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I. ABSTRACT

This Article reviews the rights of individuals younger than eighteen to engage in their daily activities, now often mediated through online service providers, learning management systems, and other technological intermediaries. Unlike prior generations, modern adolescents must navigate the complex world of online society in addition to their family life, school day, and the time they spend away from school at work or in social activities.

This project includes concerns over bullying and harassment, contractual rights, social media policies, child pornography laws, revenge pornography laws, and end-user license agreements.

Neither sectoral privacy laws nor state privacy laws address the complex problems adolescents face in the online sphere. The landscape is such that the average teen spends much of the waking day online—a virtual existence that provides little anonymity and that leaves them vulnerable to predation and harsh consequences of their own mistakes. Parents are legally expected to be the primary authority for these teens'

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upbringing and well-being, but the online competition often makes this a challenge. Parents and other authorities lack relevant knowledge to help the digital generation deal with this array of online issues.

Against this backdrop, many parents and states have turned to schools to regulate teen conduct. In response, the Supreme Court of the United States stated that the parent's traditional authority remains central, suggesting that while the schools have a role to play *in loco parentis*, the parents and guardians have primary responsibility. This is particularly true for online, off-campus speech. The cautious guidance provided by the Supreme Court will continue to pressure school districts and other state regulators to fashion practices to address these challenges.

This Article reviews the Supreme Court's school-speech jurisprudence within the larger context of online speech and conduct regulation for minors, including minors' right to access information, to create their own content, including sexual content, to transact online, and to obtain an abortion. In many of these activities, minors are barred, subjected to parental consent, or required to seek a judicial alternative to parental consent. By looking both in and beyond the schoolhouse, this Article will identify the constitutionally required protections for minors of various ages, providing a framework for assessing the constitutionality of new state laws.

II. INTRODUCTION

Tell me is my voice too loud
A grating sound piercing the beautiful silence:
Children should be seen and not heard
Compliant and quiet, empty husks for your indoctrination
For your prescription
For your fear of subversion
—Angel Xing[1]

At the most global and abstract level, the fate of children has improved in this century. For example, in 1980, "10 percent of the children born that year died from preventable causes. By 2018, that

1. Angel Xing, *If You Cut Us, Do We Not Bleed?*, YORK COMMUNITIES FOR PUBLIC COMMUNITIES FOR PUBLIC EDUCATION (Feb. 4, 2020), https://www.yorkcommunitiesfored.ca/angel_xing_poem. Performance of the full spoken word poem can be found at https://www.rogerstv.com/show?lid=12&rid=79&sid=8017&gid=325774 (beginning at 23:00).

number had declined to just 3 percent."[2] Today, United Nations International Children's Emergency Fund (UNICEF) focuses primarily on malnutrition and basic medicines. While the global outlook for children has improved, severe risks remain. UNICEF reported that "[i]n 2018, almost 200 million children under [the age of] 5 suffered from stunting or wasting while at least 340 million suffered from hidden hunger."[3] Thankfully, most of the world's children receive the nutrition and shelter they need. Children, however, need much more.

> Adolescence is the pivotal period between childhood and adulthood . . . . [Y]outh need to acquire the attitudes, competencies, values, and social skills that will carry them forward to successful adulthood. It is also the time when they need to avoid choices and behaviors that will limit their future potential.[4]

Adolescents,[5] the rising generation of leaders, are a potent force in the global economy. The family is the fundamental and universal organizing principle of society, and parents are responsible for the education and well-being of their children. Article 16 of the United Nation's Universal Declaration of Human Rights provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[6] In the United States, parental rights are considered fundamental rights that cannot be

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2. *The State of the World's Children*, UNICEF (Oct. 2021), https://www.unicef.org/reports/state-of-worlds-children.

3. *The State of the World's Children 2019: Children, Food, and Nutrition*, UNICEF (2019), https://www.unicef.org/media/106506/file/The%20State%20of%20the%20World%E2%80%99s%20Children%202019.pdf.

4. National Research Council and Institute of Medicine, *Community Programs to Promote Youth Development*, INSTITUTE OF MEDICINE AND NATIONAL ACADEMIES PRESS 1 (2002), https://doi.org/10.17226/10022.

5. Throughout the paper, the terms adolescent, child, minor, and teen are used to reflect individuals younger than eighteen years of age. The age of majority is eighteen in all states except Alabama and Nebraska, which set the age at nineteen, and Mississippi, which sets the age at twenty-one. *See* Elissa Suh, *The Age of Majority (and the UTMA Account Distribution Age) in Every State*, POLICYGENIUS (Dec. 30, 2020), https://www.policygenius.com/estate-planning/age-of-majority-by-state/. Adolescents generally refers to minors under the age of eighteen; however, the World Health Organization (WHO) defines an adolescent as any person between ages ten and nineteen. *See Orientation Programme on Adolescent Health for Health Care Providers*, WHO (2012), https://www.who.int/maternal_child_adolescent/documents/pdfs/9241591269_op_handout.pdf.

6. U.N. Universal Declaration of Human Rights, Preamble (Dec. 10, 1948). *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INTL. & COMP. L. 287, 289 (1996).

usurped by state authority without a compelling state need.[7] "Yet at least 25 percent of adolescents in the United States are at serious risk of not achieving 'productive adulthood' and face such risks as substance abuse, adolescent pregnancy, school failure, and involvement with the juvenile justice system."[8]

Familial rights often interfere with the rights of the minor, reassigning a substantial amount of individual autonomy from the minor to the minor's parents. In conflicts between the parents' rights and the children's rights, legal doctrine is inconsistent regarding parents' fundamental rights to make decisions on behalf of their children and the rights of children to make their own decisions. Nowhere are these conflicts greater than in the related areas of privacy and speech. As a result of this historical tension, the legal fiction of the minor is used to retain a body of law that does not respect the minor's autonomy, nor does it adequately reflect the tension between minors and their parents or guardians. Minors express their autonomy in several ways. They enter contracts, participate in education, engage in public speech of political and social natures, and have sex—which means that many seek contraceptive services, and some seek abortions. This Article explores the many ways adolescents express their autonomy despite authority vested in their parents and guardians, in their schools, and in the state. As described in this Article, struggles for autonomy have become more difficult and complex due to the occasionally hostile and demeaning experience teens face online.

After reviewing the teen struggles for autonomy, this Article identifies specific counterproductive efforts in helping minors develop into healthy, productive adults. Specifically, this Article suggests that expanded school authority to punish students for antisocial behavior is ineffective at resolving the problems faced by teens. It also suggests that the rights and interests of teens in their own sexual activity should serve to limit certain instances where child pornography laws are used to punish individuals for their own sexual activities that do not involve adult predators.

Rather than finding the situation intractable and current solutions ineffective, however, this Article concludes with a prescription for how best to create a healthier environment for teen development and growth. Using the principles of "empathy-by-design," this Article suggests that a combination of steps can be undertaken to improve the environment for teen development. These include bringing advertisers, financiers, and other enablers of social media to help prioritize the end

7. *See infra* Section II.

8. *Community Programs to Promote Youth Development*, *supra* note 4, at 2.

to online harassment, the development of empathy-based human-centered design principles into the school setting, expanding restorative justice practices, and teaching the skills and science behind empathy to make empathy-based problem solving the standard for teen development and institutional processes. Only by moving from a rights-based approach to an empathy-based model will the communal goals of raising healthy, well-adjusted, and productive teens be met.

II. THE LEGAL RIGHTS OF PARENTS OVER THEIR CHILDREN

The United Nations has recognized both the rights of parents and guardians. In both the 1959 Declaration of the Rights of the Child,[9] and the 1989 Convention on the Rights of the Child,[10] the United Nations emphasized the role of parents and guardians as the gatekeepers for child welfare. The Preamble to the Convention includes the following statement regarding families: "*Convinced* that the family, as the fundamental group of society and the national environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community[.]"[11]

The rights of a parent have long been established as a fundamental part of domestic law and a foundational component of natural law.[12] "The parent, by natural law, is entitled to the custody and care of the child[.]"[13] This right comes with certain duties and limitations imposed by the state.

> To society, organized as a state, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community.[14]

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of

9. U.N. Declaration of the Rights of the Child (1959). *See generally* Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INTL. L. 237, 293 (1994).

10. U.N. Convention on the Rights of the Child (1990). The United States has signed the convention but has yet to send the treaty to the Senate for ratification.

11. *Id.* (emphasis in original).

12. People v. Ewer, 36 N.E. 4, 5 (N.Y. 1894).

13. *Id.*

14. *Id.*

the fundamental liberty interests recognized by this Court."[15] Unless there is a conflict, the child's legal rights are generally safeguarded by protecting the interests of the child's parents or legal guardians.[16] "[P]arents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[17]

Parents are obligated to take care of their children, yet one-third of children in the U.S. do not live in two-parent homes.[18] The biological parents are presumed to be the custodians of their children without the need to demonstrate their ability to raise children or prove that their parenting is in the child's best interests.[19] The family is a universal component of most societies, and the parents possess the presumptive role for directing the family unit.[20] The Supreme Court of the United States, for example, has recognized the parental right to choose language education over the objection of state law;[21] to participate in religious rather than secular education;[22] and "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief[.]"[23]

Many local school districts, however, make parental participation in public schools an ongoing challenge as parents strive to balance their choices about their children's education with the choices made by the school district.[24] Caught in the middle of this tension are the wishes and interests of the children themselves. In *Prince v. Massachusetts*, for example, the Supreme Court addressed the right of a parent to compel

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15. Troxel v. Granville, 530 U.S. 57, 65 (2000).

16. *Id.*

17. Parham v. J.R., 442 U.S. 584, 602 (1979).

18. *Youth Statistics: Family Structure and Relationships*, ACT FOR YOUTH http://actforyouth.net/adolescence/demographics/family.cfm (last visited Jan. 21, 2022) (citing *America's Families and Living Arrangements: 2018: Children (C table series)*, U.S. CENSUS BUREAU (2018), http://census.gov/data/tables/2018/demo/families/cps-2018.html (last visited Jan. 21, 2022)).

19. *See*, *e.g.*, U.N. Convention on the Rights of the Child, *supra* note 10, at Art. 3.2 ("State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her . . . .").

20. The complex and evolving understanding of family, as defined by law, is beyond the scope of this Article. *See generally* Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819 (1985).

21. Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (holding that Latin, Greek, and Hebrew are not proscribed; but, German, French, Spanish, Italian, and every other alien speech are within the ban).

22. Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

23. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

24. *See* Minow, *supra* note 20, at 833.

or permit a minor to sell periodicals or engage in other street vending.[25] In addition to barring boys under twelve and girls under eighteen from various forms of street vending,[26] the law also singled out parents—but not children—for punishment under the law:

> Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation [of the act] . . . shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both[.][27]

Nine-year-old Betty Simmons, the Court explained, cried until her guardian, Sarah Prince, relented and allowed Betty and Mrs. Prince's two other children to join her. Together they stood on a downtown street corner preaching and promoting publications central to the Jehovah's Witness's religious practices.[28] The Court acknowledged that the activities were protected under the First Amendment, and had the law prohibited all persons from selling the religious texts, the law would have been unconstitutional.[29] Nonetheless, since the religious publications were considered for sale to the passersby, the street-vending law was implicated, and the Court found that the state had an interest stronger than that of the parents in enforcing the ordinance.[30] "The state's authority over children's activities is broader than over like actions of adults."[31]

> [T]he mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a 'sale' or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with

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25. *Prince*, 321 U.S. at 160–61 ("No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.").

26. *See id.* The law in question under *Prince* would violate the Equal Protection Clause due to its gender disparities, an issue not before the Court in 1944.

27. *Id.* at 161.

28. *Id.* at 161–62.

29. *Id.* at 167–68.

30. *Id.* at 168.

31. *Id.*

> similar convictions and objectives, if not alone then in the parent's company, against the state's command.[32]

Prince illustrates a judicial tolerance for regulations of minors and the access to various rights using age as a criterion. Age restrictions on driving automobiles[33] and voting[34] are other examples. A minor cannot undertake certain categories of work as determined by the Fair Labor Standards Act,[35] and laws in various states,[36] nor may a minor draft a will.[37] Finally, under common law doctrine, for example, a minor cannot enter a binding contract, making most consensual arrangements with a minor voidable.[38]

States impose these limitations on minors for a variety of reasons. As illustrated by the common law contract doctrine, the voidability rule is intended to protect the minor from both the minor's decisions and the predatory nature of commerce.[39]

> The reason for allowing the minor the privilege of voiding his contracts was the protection of the minor. It was thought that the minor was immature in both mind and experience; therefore, he

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32. *Id.*

33. *See generally, Driver's Licenses in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Driver%27s_licenses_in_the_United_States (collecting state-by-state standards) (last visited Sept. 26, 2021).

34. *See* V. Nathaniel Ang, *Teenage Employment Emancipation and the Law*, 9 U. PA. J. LAB. & EMP. L. 389 (2007) ("Teenagers have limited rights in the United States. The minimum driving age is sixteen in most states. The minimum full working age is eighteen, when teenagers are legally allowed to work in any occupation. The minimum voting age is eighteen.").

35. *See* 29 C.F.R. § 570.125 (2015). *See* Dana M. Dohn & Amy Pimer, *Child Labor Laws and the Impossibility of Statutory Emancipation*, 33 HOFSTRA LAB. & EMP. L.J. 121, 166 (2015).

36. *See generally, Hazardous Jobs*, U.S. DEPT. OF LABOR, https://www.dol.gov/general/topic/youthlabor/hazardousjobs (providing links state labor offices/state laws) (last visited Sept. 4, 2021).

37. UNIF. PROBATE CODE § 2-501 (amended 2019) ("An individual 18 or more years of age who is of sound mind may make a will."). There are two states with statutory exceptions. *See* Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 117 (2014) (The two exceptions are Georgia and Louisiana. O.C.G.A § 53-4-10 (authorizing children ages fourteen and older to execute a will); LA. CIV. CODE ANN. art. 1476 (authorizing children ages sixteen and older to execute a will)).

38. *See* Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 244 (2008); Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 485 (1994).

39. Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967).

> should be protected from his own bad judgment as well as from adults who would take advantage of him. There can be little dispute with the reasoning behind this purpose.[40]

The voidability doctrine for minors' contracts dates back to the fifteenth century. "General education was not in existence, commerce was limited to Guilds, membership in which was restricted, industry as we know it today was not yet born; no opportunity was afforded for the foundation of an experience pattern in business transactions of even the simplest nature."[41] Given this set of assumptions about the ability of minors to understand their economic choices, the protective law seems appropriate. After all, "[s]uch children were untutored in the wiles of commerce and therefore easy prey for a designing and crafty adult."[42] Still, since their adult counterparts had little more education, the distinction might be overstated.

Professor Martha Minow challenged the notion that the common law rules regarding women's domestic roles in the nineteenth century were merely descriptive, propounding instead that the common law served "as one set of ideas and practices influencing and influenced by social life."[43] The same is likely true for the law of minors, particularly since more pernicious paternalistic aspects of state law impinge on the rights of female minors.[44] Professor Minow and others also have described how many of these laws are narrowed remnants of nineteenth-century patriarchal legal systems.[45] The state provided the male head of the household "property, contract, and suffrage rights; excluded his wife and children from such rights; and accorded him powers over the property and services of his wife and children, along with powers to discipline them."[46] The law's treatment of wives as subordinate and sublimated to their husbands extended to that of their children.[47] "The same protective justification accompanied traditional legal disabilities

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40. *Id.* at 205 (quoting James L. Sivil, Jr., *Contracts–Capacity of the Older Minor*, 30 U. KAN. CITY L. REV. 230, 230 (1962)).

41. Clark Miller, *Fraudulent Misrepresentations of Age As Affecting the Infant's Contracts-A Comparative Study*, 15 U. PITT. L. REV. 73, 74 (1953).

42. *Id.*

43. Minow, *supra* note 20, at 822.

44. *See infra* Section III.

45. Minow, *supra* note 20, at 828.

46. *Id.*; *see* I. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 433–36 (1822).

47. Minow, *supra* note 20, at 828.

applied to children and exempted them from responsible control of property, contractual relations, and criminal acts."[48]

Modern minors find themselves in a particularly unique situation. "Online markets are increasingly dependent on minors."[49] The common law rules on contract disaffirmance remain firmly in place, yet every app on a smartphone, every video game, and most websites require users to sign terms-of-service agreements (or end-user-license agreements).[50] Minors are often provided free games and services with in-app opportunities to purchase new features or in-game assets.[51] Everyone does, but few people read them.[52] "A Deloitte survey of 2,000 consumers in the U.S. found that 91% of people consent to legal terms and services conditions without reading them. For younger people, ages 18–34 the rate is even higher with 97% agreeing to conditions before reading."[53] In the academic setting, an important decision involving anti-plagiarism software elided over the disaffirmance issue by applying a copyright fair use analysis to give the software company the needed authority to archive copies of the student papers.[54]

In the environment of amusement parks, Six Flags was found to have failed to meet the requirement under the Illinois Biometric Information Privacy Act when it used fingerprint technology for park passes.[55] The minors who attended the park were incapable of meeting the waiver requirements upon which the company was relying to employ its biometric passes, and therefore there was no statutorily acceptable consent to the collection of the information.[56] In 2014, the ease with

48. Minow, *supra* note 20, at 829; Edge, *supra* note 39.

49. Cheryl B. Preston, *Cyberinfants*, 39 PEPP. L. REV. 225, 228 (2012).

50. *See id.* at 226. ("Providers of such 'free' web services do so intending to recover their costs and make significant profit from advertisements and other monetized features.").

51. *See*, *e.g.*, Doe v. Epic Games, Inc., 435 F. Supp. 3d 1024, 1033 (N.D. Cal. 2020) ("Fortnite . . . can be downloaded at no cost but allows players to make 'in-App purchases' using virtual currency called 'V-Bucks,' which can be earned through game play or purchased for money.").

52. *See* Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUSINESS INSIDER (Nov. 15, 2017), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11.

53. *Id.*

54. A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 633, 637–38 (4th Cir. 2009) (permitting iParadigm's Turn-it-In software to archive student papers without either student or parental consent). *See* Preston, *supra* note 49, at 235–36.

55. Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197, 1206–07 (Ill. 2019).

56. *Id.* at 1206 ("The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent.").

which minors could use their parents' phones to make in-app purchases led to an FTC settlement by Apple.[57] A similar action led to a summary judgment action against Amazon for failing to address in-app purchases by minors who could easily buy game benefits without parental consent.[58]

There have been surprisingly few disaffirmance class action suits, but that may change. Given the tremendous economic interest in collecting funds from minors, the pressure will then mount to restrict the rights of disaffirmance. In the alternative, in-app purchases may—and indeed should—require more meaningful consent from parents or guardians.[59] But while in-app purchases capture the attention of the FTC, waivers of privacy, rights of publicity, copyright, and other interests are all being lost by minors to these opaque terms-of-service agreements with little regard to the policies underlying contractual disaffirmance. The lack of disaffirmance protections empowers minors to contract, but the structure of clickwrap agreements means that the adolescents may not be aware of the consequences of these contracts.[60]

In his essay *On Liberty*, John Stuart Mill asserted that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[61] This assertion of liberty, however, ignores the liberty interests of the minor which are held either by the parent or by the state. Yet

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57. *See Apple Inc. Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent*, FTC (Jan. 14, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

58. F.T.C. v. Amazon.com, Inc., 71 F.Supp.3d 1158, 1165 (W.D. Wash. 2014). Amazon unsuccessfully argued that the minors had "apparent authority" to purchase items, but the court deflected this claim, stating "[t]he Court notes that it is not inclined to extend apparent authority to child users without more persuasive legal authority." *Id.*

59. *See*, *e.g.,* Emily Guy Birken and Dia Adams, *Real Money for Virtual Gems: What to Do When Kids Overspend on Apps*, FORBES (Dec. 9, 2020), https://www.forbes.com/advisor/credit-cards/real-money-for-virtual-gems-what-to-do-when-kids-overspend-on-apps/.

60. *See* Katy Hull, *The Overlooked Concern with the Uniform Computer Information Transactions Act*, 51 HASTINGS L.J. 1391, 1406 (2000) ("[T]he act of the minor clicking a button which asserts competency to enter into a contract will not remove the consumer protections which allow the minor to disaffirm."). *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (describing the degradation of meaningful consent in clickwrap and similar online agreements); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 635 (2002); Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts-A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part i)*, 62 CLEV. ST. L. REV. 373, 399 (2014).

61. JOHN STUART MILL, ON LIBERTY, 1, 13 (1859).

compulsory education and truancy laws are designed to tell the child that the state has the final say in the child's best interests. The Franklin D. Roosevelt Administration established a national goal of school attendance, explaining in a 1935 report that "[t]he ideal of having all the children of elementary and secondary school age (6 to 17, inclusive) attend school has not been attained."[62] The Roosevelt Administration promoted the government's interest in enforcing truancy laws "in the faith that education is essential to the perpetuity of popular government and social justice."[63] In doing so, the government supplanted the parents, emphasizing that the family's economic needs for child labor or other objections to universal education must take a backseat to the government's interest in its citizenry. Truancy laws offered no possibility that the minor had any personal stake in the decision to participate in the decision to attend school.

To a lesser degree, parental control over a child's health care has also been usurped by state interests. In *Jacobson v. Commonwealth of Massachusetts*,[64] the Supreme Court of the United States upheld Massachusetts' mandatory vaccinations, allowing exceptions based on medical issues.[65] All states have continued to enforce similar laws.[66] In addition to medical exemptions, almost all states provide religious exemptions for mandatory vaccination of children.[67] Beyond vaccinations, states can intervene when a parent refuses to permit lifesaving medical treatment,[68] or when child neglect or abuse is

62. WALTER DEFENBAUGH & WARD KEESECKER, U.S. DEPT. OF INTERIOR, COMPULSORY SCHOOL ATTENDANCE LAWS AND THEIR ADMINISTRATION 1 (1935), available at https://files.eric.ed.gov/fulltext/ED542358.pdf (last visited Jan. 23, 2022).

63. *Id.* at 311.

64. 197 U.S. 11 (1905).

65. *Id.* at 26.

66. *See* Alan R. Hinman *et al.*, *Childhood Immunization: Laws That Work*, 30 J.L. MED. & ETHICS 122, 124–25 (2002).

67. *Id.* at 124 ("Forty-eight states currently allow religious exemptions, and sixteen permit philosophical exemptions. Additionally, Arizona and Missouri allow philosophical exemptions in some settings.").

68. Emily G. Narum, *Making the Grade: School-Based Telemedicine and Parental Consent*, 53 SAN DIEGO L. REV. 745, 754 (2016); Jennifer E. Chen, *Family Conflicts: The Role of Religion in Refusing Medical Treatment for Minors*, 58 HASTINGS L.J. 643 (2007).

> [W]here parents assert the right of refusal, the decision seems to turn on a number of factors relating to the strength of the state's interest which includes the danger to the child, the potential success of the treatment being refused, and the danger to others in the case of communicable diseases.

Id. at 655.

suspected.[69] Because parents have an affirmative duty to seek medical treatment for their children, the failure to do so can itself give rise to claims of neglect, leading to state intervention.[70]

These changes reflect a general trend that a parent's rights, though protected by Due Process as fundamental liberty rights,[71] are nonetheless being increasingly eroded. "The historical changes moved children from the control of their parents, notably their fathers, to a position as special charges of the state, and then to a position as rights-bearing individuals subject to state regulation and control."[72]

Still, in 2000, a fractured Supreme Court was unwilling to go so far. In *Troxel v. Granville*, the Court rejected Washington State's highly permissive statute that empowered "*any person* may petition the court for visitation rights *at any time*,' and the court may grant such visitation rights whenever 'visitation may serve the *best interest of the child*.'"[73] The Court found that such a broad interest violated the Fourteenth Amendment's Due Process Clause.[74] The Court wrote, "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[75] The very broad legislation substituted the judge for the parent in making the initial determination of what is in the best interest of the parent's child.[76]

> Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever.

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69. *See generally, Child Welfare Information Gateway*, U.S. DEPT. HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU (2019) (providing state-by-state requirements) https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/.

70. *See* Kimberly M. Mutcherson, *Whose Body Is It Anyway–An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J. L. & PUBLIC POLICY 251, 311 (2005).

71. *See Troxel*, 530 U.S. at 65 ("The 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children,' and 'to control the education of their own.'") (quoting *Meyer*, 262 U.S. at 399, 401).

72. Minow, *supra* note 20, at 832.

73. *Troxel,* 530 U.S. at 67 (emphasis in original) (quoting Rev. Code Wash. § 26.10.160(3) (2000)).

74. *Id.* at 72–73.

75. *Id.* at 65.

76. *Id.* at 67.

> Instead, the Washington statute places the best-interest determination solely in the hands of the judge.[77]

Dissenting in *Troxel*, Justice Kennedy raised a consideration that may well evolve into a new majority rule over time.[78] He explained that "*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion."[79] Justice Scalia, in his dissent, reinforced this suggestion: "Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated."[80] Religious conflict has often been a source of disagreement between the state and the right of parents to raise their children.[81] The conflict for Betty Simmons in *Prince* also turned on how she sought to reflect her faith.[82] Once the conflicts involving religious conflict are excluded, there are few areas where the state seeks to usurp the power of the family. What that leaves, however, is little movement regarding the rights of adolescents.

At the heart of these conflicts is a triangular relationship between the child, the parent, and the state.[83] In many of these instances, the state is asserting greater authority over the parent in decision-making for the best interest of the child, but by leaving the infirmity rules in place, the state is reducing rather than enhancing the autonomy of the individual child.[84] As a practical matter, children have a lifetime—

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77. *Id.*

78. *Id.* at 101–02 (Kennedy, J., dissenting).

79. *Id.* at 95 (Kennedy, J., dissenting).

80. *Id.* at 92 (Scalia, J., dissenting).

81. *See*, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (The First Amendment prohibited the state of Wisconsin from requiring Amish children to attend public school).

82. *See Prince*, 321 U.S. at 165.

83. *See* Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 898 (2007) ("Family law in the United States has long embraced the image of a triangle to describe the allocation of legal authority over childrearing. Parents, children, and the state stand at the three points of this triangle."); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 422 (2005) ("As a teacher of constitutional and family law for over fifteen years, I have illustrated the tensions between parents, children and the state with a triangular diagram.").

84. *See* Rosenbury, *supra* note 83, at 839 ("This orientation of the triangle emphasizes that children are rarely given power to control their own destinies, but rather are subject to the decisions of either their parents or the state."); Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1318 (1994) ("[C]onflicts primarily involve the state and the mediating entity—the family or other

though perhaps a limited one—of experience negotiating to wrest personal authority from parents. But few children have the experience or power to demand the same authority from the state itself. The majority recognized this risk in *Troxel*, rejecting judicial authority over parental authority, but it did not do so in hopes that the child would become a more active participant in determining visitation.[85]

The economic infirmity of adolescents remains a rather arbitrary rule. Many minors are quite capable of independent decision-making, while others evidence poor impulse control, but this is equally true of eighteen-year-old adults and many adults who are much older.[86] Once public policy can move past simplistic categories and replace them with more nuanced policies on decision-making and autonomy by adolescents, there can be improved understanding of the rights held by minors and their individual interests regarding privacy and speech, as well as the need to respect their ability to conduct transactions, often implicating both these interests.

III. A MINOR FEMALE'S RIGHT TO CONTRACEPTION AND ABORTION

One area where the Supreme Court has carved out a clear exception to parental control is in access to abortion. Whether this continues, however, will turn on the Supreme Court's willingness to recognize the precedential authority of *Roe v. Wade,*[87] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[88] In *Whole Woman's Health v. Jackson*,[89] the Supreme Court denied an emergency stay against a Texas law that empowers anyone to bring suit against anyone providing an abortion or assisting in the procurement of an abortion.[90] The Texas law attempted to avoid state action by permitting the public to enforce

custodian—without the independent, autonomous voice of the child being heard in the formal legal controversies.").

85. *See Troxel*, 530 U.S. at 65.

86. Daniel, *supra* note 38, at 244–45.

> At one point, the age of majority was set at twenty-one years of age. However, it was reduced to eighteen in many jurisdictions to coincide with the lowering of the voting age. This sweeping change in the age of majority with a simple stroke of a pen further demonstrates that arbitrary age limits are not an appropriate means of determining true contractual capacity. The fact that a twenty-year-old person could be generally regarded as incapable of contracting on one day and legally capable of contracting the next day due to a legislative enactment highlights the lack of consideration given to a person's actual cognitive abilities under the current scheme.

87. 410 U.S. 113 (1973).

88. 505 U.S. 833 (1992).

89. 141 S. Ct. 2494 (2021).

90. *Id.* at 2495–96.

the public policy, in much the same way that restrictive covenants were once used to bar Black, Jewish, or other "undesirable" home buyers from desegregating neighborhoods. In addition, the Supreme Court has agreed to hear *Dobbs v. Jackson Women's Health Organization*,[91] a Mississippi law that directly challenges the central holding of *Casey* that protects a woman's right to an abortion prior to the viability of the fetus.[92] Whatever the future of abortion rights, for women under eighteen, the Supreme Court has been consistent that they possess similar rights to those of adult women. Those rights, however, are generally mediated through their parents.

Under the precedent established by *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a woman's right to obtain an abortion was protected as a constitutional privacy right until the viability of the fetus.[93] The Supreme Court recognized that this same right was just as fundamental to adolescent girls as to those who had reached the age of adulthood.[94]

The jurisprudence reflects the reality that most adolescents have sex before they turn eighteen. For women, the median age for engaging in sex is 17.4 years of age, while for men, the median age for engaging in sex is slightly older at 17.7 years of age.[95] Since many teens engage in behaviors that are sexual but do not result in intercourse, the age at which they begin to expose themselves to sexually transmitted diseases are even younger.

The Supreme Court recognized that minors had the same need and the same rights to contraceptives.[96] In *Carey*, the Court explained:

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91. 945 F.3d 265, 277 (5th Cir. 2019) ("This law is facially unconstitutional because it directly conflicts with *Casey*. Accordingly, the district court did not abuse its discretion in declining to fashion relief narrowly . . . .").

92. *Id.* at 276.

> [T]he Act is invalid as applied to every Mississippi woman seeking an abortion for whom the Act is an actual restriction, never mind a large fraction of them. And for those women, the obstacle is insurmountable, not merely substantial. That the Act applies both pre- and post-viability does not save it.

93. *Casey*, 505 U.S. at 846.

> *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.

94. *Id.*

95. John Santelli et al., *Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 73 (2006).

96. Carey v. Population Serv., Intern., 431 U.S. 678, 687 (1977).

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives . . . and most prominently vindicated in recent years in the contexts of contraception . . . .[97]

In *Carey*, the Supreme Court struck down a law prohibiting nonprescription contraceptives for minors under sixteen.[98] In explaining why access to contraceptives falls within the penumbra of privacy interests, the Court made clear the reality that "the Constitution protects 'the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.'"[99] While strongly advocating for the privacy rights related to sex, procreation, and abortion, the Court in *Carey* was less expansive regarding the issues of the state's regulation of minors and the role parental authority exerted over the conduct of minors.[100] "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. We have been reluctant to attempt to define 'the totality of the relationship of the juvenile and the state.'"[101]

Without answering the question as to the scope of the minor's independent liberty interest, the Court in *Carey* relied on earlier precedent that a state could not legislate "a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."[102] It held that the restriction of access to nonprescription contraception must therefore also be unconstitutional because such a restriction would also interfere with the minor's decisions regarding sex and childbirth.[103]

Carey was particularly disdainful of New York's arguments that the restriction served to "emphasize to young people the seriousness with

97. *Id.* at 685 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

98. *Id.* at 687–88.

99. *Id.* at 687 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

100. *Id.* at 693.

101. *Id.* at 692.

102. Planned Parenthood of C. 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, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.").

103. *Id.*

which the State views the decision to engage in sexual intercourse at an early age."[104] The Court rejected the state's position that contraception should be increasingly inaccessible to deter juvenile sexual activity.[105]

Carey also looked at the First Amendment implications of restrictions on the advertisement and display of contraceptives.[106] It extended protection for truthful commercial speech as falling within the ambit of the First Amendment.[107] Despite the prudish position of the state that "advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people,"[108] the Court refused to bar protected speech because some members of the public were uncomfortable acknowledging that people have sex and use contraception.[109] "At least where obscenity is not involved," the Court remarked, "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."[110]

Carey extended a minor's access to contraception, but the earlier case of *Planned Parenthood of Central Missouri v. Danforth* first extended the rights of minor females to include abortion.[111] Under the Missouri law at issue, the written consent of a parent or person *in loco parentis* was required to approve the decision to have an abortion, unless "the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother."[112] Missouri supported the state's right to insist on parental approvals as part of its broader role in regulating the decision-making of minors:

> Missouri law, it is said, "is replete with provisions reflecting the interest of the state in assuring the welfare of minors," citing statutes relating to a guardian *ad litem* for a court proceeding, to the care of delinquent and neglected children, to child labor, and to compulsory education . . . . Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes proscribing the

104. *Carey*, 431 U.S. at 697.

105. *Id.* at 697–98.

106. *Id.* at 700.

107. *Id.* at 699 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976)) ("[A] State may not 'completely suppress the dissemination of concededly truthful information about entirely lawful activity,' even when that information could be categorized as 'commercial speech.'").

108. *Id.* at 701.

109. *Id.*

110. *Id.*

111. *Danforth,* 428 U.S. at 74–75.

112. *Id.* at 72.

> sale of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought abortions. Thus, a State's permitting a child to obtain an abortion without the counsel of an adult "who has responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors."[113]

The state provided a clear roadmap highlighting the many ways in which a minor's conduct is subject to parental control, the state's control, or a combination of both.[114] Of course, as a conflict over abortion rights, the case is less about privacy than it is about the continuing conflict of whether the life of a not-yet viable fetus should take precedence over the female who is pregnant with it.[115] The distinction is highlighted by the Court, noting that "no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment, and that in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse."[116]

In denying the right of the state to require parental consent, the Supreme Court made clear "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[117] Other decisions have continued to prohibit absolute parental approval laws.[118]

Nonetheless, the Court did not prohibit the state's attempt to require parental consent:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess

113. *Id.* at 72–73 (internal citations omitted). It is worth noting that even though the statute in question refers to a woman's access to abortion, the appellee's brief still uses "his own best interest" when referring to the minors under regulation, further disenfranchising the adolescent females seeking their privacy rights.

114. *Id.*

115. *Id.* at 73.

116. *Id.*

117. *Id.* at 74.

118. *See* Ayotte v. Planned Parenthood, 546 U.S. 320 (2006); *Casey*, 505 U.S. at 833.

> constitutional rights . . . . [Nonetheless,] the State has somewhat broader authority to regulate the activities of children than of adults.[119]

In addition, in the case of teen pregnancy, no rights are extended to the fathers-to-be. This remains equally the case for both adolescents and adult males responsible for the pregnancies.[120] This exclusion of input under *Roe* flows from the decisional privacy rights recognized under the law rather than the earlier property-based authority that gave fathers the power to determine who had legal custody and parental rights over their children.[121]

The Court analogized a minor's decision to abort a pregnancy with decisions to undergo an operation, marry, or enter military service, noting that all these activities require parental consent.[122] Despite encouraging parental consent, the Court also emphasized the importance of a judicial bypass option that enabled a court rather than a parent to provide the necessary approval.[123] The portion of the opinion by Justice O'Connor emphasized the prior decision in *Ashcroft* that parental consent may be upheld if there is an "alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."[124]

As a result of the complex and tortured constitutional jurisprudence surrounding abortion rights, a minor female does not have the same level of constitutional protection as her eighteen-year-old counterpart. Despite the sexual activity of the majority of these women and their unfettered right to contraception, the states continue to create obstacles

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119. *Danforth*, 428 U.S. at 74.

120. *See* Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1350 (2014); Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?*, 66 MOD. L. REV. 175 (2003); Marshall B. Kapp, *The Father's (Lack of) Right and Responsibilities in the Abortion Decision: An Examination of Legal-Ethical Implications*, 9 OHIO N.U. L. REV. 369 (1982).

121. *See* Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 835 (2021) ("Free women were charged with the majority of work in the home and child-rearing under prevailing custom and the common law, but fathers enjoyed the legal right to custody and control over minor children born to married couples, and mothers did not have a right to custody upon divorce."); *see also*, Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L. J. 299, 310 (2002).

122. Hodgson v. Minnesota, 497 U.S. 417, 424–26 (1990).

123. *Id.* at 456; *see also*, Bellotti v. Baird, 443 U.S. 622, 643–644 (1979); Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 491 (1983).

124. *Ashcroft*, 462 U.S. at 491.

to accessing abortion. Nonetheless, despite the tepid support for constitutional privacy rights for minors in these cases, the Court recognizes that the right exists, and the state can only undermine those rights because of its own compelling interest.

IV. ADOLESCENT AUTONOMY AND THE ONLINE EXPERIENCE

Among the many challenges of developing an appropriate policy to balance adolescents' rights with the need for parental guidance and school discipline is the stark reality facing teens both at home and online. For many teens, the world is harsh and unforgiving.

> Approximately one of every two marriages end in divorce. Unrebutted evidence indicates that only 50% of minors in the State of Minnesota reside with both biological parents.[125] This conclusion is substantially corroborated by a study indicating that 9% of the minors in Minnesota live with neither parent and 33% live with only one parent.[126]

A more recent national study roughly matches the earlier Minnesota data, stating that "[t]wo out of three (66%) of adolescents ages 12–17 live with both parents, 24% with their mother only, 5% with their father only, and 5% with neither parent."[127]

Compounding the wide variety of living arrangements in which adolescents might find themselves, their complex development from childhood to adulthood often comes with additional stressors and mental health issues. Mental health issues, depressive episodes, and substance abuse disorders appear in adolescents at rates significantly above younger children and adults.[128] "Studies have shown that there is nearly a twofold increase in mood disorders from the 13-to-14-year-old age group to the 17-to-18-year-old age group."[129] The data reflect that "[a]pproximately 938,000 U.S. adolescents aged 16 to 17 had [a major

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125. *Hodgson*, 497 U.S. at 437.

126. *Id.* at 437–38.

> Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence . . . . Studies have shown that violence and harassment may continue well beyond the divorce, especially when children are involved.

127. *Youth Statistics: Family Structure and Relationships*, *supra* note 18.

128. *See Serious Mental Health Challenges Among Older Adolescents and Young Adults*, SAMHSA (May 6, 2014), https://www.samhsa.gov/data/sites/default/files/sr173-mh-challenges-young-adults-2014/sr173-mh-challenges-young-adults-2014/sr173-mh-challenges-young-adults-2014.htm.

129. *Id.*

depressive episode] in the past year. This represents 1 out of every 10 older adolescents in this country (11.2 percent)."[130] Teens need social services and familial support to help reduce the likelihood of these negative mental health outcomes and to address them as they arise. Students without healthy families are at significant risk of increased health issues and isolation.

Another challenging aspect of adolescence is the development of a person's sexual identity. "About 3.5% Americans identify themselves as lesbian, gay, or bisexual while 0.3% identify themselves as transgender. The LGBT (lesbian, gay, bisexual, and transgender) community belongs to almost every race, ethnicity, religion, age, and socioeconomic group."[131]

According to multiple studies, LGBT teens were reported to have five times as many reports of suicidal ideation. These teens "are prone to be isolated and disconnected from the social networks," which may further the risk of depression.[132] Additionally, "LGBT youth receive poor quality of care due to stigma, lack of healthcare providers' awareness, and insensitivity to the unique needs of this community."[133]

For adolescents abandoned because of their sexual identity, for those who are diagnosed with a mental illness, for those living in violent or unhealthy domestic settings, or for those who simply cannot communicate effectively with their parents, the regulatory system must provide a meaningful alternative like that of the judicial bypass that exists in the abortion context. Unfortunately, it is only around abortion where a strategy has been adopted. Were there not a Supreme Court mandate and constitutional imperative to do so, it is unlikely that there would be a strategy to provide the resources needed for these millions of teens with mental health and developmental issues.

The need for sufficient maturity to address the concerns of independent decision-making regarding an adolescent's online speech, privacy, and sexual activity should also be considered in the context of the environment in which they find themselves:

> Even though digital media has become an essential part of everyday life . . . [i]t is not uncommon for writers to receive death threats for

130. *Id.*

131. Hudaisa Hafeez, et al., *Health Care Disparities Among Lesbian, Gay, Bisexual, and Transgender Youth: A Literature Review*, CUREUS (Apr. 20, 2017). *See* JON M. GARON, PARENTING FOR THE DIGITAL GENERATION 131, 133 (2022) (forthcoming, manuscript on file with author) ("Other reports suggest the LGBTQ population is twice the amount quoted, hovering at around 7%.").

132. Hudaisa, *supra* note 131.

133. *Id.*

> unpopular posts or for athletes to receive hate-filled posts because of errors on the field or comments off the field. High school athletes have received attacks regarding their choice of where to play in college . . . . High school athletes, cheerleaders, and other school celebrities are often the focus of shameful attacks. For other students, the bullying, harassment, and stalking come from within the school, using the power of digital media to magnify and exacerbate bullying behavior. The real harm of online harassment cannot be overstated.[134]

According to a Pew Research Survey, 59% of teens ages 13–17 have been victims of cyberbullying of some kind.[135] The most common version of online abuse is name-calling as 42% of students having been name-called at some point in their lives. A quarter of all students report receiving explicit images they did not request, and 7% of students have had their explicit images shared without their consent. More than a fifth of students (21%) have been stalked by others using digital media, and nearly a third (32%) have been the victims of false rumor campaigns. Girls are more likely than boys to be the targets of false rumors and sexually explicit content, but both groups have been victimized substantially. Girls, however, are much more likely to be the targets of four or more different forms of online harassment than boys. 15% of girls report high levels of targeted abuse compared to only 4% of boys.[136]

Teens that participated in the survey universally agreed that cyberbullying and online harassment are problems, with 63% describing them as major problems. The survey found that the teens do not believe that schools, social media platforms, or politicians are helping solve the problems. The only good news is that the teens surveyed found that parents were more effective than the other groups in addressing these concerns.[137] "Although the federal government has many mandates regarding K-12 education, there are no federal programs, curricula, or staff training mandates regarding bullying for the schools. Federal statistics do not reflect the number of students who report being bullied or harassed while in school."[138]

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134. GARON, *supra* note 131, at 143.

135. Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RESEARCH CENTER (Sept. 27, 2018), https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/.

136. *Id.*

137. *Id.*

138. GARON, *supra* note 131, at 210.

In comparing decisional privacy to informational privacy, the most relevant and expansive right under the abortion jurisprudence is the right to access nonprescription birth control. Although the Court in *Carey* was focused on the decisional privacy choice regarding conception and contraception, it directly implicated the minor's access to the information about contraception.[139] Interestingly, the right to advertise abortion services was recognized as protected commercial speech three years before *Virginia Board of Pharmacy* was decided.[140] In *Bigelow v. Virginia*, the Supreme Court rejected the state's attempt to block regulations related to New York abortion services.[141]

Just as the First Amendment rights in commercial speech expanded in the 1960's and 1970's, the First Amendment rights of minors to access content is well recognized,[142] reflecting an aspect of minors' rights that have similarly expanded in the past half-century.[143] Most notably, in *Tinker v. Des Moines Independent Community School District*,[144] the Court espoused a vigorous defense of students' free speech rights and the very limited role that the age of the individual had on the individual's constitutional protections.[145] The Court rejected the position advocated in the concurrence of Justice Stewart that "school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[146]

The First Amendment rights of children are not limited to domestic law. At least in theory, the international treaties protecting children suggest that children have more rights than those being recognized in

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139. *Carey*, 431 U.S. at 685 ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy . . . .").

140. *See* Bigelow v. Virginia, 421 U.S. 809, 825 (1975) ("Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection . . . ."); *Va. State Bd. of Pharmacy*, 425 U.S. at 748.

141. *Bigelow*, 421 U.S. at 812 ("It is to be observed that the advertisement announced that the Women's Pavilion of New York City would help women with unwanted pregnancies to obtain 'immediate placement in accredited hospitals and clinics at low cost' and would 'make all arrangements' on a 'strictly confidential' basis . . . .").

142. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

Id. at 213–14.

143. Brown v. Ent. Merchants Ass'n, 564 U.S. 786 (2011).

144. 393 U.S. 503 (1969).

145. *Id.* at 513–14.

146. *Id.* at 515 (Stewart, J., concurring).

domestic court decisions. The United Nations Convention on the Rights of the Child recognizes that children are entitled to parental obligations but also economic rights, minority rights, education, and political rights analogous to those found in the First Amendment procedural protections.[147] Articles 13–15 provide the rights analogous to the First Amendment:

> Article 13
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> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice . . . .
>
> Article 14
>
> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.
>
> Article 15
>
> 1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
>
> 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[148]

147. *See* U.N. Convention on the Rights of the Child, *supra* note 10; *see* also Levesque, *supra* note 9, at 271.

148. U.N. Convention on the Rights of the Child, *supra* note 10, at Art. 13–15.

In addition, Article 16 goes much further than United States law, providing specific privacy protection:

> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
>
> 2. The child has the right to the protection of the law against such interference or attacks.[149]

Despite the First Amendment rights of minors, Congress and state legislators have not stopped their efforts to protect minors from informational harms. For example, in 1968, in *Ginsberg v. State of N.Y.*,[150] the Supreme Court upheld a regulation barring the sale of pornography to minors which was non-obscene and lawful to sell to adults.[151] Regulators have attempted to extend *Ginsberg*, but without success. As the Internet became a social force, Congress attempted to censor the Internet from pornographic content to protect minors, but that effort was expeditiously deemed unconstitutional by the courts.[152] A similar effort was made in municipal and state laws to extend *Ginsberg* to ultraviolent or obscene levels of violence in videogames, which efforts were also held as unconstitutional.[153]

Revelations about the ongoing harm to minors on social media are likely to spur additional legislative efforts. In September 2021, the *Wall Street Journal* exposed internal reports of Facebook, the parent company for Instagram, that demonstrated the continuing harm to some of its adolescent users—even as the company's CEO was testifying before Congress that no such harms existed.[154] According to the *Wall Street Journal* story, internal reports provided damning insights into

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149. *Id.* at Art. 16.

150. 390 U.S. 629 (1968).

151. *Id.* at 639.

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful.

152. *See* The Children's Online Protection Act (COPA), 47 U.S.C. § 231 (2006); Ashcroft v. ACLU, 542 U.S. 656, 672–73 (2004); ACLU v. Mukasey, 534 F.3d 181, 207 (3rd Cir. 2008).

153. *See Brown*, 564 U.S. at 821.

154. Georgia Wells, Jeff Horwitz, & Deepa Seetharaman, *The Facebook Files: Facebook Knows Instagram Is Toxic for Teen Girls, Its Research Shows*, WALL ST. J. (Sept. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739.

the negative impact of Instagram on a portion of its most vulnerable users:

> We make body image issues worse for one in three teen girls . . . . Teens blame Instagram for increases in the rate of anxiety and depression . . . This reaction was unprompted and consistent across all groups . . . . 32 percent of teen girls said that when they felt bad about their bodies, Instagram made them feel worse . . . . Comparisons on Instagram can change how young women view and describe themselves.[155]

Reports of the data included in the story show that Facebook tracked information demonstrating that "[a]mong teens who reported experiencing suicidal thoughts, 6 percent of U.S. users and 13 percent of U.K. users attributed ideation to Instagram."[156] Instead of releasing this data, when testifying before Congress in March 2021, Facebook CEO Mark Zuckerberg stated, "[t]he research that we've seen is that using social apps to connect with other people can have positive mental-health benefits."[157] While the statement may contain some truth, the omission of the harm makes the statement materially misleading.

Each social media platform has its own attributes. Instagram emphasizes still pictures and emphasizes images and beauty in ways very different from Facebook's stories or TikTok's dance-infused movement clips. It may be that the emphasis on image exacerbates the anxieties of users who struggle with their body image or their aesthetic appeal.[158]

> At this point, it's a cliché even to note that social media makes us feel like shit about ourselves. A series of studies have shown a correlation between activities like scrolling through Instagram and negative body image. A 2020 study of undergraduate women has shown further that those asked to scroll through Instagram—but not Facebook, which emphasizes text more than photos—showed significantly decreased body satisfaction than those asked to do the

155. *See id.*; Claire Lampen, *Instagram Knows Just How Damaging It Is for Teen Girls*, N.Y. MAG. (Sept. 14, 2021), https://www.thecut.com/2021/09/facebook-very-aware-that-instagram-harms-teen-mental-health.html.

156. Lampen, *supra* note 155.

157. *Id.*

158. *See* Rebecca Jennings, *The Paradox of Online "Body Positivity*," VOX (Jan. 13, 2021), https://www.vox.com/the-goods/22226997/body-positivity-instagram-tiktok-fatphobia-social-media (last visited Jan. 23, 2022).

> reverse.[159] For homosexual men, Instagram can also reinforce the idea that queer culture is only for "ripped, statuesque men."[160]

The negative impact of Instagram, TikTok, and other doom-scrolling services should not be newsworthy because there has been public data available for years. The importance of the Facebook revelations is the extent to which the company's internal data has validated researcher concerns and to which the company has been misleading regulators about its products' ongoing harm.[161]

Facebook used external data to justify its response, which emphasized that much of the company's internal research matches the data collected by other researchers.[162]

> The research on the effects of social media on people's well-being is mixed, and our own research mirrors external research . . . . A mixed methods study from Harvard described the "see-saw" of positive and negative experiences that US teens have on social media . . . . According to research by Pew Internet on teens in the US, 81% of teens said that social media makes them feel more connected to their friends, while 26% reported social media makes them feel worse about their lives. Our findings were similar. Many said Instagram makes things better or has no effect, but some, particularly those who were already feeling down, said Instagram may make things worse.[163]

Although Facebook has responded with an acknowledgment that social media has this effect, it has not identified how its own algorithms and editorial systems promote obsessive and destructive usage and engagement rather than safe behaviors of use. The response included the laughably lame reply, "[o]ne idea we think has promise is finding opportunities to jump in if we see people dwelling on certain types of content."[164] Given that the data has been available for years, this tepid

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159. *Id.* (citing Renee Engel, et. al., *Compared to Facebook, Instagram Use Causes More Appearance Comparison and Lower Body Satisfaction in College Women*, BODY IMAGE (Sept. 2020), https://doi.org/10.1016/j.bodyim.2020.04.007.).

160. *Id.*

161. *See* Grace Holland & Marika Tiggemann, *A Systematic Review of the Impact of the Use of Social Networking Sites on Body Image and Disordered Eating Outcomes*, BODY IMAGE (Jun. 2016), https://www.sciencedirect.com/science/article/abs/pii/S1740144516300912?via%3Dihub.

162. Karina Newton, *Using Research to Improve Your Experience*, INSTAGRAM (Sept. 14, 2021), https://about.instagram.com/blog/announcements/using-research-to-improve-your-experience (last visited Jan. 23, 2022).

163. *Id.*

164. *Id.*

musing highlights the "profits over people" perspective that has been at the heart of the company from its foundation—and this is the behavior that regulators at home and abroad need to address.

If U.S. law treated the treaty obligation to protect children's "privacy, family, home or . . . honour,"[165] then substantial additional efforts would be necessary to protect adolescents from the predatory behavior of social media purveyors who collect data on the mental health harms they are perpetrating while continuing to develop algorithms that feature these harmful—but legal—images into the user's feed. State and federal officials may wish to consider regulations similar to those governing casinos that obligate the companies to undertake efforts to reduce compulsive behaviors and to hold them accountable once the companies are on notice that compulsive behavior is occurring.[166]

A. COPPA's Limitations on Minor's Access to Control Informational Privacy

Congress has had modest success in extending privacy protection for minors under the age of thirteen. Congress enacted the Children's Online Privacy Protection Act (COPPA) to limit advertising directed at children and restrict the amount of personal information that advertisers can collect regarding children.[167] The implementing regulations, known as the COPPA Rule, were adopted by the Federal Trade Commission (FTC) in 1999,[168] and substantially updated in 2012.[169] In enacting and revising the COPPA Rule, the FTC's goal was to put parents in charge of privacy and accessibility for websites when visited by children under the age of thirteen.[170] As the FTC explained, "[t]he [FTC] adopted final amendments to the Children's Online Privacy Protection Rule that strengthen kids' privacy protections and give

165. U.N. Convention on the Rights of the Child, *supra* note 10, at Art. 16.

166. *See*, *e.g.*, Lauren Woods, *Setting Limits to Stop the Gambling Epidemic*, UCONN TODAY (Apr. 18, 2019), https://today.uconn.edu/2019/04/setting-limits-stop-gambling-epidemic/ (last visited Jan. 23, 2022); *Responsible Gaming: Regulations & Statutes*, AM. GAMBLING ASS'N (Sept. 17, 2019), https://www.americangaming.org/resources/responsible-gaming-regulations-statutes-2/ (last visited Jan. 23, 2022).

167. Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506 (2021).

168. *See* Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2000). The COPPA Rule took effect on April 21, 2000.

169. *Id.*

170. *Id.*

parents greater control over the personal information that websites and online services may collect from children under 13."[171]

To the extent that the COPPA Rule limits or restricts the ability of commercial vendors to collect information about their customers because they are under the age of thirteen, those First Amendment considerations are primarily the interests of the commercial vendors rather than the minor, which at least has been the approach taken by the Supreme Court when reviewing analogous regulations. The most similar example of this limitation to collect information is the Telephone Consumer Protection Act of 1991 (TCPA), enacted to rein in unsolicited telephone calls.[172] Despite the clear speech issues at stake in limiting telephone solicitation, the TCPA has withstood constitutional challenge.[173] Like COPPA, the TCPA is an administrative restriction administered by the FTC.[174] As a result, neither COPPA nor the TCPA extends to nonprofit organizations because the FTC does not have statutory authority over those entities.[175] The FTC can limit the commercial speech activities of for-profit organizations, provided the standards adopted by Congress and the agency are consistent with the protections for commercial speech,[176] and meet at least the constitutional review standard of intermediate scrutiny.[177] If the speech

171. Press Release, Fed. Trade Comm'n, *FTC Strengthens Kids' Privacy, Gives Parents Greater Control over Their Information by Amending Children's Online Privacy Protection Rule* (Dec. 19, 2012), FTC, http://www.ftc.gov/opa/2012/12/coppa.shtm (last visited Jan. 23, 2022).

172. Telephone Consumer Protection Act, 47 U.S.C. § 227 (2012)) ("The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques."); *see* Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOK. L. REV. 1, 2 (2018).

173. *See* Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020).

174. 47 U.S.C. § 227.

175. *See* 15 U.S.C. §§ 44, 45(a) (2006); *Federal Trade Commission Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws*, FTC 1, 7 n. 20 (Sept. 1, 2003), https://www.ftc.gov/reports/federal-trade-commission-report-congress-pursuant-do-not-call-implementation-act-regulatory.

> Although non-profit organizations are outside the jurisdiction of the FTC, § 1011 of the USA Patriot Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act's definition of "telemarketing" to encompass any call soliciting a "charitable contribution, donation, or gift of money or any other thing of value."

176. *See e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Cohen v. Cowles Media Co., 501 U.S. 663 (1991); *Va. State Bd. of Pharmacy*, 425 U.S. at 748.

177. *Barr*, 140 S. Ct. at 2356 (Sotomayor, J., concurring) ("In my view, however, the government-debt exception in 47 U.S.C. § 227(b) still fails intermediate scrutiny because it is not narrowly tailored to serve a significant governmental interest.").

regulations are also based on content, then the regulations must meet strict scrutiny.[178]

COPPA has not been heavily litigated.[179] By its terms, COPPA "prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet."[180] The COPPA Rule prohibits a website operator or online service provider from collecting personal information of a minor under thirteen without the advance consent of the child's parent or guardian.[181]

At the same time, COPPA has a "mixed audience exception" that prominent social media companies use to market to children under thirteen and collect their information for purposes of behavioral advertising.[182]

> The mixed-audience exception makes clear that where an app does not target children as its primary audience, as long as it screens its users for age and does not collect personal information from users who identify themselves as under thirteen without complying with certain notice and consent requirements, the app will not be deemed directed to children.[183]

If an app is not child directed, it follows that an ad network that collects information from users of that app could not be found to have "actual knowledge" that the app is directed to children.[184]

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178. *See id.*

179. *See* Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773, 834 (2020) ("Since the mid-1990s, the FTC has enforced a largely self-regulatory privacy regime, which has allowed industry to set the terms of the debate."); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 606 (2014) ("In nearly all of the FTC's Section 5 cases and complaints alleging violations of COPPA, GLBA, and the Safe Harbor Agreement, the final disposition of the matter is a settlement, default judgment, or abandonment of the action by the FTC in the investigatory stage.").

180. 16 C.F.R. § 312.1 (2013); *See* New Mexico ex rel. Balderas v. Tiny Lab Productions, 516 F.Supp.3d 1293, 1296–98 (D.N.M. Feb. 2, 2021).

181. 15 U.S.C. § 6502(a)(1) (1998) (Under the COPPA Rule, "[i]t is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the [COPPA] regulations."); 16 C.F.R. § 312.3(a) (2013)("[A]n operator must . . . . [o]btain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children[.]").

182. *New Mexico ex rel. Balderas*, 516 F.Supp.3d at 1296.

183. *Id.* at 1297–98.

184. *Id.* at 1299 (citing 16 C.F.R. § 312.2 (2013)).

As explained by Google and adopted by the Federal District Court order, asking users for their age is essentially all a company needs to do to avoid violating COPPA.[185] Since most content targeting children can be conceptualized as targeting families including children under thirteen, the "mixed audience" exception largely sidelines COPPA as a meaningful regulation.

From a perspective of privacy, COPPA's failure is quite disappointing. Although the FTC did negotiate a $170 million fine against Google and its subsidiary, YouTube, for flagrant violations of COPPA in 2019, only after many years did YouTube market itself as the leading children's media platform while simultaneously using cookies to aggressively track children's usage without even the fig-leaf of age self-verification.[186] The FTC's Business Center lists only thirty-six cases involving COPPA actions between February 1999 and July 2020.[187] This is hardly a compelling regulation of the untold number of website operators and app vendors who solicit or target children. COPPA is "not designed to protect children from viewing particular types of content wherever they might go online."[188] COPPA "does not require operators to ask the age of visitors. However, an operator of a general audience site or service that chooses to screen its users for age in a neutral fashion may rely on the age information its users enter, even if that age information is not accurate."[189] COPPA provides an excellent tool for responsible companies attempting to respect the privacy of young children, but does almost nothing to stop predatory companies from exploiting those children.

Nonetheless, the regulation is relevant to the rights of children and the family because it reflects the continuing assumption under federal law that parents best protect the rights of children. By shifting the ability of a child under thirteen to access sites with adult content to the authority of the parent, the COPPA Rule reinforces the continuing

185. *Id.*

186. Press Release, Fed. Trade Comm'n, Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law, FTC (Sept. 4, 2019), available https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations (last visited Jan. 23, 2022).

187. *Legal Resources*, FTC, https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=246 (last visited May 15, 2021).

188. *A Guide for Business and Parents and Small Entity Compliance Guide*, FTC, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0, (last visited May 15, 2021).

189. *Id.*

expectation under U.S. law that the parents have the primary decisional authority over the minor's privacy.

Had COPPA worked, advocates might have litigated for minors even under the age of thirteen, so that they should have the right to access websites and apps with more adult content. As evidenced by the consent decree released by Google and YouTube, millions of children can access this content. Had the parental controls worked, there may have been a serious concern that those controls directly interfered with the minors' rights to access content, an important aspect of the First Amendment. COPPA's systemic failures are bad for privacy regulation but good for the free speech rights of those the law was designed to protect.

B. In Cyberspace Everyone Is an Adult . . . Or a Dog

In 1993, *The New Yorker* cartoonist, Peter Steiner, captured the essence of online anonymity with his famous cartoon with the text "[o]n the Internet, nobody knows you're a dog."[190] When the *New York Times* wrote about the cartoon in 2000, it reported that the panel had become the single most popular licensed image of *The New Yorker*.[191] The cartoon has spawned many variations and imitations. It also captures one version of Internet reality—the ability to move pseudonymously through cyberspace.[192] The prized anonymity of cyberspace and the power to project any identity one wishes contrasts with the vast amount of personal information collected by Internet host providers, websites, apps, and similar telecommunications information.[193]

The current state of the information society is on the cusp of another revolution. The government has no meaningful restrictions on non-private communications, and increasingly law enforcement actively monitors Internet activity, online content, and social media sites.[194] "[T]oday's surveillance analysts have a new source of information: social

190. Glenn Fleishman, *Cartoon Captures Spirit of the Internet*, N.Y. TIMES (Dec. 14, 2000), https://www.nytimes.com/2000/12/14/technology/cartoon-captures-spirit-of-the-internet.html.

191. *Id.*

192. *See* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1472–1501 (2000) (anticipating the transition from the age of anonymity to the era of surveillance).

193. *See* A. Michael Froomkin, *Lessons Learned Too Well: Anonymity in a Time of Surveillance*, 59 ARIZ. L. REV. 95 (2017).

194. *See id.* at 113 ("Where a decade ago it was still reasonable to see the constellation of technologies around the Internet as fundamentally empowering and anti-totalitarian, that optimism is increasingly difficult to sustain . . . ."); *see also* Rachel Levinson-Waldman & Ángel Díaz, *How to Reform Police Monitoring of Social Media*, BROOKINGS (Jul. 9, 2020), https://www.brookings.edu/techstream/how-to-reform-police-monitoring-of-social-media/.

media. Consider the recent protests over the police killings of George Floyd and Breonna Taylor. As demonstrations spread across the country, the FBI and local police monitored social media and made arrests based on what people have posted online."[195]

Adolescents are active participants in the online world, and social media plays a large part in the typical teen's life. For U.S. teens, smartphones have become ubiquitous. As of 2019, 84% of teens aged 13–18 owned their own smartphones.[196]

> Surveys show that 90% of teens ages 13–17 have used social media. 75% report having at least one active social media profile, and 51% report visiting a social media site at least daily. Two-thirds of teens have their own mobile devices with Internet capabilities. On average, teens are online almost nine hours a day, not including time for homework.[197]

This heavy reliance on social media and mobile phones often means that many of teens' thoughts, associations, religious affiliations, gender identities, political views, and sexual activities are documented and shared in a manner that makes the information visible to ISPs, advertisers, potential employers, school districts, and colleges, as well as to state and federal law enforcement.

The Supreme Court has moved to limit unwarranted searches and seizures, but these cases have focused on private information. In *Riley v. California*,[198] the Supreme Court recognized the vast amount of information an individual might store on a cell phone and ruled that the Fourth Amendment protects cell phone searches.[199]

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195. Waldman & Díaz, *supra* note 194.

196. *Teen Social Media Statistics 2021 (What Parents Need to Know)*, SMART SOCIAL (Feb. 25, 2020), https://smartsocial.com/social-media-statistics/ (last visited Jan. 23, 2022).

197. *Social Media and Teens*, AACAP (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx.

198. 573 U.S. 373 (2014).

199. *Id.* at 393.

> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
>
> One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy.

Two years earlier, in *United States v. Jones*,[200] the Supreme Court rejected the use of monitoring a person's movements electronically, but the Court did so in an opinion that left questions of GPS monitoring, app-based surveillance, and other modern techniques largely unanswered.[201] The concurrence by Justice Sotomayor raised these concerns more directly, providing a roadmap for additional constitutional protections.[202] Most recently, in *Carpenter v. U.S.*,[203] the Supreme Court has again expanded the warrant requirement by requiring a warrant when the government "accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements."[204] *Carpenter* is more significant than earlier decisions because the cell phone records were under the legal control of the cellular telephone service providers.[205] The decision made a small incursion into the third-party doctrine that when a third party holds a person's records, the person did not have a reasonable expectation of privacy in those records.[206]

These Supreme Court decisions provide some modest hope that government access to personal information will not lead to widespread surveillance.[207] But, the reality of social media, expansion of facial recognition technologies, increased use of biometric information, and similar trends show an alarming ease for the government to track the information, movements, and preferences of everyone in the country.

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200. 565 U.S. 400 (2012).

201. *Id.* at 404–05.

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

202. *Id.* at 415 (Sotomayor J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

203. 138 S. Ct. 2206, 2211 (2018).

204. *Id.* at 2210–11.

205. *Id.* at 2212.

206. *See* U.S. v. Miller, 425 U.S. 435 (1976) (holding that there is no expectation of privacy in financial records held by a bank); *see also* Smith v. Md., 442 U.S. 735 (1979) (holding that there is no expectation of privacy in records of dialed telephone numbers conveyed to telephone company).

207. In practice, these hopes must be extremely modest. Prosecutors often use both a warrant and a gag order to secretly collect private information on a regular basis. *See* Jay Greene & Drew Harwell, *When the FBI Seizes Your Messages from Big Tech, You May Not Know It for Years*, WASH. POST (Sept. 25, 2021), https://www.washingtonpost.com/technology/2021/09/25/tech-subpoena-secrecy-fight/.

The same is largely true across the globe, despite the protestations of some countries that employ self-restraint.[208]

The Court in *Carpenter*, however, made clear that the decision was not itself a broader limitation on governmental intrusion into third-party records or other forms of surveillance.[209]

> Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.[210]

Carpenter, therefore, puts a finger in the dike, but does not go far enough to stop most public surveillance. As noted earlier, COPPA self-regulation has resulted in companies primarily adopting the approach taken by YouTube and others to treat their online services as "mixed usage" to eliminate the need for COPPA compliance.[211] By its terms, COPPA covers only minors under the age of thirteen, treating teens between the ages of thirteen and seventeen as adults for all purposes of their online experience.[212] There are numerous federal laws governing sectoral privacy involving health care, financial records, credit, and other specific services, but these do not apply to the use of most private information presented on social media.[213] There are also an increasing number of state laws intended to reduce tracking for the purpose of behavioral advertising.[214]

Neither the sectoral privacy laws nor the state privacy law, however, address the complex problems that adolescents face in the online sphere. The modern Internet has lost its anonymity; the average teen

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208. *See* Froomkin, *supra* note 193, at 120–22 ("The Canadian intelligence agency, the Communications Security Establishment ("CSE"), tracks millions of video and document downloads daily . . . . Meanwhile, some European governments found ways to circumvent data collection and transfer regulations in order to implement and facilitate identification requirements.").

209. *Carpenter*, 138 S. Ct. at 2220.

210. *Id.*

211. *New Mexico ex rel. Balderas,* 516 F. Supp. 3d at 1297–98.

212. *Id.*

213. *See generally*, JON M. GARON, THE SHORT AND HAPPY GUIDE TO PRIVACY AND CYBERSECURITY LAW (2020).

214. *Id.*

spends the majority of the waking day connected through cell phones and online accounts; parents have little legal authority over what the teens do online or in the bedroom; yet the family is legally expected to be the primary authority for these teens' upbringing and well-being.

V. INEFFECTIVE STRATEGIES TO AVOID

A. The Schoolhouse and Increased Discipline Are Not the Answer

Teens need supervision and guidance. The law generally defers to parents as the providers of that support, but for many, the actual family situation is far removed from an idyllic model of domestic harmony. COPPA was never intended to solve this problem, and it has largely failed to provide a solution to the very limited problem it did address. Frustrated and struggling, parents and politicians have turned to the schools to become the source for the regulation of these concerns. Schools, however, are neither empowered nor equipped to take on this broad social obligation. A frustrated public-school teacher summed up the situation clearly:

> The way a whole society behaves is called culture, and American culture is changing significantly, not always clearly for the better. Blaming schools for what we don't like about the way our culture is changing is a cheap out, and an abject failure to confront the real issues in all their breadth and complexity.[215]

The role of schools in behavioral discipline is highly contentious, particularly concerning student speech and privacy. *Tinker v. Des Moines Independent Community School District*,[216] was the first of the modern Supreme Court decisions addressing this issue. When young students wore black armbands to protest the ongoing war in Vietnam, the Supreme Court recognized their silent protest to be speech worthy of First Amendment protection.[217] The Court took a strong stance to protect the rights of the students to raise their political voices to a topic of considerable concern in the society surrounding them.[218] "Students in school as well as out of school are 'persons' under our Constitution.

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215. Maureen Downey, *Are We Asking Teachers to Provide Parenting and Upbringing Only Families Can Provide?*, AJC (Nov. 16, 2018), https://www.ajc.com/blog/get-schooled/are-asking-teachers-provide-parenting-and-upbringing-only-families-can-provide/ARNO9VXpJ47bNIvhR2sDQJ/.

216. 393 U.S. 503 (1969).

217. *Id.* at 508–10.

218. *Id.* at 513.

They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[219]

Since *Tinker*, however, the Court has focused more on discipline and decorum than on the rights of the students. In *Bethel Sch. Dist. No. 403 v. Fraser*,[220] a student was suspended for a student assembly speech that dripped with sexual innuendo and allusions. Although the student did not use any profanity, he nonetheless delivered a ribald oration that many, but not all, of his fourteen-year-old classmates understood.[221] The Court in *Fraser* adopted the position that "public education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[222] The Court explained that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[223] Indeed, the "fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others."[224]

The Supreme Court again addressed the concerns regarding the control a school can impose on a student in the context of academic content. In *Hazelwood School District v. Kuhlmeier*,[225] the Court addressed the extent to which a school may control the content of the school newspaper. The petitioner school district offered participation in the school newspaper as part of a high school journalism course.[226] The Court in *Hazelwood* reaffirmed the *Tinker* position that students "cannot be punished merely for expressing their personal views on the school premises," whether "in the cafeteria, or on the playing field, or on the campus during the authorized hour[.]"[227] But, the Court did so with the qualification on those rights and that they may be exercised unless

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219. *Id.* at 511.

220. 478 U.S. 675 (1986).

221. *Id.* at 678–79. Fraser was given a three-day suspension, though he returned to school on the third day. "The hearing officer determined that the speech given by respondent was 'indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly.'" *Id.*

222. *Id.* at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

223. *Id.* at 676.

224. *Id.* at 683 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person.").

225. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

226. *Id.* at 262.

227. *Id.* at 265–66.

school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."[228]

The Court distinguished the obligation to tolerate particular, non-disruptive student speech from the school district's obligation to affirmatively promote student speech that was inconsistent with the "imprimatur of the school."[229] The Court rejected any obligation of the school district to do so.[230] The Court dismissed the statements of the school district that the school newspaper's protection under the policy that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism."[231] Instead of interpreting the school board policy, the Supreme Court made very clear that the school principal could override the classroom teacher and make the institutional determination of which stories could be permitted to run.[232]

In *Morse v. Frederick*,[233] the Supreme Court also allowed a school to discipline students for hanging a banner which read "Bong Hits 4 Jesus" at an Olympic torch relay. The event was treated as a school function because students were dismissed from class to stand along the parade route, participating "as an approved social event or class trip."[234] The Court framed *Morse* as a simple case: "[t]he question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."[235]

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228. *Id.* at 266 (quoting *Tinker*, 393 U.S. at 509, 512–13).

229. *Id.* at 270–71.

> The question of whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

230. *Id.* at 273.

231. *Id.* at 268.

232. *Id.* at 273.

233. 551 U.S. 393 (2007).

234. *Id.* at 396.

235. *Id.* at 403.

The Supreme Court borrowed from the Fourth Amendment jurisprudence that diminished the full protection of the Constitution in the context of warrantless searches.[236] Largely shedding the robust protections originally espoused in *Tinker*, the Court emphasized that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. "Drug abuse can cause severe and permanent damage to the health and well-being of young people."[237] The Court was not willing to label the banner "offensive" under the standard established in *Fraser*, but instead imbued the juvenile prank with the heightened advocational impact of an unprotected nature.[238]

In each of the four cases, the Supreme Court has been careful to establish that the school district's authority has been to manage and censor on-campus speech or speech that was part of the school's off-campus school-sanctioned activities. Off-campus speech posed a more challenging question. Still, most circuit courts had found schools to have jurisdiction when the speech is directed at the schools, is disrupted, or has a significant nexus to the school.[239] When the Third Circuit rejected this approach and highlighted the divergent lower court approaches, the Supreme Court took a cautious step to address the issue of student speech that occurs on social media.[240]

In *Mahanoy Area School District v. B.L.*, the Supreme Court took up a student's challenge to her suspension from the junior varsity cheerleading squad based on the cheerleader posting a Snapchat message to her friends in which she held up her middle finger to the camera with the words "f*** school f*** softball f*** cheer f*** everything" superimposed on the image.[241] The student, B.L., was upset because she was not elevated to the varsity cheerleading team. B.L. did not send her Snapchat beyond her 250 friends. Although her friends included other members of the cheerleading teams, none of the coaches

236. *See id.* at 406 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . ."); *see also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); Pottawatomie Cty. v. Earls, 536 U.S. 822, 829–30 (2002) ("'special needs' inherent in the public-school context").

237. *Morse,* 551 U.S. at 407 (quoting *Vernonia*, 515 U.S. at 661).

238. *Id.* at 409.

239. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976 (2021). Other courts have required a "nexus" between the speech and the school's "pedagogical interests" or extended *Tinker* to speech that was "intentionally direct[ed] at the school community." *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 394 (5th Cir. 2015) (*en banc*).

240. Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038 (2021).

241. *Id.* at 2043.

or school administrators were included. Most importantly, the "student's speech took place outside of school hours and away from the school's campus."[242] The speech's location became the critical distinction because the Third Circuit ruled that as a result of the off-campus nature of the speech,[243] the school district had no authority to regulate the speech or punish the student.[244] The Third Circuit explained that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."[245] Although the Supreme Court affirmed the outcome of the case for the student cheerleader, it rejected the Third Circuit's blanket refusal to extend *Tinker*.[246] Instead, the Court held that while the school may have a valid interest in controlling student speech off-campus,[247] the school district violated B.L.'s First Amendment rights in reprimanding her for her post, which is protected speech.[248]

The lower courts had struggled to develop a standard that reflects the caselaw of *Tinker*, *Fraser*, *Frederick*, and *Kuhlmeier*. The Supreme Court used the framework of these four cases to provide some limited guidance for the courts and the school districts when regulating online speech.

> We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school

242. *Id.* at 2042–43.

243. B.L. by and through Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 180 (3d Cir. 2020), *aff'd on different grounds*, 141 S. Ct. 2038 (2021).

> B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school. And while the snap mentioned the school and reached MAHS students and officials, J.S. and Layshock hold that those few points of contact are not enough.

244. *Id.* at 185–86.

245. *Id.* at 189 (quoting J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, J., concurring)).

246. *Id.* at 190.

247. Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. at 2045 ("Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances.").

248. *Id.* at 2048 ("Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, resembling those of the panel's concurring opinion, we nonetheless agree that the school violated B. L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.").

> environment." One such characteristic, which we have stressed, is the fact that schools at times stand *in loco parentis, i.e.*, in the place of parents.[249]
>
> This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech uttered during a class trip that promotes "illegal drug use,"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper.[250]

The Court also recognized that the examples from prior Supreme Court decisions did not necessarily reflect the broader and more complex sets of facts facing lower courts and school districts that were parties to those cases.[251] The examples in the opinion included:

> [S]erious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.[252]

The Supreme Court did not directly address these examples. By listing them, however, it encouraged—or at least permitted—lower courts to continue using prior opinions to reach problematic behavior in these situations. To help the lower courts, the Supreme Court instead provided three guidelines to help shape future decisions by schools and courts:

> First, a school, in relation to off-campus speech, will rarely stand in loco parentis. The doctrine of in loco parentis treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.
>
> Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech,

249. *Id.* at 2044–45 (quoting *Tinker*, 393 U.S., at 506; *Kuhlmeier*, 484 U.S. at 266).

250. *Id.* at 2045 (citing *Frederick*, 551 U.S. at 409; *Kuhlmeier*, 484 U.S. at 271).

251. *Id.* at 2045.

252. *Id.*

> include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.
>
> Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."[253]

The decision in *B.L.* is consistent with prior jurisprudence. The Supreme Court has often expressed the "view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[254] The most recent decision on off-campus speech and student discipline, therefore, reversed the trend since *Tinker* moved away from parental authority in favor of school authority.[255] With the new guidelines, the Court has rebalanced its jurisprudence to give *Tinker* far more weight.[256]

Schools retain the power to maintain decorum, control curriculum, and protect the welfare of their students, particularly in situations of harassment and bullying that often occur in junior high school and high school settings. As noted earlier, there are no federal programs to support school districts in addressing the more structural problems of bullying, harassment, or other forms of school discipline problems that occur when teens are in serious trouble.

Schools, however, have another problem when they become the alternative to parental control. Significant scholarship highlights that the discipline meted out by school districts are vastly different for

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253. *Id.* at 2046. The opinion explains the attribution of the last quote in the section as follows: Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.

254. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

255. *See Mahoney*, 141 S. Ct. at 2038.

256. *Id.*

minority students than Caucasian students.[257] "Black students in the United States are subject to disciplinary action at rates much higher than their white counterparts. These disciplinary actions put students at higher risk for negative life outcomes, including involvement in the criminal justice system."[258] While just 3.5% of white students received out-of-school suspensions as punishments, 13.46% of Black students received such a punishment.[259] Although school arrests are much less frequent, Black students are arrested nearly three and a half times more often than white students.[260] The differences have been statistically linked to systemic implicit bias and exacerbated by economic effects.[261] Another report provides that "[b]lack students are three times more likely to be suspended or expelled than white students, according to the Education Department's Office for Civil Rights, and research in Texas found students who have been suspended are more likely to be held back a grade and drop out of school entirely."[262]

Schools should be able to protect students from the aggressive conduct of other students. Schools are obligated to keep students safe while educating them and developing their potential. But the Supreme Court was correct to suggest that school districts should play a less important role rather than becoming the disciplinarians for society. The Supreme Court provided useful guidance on that question, but it did not address the resources needed to empower schools to make a difference.

B. Making Victims into Criminals Is Not the Answer

Another strategy that has been tried is to use strict enforcement of existing criminal laws to address problems of adolescent behavior. This strategy is reflected in the prior discussion of school incarcerations that are often directed at Black male teens.[263] Many other jurisdictions have expanded laws to prohibit the distribution or transmission of sexual content. Congress enacted the federal Prosecutorial Remedies and

257. Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255 (Apr. 2, 2019), www.pnas.org/cgi/doi/10.1073/pnas.1808307116 (last visited Jan. 24, 2022).

258. *Id.* at 8256.

259. *Id.*

260. *Id.* Black students experienced student arrests at the rate of 0.28% compared to white students who experienced the rate at 0.08%.

261. *Id.*

262. Libby Nelson & Dara Lind, *The School to Prison Pipeline, Explained*, VOX (Feb. 24, 2015), http://www.justicepolicy.org/news/8775 (last visited Jan. 24, 2022).

263. *See id.*

Other Tools to end the Exploitation of Children Today (PROTECT) Act,[264] to strengthen anti-child-pornography remedies and heighten criminalization for pandering and solicitation.[265] State and federal authorities have "broad authority to proscribe child pornography."[266]

Nonetheless, that authority is not unlimited. For example, non-obscene pornography involving models who are over eighteen but look younger, computer-generated virtual images of young children, and artwork depicting minors are all protected speech.[267] The prohibition against child pornography does not apply in these examples because a minor does not participate in creating such works.[268] In contrast, even if one of the parties in a potential transaction does not involve actual child pornography, such as an undercover police officer, the specific intent to distribute or obtain child pornography at the heart of the transaction is sufficient to allow for a conviction.[269]

While the PROTECT Act provides law enforcement officers with additional tools to prosecute predators and pedophiles, it is sufficiently broad to cover a sexting conversation between two consenting minors. But, because the law gives these minors both First Amendment rights and the right to contraceptives and abortion, it does not seem appropriate to apply a five-year mandatory criminal sentence to the use of technology like texting. Teen nudity can trigger the consequences of significant prison time and registration as a sex offender. In one example, "[a] 15-year-old Ohio girl faces felony charges and may have to register as a sex offender for allegedly taking nude photos of herself and sending them to her high school classmates."[270]

There are much better ways to address these problems. Louisiana, for example, prohibits "[t]he transmission, delivery or utterance of any textual, visual, written, or oral communication depicting lewd or lascivious conduct, text, words, or images to any person reasonably believed to be under the age of seventeen and reasonably believed to be

264. 18 U.S.C. § 2252A(a)(3)(B) (2018).

265. U.S. v. Williams, 553 U.S. 285 (2008).

266. *Id.* at 289.

267. *Id.*

268. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249–51, 254 (2002) (child-protection rationale for speech restriction does not apply to materials produced without children).

269. *Williams*, 553 U.S. at 296 ("The defendant must 'intend' that the listener believe the material to be child pornography, and must select a manner of 'advertising, promoting, presenting, distributing, or soliciting' the material that he thinks will engender that belief—whether or not a reasonable person would think the same.").

270. Scott Michels, *Teen Charged with Sending Nude Pics of Herself*, ABC NEWS (Oct. 9, 2008), https://abcnews.go.com/TheLaw/story?id=5995084&page=1.

at least two years younger than the offender."[271] To make the communication qualify as indecent behavior with juveniles, the offender must send the content "with the intention of arousing or gratifying the sexual desires of either person."[272] A law such as this is primarily designed to stop sexting and sexual harassment related to pedophilia. The exemption from the law for the age gap to be more than two years removes many of the concerns that the law could be used to punish consensual communications among classmates.

Protecting the constitutional rights of adolescents who send sexual images to their partners would still make the redistribution of images a crime, such as this example: "A 17-year-old in Wisconsin was charged in May with child pornography for allegedly posting naked pictures of his ex-girlfriend on the Internet. The girl had sent him the pictures. He told the La Crosse County Sheriff's Department he was just 'venting' after she broke up with him."[273] Unlike the situation in which the adolescents are retaining the images as part of their own, private intimate activities, this example of "revenge porn" is intended to shame the subject of the image and is distributed to strangers, including adults. The distinction is an important one. All individuals, including adolescents, have both a speech right to express themselves and their bodies, as well as a privacy interest that should ensure the exposure of one's nudity is not undertaken without express permission.

Taken in this light, the limitation on law enforcement suggested here should not interfere with the ongoing efforts to stop nonconsensual publication of nude and sexually explicit content. More than forty-six states plus the District of Columbia have enacted statutes designed to stop the practice of revenge porn and sexploitation.[274] All jurisdictions should provide such protections.

The narrow limit suggested on child pornography laws is intended to protect the minors who are often victims of those pictures being distributed without their permission. Any retransmission beyond the individual or the consenting couple, if the images involve sex acts, can and should still fall within the strong prohibitions against child pornography. But, in many of these cases, a young woman takes her own photo only to have her sexual partner or a third party distribute

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271. LA. STAT. ANN. § 14:81 (2020).

272. *Id.*

273. Michels, *supra* note 270.

274. Ruobing Su, Tom Porter, & Michelle Mark, *Here's a Map Showing Which US States Have Passed Laws Against Revenge Porn—And Those Where It's Still Legal*, BUSINESS INSIDER (Oct. 30, 2019), https://www.businessinsider.com/map-states-where-revenge-porn-banned-2019-10.

that picture. She is the victim of that image being distributed; she is not a sexual predator. She should be constitutionally protected from prosecution for child pornography.

VI. MODERN SOLUTIONS THAT MATCH TEENS' REALITY

This Article highlights that the balance between free speech and privacy has been difficult for U.S. courts and intractable when dealing with minors. The tension inherent in the triangle between teens, parents, and state authorities to the privacy versus speech dynamic has left policymakers with wicked problems and few effective solutions. Into this mix, the predatory nature of social media conglomerates has left adolescents with heightened anxiety, less autonomy, and a sense of powerlessness.[275]

A. Tame Social Media With the Help of its Financial Enablers or Through Nonprofit Alternatives

The first step is to tame the commercial vendors who put minors' mental health at risk in search of increased platform utilization.[276] "[T]ech companies and designers should offer a range of user-friendly tools that help parents create age-appropriate environments. They could also change the design to create an environment that is conducive to more meaningful conversations and less browsing and liking."[277] It is unlikely that these requests will occur because the companies are suddenly beneficent or altruistic. On the other hand, it is in advertisers' best interests to see that their ads and products are linked to socially beneficial platforms.[278] The Forbes Business Council framed the concern by asking the simple question: "Where is the warning label?"[279]

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275. *See* Henry Fersko, *Is Social Media Bad for Teens' Mental Health?*, UNICEF (Oct. 9, 2018), https://www.unicef.org/stories/social-media-bad-teens-mental-health.

> It is no secret that social media platforms were deliberately designed to hold users' attention as long as possible, tapping into psychological biases and vulnerabilities relating to our desire for validation and fear of rejection. Too much passive use of social media–just browsing posts–can be unhealthy and has been linked to feelings of envy, inadequacy and less satisfaction with life. Studies have even suggested that it can lead to ADHD symptoms, depression, anxiety and sleep deprivation.

276. *Id.*

277. *Id.*

278. *See* Ines Schulze Horn, *et al.*, *Business Reputation and Social Media: A Primer on Threats and Responses*, 16 JOURNAL OF DIRECT, DATA AND DIGITAL MARKETING PRACTICE 193 (2015), https://doi.org/10.1057/dddmp.2015.1.

279. Patrick Bensen, *The Warning Sign: How Social Media Companies Can Address Social Responsibility,* FORBES (Apr. 16, 2021),

The public saw a brief glimpse of the power of other businesses in the social media supply chain to impact content when OnlyFans announced it was planning to ban pornography from its service.[280] OnlyFans is a social media platform where content producers can post their original content in exchange for payment through subscriptions or tips.[281] Once a site dedicated to musicians and do-it-yourselfers, COVID changed the market. "The popularity of the social-media service exploded during the pandemic as sex workers, musicians and online influencers used it to charge fans for exclusive access to photos, videos, and other material. OnlyFans has attracted more than 130 million users."[282] The company then announced that due to mounting pressure from banks and payment providers, it would bar subscribers' adult content.[283]

A week later, this particular decision was reversed as the company announced it had received assurances from those banking and financial partners that the posting policies would remain unchanged.[284] In a rather startling reversal of public attitudes towards online content, OnlyFans' adult platform was seen as a safe haven for professional sex workers and others who turned to adult content because they could not work due to the pandemic.[285]

Among the lessons from the OnlyFans abortive announcement was the clear power that banks, financial companies, large advertisers, and other commercial enterprises have on social media platforms. If the world's professional and collegiate sports regulators, for example, restricted their content to those platforms that operated with a code of conduct that protected adolescents, then the behaviors of the platforms could quickly be held to a new standard.

An even more effective alternative at establishing new norms for the social media companies would be for a nonprofit conglomerate to provide an alternative to the predatory and profit-motivated solutions

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https://www.forbes.com/sites/forbesbusinesscouncil/2021/04/16/the-warning-sign-how-social-media-companies-can-address-social-responsibility/?sh=5e0b0e2a13b4.

280. *See* Ryan Browne, *OnlyFans Says It Will No Longer Ban Porn in Stunning U-Turn After User Backlash*, CNBC (Aug. 25, 2021) https://www.cnbc.com/2021/08/25/onlyfans-says-it-will-no-longer-ban-porn-after-backlash-from-users.html.

281. *See How It Works*, ONLYFANS, https://onlyfans.com/how (last visited Jan. 25, 2022).

282. Lucas Shaw, *OnlyFans to Bar Sexually Explicit Videos Starting in October*, BLOOMBERG (Aug. 19, 2021), https://www.bloomberg.com/news/articles/2021-08-19/onlyfans-to-block-sexually-explicit-videos-starting-in-october.

283. *Id.*

284. *See* Browne, *supra* note 280.

285. *Id.*

presently on the market. Nonprofits such as Khan Academy, Edutopia, Wikipedia, Mozilla and others have provided tremendous social benefit to society through their services. National Public Radio and the Corporation for Public Broadcasting have delivered high-quality educational news and entertainment for decades. In addition, the nation's 4,000 colleges regularly generate original scholarship, training, and educational materials for their own students and the communities they serve. With these socially beneficial resources and rich content, a well-designed consortium could supplant the market-driven companies with content and content-moderation tools that would provide more control for the user and less incentive to pull the user into destructive compulsive behaviors. The for-profit sector could certainly choose to do this as well, but the metrics for economic success in Silicon Valley militate against such a for-profit, remaining true to its long-term goals.[286]

B. Adopt "Empathy by Design" for Adolescent-Serving Institutions

A new approach is needed to make online platforms and adolescent-serving institutions healthier and more supportive for the teens they serve. One approach can be borrowed from the human-centered design approach promoted by IDEO[287] and the Institute of Design at Stanford.[288] At the heart of these efforts is the use of empathy to begin the design process:

> Empathy is the centerpiece of a human-centered design process. The Empathize mode is the work you do to understand people . . . . It is your effort to understand the way they do things and why, their

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286. *See e.g.*, Jon M. Garon, *Searching Inside Google: Cases, Controversies, and the Future of the World's Most Provocative Company*, 30 LOY. L.A. ENT. L. REV. 429 (2010) (discussing the evolution of a company that once had "don't be evil" as its motto).

287. Jason Weeby, *Creating More Effective, Efficient, and Equitable Education Policies with Human-Centered Design*, BELLWETHER EDUCATION PARTNERS (2018), https://bellwethereducation.org/publication/creating-more-effective-efficient-and-equitable-education-policies-human-centered-design ("The history of human-centered design reaches back to the 1960s, but its popularization began in the 1990s with the creation of IDEO, one of the most well-known design firms in the world.").

288. *See An Introduction to Design Thinking Process Guide, Institute of Design at Stanford*, STANFORD UNIVERSITY, https://web.stanford.edu/~mshanks/MichaelShanks/files/509554.pdf (last visited Jan. 26, 2022); Dennis Hambeukers, *Visualizing the Essence of Design Thinking in a Diagram, Part 2*, SERVICE DESIGN NOTEBOOK (Oct. 6, 2015), https://servicedesignnotebook.nl/visualizing-the-essence-of-design-thinking-in-a-diagram-part-2-62b7559f0e10.

> physical and emotional needs, how they think about world, and what is meaningful to them.[289]

Applying human-centered design to teen services is not entirely new. "[H]uman-centered design in the education sector tends to focus on the creation of products, services, and experiences. It has been used to create curriculum, learning spaces, apps, lunchtime, and even entire school systems."[290] At the same time, the actual use of this approach has been relatively rare.[291]

Among the many challenges institutions face designing solutions for children is the tendency to overgeneralize. The empathy-by-design approach must be informed by starting with the individual student rather than groups or populations. This lesson derives from the foundational need to develop youth programs featuring age-appropriate child development strategies and effective teaching strategies and human rights principles.[292]

Although this Article uses the label of "empathy-by-design," there are many others. Writing for Save the Children, Dr. Joan Durrant uses the term "positive discipline" to reflect many of these same underlying concepts. Dr. Durrant explains that positive discipline is based on "children's rights to health development, protection from violence and active participation in their learning."[293] Based on the U.N. Convention on the Rights of the Child, childrens' right to participate in decision-making includes expressing their opinions and having their opinions respected; having a say in matters affecting them; having access to information; and freely associating with other people.[294] This right to be heard and participate is the corollary of the obligation to use empathy in designing systems that govern student learning, discipline, and behavior.

Program developers and planners have had consistent success when they step into the shoes of the students they plan to serve before designing systems on their behalf.[295] A study of university advising, for

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289. *An Introduction to Design Thinking Process Guide, Institute of Design at Stanford*, *infra* note 304, at 2.

290. Weeby, *supra* note 287, at 14.

291. *Id.*

292. Joan E. Durrant, *Positive Discipline in Everyday Teaching*, SAVE THE CHILDREN (2010), https://resourcecentre.savethechildren.net/library/what-positive-discipline-positive-discipline-everyday-teaching (last visited Jan. 27, 2022).

293. *Id.*

294. *Id.*

295. There are multiple psychological definitions of empathy, including Adam Smith's explanation that empathy is "imagining how one would think and feel in another person's

example, found that effective advising was responsible for increasing graduation rates, reducing the number of semesters needed for students to complete college (which reduced student cost), and decreasing withdrawals from college.[296] A recent study showed the same thing is true when high schools provide effective student counseling.[297] These strategies directly impacted the reduction of racial and ethnic disparities in graduation rates.[298]

Teens need a different system to address their privacy needs, their free speech interests, and supplement the parents' roles beyond the school systems. Courts are serving as an *in loco parentis* alternative in the case of pregnancy, but there is no real national resource for adolescents seeking the broader range of services that they might need if they cannot get them outside the household. "[T]oday's world has become increasingly complex, technical, and multicultural, placing new and challenging demands on young people in terms of education, training, and the social and emotional skills needed in a highly competitive environment."[299]

By looking at the wide range of teen rights and limits, a coalition of nonprofits could become the foundation for a comprehensive social support initiative. Given that almost all court decisions on judicial bypass provide consent for the young pregnant woman to get an abortion, these agencies might also be designated as surrogates to arrange this permission. As part of that role, the young woman would

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situation," intuiting or projecting oneself into another's situation, and a variety of related concepts for cognitive empathy, emotional recognition, and many others. *See* C. Daniel Batson, *These Things Called Empathy: Eight Related but Distinct Phenomena*, SOCIAL NEUROSCIENCE OF EMPATHY (2009). *See also* Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J.L. & POLICY 189, 194–95 (2012) ("Sometimes, the same word—empathy—is used to talk about different things (cognitive understanding vs. emotional connection and resonance). At other times, referring to what may be the same phenomenon, we use different words ('empathy' vs. 'recognition').").

296. *See* Allison Bailey, et. al., *Turning More Tassels*, BCC & SASPA, https://success.gsu.edu/download/turning-moretassels/?wpdmdl=6472357&refresh=61449d80523b01631886720 (last visited Jan. 26, 2022).

297. Christine Mulhern, Better School Counselors, Better Outcomes, 21 EDUCATION NEXT (Fall 2021), https://www.educationnext.org/better-school-counselors-better-outcomes-quality-varies-can-matter-as-much-as-with-teachers/ (effective counselors improved high school graduation rates, attendance at four-year colleges, and persistence at those colleges into second year) (last visited Jan. 26, 2022).

298. *See id.* ("These impacts are generally larger for students who are not white, scored below average on the state test in 8th grade, or are from low-income families."); *Turning More Tassels*, *supra* note 296.

299. *Community Programs to Promote Youth Development*, *supra* note 4, at 2.

be provided with additional social services that a judge does not provide.

In 2002, the National Academy of Science embraced this approach, promoting "a broader, more holistic view of helping youth to realize their full potential is gaining wider credence in the world of policy and practice."[300] The 2002 report, however, did not anticipate the influence of social media, cell phones, and much of the technology that now mediates the adolescent's online experience. In its conclusion, the report noted that "[a] combination of factors have weakened the informal community support once available to young people."[301]

There are many skills and coping strategies needed for adolescents to develop and thrive in the current environment.[302] In the area of online privacy, these organizations could work with teens to help prevent bullying and harassment, but they could also be trained to provide services to the teens who are victims of such abuse. Notably, these are not always distinct categories. Those who are bullied have also been known to bully others. Moreover, as discussed below, empathy training can help reduce antisocial behavior and improve coping skills. By serving as advocates and supporters, rather than disciplinarians, for the teens, these social service agencies could provide the mental health referrals and other resources to keep the teens who are victims of online abuse from spiraling into depression, self-harm, or suicide.

Many agencies already provide a range of social services to teens, including YMCA, Urban League, JCC, 4H, and municipal community centers. What is missing is a national program addressing the vastly changed norms of growing up with a cell phone in one hand and social media watching every step one takes. Teens have more rights than ever before, but they do not have the resources to address the modern world. Schools are ill-equipped to help. And, for too many adolescents, their parents cannot provide them with the support they need.

Such programs could also provide the alternative to schools and courts as the source for conflict resolution involving some of the bullying and harassment activities that occur online and adjacent to school environments. If such programs proved effective over time, those organizations could also collaborate with the major social media

300. *Community Programs to Promote Youth Development*, *supra* note 4, at 3.

301. *Community Programs to Promote Youth Development*, *supra* note 4, at 297.

302. *See* GARON, *supra* note 131, at 76–80 (discussing information literacy, digital literacy, privacy, and security literacy, as well as "the attributes essential to build lives of meaning and fulfillment."); *see also Community Programs to Promote Youth Development*, *supra* note 4, at 301 (discussing settings providing physical and psychological security, emotional support, opportunities to develop relationships, and other similar attributes).

platforms. In such an arrangement, the victim of online bullying could inform the nonprofit social service organization. It would have a "preferred status" to red flag harmful content and conduct, alerting the social media platforms of such content that singled out individuals, violated the terms of service for these platform providers, and helping assure an expeditious removal of the content which violated the community norms of the platforms.

Responsible social media hosts should be expected to welcome the help if it can be established that these organizations can make informed decisions balancing the speech interests of their teen participants and the need for their teen participants to be free from harassment, bullying, and stalking. Although voluntary, this approach is much more intentional and supportive than the current model. If combined with conflict-resolution programs and similar tools, these programs—run by the premiere network of existing social service agencies—could make a significant difference in the lives of countless teens.

C. Expand Restorative Justice Strategies

Additional benefits will be found by expanding efforts to utilize restorative justice or restorative practice strategies in many areas involving adolescent discipline, particularly those that fall into the gray area between parental authority and institutional authority.[303] For teens, these restorative practices may be summarized as "a transformative force that addresses healing and accountability at personal and structural levels of society, and . . . a tool to address interpersonal harm . . . ."[304] "Research has established a myriad of

303. *See* Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis,* 2019 UTAH L. REV. 1027, 1035 (2019) ("In the education system, restorative justice requires 'a philosophical and practical shift away from punitive and retributive control mechanisms . . . to prioritize individual and community growth to support safe and healthy school culture.'") (quoting Thalia González, *Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline*, 60 HOW. L.J. 267, 270–71 (2016)).

304. Carl Stauffer & Sonya Shah, *Restorative Justice: Taking the Pulse of a Movement* 19 (2018) (unpublished manuscript) (on file with Zehr Institute for Restorative Justice), http://zehr-institute.org/publications/docs/introduction.pdf [https://perma.cc/T42Z-XL6Q]. *See also* Vogel, *infra* note 311, at 572 ("Restorative justice requires, at a minimum, that we address victims' harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.") (quoting HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, 1, 25 (2002)).

benefits that flow from nonpunitive approaches utilizing restorative justice concepts and other holistic approaches."[305]

> Restorative justice [(RJ)] has its origins in indigenous communities . . . . For First Nations people, the Navajo, and other native people, this worldview has been a way of being that prioritizes relationships, interdependency, fairness, shared decision making, solidarity, and healing. Although Western iterations of RJ emerged initially as an alternative approach to responding to harm and crime, schools are returning to the historical roots of RJ, with people adopting a more holistic framing and recognizing the importance of living well together in communities.[306]

Like positive discipline and empathy by design, restorative justice education is predicated on an empathetic, holistic model of engagement, dignity, and mutual respect.[307] It is initially thought of as a system for criminal or tortfeasor accountability, but the role of restorative justice applies more appropriately as a method of conflict resolution, applicable whether or not prior conduct has resulted in some community members taking criminal or otherwise antisocial action.[308] "School-based practices that (a) center healthy relationships, (b) work to heal harms and transform conflict, and (c) advocate for justice and equity include both preventative and responsive practices."[309] Each of these three goals is an essential component of community building. Professor Marie Failinger has written that restorative justice practices can help support unwed teen mothers.[310] In her work, she outlines five critical components for understanding the model:

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305. Khin Mai Aung, *Pitting Our Youth Against Each Other: Moving School Harassment and Bullying Policy from A Zero Tolerance Discipline to Safe School Environment Framework*, 3 UC IRVINE L. REV. 885, 897 (2013).

306. Anne Gregory and Katherine R. Evans, *The Starts and Stumbles of Restorative Justice in Education: Where do We Go from Here?*, NAT. ED. POLICY CENTER (Jan. 2020), http://nepc.colorado.edu/publication/restorative-justice (internal citations omitted) (last visited Jan. 26, 2022).

307. *Id.*

308. Brian Littlechild and Helen Sender, *The Introduction of Restorative Justice Approaches in Young People's Residential Units: A Critical Evaluation, Centre for Community Research*, U. HERTFORDSHIRE (Feb. 2010), www.nspcc.org.uk/inform ("The conflict resolution and restorative approaches outlined in this report can be an effective way of dealing with criminal behaviour for both victims and perpetrators, as well as for developing positive social and interpersonal attitudes within residential units.") (last visited Jan. 26, 2022).

309. Gregory & Evans, *supra* note 306, at 8.

310. Marie A. Failinger, *Ophelia with Child: A Restorative Approach to Legal Decision-Making by Teen Mothers*, 28 L. & INEQUAL. 255, 278–80 (2010).

> [T]he restorative justice movement has re-imagined the nature of the individual's relationship to the state in five important ways . . . .
>
> First, the restorative movement recognizes the reality and value of interdependence, and makes legally visible those relationships with family, friends, and community that exercise dynamic and interactive influences on the subject of government intervention . . . . [T]he restorative movement recognizes that in each moment, the individual is acting on and being acted upon by others related to him or her, and that these relationships constitute the warp and woof of the individual's capacity to make successful choices.
>
> Second, the restorative . . . planners understand that human beings often make choices that undermine their well-being for a variety of reasons, ranging from confusion about what is in their best interests, to impulsivity, to a sense of worthlessness and hopelessness. Restorative planners bring the community in to surround offenders for a long-term process expected to confront behavioral reverses.
>
> Third, the restorative movement demands accountability to others harmed, both those who suffer immediate injuries from the offender's actions and those whose community is more indirectly impaired because of the fear, anger, or other emotions caused by the offender's conduct . . .
>
> Fourth, accountability for change is reflexive in the restorative model—not only is the offender accountable to those closest to him or her, but the community is accountable for "seeing" the offender as a whole person with strengths as well as flaws, without excusing or ignoring the offender's blame for his or her condition . . .
>
> Fifth, restorative justice is built on reality-tested hope. As Professor Howard Vogel has described it, restorative justice is "rooted in a wager about the nature of reality and the human condition," specifically that every person wants to create positive connections with others and, in a "safe space," we can "take action through dialogue to build community so that all life might flourish."[311]

Restorative justice's emphasis on all stakeholders helps the minor, the minor's parents, and the institutions continue to stress within their triangular dynamic. "Restorative justice enhances social and emotional intelligence—the ability to identify and navigate emotions within oneself and with others. It also sensitizes participants to the value of

311. *Id.* (quoting Howard J. Vogel, *The Restorative Justice Wager: The Promise and Hope of a Value-Based, Dialogue-Driven Approach to Conflict Resolution for Social Healing*, 8 CARDOZO J. CONFLICT RESOL. 565 (2007)).

relationships within and between social groups, and it strives to teach responsibility, accountability, honesty, empathy, and the satisfactions provided by work."[312]

To bring restorative justice into school systems, community centers, judicial diversionary programs, and other realms where such tensions exist, the participants facilitating the restorative practices must not lose sight of the five values identified by Professor Failinger. Empathy and respect for each participant, beginning with the minor at the center of the process, remains essential for the program to work. Facilitators need sufficient training and experience to deliver these outcomes, often needing to educate the participants as a component of providing the service. In practice, this means "restorative justice in schools is playing a positive role, but schools must work hard to avoid the pitfalls that can blunt the programs' impact—usually the result of faulty design and implementation."[313]

It must also be recognized that restorative justice and empathy by design are necessary but not sufficient. "Despite the laudable goals of school reform measures such Restorative Justice and Positive Behavioral Interventions and Supports, all of these efforts will not yield systemic reform without addressing implicit bias."[314] Conflict resolution strategies will necessarily fall short where racial bias and inequitable processes or programs exist at the core of the conflict. Again, starting with the empathy-by-design approach may help identify some of these structural barriers to unequal treatment. By combining these principles, conflicts can be minimized while structural changes can be implemented.

Restorative justice practices can even be explored for online communities. Again, the core values of the restorative practice model are relationships, interdependency, shared decision making, and a community spirit, which are often found in the rhetoric of social media platforms but rarely in their algorithmic design. Changing the goals of social media platforms to match community-based, collaborative, and healthy interactive networks would facilitate a positive change in

312. Lisa Abregú, *Restorative Justice in Schools: Restoring Relationships and Building Community*, 18 DIS. RES. MAG. 10, 11 (Summer 2012).

313. Tim Walker, *Restorative Practices in Schools Work . . . But They Can Work Better*, NEA TODAY (Jan. 30, 2020), https://www.nea.org/advocating-for-change/new-from-nea/restorative-practices-schools-work-they-can-work-better (last visited Jan. 26, 2022).

314. Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 298 (2016) (citing Khin Mai Aung, *Pitting Our Youth Against Each Other: Moving School Harassment and Bullying Policy from a Zero Tolerance Discipline to Safe School Environment Framework*, 3 U.C. IRVINE L. REV. 885, 897–98 (2013)).

minors' online experiences, promoting the best technology has to offer while mitigating the known harms. Restorative justice provides a philosophical roadmap that dovetails with the empathy-first model of human-centered design and hopefully captures in the empathy-by-design model for system interactions.

D. Teach the Skills and Substance of Empathy

Empathy permeates the heart of restorative justice, requiring both empathies by the perpetrator of antisocial acts towards the victims of those acts as well as by those victims towards the perpetrator.[315] "Empathy is a critical element of the restorative justice process."[316] But, empathy is not easy and should not be presumed readily available from all perpetrators of antisocial activities, nor from all victims of those behaviors. Even outside the restorative justice framework, it is asking quite a bit to simply expect that all community members are empathetic to the plight of those around them. Empathy requires:

> [S]tanding in another person's shoes to feel and think as they do. Empathy must then be followed by a desire to reduce the other's suffering, a desire that must be sufficiently intense to prod you into suffering-reducing action. But empathy requires imagination, and the suffering-alleviation urge turns on social norms that dictate when we should feel and then act on certain emotions.[317]

Rather than calling for the implementation of empathetic strategies in the context of criminal behavior or antisocial conflict in schools, the empathy-by-design approach requires that empathy is viewed as a building block to create healthy schools and communities to lessen the likelihood of conflict and address those conflicts once they occur. To do this, the schools and institutions that serve teens need to invest their resources to value empathy as more than an abstract ideal. These schools and institutions need to teach about the importance of empathy, train students to be more empathetic, and model empathetic

315. Renee Warden, *Where Is the Empathy? Understanding Offenders' Experience of Empathy and Its Impact on Restorative Justice*, 87 UMKC L. REV. 953, 957 (2019) ("Empathy is an essential component of offenders' respect for the law and rights of others. It also has the potential to explain and to heal what is broken in offenders' relationships to society."); Andrew E. Taslitz, *In General, Should Excuses Be Complete or Partial?: Why Did Tinkerbell Get off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 420 (2009).

316. Amanda Cooper, *A Case for Diversionary Restorative Justice in Cases Involving the Embezzlement of Funds from Small Businesses*, 22 CARDOZO J. CONFL. RES. 627, 643 (2021).

317. Taslitz, *supra* note 315, at 420.

experiences in age-appropriate pedagogies.[318] The goal with these programs should be to increase the student's "empathetic accuracy," meaning the "extent to which such everyday mind reading attempts are successful."[319] Empathic accuracy first requires '[e]mpathic inference,' . . . the everyday mind reading that people do whenever they attempt to infer other people's thoughts and feelings."[320]

Studies show that the efforts to develop empathetic accuracy can pay dividends: "Studies relating empathy to such prosocial behaviors as cooperation, sharing, donating, and other altruistic acts have generally yielded positive findings, especially in adults."[321] The data are less clear for children because of the wide variety of tests and measures used. Nonetheless, "[i]nvestigations that have addressed the relationship in children between empathy and cooperation and studies entailing the training of empathy have yielded more consistent positive outcomes."[322] The research supports findings of a reduction in social prejudice and aggression while increasing academic achievement and emotional intelligence.[323] Other studies in primary education have produced similar, positive outcomes.[324] For example, in a study conducted amongst fifth-grade South Korean students, empathy-based learning was used in the student's social studies classes. The results produced statistically significant changes in behavior and attitudes as well as garnering positive feedback from the students.[325]

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318. *See*, *e.g.*, Brown, *supra* note 295, at 189.

> Teachers of law are preparing students to be peacemakers—or, at least, to facilitate peace by helping clients resolve conflict in particular ways. I have come to believe that if we take this peacemaking business seriously, our job as legal educators is not only to teach students the doctrine, theory, and practical skills associated with lawyering, but also to . . . nurture of their growth not only intellectually, but also socially, emotionally, and (dare I say it) morally.

319. William Ickes, *Empathic Accuracy: Its Links to Clinical, Cognitive, Developmental, Social, and Physiological Psychology*, SOCIAL NEUROSCIENCE OF EMPATHY, 1, 57 (2009).

320. *Id.*

321. Norma Deitch Feshbach & Seymour Feshbach, *Empathy and Education*, SOCIAL NEUROSCIENCE OF EMPATHY, 1, 85 (2009).

322. *Id.*

323. *Id.* at 86–88.

324. *See, e.g.*, June Lee, Yunoug Lee, & Mi Hwa Kim, *Effects of Empathy-Based Learning in Elementary Social Studies*, ASIA-PACIFIC EDU RES 510 (2018), https://doi.org/10.1007/s40299-018-0413-2 (last visited Jan. 27, 2022).

325. *Id.* at 516–18. "The results showed that empathy-based instruction had stronger positive effects on students' empathy and academic engagement than traditional lecture-oriented instruction. In addition, the students and teacher in the experimental group indicated that they were satisfied with the empathy-based class and acknowledged the importance of empathy in the interviews." *Id.* at 517.

Students are much more likely to use empathetic approaches to problem solving and conflict resolution if they are taught the importance of these techniques and trained in their use throughout their education than if they are required only when the students are in crisis. Although untested, it is reasonable to predict that students' online aggressiveness and bullying behavior would be reduced if they had been trained previously to be empathetic towards others and reflect on the negative consequences of bullying posts before making them.

Comprehensive training could well prove the missing element to make restorative practices easier to adopt and administer and to reverse the negative trends for minors in their online experiences. Reinforcing the importance of empathy could then be built into community messaging surrounding online activities, and eventually be built directly into the social media filters themselves.[326] The work has already begun. "Cutting-edge companies are layering AI techniques such as clustering, feature extraction and natural language processing on top of more traditional algorithmic approaches to gain intelligent, prescriptive and empathetic insights that can be rapidly understood and used by business and technical users."[327]

A combination of empathy-by-design pedagogy and technology can make a difference for minors, enabling a future that is less fraught with anxiety and better designed to support empathetic and caring communities. But, if schools and institutions do not embrace empathy-by-design, then the experiences for minors will continue to make mental health worse and increase the size and scale of conflicts at home and school—conflicts the Supreme Court has largely sidestepped in ruling on minors' rights.

VII. CONCLUSION

Social media, the Internet, cell phones, and the always-on, interconnected world have fundamentally changed the nature of adolescence. Parents remain the primary authority for raising children, but many children have only one parent at home, and some have none. Teens struggle with online bullying, mental health issues, and the challenges of becoming adults in a world much different than the one in which their parents grew up.

Adolescents do have constitutional rights, including the right to privacy and the rights protected by the First Amendment. Society,

326. *See*, *e.g.*, Agata Bugaj, *Using AI to Drive Human Empathy at Machine Scale*, AI AUTHORITY TECH. INSIGHTS (Mar. 23, 2021), https://aithority.com/machine-learning/using-ai-to-drive-human-empathy-at-machine-scale/ (last visited Jan. 26, 2022).

327. *Id.*

however, sends very mixed signals on how those rights should be understood and protected. Lessons from Supreme Court decisions on contraceptives and abortion services provide some insight into the extent of those rights. The Supreme Court's recent decision in *Mahanoy Area School District v. B.L.* has shed further light on the powers school districts possess to provide discipline.

But none of these constitutional frameworks help address the fundamental need to support and supplement the family with constructive and proactive services for teens, particularly those in trouble. Such services may help narrow the racial gap and reduce the disproportionate burden that young women and LGBTQ+ teens face. Constitutional rights do not necessarily lead to statutory remedies. The Supreme Court's jurisprudence suggests that there is a social problem with which society needs to address. The case law provides us with a small voice calling out for a new beginning.

There is a strategy available to make a difference for teens, but it requires rethinking the institutions that serve them. Empathy-by-design and restorative practices can substantially help provide tools to manage the conflict in their lives and offer models that reduce the conflicts from arising. Banks, financial institutions, and large commercial advertisers can also do their part by putting their resources behind those platforms that adopt positive mental health strategies and avoid predatory marketing practices. Together, this global village comprised of schools, nonprofits, commercial institutions, and technology companies can reverse the pressure on our minors, addressing the stresses that have exacerbated mental health problems. But, if the institutions do nothing, the problem will worsen. No one institution is uniquely responsible, but each must play its part. Empathy-by-design provides a blueprint for developing this cooperative model.

Perhaps, it is time to step into our children's shoes. Perhaps, with time, we can learn to listen.