

THE PUBLIC/PRIVATE HOME

Clare Ryan†

Families today are more private and more public than traditional family law doctrine ever envisioned. This Article reveals how many elements of family life, which the law often assumes will occur in public—work, school, social life—have moved into the private sphere of the home. While at the same time, private family life has become increasingly visible and public through social media and continuous data collection within the home.

The balance of public and private life has shifted with profound implications for the field of family law, especially as it governs the parent-child relationship. Transformations in home life have the potential to ameliorate deep inequities inherent in modern family privacy law. But these transformations also risk exacerbating issues of family violence, oppressive state intervention, and inequality. Deploying vital critiques of family privacy arising from feminist theory, queer theory, and other critical traditions, this Article unpacks three foundational assumptions about the home: 1) What happens within the home is protected from outside view; 2) The home is separate from the market; and 3) Provision of public services happens outside of the home. I argue that these assumptions present a doctrinal vision of family life that is starkly at odds with lived experience.

This Article proposes that parental rights should be unteathered from the private home. Instead, law governing parents' decisions about their children should be grounded in a core element of the parent-child relationship: parents' duty to protect their children's wellbeing.

† Associate Professor of Law, University of Alabama School of Law. My deepest thanks to the participants in the 2023 and 2024 Family Law Scholars and Teachers Conferences, the 2024 West Coast Gender, Sexuality, and the Law Conference, the 2024 Law & Society Association Annual Meeting, the Northeastern University School of Law faculty colloquium, the Yale Law School PhD in Law 10th Anniversary conference, and the 2024 Junior/Senior Faculty workshop, as well as to my wonderful colleagues at the University of Alabama School of Law for their insights. I am also grateful to my excellent research assistants, Margaret-Anne Stewart, Sydney Hardern, and Bailey Ruhm for their hard work. My thanks to the editors of *Cornell Law Review*.

INTRODUCTION.....	1488
I. FAMILY PRIVACY & THE PARENT-CHILD RELATIONSHIP	1493
A. Parents & Children.....	1493
B. Assumptions about Family Privacy	1499
II. DISRUPTING THE PRIVATE HOME	1505
A. The Home Is a Stage.....	1507
B. The Home Is a Workplace	1512
C. The Home Is a School	1516
III. THE PROBLEM(S) WITH THE PRIVATE HOME.....	1521
A. The Private Home & Family Violence.....	1522
B. The Private Home & Exclusion.....	1523
IV. FAMILY AUTONOMY REIMAGINED	1527
A. New Public/Private Homes	1527
B. Emerging Threats to Family Privacy.....	1530
C. Family Autonomy for Child Wellbeing	1532
CONCLUSION.....	1537

INTRODUCTION

Home is a powerful legal concept. In constitutional law¹, property law², criminal procedure³, tax law⁴, and—of course—

¹ Many of the cases cited in this Article have constitutional dimensions; specifically, they address the home in the context of the Fourth, Fifth, and Fourteenth Amendments. Even the Third Amendment makes an appearance in this area. See *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting) (“That aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection at two places only. These are the Third Amendment, relating to the quartering of soldiers, and the Fourth Amendment, prohibiting unreasonable searches and seizures.” (footnote omitted)).

² The examples are so plentiful that a full account of property law’s treatment of the home is difficult, but include land use regulations, donations and transfers, limitations on compelled partitions, probate law, and more. See *generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS (AM. L. INST. 1999).

³ See *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

⁴ The Internal Revenue Code treats the home as unique throughout the Code. See, e.g., 26 U.S.C.A. § 121(a) (West) (“Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer’s principal residence for periods aggregating 2 years or more.”). For a foundational article on the tax code’s role in family and home life, see Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2004 (1996) (describing the relationship between tax policy and allocation of labor within the home).

family law⁵, the home is treated differently from other spaces.⁶ Legal rules of various sorts protect and instantiate the home as a private space that is shielded from external forces of the state and the market.⁷ As Justice McReynolds famously expounded in *Meyer v. Nebraska*, the right to “establish a home” is understood as one of the fundamental rights protected by the Due Process Clause of the Fourteenth Amendment.⁸

Family law’s image of the private home was never a reality for many American families, but it stands in particularly stark contrast with the lived experience of home life today. This Article contends that the existing lines between public and private within the home must be interrogated. It seeks to demonstrate how the imagined realities of home life that undergird current family law, and especially rules governing the parent-child relationship, no longer ring true. And contends that when core features of a legal regime no longer fit the lives of those that it governs, there is an opportunity to fundamentally change the underlying legal rules.

Although, as Professor John Sprankling recently observed, “the nature and scope of the right to establish a home remain[s] uncharted,”⁹ the image of an ideal home has found its way into many elements of modern family law. The home offers many protections to its inhabitants, including the right to raise children in a manner consistent with the values and goals of the parents.¹⁰ In the home, parents serve as caregivers who shape and guide their minor children into adulthood outside

⁵ See *infra* subpart I.1 for a discussion of the many family law implications of home.

⁶ See Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099, 1100 (2019) (“The home occupies a special place within the Constitution. Americans’ admiration ‘for the sanctity of the home’ is linked to the individual, the family, and the fabric of society. The home is the ‘moral nexus between liberty, privacy, and freedom of association’ and property. This sentiment is the basis of the Supreme Court’s distinctive protections to the home. . . . The Court has, in other words, extended itself to textually adhere or doctrinally shape its jurisprudence to protect the home, as opposed to other places and spaces.” (footnotes omitted)).

⁷ See *infra* subpart I.2 for more discussion of these rules.

⁸ 262 U.S. 390, 399 (1923).

⁹ John G. Sprankling, *The Constitutional Right to “Establish a Home,”* 90 GEO. WASH. L. REV. 632, 634 (2022).

¹⁰ David D. Meyer, *The Geography of Family Privacy*, 156 U. PA. L. REV. ONLINE 136, 136 (2007) [hereinafter Meyer, *The Geography of Family Privacy*] (“At home, parents rule the roost; their authority within the sanctity of the home is protected by a robust constitutional doctrine of parental rights that gives way to state control only in cases of abuse or neglect.”).

the watchful eye of outsiders—and the state.¹¹ The home is a space in which family privacy is most protected. The right to privacy in the home, evoked in *Meyer*, and in myriad cases over the last century, stands as a cornerstone of parental rights doctrine by creating a space—both physical and metaphorical—where private family life is conducted.¹² Over the course of American history, life within the home has taken many forms. The mid-twentieth-century vision of nuclear family domesticity is relatively new, but it has had an undeniably powerful impact on family law doctrine.¹³ This vision prioritizes specific family forms at the expense of others, producing a profoundly unequal set of rules for those who conform to heterosexual, white, middle-class models of domesticity and those who cannot or will not ascribe to this family model.¹⁴

This idealized image of the private family life, conducted within the home, is eroding. Today, home life includes a combination of work, caretaking, family decision making, and interaction with the outside world that looks very different from earlier eras when the foundational assumptions of private family life were set into law.¹⁵ Changes in society and in the law have combined to destabilize the public/private binary within home life that developed over the course of the twentieth century, during the period when courts and lawmakers articulated the modern doctrine of parental rights and family privacy.¹⁶

¹¹ For a rich discussion of how this law developed, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 262–85 (2011).

¹² *Id.* at 263–64.

¹³ Scholars in many fields have observed and analyzed trends in twentieth-century American home life. For one notable example, which provides in-depth descriptive accounts of how the physical space of home was shaped, and help to shape, an idealized American family, see generally DOLORES HAYDEN, *REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE* (1984).

¹⁴ See Part III.

¹⁵ This Article focuses primarily on images of home and family life enshrined in constitutional and family law doctrine during the twentieth century because that is the period in which the U.S. Supreme Court began to treat parental rights as a matter of constitutional privacy law. That said, the border between public and private functions within the home has taken many forms over decades and centuries. A long look back at the history of home life is beyond the scope of this article.

¹⁶ See Katharine K. Baker, *Making Some Sense of the Constitutional Family*, 72 WASH. U. J.L. & POL'Y 1, 5 (2023) (“The constitutional importance of the family first surfaced in the progressive era when the Supreme Court held that the constitutional right to ‘liberty’—found in the Fourteenth Amendment—included the right to ‘establish a home and bring up children’ without government interference.”).

Consider the recent prosecution of Ruby Franke for aggravated child abuse.¹⁷ Her case was particularly brutal in its facts; Utah state prosecutors described how she subjected her children to starvation diets and backbreaking labor under horrific conditions.¹⁸ But what makes her case exceptional is that as she subjected her children to this abuse, she gained two million social media followers, who served as consumers of her harsh, unyielding parenting advice.¹⁹ The Franke case exemplifies one of the central tensions in modern family law: families are far more public and visible than they once were, but at the same time, parents can control carefully curated fictions of traditional private life for public consumption.

Compare the Franke story to that of the D'Amelio Family, which, thanks to the social media presence of the family's young daughters, has amassed a substantial fortune in sponsorships, collaborations, and monetization of their brand.²⁰ Millions of followers have watched their sensationalized depiction of family life starting when the star of the family, Charli D'Amelio, was a teenager.²¹ Their success, and those of other social media families, have inspired an industry of parents displaying their children's images and daily lives for an anonymous, watching public. In 2024, the *New York Times* published an in-depth investigation of over two million social media posts, which revealed a pervasive phenomenon on platforms like Instagram

¹⁷ Details of the prosecution can be found at Kerry Breen, *Ruby Franke and Jodi Hildebrandt Sentenced to up to 30 Years in Prison in Child Abuse Case*, CBS NEWS (Feb. 20, 2024, 3:17 PM), <https://www.cbsnews.com/news/ruby-franke-jodi-hildebrandt-sentenced-child-abuse-youtube-eight-passengers/> [<https://perma.cc/226B-N7NL>].

¹⁸ *Id.* State Prosecutor Erik Clarke compared the conditions in which she kept her children to a "concentration camp-like setting." *Id.*

¹⁹ Ruby Franke ran a now-shuttered YouTube Channel called "8Passengers," which espoused a strict, religious view of parenting that included withholding food as a form of punishment. See Bindu Bansinath, *What We Know About the Mommy Vlogger Accused of Child Abuse*, THE CUT (Feb. 20, 2024), <https://www.thecut.com/article/ruby-franke-utah-mommy-vlogger-pleads-guilty-to-child-abuse.html> [<https://perma.cc/9V85-5N5Z>]. Despite calls from viewers that her practices constituted child abuse, starting by at least 2020, by 2023 her channel had 2 million subscribers. See *id.*

²⁰ For more on the D'Amelio family's rise to fame via Charli's initial success posting TikTok videos from her bedroom in Norwalk, CT, see Alexandra Sternlicht, *Charli and Dixie D'Amelio Turned TikTok Fame into a Billionaire-Backed Personal Brand That Hinges on Their Personal Lives*, FORBES (Sept. 6, 2022, at 6:30 AM), <https://www.forbes.com/sites/alexandrasternlicht/2022/09/06/charli-and-dixie-damelio-turned-tiktok-fame-into-a-billionaire-backed-personal-brand-that-hinges-on-their-personal-lives/?sh=6e71c0677594/> [<https://perma.cc/Y3LN-VKSM>].

²¹ *Id.*

of mothers posting revealing images of their underage daughters.²² As the report concludes, these images garner followers for the mothers' platforms, spurred on by viewers who see these young girls as sexual objects.²³

At the same time that the technology erodes the public/private divide within the home, another pillar of parental rights doctrine may also be on shaky foundation. Changes to long-standing Substantive Due Process analysis, articulated in *Dobbs v. Jackson Women's Health*, open the door to more restrictive constitutional interpretations of parental authority to make decisions about their children in and out of the home.²⁴ In a challenge to the Alabama law banning parents from seeking certain forms of gender-affirming care for their minor children, the Eleventh Circuit referenced the analysis in *Dobbs* to interpret the scope of parental rights narrowly:

[N]one of the binding decisions regarding substantive due process establishes that there is a fundamental right to "treat [one's] children with transitioning medications subject to medically accepted standards." Instead, some of these cases recognize, at a high level of generality, that there is a fundamental right to make decisions concerning the "upbringing" and "care, custody, and control" of one's children.²⁵

The future of constitutional family rights remains an open question.²⁶

²² Jennifer Valentino-DeVries & Michael H. Keller, *A Marketplace of Girl Influencers Managed by Moms and Stalked by Men*, N.Y. TIMES (Feb. 25, 2024), <https://www.nytimes.com/2024/02/22/us/instagram-child-influencers.html> [<https://perma.cc/4W7S-39LY>].

²³ *Id.* (quoting a comment posted to one such account, which said: "I'm so glad for these new moms pimping their daughters out. . . . [T]here's an infinite supply of it—literally just refresh your Instagram Explore page there's fresh preteens.").

²⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247–48 (2022).

²⁵ *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1224 (11th Cir. 2023) (alteration in original) (first quoting *Eknes-Tucker v. Marshall*, 603 F.Supp.3d 1131, 1144 (M.D. Ala. 2022), *vacated sub nom. Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205 (11th Cir. 2023); and then quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

²⁶ See Reva B. Siegel, *Memory Games: Dobbs's Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1182 (2023) ("Dobbs's backward-looking history-and-traditions analysis thus threatens to discredit many decisions, ranging from the right to interracial marriage (*Loving v. Virginia*), to the right to contraception (*Griswold v. Connecticut*), to the right to same-sex intimacy (*Lawrence v. Texas*) and same-sex marriage (*Obergefell v. Hodges*). None of these decisions is easily upheld under the kind of history-and-traditions analysis the majority practices in *Dobbs*." (footnotes omitted)).

Privacy and its relationship to the home is an enormous topic, which covers many areas of law and doctrine, from the constitutional to the local. It would be impossible for a single article to comprehensively address all implications of changing a core principle like family privacy. Instead, this Article has a humbler mission: to present evidence of a changing world, evidence that raises questions about the continued viability of a legal concept and then imagine some possible consequences that could flow from rethinking that legal concept. The goal of this project is to point out incongruities between law and lived experience and to propose some general principles for reconciling this gap.

The Article begins with an account of the private family home, the norms upon which it is built, and its history in the development of American family law. This Part emphasizes the centrality of the home in the development of family privacy and in the divide between public and private realms. In Part II, this Article addresses the ways in which recent technological, social, and economic changes have destabilized foundational assumptions about the private home as a central marker of family life. This Part focuses especially on how private home life has become increasingly public, while traditionally public activities like work and school have entered the home in transformative ways. In Part III, this Article raises the critiques of family privacy espoused by critical theorists. It demonstrates how transformations in the public/private home might respond to these critiques. Part IV looks to the future, asking: What is next for family privacy? The Article suggests a path forward that embraces change as an opportunity to rethink family privacy. It concludes by proposing a new way to think about family privacy and autonomy for the twenty-first century, not as grounded in a private sphere of home life but instead grounded in the fundamental relationship between parents and children.

I

FAMILY PRIVACY & THE PARENT-CHILD RELATIONSHIP

A. Parents & Children

In their powerful account of twentieth-century developments in family law, Professors Grossman and Friedman paint an evocative picture of that idealized family home:

Here is the cozy home; in it, a man and a woman, married and faithful to each other, sit at the head and foot of the table; he is the breadwinner, and the head of the family, ruggedly

masculine, in charge, ruler of the roost, but a benign despot, firm but understanding, an object of respect and not of dread. She, on the other hand, inhabits a “separate sphere.” She is the homemaker, the soft and delicate core of the family, neat and feminine, the loyal and trustworthy wife, obedient and helpful, darning the socks and baking the bread; the primary caregiver of the children.²⁷

Lawmakers—both judges and legislators—embraced this vision as they developed, interpreted, and applied family law doctrine. Many scholars have addressed the centrality of marriage in family law doctrine,²⁸ but this Article will focus on the family law rules governing parents and children. The parent-child relationship, as a matter of law, consists of a bundle of rights and obligations. The idealized private family home stands as a backdrop to this bundle.²⁹ The twentieth-century model of parental rights and obligations includes some key features: Parents have authority over their children within the private home, which includes the right to exclude people and ideas within that sphere.³⁰ Caretaking is a private parental obligation, as is the obligation of financial support.³¹ Caretaking within the home is separate from the public labor market.³² Families that require public assistance relinquish the family privacy afforded to parents who provide private support.³³ State intervention into the private family is only justified by public interests—including protecting children—and is usually triggered by the child’s interaction with public actors—such as police, teachers, social workers, medical professionals, etc.³⁴

The ideal of family privacy forms a foundational element of laws governing the parent-child relationship. However,

²⁷ GROSSMAN & FRIEDMAN, *supra* note 11, at 3–4.

²⁸ For an excellent recent symposium on marriage’s central role in family law, see generally *Symposium: Third Annual Roundtable on Nonmarriage and the Law*, 99 WASH. U. L. REV. 1807 (2022).

²⁹ Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1112–13 (2010) (describing the balance between laws that regulate family obligations and laws that promote family autonomy).

³⁰ See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

³¹ See Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 657 (2022) (discussing the parental duty of support).

³² See *id.*

³³ See *infra* subpart III.2 for more discussion on this point.

³⁴ See *infra* notes 156–160 for more on the role of professionals in the regulation of family life.

the relationship between parental rights and authority, family privacy, and the constitutional protections of the home is not always evident, especially in constitutional doctrine. As Professor David Meyer points out:

The Supreme Court has eschewed any effort to develop a unified theory that might define the special content of family liberty and justify the extraordinary limitations placed upon state authority in this area. Instead, the Court has been content to let strands of doctrine emerge piecemeal. Rights to abortion, contraception, marriage, kinship, and the custody and rearing of children have, for the most part, sprung up independently of one another, only later converging into a loosely recognized constellation of “family privacy” rights.³⁵

This is especially true of parental rights cases because parental authority begins not with the canonical twentieth-century constitutional law cases, but also in earlier common law.³⁶ Indeed, the power parents have to make decisions about and for their children touch the very core of individual liberty; the Supreme Court has explained that “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights.”³⁷

Family privacy is both relationship-dependent (Parent-Child)³⁸ and geographically bounded (Home-Public).³⁹ The

³⁵ David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 528 (2000) [hereinafter Meyer, *The Paradox of Family Privacy*].

³⁶ See GROSSMAN & FRIEDMAN, *supra* note 11, at 263 (“Only in the twentieth century did the Supreme Court establish a constitutional basis for parental rights.”); MARK E. BRANDON, STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER 43-48 (2013) (discussing the English common law origins of the law of parent and child).

³⁷ *Smith v. Org. of Foster Fams.*, 431 U.S. 816, 845 (1977) (footnote omitted).

³⁸ Family privacy also shapes relationships between intimate partners, especially spouses, but this article focuses on the parent-child relationship. See *infra* Part III for more discussion of the spousal implications of family privacy.

³⁹ For discussion on the geography and the relational aspects of family privacy, see, for example, Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833-34 (2007) (discussing the spaces in which decisions about children are made); Meyer, *The Geography of Family Privacy*, *supra* note 10, at 136 (“The allocation of public and private power in domestic life is classically diagrammed as a triangle [between parent-child-state].”); Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 568-70 (2006) (describing the rise of family autonomy within the home as a counterweight to the public sphere during the nineteenth and twentieth centuries); Meyer, *The Paradox of Family Privacy*, *supra* note 35, at 545 (“[T]he Court’s parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing because they rest uncomfortably upon two competing and as-yet-unreconciled metaphors: the family as a ‘private refuge’ from a brutal or indifferent community and the state as ‘protector’ of children from a brutal or indifferent

home is not always an essential element of the parental rights doctrine—in the sense that parents have the authority to make decisions regarding their children outside of the home—it nevertheless plays a central role in the development of family privacy and parental rights. Indeed, the foundational twentieth-century parental rights cases involved activity outside of the home, which is not surprising because that is precisely where public authority and parental choices are most likely to conflict.⁴⁰ The point is made clearly in the case of *Prince v. Massachusetts*, where the Supreme Court explained: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”⁴¹ However, the Court continued: “The state’s authority over children’s activities is broader than over like actions of adults. This is peculiarly true of *public activities* and in matters of employment.”⁴² In the intervening century, the Supreme Court has articulated in many cases, especially those involving schools, that family privacy is strongest within the home and weakest when the child is in the care of the state.⁴³ This Article, therefore, does not assert that the private home is the location for parental rights to the exclusion of other spaces or contexts but rather that the imagined private home life formed an integral part of how courts reasoned about families and family autonomy.

Family privacy is different from other forms of privacy in that, by definition, it involves information and decisions by and about more than one person; it is a form of relational privacy.⁴⁴

family.” (first quoting Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1157 (1985); and then quoting *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894)).

⁴⁰ See, for example, the early twentieth-century cases involving parental rights involving their children’s education. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁴¹ 321 U.S. 158, 166 (1944).

⁴² *Id.* at 168 (emphasis added).

⁴³ *Rosenbury*, *supra* note 39, at 833–34 (“Although struggles over authority remain, a general principle has long been clear: absent abuse or other forms of perceived family default, parents enjoy almost complete authority over their children at home, whereas the state may exercise authority over children at school by mandating school attendance and regulating educational curricula” (footnote omitted)).

⁴⁴ See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 389 (2000) (“The right of relational privacy ‘casts a mantle of immunity from state interference around certain intimate and consensual relationships.’ It provides the freedom to create and maintain intimate associations apart from the

Indeed, family privacy frequently produces opposite results to individual privacy.⁴⁵ When children are involved, especially young children, they are often unable, either for developmental reasons or because of incapacities in the law, to defend their own rights and interests.⁴⁶ Family privacy, therefore, authorizes parents to decide on what medical care their children will receive, what activities they will participate in, what kind of education they will receive, what information about the child is shared or kept secret, and so on.⁴⁷ By contrast, the state's power to intervene into these decisions (at least in theory) can only be done to protect the child or to protect general welfare.⁴⁸

The relationship between family and privacy is complex, as many family law scholars have commented.⁴⁹ Professor Katherine Baker describes this tension as follows:

The idea that there is a doctrine of family autonomy or some ideal of family privacy is itself controversial. Professor Fran Olsen uses the word “incoherent” to describe the idea of family privacy. . . . If the state has the power to define who counts as family, how could it be bound to afford the family freedom from state interference? In theory, if the state desired to regulate some activity “within” the family unit, it could simply redefine that activity as outside the familial sphere.⁵⁰

state” (quoting Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078 (1998)).

⁴⁵ See, e.g., Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1902 (2019) (demonstrating how traditional family privacy failed to account for women's individual sexual privacy).

⁴⁶ See Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 423 (2021) (“For their protection, law incapacitates children and places core decisions such as where they will live, and with whom, in the hands of adults. These protective measures, however, make children vulnerable. Because of the uniquely weak position of children in the law, doctrines relating to children often articulate the duties and responsibilities owed to them by adults, especially parents.” (footnote omitted)).

⁴⁷ See GROSSMAN & FRIEDMAN, *supra* note 11, at 264 (“Parents have a constitutional right to make basic decisions for their (minor) children. This is not only legal dogma; it rests on a strong social norm.”).

⁴⁸ See Ryan, *supra* note 46, at 415 (describing the purpose and limits of state intervention into the family).

⁴⁹ See, e.g., Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1225 (1999) (“Privacy within family law has two primary, and interrelated, meanings. First, privacy can mean privatization, the use of internal rather than external norms, and thus, the legal ability to control the rights and responsibilities that attach to any familial relationship. Second, privacy can denote a protected sphere, the right to engage in any activities that one chooses within that sphere.” (footnote omitted)).

⁵⁰ Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412, 418–19 (2022) (quoting Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835, 837 (1985)).

As Professor Baker's comment suggests, the term family privacy may indeed be something of a misnomer.⁵¹ Although the cluster of rights and duties associated with family privacy shares some features with other types of privacy interests (intimate relationships, information privacy), it is perhaps more aptly described as family autonomy.⁵² Family privacy is less about individual bodily autonomy or protection of private data and more about decision-making authority within the family sphere.⁵³ The family home often embodies the privacy elements of family privacy by providing a setting in which parental autonomy is at its peak.

The ideal of a private home life is central to whether courts view a group of people as a family. Family ties are also a key element in the Supreme Court's jurisprudence on the right to live together.⁵⁴ Applying strict scrutiny to a municipal zoning ordinance, the Court articulated in *Moore v. City of East Cleveland*, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."⁵⁵ In other words, families (however the Court chooses to define them) are imagined to live together, and the right to do so is fundamental.

Cohabitation within the same household can also be a crucial element for establishing parentage and parental rights in cases where marriage or biology do not provide a legal basis.⁵⁶

⁵¹ *Id.*; see also Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424–25 (1974) (describing the ambiguity in the Court's use of the terms "privacy" and "autonomy").

⁵² See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 554 (2006) ("*Griswold*, *Eisenstadt*, and *Baird* all protect against . . . governmental interference with people's decisions regarding certain matters of their lives. These cases extend to decisions relating to sex and sexuality, while others extend to decisions concerning the upbringing of one's children. Many commentators have argued that the language of privacy is inappropriate for decisional interference cases, since they primarily concern a harm to autonomy and liberty, not to privacy." (footnote omitted)).

⁵³ See, e.g., Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1145 (1985) ("Generally, the notion of family privacy includes two situations: those in which courts decline to intervene to resolve intra-familial disputes for prudential reasons and those in which they say that law may not properly regulate certain aspects of family relationships.").

⁵⁴ *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977).

⁵⁵ *Id.* at 499.

⁵⁶ See Uniform Parentage Act (2017) § 609(d)(1) (requiring that the individual be a "regular member of the child's household" as an element of establishing de facto parentage).

In cases involving de facto or psychological parents, cohabitation with the child is almost always a required element for establishing a claim to legal parentage.⁵⁷ Cohabitation also arises in cases involving the rights of unmarried biological fathers. Although living with the child is not a formal requirement to establish parentage for unmarried biological fathers, it can be a key factor in determining whether the father has “grasped” his opportunity to form a parent-child relationship.⁵⁸ The relationship between cohabitation and family formation, however, is not automatic: “On the one hand, the home has always been central to the family, but on the other hand, the home is not consistently used as a sufficient or necessary condition for family formation.”⁵⁹

B. Assumptions about Family Privacy

This project seeks to disentangle some of the assumptions that form the web of parental rights, authority, and duties grounded in the private sphere of the home. The following section lays out core assumptions upon which much of modern family law, and law governing the parent-child relationship, rely. When viewed collectively, this seemingly disparate set of family law rules reveals a picture of family life that is based on a set of assumptions. These assumptions form the basis for many decisions in family law, but are rarely interrogated:

Assumption 1: What happens within the home is protected from outside view.

At its core, this assumption supposes that in order for those outside the home to enter into the private sphere of home life, they must have permission. This permission may come from the state (i.e. a warrant) or by invitation or consent of the residents.⁶⁰ Otherwise, the small daily rituals and choices

⁵⁷ See generally Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023) (discussing the range of state law requirements for recognizing functional parenthood).

⁵⁸ See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (“The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.”).

⁵⁹ Pamela Laufer-Ukeles & Shelly Kreiczler-Levy, *Family Formation and the Home*, 104 Ky. L.J. 449, 450 (2016).

⁶⁰ See *Florida v. Jardines* 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s ‘very core’

within a home are shielded from public scrutiny—both legally and practically. Methods of surveillance that are permitted on public streets, such as CCTV, drones, or police patrols, are shunned within the home. Within the home—so long as certain lines are not transgressed—families are shielded from public judgment over how parents raise children, what happens in the marital bedroom, and how individuals conduct their lives.⁶¹

Home protects families from scrutiny by the state. As Professor Melissa Murray describes:

[T]he private sphere includes the home and the family, . . . — entities that are viewed as insulated from state regulation—and gives rise to a degree of “private autonomy which government is bound to respect.” By contrast, the public sphere is that area of activity that is legitimately subject to state regulation.⁶²

The private home serves as an autonomous space into which state actors cannot enter.⁶³

In some ways, this is expressly codified as a constitutional right.⁶⁴ Fourth Amendment jurisprudence continually emphasizes the special protections afforded to the home.⁶⁵ Within this space, state actors must *usually* obtain a warrant

stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

⁶¹ See Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1445 (2023) (“The parent-child-state triad is a well-established concept in American family law, with the presumption that parents act in the best interests of their child while simultaneously recognizing that the State can intervene in the family at the point of abuse or neglect and mandate education to a certain age.”).

⁶² Melissa Murray, *Children of Men: The Roberts Court’s Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 828 (2023) (quoting *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring)).

⁶³ See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1133–34 (2002) (describing the historical developments of family privacy).

⁶⁴ See Dickinson, *supra* note 6, at 1107 (“William Blackstone has raised the home as a paramount legal concept under American law. He noted that ‘every man’s house is looked upon by the law to be his castle.’ Such sentiments have led to the castle doctrine under Supreme Court precedent; that is, a person’s home is his castle, and the common law traditionally protected the house as a ‘castle of defence and asylum.’” (footnote omitted)).

⁶⁵ See Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 912 (2010) (“Homes have achieved iconic status in the modern Fourth Amendment, with judicial rhetoric elevating residential search to the apex of protection.”).

or consent to enter.⁶⁶ Fourteenth Amendment cases show how sexual activity is specially protected in the home.⁶⁷ First Amendment cases show how expression and materials that could be illegal outside of the home receive greater deference inside the home.⁶⁸ The First Amendment doctrine also show how the “home” takes on special meaning for the right to exclude unwanted information from entering; a doctrine, which Professor Katharine Silbaugh explains: “recognizes . . . a parent’s right to choose what their child hears, [and where] the government has wide latitude to regulate speech that threatens that individual right.”⁶⁹

In addition to the constitutional right to exclude, are common law principles grounded in family privacy that restrict judicial scrutiny of family life. The common law’s instinct to separate private family life from the public courtroom can be seen broadly in courts’ resistance to involving the law in the day-to-day relationships within a family.⁷⁰ The doctrine includes inter-familial tort immunities and testimonial privileges, which are designed to keep the private family life out of the courtroom and judges out of the private decisions of families.⁷¹ While many of these doctrines have been minimized or abrogated over the last few decades, especially to the extent that they enabled family violence, they served as important state law corollaries to the federal constitutional developments around family privacy of the same era.⁷²

⁶⁶ See *id.* at 913, 917. But see *Wyman v. James*, 400 U.S. 309, 317 (1971) (holding that “home visits” by social services agencies were not “search[es]” within the meaning of the Fourth Amendment).

⁶⁷ See Citron, *supra* note 45, at 1881 (referencing a rich literature on sexual privacy).

⁶⁸ See John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 42–43 (2012) (describing *Stanley v. Georgia*, 394 U.S. 557 (1969) and the Supreme Court’s treatment of the home as uniquely protected in First Amendment doctrine).

⁶⁹ Katharine Silbaugh & Adi Caplan-Bricker, *Regulating Social Media through Family Law*, 15 U.C. IRVINE L. REV. 1, 47 (2024) (explaining how the “captive audience doctrine” supports parental authority to determine what information their children can access).

⁷⁰ See Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 39 (2006) (describing the common law origins of family privacy).

⁷¹ See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 22 (2000) (emphasizing the relationship between “the law’s adherence to the ideology of nonintervention in the family” and doctrines like inter-spousal and parental tort immunities).

⁷² See *id.* at 23.

Assumption 2: The home is distinct from the market.

This assumption supposes that within the home, labor is uncompensated.⁷³ When it is done by members of the family, the work of raising children, cooking and cleaning, caring for the elderly, and the everyday tasks of “homemaking” do not fall within the sphere of the market.⁷⁴ Regulations applicable to the workplace do not apply to labor within the home.⁷⁵ As Professor Katharine Silbaugh explains: “courts and other legal actors repeatedly decline opportunities to treat housework as work because of the affectionate familial context in which the work is performed.”⁷⁶

Within the home, as well, resource sharing is normal, and exchanges are not arms-length transactions.⁷⁷ Consequently, duties and obligations are defined differently from those that generally govern tort, contract, employment law, and other areas that regulate interactions between individuals in the market. As Professor Janet Halley observed in her rich history of family law, “The idea that the family and its law are the opposites of the market and its law is . . . one form of family law exceptionalism.”⁷⁸ In contrast to the market, common law duties of support between spouses, as well as parents and children, evoke family privacy; dependency is a private matter of familial responsibility, only incurring state involvement when the system of privatized dependency fails.⁷⁹

The traditional notion of “separate spheres” ascribed certain qualities and characteristics to the “private” sphere of the home: domesticity, caretaking, child-raising, and protection

⁷³ Or, at best, indirectly compensated through the benefits the caregiver receives by being a part of the family.

⁷⁴ For a rich analysis of the doctrinal divide between work and home, see generally Yiran Zhang, *Home as Non-Workplace*, 105 B.U. L. REV. 911 (2025).

⁷⁵ *Id.* at 918.

⁷⁶ Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. REV. 1, 5 (1996).

⁷⁷ See Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Laws*, 101 N.C. L. REV. 1305, 1311 (2023) (“U.S. family policy is constructed on the expectation that families will privately supply the resources, services, and conditions that family members need to thrive, largely without the assistance of government.”).

⁷⁸ Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 190 (2011).

⁷⁹ See Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1992 (2018) (describing the role of privatized dependency in American family law); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 4–5 (1992) (describing the idea of “privatization” in economic terms).

from state and market forces.⁸⁰ The “public” sphere, by contrast, is the world of market-based, arms-length transactions, rational economic actors, and of political and civic engagement. In this model, the private sphere is coded as feminine, and the public is masculine.⁸¹ The separate spheres logic assumes that women will serve as caretakers within the home, while men will serve as breadwinners.⁸² Even into the twentieth century, married women had little legal control over their place of domicile, which was, by operation of law, the residence of their husbands.⁸³ And laws regulating marriage and child custody until the 1970s firmly entrenched a gendered separate spheres model into law.⁸⁴

Today, although much of the specifically gendered language has been excised, attitudes about the separate spheres of care work and paid labor shape how courts determine alimony and child custody.⁸⁵ Equitable distribution principles require courts to consider unpaid care work within the family home

⁸⁰ See, e.g., ROSALIND ROSENBERG, *BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM*, at xiv–xvii (1983) (providing a historical account).

⁸¹ See *Developments in the Law—Labor and Employment*, 136 HARV. L. REV. 1604, 1611 (2023) (“One recurring critique is that American workplaces assume a certain ‘ideal worker.’ For much of the twentieth century, most families were structured such that a man could work for pay while his wife provided hours of unpaid homemaking labor, which served to preserve her husband’s time for work. A gendered ‘ideal worker’ assumption resulted in the emergence of what Professor Michelle Travis has called the ‘full-time face-time norm,’ meaning a ‘judicial presumption that work itself is defined by very long hours, rigid schedules, and uninterrupted, in-person performance at a centralized workspace.” (footnote omitted) (quoting Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL’Y 203, 204 (2021))).

⁸² See Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 977, 982–83 (2018) (explaining that until the mid-1970s, parental policies were specifically applied to women because “childcare was perceived as the primary responsibility of women, and if paid employment was taken up, it must take second place to the woman’s responsibilities within the home [and t]his vision that is usually labeled the ‘ideology of separate spheres’ was reflected in court decisions and legislative debates at the time, constructing a normative model of women and gender differences resting on the perceived natural, universal, and unchanging nature of the maternal role” (quoting Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1119 (1986))); see also Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J. FORUM 215, 223 (2021) (questioning the allocating of care work).

⁸³ Note, *The Domicile of a Wife*, 26 HARV. L. REV. 447, 447 (1913) (“At common law, a husband and wife were considered as a single legal unit. Being but one unit they had but one domicile, which was that of the husband.”).

⁸⁴ See Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1524 (2023) (describing the shift on marriage laws in the 1970s).

⁸⁵ For a fifty-state survey on how state courts consider alimony, see generally *Alimony, Maintenance, and other Spousal Support*, THOMSON REUTERS 0080 SURVEYS 11 (2024).

as a contribution to the family that is compensable through the distribution of marital assets, but courts have generally rejected attempts to calculate the precise market value of this kind of work.⁸⁶ Primary caretaker presumptions assume that the parent who cares for the child within the home should have custody.⁸⁷ The centrality of the private home to the raising of children is also reflected in laws that treat the family home differently from other assets in property division and distribution in divorce.⁸⁸ The home, in all of these cases, is seen as a special and protected location for the care of children, and therefore, is treated differently than other types of spaces.

Assumption 3: Provision of public goods happens outside of the home.

This assumption supposes that whereas the home is a space for family privacy and autonomy, public services are distributed or provided in public spaces, such as schools, hospitals, courthouses, and public squares.⁸⁹ Many children interact with the state first through their teachers.⁹⁰ Adults engage in public life—civic participation, political action, community—in *public*. By contrast, the home is the place for the transmission of private values.⁹¹

For at least the last century, the state has intervened into family decision making most forcefully when it takes place in visible public (or quasi-public) spaces such as public housing,

⁸⁶ Silbaugh, *supra* note 76, at 58 (“For those courts that do consider housework, no method of considering it is provided, and no weight is prescribed.”); Mark A. Sessums, *What Are Wives’ Contributions Worth Upon Divorce?: Toward Fully Incorporating Partnership into Equitable Distribution*, 41 FLA. L. REV. 987, 991 (1989) (“Partnership implies that both spouses contributed to the accumulation of marital property either by generating income or by providing the family with services such as homemaking or childrearing.”).

⁸⁷ Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 292 (1992) (“The primary caretaker standard requires courts to award custody to those parents who have been principally responsible for attending to their children’s daily needs . . .”).

⁸⁸ See John Tingley & Nicholas B. Svalina, MARITAL PROPERTY LAW § 45:1 (2d ed.) (discussing how courts allocate the family home in a divorce)

⁸⁹ For a discussion of the meaning of “public goods,” see Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 8 (2001).

⁹⁰ See, e.g., Elizabeth Chu, James S. Liebman, Madeleine Sims & Tim Wang, *Family Moves and the Future of Public Education*, 54 COLUM. HUM. RTS. L. REV. 469, 474 (2023) (discussing the democratic nature of public education, and the role of teachers).

⁹¹ Rosenbury, *supra* note 39, at 839–40 (contrasting public authority, especially in schools, with parental control over the transmission of personal values).

city street corners, and public hospitals.⁹² The same activities, when undertaken within the private home, received deference from the state as to parental authority, while when undertaken in a more public sphere were treated as well within the purview of the state to control.⁹³

Additionally, within the home public support is only available after private resources are exhausted. The private home supports, and is supported by, the American system of privatized dependency.⁹⁴ Under this system, care and support for vulnerable people is a matter for private family concern first, and only a matter for public welfare when there is a breakdown of private support systems.⁹⁵

II

DISRUPTING THE PRIVATE HOME

This Part addresses the technological, economic, and social changes that have, in recent years, disrupted the underlying assumptions upon which the law of the parent-child relationship is grounded. The Covid-19 pandemic served as a catalyst or accelerant for much of what is described in this Part, but it is not the sole cause.⁹⁶ While some trends, such as rates of homeschooling and work-from-home, are already moving back toward pre-2020 numbers, the effects of the pandemic continue.⁹⁷ Even without the pandemic's intense shock to economic

⁹² See Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 851–52 (2015) (describing the Court's rhetoric of treating public spaces and interests differently from those within the home).

⁹³ *Id.*

⁹⁴ See Eichner, *supra* note 77, at 1311 (discussing privatized dependency).

⁹⁵ See, e.g., Courtney Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 171 (2015) (describing the role of privatized dependency in family law).

⁹⁶ For recent work on the public/private divide and the Covid-19 pandemic, see Jason Jackson & Aziza Ahmed, *The Public/Private Distinction in Public Health: The Case of Covid-19*, 90 FORDHAM L. REV. 2541, 2543 (2022) ("The public/private distinction is particularly evident in the guidance around masking and other risk-mitigation policies and advice issued by public health agencies. This public health approach reifies the notion of the home as an exceptional private space that exists outside of the possibility of COVID-19 transmission, obscuring the reality of the high risk of transmission in some households."); see also Susan Frelich Appleton & Laura A. Rosenbury, *Reflections on "Personal Responsibility" After Covid and Dobbs: Doubling Down on Privacy*, 72 WASH. U. J.L. & POL'Y 129, 129–30 (2023).

⁹⁷ See Tareena Musaddiq, Kevin M. Stange, Andrew Bacher-Hicks & Joshua Goodman, *The Pandemic's Effects on Demand for Public Schools, Homeschooling, and Private Schools*, fig.4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29262, 2022) (illustrating nationwide changes in household rates of homeschooling).

and social practices, technological change would likely have moved American home life in this direction anyway, if perhaps less quickly.

How have the three assumptions, described above, that undergird the public/private divide been upended in recent years? First, the ubiquity of social media has made the most private aspects of family life open to public view. Through social media, families have flung open the windows into the home by voluntarily sharing what the law often designates as “private.”⁹⁸ Second, technological developments, coupled with the post-pandemic economy, have brought workplaces into the home.⁹⁹ Even child labor has returned to the home, as children work as models, actors, and content creators in their own homes.¹⁰⁰ Third, since pre-Covid 2020, the number of children homeschooled in America has, by some counts, doubled.¹⁰¹

⁹⁸ For data on social media use and frequency in the United States, see *Social Media Fact Sheet*, PEW RSCH. CTR. (Jan. 31, 2024), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/XU28-UZEW>].

⁹⁹ See Yuting Chen, Patricia Cortés, Gizem Koşar, Jessica Pan & Basit Zafar, *The Impact of Covid-19 on Workers' Expectations and Preferences for Remote Work* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30941, 2023); Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Let Me Work from Home, or I Will Find Another Job* (Becker-Friedman Inst., Working Paper No. 2021-87, 2021) (collecting data on remote work); Kim Parker, Juliana Horowitz & Rachel Minkin, *Covid-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/> [<https://perma.cc/UG7R-K5RY>].

¹⁰⁰ While legal scholarship is only starting to address children and families as social media content creators, law students—many of whom grew up around social media—are clearly aware of this important gap. Student notes have proliferated over the last several years on the topic of child content creators. See, e.g., Nila McGinnis, Note, “*They’re Just Playing*”: Why Child Social Media Stars Need Enhanced Coogan Protections to Save Them from Their Parents, 87 *Mo. L. REV.* 247, 247–48 (2022); Charlotte B. Winckler, Note, *Kidfluencers: How the Law’s Failure to Keep Up Leaves Children Across the Country at Risk of Labor Abuse and Financial Exploitation*, 16 *CHARLESTON L. REV.* 111, 120–21 (2022); Jessica Pacht-Friedman, Note, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 *CARDOZO J. EQUAL RTS. & SOC. JUST.* 361, 362 (2022); Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 *U. PA. L. REV.* 577, 578–79 (2020); Amanda G. Riggio, Comment, *The Smaller Screen: Youtube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 *SEATTLE U. L. REV.* 493, 494–95 (2021); Erin E. O’Neill, Essay, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing*, 72 *STAN. L. REV. ONLINE* 42, 44–45 (2019).

¹⁰¹ For recent coverage of this trend, see William Brangham & Mary Fecteau, *How Homeschooling’s Rise During the Pandemic Has Impacted Traditional School Enrollment*, PBS (May 18, 2023), <https://www.pbs.org/newshour/show/how-homeschoolings-rise-during-the-pandemic-has-impacted-traditional-school-enrollment> [<https://perma.cc/P8CQ-CG59>]; *Post-Pandemic Future of*

Even for those who returned to in-person school, engagement and participation with outside communities, causes, and activities also happen within the home.¹⁰²

This Part grapples with the implications of the shift in what is public and what is private within the home. Part I began by describing the traditional assumptions regarding home life that are integral to family law's treatment of family privacy. This Part identifies the economic, social, and political forces that have recently destabilized these core assumptions. Contrasting the traditional assumptions with the reality of home life in twentyfirst-century America, this Article reveals how the dominant legal view of family privacy is ill-equipped to deal with modern challenges.

A. The Home Is a Stage

Social media has turned the assumption that what happens in the home is shielded from outside view on its head. People of all ages share remarkable amounts of detailed content about the most private aspect of home life.¹⁰³ Some families have become world famous by opening their homes (in specifically curated ways, to be sure) to round-the-clock public view.¹⁰⁴ Reality television made this level of publicity possible for a handful of families before social media was ubiquitous, but now many, many more families can throw open the doors to their private family life, whether to a handful of followers, or to millions across the globe.

Homeschooling, HARVARD KENNEDY SCH. (June 28, 2021), <https://www.hks.harvard.edu/centers/taubman/programs-research/pepg/events/future-homeschooling> [<https://perma.cc/K7Q4-RXS4>]; Thomas S. Dee, *Where the Kids Went: Nonpublic Schooling and Demographic Change During the Pandemic Exodus from Public Schools*, URBAN INST. (Feb. 9, 2023), <https://www.urban.org/research/publication/where-kids-went-nonpublic-schooling-and-demographic-change-during-pandemic> [<https://perma.cc/N6ET-CZWT>].

¹⁰² See generally Benjamin Bowyer & Joseph Kahne, *The Digital Dimensions of Civic Education*, 69 J. APPLIED DEV. PSYCH. 1 (2020) <https://www.sciencedirect.com/science/article/pii/S0193397320301544?via%3Dihub> [<https://perma.cc/TXK8-QEEX>] (describing trends in online civic engagement).

¹⁰³ In 1999, Professor Anita Allen wrote: "Another cause of erosion in privacy-related tastes and expectations could be an avalanche of two related kinds of opportunities. First, opportunities to earn money and celebrity by giving up privacy voluntarily, and second, opportunities to consume other people's privacy and private lives on the cheap," an observation that has become exponentially more apt in the intervening decades. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 730 (1999).

¹⁰⁴ See *supra* note 20 for a discussion of the D'Amelio family.

The home has become a public stage.¹⁰⁵ As of 2021, forty-three percent of households in America reported having smart devices that record and transmit data from within the home (not including smartphones).¹⁰⁶ A substantial majority of children ages 13-18 had social media accounts.¹⁰⁷ Millions of parents and children share images and information about home life to public audiences every day.¹⁰⁸ This massive sharing of seemingly private information does not necessarily violate privacy law (or norms) because, in theory, the sharer consents to the publication of their private information.¹⁰⁹ This is different from most privacy intrusions imagined by the law because this information is shared voluntarily.¹¹⁰ Individuals are generally free to share or reveal (to make public) the private information within their control.¹¹¹

¹⁰⁵ While public scrutiny of family life is not new, the extent to which the public can see into the family home has increased dramatically with social media and smart home devices. See Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 609 (2013) (observing the “ubiquit[y]” of “family performances” over a decade ago when some of the technologies discussed in this article were still new).

¹⁰⁶ Bergur Thormundsson, *Household Penetration of Smart Home Devices in the United States 2019 & 2021*, STATISTA (June 21, 2023), <https://www.statista.com/statistics/1247351/smart-home-device-us-household-penetration/> [<https://perma.cc/2W8R-LGQW>].

¹⁰⁷ See Melinda Wenner Moyer, *Kids as Young as 8 Are Using Social Media More than Ever, Study Finds*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html> [<https://perma.cc/93E4-4EJL>].

¹⁰⁸ See generally Brooke Auxier, Monica Anderson, Andrew Perrin & Erica Turner, *Children’s Engagement with Digital Devices, Screen Time*, PEW RSCH. CTR. (July 28, 2020), <https://www.pewresearch.org/internet/2020/07/28/childrens-engagement-with-digital-devices-screen-time/> [<https://perma.cc/EB8X-R5EG>].

¹⁰⁹ This is a contested point given just how much data is collected, and how little control people have over exactly what information about them is gathered and how it is used. See Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CALIF. L. REV. 1221, 1249 (2022) (“The pervasive and widespread assumption that privacy is about control over data parallels pervasive and widespread practices of privacy-as-control. We read privacy policies, consent to data tracking on a website-by-website basis, click buttons to opt out of certain information processing, and otherwise take personal agency to exercise control over information.”). See generally Ignacio Cofone, *THE PRIVACY FALLACY: HARM AND POWER IN THE INFORMATION ECONOMY* (2023) (discussing how poorly a consent-based model fits with modern data collection techniques).

¹¹⁰ See Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719, 1721 (2019); see also Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 599 (2021) (“The focus on individual selfhood is expressed in the canonical purpose of data governance: informational self-determination. This purpose is consistent with the classic legal view of privacy as control, which offers ways to secure and enact self-determination.”).

¹¹¹ Some laws require individuals to keep information private, which span the gamut of indecency laws to laws about confidentiality. See LAWRENCE M. FRIEDMAN

However, within the home, the notion of consensual sharing is complicated by the fact that other household members may not have consented to the sharing.¹¹² When families share details about private home life, they often do so without regard for their family members whose private lives are also being exposed.¹¹³ The question of consent is even murkier when the person who is being exposed is a child who may lack the capacity to consent to their sharing of their personal details on social media.¹¹⁴ But it is also complicated when a child shares personal details online that implicate their parents or other family members. As Professor Stacey Steinberg explains:

[To understand] how social media has generally impacted family life . . . one must consider privacy laws. While most privacy laws focus on conflicts between individuals and those living outside the family unit, few laws govern how individuals—particularly children—within a family unit can have privacy *separate and apart* from one another—particularly their parents.¹¹⁵

Public sharing about private family life also allows for a level of state and private surveillance that would have been previously impossible. For that reason, the presence of social media and smart home technology in families is not just an issue of individual information privacy. It is also a window for the state to see into the home and, thus, to assert its decision-making authority in a realm that it is once treated as off-limits. Privacy scholars have been concerned about how social media facilitates voluntary relinquishing of privacy rights for years,

& JOANNA L. GROSSMAN, *THE WALLED GARDEN: LAW AND PRIVACY IN MODERN SOCIETY* 113 (2022).

¹¹² See Clare Ryan, *Children's Autonomy Rights Online*, U. CHI. L. REV. ONLINE, <https://lawreview.uchicago.edu/online-archive/childrens-autonomy-rights-online> [<https://perma.cc/LAF2-KQQX>].

¹¹³ See *infra* note 210 for references to many cases in which children have not consented to the use of their images.

¹¹⁴ See Zahra Takhshid, *Children's Digital Privacy and the Case Against Parental Consent*, 101 TEX. L. REV. 1417, 1429 (2023) (“[M]inors are granted limited digital privacy protection in the United States, the core of which relies on the notice-and-parental-consent method. Today, however, protecting children’s digital privacy from parents has become a burning issue. The phenomenon of “sharenting” has increasingly become a danger to children’s privacy, personas, and digital identities.” (emphasis omitted)).

¹¹⁵ Stacey B. Steinberg, Meredith Burgess & Karla Herrera, *Adopting Social Media in Family and Adoption Law*, 2023 UTAH L. REV. 447, 453 (2023) (footnote omitted).

but it is not an issue that has gained as much traction in the family law literature.¹¹⁶

For families in the public eye, decisions about child-rearing are subject to the scrutiny of an anonymous public.¹¹⁷ And, sometimes, by the state. Some high-profile child abuse investigations have been triggered by social media content.¹¹⁸ The distressing details of well-known parenting influencer Ruby Franke's arrest for aggravated child abuse were highly publicized in 2023 when one of her children escaped the home, severely malnourished, and sought help.¹¹⁹ But far more common are reports and investigations into families that do not make national news.

Additionally, child custody disputes now routinely feature social media as evidence used by one parent or the other to demonstrate their ex's unfitness as a parent.¹²⁰ Although

¹¹⁶ For a recent analysis and review of the emerging literature on information privacy, social media, and the law, see generally Amy Kapczynski, *The Law of Informational Capitalism*, 129 *YALE L.J.* 1460 (2020).

¹¹⁷ See Sarah Brayne, Sarah Lageson & Karen Levy, *Surveillance Deputies: When Ordinary People Surveil for the State*, 57 *L. & Soc'y REV.* 462, 463 (2023) (“[T]he networked, data-intensive technologies that have become the infrastructure of everyday life—like smartphones, Internet of Things (IoT) sensors, software, and digital platforms—are both intensifying and transforming [private surveillance practices]. Our analysis shows how these new devices and capabilities benefit the interests of both the user and the state; they allow more expansive and invasive surveillance capabilities as technology evolves; they allow governments to evade privacy-protective legal constraints” (citations omitted)).

¹¹⁸ For news coverage of these cases, see Madeline Holcomb, *What Happens When Parents Abuse and Exploit Children for Internet Fame?*, CNN (Mar. 22, 2019, 6:05 AM), <https://www.cnn.com/2019/03/22/us/hobson-parents-youtube-abuse-claims/index.html> [<https://perma.cc/2Q77-VES9>]; Alex Hern, *FamilyOfFive: Youtube Bans 'Pranksters' After Child Abuse Conviction*, GUARDIAN (July 19, 2018, 11:03 AM), <https://www.theguardian.com/technology/2018/jul/19/youtube-bans-familyof-five-pranksters-michael-heather-martin-child-abuse-conviction> [<https://perma.cc/865T-2VT3>].

¹¹⁹ See Todd Spangler, *Internet Mom Influencer Ruby Franke Arrested on Aggravated Child Abuse Charges*, VARIETY (Sept. 1, 2023, 6:46 AM), https://variety.com/2023/digital/news/ruby-franke-arrested-aggravated-child-abuse-1235710571/?sub_action=logged_in [<https://perma.cc/LT9D-T469>].

¹²⁰ See, e.g., *Montalbano v. Babcock*, 65 N.Y.S.3d 396, 397–98 (App. Div. 2017) (“Here, the mother’s [child custody] petition included a screenshot of a Facebook post in which the father stated that the child himself had operated the boat for the first time, and had raced another boat at 70 miles per hour.”); *Gonzalez v. Dooley*, 614 S.W.3d 515, 522 (Ky. Ct. App. 2020) (“[Mother] uploaded [to Facebook] a picture of Child, with very little clothing, lying on a bed, holding a rose. She testified that she ‘takes the same pose of the child each year on Valentine’s Day and will continue to do so until he is eighteen years old.’ . . . The family court found . . . [the] incidents ‘exhibited poor decision making regarding the child.’”); *Bonds v. Bonds*, 529 S.W.3d 671, 676 (Ark. Ct. App. 2017) (remarking on the mother’s boyfriend’s social media post regarding a child not related to

custody disputes have long been highly invasive inquiries, the kind of sharing that social media facilitates, the access courts have to that shared information, and how it is preserved as evidence, is different in degree, if not in kind from earlier eras.

It is also worth noting that the ones throwing open the doors to the private family home are often family members who, under the traditional model of family privacy, were the “private” sphere actors: mothers and children.¹²¹ The incredibly lucrative “mommy blog” or “momfluencer” industry reifies and subverts the traditional feminine private sphere.¹²² On the one hand, its subject matter is primarily that of the traditional private family—child rearing and homemaking—and the stars of this genre are depicted in the traditionally private home setting.¹²³ On the other hand, these entrepreneurs are engaging with the public market, sometimes garnering enormous sponsorship deals or otherwise monetizing their depictions of private family life.

the custody dispute, the family court observed: “knowing that it was inappropriate, he, nevertheless, posted a photograph of his own child, a toddler, eating a taco with the caption in quotations as if attributable to the child of: ‘I m***f*** love tacos! Suck my baby dick these are f*** delish!’ This action . . . is indicative of an individual who has no business being in position of authority over a minor. This photograph and its quotes are . . . made in public by virtue of his placement of the information into social media. They are forever in the public forum subject to a plethora of uses that would be a detriment to the child now and throughout the child’s life.”)

¹²¹ For a study on children’s expectations of privacy and social media, see generally Lori A. Hoetger, *Kids These Days: Social Media, Evolving Expectations of Privacy, and Implications for the Fourth Amendment*, 2024 U. ILL. L. REV. 1339 (2024).

¹²² See Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1324 (2009); Jessica Grose, Opinion, *Why Are Momfluencers So Good at Worming Their Way into Your Brain?*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/opinion/influencers-moms-parenting.html> [<https://perma.cc/PS2F-F472>]; Ruth Graham, *The Outrageous Mommy Blogger Who Refuses to Stop Writing About Her Kid Highlights a Key Parent-Child Generational Gap*, SLATE (Jan. 8, 2019, 4:07 PM), <https://slate.com/human-interest/2019/01/mommy-blogging-christie-tate-generation-gap.html> [<https://perma.cc/GW85-P53B>]; Neil Patel, *9 Things We Can Learn from the Mom Blog Industry*, FORBES (Nov. 3, 2016, 10:00 AM), <https://www.forbes.com/sites/neilpatel/2016/11/03/9-things-we-can-learn-from-the-mom-blog-industry/?sh=79daa64e2181> [<https://perma.cc/Y48V-RK3X>].

¹²³ A recent iteration of this phenomenon is the “#tradwife” trend in which women espouse a sort of idealized 1950s vision of traditional motherhood as a role within the home, as contrasted to the role her husband plays in the outside world. See Hadley Freeman, *“Tradwives”: The New Trend for Submissive Women Has a Dark Heart and History*, GUARDIAN (Jan. 27, 2020, 12:22 PM), <https://www.theguardian.com/fashion/2020/jan/27/tradwives-new-trend-submissive-women-dark-heart-history> [<https://perma.cc/Q8BX-DSQ9>].

Children are also actively participating in the publicity of private family life. “Kidfluencers” have generated millions of dollars in revenue by showing videos, often live streamed, of their home and family life.¹²⁴ Children, as content creators, have brought compensated child labor back into the home. Of course, they don’t do this alone; behind the scenes are parents who facilitate deals, provide resources, and permission for their children to engage in these forms of labor.¹²⁵ Even when there is no meaningful compensation for the content, many, many families still share details about their private lives on social media.

B. The Home Is a Workplace

The home has always been a site of labor. In previous centuries, homes were primary sites of production, both for the home and for exchange in the marketplace.¹²⁶ The industrial revolution moved production out of the home for most families, as well as much of the *paid* labor that had been performed by servants within wealthy homes.¹²⁷ From this, the traditional American model of labor for pay outside of the home, and uncompensated labor within the home developed.¹²⁸ It also served to entrench the separate spheres, including the insulation of

¹²⁴ See Olivia Levinson, Note, *Embedded Deception: How the FTC’s Recent Interpretation of the Children’s Online Privacy Protection Act Missed the Mark*, 105 MINN. L. REV. 2007, 2009–10 (2021) (“Ryan’s World is one of the most lucrative and frequently viewed YouTube channels in the platform’s history. Ryan got his start on YouTube in 2015 when he was just three years old. His first videos consisted of his parents recording him playing with toys and describing his experience. Ryan has been the highest grossing YouTuber for several years in a row, in part due to advertisement revenue and his own line of products.” (footnotes omitted)); see also Sapna Maheshwari, *Online and Earning Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> [<https://perma.cc/8XAV-A9AE>].

¹²⁵ Levinson, *supra* note 123, at 2009–10; Maheshwari, *supra* note 123.

¹²⁶ See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 9 (2017) (describing a pre-industrial era “where production was not yet separated from the household”).

¹²⁷ Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 YALE J.L. & HUMAN. 205, 205 (2013) (“The move of servants out of the household and into the workplace took place against the emerging ideology of the family/market dichotomy as well as the related philosophy of free labor and freedom of contract.”). In many parts of the country, the use of paid servants was itself a replacement for forced labor within the home under the laws of slavery. See MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* 94–95 (2013) (describing the violence done by the laws of slavery on enslaved families, and their role in the homes of white slaveholding families).

¹²⁸ See *supra* notes 80–82 on “separate spheres.”

family violence from state intervention: “By separating servants out from the family, the legal system hardened the line between family and workplace, legitimating the use of violence against family members even as it deplored the use of violence against employees.”¹²⁹

This model never captured how all labor functioned, but it helped to shape the divide between home and public life. The assumption that the home is not the site for compensated labor is at the heart of the private family/public market divide. If the market and labor are public, they can be regulated by a different set of rules than care work and other work of the home (which is often not treated as work at all).¹³⁰ But that clean division does not apply to many families, especially today. Millions of people are engaged in remote work, and that work often combines compensated market labor and care work.¹³¹ This was acutely true during the pandemic when many people (often women) were working from home for outside employers and caring for family members and teaching their children within the home.¹³²

The last decade has seen a substantial increase in homes as the site of production of goods and services for public consumption.¹³³ This shift takes two main forms. First, are jobs that were once done in offices that can now be performed remotely thanks to changes in technology. And while not all remote work is done from a home, much of it is. The Covid-19 pandemic shifted many jobs from offices into homes and while some have returned to the office, remote work is more prevalent now that it was prior to 2020.¹³⁴ Second, are jobs that

¹²⁹ Atkinson, *supra* note 127, at 224.

¹³⁰ See generally Yiran Zhang, *The Care Bureaucracy*, 99 IND. L.J. 1241 (2024) (distinguishing between unpaid and paid care work).

¹³¹ See *supra* note 99 for statistics on remote work.

¹³² See Naomi R. Cahn & Linda C. McClain, *Gendered Complications of Covid-19: Towards A Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 3-4 (2020) (describing the impact of Covid-19 on women and work).

¹³³ See generally Zhang, *supra* note 74 (describing recent disruptions to the home/workplace dichotomy).

¹³⁴ Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1, 15-16 (2021) (“One of the biggest debates about the post-pandemic workplace is whether this ‘great American experiment’ with telecommuting will and should continue. Although many employers allowed some employees to work from home before the pandemic, most employers did not. Work-from-home is often coveted by working parents because it saves time on commuting and it allows parents to be home when children are not attending their normal daycare/school arrangement.” (footnote omitted) (quoting Patrick Dorrian & Robert Iafolla, *Asthmatic Worker Gets Covid-Related Telework Order*, *For*

could not exist without recent technology—these are jobs of “content creators.”¹³⁵ Rather than replicate office work within the homes, content creators use the home as the studio, the backdrop, and even the subject of their labor.

The pandemic also underscored the unequal nature of family privacy, while some parents had private spaces and employment that permitted them to work from a home office, many did not. The divide between remote workers and “essential workers” starkly revealed a truth that, in the words of Friedman and Grossman, “privacy and its values were one thing for the rich and something else for the poor,” and “self-isolation is an economic luxury.”¹³⁶ Not every worker had the choice about whether to stay home. Professor Deepa Das Acevedo described a shift in Americans’ view of essential work during the pandemic, noting that “essential types of labor include several tasks that are irregular, low prestige, poorly paid, and require little in the way of specialized skills or training.”¹³⁷ The higher prestige, higher paid positions in many fields were more easily transferred to remote work, which has remained a feature of the American economy in the subsequent years.

The transformation of work-from-home in recent years has triggered rethinking about the boundaries of the workplace in various fields of law. In labor law, the Americans with Disabilities Act (ADA) is now more frequently interpreted to permit—or even require—remote work as a reasonable accommodation for workers with disabilities for whom the workplace itself presents barriers to their productivity or ability to perform necessary job functions, which they are able to more easily perform within their own homes.¹³⁸ As Professor Arlene Cantor observed in cases involving reasonable accommodations in employment, “[a]s advances in data protection,

Now, BLOOMBERG LAW (Sept. 17, 2020, 5:38 PM), <https://news.bloomberglaw.com/daily-labor-report/asthmatic-worker-gets-covid-related-stay-against-in-person-work> [<https://perma.cc/LHV8-9938>]].

¹³⁵ By content creator, I mean anyone who produces creative works, including videos, images, and text that is disseminated via social media and involves some form of compensation. That compensation can be in the form of sponsored content, monetized channels, paywalled content (or other forms of direct payment, like Patreon), or in-kind goods and services.

¹³⁶ FRIEDMAN & GROSSMAN, *supra* note 111, at 316.

¹³⁷ Deepa Das Acevedo, *Essentializing Labor Before, During, and After the Coronavirus Pandemic*, 52 ARIZ. ST. L.J. 1091, 1116 (2020).

¹³⁸ See Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORNELL L. REV. 1927, 1945–46 (2022) (describing recent EEOC developments on remote work accommodations).

videoconferencing, and other forms of digital collaboration have become more sophisticated, courts may no longer find as persuasive employers' claims that teamwork, supervision, and personal interaction are essential functions of a job that must be performed at the workplace."¹³⁹

Additionally, some states have recently sought to regulate content creation to more closely resemble traditional labor laws. For instance, several states have passed legislation regarding child content creators.¹⁴⁰ In Illinois, parents must set aside children's social media earnings in a special trust, akin to those used for child actors.¹⁴¹ This includes money parents earn by posting videos of their children to social media. Once they reach majority, children have standing to sue their parents if the money is not properly set aside.¹⁴²

While the labor law implications of the shift in workplace geography is evident, less attention has been given to how these shifts affect family law. But the foundational assumptions that labor done within the home is not compensated by the market is destabilized by this change. The traditional assumption imagines labor at home to include caretaking, cleaning, cooking, and maintaining the home—work that is considered part of the duties of marriage and parenthood and which falls within the traditional private domain of mothers.¹⁴³ It is also the kind of work that is evoked to establish claims to custody of children because it is assumed that the person who labors within the home is the primary caretaker of the child, such that it is in the child's best interest to remain with that parent (and, ideally, within that home).¹⁴⁴ And in cases where individuals must offer evidence to support their claims to parental recognition, such as in the case of *de facto* or psychological parents,

¹³⁹ *Id.* at 1948.

¹⁴⁰ See O'Neill, *supra* note 100, at 45 (discussing federal and state law exemptions for child performers and for children who work for parents).

¹⁴¹ Ill. Pub. Act 103-0556 (amending the Child Labor Law to include compensation for online content made by minors).

¹⁴² For more on this first-of-its-kind legislation, see Claire Savage, *Starting Next Year, Child Influencers Can Sue if Earnings Aren't Set Aside, Says New Illinois Law*, AP News (Aug. 12, 2023, 2:55 PM), <https://apnews.com/article/tiktok-child-influencer-illinois-social-media-f784b4bc52cb75ad1e0d28785993b1c5> [<https://perma.cc/9VJ9-RAWL>].

¹⁴³ See *supra* Part I.

¹⁴⁴ See generally Andrea G. Nadel, Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R.4th 1129 (1985) (collecting cases establishing "[p]rimary caretaker role of respective parents as factor in awarding custody of child").

cohabitation and care within the home for that child is often a necessary element to prove.¹⁴⁵ However, in an era where work within the home does not necessarily fit this caretaking model, these expectations may be subverted.

In addition, grounding labor for pay within the home destabilizes the twentieth-century developments in regulating child labor. These laws imagined the dangers children would face working outside of the home, even expressly excluding work in the home (such as the family farm) from regulation.¹⁴⁶ Child labor assumptions are also disrupted by recent technological changes, which go back farther than 2020, but which are still quite recent.¹⁴⁷ Children are content creators, earning sometimes staggering sums of money within their homes through social media.¹⁴⁸ Parents are also creating paid content using their children as models, actors, and sources for their work.¹⁴⁹ The model that has been applied in most cases so far to social media child labor is that of the private home and parental authority.¹⁵⁰ Generally, so long as children are receiving an education and are not being subjected to abuse or neglect, parents have the power to decide how much work their children are allowed to do online, and how they are compensated.¹⁵¹

C. The Home Is a School*

In March 2020, millions of homes turned into schools overnight as children attended virtual classes. Although most children have returned to schools outside of the home, many did

¹⁴⁵ See generally Joslin & NeJaime, *supra* note 57.

¹⁴⁶ For recent work on the topic of child labor's historical and modern iterations, see generally Naomi Cahn, Maxine Eichner & Mary Ziegler, *Children at Work, Parental Rights—and Rhetoric*, 77 ARK. L. REV. 257 (2024).

¹⁴⁷ To be sure, many people still work outside of the home, including children. See *id.* Recent news stories abound recounting the awful conditions in which children—often migrant children—have been working in US factories, farms, and fast-food operations. See Jennifer Sherer & Nina Mask, *Child Labor Laws Are Under Attack in States Across the Country*, ECON. POL'Y INST. (Dec. 21, 2023), <https://www.epi.org/publication/child-labor-laws-under-attack/> [<https://perma.cc/JVP4-4MFL>].

¹⁴⁸ See *supra* note 124 for information on children as content creators.

¹⁴⁹ See *supra* note 124 for information on children as content creators.

¹⁵⁰ See *supra* note 100 for recent law review student notes discussing the limitations of the current model.

¹⁵¹ See Stacey Barell Steinberg, *Beyond Sharenting*, 99 SO. CAL. L. REV. (forthcoming 2026) (advocating for a child welfare approach to parents' control over children's images and content on social media).

* And a doctor's office, and a public forum . . .

not.¹⁵² Many more children are homeschooling than were prior to 2020, and they do not necessarily fit the stereotypical image of insular, religious homeschooling families.¹⁵³ Some families are choosing the private home as the site of education for a range of reasons, including: unsafe and violent schools; curricular changes that exclude discussion of sex and gender identity or “critical race theory;” or simply because the parents are able to spend more time at home with their children because they are working from home.¹⁵⁴

Education is not the only public good that has entered the private home in new ways. Engagement with social movements and political causes, once a paradigmatic public sphere activity, is now often done within the home through online platforms.¹⁵⁵ Public spaces of all sorts, especially for digital native generations, may often be virtual and not grounded in a physical geography. This blurs the line even further between the private home and the public world outside.

Telehealth has also brought medical care into the home, in ways that were unimaginable a decade earlier.¹⁵⁶ The role of healthcare providers as lines of defense against child abuse depend largely upon the child’s interaction with these professionals in doctor’s offices, school nurses’ offices, and hospitals.¹⁵⁷ While many children still receive medical care through these

¹⁵² See *infra* note 154 for a discussion of homeschooling data in the United States.

¹⁵³ See Lawson B. Hamilton, *Parent, Child, and State: Regulation in A New Era of Homeschooling*, 51 J.L. & EDUC. 45, 47–48 (2022) (“[H]omeschooling continues to increase, diversify, and become a more mainstream educational option.”).

¹⁵⁴ For a discussion of recent trends in homeschooling, see *Homeschooled Children and Reason for Homeschooling*, NAT’L CTR. EDUC. STATS. (May 2022), <https://nces.ed.gov/programs/coe/indicator/tgk/homeschooled-children> [<https://perma.cc/V58J-YTND>]; Laura Newberry, *The Pandemic Pushed More Families to Home-school. Many Are Sticking with It*, EDUCATIONWEEK (Jan. 28, 2022), <https://www.edweek.org/policy-politics/the-pandemic-pushed-more-families-to-home-school-many-are-sticking-with-it/2022/01> [<https://perma.cc/XF8S-39EM>].

¹⁵⁵ This is not to say that all, or even much online engagement is the kind of public good civic engagement envisioned in earlier times. A lot of online interaction is radicalizing, hateful, anonymous, and/or isolating.

¹⁵⁶ See generally Allison Curfman et al., *Telehealth: Improving Access to and Quality of Pediatric Health Care*, 148 PEDIATRICS 1 (2021), <https://connectwithcare.org/wp-content/uploads/2022/04/Telehealth-Opportunities-to-Improve-Access-Quality-and-Cost-in-Pediatric-Care.pdf> [<https://perma.cc/SRZ3-F9FU>].

¹⁵⁷ For the procedures by which pediatricians review indications of abuse and neglect during interactions with patients, see generally Cindy W. Christian, *The Evaluation of Suspected Child Physical Abuse*, 135 PEDIATRICS 1 (2015), <https://med.jax.ufl.edu/calendar/attachments/6579/christianetaltheevaluationofsuspectedchildphysicalabuse2015.pdf> [<https://perma.cc/N25B-B6NL>].

methods, the use of telehealth and telemedicine has expanded significantly. Remote visits between doctors and children may not provide healthcare professionals with the same information about the child as an in-person visit could.

Homes have always been sites of caretaking and education, but in the modern era, the private work of caring for children has stood in contrast to the public work of teaching and healing them. As Professors Millat and Murry observed, “While once inseparable, education and childcare are now siloed, with education a core function of the state, and childcare the private charge of the family.”¹⁵⁸ Schools serve as checks on family privacy, where teachers and school-based professionals observe children, and report concerns about abuse or neglect to state authorities. One implication of this migration of public activities into the home is that child abuse reporters, such as teachers, doctors, and even law enforcement, might not see some children in the same spaces where they once were.¹⁵⁹

The 2020 turn to remote learning for almost all children in the United States had a profound impact even for those children who returned to in-person classrooms in 2021-22.¹⁶⁰ Parents, many for the first time, were given a window into their children’s day-to-day learning. This shifted the relationship between parents and schools; parents became direct providers of public education by setting up their children’s zoom classes, helping them with remote assignments, teaching school curriculum, and monitoring their children’s behavior throughout the day.¹⁶¹ In addition to the disruptive effect this period had on many children’s learning and on many parents’ (especially

¹⁵⁸ Caitlin Millat & Melissa Murray, *Education as Childcare*, 101 N.C. L. REV. 1463, 1465 (2023).

¹⁵⁹ Benjamin H. Levi & Sharon G. Portwood, *Reasonable Suspicion of Child Abuse: Finding a Common Language*, 39 J.L. MED. & ETHICS 62, 63 (2011) (“[T]he trigger for [a child abuse] investigation is reporting, most of which issues from mandated reporters. All 50 United States have laws that mandate reporting by anyone whose professional work brings them into routine contact with children. Almost 40 professions are designated mandated reporters, including teachers, law enforcement personnel, firefighters, health care professionals, social services providers, and child care workers.” (footnote omitted)).

¹⁶⁰ See Cory Turner & Sequoia Carrillo, *K-12 Students Learned a Lot Last Year, but They’re Still Missing Too Much School*, NPR (Feb. 9, 2024, 2:00 PM), <https://www.npr.org/2024/02/09/1228441120/covid-schools-students-learning> [<https://perma.cc/U67K-PB5N>] (breaking down by state the school participation rates and learning loss after 2020).

¹⁶¹ See *id.* Many accounts exist of the range of experiences of a diverse array of families is providing access to education during the Covid-19 Pandemic, see Millat & Murray, *supra* note 158.

mothers')¹⁶² workforce participation, it also meant that some parents developed an increased sense of ownership over their children's education that before had been left to teachers and school administrators.

The wave of "parental rights" legislation in 2021¹⁶³ and onward is best understood in the context of the shifting boundaries of public and private functions in the home. Parents were emboldened to challenge public school curriculum after taking a more active role in the provision of this public good when their children were stuck at home. Professor LaToya Baldwin Clark situates this "parental rights" movement in the long history of parental mobilization around race, noting that "schools have long been foundational sites of racial contestations, and curriculum wars are not new. Predictably, these struggles mobilize parents, and mobilizing White parents for racially regressive ends has been a recurring response to racial reform efforts, however modest."¹⁶⁴ She also emphasizes the importance of the pandemic era at-home school to the current anti-CRT movement, describing several situations in which parents overheard or observed their children's classroom, including one who "claimed that her child's teacher was engaging in indoctrination [by discussing] 'critical race theory "buzz" words such as: bias, discrimination, equity, inequity, racist, etc.'"¹⁶⁵

Even for the children who attend school outside of the home, their contact with the outside world does not end when they get off the school bus and sit down at the kitchen table. Children are educated by smart devices, which answer questions like "what is 3x3?" and "what happens when we die?"¹⁶⁶ This

¹⁶² See Porter, *supra* note 134, at 4 ("By January 2021, the US female labor force participation rate had fallen below 56 percent, the lowest since 1987. This impact is mostly felt by low-income women and women with children, especially young children." (footnote omitted)).

¹⁶³ See LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 *YALE L.J.* 2139, 2146 (2023) ("Between January 2020 and December 2022, state lawmakers in at least thirty-four states introduced parents' rights bills alongside anti-CRT efforts.").

¹⁶⁴ *Id.* (footnotes omitted).

¹⁶⁵ *Id.* at 2187.

¹⁶⁶ This is not as recent a phenomenon as some of the others discussed in this Part but has been a feature of American family life for at least the past eight years. See Robbie Gonzalez, *Hey Alexa, What Are You Doing to My Kid's Brain?*, *WIRED* (May 11, 2018, 4:31 PM), <https://www.wired.com/story/hey-alexa-what-are-you-doing-to-my-kids-brain/> [<https://perma.cc/MT63-XDND>]; Michaelen Doucleff & Allison Aubrey, *Alexa, Are You Safe for My Kids?*, *NPR* (Oct. 30, 2017, 4:51 AM), <https://www.npr.org/sections/health-shots/2017/10/30/559863326/alexa-are-you-safe-for-my-kids> [<https://perma.cc/P686-U953>]; Rachel Botsman,

has become so prevalent that companies producing devices like Alexa or Amazon Echo employ child psychology experts to craft answers that are developmentally appropriate (or even prompt children to say “please” when asking questions).¹⁶⁷ Sometimes, these devices are programmed to deflect the kinds of questions once reserved for parents (“what is sex?” “Does God exist?”), but that does not always work. Debates over screentime are everywhere in parenting conversations, but the fact is that most children do have access to some form of internet-enabled device at home, which grants them access to a much broader array of teachers—good and bad—than they have ever had before. The role of educating children within the home may once have fallen within the purview of the private caretaker, but today, children can continue to receive instruction and be exposed to all kinds of teaching while at home whether their parents are aware of this education or not.

Not all public benefits and services are directly intended to benefit of the person receiving them. Consider the insights provided in the recent article by Professor Kate Weisburd, who meticulously documents how homes have become carceral sites for the millions of people subject to electronic monitoring and house arrest.¹⁶⁸ Technology that facilitates remote supervision by the carceral state erodes home privacy for those whose lives it touches perhaps more than any other single shift described in this Article.¹⁶⁹ Homes have also become disciplinary sites for children struggling with behavioral challenges that public school are unwilling or ill-equipped to deal with. Rather than find public options for these children, school districts have started turning to online learning programs, which allow the school to ostensibly fulfil its educational obligation to the child, while outsourcing all responsibility for supervision and care to the family.¹⁷⁰

Opinion, *Co-Parenting with Alexa*, N.Y. TIMES (Oct. 7, 2017), <https://www.ny-times.com/2017/10/07/opinion/sunday/children-alexa-echo-robots.html> [<https://perma.cc/G3YP-3ADD>].

¹⁶⁷ See Rachel Withers, *Alexa Is Shielding Children from the Truth*, SLATE (Aug. 24, 2018, 11:32 AM), <https://slate.com/technology/2018/08/the-amazon-echos-kid-friendly-setting-freetime-lies-to-children.html> [<https://perma.cc/6TSQ-T46C>].

¹⁶⁸ Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879, 1883 (2023).

¹⁶⁹ *Id.* at 1894–95.

¹⁷⁰ See Erin Einhorn, *Schools Are Sending Kids to Virtual Classes as Punishment. Advocates Say That Could Violate Their Rights.*, NBC NEWS (May 4, 2021, 4:31 AM), <https://www.nbcnews.com/news/education/schools-are-sending-kids-virtual-classes-punishment-advocates-say-could-n1266152> [<https://perma.cc/6TSQ-T46C>].

As the home becomes a site of public provision of services, the home becomes less private and the public services becomes less public. The home becomes an increased site of surveillance. At the same time, provision of public benefits within the home can make the process of their provision less subject to the kinds of public oversight and participation by public actors that we might expect. And because the porous boundary between public and private within the home does not affect every home and every family equally, these shifts are primed to affect even greater inequalities between those families whose choices and interests are protected by law and those whose choices are ignored or even criminalized.

III

THE PROBLEM(S) WITH THE PRIVATE HOME

Acknowledging that the paradigm of the private family home no longer fits with lived reality may be a frightening prospect. Family privacy can be a powerful shield against state intervention.¹⁷¹ It is also important to recognize that it was never a model that fit every family. As the critical scholars have very aptly described, poor families, Black families, undocumented families, indigenous families, and queer families have often been excluded from the protections of family privacy.¹⁷² Sometimes this is because they are not seen or treated as family by the law. Sometimes it is because they are unable to access the private home that stands as the physical marker of family privacy. Sometimes it is because the state has forced them to renounce family privacy in order to survive. Often it is a combination of all three forces working together to deprive families of the protections that privacy is supposed to provide.¹⁷³ Even when family privacy is the operating norm, that may come at the expense of individuals within the family. Many feminist scholars have raised trenchant critiques of family privacy that has been used to justify family violence, exploitation, and deprivation that the state refuses to remedy.¹⁷⁴ It also serves as the bedrock for the privatized family, which is expected to care for its own, especially financially.

cc/964B-VGLUJ (describing an increase in virtual classes as a way to remove children with behavioral challenges from the classroom).

¹⁷¹ See Part I for more discussion of the protective role of family privacy.

¹⁷² See *infra* notes 182–88.

¹⁷³ See *infra* subpart III.2.

¹⁷⁴ See *infra* notes 175–79.

In the decades leading up to the transformations in family life described in this Article, scholars, and advocates began launching powerful critiques of family privacy. Put simply, the critical scholars discussed in this Part contend that family privacy protects too much, and not enough. Both of these veins of critical analysis of existing family privacy doctrine take on new dimensions in the current social, economic, and legal landscape.

A. The Private Home & Family Violence

A longstanding and powerful feminist critique of family privacy is that it is an abdication of state responsibility, a sphere outside the scope of state law in which vulnerable individuals are at the mercy of more powerful family members.¹⁷⁵ Under this view, the family can be a place of violence, abuse, and isolation. The more light that is shone on what happens within the home, the more support and protection individuals can receive.¹⁷⁶ As Professor Sally Goldfarb explained: “American law has long embraced a fundamental distinction between the public and private spheres. As a result, certain issues important to women, including domestic violence and sexual assault, have traditionally been deemed private and therefore exempt from legal scrutiny.”¹⁷⁷

Much of this critique of family privacy focuses on women’s experience within the home. In her pathbreaking book, for instance, Professor Jeannie Suk describes the role of the private home in facilitating domestic violence, and the ways in which advocates and legal actors worked to open the home to greater scrutiny in the late twentieth and early twenty-first centuries.¹⁷⁸ The feminist critique takes aim at arcane assumptions of

¹⁷⁵ See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 973–74 (1991) (“The notion of the family as a sphere of privacy, immune from state interference, is central to *Griswold*. But *Griswold* . . . is premised on an idealized vision of marriage as ‘enduring and intimate,’ promoting ‘harmony in living.’ . . . The concept of freedom from state intrusion into the marital bedroom takes on a different meaning when it is violence that goes on in the marital bedroom.” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

¹⁷⁶ Scholarly critiques of family privacy offer distinct perspectives and are far more nuanced than this brief description. My objective is to sketch the broad contours of the debate over family privacy, rather than to capture the thesis of any specific scholar.

¹⁷⁷ Goldfarb, *supra* note 71, at 1.

¹⁷⁸ JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 4-7 (2009). While a remarkable contribution to the discourse, the book says very little about children.

intimate adult relationships at the heart of family privacy: men operate in the public sphere, and are economic, social, and civic actors, while women operate in the private sphere, and are homemakers and caretakers, whose primary duty is to carry and raise children; men have authority over their homes and can engage in discipline (including physical violence) over all members of the household, but must also provide for the household and ensure that they are not dependent upon public assistance; marriage defines these gendered roles and forms the structure of the household.¹⁷⁹

These feminist critiques, among others, succeeded in powerfully dismantling a core element of the private home: domestic violence and marital rape are no longer treated as matters outside of the law's consequences.¹⁸⁰ This body of feminist scholarship, however, paid less attention to the parent-child relationship. The focus of this critique was intimate adult relationships, and the subjugation of women's needs and interests under traditional family and constitutional law. The feminist critiques of family privacy, however, provide crucial insights into parental control over children within the home as well.

B. The Private Home & Exclusion

The other major critique leveled at family privacy is that many families are excluded from its protection. Parents who seek state assistance waive their rights to family privacy, if they ever had such rights to begin with. Poor families, especially Black families, are subject to surveillance by state agencies to a degree that denies the possibility of privacy.¹⁸¹ In her book, *The Poverty of Privacy Rights*, Professor Khiara Bridges dismantles

¹⁷⁹ Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *YALE L.J.* 2117, 2120 (1996). In her foundational article on the history of privacy and violence in the home, Professor Siegel explains:

Instead of reasoning about marriage in the older, hierarchy-based norms of the common law, jurists began to justify the regulation of domestic violence in the language of privacy and love associated with companionate marriage in the industrial era. Jurists' reasoning in this discourse of "affective privacy" progressively abandoned tropes of hierarchy and began to employ tropes of interiority to describe the marriage relationship, justifying the new regime of common law immunity rules in languages that invoked the feelings and spaces of domesticity.

¹⁸⁰ See Kim, *supra* note 39, at 558 ("Legal reform regarding domestic violence is born fundamentally of skepticism toward the 'public-private' distinction and privacy's subordination of wives and mothers in the domestic sphere.")

¹⁸¹ See Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 *BROOK. L. REV.* 1389, 1389, 1400 (2012).

piece by piece the image of family privacy as an effective bulwark against state interference for poor, Black families (especially single mothers).¹⁸² As Professor Charissa Smith describes, “[t]hroughout the U.S., the family policing system targets families of color in low-income communities in situations that are overwhelmingly linked to underlying poverty and socioeconomic disadvantage, while also penalizing marginalized families for behavior that is widespread across the population.”¹⁸³ When the main shield against state surveillance is the home, those who are unable to obtain a stable, permanent home have lost the most powerful tool in the family privacy arsenal. The home is not available to all people who wish to enjoy the protections that it affords.¹⁸⁴

Scholars have long noted that people who are excluded from the privileged privacy of white, single-family neighborhoods are far more visible to state surveillance, police contact, and arrests.¹⁸⁵ As attorney Anna Belle Newport described:

Indigent families are unequally exposed to surveillance and monitoring . . . since families must “open themselves up to the state as a condition of receiving public benefits.” Caretakers living in low-income communities are more likely to use public services than caretakers of greater socioeconomic privilege. Parents are surveilled by a variety of social service providers, including shelter workers, public housing employees, public school officials, and hospital staff.¹⁸⁶

¹⁸² KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 130 (2017) (describing the trap for poor Black mothers between seeking welfare services and waiving privacy rights or incurring state surveillance and child removal because of poverty).

¹⁸³ Charisa Smith, *When COVID Capitalism Silences Children*, 71 U. KAN. L. REV. 553, 562 (2023).

¹⁸⁴ See Nestor M. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119, 124–26 (2012) (describing the value placed on “home” and especially homeownership and the exclusion of those who do not possess a home). For a critique of how the state polices and regulates certain kinds of home lives, see Swan, *supra* note 92, at 829.

¹⁸⁵ See *supra* Part I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43, 45 (2009); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 790 (1999) (referring to the construction of “visibly lawless” people as a form of racist policing of public space).

¹⁸⁶ Anna Belle Newport, *Civil Miranda Warnings: The Fight for Parents to Know Their Rights During a Child Protective Services Investigation*, 54 COLUM. HUM. RTS. L. REV. 854, 867 (2023) (footnote omitted) (quoting Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 612 (2020)).

This visibility is also present in child removals, where children who are more likely to come in contact with mandated reporters are more likely to be the subject of abuse or neglect investigations.¹⁸⁷ But it is not a matter of chance that poor, Black children are more likely to be in public spaces. That is deeply interconnected with the failure of state policies to provide safe and adequate shelter, and years of destruction and economic deprivation of Black communities.¹⁸⁸ As Professor Weisburd explains:

[S]o long as reform efforts and modern welfare regimes continue to deploy social control and surveillance methods targeted at private life, the home as a “constitutionally protected area” becomes an empty promise. Indeed, the law’s continued focus on the physical home as the legal “firm line” between protected and unprotected spaces risks legitimating a hierarchy of privacy protections, reinforcing racialized surveillance¹⁸⁹

Professor Tarek Ismail describes how for families caught up in child abuse and neglect investigations, the home’s privacy is vastly diminished:

Most state statutes or regulations explicitly require a search of (or the less intrusive-sounding “visit to”) the home as part of a [child abuse or neglect] investigation, some only authorize such a search, and other states do not mention home searches whatsoever in their state code. Even when state statutes do not specifically require that the home be searched, they invariabl[y] require a CPS agent to “interview every child in the home” or to “speak with every adult who lives in the home.” Thus, everywhere, CPS is concerned about what is happening in the place where the child lives.¹⁹⁰

¹⁸⁷ See Jessica Dixon Weaver, *A Critical Race Theory Approach to Children’s Rights*, 71 AM. U. L. REV. 1855, 1881 (2022) (“[R]acial bias and discrimination among child welfare staff and mandatory reporters (like teachers and health professionals), as well as institutional racism, may be inherent in the policies and practices of child welfare agencies.”); Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 130 (2019).

¹⁸⁸ See DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 161–67 (2022); Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 329 (2017) (“[T]he modern criminal justice regime has rewritten family law and family life, especially for Black families.”).

¹⁸⁹ Weisburd, *supra* note 168, at 1885 (footnote omitted).

¹⁹⁰ Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1500–01 (2023) (footnotes omitted).

Queer scholarship makes a resonant argument about intimate privacy. Historically, queer intimacy was not afforded the protections of family privacy, even when it occurred within private homes.¹⁹¹ While the private home rationale expanded to encompass some expressions of queer sexuality and intimacy after *Lawrence v. Texas*, it did so only insofar as that sexual expression conformed to the existing private home model.¹⁹² Public expressions of sex and sexuality remain policed and punished.¹⁹³ Criminalizing certain forms of sexual relationships and expression is also closely tied to decisions about fit parenthood. While it may no longer be permissible for court to base a “best interests of the child” assessment solely on a parent’s sexual orientation, sexual expression outside the bounds of the private home remains a ground for denying parents’ custody.¹⁹⁴

These two broad categories of critique—too much and not enough—are not incompatible with each other, even though one sees family privacy as facilitating family violence, while the other sees family privacy as a privilege afforded only to certain families. Together, they describe a world in which powerful people can operate without state intervention, while those who fail to conform to a particular normative view of the family are punished.¹⁹⁵ It also follows from this traditional view of the

¹⁹¹ See Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 B.C. L. REV. 801, 842 (2023) (“Queer people similarly have been forced out of the homes in order to find each other, explore their authentic selves, and escape the heteronormative expectations of their nuclear families. Nevertheless, judges and lawmakers tell them that they should reasonably expect to be punished at work, in court, and by society when their ‘public’ activities are documented without their consent. This spatial construction of private versus public represses the sexual agency of both straight women and queer people.”).

¹⁹² See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1401 (2004) (“[I]t is a curious form of liberty that Justice Kennedy reaches for in *Lawrence*. ‘Liberty protects the person from unwarranted government intrusions into a dwelling or other private places,’ he writes. ‘Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.’ Yet the liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated.” (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003))).

¹⁹³ See Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 4 (2008).

¹⁹⁴ Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 175–76 (2020) (describing the best interest of the child assessment in relation to parents’ sexual expression).

¹⁹⁵ Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L.Q. 227, 227 (2010) (“Historically, criminal law and family law have worked in tandem to produce a binary view of intimate life

private home that when a person who is meant to exist primarily within the private sphere is visible in the public sphere, they are subject to even greater state control.

IV

FAMILY AUTONOMY REIMAGINED

So far, this Article has attempted to paint a picture of how family law's assumptions are grounded in a particular vision of the home and the public/private spheres. The Article then revealed how these assumptions are a poor fit for modern life and the implication of this mismatch between law and lived experience. This Part looks to the future. In what ways could the tension between the existing family law and the permeable—sometimes flip-flopped—public/private divide in the twenty-first century home produce legal changes?

When core features of a legal regime no longer fit the lives of those that it governs, there is an opportunity to fundamentally change the underlying legal rules. Professors Millat and Murray offer a hopeful note: “[S]ome positive changes emerged as institutions refashioned themselves in the pandemic’s wake. . . . [T]he pandemic, though incredibly disruptive, has also served as a powerful catalyst for change and reimagining long-held beliefs, allegiances, and structures.”¹⁹⁶ There is, of course, also a real likelihood of retrenchment and preservation of the existing power balance.¹⁹⁷ With this caution in mind, how might the changes to what is public and private open new avenues for responding to the above critiques of family privacy?

A. New Public/Private Homes

Social media and remote work offer new opportunities for traditionally private sphere actors, such as stay-at-home mothers, to earn income and communicate their experiences to

that categorizes intimate acts and choices as either legitimate marital behavior or illegitimate criminal behavior.”).

¹⁹⁶ Millat & Murray, *supra* note 158, at 1464–65.

¹⁹⁷ Murray, *supra* note 62, at 800–01. Professor Murray has observed this trend of retrenchment in other privacy rights cases, through what she terms a “jurisprudence of masculinity,” which “recasts the legal landscape to ensure maximum solicitude for the protection of men and the exercise of men’s rights. Specifically, it reorganizes the traditional public-private divide to insulate men’s bodies from the imposition of state regulation, it recasts women’s bodies in terms that make them particularly susceptible and well-suited to public regulation, and it recharacterizes the relationship between the state, rights, and regulation.” *Id.* at 800.

the outside world. The internet offers an outlet for those who might otherwise suffer from the isolation and lack of agency that traditional family privacy sometimes brings. It permits people to share and communicate their experiences, to organize and participate in civic life, and to provide unpaid care work within the home while also earning an income. It also provides a way for the public sphere to come into the home. Adults and children can learn and interact with the outside world in ways that were never previously available. Young people can, at least in theory, set themselves up for financial independence through their work as content creators or influencers. Survivors of abuse within the home can shed light on their situations, and harmful parenting practices can receive public scrutiny and reprobation.

Recent economic and social changes also enable public functions to happen within the relative privacy and autonomy of the home. For instance, children who are more likely to experience school discipline and CPS interventions have an opportunity to exit public school surveillance. One of the groups with the largest post-Covid increases in homeschooling are Black families, some of whom see this as a chance to educate their children in a safer, more supportive, less punitive environment.¹⁹⁸ Especially in rural areas, families who live far from public services, like doctors, can provide increased care for their children within the home.

While these salutary changes are possible, harmful consequences also flow from the upending of traditional family privacy. The U.S. Surgeon General's advisory about the harms of social media use in young people highlights the dangers of a world in which kids are constantly online.¹⁹⁹ As the first generation of children who found fame on platforms like YouTube become adults, more and more stories of harmful experiences have come to light.²⁰⁰ The "mommy blog" world, too, has ex-

¹⁹⁸ See Athena Jones & Nicquel Terry Ellis, 'A Form of Resistance': More Black Families are Choosing to Homeschool Their Children, CNN (Mar. 1, 2023, 1:54 PM), <https://www.cnn.com/2023/03/01/us/black-families-home-school-reaj/index.html#:~:text=According%20to%20census%20data%2C%20the,largest%20of%20any%20racial%20group> [<https://perma.cc/GDZ5-L23G>] (noting that Black families experienced the largest jump in post-2020 homeschooling of any racial group).

¹⁹⁹ See Ed Pilkington, *US Surgeon General Issues Advisory on 'Profound' Risks of Child Social Media Use*, GUARDIAN (May 23, 2023, 11:13 AM), <https://www.theguardian.com/media/2023/may/23/social-media-warning-kids-mental-health> [<https://perma.cc/GQ6P-3WR8>].

²⁰⁰ See Kate Lindsay, *The First Social-Media Babies are Growing Up—and They're Horrified*, ATLANTIC (May 23, 2023), <https://www.theatlantic.com/>

perienced a number of reckonings as participants grapple with the repercussions of sharing so much of their families' private lives online.²⁰¹ Judges in child custody cases can delve even deeper into the private lives of litigants by reviewing (and even restricting) their social media use.²⁰² And while previous hidden abuse might come to light via social media, there are also troubling examples of parents abusing their children in order to garner views, through "prank" channels and by exposing children to online predators.²⁰³

Nor is it clear yet how much protection is really offered by online schooling and other opportunities that allow Black children, and other children who are ill-served by the public education system, to exit the public spaces that were typically sites of state intervention into the private family.²⁰⁴ Most children still attend public school, nor does removal from school necessarily remove the child from the state's view.²⁰⁵ Indeed, it might result in increased surveillance or intervention under state educational neglect laws.²⁰⁶ Just because some families have been able to use the home, and homeschooling, as a defense against state intervention does not mean that this protection will be offered to all families.

technology/archive/2023/05/parents-posting-kids-online-tiktok-social-media/674137/ [https://perma.cc/K5TP-9NKB]; Fortesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made into Content*, TEEN VOGUE (Mar. 10, 2023), <https://www.teenvogue.com/story/influencer-parents-children-social-media-impact> [https://perma.cc/YG7P-D7BW].

²⁰¹ The recent death of one of the most influential bloggers in this space has generated considerable discussion about this field. See Sara K. Eskridge, *Mom, Interrupted: Heather Armstrong's Journey from Mommy Blogger to Cautionary Tale*, SALON (May 13, 2023, 12:59 PM), <https://www.salon.com/2023/05/13/heather-armstrong-dooce-mommy-blogger-to-cautionary-tale/> [https://perma.cc/JQ35-AX3K].

²⁰² See *supra* note 120 for more on custody and social media.

²⁰³ See *supra* note 118 for more information on child abuse cases and social media.

²⁰⁴ For a critical look at how Covid-19 policies excluded and harmed young people, see Smith, *supra* note 183, at 572 ("The COVID-19 pandemic and its accompanying recession continue to place U.S. children and families in precarity just as U.S. policymakers deprioritize most life-affirming and empowering measures. These developments ultimately silence children by curtailing their available resources and development, magnifying their vulnerability, and stifling their potential (sometimes current) civic participation.").

²⁰⁵ For recent depictions of the pervasive nature of state surveillance of low-income children and data collection of children in schools, see generally Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315 (2023); LaToya Baldwin Clark, *Family | Home | School*, 117 NW. U. L. REV. 1 (2022).

²⁰⁶ Gamal, *supra* note 205; Clark *supra* note 205.

It is also important to keep in mind that families experience these technological and economic shifts very differently.²⁰⁷ We can think about broad trends, but that sometimes hides crucial differences. A child growing up in an insular religious faith whose parents monitor and restrict all forms of social media or internet usage, who attends a parochial school (or is homeschooled), and who lives in a community of similar families, will not have the same experience as a child whose parents work outside of the home and who has a WIFI enabled smartphone at age ten. A child living on a remote reservation with little access to reliable internet or a child whose family lives in a motel, or their car, or a shelter will quite obviously not have the same experience as a millionaire influencer child with a trust fund and sponsorship deals. A child who lives with an undocumented parent who works primarily as a caretaker of other people's homes is going to experience family privacy differently from a child whose white, middle-class family fits the traditional assumptions of family life. The list goes on.

B. Emerging Threats to Family Privacy

For decades, privacy law scholars have written extensively on the impact of new technologies on the scope and nature of privacy rights.²⁰⁸ Family law scholarship, too, places an important emphasis on the privacy of the home.²⁰⁹ Unlike in the other branches of privacy law, however, where technological change has dominated the discourse around privacy law and its future, that has not been nearly as true of family law.²¹⁰ And yet, the same transformative societal and technological

²⁰⁷ See, e.g., Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 *YALE L.J. F.* 907, 908 (2022) ("African Americans could greatly benefit from well-designed, race-conscious efforts to shape a more equitable digital public sphere through improved laws and legal institutions.").

²⁰⁸ See, e.g., Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 *MD. L. REV.* 614, 619 (2011) ("[A] future is nearly upon us that will make it impossible to preserve the privacy even of traditional Fourth Amendment bastions, such as the home, without considering the intertwined effects of technological and social change.").

²⁰⁹ See, e.g., Laufer-Ukeles & Kreiczler-Levy, *supra* note 59, at 450.

²¹⁰ There are important exceptions to this generalization, for example, Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 *EMORY L.J.* 839 (2017) (analyzing social media issues from a privacy lens); and Steinberg, Burgess & Herrera, *supra* note 115, at 453 (analyzing social media use in adoptions), but I have not had an easy time identifying family law scholars who engage with changing technology and its role in family privacy (other than reproductive technology, which presents its own unique set of challenges).

shifts impact the family as much as they do the individual, the market, and the state.²¹¹

At the same time, privacy rights are under threat. The Supreme Court has expressed a willingness to overturn fundamental reproductive rights, and more such rights may be in the crosshairs if the “traditionalism” model of Fourteenth Amendment analysis spreads into other areas of sexual intimacy, reproduction, and family life.²¹² The *Dobbs* opinion undeniably destabilized this entire area of law.²¹³ Since that fateful ruling, Court experts have speculated as to how much substantive due process—part of the constitutional foundation upon which family privacy rests—remains.²¹⁴ While the classic canon of family privacy cases are unlikely to be overturned, the traditionalist method empowers courts to read “parental rights” narrowly when they conflict with other state interests.

Social media and other forms of omnipresent technology present new dangers. They expose our most private data to unscrupulous outside actors—both the state and private parties. It harms our mental health, and especially children’s health.²¹⁵ We might argue, therefore, that law should serve as a bulwark against further encroachment of technology into private lives

²¹¹ For an analysis of Covid-19 policies grounded in the public/private divide, see Jackson & Aziza, *supra* note 96, at 2543 (“The public/private distinction is particularly evident in the guidance around masking and other risk-mitigation policies and advice issued by public health agencies. This public health approach reifies the notion of the home as an exceptional private space that exists outside of the possibility of COVID-19 transmission, obscuring the reality of the high risk of transmission in some households.”).

²¹² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022) (rejecting the privacy rationale for the right to abortion).

²¹³ See, e.g., Siegel, *supra* note 26, at 1130 (discussing the ways in which the opinion disrupted existing laws); Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women’s Health Organization*, 2022 SUP. CT. REV. 111, 114 (2022) (emphasizing how the majority opinion “cabin[s]” other privacy rights, such as contraception and same-sex marriage, in a manner that lacks clarity for this body of law).

²¹⁴ See Baker, *supra* note 50, at 421 (“The particularities of the parental rights at stake in these early cases, teaching German, sending a child to parochial school, distributing religious literature, seem almost quaint today, but the legacy of these cases has proved remarkably robust.”).

²¹⁵ The recent lawsuit brought by forty-one states against Meta (which includes Facebook and Instagram), over harmful and deceptive practices related to children, is a powerful instance of this approach. See Christiano Lima-Strong & Naomi Nix, *41 States Sue Meta, Claiming Instagram, Facebook Are Addictive, Harm Kids*, WASH. POST (Oct. 24, 2023, 3:25 PM), <https://www.washingtonpost.com/technology/2023/10/24/meta-lawsuit-facebook-instagram-children-mental-health/> [https://perma.cc/2ZSV-5R25].

and should empower parents to protect their children from the harms of social media and unfettered access to the internet.²¹⁶

Social and technological changes that uprooted the traditional public/private binary are not going away any time soon, however, and are likely to only increase in the future. The goal of this Article is not to determine if these changes to the public/private home are good or bad. Their potential for benefits and harms varies significantly depending on the context. Rather, the goal of this Article is to demonstrate how these changes present an opportunity to reconsider current doctrine and practice.²¹⁷ We have an opportunity to reflect on the often-unspoken assumptions of the idealized private home and an opportunity to consider how family autonomy rules might better serve a broader array of families than it has in the past.

I argue that the best approach is to work with these changes to create a system that provides for more flexibility, less of a rigid public/private binary, and which embraces the transformative potential of technology, rather than focusing on its harms. By embracing change, this view opens the door to a future in which the public/private binary is replaced with a spectrum of possible modes of family autonomy that are not tethered to certain kinds of physical spaces or types of family form.

C. Family Autonomy for Child Wellbeing

What might family autonomy for the twenty-first century look like? Is it possible, let alone desirable, to separate family privacy from the physical space called “home”? Living in a world where our physical spaces and our virtual spaces sometimes overlap in function, is there a way to create a functional family autonomy that protects certain kinds of choices from public scrutiny or state intervention regardless of where they occur?²¹⁸ On the flip side, it is possible to enhance the provision

²¹⁶ For a discussion of this topic, and the argument against moving in that direction, see Anne C. Dailey & Laura A. Rosenbury, *Beyond Home and School*, 91 U. CHI. L. REV. 567, 586 (2024).

²¹⁷ For an analysis of how Covid-19 era economic policies supported families and gave opportunities for greater state support but also were often the first policies cut after the pandemic, see generally Eichner, *supra* note 77.

²¹⁸ See Allen, *supra* note 103, at 23–25 (“The liberal conception of private choice is the idea that government ought to promote interests in decisional privacy, chiefly by allowing individuals, families, and other nongovernmental entities to make many, though not all, of the most important decisions concerning friendship, sex, marriage, reproduction, religion, and political association. The liberal conception of private choice informs normative understandings of the First

of public support within private spheres in order to enhance the public benefits or services that are distributed within the home? Could we imagine substantive protections for certain kinds of choices, regardless of how much interaction a child has with public authorities? Would doing so risk granting excessive power to parents to assert their own interests in public spaces, like schools? Would it risk greater state intervention into families' most private spaces? Untethering parental rights from home privacy could have harmful consequences. But the foundation upon which family privacy currently rests has cracked and could collapse. We need alternative approaches to protect families and children.

I contend that the best option is to embrace these societal changes, to acknowledge the porous and unstable boundaries of public and private, and to imagine a doctrine of parental rights and family privacy that rejects the centrality of the private home. In place of the private home, I propose a relationship-centered model of family autonomy.²¹⁹ The parent-child relationship itself is the core source of the right to make decisions about the child, because parents have an obligation to preserve and protect their children's wellbeing. In addition to this fundamental duty, parents have the right to defend against state intrusions that interfere with the parent's capacity to perform that duty.²²⁰

This proposal draws inspiration from the forthcoming *ALI: Restatement of Children and the Law's* emphasis on child wellbeing.²²¹ To understand the child wellbeing model, one must first understand that the common law right of parental authority over children developed from a view that children belonged to their parents. Parental—or, more accurately,

Amendment and the substantive due process requirements of the Fourteenth Amendment. The concept of private choice seems to presuppose that social life is divided into distinguishable public and private spheres, the private sphere being a realm of individual decisionmaking about sex, reproduction, marriage, and family." (foonote omitted)).

²¹⁹ Although I would not claim this Article as a part of relational feminism, it does share some features with that literature. See, e.g., Christine M. Koggel, Ami Harbin & Jennifer J. Llewellyn, *Feminist Relational Theory*, 18 J. GLOB. ETHICS 1 (2022), <https://www.tandfonline.com/doi/epdf/10.1080/17449626.2022.2073702?needAccess=true> [<https://perma.cc/BP2M-JPP6>].

²²⁰ See *supra* note 29–31 on parental rights and obligations.

²²¹ Clare Huntington & Elizabeth S. Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 FAM. L.Q. 91, 120 (2020) ("The *Restatement of Children and the Law* identifies and reinforces the Child Wellbeing framework across the breadth of the legal regulation of children, demonstrating that the framework is a solid structure for modern regulation.").

paternal—authority was a right akin to property rights.²²² Even the early constitutional family privacy cases embraced a view of children as belonging to their parents, in ways that shaped parental rights as property-like control over children.²²³ Over time, as the Restatement reporters explain, this model of parental rights transformed into a model that centered the child's wellbeing.²²⁴ We could imagine a similar transformation in family privacy. Rather than rely on the private home to justify parental authority, instead, it would be justified by parents' unique capacity to protect and defend their children's wellbeing.

There must, of course, be limits to parental rights under this model. The state could infringe on parental rights where there is a demonstrable risk of physical or mental harm to the child. As Professors Huntington and Scott explain, "Parental authority is not absolute . . . in a regime in which parental rights are justified as protecting child wellbeing[:] parents are not free to inflict serious harm on their children, even on the basis of religious beliefs."²²⁵ This model would also allow for children, particularly older children, to defend their own interests.²²⁶ A relationship-based model of parental rights can, and will, give rise to conflict between parents and the state, between parents who disagree on the best course of action, and between the child and parents and/or the state. The current system weights the conflicting interests based on a century of parental rights cases that used the private home as their lens. By contrast, my proposed relationship-based model would

²²² Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1048 (1992) (describing the historical and common law developments as children as the property of their fathers).

²²³ *Id.* at 997 ("[Early parental rights cases were animated by] a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor. Along with protecting religious liberty and intellectual freedom, Meyer and Pierce constitutionalized a narrow, tradition-bound vision of the child as essentially private property.").

²²⁴ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1415 (2020) ("Analysis of modern parental rights doctrine in our framework underscores the importance of child wellbeing as a reinforcing rationale for the law's continued deference to parental authority as well as a self-limiting mechanism for these rights. Courts in affirming parental rights are sometimes explicit about the values underlying the framework, but these values are often implicit.").

²²⁵ *Id.* at 1377.

²²⁶ *Id.* at 1433 (explaining how older minors' ability to exercise certain autonomy and privacy rights enhances their wellbeing).

ground deference to parental decision making in the child well-being framework. In application, this reframing of the parents' rights to make choices about—and for—their children would not change the core presumption that a “fit parent acts in the best interest of their child.”²²⁷ The biggest shift is that the parents' right to make choices about their children's lives would not be dependent on how much contact the family has with public authorities or how easy it is for the family to retreat into a private home.

The traditional family privacy model grants greater protections and deference to those families that hew closest to the normative ideal of the single-family household under one roof.²²⁸ In contrast, the goal of the relationship-centered model of family autonomy would be to sever parental rights from this outdated vision of the family. Parents whose rights have historically been ignored or subject to excessive scrutiny and surveillance by state actors should be able to assert their authority to protect their children's fundamental right to autonomy. Seeking public assistance and support, for example, should bolster the parents' authority to make decisions related their child rather than undermine it because it demonstrates parental efforts to ensure their children's wellbeing.²²⁹

Essentially, parents could no longer stand behind the privacy of the home as the justification for deference. For example, control over children's access to information and ideas would be grounded in the parents' decisions about their child's wellbeing, rather than the underregulated and unsupervised decisions made within insular home lives. This may also provide guidance to situations in which the idealized private-sphere image of parental authority has spilled over into public spaces, for example, when banning books from public libraries is justified by “parental rights.”²³⁰ Instead, parents' choices should receive deference because they have a unique and vital role to play in their children's wellbeing, not because they have a right to control their child's environment. This parent-child relationship model would also limit parents' authority to make choices that interfere with their children's future rights and interests, for instance by licensing the child's image or likeness or their

²²⁷ Troxel v. Granville, 530 U.S. 57, 68 (2000) (“[T]here is a presumption that fit parents act in the best interests of their children.”).

²²⁸ See *supra* note 27 for a description of the idealized family home.

²²⁹ See BRIDGES, *supra* note 182.

²³⁰ See Cahn, *supra* note 61, at 1445–46 (2023) (discussing the distortion of parental rights in recent political discourse).

access to education.²³¹ And in some cases, it would cabin parent's authority to make decisions about their children's medical care and education insofar as those choices are contrary to the child's fundamental privacy and bodily autonomy.²³²

Because parents would still be presumed to function as the guardian of their child's wellbeing and would be best situated to protect their child's rights, however, the state would need to demonstrate harm to the child in order to intervene into individual parental decision making about their child. At the same time, a relationship-based model of family autonomy also highlights the importance of legislation applicable to all families. Such laws should apply in areas where parents are not well situated to make choices that protect their children's wellbeing, even when they attempt to do so in good faith.²³³ This model could also help guide decisionmakers in balancing rights where one parent's exercise of their authority interferes with another's parent's ability to protect their child's wellbeing—such as in disputes over public school curriculum or public health.²³⁴

It will not be easy to shift underlying assumptions of family privacy or to change deeply embedded structural practices of inclusion and exclusion in family law. The way we understand and talk about family privacy and parental rights, however, is important in changing perspectives over time. Furthermore, there might be greater interest in embracing a changed perspective given how many families lives are touched by the social

²³¹ For an argument criticizing parent's authority, see Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 79 (2021).

²³² This already exists in the law, when the state is authorized to override parental decisions about their child that present a danger to the child, or in which an older minor child is able to make such decisions without parental consent. The "mature minor" doctrine in medical decision making is such an example. See, e.g., Doriane Lambelet Coleman & Philip M. Rosoff, *Adolescent Medical Decisionmaking Rights: Reconciling Medicine and Law*, 47 AM. J.L. & MED. 386, 395 (2021) (describing the "mature minor" doctrine).

²³³ See Takhshid, *supra* note 114, at 1420 ("In the era of EdTech and artificial-intelligence-enabled tools such as ChatGPT, and voice- and facial-recognition tools, parental consent can no longer meaningfully serve its traditional purpose of protecting the best interests of the child, particularly given the complexity of innovation and potential for breaches of privacy associated with EdTech services. As such, new privacy initiatives at the federal level should also not rely primarily on parental consent but instead offer privacy protection laws that limit the overreach of EdTech companies." (footnote omitted)).

²³⁴ See generally Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Diversion: The New Politics of Parental Rights*, 123 MICH. L. REV. 669 (2025) (describing the development of the term "parental rights" as a means of promoting policies over public education curriculum and many other policies).

and economic changes described in this Article. If it was once true that some families could ensure they would enjoy nearly absolute autonomy by constructing a private home life, while other families could expect constant surveillance and state interference because they lacked that private bubble, today many of those bubbles have burst. Even families who could once rely on the private home to protect them find that barrier increasingly thin and full of holes. Consequently, there may be more buy-in from families on the need for change.

To be sure, while this Article offers an alternative understanding of family autonomy and parental authority that is not dependent on the privacy of the home, it does so at a level of abstraction that requires substantial future work to implement. The purpose of this Article is to demonstrate that alternative visions of parental rights are possible, and to show why new frames are needed at this moment in time when the foundational assumptions of the current model are crumbling. Nor should this be read to reject the importance of home.²³⁵ Every child should be cared for in a safe home that is free from unnecessary state surveillance and intervention. That is a fundamental aspect of the child's wellbeing.²³⁶ But that doesn't mean that a parental authority must be tethered to the parent's ability to create such a home for their children.

CONCLUSION

The fact that the assumptions that undergird family privacy are unraveling is a mixed bag. On the one hand, some autonomy and protection from state intervention, however imperfectly applied, is better than none. Changes wrought by technological advances and spurred by the Covid-19 pandemic could erode the lines of public and private to the point where they are so permeable as to provide no shield from the state. That is a troubling future for many who are observing these changes unfold.

However, transformational social and economic change also presents an opportunity to create a more equitable and

²³⁵ Home is also a powerful social and emotional idea, as well. See Davidson, *supra* note 184, at 124–26 (“In popular culture and in legal imagination, ‘home’ occupies a unique role as property, invoking personal comfort and shelter, privacy, ontological security, and other positive associations.”); see also D. Benjamin Barros, *Legal Questions for the Psychology of Home*, 83 TUL. L. REV. 645, 647 (2009) (discussing psychological research on the psychological centrality of the home).

²³⁶ See *supra* note 221 on the child wellbeing model.

inclusive system. The maximally optimistic, ideal world vision is that the erosion of the traditional public/private binary leads to a wholesale reimagining of what family privacy could be. One that does not depend on how closely the family conforms to a singular, traditional image of family life. One that is not a haven for interpersonal or state violence. Perhaps such a future is impossible, but since the future is in constant flux, we might as well envision one that has transformative potential.