts evaluate minors' informational privacy claims using the same level of scrutiny applied to adults' claims—as the Third and Ninth Circuits both do. But when they balance state interests in disclosure against minors' interests in confidentiality they should also consider the potential for harm from the mere *threat* of disclosure.

¹⁶³ See *Bellotti II*, 443 US at 634 (addressing minors' constitutional rights flexibly to account for their special status).

¹⁶⁴ See notes 186, 189.

A. Criticism of Current Approaches

1. Tenth Circuit: incorrect level of scrutiny.

The Tenth Circuit's analysis of minors' informational privacy rights is fundamentally flawed because it unjustifiably holds minors' privacy rights to a lower level of scrutiny than adults' rights. Instead of evaluating the scope of minors' informational privacy under *Bellotti II*'s general test to determine minors' rights, in *Aid for Women*, the court adopted the earlier *Carey* standard. Yet *Carey* justifies limiting minors' decisional privacy rights, and is not applicable to informational privacy without further analysis—analysis the Tenth Circuit fails to undertake.

In *Carey*, a plurality of the Supreme Court struck down a New York statute criminalizing the sale of contraceptives to minors younger than sixteen.¹⁶⁵ This plurality applied a lower standard for reviewing restrictions on minors' privacy rights, declaring that “[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve ‘any significant state interest . . . that is not present in the case of an adult.’”¹⁶⁶ The test is “less rigorous than the ‘compelling state interest’ test applied to restrictions on the privacy rights of adults.”¹⁶⁷ The plurality justified its lesser scrutiny on three closely related grounds: (1) “the States’ greater latitude to regulate the conduct of children,”¹⁶⁸ (2) “the right of privacy implicated here is ‘the interest in independence in making certain kinds of important decisions,’”¹⁶⁹ and (3) “the law has generally regarded minors as having a lesser capability for making important decisions.”¹⁷⁰ Yet each of these grounds relates to one primary reason to limit minors' rights: their “inability to make critical decisions in an informed, mature manner.”¹⁷¹

Carey was a precursor to the Court's more thorough analysis of minors' rights in *Bellotti II*, where the Court laid out the “three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults.” The reasons were children's lesser decisionmaking capacity, their particular vulnerabilities, and the parental role in childrearing.¹⁷² The *Carey* factors, therefore, are only one-third of the minors' rights analysis; the Tenth Circuit is incorrect to rely on them while ignoring the later and more thorough *Bellotti II*

¹⁶⁵ *Carey*, 431 US at 681–82.

¹⁶⁶ *Id.* at 693, quoting *Planned Parenthood of Central Missouri v Danforth*, 428 US 52, 75 (1976).

¹⁶⁷ *Carey*, 431 US at 693 n 15.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, quoting *Whalen*, 429 US at 599–600.

¹⁷⁰ *Carey*, 431 US at 693 n 15.

¹⁷¹ *Bellotti II*, 443 US at 635–36. See also Part III.B.1.b.

¹⁷² See *Bellotti II*, 443 US at 634.

framework. The two *Bellotti II* factors unaddressed by the Tenth Circuit—minors' peculiar vulnerabilities and the parental role in child-rearing—are instrumental in determining the scope of minors' right to informational privacy.¹⁷³

The Tenth Circuit's reliance on *Carey* alone is even more problematic because the *Carey* court assessed minors' decisional, not informational, privacy rights. Minors' lesser ability to make good decisions should affect the scope of minors' rights to make private decisions, such as whether or not to use contraceptives. It is unclear what impact this lesser ability should have on minors' right to keep their personal information confidential.¹⁷⁴ Yet the court in *Aid for Women* fails to explain why it applied a plurality decision limiting minors' decisional privacy rights to a case involving minors' informational privacy. Instead, the court cites three other decisions supporting use of the lower *Carey* standard;¹⁷⁵ but none of these involved informational privacy, and only one addressed privacy at all. Instead, each discusses the regulation of minors' conduct: two cases involve challenges to curfew ordinances for minors¹⁷⁶ and one evaluates a parental consent for abortion law with no informational privacy component.¹⁷⁷ The Tenth Circuit has good support for limiting the *conduct* of minors. But it offers no support for limiting the *confidentiality* minors possess in their personal information, or for linking conduct and confidentiality.

The impact of limiting the scope of minors' right to informational privacy, as the Tenth Circuit has done, is significant. Under its analysis, minors' personal information will always be less protected than adults' information. This is so regardless of minors' expectation of privacy, the type of personal information acquired or disclosed, and the government's reasons for accessing this information. While there are some occasions when the state should have greater access to minors' personal information,¹⁷⁸ there are also times when minors should receive the same, if not higher, protections that adults enjoy.¹⁷⁹ If minors' right to informational privacy are—on balance—coextensive with those of adults, the state will still be able to acquire or disclose minors' personal information, even when they are barred from accessing similar information about adults. Yet the state must present a legitimate rea-

¹⁷³ See Part III.B.1.a, Part III.B.1.c, and Part III.B.2.

¹⁷⁴ The relationship between informational privacy and minors' decisionmaking capacity is explored in depth in Part III.B.1.b.

¹⁷⁵ See *Aid for Women*, 441 F3d at 1119.

¹⁷⁶ See *Schleifer v City of Charlottesville*, 159 F3d 843, 845–46 (4th Cir 1998); *Johnson v City of Opelousas*, 658 F2d 1065, 1067–68 (5th Cir 1981).

¹⁷⁷ See *Wynn v Carey*, 582 F2d 1375, 1377 (7th Cir 1978).

¹⁷⁸ See Part III.B.1.c.

¹⁷⁹ See Part III.B.1.b.

son to invade any minor's informational privacy, instead of benefiting from a presumption that age alone is a sufficient justification.

2. Third, Ninth, and Tenth Circuits: no consideration of minors' particular vulnerabilities.

All three circuits that have addressed minors' informational privacy rights fail to adequately protect these rights. They neglect to consider the specific effects that threats of disclosure of personal information can have on minors. This failure is particularly apparent in *Lawall*, as the Ninth Circuit upheld a judicial bypass system that seriously risked disclosing minors' decisions to seek an abortion through the court system to a wide audience. The Arizona statute allowed a broad range of state employees to access minors' closed judicial bypass records, including "judges, clerks, administrators, professionals or other persons employed by or working under the supervision of the court or employees of other public agencies who are authorized by statute or federal rule or law to inspect and copy closed court records."¹⁸⁰ The majority acknowledged that "[i]t is . . . undisputed that the disclosure of [judicial bypass proceedings] would cause significant harm,"¹⁸¹ but ultimately determined that the statute adequately protected minors from the disclosure of their personal information.¹⁸²

Yet the majority failed to consider the secondary effects of such a statute: even if the actual risk of disclosure is low, the fear of disclosure may change minors' behavior for the worse. The dissent pointed this out, as it forcefully criticized the majority for "ignor[ing] the breadth of the exception in the [statute's] confidentiality provision" and detailed the adverse effects on minors: "Although the ramifications of today's holding are widespread, we will not see most of them because this statute and others like it will prevent numerous young women from exercising their constitutional right to terminate a pregnancy."¹⁸³ The majority may have been correct to allow the public interest "in favor of permitting authorized personnel to handle closed court records" to outweigh minors' interests in keeping their records confidential. But it failed to include one factor in its calculus: minors' particular susceptibility to the chilling effect that the threat of disclosure has on their behavior.

In *Whalen*, the Court recognized that allowing the state to collect patients' prescription drug information would deter some patients

¹⁸⁰ Ariz Rev Stat § 36-2152(D) (2000) (emphasis added).

¹⁸¹ *Lawall*, 307 F3d at 790.

¹⁸² *Id.*

¹⁸³ *Id.* at 790–91 (Ferguson dissenting).

from using prescribed drugs. It rejected this as a reason to strike the reporting requirement in question because the record supported such deterrence in only a handful of patients.¹⁸⁴ Yet the Court has continued to note the possibility of such deterrence, declaring in 2001 that “an intrusion on [patients’ expectation of privacy] may have adverse consequences because it may deter patients from receiving needed medical care.”¹⁸⁵

This deterrence is particularly acute in minors.¹⁸⁶ After evaluating a series of scientific testimony and studies presented during the bench trial, the district court in *Aid for Women* found that mandatory disclosure of minors’ consensual sexual activity would result in “a significant decrease in minors seeking care and treatment related to sexual activity.”¹⁸⁷ Such deterrence, the court held, would lead to “risks to minors including the worsening of existing medical conditions and the spreading of undiagnosed diseases.”¹⁸⁸ In one study the court relied upon, minors reported an *increase* in risky behavior when confidential care was not available.¹⁸⁹ All individuals have an interest in maintaining

¹⁸⁴ See *Whalen*, 429 US at 602–03 (noting that the record supported deterrence of drug use in a handful of patients, but that over 100,000 prescriptions subject to the reporting requirements were still being filled).

¹⁸⁵ *Ferguson v City of Charleston*, 532 US 67, 78 n 14 (2001) (holding that reporting positive urine tests to the police represented an unreasonable search).

¹⁸⁶ See *Aid for Women v Foulston*, 427 F Supp 2d 1093, 1107–08 (D Kan 2006) (citing studies that show increasing numbers of minors will fail to seek medical treatment if statutes require parental notification or other disclosure). See also Tina L. Cheng, et al, *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes among High School Students*, 269 JAMA 1404 (1993) (“Adolescent behavior, including care-seeking behavior, can be powerfully influenced by concerns about privacy.”). Adolescents are also less likely to have access to health care than almost any other age group, which makes their confidentiality concerns even more critical. See Carol A. Ford, Peter S. Bearman, and James Moody, *Foregone Health Care among Adolescents*, 282 JAMA 2227, 2227 (1999).

¹⁸⁷ *Aid for Women*, 427 F Supp 2d at 1108.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* See generally D.M. Reddy, R. Fleming, and C. Swain, *Effect of Mandatory Parental Notification on Adolescent Girls’ Use of Sexual Health Care Services*, 288 JAMA 710 (2000) (finding that 59 percent of girls would stop using some or all sexual health care services, or would delay treatment or testing for sexually transmitted diseases, if their parents were notified that they were seeking contraceptives). Other studies report similar ill effects in minors’ care-seeking behavior when their confidentiality is subject to breach. In a study of 12,079 high school students, 18.7 percent reported forgoing health care and 11.5 percent of these students attributed it to concerns about confidentiality. See Ford, Bearman, and Moody, 282 JAMA at 2230, 2232 (cited in note 186). In another nationwide survey, nearly one-third of adolescents had missed needed health care. Thirty-five percent of these adolescents avoided health care because they did not wish to tell their parents. See Jonathan D. Klein, et al, *Access to Medical Care for Adolescents: Results from the 1997 Commonwealth Fund Survey of the Health of Adolescent Girls*, 25 J Adolescent Health 120, 120 (1999). Additionally, data suggest that assurances of confidentiality directly affect minors’ willingness to both share sensitive information with physicians and seek future medical care. See Carol A. Ford, et al, *Influence of Physician Confidentiality Assurances on Adolescents’ Willingness to Disclose Information and Seek Future Health Care: A Randomized Controlled Trial*, 278 JAMA 1029, 1033 table 3 (1997).

confidential relationships with their health care providers; minors in particular are more likely to refuse care when they fear disclosure of their sensitive personal information. Many states recognize this risk and have public health laws that allow minors to receive medical treatment for particularly sensitive and important conditions without parental consent, which is otherwise required for minors to receive health care.¹⁹⁰ Therefore, minors are likely to be harmed not only by the potential for *actual* disclosure of their information, but also by the *threat* of such a disclosure, as it can affect their care-seeking behavior. Yet no circuit takes this particular vulnerability of minors into account, even though *Bellotti II* requires courts to consider such vulnerabilities when assessing minors' constitutional rights.¹⁹¹ Even if the potential for harm from the threat of disclosure is not dispositive, it is still a factor courts must assess on a case-by-case basis when determining minors' informational privacy rights.

B. Framework Modification for Minors

The current approaches for scrutinizing minors' informational privacy claims are inadequate. Although purporting to act in the best interest of minors, the Tenth Circuit undercuts minors' privacy rights by deferring too strongly to state interests. And no circuit sufficiently protects minors' vulnerabilities because they all fail to acknowledge the possible harm from the threat of disclosure in their balancing tests. Instead, courts should take two steps to appropriately integrate minors' informational privacy claims into a framework developed for adults: (1) they should apply the same basic level of scrutiny to minors' informational privacy claims that they apply to adults' claims, and (2) they should consider what harm may result from the mere threat of disclosure when balancing minors' interests against the state's interests.

1. The *Bellotti II* framework: analyzing the scope of minors' constitutional right to informational privacy.

As illustrated in Part III.A.1, limiting the scope of minors' right to informational privacy cannot be justified by merely applying the

¹⁹⁰ Many states allow minors to make autonomous health care decisions about pregnancies, sexually transmitted diseases, HIV, drug and alcohol dependency, mental health services, and sometimes even for emergencies and care related to sexual assault. See Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 Cornell J L & Pub Policy 251, 263–66, & nn 39, 40, 44–46 (2005) (listing state statutes that waive parental consent for minors' health care decisions in certain situations).

¹⁹¹ See *Bellotti II*, 443 US at 634.

rationales used to limit minors' decisional privacy rights. Such an application is incomplete, as it fails to consider the differences between informational and decisional privacy as well as the other factors relevant to an analysis of minors' constitutional rights. The Supreme Court most clearly discusses its rationales for limiting the scope of minors' constitutional rights in *Bellotti II*: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."¹⁹² By evaluating each justification in turn, it is clear that, on balance, the scope of minors' informational privacy rights should be coextensive with those of adults.

a) "*The peculiar vulnerability of children.*" In *Bellotti II*, the Court pointed to the "peculiar vulnerability of children" as one potential reason to treat minors' constitutional rights differently.¹⁹³ This justification, the court explained, is best seen in cases where minors claim that the state has deprived them of liberty or property interests.¹⁹⁴ In many of these cases, "the child's right is virtually coextensive with that of an adult."¹⁹⁵ Yet the existence of the juvenile justice system illustrates the state's power to treat minors differently based on their "vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'"¹⁹⁶ These differences in minors' and adults' rights are reflected in

¹⁹² *Bellotti II*, 443 US at 634. See also Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 Sup Ct Rev 355, 357 ("[T]he Court repeatedly points to children's differences to justify affording children diminished rights . . . [Its] most thorough account of these differences is set out in *Bellotti v Baird (Bellotti II)*."). While the *Bellotti II* Court did not claim that its three reasons for restricting minors' rights are exhaustive, the Court has not expanded on these reasons since the decision. The Court's most recent decisions involving minors' constitutional rights still focus only on the *Bellotti II* justifications. See, for example, *Roper v Simmons*, 543 US 551, 569–70 (2005). While scholars have quarreled with *Bellotti II*'s "thin and incomplete" analysis, see, for example, Buss, 2004 Sup Ct Rev at 357–58, the aim of this Comment is not to suggest additional ways that minors are different from adults, but instead to illustrate how minors' right to informational privacy fits into the minors' rights framework the Court currently employs.

¹⁹³ *Bellotti II* at 634–35.

¹⁹⁴ See *id.* at 634 (stating that minors are particularly vulnerable in those contexts, and citing juvenile delinquency proceedings as an example of when the state may adjust its legal system accordingly).

¹⁹⁵ *Id.* See generally *Application of Gault*, 387 US 1 (1967) (recognizing minors' rights to adequate notice, counsel, confrontation, cross-examination, and against self-incrimination in juvenile justice proceedings). See also *Breed v Jones*, 421 US 519, 541 (1975) (recognizing minors' protection against double jeopardy); *In re Winship*, 397 US 358, 368 (1970) (recognizing minors' right in criminal proceedings to be found guilty only upon proof beyond a reasonable doubt).

¹⁹⁶ *Bellotti II*, 443 US at 365. See *McKeiver v Pennsylvania*, 403 US 528, 545 (1971) (holding that juveniles are not constitutionally entitled to trial by jury in delinquency proceedings because it would upset the nonadversarial nature of the juvenile system); *Schall v Martin*, 467 US 253, 255–57 (1984) (holding that juveniles are not entitled to bail).

the greater emphasis on rehabilitation in the juvenile justice system, due to minors' developing identity.¹⁹⁷

Minors' vulnerabilities may favor informational privacy rights coextensive with, if not greater than, adults' rights. First, minors are particularly vulnerable to the threat of disclosure of their personal information, with some minors shunning necessary medical care in order to avoid possible breaches of confidentiality.¹⁹⁸ As noted in Part III.B.2, courts should account for this vulnerability by carefully weighing the possible adverse deterrent effects of statutes requiring governmental acquisition or disclosure of minors' personal information. They should not limit the scope of minors' right to keep this information confidential.¹⁹⁹

Second, minors' identities are not fixed, but are instead malleable and subject to influence.²⁰⁰ This evolving identity counsels in two directions for minors' autonomy rights. It gives society more power to restrict minors' decisions and to ensure that they are exposed to positive influences.²⁰¹ Yet society must also allow minors to practice making independent decisions for themselves if they are to grow into responsible adults who exercise their rights.²⁰² Julie Cohen argues that the same learning process is necessary for information, and that maintaining the integrity of this process requires protecting information: "[People] will learn [to process information] differently [under conditions of no privacy], and the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior."²⁰³ The importance of allowing minors to experiment with their identity

¹⁹⁷ See Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 Tex L Rev 799, 804–05, 837–38 (2003) (“[A] separate juvenile court and correctional system are more likely than the adult justice system to offer an environment in which youths can successfully ‘mature out’ of their antisocial tendencies and to provide educational and job training programs to prepare young offenders for conventional adult roles.”). See also *Roper*, 543 US at 570 (“[A] greater possibility exists that a minor’s character deficiencies will be reformed.”).

¹⁹⁸ See Part III.A.2.

¹⁹⁹ See Part III.B.2.

²⁰⁰ See *Roper*, 543 US at 570 (“[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”). For the most influential study of identity development in adolescence, see generally Erik H. Erikson, *Identity: Youth and Crisis* (Norton 1968).

²⁰¹ See *Prince v Massachusetts*, 321 US 158, 168–69 (1944) (finding that the state has greater power to control the conduct of minors than adults in order to secure “the healthy, well-rounded growth of young people into full maturity as citizens”); Buss, 2004 Sup Ct Rev at 361 (cited in note 192) (observing that “society’s interest in ensuring children’s exposure to positive influences . . . and preventing their exposure to negative influences . . . is offered as a standard justification for curtailing the rights of children”).

²⁰² See Franklin Zimring, *The Changing Legal World of Adolescence* 89–98 (Free 1982).

²⁰³ See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan L Rev 1373, 1424–26 (2000) (“We do not experiment only with beliefs and associations, but also with every other conceivable type of taste and behavior that expresses and defines self. The opportunity to experiment with preferences is a vital part of the process of learning.”).

formation may also encourage greater protections for minors' personal information, as privacy intrusions can thwart the experimentation process. Although some experimentation can be harmful to minors, any reasonable state attempt to acquire information about minors to prevent or treat harmful behavior can surely be accommodated under the current level of scrutiny used to evaluate adult informational privacy claims.²⁰⁴

Some types of personal information, such as being HIV positive, are not amenable to experimentation. Disparity between the government's ability to acquire or disclose personal information about minors and adults could allow the government to gain access to immutable information about an individual when she is a minor and still have access to it when she reaches the age of majority. The government would have the information even if it could not otherwise be acquired from an adult. This result may counsel against lowering protections for minors' private information if the effects would follow them into adulthood.

b) *Minors' "inability to make critical decisions in an informed, mature manner."* Minors have a lesser capacity to make important decisions, and therefore the state has a greater ability to regulate their conduct. This reasoning allowed the Tenth Circuit to justify adopting the lower *Carey* level of scrutiny for evaluating minors' informational privacy claims. Yet it is unclear how this ability to regulate minors' conduct, which justifies limiting the scope of minors' decisional privacy rights²⁰⁵ and their First Amendment rights,²⁰⁶ should affect the scope of minors' informational privacy rights.

In *Bellotti II*, the Court emphasizes the state's ability to "limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."²⁰⁷ To determine if limiting the informational privacy of minors is within the state's power to limit minors' freedom to make affirmative choices, it is useful to separate informational privacy interests into three theoretical groups.²⁰⁸

²⁰⁴ See Part III.B.1.c.

²⁰⁵ See *Carey*, 431 US at 693 n 15 (allowing the states greater latitude to regulate decisional privacy since "the law has generally regarded minors as having a lesser capability for making important decisions").

²⁰⁶ See *Ginsberg v New York*, 390 US 629, 649–50 (1968) (finding that a state can prohibit the sale of pornographic material to minors under seventeen years old). But see *Tinker v Des Moines Independent Community School District*, 393 US 503, 511 (1969) (holding that minors as young as eight years old have the right to freedom of expression).

²⁰⁷ *Bellotti II*, 443 US at 635.

²⁰⁸ In practice, informational privacy violation claims may overlap between the three types described here. However, separating these types of claims in theory will help elucidate the connection between minors' lesser ability to make good decisions and the scope of their right to informational privacy.

First, there are informational disclosures, or risks of such disclosures, that implicate no other rights—fundamental or decisional privacy—and produce no chilling effects on an individual's behavior. These disclosures simply violate the right to keep private information confidential, and the disclosure itself is inherently harmful. Examples of such singular informational privacy claims include a husband's desire to keep the contents of his dead wife's diary protected from public disclosure,²⁰⁹ an arrestee's desire to keep his HIV status private,²¹⁰ and an employee's desire to keep her personal financial information private.²¹¹ Where there is no relationship between disclosure of information and ensuing conduct, there is no reason to limit the scope of minors' rights based on their inability to make informed, reasoned decisions. However, disclosure of personal information is more likely to affect the conduct of minors than that of adults, so minors will seldom raise this first type of claim.²¹² The majority of minors' claims likely fall within the next two groups.

The second type of informational privacy interest implicates fundamental rights, which may include decisional privacy rights. Sometimes the link is quite direct, as in the fundamental right to life, personal security, and bodily integrity put at risk in *Kallstrom* by the disclosure of undercover police officers' personnel files.²¹³ Other times, the disclosure of personal information will limit a fundamental right by producing a chilling effect on constitutionally protected conduct. For example, if there is a risk that a minor's choice to seek an abortion through a judicial bypass proceeding will be disclosed, there will be an "unacceptable danger of deterring" her from exercising her right to obtain an abortion.²¹⁴ Disclosure of private information can have a direct effect on minors' choices—choices that the Court deems deserve constitutional protection. In order to maintain these constitutional protections, lower courts increase their scrutiny of state actions that invade individuals' information implicating fundamental rights.²¹⁵

²⁰⁹ See *Sheets v Salt Lake County*, 45 F3d 1383, 1388 (10th Cir 1995).

²¹⁰ See *A.L.A. v West Valley City*, 26 F3d 989, 990 (10th Cir 1994).

²¹¹ See *Walls v City of Petersburg*, 895 F2d 188, 194 (4th Cir 1990).

²¹² See Part III.A.2.

²¹³ See *Kallstrom*, 136 F3d at 1062 (explaining that officers had a fundamental liberty interest in preserving their bodily integrity).

²¹⁴ *Thornburgh v American College of Obstetricians & Gynecologists*, 476 US 747, 767–68 (1986), overruled in part on other grounds by *Planned Parenthood v Casey*, 505 US 833, 882 (1992). See also *Lawall*, 307 F3d at 791 (Ferguson dissenting).

²¹⁵ See *Bloch v Ribar* 156 F3d 673, 686 (6th Cir 1998) (finding no compelling state interest in releasing the details of a rape in which the victim had a fundamental privacy right); *Kallstrom*, 136 F3d at 1064 (requiring that a state action infringing a fundamental right be narrowly tailored to serve a compelling state interest); *Thorne v City of El Segundo*, 726 F2d 459, 469 (9th Cir

Therefore, instead of limiting the scope of privacy protections for minors' information that implicates their constitutional rights to autonomy, courts should increase their protection.

The third group of informational privacy interests implicates decisions or behaviors that are not constitutionally protected. In these situations, the disclosure of an individual's private information may chill other behavior. Sometimes this may be behavior that the state wishes to discourage. In *Aid for Women*, the attorney general's mandatory reporting requirement for all sexual activity between minors under fifteen was clearly meant to discourage this sexual activity, as the premise of his interpretive opinion was that such behavior is per se abusive. Yet, as the plaintiffs in *Aid for Women* claimed, these disclosure requirements may chill behavior in minors that the state wants to encourage, such as seeking medical and psychological care.²¹⁶ The *Whalen* case also raised similar problems: the plaintiffs there asserted that the disclosure of prescription drug records would deter some patients from using these drugs.²¹⁷

Although the state may have an interest in regulating some of the conduct chilled by disclosing minors' private information, it should do so directly, instead of reducing privacy protections for information that implicates such conduct. As shown in the examples above, such indirect regulation may produce adverse effects that outweigh the state's justification for regulating minors' conduct. Indirect regulation may be the most effective and least costly way to guide minors' decisionmaking in some situations. But it may also be an attempt to subvert more politically costly measures to regulate minors' conduct.

Overall, Courts should not encourage such indirect regulation by lowering the protection afforded minors' informational privacy rights. The scrutiny level used to evaluate adults' claims can adequately account for the state's need to monitor minors. If a state's only viable option is to regulate minors' conduct indirectly through information gathering, it should be able to show that these indirect means are narrowly tailored or significantly related to a compelling or important state interest. There will be times when the state can have greater access to minors' information than adults' information. These instances

1983) (holding that police department questions about an employee's sex life are subject to strict scrutiny because they implicate her decisional privacy and free association rights).

²¹⁶ See *Aid for Women*, 441 F3d at 1120 n 22 (quoting the plaintiffs' argument that mandatory disclosure would "specifically deter adolescents from being open and candid with their health care providers").

²¹⁷ See *Whalen*, 429 US at 595 ("Appellees offered evidence tending to prove that persons in need of treatment with Schedule II drugs will from time to time decline such treatment because of their fear that the misuse of the computerized data will cause them to be stigmatized as 'drug addicts.'").

should be defined on a case-by-case basis, according to specific government interests in specific information. An individual's status as a minor should not grant the state automatic access to sensitive information it could not otherwise reach. Limiting the scope of minors' rights assumes that the state always has a good reason to invade minors' privacy, regardless of the type of information it wishes to access or the reasons for doing so. Yet minority is not an automatic pass to less protection, and sometimes minors' information should be more stringently protected than even adults' information. Overall, courts should be wary of limiting minors' general right to informational privacy due to the state's ability to regulate minors' conduct, as the link between informational privacy and conduct can be quite attenuated and such regulation through information gathering may chill other positive behaviors.

c) "[T]he importance of the parental role in child rearing." The Court's final justification for limiting minors' constitutional rights is the importance of the parental role. The state must defer to parents to raise their children, and also to the resulting authority parents have over their children.²¹⁸ Yet in informational privacy cases, the fight for developmental control of minors is not just between parents and the state.²¹⁹ The minor plays a role as well. Emily Buss has developed a framework for resolving these three-way struggles.²²⁰ First, courts should determine whether the state or the family should control the development of a minor. Like other scholars, Buss concludes that the state should usually defer to the family, as the family is more competent to gauge the minor's best interest.²²¹ Second, if developmental control has been conferred upon the family, then courts should determine who within the family—the parents or the minor—should control the minor's development.²²²

This framework helps resolve how the parental role should affect the scope of minors' informational privacy rights. The prototypical case is an attempt by the state to acquire or disclose a minor's personal information, which can be seen as an invasion of not only the minor's right to privacy, but also of the parents' right to control their

²¹⁸ *Bellotti II*, 443 US at 637–39 (reasoning that parents play a crucial role in rearing children, which the state cannot replicate).

²¹⁹ See generally Emily Buss, *Allocating Developmental Control among Parent, Child and the State*, 2004 U Chi Legal F 27.

²²⁰ See *id* at 43–45 (arguing that children are an oft-overlooked competitor in the control of their own development).

²²¹ *Id* at 31, 43. See also Elizabeth S. Scott and Robert E. Scott, *Parents as Fiduciaries*, 81 Va L Rev 2401, 2415 (1995) (“[T]he state is not well suited to substitute for parents in the job of rearing children.”).

²²² See Buss, 2004 U Chi Legal F at 43 (cited in note 219).

child's development. In some of these cases, parents' and minors' interests align, and parents will sometimes join with their minor children to bring suit against the state for violating the informational privacy rights of their children.

In both *Gruenke* and *Ridgewood*, parents brought suit against their respective school districts for violating their "substantive due process right to be free from state interference with family relations."²²³ In *Gruenke*, the mother of the minor compelled by her swim coach to disclose her pregnancy status claimed that the coach's acquisition and later disclosure of her daughter's private information adversely affected the family's plan for managing the daughter's pregnancy.²²⁴ The court agreed, and found that the parents' constitutional right to familial privacy had been violated, as had the minor's right to informational privacy.²²⁵ In *Ridgewood*, the parents of students asked to fill out an anonymous survey about their sexual behavior, drug and alcohol use, and relationships brought a similar, albeit unsuccessful, familial privacy claim.²²⁶ These cases illustrate that the "importance of the parental role in child rearing" can be strengthened by protecting minors' right to informational privacy. When parents and their minor children align against government invasion of both groups' privacy rights, robust privacy protections for minors can be an important way to protect familial privacy. However, the relationship between minors' informational privacy rights and parents' familial privacy rights becomes more difficult when these interests do not align, or when parents split, with some aligning with the state and others with the minors.²²⁷ Buss suggests that where the minor's interests align with the state, the minor's opinion of her best interest should have special force.²²⁸ Sometimes the state may be in a better position to gauge the best interests of the child than the parents. It may be best to defer to the state when it takes on the custodial role of *parens patriae* and asserts the need to invade minors' informational privacy to protect minors from abuse, for example. But state efforts to track abuse may be a pretext for monitoring other information less necessary for state protection of minors' interests. This was arguably the situation in *Aid*

²²³ *Gruenke*, 225 F3d at 303. See *Ridgewood*, 430 F3d at 182–83.

²²⁴ *Gruenke*, 225 F3d at 306.

²²⁵ *Id.* at 307. However, the swim coach was not held liable for the violation under the qualified immunity doctrine. See *id.*

²²⁶ See *Ridgewood*, 430 F3d at 182–86.

²²⁷ See, for example, *Vernonia School District 47J v Acton*, 515 US 646, 650–51 (1995) (explaining that while parents at a student-athlete meeting unanimously approved drug testing, one minor and his parents refused to sign consent forms for the test, and filed suit to contest the policy).

²²⁸ Buss, 2004 U Chi Legal F at 44 (cited in note 219) ("Where the child's views align with either the parents' or the state's, the child's position should have special developmental force.").

for Women. Although the state claimed to need information about minors' consensual sexual conduct to investigate cases of child abuse, the state "screened out" this consensual sexual activity once collected and never investigated its potential for abuse.²²⁹

The state may also have more access to minors' personal information in the school setting, as teachers and administrators stand *in loco parentis* over their students. In the context of Fourth Amendment search cases, the Court has held that "students within the school environment have a lesser expectation of privacy than members of the population generally."²³⁰ But this lowered expectation of privacy is limited to certain types of information: "[I]t is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic."²³¹ In informational privacy cases, the state's role as tutelary custodian may warrant deference, but on a case-by-case basis, depending on the type of information acquired or disclosed and the state's interest for doing so. Students have less privacy in some, but not all, of their personal information.

Finally, minors' privacy in their information may implicate a fundamental right or decisional privacy right that the Court has already examined vis-à-vis the parental role in child rearing and determined that minors should be able to exercise these rights free of parental control. When minors' personal information relates to these rights, there should be no reduction in their privacy protection due to the familial right to privacy.

2. Minors' special vulnerability: the threat of disclosure.

As shown in Part III.A.2, minors are particularly sensitive to the threat of disclosure of their personal information. This threat itself can cause harms distinct from the actual disclosure of protected information.²³² Although this phenomenon may also affect adults, research shows that minors are more likely to both forgo health care generally and to forgo health care because of confidentiality concerns specifically.²³³ The threat of disclosure may adversely affect the doctor-patient relationship even if a minor makes the initial decision to seek health care, as the minor will be less likely to reveal sensitive informa-

²²⁹ See *Aid for Women*, 441 F3d at 1122.

²³⁰ *Vernonia*, 515 US at 657, quoting *New Jersey v T.L.O.*, 469 US 325, 348 (1985) (Powell concurring).

²³¹ *Vernonia*, 515 US at 658.

²³² See note 186 and accompanying text. Specifically, minors that fear their personal information will not be kept confidential may refuse necessary health care, counseling, or other services.

²³³ See note 186.

tion to her health care provider.²³⁴ The Supreme Court has recognized that this barrier to care is problematic: “[T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.”²³⁵

Courts should account for this additional harm when evaluating informational privacy claims, particularly when minors’ privacy is invaded. The most clearly articulated list of factors used to balance private interests and state interests comes from the Third Circuit’s *Westinghouse* decision, which weighs (1) the type of information requested; (2) the potential for harm in any subsequent nonconsensual disclosure; (3) the adequacy of safeguards to prevent unauthorized disclosure; (4) the degree of need for access; and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.²³⁶ Although the second factor takes into account the harm that may arise from future disclosures of information, this is distinct from the harm from the *threat* of disclosure. For example, a state could pass a statute requiring that all health care providers, teachers, and school administrators report minors with sexually transmitted diseases to the State Department of Health. This statute has the potential to harm minors in two distinct ways. One way is routinely acknowledged by courts: if the state does not have adequate safeguards to protect this sensitive information, it is possible that minors’ sexual health information will be disclosed beyond the confines of the Department of Health, possibly to the public. This is the second *Westinghouse* factor. Yet courts do not consider that this statute, just by being on the books, may deter minors from seeking treatment when they suspect they have contracted a sexually transmitted disease.

Courts have the institutional capacity to evaluate the deterrent effect of laws that trigger informational privacy concerns when an individual seeks care. In *Whalen*, the Supreme Court weighed this deterrent argument, dismissing it only because the record did not support widespread deterrence in prescription drug use.²³⁷ And the trial court in *Aid for Women* was able to determine the possible deterrent effects

²³⁴ See note 189.

²³⁵ *Trammel v United States*, 445 US 40, 51 (1980) (discussing the importance of confidence and trust in the patient-physician relationship). The Court has stressed the importance of the physician-patient relationship in other cases as well. See, for example, *Roe v Wade*, 410 US 113, 163–66 (1972) (emphasizing that the abortion decision is one to be made privately by the pregnant woman and her physician).

²³⁶ See 638 F2d at 578.

²³⁷ See *Whalen*, 429 US at 602–03 (noting that the record supported deterrence of drug use in a handful of patients, but that over 100,000 prescriptions subject to the reporting requirements were still being filled).

of the Kansas Attorney General's interpretive opinion based on the evidence presented during the bench trial.²³⁸

Placing this factor within the current balancing test is appropriate for a number of reasons. Informational privacy cases are quite fact-specific and case-by-case determinations have been the most effective way to resolve these claims. Different types of privacy invasions will produce different deterrent effects on minors' decision to seek health care. The more sensitive the information and the broader the disclosure, the more likely it is that the threat of disclosure will have an adverse deterrent effect on minors. In some cases, the threat of disclosure alone will be serious enough to qualify as an unconstitutional invasion of informational privacy. In *Sterling v Borough of Minersville*,²³⁹ a police officer found two young men, one eighteen years old, the other seventeen, in a parked car about to engage in consensual sex. The police officer threatened to tell the eighteen-year-old's grandfather about the incident if the young man did not tell him first. Instead, the eighteen-year-old went home and immediately committed suicide.²⁴⁰ The court determined that, "[t]he threat to breach some confidential aspect of one's life then is tantamount to a violation of the privacy right because the security of one's privacy has been compromised by the threat of disclosure."²⁴¹

In other cases, there may be no discernible harm from the threat of disclosure. For example, the chance that personal financial information might be disclosed likely has a less significant chilling effect on minors' behavior.²⁴² In these situations, courts need only assess and balance the factors relevant to the specific case. However, whenever courts are asked to evaluate a minor's informational privacy claim, they should consider the potential for harm from the threat of disclosure and only remove this factor from their balance if it is irrelevant to the facts of the case. While such harm may also be present in the case of adults,²⁴³ it should be given substantially more weight when assessing minors' claims due to the greater likelihood that the risk of disclosure will affect minors' care-seeking behavior.²⁴⁴ Minors are particularly susceptible to forgoing necessary care when faced with the risk of

²³⁸ See *Aid for Women*, 427 F Supp 2d at 1107–08 (finding that the attorney general's interpretation of the Kansas child abuse statute would cause minors' irreparable harm by deterring them from seeking necessary health care).

²³⁹ 232 F3d 190 (3d Cir 2000).

²⁴⁰ *Id.* at 192–93.

²⁴¹ *Id.* at 197.

²⁴² See, for example, *Fraternal Order of Police Lodge No 5 v City of Philadelphia*, 812 F2d 115 (3d Cir 1986) (“[F]inancial information . . . is less intimate than medical information.”).

²⁴³ See, for example, *Whalen*, 429 US at 602–03; *Sterling*, 232 F3d at 197.

²⁴⁴ See notes 186, 189.

nonconsensual disclosure of their personal information. Courts can only account for this susceptibility by including it in their evaluation of an informational privacy claim.

CONCLUSION

Neither the right to privacy nor minors' constitutional rights jurisprudence has been lauded for its clarity, particularly in the areas where they overlap. While the Supreme Court has taken the lead in defining the parameters of minors' right to decisional privacy, it has never discussed minors' right to informational privacy. And the Court has discussed adults' informational privacy rights in such a passing fashion that the courts of appeals have been tasked with defining the right's scope. Against this backdrop, recent appellate decisions have failed to properly recognize and protect the informational privacy rights of minors. This Comment proposes a new solution, modifying the informational privacy framework to account for minors' particular vulnerabilities where necessary but strongly protecting minors' rights as coextensive with adults when there is no rational explanation to curtail their scope. Without these changes, the right to informational privacy may indeed devolve into a Fourteenth Amendment protection "for adults alone."²⁴⁵

²⁴⁵ *Application of Gault*, 387 US 1, 13 (1967).