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Elizabeth S. Scott  
*Columbia Law School*, [escott@law.columbia.edu](mailto:escott@law.columbia.edu)

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## Comment on Part 4 Essays: Goodwin and Dailey and Rosenbury

Elizabeth S. Scott<sup>†</sup>

Professors Michelle Goodwin and Anne Dailey and President Laura Rosenbury have written two compelling essays on Part 4 of the Restatement of Children and the Law,<sup>1</sup> dealing with Children in Society. Goodwin's essay, *She's So Exceptional: Rape and Incest Exceptions Post-Dobbs*,<sup>2</sup> focuses on § 19.02 of the Restatement, dealing with the right of minors to reproductive health treatments. This Section was approved by the American Law Institute before the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*,<sup>3</sup> overturning *Roe v. Wade*.<sup>4</sup> In her essay, Goodwin explores the harms that will follow if minors' right of access to abortion, contraception, treatment for sexually transmitted infections and other care is cut off.<sup>5</sup> Dailey and Rosenbury engage with §§ 18.10 and 18.11, dealing with minors' right of free expression in their essay, *Beyond Home and School*.<sup>6</sup> Building on arguments against strong parental authority they have developed in earlier work, they challenge the Restatement's position recognizing parents' authority to limit their children's access to speech, focusing particularly on social media.<sup>7</sup>

This Comment begins by briefly describing Part 4 of the Restatement, which includes diverse regulation dealing with the law's direct relationship with children, not mediated (primarily) through the institutions most relevant to children's experience—the family, the public school, and the justice system. It

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<sup>†</sup> Harold R. Medina Professor Emerita, Columbia Law School. For helpful comments and suggestions, I am grateful to Emily Buss and Clare Huntington.

<sup>1</sup> Note that this piece cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

<sup>2</sup> See generally Michele Goodwin, *She's So Exceptional: Rape and Incest Exceptions Post-Dobbs*, 91 U. CHI. L. REV. 593 (2024).

<sup>3</sup> 142 S. Ct. 2228 (2022).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> See Goodwin, *supra* note 2, at 602.

<sup>6</sup> See Anne C. Dailey & Laura A. Rosenbury, *Beyond Home and School*, 91 U. CHI. L. REV. 567, 572 (2024).

<sup>7</sup> See *id.* at 569.

then reviews the two essays on Part 4, turning first to Goodwin's essay and then to Dailey and Rosenbury's essay. Finally, I suggest that the two essays, while they address very different legal issues, are in conversation with one another. Goodwin's essay is a cautionary tale on the risk of giving the state (and particularly the political branches) greater authority to decide what is harmful to children, as Dailey and Rosenbury's proposal would seem to do.

### I. REGULATING CHILDREN IN SOCIETY

Part 4 of the Restatement deals with a diverse range of issues in which the relationship of children and the state is not embedded in the family, the public school, or the justice system. Some sections, like the two that are the focus of the essays in this volume, deal with rights granted to children, through which the authority exercised by the state and parents is restricted, and children are given greater control over decision making and expression. Sections 18.10 and 18.11 restrict the state from interfering with minors' right of free expression and free access to ideas.<sup>8</sup> Sections 19.01 and 19.02 authorize minors to consent independently to particular types of medical treatment, offering substantial protection to minors who might be unwilling or unable to seek necessary treatment if parental consent were required.<sup>9</sup> Section 19.02 extends the general mature minor doctrine to reproductive health decisions.<sup>10</sup> Other sections in Part 4, such as curfew regulations<sup>11</sup> and the infancy doctrine in contract law,<sup>12</sup> impose restrictions on minors to which adults are not subject. These restrictions are justified as needed to protect children both from their own bad judgment and from adults who might harm their interests.<sup>13</sup> Thus, the infancy doctrine protects minors from the overreaching of adults and their own improvidence. Curfew laws restrict children from being out in public at times when lawmakers believe they may be at risk either as victims of adult predators or as perpetrators of

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<sup>8</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW §§ 18.10–18.11 (AM. L. INST., Tentative Draft No. 5, 2023) [hereinafter RESTATEMENT Draft No. 5].

<sup>9</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW §§ 19.01, 19.02 (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2].

<sup>10</sup> *Id.* § 19.02. Section 19.01 deals with the common law right of mature minors to make certain routine medical decisions. *Id.* § 19.01.

<sup>11</sup> RESTATEMENT Draft No. 2 § 19.01.

<sup>12</sup> RESTATEMENT Draft No. 5 § 20.20.

<sup>13</sup> *See id.* § 20.20 cmt. a.

delinquent acts. Both doctrines have exceptions that protect minors' freedom to act when the restriction would be harmful.<sup>14</sup> Thus minors can execute enforceable contracts for necessities, thereby encouraging adults to contract with minors for essential goods and services.<sup>15</sup> And curfew restrictions do not apply if minors are exercising their First Amendment<sup>16</sup> rights or traveling to and from educational activities or jobs.<sup>17</sup>

The legal rules in Part 4 of the Restatement offer protections or restrictions that either legally or functionally apply to minors as they mature into adolescence and become more independent from their parents. While younger children have a right of free expression, this right becomes increasingly salient as teenagers venture into the broader marketplace of ideas. Thus, free speech claims are brought by middle and high school students and seldom by younger children.<sup>18</sup> Curfew laws could be applied to younger children, but teenagers are more likely to be out in public during curfew hours. And younger children are unlikely to seek medical treatment without involving a parent and most would be incapable of giving informed consent, the legal prerequisite; the mature minor doctrine presumes that older minors possess this capacity.<sup>19</sup> Access to reproductive health treatment is usually not relevant for younger children. Finally, the infancy doctrine has almost exclusively been applied to teenagers, who are far more likely to enter improvident contracts (or any contracts) than younger children. So the law in Part 4 relates directly to children mostly when they move "beyond home and school,"<sup>20</sup> and engage with the wider world as adolescents. At that point, the law's traditional paternalistic assumptions subjecting minors to parental and state control may undermine their well-being as developing persons and citizens.

The sections in Part 4 are a diverse mix of adult rights and special protections or restrictions for minors. The two rights that

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<sup>14</sup> *See id.*

<sup>15</sup> *Id.*

<sup>16</sup> U.S. CONST. amend. I.

<sup>17</sup> *See id.* § 18.10 reporters' note, cmt. d.

<sup>18</sup> *See, e.g.,* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). Hope and Paul Tinker, 8 and 11 years old respectively, were not parties to the suit challenging the school district—their two teenage siblings were. *See id.* at 522; *see also* RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 8.10 cmt. a (AM. L. INST., Tentative Draft No. 3, 2021) (describing the relevance of age to students' speech rights in school).

<sup>19</sup> Research supports the accuracy of this assumption. *See* RESTATEMENT Draft No. 2 § 19.01 cmt. c.

<sup>20</sup> Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834 (2007).

are the subject of the essays in this issue, the right of free speech and the right to make medical decisions dealing with reproductive health treatment, are among the adult rights conferred on minors before they reach the age of majority. As I explain in my Essay in this volume, both rights are important to the well-being of minors—either directly or by avoiding the harm of paternalistic legal constraints on minors’ autonomy.<sup>21</sup> The right of free expression directly benefits minors, while the right to access reproductive health treatment avoids the harm that might follow if parental consent were required for this type of treatment. Indeed, as Goodwin explains, allowing minors access to reproductive health treatment without involving parents can prevent and avoid the substantial harm of teenage pregnancy.<sup>22</sup> Restrictions on minors’ freedom under the infancy doctrine in contract law and curfew laws are similarly justified as protections of minors’ well-being. To be sure, curfews directed at youth aim to protect public safety as well as youth themselves, and, as restrictions on freedom of movement and assembly, they can pass constitutional muster only if narrowly tailored to avoid imposing an excessive burden on the minors’ freedom.<sup>23</sup>

## II. THE IMPORTANCE OF ACCESS TO REPRODUCTIVE HEALTHCARE

Goodwin, in her essay, describes the harms to teenagers if access to abortion and other reproductive services is cut off or restricted as states respond to *Dobbs*. The essay presents a compelling account of these harms and, in doing so, offers a solid rationale for retaining the rule in § 19.02 in a post-*Dobbs* world.<sup>24</sup>

Section 19.02 of the Restatement holds that mature minors have the right to consent to reproductive health care without parental involvement or consent; it embodies the legal rule adopted in all states before *Dobbs*. The comments to the rule explain its constitutional foundation in a series of Supreme Court opinions in the 1970s and 1980s, in which the Court held that a mature minor has the right to terminate pregnancy,<sup>25</sup> but the state can require

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<sup>21</sup> Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. CHI. L. REV. 279, 310–11 (2024) (discussing the social costs of teenage pregnancy).

<sup>22</sup> See Goodwin, *supra* note 2, at 601–02.

<sup>23</sup> See RESTATEMENT Draft No. 5 § 18.10 cmt. d (prescribing exceptions to curfew restrictions).

<sup>24</sup> See Goodwin, *supra* note 2, at 610–15.

<sup>25</sup> See, e.g., *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“[T]he State does not have the constitutional authority to give a third party an absolute,

her to demonstrate her maturity in what has come to be called a judicial bypass proceeding.<sup>26</sup> Further, *Bellotti v. Baird*<sup>27</sup> held that the court should allow the pregnant minor who is not mature to obtain an abortion without involving her parents if this outcome is in her best interests.<sup>28</sup> Following *Bellotti*, many states created judicial bypass proceedings, while others allowed minors to consent to abortion on the same basis as adults.<sup>29</sup> Section 19.02 guides courts evaluating a minor's maturity to make the abortion decision, or, for the minor found to lack maturity, her best interest.<sup>30</sup>

*Dobbs* destroyed the constitutional foundation underlying § 19.02; a mature minor no longer has a constitutionally protected right to terminate an unwanted pregnancy without parental consent or notification.<sup>31</sup> But many states have retained their pre-*Dobbs* laws allowing minors' access to abortion either directly or through a judicial bypass proceeding, notwithstanding that the minor's right is no longer grounded in constitutional law.<sup>32</sup> Even states that have severely narrowed access to abortion for all pregnant individuals have retained the judicial bypass proceeding for minors.<sup>33</sup> Thus it would seem that, in those states, a minor who

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and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy.”)

<sup>26</sup> See *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

<sup>27</sup> 443 U.S. 622 (1979).

<sup>28</sup> See *Bellotti*, 443 U.S. at 643.

<sup>29</sup> See RESTATEMENT Draft No. 2 § 19.02 cmt. a.

<sup>30</sup> See *id.*

<sup>31</sup> See *Dobbs*, 142 S. Ct. at 2283–84.

<sup>32</sup> See, e.g., COLO. REV. STAT. ANN. §§ 13-22-704, 13-22-707 (2023) (notification requirement and judicial bypass); DEL. CODE ANN. tit. 24, §§ 1783, 1784 (2023) (same); IOWA CODE ANN. § 135L.3 (2017) (same); KAN. STAT. ANN. § 65-6705 (2022) (parental notification and consent required or judicial bypass); ME. REV. STAT. ANN. tit. 22, §§ 1598, 1597-A (2022) (stating that neither parent notification and consent nor a judicial bypass is required if the health care professional has secured informed consent of minor, who the professional has determined is “mentally and physically competent to give consent”); MD. CODE ANN., HEALTH–GEN. §§ 20-209, 20-103 (2022) (“The qualified provider may perform the abortion, without notice to a parent or guardian of a minor if, in the professional judgment of the qualified provider” any of three circumstances exist—e.g., notice is not in the best interest of the child); MASS. GEN. LAWS ANN. ch. 112, § 12R (2022) (parent consent required or judicial bypass); MICH. COMP. LAWS ANN. §§ 722.903, 722.904 (1991) (parent consent required or judicial bypass); NEV. REV. STAT. ANN. § 442.255 (2023) (parent notification required or judicial bypass); N.H. REV. STAT. ANN. §§ 132:33, 132:34 (2022) (same); 18 PA. STAT. AND CONS. STAT. ANN. § 3206 (2022) (parent consent required or judicial bypass); 23 R.I. GEN. LAWS ANN. § 23-4.7-6 (2014) (same); VA. CODE ANN. § 16.1-241 (2023) (same).

<sup>33</sup> See *Parental Consent/Notification Requirements for Minors Seeking Abortions*, KAISER FAM. FOUND., <https://perma.cc/9H5J-BZLZ> (last updated Mar. 1, 2023) (noting that all states that require parental involvement for an abortion have a judicial bypass procedure).

demonstrates maturity can obtain an abortion within the narrow limits provided under restrictive statutes.<sup>34</sup> Explicitly or implicitly, states that continue to protect minors' access to abortion have recognized that protection of minors' ability to terminate an unwanted pregnancy without involvement of parents is justified with no need for a constitutional rationale.

In her essay, Goodwin provides this justification, offering a powerful rationale for retaining the rule in § 19.02 authorizing minors to consent independently to abortion and other reproductive healthcare treatments.<sup>35</sup> First, she points out that a majority of minors are sexually active, a reality that is not a consequence of sex education in school, despite the claims of conservative politicians.<sup>36</sup> As Goodwin explains, the teenage pregnancy rate is

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<sup>34</sup> These include brief time periods, rape and incest, and medical emergency. *See, e.g.*, S. 300, 2023 Leg., 125th Reg. Sess. (Fla. 2023) (banning abortion after six weeks, with exceptions for rape or incest, pending the outcome of a challenge to a fifteen-week ban currently in effect); GA. CODE ANN. § 15-11-682 (2023) (prohibiting abortion when there is a “detectable human heartbeat,” usually around 6-weeks gestational age; notification requirement with judicial bypass); IDAHO CODE ANN. §§ 18-622, 18-609A (2023) (prohibiting abortion generally with exceptions for rape or incest in the case of minors only; parental consent and notification or judicial bypass required for minors); IND. CODE ANN. §§ 16-34-2-1, 16-34-2-4 (2023) (prohibiting abortion generally with exceptions for rape or incest; parent consent or judicial bypass required for minors); KY. REV. STAT. ANN. §§ 311.772, 311.732 (2022) (prohibiting abortion generally with no exceptions for rape or incest; parent consent or judicial bypass needed for emergency exception; ban in place by order of the Kentucky Supreme Court pending outcome of challenge); *Cameron v. EMW Women’s Surgical Center*, P.S.C., 664 S.W.3d 633, 640–41 (Ky. 2023) (describing current abortion rejections and rejecting a challenge to such restrictions on standing grounds); LA. STAT. ANN. §§ 40:1061, 40:1061.14 (2022) (prohibiting abortion generally with no exceptions for rape or incest; parent or husband of minor consent or judicial bypass required); MISS. CODE ANN. §§ 41-41-45, 41-41-53 (2023) (prohibiting abortion generally with exceptions for rape; parent consent or judicial bypass required); MO. ANN. STAT. §§ 188.017, 188.028 (2022) (prohibiting abortion generally with very limited exceptions; parent consent or judicial bypass required); S. 20, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); N.D. CENT. CODE ANN. §§ 12.1-42-01, 12.1-42-02, 12.1-42-03, 14-02.1-03.1 (2023) (prohibiting abortion generally with exceptions for rape or incest before gestational age of 6 weeks; parent consent or judicial bypass required for unemancipated minors); OHIO REV. CODE ANN. §§ 2919.195, 2919.121 (2019) (prohibiting abortion after fetal heartbeat detectable, around 6-weeks gestational age with no exceptions for rape or incest; parent consent requirement previously held unconstitutional but injunction dissolved after *Dobbs* in *Cincinnati Women’s Servs., Inc. v. DeWine*, 343 F.R.D. 50, 54 (S.D. Ohio 2022)); TEX. FAM. CODE ANN. §§ 33.002–33.004 (2021) (requiring parent notification and consent or judicial bypass); H.R. 467, 2023 Leg., Reg. Sess. (Utah 2023) (amending UTAH CODE ANN. § 76-7-304.5 (2022) to limit abortion to eighteen weeks for cases of rape and incest or for minor under age 12; parent notification or judicial bypass required, *id.* § 76-7-304.5(4)(b)); W. VA. CODE ANN. §§ 16-2R-3, 16-2R-5 (2023) (general prohibition with exceptions for “sexual assault” and incest within first fourteen weeks in the case of minors; parent notification or judicial bypass required).

<sup>35</sup> *See* RESTATEMENT Draft No. 2 § 19.02; *see also* Goodwin, *supra* note 2, at 631–32.

<sup>36</sup> Goodwin, *supra* note 2, at 606.

higher in the United States than in other developed countries, perhaps due in part to less available access to contraceptive services in many parts of the United States.<sup>37</sup> Goodwin then documents the harms of teenage pregnancy, both to pregnant teens and to their children.<sup>38</sup> Pregnancy and childbirth are the leading causes of death for teens age 15 to 19;<sup>39</sup> the childbirth death rate is fourteen times higher than for abortion.<sup>40</sup> This alone indicates that the threat of pregnancy to the physical health of teenagers is far greater than for adults. Beyond the physical risks, teenage parents have lower educational attainment, poorer employment prospects, and lower income than those who postpone having children.

Goodwin also writes compellingly of the harms inflicted on the children of teenagers, who have poorer outcomes across several measures than the children of mothers even a few years older. She cites research showing that, as young adults, children of teenagers have “poorer educational achievement, life satisfaction and personal income” than those born to mothers in their early 20s.<sup>41</sup> Children of teen mothers are also more likely to experience pregnancy as teenagers themselves, reproducing the cycle.<sup>42</sup> And boys born to teenage mothers are almost three times as likely to be incarcerated as those born to older mothers.<sup>43</sup>

The burden of teenage pregnancy falls most heavily on Black and Brown teenagers and their children.<sup>44</sup> The pregnancy rate is higher for these teens, and they disproportionately suffer the health, educational, employment, and other harms as a consequence.<sup>45</sup> Black teens are also far more likely to experience a pregnancy-related death than their white counterparts.<sup>46</sup> Thus, those

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<sup>37</sup> *Id.* at 609.

<sup>38</sup> *Id.* at 621.

<sup>39</sup> *Id.* at 626.

<sup>40</sup> *Id.* at 612 (quoting *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016)).

<sup>41</sup> Goodwin, *supra* note 2, at 628 (quoting Ellen L. Lipman, Katholiki Georgiades, & Michael H. Boyle, *Young Adult Outcomes to Children Born to Teen Mothers: Effects of Being Born During Their Teen or Later Years*, 50 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 232, 236 (2011)).

<sup>42</sup> *Id.* at 627–28 (citing JESSICA TOLLESTRUP, CONG. RSCH. SERV., R45184, *TEEN BIRTH TRENDS: IN BRIEF* 8 (2022)).

<sup>43</sup> *Id.* at 628 (quoting REBECCA A. MAYNARD & EILEEN M. GARRY, U.S. DEPT OF JUST., *ADOLESCENT MOTHERHOOD: IMPLICATIONS FOR THE JUVENILE JUSTICE SYSTEM* 1 (1997)).

<sup>44</sup> *Id.* at 627.

<sup>45</sup> *See id.*

<sup>46</sup> *See* Goodwin, *supra* note 2, at 621 (citing Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely Bear the Brunt of Abortion Limits*, TEX. TRIB. (June 30, 2022), <https://perma.cc/X4P6-BA67>).



teens who already experienced inequity and disadvantage in our society bear the heaviest burden of teen pregnancy.<sup>47</sup>

The goal of avoiding the serious harm of teenage pregnancy for minors provides a compelling rationale for authorizing minors to consent to the termination of pregnancy without involving their parents. For some minors, a legal requirement of parental consent creates a serious obstacle, which may lead them to postpone the abortion decision until it becomes more dangerous, seek an illegal abortion, or continue the pregnancy, enduring the substantial harms associated with that course. The law's core goals in regulating children are to protect them from harm and promote their well-being. Goodwin's account of the harms of teenage pregnancy makes clear that allowing minors to have independent access to abortion is fully compatible with these goals.<sup>48</sup>

The child well-being rationale also justifies authorizing minors' access to reproductive health treatments covered by § 19.02 other than abortion. The minor's right of access to contraceptive services allows the sexually active minor to avoid pregnancy, promoting her interests and reducing potential harm with far lower emotional, social, and financial costs than abortion. And, as with abortion, the minor may be deterred from seeking treatment in a timely way if parental consent were required, as parents may be unaware that their child is sexually active or disapprove on moral or religious grounds. Similarly, a minor might be deterred from obtaining treatment for a sexually transmitted infection (STI) if parental consent were required. And as Goodwin points out, teenagers and young adults are at higher risk for STIs than older adults.<sup>49</sup> Under § 19.02, minors can obtain treatment privately that will benefit not only themselves but any subsequent sexual partners as well. The upshot is that while the traditional requirement of parental consent to children's medical treatment usually serves to promote children's well-being, the right of mature minors to consent to treatments covered by §§ 19.01 and 19.02 avoids harmful consequences that could follow from the application of the traditional rule.

The rationale for minors' access to reproductive health treatment provided by Goodwin is compatible with the justification for

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<sup>47</sup> *Id.* at 603.

<sup>48</sup> *See id.* at 628–32.

<sup>49</sup> *Id.* at 608 (quoting JOYCE C. ABMA & GLADYS M. MARTINEZ, NAT'L CTR. FOR HEALTH STAT., SEXUAL ACTIVITY AND CONTRACEPTIVE USE AMONG TEENAGERS IN THE UNITED STATES, 2011–2015, at 2 (2017)).

the general mature minor rule in § 19.01 allowing minors to consent independently to routine medical treatment.<sup>50</sup> The common law mature minor rule confers the right to consent to medical treatment in situations in which the minor's parents, whose consent would otherwise be required, are unavailable.<sup>51</sup> While some children's rights advocates have suggested that the mature minor doctrine recognizes an autonomy interest in children, it is probably better understood as a rule that promotes their well-being. Healthcare providers would be reluctant to provide care without legally valid consent;<sup>52</sup> thus the mature minor rule facilitates beneficial care in situations in which treatment might not otherwise be provided. This rationale for the rule is bolstered by its limits; the mature minor rule only applies if parents are unavailable, and it does not give minors a right to refuse treatment.

In general, §§ 19.01 and 19.02 embody the view of lawmakers that minors competent to give informed consent<sup>53</sup> should be authorized to consent to healthcare services independently when the default requirement of parental consent is likely to deter them from seeking treatment that promotes their well-being. The underlying principle is the same whether the circumstances involve the absence of the parent or the reluctance of the child to disclose the need for treatment to the parent. Goodwin's essay makes clear that the promotion of child well-being is a compelling rationale for preserving minors' access to abortion and contraceptive services in a post-*Dobbs* world.

### III. SOCIAL MEDIA ACCESS AND PARENTAL AUTHORITY

Dailey and Rosenbury applaud Part 4 of the Restatement, seeing in it the potential for a legal regime centered on the personhood of children.<sup>54</sup> Their essay focuses on minors' right of free speech and eloquently elaborates on the importance to children

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<sup>50</sup> See *id.* at 602 (arguing that reproductive health restrictions harm the "human rights interests of minors"); see also RESTATEMENT Draft No. 2 § 19.01 cmt. a (acknowledging the mature minor doctrine's role in furthering adolescents' interest in self-determination when their health and privacy are implicated).

<sup>51</sup> See RESTATEMENT Draft No. 2 § 19.01 cmt. a.

<sup>52</sup> Informed consent by the patient or a surrogate is the legal required predicate for medical treatment, which otherwise would constitute a battery. Research has found that by mid-adolescence, teens are competent to make medical decisions. See Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982) (finding 14-year-olds to be as competent as adults to make informed medical decisions).

<sup>53</sup> RESTATEMENT Draft No. 2 §§ 19.01(b), 19.02(b).

<sup>54</sup> See Dailey & Rosenbury, *supra* note 6, at 570–71.

as developing persons of the right of free expression and access to ideas, embodied in §§ 18.10 and 18.11.<sup>55</sup> These sections clarify that while the state can limit minors' First Amendment<sup>56</sup> free speech rights in the context of the public school when the restriction is necessary to further educational purposes; the state is otherwise strictly constrained in its authority to restrict minors' speech rights.<sup>57</sup> As the section provides, with narrow exceptions relating to sexual material, the government generally cannot limit minors' access to information to a greater extent than it can limit that of adults.<sup>58</sup>

Dailey and Rosenbury emphasize the critical importance of minors' access to the marketplace of ideas for their development as persons and citizens.<sup>59</sup> Section 18.11 is compatible with their view, emphasizing in the comments the importance of access to information in allowing minors to participate in the political process, and to develop their personal and social identity by exploring ideas and seeking answers to their questions.<sup>60</sup> This aligns with Dailey and Rosenbury's recognition of the value of free expression and access to information.<sup>61</sup> The authors also propose several useful means by which the law could promote children's access to ideas in ways that avoid developmental harm, through education, disclosure, and other means.<sup>62</sup> These proposals are compatible with § 18.11.

While Dailey and Rosenbury applaud the Restatement for strictly constraining the government's authority to restrict children's speech, they criticize its retention of parental authority to control their children's expression and access to information.<sup>63</sup> Focusing on § 18.11, which deals with access to information, they argue that children should have free access to the marketplace of

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<sup>55</sup> *Id.* at 572–73; RESTATEMENT Draft No. 5 §§ 18.10(a), 18.11(a).

<sup>56</sup> U.S. CONST. amend. I.

<sup>57</sup> *See* RESTATEMENT Draft No. 5 §§ 18.10 cmt. a, 18.11 cmt. a.

<sup>58</sup> *See id.* § 18.10 cmt. a.

<sup>59</sup> *See* Dailey & Rosenbury, *supra* note 6, at 576.

<sup>60</sup> RESTATEMENT Draft No. 5 § 18.11 cmt. a.

<sup>61</sup> *See* Dailey & Rosenbury, *supra* note 6, at 576–77.

<sup>62</sup> *Id.* at 589–91.

<sup>63</sup> *Id.* at 569. In other work, Dailey and Rosenbury have criticized broad parental authority to make critical decisions regarding their children, as undermining the personhood and independent interests of children. *See, e.g.*, Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 *DUKE L.J.* 75, 96 (2021); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448, 1478–79 (2018).

ideas unconstrained by their parents.<sup>64</sup> Under their proposed alternative Restatement, the state cannot empower the parent to limit children's access to ideas.<sup>65</sup> Dailey and Rosenbury focus on access to the internet and social media, as the embodiment of the world of ideas "beyond home and school," and admonish the Restatement for endorsing parental control of their children's free access.<sup>66</sup>

Although Dailey and Rosenbury object to giving parents legal authority to make decisions that their children should not have access to particular internet content, they recognize that some internet expression can be harmful to children; thus, the interests of children would not be promoted by having free access to all internet content.<sup>67</sup> Their solution is to give the state the authority to limit children's access to material deemed developmentally harmful.

Dailey and Rosenbury's critique can be interpreted in two ways. First, the essay could be viewed as arguing that the Restatement does not clarify that the state is prohibited from engaging in overt acts that reinforce parental authority to control their children's access to social media. For example, the authors criticize a Utah statute that requires parental consent for minors to access a social media account.<sup>68</sup> Although they suggest otherwise,<sup>69</sup> § 18.11 is compatible with this variation of their critique. As the comments to § 18.11 clarify, under current law, parents have broad authority to control their children's access to information and ideas outside of school, but the state has very limited authority to reinforce parental control.<sup>70</sup>

In *Brown v. Entertainment Merchants Ass'n*,<sup>71</sup> the Supreme Court struck down a California statute prohibiting minors from purchasing certain violent video games, rejecting the state's argument that the statute was justified because it aimed to support parents in their effort to limit their children's exposure to violent

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<sup>64</sup> See Dailey & Rosenbury, *supra* note 6, at 577–80.

<sup>65</sup> *Id.* at 590.

<sup>66</sup> See *id.* at 581–82.

<sup>67</sup> See *id.* at 586.

<sup>68</sup> Dailey & Rosenbury, *supra* note 6, at 587–89; see also Utah Social Media Regulation Act, S. 152, 2023 Leg., Gen. Sess., § 13-63-102(1) (Utah 2023).

<sup>69</sup> See Dailey & Rosenbury, *supra* note 6, at 588 ("The Utah and Arkansas laws are consistent with § 18.11's unqualified affirmation of parents' right 'to prevent their children's access to such material.'" (quoting RESTATEMENT Draft No. 5 § 18.11(a))).

<sup>70</sup> RESTATEMENT Draft No. 5 § 18.11 cmt. c ("Parents' ability to engage the assistance of government to control their children's access to information is severely limited.").

<sup>71</sup> 564 U.S. 786 (2011).

material.<sup>72</sup> This opinion supports Dailey and Rosenbury's argument that laws such as the Utah statute (and proposed federal legislation) are problematic as a restraint on minors' First Amendment rights. Under *Entertainment Merchants Ass'n*, state action limiting minors' free expression would appear to be limited to restrictions on access to sexual content deemed obscene for minors, a restriction that *Ginsberg v. State of New York*<sup>73</sup> upheld.<sup>74</sup> It is unclear whether the current Supreme Court would strike down a law requiring parental consent as a condition of minors' internet access, but Dailey and Rosenbury's argument against such laws has a solid legal foundation. If this is their argument, their sharp criticism of § 18.11 is misplaced.

The second strong form of their critique goes beyond prohibiting state action in support of parental authority and instead advocates that parents themselves should be restricted from interfering with their children's internet access. This position, which they seem to support rhetorically, although it is not explicit in their proposed alternative to § 18.11, ventures into unexplored legal territory and is contrary to current law.<sup>75</sup> Parents today are free to decide whether, when, and to what extent their children should be allowed to access the internet or any other source of information unless their actions in some way constitute legally defined child abuse.<sup>76</sup> No statute or case law, to my knowledge, holds otherwise, and because the First Amendment is directed at state action and not the acts of private citizens, this is not surprising.<sup>77</sup> On this ground alone, Dailey and Rosenbury's creative proposal could not be adopted as part of the Restatement, as restatement rules must have a solid foundation in existing law.<sup>78</sup>

But would such a rule be superior to current law as a means to advance the interests of children, either in promoting their access to the marketplace of ideas or more generally? I am skeptical

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<sup>72</sup> See *id.* at 792, 795 n.3.

<sup>73</sup> 390 U.S. 629 (1968).

<sup>74</sup> *Id.* at 637.

<sup>75</sup> See, e.g., Dailey & Rosenbury, *supra* note 6, at 580 ("In our view, children should have the right to access ideas on their own, and the state should not have the authority to endorse parental control over children's access to ideas outside the home absent serious developmental harm.").

<sup>76</sup> See RESTATEMENT Draft No. 5 § 18.10 cmt. a.

<sup>77</sup> See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988).

<sup>78</sup> The Restatement can adopt a minority rule that captures an emerging reform, but it must have some basis in case law.

on several grounds, some substantive and some logistical. Ultimately, the question is whether children's interest would be better served if the state and not their parents had the authority to determine what material on social media and the internet poses a serious risk of developmental harm. For the reasons that the Restatement generally retains strong parental rights, and with more skepticism about the wisdom of state actors than Dailey and Rosenbury have, I think the answer is no. Indeed, I fear that, at least in some jurisdictions, their proposed restriction on parents would undermine the goal they seek to advance—of allowing minors free access to the marketplace of ideas.

Dailey and Rosenbury recognize that the internet is a double-edged sword.<sup>79</sup> It is a wonderful means of access to diverse ideas and cultures, both of which are so important to children's development in a pluralistic society. But it is also a source of content that can harm children, through bullying, predatory behavior, violence, toxic content, and dangerous viral trends.<sup>80</sup> In 2023, the American Psychological Association (APA) released a report with elaborate guidelines for adolescent social media use, recommending adult monitoring of use by younger teens and minimizing teens' exposure to a broad range of potentially harmful content.<sup>81</sup>

Recognizing the potential harm of the internet, Dailey and Rosenbury's proposal gives the state authority to limit internet access to protect children from "serious developmental harm."<sup>82</sup> As a consequence, under their proposal, it would seem that the state would have broader authority to regulate speech content available to minors than it currently has. Currently, parents on an individual basis can prohibit or limit access to the internet if

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<sup>79</sup> See Dailey & Rosenbury, *supra* note 6, at 586–87.

<sup>80</sup> For example, one social media post detailed how to get high on large doses of Benadryl. See Claire McCarthy, *Defusing the 'Benadryl Challenge': Discussing Danger with Teens*, HARV. HEALTH PUBL'G. (Nov. 2, 2020), <https://perma.cc/UTA7-9WCZ>.

<sup>81</sup> The guidelines were issued in a report created by a special American Psychological Association advisory panel. See generally AM. PSYCH. ASS'N, HEALTH ADVISORY ON SOCIAL MEDIA USE IN ADOLESCENCE (2023). The report recommended limiting adolescents' exposure to material that is violent, illegal, maladaptive (such as material promoting eating disorders), discriminatory, or encouraging of cyberbullying. The recommendations also advise monitoring teens for signs that social media is impairing their ability to engage in daily roles in ways that could lead to further psychological harm. The report also recommends close monitoring by parents of social media use by younger teens, ages 10 to 14. See *id.* at 6–7; see also Zara Abrams, *Why Young Brains Are Especially Vulnerable to Social Media*, AM. PSYCH. ASS'N. (Aug. 3, 2023), <https://perma.cc/6Y69-4B55>.

<sup>82</sup> Dailey & Rosenbury, *supra* note 6, at 590.

they determine that particular content is harmful to their children, or if they believe their children will be better off if they stay off social media altogether.<sup>83</sup> In shifting this authority to the state, their proposal creates a government oversight role monitoring speech content that would seem to conflict with current constitutional doctrine. *Entertainment Merchants Ass'n* acknowledges that access to the violent video games that California sought to restrict might be harmful, but observed that parents could protect their children and restrict access by following the manufacturers' age code.<sup>84</sup> Authorizing the state rather than parents to monitor harmful content on the internet might well run afoul of *Entertainment Merchants Ass'n* and would likely lead courts to relax the strict limits imposed by the First Amendment on state interference with individuals' access to information and expression—at least for children.<sup>85</sup>

Assuming it passed constitutional muster for purposes of this Essay, Dailey and Rosenbury's proposal could benefit some children, who would have broader access to the world of ideas than their parents allow. Some parents want to restrict their children's access to any information that might vary from the parents' beliefs or values. For those children, restriction of parental authority could potentially expand their intellectual, cultural, and social horizons, contributing to their experience as children and their development as persons.

Overall, however, the harms created by the implementation of Dailey and Rosenbury's proposal might well exceed the benefits. Besides expanding the role of the state in regulating the speech of minors, an issue to which I return below, shifting responsibility for protecting children from harmful internet content could result in intrusive state intervention in the family, and it seems unlikely to promote the interests of children. Under Dailey

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<sup>83</sup> See RESTATEMENT Draft No. 5 § 18.11 cmt. c.

<sup>84</sup> See *Entertainment Merchants Ass'n*, 564 U.S. at 803.

<sup>85</sup> Dailey and Rosenbury seem to acknowledge the risk of this state role. Their proposed alternative § 18.11 limits the state's authority to protect children from developmental harm by allowing state restriction only of content unprotected by the First Amendment. See Dailey & Rosenbury, *supra* note 6, at 590. But this would only allow restriction of sexual content under *Ginsberg*, unless the authors contemplate that courts would relax the boundaries of the First Amendment to protect children from content that is protected speech for adults, but harmful for children. Otherwise, given Dailey's and Rosenbury's opposition to parental authority to monitor their children's access to social media, children could access content that is racist, fascist, antisemitic, and violent with no filter or adult guidance.

and Rosenbury's proposal, the state would have a dual role, monitoring parents to be sure they are not illegally controlling their children's internet access,<sup>86</sup> as well as enforcing parents' compliance with state rules prohibiting access to particular content deemed harmful by the state. These roles together seem likely to result in significant intrusion in the family.

It is difficult to envision how state oversight would work, and many questions arise. Would children have the freedom to access the internet whenever and for as long as they wish?<sup>87</sup> Would parents who prohibit their children's access be subject to child abuse petitions? Could children report their parents' effort to limit internet access to a teacher or other state agent? How would the state enforce restrictions on access to material deemed harmful?

It is unclear how, or if, children's internet access would be supervised under Dailey and Rosenbury's proposal. The APA report, cited above, recommends that social media use by children ages 10 to 14 be monitored closely.<sup>88</sup> Under Dailey and Rosenbury's proposal, it would seem that parents would not be authorized to perform this function. Moreover, the potential harm of internet access is likely to vary depending on the child's age, mental health, and a range of other individualized factors. Thus, some children might be harmed by access to particular internet content that would not be deemed harmful to other children. For example, a website promoting weight loss might be harmful for an anorectic teen. Would her parents need to apply for a permit to limit their child's access? On my view, most parents care for their children and understand their interests better than a state decision-maker is likely to do; thus a regime in which each decision about limiting internet access is made by the state seems inefficient at a minimum, and overall, less likely to promote children's welfare.

Toward the end of their essay, the authors observe that "[p]arents remain free to exercise control over their children in the home, but [not] . . . in the spaces beyond home and school."<sup>89</sup> Possibly, this means that parents, indeed, do have the authority to regulate their children's access to social media at home. If so, the space between Dailey and Rosenbury's view and § 18.11 is

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<sup>86</sup> Parents likely would not be allowed to install apps to limit internet access on particular sites. *See id.*

<sup>87</sup> The Supreme Court has allowed time, place, and manner restrictions on speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

<sup>88</sup> AM. PSYCH. ASS'N, *supra* note 81, at 5.

<sup>89</sup> Dailey & Rosenbury, *supra* note 6, at 591.



quite narrow. Alternatively, their meaning may be that children's access to social media, as a unique form of speech "beyond home and school,"<sup>90</sup> should receive special protection that other content (books or magazines perhaps) might not receive in the home. This view, as suggested, raises many questions.

#### IV. STATE DETERMINATIONS OF DEVELOPMENTAL HARM: A CAUTIONARY TALE

The two essays commenting on Part 4 of the Restatement focus on very different issues, but in one sense they are in conversation with each other. Goodwin describes the impact of a few parents' opposition to a sex-education curriculum in school,<sup>91</sup> affirming the concern at the heart of Dailey's and Rosenbury's proposal that some parents will restrict their children's access to information in harmful ways.<sup>92</sup> But she also suggests the peril of expanding the role of the state in regulating children's access to speech deemed harmful. Goodwin describes how conservative lawmakers have seen developmental harm in the content of sex-education programs, banning material about sexual and gender identity as "pedophilia" and "child abuse."<sup>93</sup> In Florida, the legislature has enacted a statute restricting the content of the public school curriculum and requiring the approval of sensitive content by the politically controlled state department of education.<sup>94</sup> The upshot is that instead of a small percentage of parents withdrawing their children from sex-education classes based on their personal moral or religious views, all Florida schoolchildren will be denied access to curricular content deemed offensive by the department. In general, recent events suggest that lawmakers may be ready to restrict children's access to books and other material dealing with politically sensitive issues. Government officials in many localities have banned access in public schools to publications criticizing our history of racial oppression and others dealing with sexual and gender identity.<sup>95</sup> Dailey and Rosenbury surely would

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<sup>90</sup> *Id.* at 570.

<sup>91</sup> Goodwin, *supra* note 2, at 616.

<sup>92</sup> See Dailey & Rosenbury, *supra* note 6, at 569.

<sup>93</sup> See Goodwin, *supra* note 2, at 615 (quoting Tracey Tulley, *Sex Ed Emerges as Core Issue for N.J. Republicans as Midterms Approach*, N.Y. TIMES (Sept. 2, 2022), <https://perma.cc/J4CJ-KMFK>).

<sup>94</sup> See FLA. STAT. § 1003.42 (2023).

<sup>95</sup> This is discussed by scholarship within this issue. See Kristine L. Bowman, *The New Parents' Rights Movement, Education, and Equality*, 91 U. CHI. L. REV. 399, 426–27 (2024); Emily Buss, *Protecting Children's Access to a Sound Basic Education in the Age of*

oppose these moves, but I fear that their proposal might lead to legal changes more supportive of politicians' efforts to restrict children's speech.

In general, shifting authority from parents to the state to determine what expressive content causes developmental harm could lead to greater restrictions of children's access to ideas—at least in some states. In *Entertainment Merchants Ass'n*, the violent video case, the Court announced that while the state had the authority to regulate children's access to sexual materials, it could not create a whole new category of content-based regulation of speech directed only at children.<sup>96</sup> The Court might well relax this restrictive approach if Dailey and Rosenbury's proposal were adopted. Predictably, if only the state and not parents were allowed to restrict children's access to harmful internet content, state authority to do so would likely expand;<sup>97</sup> the state would have the authority to restrict internet speech that causes severe developmental harm, as determined by state actors. As the Florida example suggests, in some states, this proposal could lead to far broader restrictions on children's access to information than are allowed under current law in which the parents, and not the state, act as filters. Instead of a subset of parents deciding that particular internet content is harmful, a state rule would restrict the prohibited speech for all children.

#### CONCLUSION

The current regime in which parents are given substantial authority to restrict their children's access to speech, while state authority is severely restricted, does not result in optimal access to the world of ideas for every child. Some parents likely inflict harm on their children by strictly limiting their ability to learn about the wider world, while others may fail to protect their children from online material that causes substantial harm. But on the whole, children's interests seem likely to be better served if their parents, and not the government, make these important decisions.

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*Political Polarization, A Comment on Goodwin Liu and Kristine Bowman's Essays on Children's Education in the Restatement*, 91 U. CHI. L. REV. 449, 455 (2024). For a discussion of this trend, see Hannah Natanson, *School Book Bans and Challenges, at Record Highs, Are Rising Again*, WASH. POST (Sept. 19, 2022), <https://perma.cc/AX7U-2Y73>.

<sup>96</sup> See *Entertainment Merchants Ass'n*, 564 U.S. at 794. The Court in *Entertainment Merchants Ass'n* discounted the relevance of the many studies showing the harmful impact of exposure to violent videos. See *id.* at 800–01.

<sup>97</sup> See *supra* note 68 and accompanying text.