



OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

Response to the Questionnaire of the Special Rapporteur on the Right to Privacy examining the privacy rights of children and how this right interacts with the interests of other actors as the child develops the capacity for autonomy.

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Submission by:

The Parental Rights Foundation
1 Patrick Henry Circle
Purcellville, Virginia

Web: www.parentalrightsfoundation.org
Email: info@parentalrightsfoundation.org

Introduction

1. The Parental Rights Foundation is a research and educational institution formed to protect children by empowering parents. We advocate for the inherent rights of children and families by educating the public and policy makers on the natural role of parents as the defenders and best representatives on behalf of and in the interests of children who, by nature of their minority, are otherwise vulnerable.
2. With reference to the recent call for submissions about the privacy rights of children (under the age of 18), the Parental Rights Foundation wishes to provide input to the Special Rapporteur on the privacy rights of children and how this right interacts with the interests of other actors as the child develops the capacity for autonomy, to be considered in the next thematic report to be presented to the Human Rights Council in March 2021.
3. This contribution argues that the privacy right of children involves not only a right to individual privacy, but a right to family privacy which the child shares with his or her parents and other members of the family. Actions that violate this right to family privacy without cause, even if ostensibly undertaken in the name of the child's individual privacy right, should be rejected.
4. First, through an overview of the Convention on the Rights of the Child (CRC) and General Comment No. 7 on Implementing Child Rights in Early Childhood (GC7), this contribution considers the primary role of parents and the family as recognized in these documents, and the relation of the family—especially parents—to the exercise of a child's rights, including the right to privacy.
5. Second, this offering considers the nature of the child's right to privacy as both a right to individual privacy and a right to a collective family privacy.
6. Third, this written contribution considers the tension between the responsibility to protect children from harm and the child's family privacy right, especially considering the danger that unnecessary disruption poses to the child's right to this family privacy.

The Primary Role of Parents

7. Article 3 of the CRC, on the Best Interest of the Child, requires States Parties to “tak[e] into account the rights and duties of [the child's] parents, legal guardians, or other individuals legally responsible for him or her.” Hence, no consideration of the child's best interests can be complete without accounting for this important parental role.

8. Article 5 of the CRC requires States Parties to “respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.” This statement recognizes that parents play a vital role in the development of the child, which the State Party can neither supply nor hinder.
9. Article 7 guarantees to the child “as far as possible, the right to know and be cared for by his or her parents.” In keeping with the evolving capacity of the child, this right to “be cared for by his or her parents” includes, especially in infancy, a vital role of parents in directing day-to-day tasks with the child in settings over which States Parties will have no direct oversight or control.
10. Article 9 “ensure[s] that a child shall not be separated from his or her parents against their will” except when “such separation is necessary for the best interests of the child.” While this clearly speaks to physical separation, there also exists a danger in separating a child from his or her family by splintering their collective family privacy right as though it were nothing more than the individual privacy rights of each individual member.
11. One reason the Parental Rights Foundation agrees with the decision of the United States to not ratify the CRC is the ambiguity in the application of the “best interest of the child” standard highlighted in CRC Article 3 and mentioned again in Article 9. It is the position of the Parental Rights Foundation that there must exist in international law, as in United States law, a rebuttable presumption that fit parents act in their child’s best interests. Before the State Party gains authority to determine the child’s best interests, it must first show that the parents are unfit to exercise that responsibility. When we reference the best interest standard here and throughout, we do so in accordance with this legal presumption.
12. Article 18 calls upon States Parties to “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.” It adds that “Parents or, as the case may be, legal guardians have the *primary responsibility* for the upbringing and development of the child” (emphasis added). This “primary responsibility” alludes once again to the role that parents and family play in the life of a child in matters over which government agents and States Parties will have no direct oversight or proper control. The sphere within which this role is played out is the arena we refer to when we speak of family privacy.
13. Article 15 of GC7 states that “Under normal circumstances, a young child’s parents play a crucial role in the achievement of their rights.”
14. Article 16 of GC7 adds that “under normal circumstances, young children form strong mutual attachments with their parents or primary caregivers. These relationships offer children physical and emotional security, as well as consistent care and attention. Through these relationships children construct a personal identity and acquire culturally

valued skills, knowledge, and behaviours. In these ways, *parents (and other caregivers) are normally the major conduit through which young children are able to realize their rights*" (emphasis added).

15. These are by no means the only mentions of family or the primacy of parents in these documents. Beginning with the Preamble of the CRC¹, and especially including Articles 15-21 of GC7, these documents are replete with language that clearly communicates the importance of the family, and especially of the parental role, in understanding, realizing, and safeguarding the rights of the child.
16. It should thus be concluded that the child's right to privacy, along with all of the child's rights, will, under normal circumstances, be primarily understood and realized within the vital relationship the child enjoys with his or her parents or care-givers.
17. The kind of formative relationship described in GC7, especially articles 6(b), 15, and 16, involve matters of shared privacy beyond the scope or role of government authorities. In countless day-to-day activities, the child shares a private sphere with his or her parents that is vital to the child's formation and upbringing.
18. Any understanding of a child's right to privacy that would negate this vital sphere is inadequate and incomplete.

The Child's Right to Family Privacy

19. Article 16 (1) of the CRC—"No child shall be subjected to arbitrary interference with his or her privacy, family, home or correspondence..."—closely associates the child's privacy with their family and their home, as well as their correspondence. This association demonstrates that these concerns are closely linked.
20. It should be self-evident that protecting a child's privacy while neglecting to protect his or her correspondence, which may expose something profoundly private, would be counterproductive to preserving the privacy right of the child.
21. Similarly, protecting the child's privacy cannot be separated from protecting the privacy of the child's family, or the privacy of the child's home. The child's right to a collective familial privacy is as important as the child's right to individual privacy.
22. Article 15 of GC7 states, "Under normal circumstances, a young child's parents play a crucial role in the achievement of their rights, along with other members of [the] family, extended family or community, including legal guardians as appropriate." This crucial role is necessarily played out primarily in a sphere of privacy that includes the family but is beyond the immediate oversight of government actors.

¹ Convention on the Rights of the Child, Preamble, paragraphs 6-7.

23. Within this private family sphere, the child shares a collective privacy right with other members of the family. While each member of the family has and exercises an individual right to privacy, the family unit is also entitled to a collective right to privacy, within which the parents bear the primary responsibility to direct and encourage the growth of the child in the exercise of his or her rights.
24. There are, unfortunately, times when it is necessary to invade this family privacy to preserve the health and safety of the child, such as to protect the child from abuse or neglect. The family privacy of the child is not absolute.
25. Under normal circumstances, however, the family will and should enjoy a level of privacy that encompasses the child, along with parents and other family members. This sphere of privacy is a right of the child that deserves protection from unnecessary government intrusion or interference.
26. Many decisions that will be made by the family, including decisions that may be made by the child himself or herself, as well as decisions that a parent will make in the best interest of the child, will fall within this sphere of family privacy and should not be subjected to unwarranted government intrusion or disruption.

Disruption of the Child's Family Privacy Right

27. Article 16 (1) of the CRC provides that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation."
28. Article 16 (2) declares the child's "right to the protection of the law against such interference or attacks."
29. It must first be noted that this article recognizes "arbitrary or unlawful interference" as a threat to the rights of the child and to his or her exercise of those rights. The State Party and its agents must be included among those whose interference, if it is "arbitrary or unlawful," poses such a threat.
30. The right to protection of the law against arbitrary or unlawful interference in this Article encompasses not only a child's (individual) privacy, but also his or her family, home, or correspondence. Each of these interests may be distinguished from the others, yet they are all facets of a child's privacy, and share the same right to protection of the law. They cannot reasonably be separated.
31. The responsibility of States Parties to provide legal protection for a child's right to privacy must not, therefore, end with protection of the child's right to individual privacy, but must also include the child's right to family privacy and to privacy in the home.
32. A State Party or government actor may be tempted to overlook this sphere of family privacy, ostensibly in the name of protecting a child's right to privacy from the direction of

the child's parent or caregiver. Yet to do so, absent evidence of abuse or neglect, would violate the child's right to privacy both within the family and within the home.

33. Although the United States is not a party to the CRC, The Parental Rights Foundation believes the US Court of Appeals for the Ninth Circuit articulated this balance of privacy and best interests particularly well when it declared, "The government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents."² This "lawfully exercised authority" parallels the CRC's recognition, outlined above, of the primary role of parents in the exercise of the child's rights, including his or her right to privacy.
34. Unwarranted intrusions into the zone of lawfully exercised parental authority can cause trauma to the child's development by robbing him or her of the sense of security within the loving bonds of family to which all children are entitled³.
35. In Article 18 of GC7, "The Committee [on the Rights of the Child] urge[d] States parties to take all necessary steps ...to support parents in fulfilling their responsibilities, including by reducing harmful deprivations, disruptions and distortions in children's care; and to take action where young children's well-being may be at risk."
36. This article's mention of "harmful deprivations, disruptions and distortions in children's care" should be considered in parallel with CRC Article 16's reference to "arbitrary or unlawful interference." Such consideration brings the obvious conclusion that such "interference" is likewise "harmful."
37. Article 18 further demonstrates the need for a balance between the reduction of harmful disruptions and the protection of a child's well-being. States Parties have a role to play in protecting children from harm, but they also have a duty to protect the privacy of the child's family.
38. Policies or procedures that seek to protect children from harm, but which would do so arbitrarily at the cost of the child's individual, family, or home privacy, should be condemned. The child's right to privacy—including his or her right to family privacy—should not be violated unless there is evidence that such violation is necessary and warranted to protect the child from imminent harm
39. In conclusion, the Parental Rights Foundation encourages the Special Rapporteur to consider not only the child's right to individual privacy, but also the child's shared right to family privacy, when presenting his upcoming report.

² *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999),

³ CRC Preamble, paragraph 7.