PRIVACY IN A PANDEMIC: AN EXAMINATION OF THE UNITED STATES' RESPONSE TO COVID-19 ANALYZING PRIVACY RIGHTS AFFORDED TO CHILDREN UNDER INTERNATIONAL LAW

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INTRODUCTION

Among legal disciplines and focus areas that have emerged and evolved in the twenty-first century, the concept of child law has been at the forefront.[1] An examination of the historical, psychological, sociological, and political insights into childhood show the metaphorical explosion of research devoted to understanding children and childhood within the current and last century.[2] It would follow that a post-world war world committed to elaborating and safeguarding its members inherent rights would extend similar considerations to the world's younger inhabitants.[3] With the stage set, several landmark understandings and international agreements came to existence between 1924 and 1989 which were established to secure rights to children, culminating in the Convention on the Rights of the Child (hereinafter, the CRC).[4] The international instrument, containing over fifty articles centered around child welfare and development, is considered "the most important result of the children's rights movement in international human rights law."[5] Such praise is not without merit. The CRC has received "near-global ratification,"[6] with the United States bearing

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[1] *See History of Child Rights*, UNICEF, https://www.unicef.org/child-rights-convention/history-child-rights (last visited Nov. 4, 2020) [hereinafter UNICEF].
[2] TREVOR BUCK, INTERNATIONAL CHILD LAW 1–18 (3rd ed. 2014).
[3] *Id.* at 23.
[4] UNICEF, *supra* note 1.
[5] DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CAREGIVERS AND COMMUNITIES 26 (JAN C. M. WILLEMS ed., 2002).
[6] BUCK, *supra* note 2, at 87.

the scarlet symbol of being the only state not party to the CRC.[7] Furthermore, the CRC has blazed a trail for children, establishing them as an "active 'subject' of international law who can be a holder of rights" as opposed to some kind of legal "'object.'"[8]

Just as the CRC impacted the global stage, so, too has the COVID-19 pandemic. The COVID-19 virus has affected nearly every aspect of life for communities around the world. Economies have suffered, physical health concerns have become paramount, mental and social health has become a casualty, and every-day domestic life has been turned on its head from quarantine efforts and social distancing guidelines. This is to say little of the legal issues, questions, and concerns that have arisen due to the disease's effect on the world.[9] Concerns about one's privacy have been among those expressed during the pandemic.[10] Governments across the globe have implemented contact tracing measures[11] and several tracking services exist to monitor individuals' movements.[12] This practice,

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[7] Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015, 1:30 PM), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens.

[8] BUCK, *supra* note 2, at 88.

[9] *See* Caitlain Deveraux Lewis et al., *Legal Issues Related to the COVID-19 Outbreak: An Overview*, CONGRESSIONAL RESEARCH SERVICE, LEGAL SIDEBAR (June 12, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10433.

[10] Christine Lehmann, *Privacy Concerns Hindering Digital Contact Tracing*, WEBMD (Sep. 25, 2020), https://www.webmd.com/lung/news/20200928/privacy-concerns-hindering-digital-contact-tracing.

[11] *Dashboard on government responses to COVID-19 and the affected populations*, UNICEF (August 2020), https://data.unicef.org/resources/government-responses-due-to-covid-19-affected-populations/.

[12] *See Social Distancing Reporter*, CAMBER SYSTEMS, https://covid19.cambersystems.com (last visited Feb. 6, 2021) [hereinafter CAMBER SYSTEMS Reporter]; *Social Distancing Scoreboard*, UNACAST, https://www.unacast.com/covid19/social-distancing-scoreboard?view=county&fips=49005#scoreboard (last visited Feb. 6, 2021) [hereinafter UNACAST Reporter]; James Glanz et al., *Where America Didn't Stay Home Even as the Virus Spread*, THE NEW YORK TIMES (April 2, 2020),

however, has been cause for some alarm. According to a Pew Research study, nearly half of Americans feel that it is "at least somewhat unacceptable" for the government to track positive cases of the virus using cell phone data to deepen understanding of COVID-19, while almost two-thirds of the national population feel that it is "somewhat or very unacceptable" to use that same data to track individual movements to ensure compliance with social distancing guidelines.[13]

The important nature of privacy rights and the national interest in these rights, as caused by the COVID-19 pandemic, create a situation where an analysis of children's privacy rights is long overdue. The United States, a signatory to the CRC, can do more to fulfil its obligations to the CRC and its youngest citizens, specifically in the protections it affords its children's privacy rights.[14] The United States can do so by establishing a greater understanding of and respect for children's privacy rights through a new legislative undertaking, founded on ideas enshrined in the CRC that children and parents or caregivers[15] can together come to an understanding of children's rights, making decisions as informed by those rights. In advocating for such an approach, this paper will first discuss the CRC as well as the unique circumstances of the United States' relationship to the CRC and the United States' duties as a signatory. In addition, this paper will examine the current approaches the United States has taken to protect children's privacy rights both before and in light of the 2019 novel coronavirus and the shortcomings therein.

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https://www.nytimes.com/interactive/2020/04/02/us/coronavirus-social-distancing.html [hereinafter NEW YORK TIMES Reporter].

[13] Brooke Auxier, *How Americans See Digital Privacy Issues Amid the COVID-19 Outbreak*, PEW RESEARCH CENTER (May 4, 2020), https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/.

[14] Mehta, *supra* note 7.

[15] I use the term "parents" and "caregivers" interchangeably in this paper, not to undermine any relationship in light of another but rather to help elucidate that the responsibilities espoused herein apply to both biological parents, guardians, and other caregivers such as foster parents, adoptive parents, and so on.

Lastly, this paper will advocate for the implementation of a new framework, centered around a presumption that children and parents will work together to reach a greater understanding of children's role in the legal sphere. This will be informed by an analysis of obligations that have been recommended for states to consider in protecting such legal actors' right to privacy, specifically concerning identifying data that has quickly become one of the greatest legal concerns in the midst of the pandemic. By so doing, caregivers will be able to help children understand their inherent autonomy as players in the legal arena during especially formative years.

I. THE UNITED NATIONS' CONVENTION ON THE RIGHTS OF THE CHILD

To engage in such an examination of privacy rights for children, one must turn to the CRC as one of the premier global statements of child rights. Universally acknowledged as one of the greatest developments in child welfare law, the document centers around "four fundamental principles" of "non-discrimination . . . life and development . . . the right to be heard . . . and the best interest of the child."[16] The pioneering nature of the CRC, and the source of much controversy surrounding it, stems from its views surrounding children as legal actors: "The adoption of the UN Convention on the Rights of the Child . . . signified a paradigm shift from a welfare-based approach towards a rights-based approach with respect to children."[17] As van der Hof notes, "children have long been treated as the objects of adult protection rather than as the subjects of (human) rights and the [CRC] . . . has given children a voice and, therefore, a confirmed . . . position in society."[18]

While the United States remains hesitant to the document as a whole, as will be analyzed below,[19] it is worthwhile to note that

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[16] Simone van der Hof, *I Agree ... Or Do I?—A Rights-Based Analysis of the Law on Children's Consent in the Digital World*, 34 WIS. INT'L L.J. 409, 426 (2016).
[17] *Id.* at 425.
[18] *Id.*
[19] *See* Buck, *supra* note 2, at 92; *see also* Todres, *infra* note 35.

the nation played a very active role in the drafting of the CRC even though it is the only country who has not ratified the document to date.[20] The United States "proposed to include three separate provisions," centering around children's rights of expression, "freedom of association and of peaceful assembly," and, notably for purposes of this paper, the right to privacy.[21] In fact, "[t]he [convention's] representative of the United States stated that children not only had the right to expect certain benefits from their Governments; *they also had civil and political rights* to protect them from abusive action of their Governments."[22]

The proposal to include a protection of privacy was first raised in 1982 and included language similar to that in the final document: "The States Parties to the present Convention shall ensure that the child and his parents are not subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence."[23] The United States proposed the specific language affording the right to "privacy" several times throughout the years of 1982 to 1989,[24] with the United States' representative to the convention explaining "the protection of children's civil and political *rights* [including the right to privacy] was of fundamental importance to his country."[25] As adopted, the current language of Article 16 is as follows:

> 1. No 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 and reputation.

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[20] Mehta, *supra* note 7.

[21] SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 270 (1999).

[22] *Id.* (emphasis added).

[23] JAAP DOEK & NIGEL CANTWELL, CONTRIBUTORS, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 256 (Sharon Detrick ed.1992).

[24] *Id.* at 256–62.

[25] *Id.* at 258 (emphasis added).

> 2. The child has the right to the protection of the law against such interference or attacks.[26]

The irony of the situation outlined above has not been lost to scholars, as Cohen notes: "The United States, which has a somewhat fragile constitutional right to privacy, was responsible for an article that uses the strongest obligatory language in the human rights lexicon to protect the child's privacy rights."[27] While ironic, what does the situation mean for the United States in the current day? How is the nation to treat a document that it has not ratified after such an engaged and drawn-out process of drafting?

A. United States' Obligations Under the Convention

The fact that the United States has not ratified the CRC requires a threshold analysis to determine the exact contours of its obligations to the document. The duties of the United States, reflected in the Vienna Convention on the Law of Treaties (hereinafter, VCLT), require the nation, a signing party that has not formally ratified the CRC, to "refrain from acts which would defeat the object and purpose of [the] treaty."[28] This obligation is subject to a state's making intentions clear that it will not ratify the treaty,[29] and this is where more ambiguity comes into play with the United States. Days prior to the United States' signing, then-President Clinton explained that the executive would take the matter to the Senate for "'advice and consent'" and, in so doing, "would 'ask for a number of reservations and understandings."[30] In addition to the Executive's intentions, then-ambassador to the United Nations

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[26] United Nations, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 1990 [hereinafter CRC].

[27] Cynthia Price Cohen, *Role of The United States in Drafting The Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9, 34 (1998).

[28] United Nations, Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[29] *Id.*

[30] BUCK, *supra* note 2, at 92 (quoting The White House, *White House Statement on U.S. Decision to Sign UN Convention on Rights of the Child* (Feb. 10, 1995)).

Madelaine Albright publicly acknowledged the United States' intent to "seek Senate consent to the ratification of . . . the Convention on the Rights of the Child."[31] However, due to pressures from the Senate in response to these statements, it appears that any and all intent to seek confirmation was dissolved.[32]

The United States' standing with the document was brought up again in 2008. During his initial run for presidency, then-nominee Barack Obama also referenced the CRC, stating that he would "review" it to help maintain the United States' global prominence in international human rights issues.[33] Although a promise of "review" is a far cry from ratification, the United States has not made a public statement regarding any express intent not to ratify; if it had, it would no longer be subject to obligations under the VCLT.[34] To be sure, the United States' not ratifying the treaty is not cause for alarm as the country has not historically implemented many human rights treaties.[35] Even without ratification, the CRC still carries legal authority: "[T]he CRC is seen by U.S. courts as codifying customary international law, or at least as evidence of customary international law."[36] This standing also helps establish the treaty's provisions as

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[31] Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ISLA J. Int'l & Comp. L. 629, 632 (1997) (quoting Madelaine Albright, *Remarks at the State Department Conference on Crises* (Apr. 3, 1995)).

[32] Renteln, *supra* note 31, at 632-633.

[33] Caryl M. Stern, *Obama Should Take Action to Protect the World's* Children, TIME (Apr. 19, 2016, 11:27 AM), https://time.com/4293977/convention-on-the-rights-of-the-child/.

[34] VCLT, *supra* note 28.

[35] *See* BUCK, *supra* note 2, at 92. *See also* THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 30 (JONATHAN TODRES et al. eds., 2006).

[36] Eric Engle, *The Convention on the Rights of the Child*, 29 QUINNIPIAC L. REV. 793, 794 (2011). *But see* The U.N. Convention on the Rights of the Child, *supra* note 34, at 19. *See generally* Roper v. Simmons, 543 U.S. 551, 554 (2005) ("The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18."); Graham v. Florida, 560 U.S. 48, 81 (2010) (holding that the CRC, while not controlling, still "'provide[s] respected and significant

highly relevant and controlling principles upon international law actors including the United States and that the nation's domestic courts feel it has an element of control for the nation.[37]

Despite not ratifying the CRC, the United States cannot escape its duties not to "defeat" its "object and purpose" under Article 18 of the VCLT.[38] Furthermore, the fact that the country played such an involved role in documenting protections for the "fundamental importance" of the right to privacy as well as the view domestic courts have toward it show that the United States has a unique obligation to help protect its children against attacks on their individual privacy, regardless of whether or not it is a party to the CRC in the traditional sense.[39]

B. The Object and Purpose of Article 16

As outlined above, the United States' obligation under the CRC is a complicated one. While it has not ratified the treaty in its entirety, it is still under a binding obligation to not frustrate its "object and purpose."[40] Thus, one naturally questions what are the object and purpose of the CRC, including those dealing with privacy as referenced in Article 16? To understand this and to understand the rubric for the United States' actions to safeguard privacy both before and during COVID-19, the text of the CRC itself is the most valuable starting point.

Looking to the text, the CRC sets out three main obligations. These include: (1) protecting children from attacks on their privacy that could be deemed "arbitrary;" (2) protecting children from

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confirmation'" of the Court's upholding constitutional limitations of life imprisonment without parole for juveniles).

[37] There are numerous analyses necessary to determine whether the CRC would qualify as a binding example of customary international law. This paper does not set out such an analysis, but such examination is nonetheless warranted for greater understanding.

[38] VCLT, *supra* note 28.

[39] DOEK & CANTWELL, *supra* note 23, at 258.

[40] VCLT, *supra* note 28.

attacks that could be termed "unlawful;" and (3) giving such protection through legal safeguards.[41]

The first term used to describe attacks on children's privacy under the CRC is "arbitrary."[42] Borrowed from the International Covenant on Civil and Political Rights (ICCPR), the term "arbitrary" is found nowhere else in the CRC and has not been expounded upon by the Committee on the Rights of the Child.[43] However, looking to the drafting process of the synonymous article in the ICCPR, "'arbitrary interreference contains an element of injustice, unpredictability and unreasonableness.'"[44] Furthermore, in drafting Article 17 of the ICCPR, the Human Rights Committee explained that "the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be . . . *reasonable* in the particular circumstances."[45]

On another occasion, the Human Rights Committee held that the use of the term "reasonable" necessarily implies that any "'interference with privacy must be *proportional* to the end sought and be necessary in the circumstances of any given case.'"[46] Such an analysis is bolstered by the United Nations' recently published general comment regarding children's rights in the digital sphere. The comment was published in 2021 and bolsters the analysis set forth above.[47] The comment explains that "any such interference

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[41] CRC, *supra* note 26.

[42] *Id.*

[43] JOHN TOBIN & SARAH M FIELD, CONTRIBUTORS, THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 556 (Tobin ed., 2019).

[44] M. NOWAK, COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (2005) *quoted in* TOBIN & FIELD, *supra* note 42, at 556.

[45] Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Home and Correspondence, and Protection of Honour and Reputation* (Apr. 8, 1988) (emphasis added).

[46] Toonen v. Australia, 488/1992, United Nations Human Rights Committee, ¶ 8.3 (Apr. 4, 1994) (emphasis added) *quoted in* TOBIN & FIELD, *supra* note 43, at 556.

[47] Committee on the Rights of the Child, *General Comment on children's rights in relation to the digital environment*, UNITED NATIONS HUMAN RIGHTS, https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx (last visited May 21, 2021).

[with a child's privacy] should . . . be *proportionate*."[48] By looking to these several sources, the initial determination of arbitrariness of an attack on a child's privacy necessary involves engaging with the action's "*reasonableness*" as well as its "*proportionality*."[49]

The second main obligation under the CRC is the state's obligation to protect children against "unlawful" interferences with a child's right to privacy.[50] This requirement implicates two additional requirements as well. First, any infringement on a child's right to privacy must be supported by law, what Tobin and Field refer to as "a formal dimension."[51] This falls in line with statements from the UN Human Rights committee that "no interference can take place except in cases envisaged by the law."[52] To meet the standard of legality, such legislation must "specify in detail under which precise circumstances an interference can be permitted"[53] and such interreferences must be made with proper authority and "on a case by case basis."[54] Vandenhole, Türkelli, and Lembrechts also elucidate these expectations, stating that, "privacy rights for children must be provided for and regulated by law. Legislative and other measures must be adopted to give effect to the prohibition against state interference."[55] Key to this duty is the expectation that states will "regulate[] . . . the gathering and holding of personal information, the access of the child to personal records . . . as well as the possibility to access complaint mechanisms or other appropriate remedies in case of alleged violations of their privacy rights."[56] As before, the general comment concurs with this scheme:

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[48] Convention on the Rights of the Child, General Comment No. 25, 12, (Aug. 13, 2020) [hereinafter General Comment 25] (emphasis added).
[49] TOBIN & FIELD, *supra* note 43, at 556–67 (emphasis in original).
[50] CRC, *supra* note 26.
[51] TOBIN & FIELD, *supra* note 43, at 558.
[52] DETRICK, *supra* note 21, at 272.
[53] WOUTER VANDENHOLE, ET AL., CHILDREN'S RIGHTS: A COMMENTARY ON THE CONVENTION ON THE RIGHTS OF THE CHILD AND ITS PROTOCOLS 189 (2019) (ebook).
[54] TOBIN & FIELD, *supra* note 43, at 558.
[55] VANDENHOLE, et al., *supra* note 53, at 189.
[56] *Id.*

"Any such interference should therefore be provided for by law."[57] Furthermore, the Committee on the Rights of the Child in their comment continue by stating that "[s]tates parties should take legislative, administrative, and other measures to ensure that children's privacy is respected and protected by all organizations and in all environments that process their data."[58] The committee also encourages states to "regularly review privacy and data legislation and ensure" that the protective measures are, in fact, effective.[59]

The second aspect of the "unlawful"[60] analysis is that the intrusion into a child's privacy must not only be supported by law, it must also comport with the CRC as a whole, what Tobin and Field christen the "substantive dimension."[61] Comporting with the CRC as a whole necessarily implicates the requirement that "a legitimate aim must be pursued" as Vandenhole, Türkelli, and Lembrechts state.[62] The Committee on the Rights of the Child has recently outlined similar requirements, stating that any interference must not only be "provided for by law" as outlined above, but that it must also not "conflict with the provisions, aims or objectives of the Convention.[63]" As one can see, the United States' obligation to not "defeat" the "object and purpose" of the CRC[64] would implicate several considerations in making sure that children have the protection of the laws against attacks on their right to privacy.[65]

The third obligation under the CRC is to provide affirmative protection against attacks that meet the multi-pronged definitions of arbitrary or unlawful provided above.[66] Much has been written offering guidance on what such protection may entail. Vandenhole, Türkelli, and Lembrechts cite the Human Rights Committee and

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[57] General Comment 25, *supra* note 48, at 12.
[58] *Id.* at 12.
[59] *Id.*
[60] CRC, *supra* note 26.
[61] TOBIN & FIELD, *supra* note 43, at 558.
[62] VANDENHOLE, et al., *supra* note 53, at 189.
[63] General Comment 25, *supra* note 48, at 12.
[64] VCLT, *supra* note 28.
[65] CRC, *supra* note 26.
[66] *Id.*

UNICEF's handbook for implementing the CRC in stressing that a state must provide children with the knowledge that their information is being stored, why and where it is stored, as well as give them the ability to alter it for accuracy.[67] The Committee on the Rights of the Child has also referenced the kind of control inherent in these duties.[68] These expectations will be explored in greater depth below, however, to function in guiding an analysis of how the United States may implement a presumption in favor of a more collaborative approach to understanding privacy rights between caregiver and children, thereby meeting this third expectation under the CRC.[69]

As one can see, there are numerous duties and obligations found within the CRC's Article 16. Many considerations factor into whether a state has meaningfully met its burden to not "defeat the object and purpose" of the document.[70] It is with this obligation in mind that one now turns to analyzing the United States' responses to the COVID-19 pandemic to see if the nation has met its duties under the CRC and the VCLT. One must consider the legislative measures taken by the United States to help protect privacy rights before the COVID-19 pandemic began before examining two specific items of legislation proposed during the nation's 116th Congress which proceeded in the midst of the pandemic to gain a picture of the United States' protections for privacy rights as a whole.

II. THE UNITED STATES' MEASURES TO PROTECT CHILDREN'S PRIVACY

One of the first examples of the United States attempting to protect children's' right to privacy is the Children's Online Privacy Protection Act of 1998 (COPPA). The Act's mission is to "prohibit[] unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and

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[67] VANDENHOLE, et al., *supra* note 53, at 189.
[68] General Comment 25, *supra* note 48, at 12.
[69] *See infra* Section IV.B.i.
[70] VCLT, *supra* at 28.

about children on the Internet."[71] It defines children as "an individuals under the age of 13"[72] and, in helping business comply with the Act, The FTC has established the expectation that "personal information" includes several identifying factors such as social security numbers, full names, geolocation information, and others.[73] The agency also lists actions such as "encouraging the submission" of the previously named information, using the information in tracking children, and making the information available publicly before redacting "virtually all personal information" as those which bring a website under COPPA's purview.[74] The Act requires, and the FTC guides business to follow suit, that a parent's consent shall be required before a child's information may be "collect[ed], us[ed], or disclos[ed]" and that businesses disclose just how the information will be used.[75] The FTC notably encourages businesses to afford parents the ability to "review" the information collected about a child, "revoke their consent" for the sharing, and to remove the information as well.[76]

At first blush, COPPA appears to meet all the requirements under the CRC's Article 16 as a legal safeguard. It regulates the storing of personal information and gives parents the chance to control that information, to some extent. Politicians in recent years have called for examinations of several services and websites due to suspected lack of compliance with COPPA, including TikTok, Facebook, Amazon Echo, and others.[77] However, there exists one main flaw in this piece of legislation, namely that its efforts appear,

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[71] Children's Online Privacy Protection Rule, 16 C.F.R. § 312.1 (2021).
[72] 16 C.F.R. § 312.2 (2021), *see also* van der Hof, *supra* note 16, at 424.
[73] *Children's Online Privacy Protection Rule: A Six-Step Compliance Plan For Your Business*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance (last visited Dec. 1, 2020) [hereinafter Six-Step Compliance Plan].
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Children's Online Privacy Protection Act (COPPA)*, ELECTRONIC PRIVACY INFORMATION CENTER, https://epic.org/privacy/kids/ (last visited Dec. 1, 2020).

in practice, to focus largely on *parents* and obtaining consent before information may be shared.[78]

Van der Hof explains how the idea of parental consent behind COPPA and the European Union's General Data Protection Regulation (GDPR) is, upon closer examination, not as meaningful as it may appear to be.[79] Looking to the GDPR's requirements to measure the effectiveness of parental consent, Van der Hof explains the doubt that such consent is meaningful by describing how, even if a parent does so, consenting to the use of an online service is unlikely to contain necessary elements of specificity and information.[80] The privacy notices used by such services may be either too long and inconvenient to read, nonexistent, or simply be "disclosed in vague terms," with parents unable to understand the statement provided.[81] While a parent's rights in regard to a child's Article 16 rights must be respected,[82] the thinking behind relying merely on parental figures to guide the application of a child's rights deserves re-thinking.[83]

Turning to the judicial branch, one can see the attempts of the United States' Supreme Court at helping inform the consideration of data collection. In the case of *Carpenter v. United States,* the Court, in answering whether an individual's movements as tracked by cellular data could be qualified under the United States' Constitution as a search and be subject to greater protection,[84] helped elucidate how the nation's highest court considers data collection. The Court explained that the relevant Fourth Amendment (which bears some textual similarity to Article 16) contains "certain expectations of privacy."[85] It does not matter, according to the Court, that information of one's whereabouts from cellular devices are shared with third parties "given the unique

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[78] *See* van der Hof, *supra* note 16, at 443.
[79] *Id.* at 437–38.
[80] *Id.* at 437.
[81] *Id.* at 437–38.
[82] TOBIN & FIELD, *supra* note 43, at 558–59.
[83] *See infra* Section IV.B.ii.
[84] Carpenter v. United States, 138 S.Ct. 2206, 2221 (2018).
[85] *Id.* at 2213.

nature of cell phone location records."[86] This nature is described as "an all-encompassing record of the holder's whereabouts," a record that "provides an intimate window into a person's life, revealing not only . . . particular movements, but through them . . . 'familial, political, professional, religious, and sexual associations.'"[87] One can come to see that the understanding of personal data collection within the Supreme Court is informed, in large part, by the "depth, breadth, and comprehensive reach" of such data collection.[88] While this framework is useful in considering the current state of the law, the Supreme Court's decision was marked as being "narrow" to the facts of the case.[89] A review of the case is still helpful to guide an understanding of the Court's opinion generally, although it is not determinative as a specific protection for protecting children's data.

One of the cases heard before the Supreme Court which did focus on children's rights was *Vernonia School Dist. 47J v. Acton*. An analysis of the boundaries of the holding will be conducted below;[90] however, the Supreme Court notably held that a random drug test for a student athlete did not violate the Fourth Amendment.[91] Similar to *Carpenter*, the Court based their decision largely on the events surrounding the drug test: "[T]he decreased expectation of privacy [stemming from the party being a public-school student being a member of a sports team], the relative unobtrusiveness of the search, and the severity of the need met."[92] This decision limits the holding, which I will examine below[93] in the potential objections to the legislative solution proposed herein.

By examining the United States' efforts to afford children rights to privacy and fulfill their obligations to the CRC, it is clear that more action is warranted. As discussed, COPPA was enacted to help protect children's data and *Carpenter* helps to show, at least on

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[86] *Id.* at 2217.
[87] *Id.* (quoting United States v. Jones, 565 U.S. 400, 415 (2012)).
[88] *Id.* at 2223.
[89] *Id.* at 2220.
[90] *See infra* Section IV.B.ii.
[91] Vernonia School District 47J v. Acton, 515 U.S. 646, 664–65 (1995).
[92] *Id.*
[93] *See infra* Section IV.B.ii.

a very general level, the sentiments surrounding the protection of citizens' personal data.[94] However, the passioned prose of the Supreme Court is not adequately reflected in the everyday practice regarding children's data. Furthermore, one of the main Supreme Court cases regarding children's rights to privacy was confined to the circumstances of a student athlete subject to a drug test.[95] To continue to fulfil its obligations to protect against unlawful or arbitrary attacks on children's privacy, more needs be done for the United States to create legal safeguards for children's privacy.

A. The United States' Response to Child Privacy During COVID-19

Issues of privacy and children, which have been growing in recent years, have all but come to a head as a result of the COVID-19 pandemic. The global virus has shown just how easy it is for sensitive, identifying information to be tracked and, later, found by individuals with little or no authorization from those whose information is gathered.[96] A school district in Ohio, as of June 2020, was reported as preparing to implement measures to track students' location to help track cases in the school through devices worn by students.[97] The New York Times featured a report detailing a month's information showing how counties across the United States reacted to stay-at-home orders by mapping out the trends in movement within counties.[98] Unacast and Camber Systems have established similar, interactive, and, in Unacast's case, ongoing databases comparing movement trends by county within the United States.[99] High School Theater Director Alisha Morris was able to

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[94] Carpenter v. United States, 138 S.Ct. 2206, 2217(2018).
[95] Vernonia School District 47J at 664–65 (1995).
[96] *See* NEW YORK TIMES Reporter, *supra* note 12; UNACAST Reporter, *supra* note 12; CAMBER SYSTEMS Reporter, *supra* note 12.
[97] Will Knight, *Schools Turn to Surveillance Tech to Prevent Covid-19 Spread*, WIRED, (Jun. 5, 2020, 7:00 AM), https://www.wired.com/story/schools-surveillance-tech-prevent-covid-19-spread/.
[98] NEW YORK TIMES Reporter, *supra* note 12.
[99] UNACAST Reporter, *supra* note 12; CAMBER SYSTEMS Reporter, *supra* note 12.

create her nation-wide COVID-19 tracker using articles and anonymous submissions to fuel its data.[100] What started as something shared between work associates quickly "'went viral'" and was eventually overtaken by the National Education Association (the NEA).[101] The website was "broken down by state and show[ed] schools and counties with known cases and suspected cases and deaths, as well as whether those infected were students or staff."[102] The tracker was informed by "local news reports" which were "linked" to the tracker for verification purposes, but also included information submitted by others whether or not the case was verified.[103] The ability of anyone to report positive cases which would then be shared with a national audience is indicative of the need within the Nation to rework its understanding surrounding child's privacy. Beyond these mentioned, the most basic of internet searches will yield a host of local tracking devices used by school districts containing information ranging from the number positive cases to the schools in which they are located.[104]

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[100] Tim Walker, *Teacher Creates National Database Tracking COVID-19 Outbreaks in Schools*, NATIONAL EDUCATION ASSOCIATION, (Sep. 2, 2020), https://www.nea.org/advocating-for-change/new-from-nea/teacher-creates-national-database-tracking-covid-19-outbreaks.

[101] Alisha Morris *quoted in* Walker, *supra* note 100. While the tracker is, as of the publication of this paper, no longer available online, the information contained therein, as well as the sources thereof, help inform the need to re-think the protections children are given as to their rights to privacy.

[102] Simone Popperl et al., *How Many Coronavirus Cases Are Happening in Schools? This Tracker Keeps Count*, NPR (Aug. 28, 2020), https://www.npr.org/sections/health-shots/2020/08/28/906263926/how-many-coronavirus-cases-are-happening-in-schools-this-tracker-keeps-count.

[103] *Id.*

[104] *See* Emilee Speck, *Database: Tracking coronavirus in Central Florida schools*, CLICKORLANDO.COM, (Nov. 20, 2020, 3:10 PM), https://www.clickorlando.com/news/local/2020/09/01/database-tracking-coronavirus-in-central-florida-schools/; *COVID-19 Tracking Sheet*, Moore County Schools, https://www.ncmcs.org/announcements/c_o_v_i_d-19_tracking_sheet (last visited December 1, 2020); Interactive Database of Cases in Texas Schools, TEXAS AFT, https://www.stopthespreadtx.school/ (last visited Feb. 6, 2021).

The depth and range of information on such sites is astounding, rivaled only by the lack of protection around such information. No school district login credentials were asked for and no account was needed to access any of the above-mentioned databases. Such availability of sensitive information has been cause for concern around the globe.[105] UNICEF shared the story of a boy from Singapore whose information shared online could easily be used to identify him.[106] The organization has also shared concerns that many individuals engaged in the assimilation of data are not versed in child's rights and do not consider how their choices will affect children.[107] These facts show the delinquencies of the United States in failing to provide adequate legal safeguards to protect children's data privacy, despite the fact that two specific pieces of legislation were introduced during the global pandemic which introduced measures to help protect citizens' privacy during the pandemic.

The first piece of legislation addressing COVID-19 was introduced in the House of Representatives in April 2020 as H.R. 6585— the Equitable Data Collection and Disclosure on COVID-19 Act.[108] The bill focusses largely on "conduct[ing] or support[ing] data collection on the racial ethnic, and other demographic implications of COVID-19."[109] The Act, in addition to establishing the need to collect data regarding COVID-19, states that the data the government seeks to collect will be made "publicly available" on the Center for Disease Control's website.[110] The data it seeks to

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[105] Linda Raftree et al., *COVID-19: A Spotlight on Child Data Governance Gaps, Office of Global Insight and Policy*, UNICEF 1, 2 (Aug. 2020), https://www.unicef.org/globalinsight/media/1111/file/UNICEF-Global-Insight-data-governance-covid-issue-brief-2020.pdf.

[106] *COVID-19 and children's digital privacy*, UNICEF, (Apr. 7, 2020), https://www.unicef.org/globalinsight/stories/covid-19-and-childrens-digital-privacy.

[107] *Id.*

[108] *All Actions H.R.6585*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/6585/all-actions?s=1&r=9 (last visited May 21, 2021).

[109] Equitable Data Collection and Disclosure on COVID-19 Act, H.R. 6585, 116th Cong. (2020) [hereinafter H.R. 6585].

[110] *Id.*

collect and share includes treatment information, information regarding the number of tests and positive tests, and results of COVID-19 treatment "disaggregated by race, ethnicity, sex, age, primary language, socioeconomic status, disability status, and county."[111]

While the amount and type of information does not seem to violate the "object and purpose" [112] of the CRC of protecting against "arbitrary or unlawful" attacks on privacy,[113] the bill falls short in its protections afforded by law.[114] The Act states that it will ensure the sensitive information is handled appropriately and requires compliance with the Health Insurance Portability and Accountability Act (HIPPA).[115] The protections afforded by HIPPA include the ability to receive copies of and request corrections to an individual's "health information" as well as to examine its dispersal.[116] However, HIPPA does not allow individuals the full range of control imagined by UNICEF and explicitly named by the Committee on the Rights of the Child, nor are such controls present in the Act's proposed legislation.[117]

Despite the House of Representatives having good intentions with the bill, the bill ultimately was not passed in the most recent Congress as of the date of this paper. After being introduced, it was referred to both the Committee on Energy and Commerce as well as the Committee on Natural Resources before being referred to the Subcommittee for Indigenous Peoples of the United States.[118] Since

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[111] *Id.*
[112] VCLT, *supra* note 28.
[113] CRC, *supra* note 26.
[114] H.R. 6585, *supra* note 111.
[115] *Id.*
[116] U.S. DEP'T OF HEALTH & HUM. SERV.'S, YOUR HEALTH INFORMATION PRIVACY RIGHTS (last visited Feb. 6, 2021), https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf.
[117] VANDENHOLE, et al., *supra* note 53, at 189; *See* General Comment 25, *supra* note 48, at 12.
[118] *All Actions H.R.6585*, *supra* note 110.

the referral in April of 2020, there has been no further action regarding the bill.[119]

A similar situation occurred in the Senate closely after H.R. 6585 was sent to committee. Senate Bill 3663, the Covid-19 Consumer Data Protection Act of 2020, was introduced in May of 2020.[120] The bill contained many provisions around the empowerment of individuals to control the collection of their data and to revoke their consent to the data being collected.[121] Much of the bill hearkens back to the duties listed by Vandenhole, Türkelli, and Lembrechts — that individuals need to exert a certain control over their collected data.[122] The bill was referred to the Committee on Commerce, Science, and Transportation and has not been moved into law nor had any additional actions taken on it since being introduced and referred to committee.[123]

In addition to failing to pass during the most recent Congress, the shortcomings of the United States in not violating the "object and purpose" of the CRC are similarly apparent in the fact that neither pieces of COVID-19 specific legislation made specific provisions for children's data.[124] While children's data would be included within the scope of both pieces of legislation, the lack of delineation reveals the need for a shift in understanding.[125] The United States has failed, not because of a lack of policing children's privacy rights or in attempting to pass legislative safeguards, but because of a lack of understanding behind children's privacy rights, resulting in effectively ineffective safeguards.

In order to come to compliance with the "object and purpose" of the CRC, a new legislative approach is needed in the United States centered around a new presumption that does more

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[119] CONGRESS.GOV, *supra* note 108.
[120] COVID-19 Consumer Data Protection Act of 2020, S. 3663, 116th Cong. (2020) [hereinafter S. 3663].
[121] *Id.*
[122] VANDENHOLE, et al., *supra* note 53, at 189.
[123] *All Actions S.3663*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/3663/all-actions (last visited May 21, 2021).
[124] VCLT, *supra* note 28.
[125] *See* H.R. 6585, *supra* note 111; S. 3663, *supra* note 122.

than merely rely on parental consent.[126] Rather, a presumption is needed that not only will result in protection of children's privacy but help meet the goal of "promoting the increasing autonomy of the child."[127] This is most likely to be achieved as both child and caregiver work together to understand and determine the application of the child's legal rights to privacy, which is the foundation of the new legislation proposed below.

III. A NEW UNDERSTANDING

In order to fully establish a new framework that will be lasting and beneficial for children and privacy concerns, one must first understand several of the key paradigm shifts surrounding children in other areas of the world outside the law. Such an understanding will not only help protect children but prepare them for "an increasingly data-intense, hyperconnected, and commercialized world."[128]

A. Understanding Childhood

Sigmund Freud was one of the early proponents of a greater understanding of childhood. His theories surrounded "experiences in childhood" as having consequences on the child and their development.[129] This idea of experiences happening *to* a child continued into the findings of Erik Erickson, who described "eight 'psychosocial' stages" with "a conflict that had the potential to become a beneficial or damaging developmental turning point" for the child.[130] One of the larger shifts came with the introduction of Piaget's theory of childhood development, which "attempts to explain how humans adapt to their environment via the process of

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[126] VCLT, *supra* note 28. *See* CRC, *supra* note 26.

[127] INGEBORG SCHWENZER IN COLLABORATION WITH MARIEL DIMSEY, MODEL FAMILY CODE – FROM A GLOBAL PERSPECTIVE, 138 (2006).

[128] van der Hof, *supra* note 16, at 443.

[129] BUCK, *supra* note 2, at 6.

[130] *Id.*

the child's 'assimilation.'"[131] This, along with the revolution of education for children[132] (by its nature something to engage with not something to happen while a child passively absorbs it),[133] has helped inform a view of childhood that is much more than a collection of experiences that happen to a child. Rather, childhood is an active time of growth and development and children play an active role in it.[134] Such a role should come to inform legal considerations about child rights as well in order to afford greater meaning and concreteness in legal considerations surrounding children's rights. Once a nation and its people understand childhood in greater depth, protecting children's rights becomes much more of a priority, helping to bring the United States to greater harmony with the "object and purpose" of the CRC.[135]

The CRC was formed with such a view of children inherent in the document. As quoted above, "[the CRC] marks a step-change . . . [p]rior to this treaty, the international community had begun to recognize the child at least as a legitimate 'object' of international law. The CRC goes further and recognizes the child as a more active 'subject' of international law."[136] This idea has begun to take hold in international cases. The House of Lords held, for example, in the 1980's that a minor daughter could receive contraceptive information and treatment from a physician absent the consent of her guardian so long as the minor was able to appreciate the effects of the treatment.[137] The Court specifically set aside the idea that parental control over such matters could be used based only off a child's age; rather, the child's overall disposition must be taken into

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[131] *Id.* at 7.
[132] *Id.* at 6.
[133] *Active Learning*, PENNSTATE EXTENSION, https://extension.psu.edu/programs/betterkidcare/knowledge-areas/environment-curriculum/activities/all-activities/active-learning (last visited May 15, 2021).
[134] *See id.*
[135] VCLT, *supra* note 28. *See* CRC, *supra* note 26.
[136] BUCK, *supra* note 2, at 88.
[137] *See, e.g.*, Gillick v. West Norfolk and Wisbech Area Health Authority [1986] AC 112. *See also* BUCK, *supra* note 2, at 27–8.

account in such decisions.[138] The Supreme Court of Canada likewise ruled in 2009 that a child's opinions, depending on the individual child's maturity, should be taken into account when decisions are made in accordance with the need to protect children.[139] Such shifts in understanding of how children interact with the law are essential in creating a framework for understanding children's rights in terms of privacy and controlling sensitive information.

This understanding has started taking root in U.S. domestic law as well. King and Piper state that, "the child as a legal construct is not merely a 'thing in need of protection,' but also a 'legal person', whose interests must be represented at court hearings and whose views must be sought on issues concerning his or her future welfare."[140] Counsel assigned to represent children specifically separate from parents and appointment of specialists to represent children's views and interests in court proceedings have been cited as manifestations of the shift for children to have a more active place in the courtroom rather than passive bystander.[141] With such an understanding of the child's place as a legal figure, with rights able to be exercised, the question naturally arises as to what can be done to protect these rights and help children in their application? This will be the focus of the needed legislative presumption in order to help the United States fulfill its obligations as a signatory to the CRC and, in larger measure, to fulfil the inherent duty as a home nation to its youngest members.

B. Understanding the New Legislation

Up to this point, this article has outlined the United States' unique duties and obligations under the CRC to protect children's rights to privacy. Notable steps were referenced which, it could be

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[138] *See, e.g.*, West Norfolk and Wisbech Area Health Authority AC 112. *See also* BUCK, *supra* note 2, at 28.

[139] *See, e.g.*, A.C. v. Manitoba (Director of Child and Family Services) 2009 SCC 30; See also BUCK, *supra* note 2, at 29.

[140] MICHAEL KING & CHRISTINE PIPER, HOW THE LAW THINKS ABOUT CHILDREN 77 (2nd ed. 1995).

[141] *Id.* at 78.

argued, have helped the nation to fulfill this duty.[142] However, the shortcomings of COPPA were also noted and, as the COVID-19 pandemic has shown, there is need for greater protection of children's privacy rights.[143] Finally, the unique view of children espoused in the CRC and in psychological developments was cited as a framework[144] to help guide the understanding and implementation of a new framework which will be proposed below.

In looking to the legislation currently at play within the United States, it becomes clear that new legislation must be established in order to meet the dual demands of protecting children's privacy rights while not frustrating the "object and purpose" of the CRC to engage with the child as a holder of legal rights.[145] This scheme will be outlined in greater detail below[146] and offer, first, an analysis of the individuals a new legislation would affect, second, an exploration of how this legislation would help the United States come into greater compliance with the CRC, third, an analysis responding to potential objections surrounding the proposed legislation, before, finally, an outline of benefits from the proposed scheme.

i. New Legislation: Who?

The first step in advocating for this new legislation is to help understand exactly to whom it will apply. Primarily, a potential new legislation will apply to children and their parents and other caregiving adults, i.e., foster parents, legal guardians, and so on.[147] This answer appears simple on its face but as discussed already, a new understanding of these players is warranted. The crux of this new scheme is the idea that children be seen as legal actors themselves. As this has already been covered in great detail above,

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[142] *See supra* Section III.
[143] *Id.*
[144] *See supra* Section IV.A.
[145] VCLT, *supra* note 28. *See* CRC, *supra* note 26.
[146] *See infra* Section IV.B.ii.
[147] *See* SCHWENZER & DIMSEY, *supra* note 129, at 10.

a recount of the various authorities that support this position is not necessary here.[148]

The *Routledge Handbook of Family Law and Policy* helps elucidate more on this idea of children acting as holders of rights. The text references Article 12, which protects a child's "right to express [his or her own views] freely in all matters affecting the child," which has been used to advocate for greater weight given to children's views regarding familial relationships.[149] This idea of children being given a voice is echoed in the Committee's general comment, stating that a child's opinion should be taken into consideration when determining whether or not a child's information should be gathered, if plausible, and deleted or corrected.[150]

This does not mean that the child's decision should be taken as being able to overrule any parental concerns. It is true that much of the literature in support of such a view of children's rights supports the idea that children, at a certain age, "be in a position to make decisions independently, and be allowed to do so."[151] However, this idea of complete removal of parental authority does not need to become the breaking point for a state attempting to implement such a legislation in order to bring a nation into compliance with the CRC.[152] *The Routledge Handbook of Family Law and Policy* explains how, within the CRC, "Article 12(1) only gives a child who is 'capable of forming his or her own views' the right to 'express' those views, which are to be given 'due weight in accordance with the age and maturity of the child.'"[153] The handbook continues by stating that the House of Lord's reasoning in *Gillick*, referenced above, "seemed to go further" than what was

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[148] *See supra* Section IV.A.

[149] CRC, *supra* note 26, *quoted in* ROUTLEDGE HANDBOOK OF FAMILY LAW AND POLICY 290 (John Eekelaar & Rob George eds., 2014) [hereinafter ROUTLEDGE HANDBOOK].

[150] General Comment 25, *supra* note 48, at 12.

[151] SCHWENZER & DIMSEY, *supra* note 129, 138. *See also* ROUTLEDGE HANDBOOK, *supra* note 152, at 291; General Comment 25, *supra* note 48, at 12.

[152] ROUTLEDGE HANDBOOK, *supra* note 152, at 290–91.

[153] *Id.* (quoting CRC, *supra* note 26).

envisioned within Article 16.[154] In fact, while the general comment includes provisions for children to make decisions regarding their privacy rights, it also carves out the ability for parents to make decisions regarding children's data in place of the child should the need arise.[155] The comment further recommends that "guidance" offered to children in the realm of data privacy be "based on mutual empathy and respect, over prohibition or control."[156] Thus, such a legislative scheme could easily include a presumption that children and caregivers would at least have a dialogue together regarding the child's rights before coming to a decision.[157]

The need for such collaboration has been noted by scholars of international child law as well. Tobin and Field note that, although they value privacy, research shows that children are unsure of how to traverse the twenty-first century which is wrought with ways in which one's privacy may be compromised.[158] According to Tobin and Field:

Such observations are suggestive of a need for adults to equip children with the tools to ensure the effective enjoyment of their article 16 rights but at the same time adjust their expectations as to the scope, content, and significance of such rights in light of children's priorities and expectations.[159]

By coming to acknowledge this and the potential for both parties to engage in an "enriching" "dialogue" that "can only lead to a better understanding of what it means for a child to effectively enjoy their rights under Article 16," caregivers and children can come to realize that, in practice, this need not be a battle of wills and a shouting match over who speaks the loudest.[160] Rather, the dichotomy is a balancing of interests between two legal actors.[161]

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[154] *Id.* at 291.
[155] General Comment 25, *supra* note 48, at 12.
[156] *Id.* at 14.
[157] *See id.*
[158] TOBIN & FIELD, *supra* note 43, at 598.
[159] *Id.*
[160] *Id.*
[161] *See, e.g., id. See also,* AOIFE DALY, 3 CHILDREN, AUTONOMY AND THE COURTS: BEYOND THE RIGHT TO BE HEARD 396 (Said Mahmoudi et al. eds., 2018).

Dialogue, by its very nature, requires two parties and a give-and-take balance between interests. The balancing test is not meant to oust one over another but to help each come to a greater understanding of children's rights and how this works in individual lives.[162] Rather than existing in a vacuum-like mindset where one party's rights prevail over another's, individuals can come to understand and appreciate the fact that children's rights and the rights of others are able to be balanced and considered together. This will help such dialogue immensely because it allows both parties the chance for meaningful participation.

The legislation as proposed herein would also require a third party to be involved. A third-party arbitrator of sorts would also need to be established to help decide outcomes of circumstances when, despite efforts to work together, child and caregiver would be unable to reach an agreement. Some may argue that the best possible way to arbitrate such proceedings would be through adjudication applying the well-known standard of a child's "best interest" as in other areas of the law.[163]

After all, "[t]he 'best interest of the child' is the iconic standard courts use to resolve disputes about children."[164] As Aoife Daly discusses, however, "[t]he common law adversarial system is highly unsuited for family law cases. Parents are focused on 'winning', they are often advised not to speak to each other, and the disputes can have psychologically damaging effects on both them and their children."[165] Though seemingly referring to custody cases, the same concerns apply to a hypothetical adjudication regarding a child's rights to privacy. One can hardly imagine a courtroom to be the kind of place which would inspire and facilitate the two-way, enriching dialogue envisioned herein. An adjudicatory setting seems to be the exact opposite of the "[i]n-depth and frank discussions" to help "develop[] trust" amidst "compromis[e]" and "alternative

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[162] *See, e.g., id.*

[163] 33 CAL. JUR. 3d *Family Law* § 960 (Nov. 2020).

[164] June Carbone, *Legal Applications of the 'Best Interests of the Child' Standard: Judicial Rationalization or a Measure of Institutional Competence?*, 134 PEDIATRICS S111, S112, (2d Supplement Oct. 2014).

[165] DALY, *supra* note 164, at 427–28.

solutions" that children envisioned when asked how to increase their participation in the decision-making process.[166]

Daly continues to expound on how "legal systems" would need to change to appreciate a greater level of childhood autonomy: [T]he matters at play in family law proceedings are often not necessarily binary and there should be opportunities for children to provide suggestions and solutions, and to have those prioritized. Legal processes must facilitate children to try different options and to change their minds. There should be an element of flexibility built-in to arrangements so that children can seek to change them if they wish. Children state that it is very important to them to have flexible arrangements that can be modified in accordance with their changing needs.[167]

Daly also brings in the Scottish Children's Hearings system, "a less overtly legal arena," as an example of a potential solution.[168] The entity, which "takes an integrated and holistic approach to care and justice, in which the child's best interests are the paramount consideration,"[169] hosts hearings which are termed "legal *meeting*[s] arranged to consider and make decisions about . . . young people who are having problems in their lives and who may need legal steps to be taken to help them."[170]

The administration's website features several resources to help children and adolescents understand what will happen during such meetings[171] and help all parties meaningfully contribute to the

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[166] European Commission, *Evaluation of Legislation, Policy and Practice on Child Participation in the European Union: A Final Report to the European Commission Directorate-General for Justice* 178 (2014), *quoted in* DALY, *supra* note 164, at 393.

[167] DALY, *supra* note 164, at 429.

[168] *Id.* at 428.

[169] *Child Protection*, SCOTTISH GOVERNMENT, https://www.gov.scot/policies/child-protection/childrens-hearings/ (last visited Feb. 2, 2021).

[170] *Parents & Carers, Questions and Answers*, SCOTTISH CHILDREN'S REPORTER ADMIN., https://www.scra.gov.uk/parent_carer/questions-and-answers/ (last visited Feb. 2, 2021, emphasis added).

[171] *See Children, At your Hearing*, SCOTTISH CHILDREN'S REPORTER ADMIN., https://www.scra.gov.uk/children_articles/at-your-hearing/ (last visited Feb. 2,

proceeding before a panel of volunteers, called "Panel Members," which makes decisions on matters such as "where the child is to live and other conditions."[172] Such decisions are appealable based on "a reason in law" and either parent, caregiver, or children can appeal.[173]

The approach of the Scottish Children's Hearings seems tailored toward children and juveniles in criminal law proceedings.[174] Such a collaborative nature between all parties in making concerns and viewpoints known, however, could be used to carry over into other areas of the law.[175] While such a scheme has been implemented, Daly notes the potential objections to it that it may not be as cost-effective as it appears to be and that judgments made from it will suffer as a result as they are made "quickly and less considerately."[176]

It is unlikely that a perfect third-party arbitrator would ever be able to be established that would allow for the rights and interests of all parties to be taken into account together and fairly. Daly explicitly notes the challenges inherent in the desire to find avenues to increase child autonomy in legal proceedings: "The argument in favour of prioritizing children's autonomy does not claim to resolve broader questions concerning the type of system needed in order to secure equitable family justice. It simply seeks to insist upon a prominent position for children in those systems and in those debates."[177] The method in which children and caregivers come to a consensus on children's privacy rights is the key consideration in who guides such a discussion. Whether the arbitrator comes from a judge's chambers or is found in a group of caseworkers in a meeting devoted to a child's case, the principles of respect for a child's participation in such an environment is tantamount to the proceeding

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2021); *Young People, At Your Hearing*, SCOTTISH CHILDREN'S REPORTER ADMIN., https://www.scra.gov.uk/young_people/at-your-hearing/ (last visited Feb. 2, 2021).

[172] SCOTTISH CHILDREN'S REPORTER ADMIN., *supra* note 173.

[173] *Id.*

[174] *Id.*

[175] *See* SCOTTISH CHILDREN'S REPORTER ADMINISTRATION, *supra* note 173.

[176] DALY, *supra* note 164, at 428.

[177] *Id.* at 433.

and is just as vital as the final embodiment of authority issuing final decisions.

ii New Legislation: What?

Having already established the "who" behind a framework that will afford children greater privacy rights, one must now turn to an understanding of "what" exactly requires protection. Hearkening back to the text of Article 16 of the CRC, the text requires that parties offer protection for children's "privacy."[178] The published comment from the Committee on the Rights of the Child includes numerous considerations under the protection of "privacy" including parents sharing photos of children online as well as "data collection and processing."[179] Tobin and Field note this unique aspect of the protection of privacy as well, designating "the right to information privacy" and, notably, to "protection of information *about a child.*"[180]

Tobin and Field explain that such protection extends to "information . . . created by the various individuals and agencies . . . that gather, collect, hold, and have the capacity to disseminate information about children."[181] The general comment also notes that "[t]hreats to children's privacy may arise from" the activities of "public institutions, businesses and other organizations, as well as from such criminal activities as identity theft."[182] As referenced above, the COVID-19 pandemic has resulted in an unprecedented fascination with the collection and dissemination of information regarding individual's movements, medical diagnoses, and locations, including those of children.[183]

Before the pandemic, the CRC Committee had advocated for states to help protect and educate children about such information

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[178] CRC, *supra* note 26.
[179] General Comment 25, *supra* note 48, at 11.
[180] TOBIN & FIELD, *supra* note 43, at 570.
[181] *Id.* at 570.
[182] General Comment 25, *supra* note 48, at 11.
[183] *See* Auxier, *supra* note 13.

gathering.[184] In the midst of the pandemic, the Committee on the Rights of the Child has also reaffirmed the need for protection of children's privacy.[185] In explaining the duty of states, the Committee noted that:States parties should ensure that consent is informed and freely given by the child or, depending on the child's age and evolving capacity, by the parent or caregiver, and obtained prior to the processing those data . . . .

States parties should ensure that *children and their parents or caregivers can easily access stored data, rectify data that are inaccurate or outdated and delete data unlawfully or unnecessarily stored* by public authorities, private individuals or other bodies, subject to reasonable and lawful limitations. *They should further ensure the right of children to withdraw their consent and object to personal data processing* where the data controller does not demonstrate legitimate, overriding grounds for the processing. They should also provide information to children, parents and caregivers on such matters, in child-friendly language and accessible formats. *Children's personal data processed should be accessible only to the authorities, organizations and individuals designated under the law to process them in compliance with such due process guarantees as regular audits and accountability measures.* Children's data gathered for defined purposes, in any setting . . . should be protected and exclusive to those purposes and should not be retained unlawfully or unnecessarily or used for other purposes.[186]

The three-part framework advanced is not new, however. In a comment to the ICCPR (which affords similar protections in several areas such as Article 16), the UN Human Rights Committee advanced that:

Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his

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[184] TOBIN & FIELD, *supra* note 43, at 572.

[185] General Comment 25, *supra* note 48, at 11–12.

[186] *Id.* at 12 (emphasis added).

private life, *every individual should have the right to ascertain in a intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes*. Every individual should also be able to ascertain *which public authorities or private individuals or bodies control or may control their files*. If such files contain certain incorrect personal data or have been collected or processed contrary to the provisions of the law, *every individual should have the right to request rectification or elimination*.[187]

These comments help underscore three main considerations for states attempting to apply frameworks for issues of privacy protection for children: (1) measures must be implemented that help control the dissemination of the information, (2) parties must be able, to some extent, to control the data gathered for purposes of correcting or removing; and (3) parties should be able to revoke the permission to gather data.[188] The principles referenced above have also been used to inform the Guidelines Concerning Computerized Data Files which were adopted by the United Nations General Assembly in 1990.[189] The Guidelines are founded on principles which hearken back to this basic framework, principles which include: "'accuracy', 'purpose-specification', and 'interested-person access.'"[190]

In helping inform actions and measures by states endeavoring to protect children's privacy rights in harmony with the "object and purpose" of the CRC,[191] these same principles can help show the shortcomings of United States' measures analyzed above. To refresh one's memory, the shortcomings of current United States policies exist in either (1) the lack of meaningful participation for children in determinations surrounding the exercise of their rights and/or (2) a lack of control for who may access the information.[192]

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[187] UN Human Rights Committee, *General Comment 16* (1988) *quoted in* DETRICK, *supra* note 21, at 275–76 (emphasis added).
[188] *Id.*; General Comment 25, *supra* note 48, at 12.
[189] TOBIN & FIELD, *supra* note 43, at 572–73.
[190] G.A. Res. 45/95, Guidelines for the Regulation of Computerized Personnel Data Files (Dec. 14, 1990) *quoted in* TOBIN & FIELD, *supra* note 43, at 573.
[191] VCLT, *supra* note 28.
[192] *See supra* Section III.

The necessary legislation would, then, need to rectify the two points just mentioned. As outlined in Simone van Der Hof's article, the current requirement of COPPA for parental consent for children under the age of thirteen is ineffective at best for several reasons:

The current rules are no testimony to the protection of children's—or anyone else's for that matter—personal data being taken sufficiently seriously. They focus too much on procedural safeguards—notice and consent—to the detriment of a fundamental assessment of data processing practices in terms of fairness.[193]

Thus, it appears that the answer to a more meaningful approach to legislation to protecting children's rights is a presumption that both child and parent will work *together* to decide whether or not data on a child may be gathered.[194] This greater dialogue could also easily extend to the other areas of the three-pronged proposal set forth above, i.e. correction of data and revoking permission to share it.

The second necessary aspect of new legislation would be centered in creating more protections surrounding who may access the information gathered. A framework could be drafted with a presumption encouraging the need for serious protection of children's privacy. Following part one of the three-part framework above, if a legislation spelled out the expectation of greater control over children's private data, it would hopefully follow that individuals tasked with holding the data would do so with the amount of care needed for a signatory of the CRC. Indeed, the newly published general comment focused on privacy leaves much to the Nations, explaining that "strong safeguards, transparency, independent oversight and access to remedy" may be used to help protect a child's right to privacy.[195]

In conclusion, new legislation is needed in order for the United States to meet its responsibilities as a signatory to the CRC.

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[193] van der Hof, *supra* note 16, at 443–44.

[194] *See* TOBIN & FIELD, *supra* note 43, at 598 ("Parents and the state must guide and assist children in [expressing their rights to privacy] but they cannot deprive a child of this right.").

[195] General Comment 25, *supra* note 48, at 12.

In order to do so, the legislation would need to be centered around the idea of children as legal actors, which is central to the CRC as a whole, engaging with their caregivers.[196] This legislation should include such provisions necessary in order to give children the ability to participate in dialogue surrounding who has access to the child's medical data and should give children the chance to participate in the correction of information or in its deletion.[197]

ii. New Legislation: Possible Objections

Before moving further in describing the benefits of such legislation, there are several potential objections to address and discuss. This paper is being written in a time of global uncertainty and fear the likes of which many of the world's population has not experienced before, and these facts must be taken into consideration. These principles and ideas seem beneficial when written and discussed in the abstract, but what of the fact that these issues are currently being weighed in the midst of a pandemic? Surely the benefits of society must also be taken into consideration and some sacrifices are warranted to help with greater protection and understanding. These concerns are warranted and have been noted in addition to the need for a new approach to children's privacy protections. Such concerns may be answered by coming to understand the "best interests of the child"[198] standard in a new way as well as the boundaries of these provisions and the collaborative nature between guardian and child such a framework presents.

The first way these concerns can be addressed is by understanding the standard well-known to anyone who deals with children and the law of the child's "best interests."[199] This standard is established in Article 3 of the CRC, which causes "all actions concerning children" to be viewed with this standard in mind.[200]

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[196] *See supra* Section IV.B.i.
[197] *See* General Comment 25, *supra* note 48, at 12; UN Human Rights Committee, *supra* note 190.
[198] CRC, *supra* note 26.
[199] *Id.*
[200] BUCK, *supra* note 2, at 137.

Much of the subsequent understanding surrounding this article has come from the Committee on the Rights of the Child's General Comment Number 14, which helps guide states in their understanding of the "best interests of the child" standard.[201] The standard is unique because it allows for both the expression of rights given to children under the CRC and "the holistic development of the child."[202] Thus, states not only have a duty to respect children's rights but must also balance these rights with a duty to "secure a child's best interests and/or survival and development. . . . these [Article 16] rights must be tempered and constrained to protect their best interests and development."[203] This helps establish that there are boundaries within the CRC in addition to large grants of power; the CRC does not offer a free-for-all for children. In fact, states are able to infringe on a child's rights so long as such activity is based on an analysis of potential harm and takes into consideration the views of the child.[204] As has been noted, "child protection is not an automatic trump card when dealing with the collection and disclosure of information that will interfere with a child's right to privacy."[205]

Thus, a state such as the United States has a duty to uphold the idea of privacy rights for children while also honoring their best interests. The latter interest has been called both "flexible and adaptable" as well as one that is best applied in a "case-by-case basis."[206] It would be overly simplistic to set out a definition of when such actions may be warranted. Tobin and Field arrive at the conclusion, however, that "the coupling of *reasonableness* and *proportionality*,"[207] discussed above,[208] "allows for a coherent approach to the question of when an interference with a child's right

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[201] *Id.* at 138.
[202] *Id.*
[203] TOBIN & FIELD, *supra* note 43, at 559.
[204] *Id.*
[205] *Id.* at 571.
[206] BUCK, *supra* note 2, at 139.
[207] TOBIN & FIELD, *supra* note 43, at 556.
[208] *See supra* Section II.B.

to privacy will be justified."[209] Looking to the similar test used to determine an "interference with other civil and political rights"[210] elsewhere in the CRC, Tobin and Field arrive at a two-part test to determine if such a justification exists. [211] First, the reasonable interference must necessarily be proportionate to the aims it attempts to achieve.[212] Second, to determine the proportionality, there must be an adequate "nexus between the measure and aim . . . and . . . if so, whether there is a reasonably available alternative which would have minimized the interference with the child's right."[213] Tobin and Field continue to note that, while Article 16 does not contain any limitations in and of itself for when a state may infringe on privacy rights:

[i]f a state seeks to establish a legitimate aim upon which to restrict a child's right to privacy its aim will invariably have to fall within the scope of the legitimate considerations listed in the limitation clauses of other provisions in the CRC which include . . . the rights of others, public health, and public order."[214]

Is the United States wrong for seeking children's data as a measure in their response against the COVID-19 pandemic? There is an argument for saying that such an action is warranted in light of the "public health" and "order."[215] That being said, there is still room for improvement as this paper has shown the lack of protection of information from reaching unauthorized users.

Along similar lines, the competing rights of the general public's health to be protected and the right of a child to protect his or her privacy could be seen as another objection to the legislation proposed in this paper. Ingrid Nifosi-Sutton has explained that "the right to receive accurate information about the COVID-19 pandemic

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[209] TOBIN & FIELD, *supra* note 43, at 556–57.
[210] *Id.* at 557.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*

. . . should be at the heart of any response to the pandemic"[216] in her piece outlining a "rights-based approach" to COVID-19. [217] This right to information must still be balanced against "the right to have personal health data treated with confidentiality," as noted by the Committee on Economic, Social and Cultural Rights in its General Comment Number 14.[218]

How can such a balancing act be conducted? One of the most important considerations in such an analysis hearkens back to the legal scheme in which privacy is compromised:

There is nothing wrong in principle with subjecting a patient's right to the overriding consideration of the safety of the society as a whole in times of public health emergency as the individual also needs a safe community to survive. It must however always be borne in mind that the rights of a patient, whether seen from the ethical or legal perspective, bear a semblance of personal property which adds value to the person's existence and quality of life. *Any derogation from such rights in preference for public interests should as such adhere strictly with the specified protocol contained in the enabling law or rules of ethics to attain some level of legitimacy.*[219]

The balance can at least somewhat be attained through ensuring that the intrusion into one's private sphere is given strict protections by law. This hearkens back to the requirement that any violations of a child's privacy should only take place in cases supported by law, as discussed above.[220]

The legality of measures can strike this balance so long as it is founded on the principles discussed at length within this paper. If legislation is adopted which allows for the consideration of children's voice and viewpoints while also taking into account their

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[216] Nifosi-Sutton, *Human Rights and Covid-19 Responses: Challenges, Advantages, and an Unexpected Opportunity*, 24 HUM. RTS. BRIEF 18, 23 (2020).
[217] *Id.* at 25.
[218] Committee on Economic, *Social and Cultural Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (Aug. 11, 2000).
[219] Gloria C. Nwafor & Anthony O. Nwafor, *The Healthcare Providers-Patients Relationship and State Obligations in Times of Public Health Emergency*, 9 AFR. J. LEGAL STUD. 268, 297 (2016) (emphasis added).
[220] *See supra* Section II.B.

best interest, this provides the exact kind of dialogue which would be able to find a balance between these two interests on a "case by case basis."[221] It may very well be that a child's best interest would necessitate their information being made known to better protect themselves and those around them, but children deserve to know their viewpoint was at least considered before reaching such a decision.

Some may object on the grounds of the *Vernonia* decision mentioned above.[222] In *Vernonia*, the Court held that a student at a public school had a limited expectation of privacy,[223] but several important boundaries of the decision need be outlined. As noted, the decision of the Supreme Court was informed largely by the circumstances of the case.[224] Furthermore, the Supreme Court's decision dealt largely with the student's expectations of privacy under the United States Constitution: "[C]hildren assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate' [but] . . . rather . . .the nature of those rights is what is appropriate for children in school."[225] The purpose of the CRC, which the United States has a duty to not frustrate, is to list and expand upon the rights inherently possessed by children, including the right to privacy under Article 16.[226]

A final objection to the adoption of such a legislative agenda is one that is commonly raised to Article 16 as a whole. Some critics feel that such a right to privacy would extend to "any realm that is 'private'"[227] and could prove dangerous for minors experimenting

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[221] BUCK, *supra* note 2, at 139.
[222] *See* Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 472 (1996).
[223] Vernonia School District 47J v. Acton, 515 U.S. 646, 657 (1995).
[224] *Id.* at 664–65.
[225] *Id.* at 655–56 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969).
[226] VCLT, *supra* note 28. *See also* CRC, *supra* note 26.
[227] Hafen & Hafen, *supra* note 223, at 474.

sexually.[228] However, the position advocated in this paper is not one of "abandoning children to a mere illusion of real autonomy."[229] In fact, by creating a presumption that parents and children will come to decisions together, the process begins to appear more like "teaching children to act with actual autonomy," the very thing that Hafen opines "the CRC ironically undermines."[230] This process is much more than attempts at "serv[ing] adult convenience," it is a process requiring much more from adults than the mere click of a button saying one agrees to a website's terms and conditions.[231]

Allowing children a degree of autonomy and affording them a place as legal actor, and not just object, does not necessarily mean that children are suddenly left alone to make any and all decisions themselves. One can imagine a world with no bedtimes, curfews, or balanced meals; such is not the view espoused herein. Rather the view is that children and parents should work together in the understanding and implementing of their rights. Tobin and Field state that the duties given to parents under the CRC are based in giving "direction" and "guidance" to their children rather than exerting "control" over them.[232]

The difference in the two terms is easy to understand and appreciate. Rather than authoritatively instructing children on what to do, Tobin and Field's framework brings to mind a more collaborative approach.[233] This holds up under the duo's second consideration, which is that the parental claims over their children's right to privacy "remains subject to a child's evolving capacity. Thus, as a child moves from dependency to independence . . . the right of parents to exercise influence over a child's right to privacy will gradually diminish."[234] Again, this view is not to say that

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[228] *Id.*; Richard G. Wilkins, et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 424 (2003).
[229] Hafen & Hafen, *supra* note 223, at 491.
[230] *Id.* at 451.
[231] *Id.* at 478.
[232] TOBIN & FIELD, *supra* note 43, at 558.
[233] *Id.* at 558–59.
[234] *Id. at 559.*

parents should not have any say in their children's exercising their individual rights.

Parents (and, arguably, society at large) should endeavor to see children as growing and evolving legal actors: becoming more and more capable to weigh the ramifications of decisions and choices regarding their personal privacy matters. Buck also deals with this balancing of demands as well, acknowledging that such is "good practice for more central participation in decision-making to be undertaken later in adulthood."[235] He references the emerging trend of "participation" used in such questions, a practice of "ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes."[236]

iii. New Legislation: Benefits

One of the main benefits of implementing such legislation has already been hinted at. The old adage that "children should be seen and not heard" is as far from the truth as it could be. Children should be seen *and* heard when making decisions about their privacy rights as well as in the exercise of other rights as well. As Buck notes, such practice is useful to provide a sort of biosphere in which children may feel out their decision-making powers.[237] Parents and states concerned with ensuring the best for children should see that by helping children understand their rights and practice exercising the autonomy granted them as human beings and the holder of inherent rights they are providing them with guidance and assistance far greater than any authoritarian decision could provide. The Model Family Code speaks to this, stating that:

It must be the aim of any upbringing of a child to ensure that the child is equipped with the necessary personal skills to enable him or her to lead an autonomous and responsible life . . . . This is achieved

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[235] BUCK, *supra* note 2, at 31.
[236] *Id.* at 32.
[237] *Id.* at 31.

by gradually teaching and leading the child to accept and assume responsibility for him- or herself, as well as for others.[238]

Not only would implementing the recommendations herein result help the United States meet its duty to not "defeat the object and purpose" of the CRC, it would help equip the rising generations with the necessary tools to traverse the increasingly complex world they will inevitably find themselves upon reaching adulthood.[239] As Van der Hof notes:

Moreover, digital citizenship is so much more than understanding how to push the right buttons . . . . At some point, however, tinkering with technology must be associated with external, social, and economical, effects that greatly determine technological innovation and human lives. This is a daunting task to be sure and entails recalibrating what constitutes optimal development in a world more and more dominantly mediated by technology.[240]

Protecting a child's right to privacy is much more than protecting children from "arbitrary" or "unlawful" attacks on their personal information.[241] It is the facilitation of a deep, ongoing, and vitally important teaching process between caregiver and child with the focus of helping the latter become the responsible global citizen they are able to become [242] with guidance and support.

Children are engaging with issues of privacy like never before. On average, children receive their first smartphones at age ten and begin using social media just one year after that.[243] Furthermore, by age twelve, it is expected that nearly fifty percent of children will have a social media account.[244] Besides social media, YouTube has been reported as being a serious risk for unregulated data collection from children who use the

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[238] SCHWENZER & DIMSEY, *supra* note 129, at 138.
[239] VCLT, *supra* note 28.
[240] van der Hof, *supra* note 16, 442.
[241] CRC, *supra* note 26.
[242] *Id.* at 442–43.
[243] Katie Brigham, *Facebook, Snapchat and TikTok have a massive underage user problem – here's why it matters*, CNBC (Dec. 22, 2018, 9:17 AM), https://www.cnbc.com/2018/12/21/what-age-is-appropriate-to-sign-up-for-social-media.html.
[244] *Id.*

application.[245] Children need the guidance of others to help explore the digital terrain while still being able to learn and understand their rights to privacy in a meaningful and lasting way.

C. This Understanding in Practice

Having outlined the who (a deepened understanding of who children are in terms of their rights), the what (what information is afforded protection under Article 16), the how (how states can aid in the protection of children's sensitive information), and having addressed some initial concerns, one can now turn an eye to exactly what measures could be implemented or what safeguards could be established to bring about these purposes. In guiding such a discussion, the main obligations of states under Article 16 will be used as a framework to inform how states may achieve these ends.

The first obligation to consider when proposing a new framework is the need for states to control who has access to the information.[246] The need for this prong to be met cannot be stressed enough. Google and Apple teamed together to create a software to control contact between parties and have stated that the only individuals able to access the system are public health authorities.[247] Such measures are essential to keep tabs on the sensitive information collected during this time. The idea of data centralization has proved to be a challenging consideration for the United States, with the former Trump administration changing COVID-19 reporting from being collected by the CDC to the Department of Health and Human Services.[248]

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[245] Steven Johnson, *The Bargain at the Heart of the Kid Internet*, THE ATLANTIC (Apr. 12, 2018), https://www.theatlantic.com/family/archive/2018/04/child-data-privacy/557840/.

[246] DETRICK, *supra* note 21, at 275–76.

[247] *Exposure Notifications: Using technology to help public health authorities fight COVID-19*, GOOGLE, https://www.google.com/covid19/exposurenotifications/#exposure-notifications-and-privacy (last visited December 1, 2020).

[248] Sheryl Gay Stolberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, THE NEW YORK TIMES (Sep. 9, 2020),

Despite the political tensions caused by such a decision, medical experts have held that the information needs to be in a centralized location.[249] Merely keeping the information in a centralized location is not enough. Adequate controls must also be established to control who has access to the information. Sensitive information such as one's location patterns is currently being broadcasted on the world wide web and, while the information does not identify individuals, privacy rights are still affected by the lack of control over who could access this data.[250] As Tobin and Field highlight, "privacy is about far more than maintaining the secrecy of personal information. It is concerned with the control that individuals, *including children*, have over their own personal boundaries."[251] Thus, the argument that such data could not be used to identify individuals is still an attack on one's privacy as an attack on the ability a child has in exercising their right to create the life they wish to live, free of their data being collected and shared.[252]

Furthermore, while movement databases do not offer the ability to identify individuals, the various databases of students previously referenced would become much more identifying for the COVID-19 positive student in the community, which now has the location where the student spend the majority of their time revealed to any interested eyes.[253] Such databases previously referenced[254] which boast deeply personal information about individuals "may have adverse consequences on children, which can continue to affect them at later stages of their lives."[255]

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https://www.nytimes.com/2020/07/14/us/politics/trump-cdc-coronavirus.html?auth=login-google.

[249] *Id.*

[250] *See* Speck, *supra* note 106; *COVID-19 Tracking Sheet, supra* note 106; Interactive Database of Cases in Texas Schools, *supra* note 106.

[251] TOBIN & FIELD, *supra* note 43, at 598.

[252] *See id.*

[253] *See* Speck, *supra* note 106; *COVID-19 Tracking Sheet, supra* note 106; Interactive Database of Cases in Texas Schools, *supra* note 106.

[254] *See* NEW YORK TIMES Reporter, *supra* note 12; UNACAST Reporter, *supra* note 12; CAMBER SYSTEMS Reporter, *supra* note 12.

[255] General Comment 25, *supra* note 48, at 11–12.

What can be done to help reign in these informal databases and the unbridled dissemination of information? As discussed at length, bringing children into the decision-making process regarding their rights to privacy is the first step. It may very well be that a child would agree that their information would be needed to help in the greater good. It could also be that another's views are starkly against the practice and their views would warrant a discussion.[256] One thing is for sure, that "it [is] wrong to deny children from enjoying a level of autonomy and agency, consistent with their right to privacy and their evolving capacity."[257] Of course, significant measures could also be taken by governments to help control this information. In the educational sphere, one individual recommended controlling access to class recordings and limiting the length of time the recording is kept as a way to protect student privacy.[258] The policies behind these recommendations (guarded access, control of information dissemination) could easily translate to password-protected databases for school districts or set schedules on the length of time information on a database may exist are two possible ideas that come to mind at first thought.[259] The opportunities are numberless and too great to count in this paper. However, with such a framework and understanding in mind, states will be able to apply this framework in many different ways to help both children and society at large.

The last two considerations, party control over the collection of data itself and the ability to correct information and stop its collection, may appear self-explanatory and, to some extent, easier to implement than the first consideration above. The first

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[256] It very well could be that the outcome of this decision is that the child's information would be shared regardless of their desires to the contrary. As discussed, though, part of the importance of this step is in the process and not necessarily the outcome.

[257] TOBIN & FIELD, *supra* note 43, at 597–98.

[258] Rebecca Richards, *COVID-19, Privacy, and School Recordings*, IAPP (Sep. 17, 2020) https://iapp.org/news/a/covid-19-privacy-and-school-recordings/.

[259] *See id. See also Joint Statement on Data Protection and Privacy in the COVID-19 Response*, UN GLOBAL PULSE (November 2020), https://www.unglobalpulse.org/wp-content/uploads/2020/11/Joint-Statement-on-Data-Protection-and-Privacy-in-COVID-19-response-Final-12112020-1-3-3.pdf.

consideration, allowing parties greater control, and by extension privacy, in the collection of data can influence, in large part, how the data is collected. Privacy was the guiding principle behind Syu Kato's coronavirus-tracking app created in the midst of the pandemic.[260] The teenager's app uses GPS data to "jog users' memories about where they were and who they saw, to help anyone exposed to COVID-19 track down others they may have infected without compromising their own privacy."[261] The app also stores data on the user's phone instead of making it known to a third party or an external cloud-based storage device.[262] The idea of using personal data to help individuals self-report is one that could be used to track the spread of the virus throughout the United States. While relying on an individual's own memory is subject to mistakes, it nonetheless offers the privacy and control required by Article 16. From this it can be extrapolated that such mechanisms as described would give the subject of the information the ability to meaningfully engage with the reported information because they are able to correct and/or remove it from their device. As these examples show, there are several meaningful avenues for a state to provide for the health of its members while still not "defeat[ing] the object and purpose" of the CRC.[263]

V. Conclusion

The COVID-19 pandemic has disrupted life for individuals, nations, and, arguably, the globe. Work, school, and nearly all other aspects of life were uprooted for many as nations faced questions of national importance on how to combat a virus invisible to the naked eye. Many organizations have tracked, and continue to track, the number of cases on national, state, and county levels in the United

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[260] Lucy Craft, *Teen's tracking app takes a different approach to the coronavirus challenge*, CBS NEWS (May 21, 2020, 11:22 AM), https://www.cbsnews.com/news/coronavirus-teens-tracking-app-different-approach-data-privacy-covid-tracing-japan-asiato/.

[261] *Id.*

[262] *Id.*

[263] VCLT, *supra* note 28. *See* CRC, *supra* note 26.

States.[264] Some even track and report on movement trends within populations.[265] These databases, which compile information and make it widely available for the public, have seemingly come into being with an apparent lack of control over them.[266]

These databases and other practices that have been established during this time have started a national dialogue on the rights of privacy for individuals. In this dialogue, however, the world's youngest players' voices must be heard as well as those of adults. The Committee on the Rights of The Child explain that "[d]uring consultations, children expressed the view that the digital environment should support, promote, and protect their safe and equitable engagement" and that children are aware of data collection practices and desire to understand more.[267] UNICEF bemoans the plight of children left from the table, stating that "children are part of the digital health surveillance ecosystem and should not be an afterthought in the creation of tech-driven solutions or policymaking."[268]

An analysis of children's privacy rights in the United States amid COVID-19 necessarily implicates several considerations. Several principles have been established in international law that are binding, to some extent, on the United States as a signatory to the CRC. Because of this, the United States has a duty not to frustrate the purposes of the international agreement.[269] In advocating for greater compliance with the CRC, this paper has examined the United States' duties to the CRC, analyzed current ways the United States has engaged with children's right to privacy, and, lastly, advocated for new legislation which could help protect children's

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[264] Speck, *supra* note 106; *COVID-19 Tracking Sheet, supra* note 106; Interactive Database of Cases in Texas Schools, *supra* note 106.

[265] NEW YORK TIMES Reporter, *supra* note 12; UNACAST Reporter, *supra* note 12; CAMBER SYSTEMS Reporter, *supra* note 12.

[266] *See id.*; Speck, *supra* note 106; *COVID-19 Tracking Sheet, supra* note 106; Interactive Database of Cases in Texas Schools, *supra* note 106.

[267] General Comment 25, *supra* note 48, at 1.

[268] *COVID-19 and children's digital privacy*, *supra* note 108.

[269] BUCK, *supra* note 2, at 91.

right to privacy by encouraging discourse between caregivers and children.

While the need for such a new framework is warranted because of the effects the COVID-19 and data collection, such framework has lasting impacts that arguably do more than help the United States become more compliant with the CRC. The rising generation are engaging with technology at a rate that was arguably unforeseen before it became the reality that is the current global culture.[270] While this may be a cause for alarm, some call this a "silver lining," or at least the potential to become one, if caregivers are willing to help guide children at a younger age, having more time to establish "healthy habits" surrounding technology use.[271] While this paper has focused on the need for understanding and appreciation of child privacy rights in terms of data collection and COVID-19, the same principles and framework may be used for other areas of life that pose risks to children's privacy. The COVID-19 pandemic has begun a conversation that, in order to continue to protect children and create competent global citizens of the future, must continue.

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[270] Anya Kamenetz, *Report: More Than Half of U.S. Children Now Own A Smartphone By Age 11*, NPR (Oct. 29, 2019, 5:06 AM), https://www.npr.org/2019/10/29/774306250/report-more-than-half-of-u-s-children-now-own-a-smartphone-by-age-11.

[271] *Id.*