

Influencing “Kidfluencing”: Protecting Children by Limiting the Right to Profit From “Sharenting”

ABSTRACT

Statistics on children’s digital presences are staggering, with an overwhelming majority of children having unique digital identities by age two. The phenomenon of “sharenting” (parents sharing content of their children on social media) can start as early as a sonogram photo or a birth video and evolve into parent-run Instagram and TikTok accounts soon after. Content is often intimate, sometimes embarrassing, and frequently shared without children’s consent. Sharenting poses a myriad of risks to children including identity theft, digital kidnapping, exposure to child predators, emotional trauma, and social isolation. In the face of such significant risks to children’s well-being, one can only hope that parents will take care in deciding what information to share about their children online or whether to share at all. In recent years, that delicate risk calculus has been skewed by the potential to garner immense wealth from sharing content about children on sites like YouTube, TikTok, and Instagram.

It is high time that regulations protect the rights and privacy of children online. However, attempts to regulate sharenting itself will struggle to overcome the strong countervailing parental constitutional rights to free speech and parental autonomy. This Note proposes limiting the ability to profit from sharenting so that settled parental rights are undisturbed while the perverse incentive to expose children to immense risk for the possibility of profit is mitigated. This Note: (1) provides an overview of the phenomenon of sharenting, (2) surveys the current regulatory framework and its lapses in adequately protecting child influencers, (3) addresses the strong countervailing parental rights to parental autonomy and free speech, and (4) introduces an incentives-based solution to reduce the incidence of harmful child exposure online while respecting parental rights.

TABLE OF CONTENTS

I.	BACKGROUND: SHARENTING, PARENTAL RIGHTS, AND THE CURRENT REGULATORY SCHEME	850
	<i>A. The Prevalence of Sharenting</i>	850
	<i>B. Parental Rights</i>	854
	<i>C. Overview of the Current Regulatory Scheme</i>	856
	1. The Fair Labor Standards Act.....	856
	2. The Coogan Law	858
	3. Children’s Online Privacy Protection Act	859
III.	ANALYSIS OF ALTERNATIVE SOLUTIONS	860
	<i>A. Tort-Based Approach</i>	860
	<i>B. Public Health Approach</i>	861
	<i>C. Expanding the Entertainment Law Regime</i>	862
	<i>D. Adopting the “Right to Be Forgotten”</i>	863
III.	SOLUTION: BALANCING INCENTIVES BY LIMITING THE RIGHT TO PROFIT FROM SHARENTING	863
	<i>A. Overview of Influencer Compensation Models</i>	864
	<i>B. How to Limit Profitability of Kid-Centric Content</i>	866
	<i>C. Defining Private Content</i>	867
	<i>D. Benefits of Limiting Profitability of Content Featuring Children</i>	868
IV.	CONCLUSION.....	869

INTRODUCTION

Many children today make their online debut in a sonogram Instagram photo, or a birth video shared on Facebook or YouTube. However they make their internet entrances, most children have distinct digital identities by age two.¹ The recent phenomenon of parents sharing content of their kids online has been dubbed “sharenting.”² The majority of sharenting happens on a small scale,

1. Taylor Lorenz, *When Kids Realize Their Whole Life Is Already Online*, ATLANTIC (Feb. 20, 2019, 4:53 PM), <https://www.theatlantic.com/technology/archive/2019/02/when-kids-realize-their-whole-life-already-online/582916/> [perma.cc/4RNF-X3J2].

2. See Hua Hsu, *Instagram, Facebook, and the Perils of “Sharenting,”* NEW YORKER (Sept. 11, 2019), <https://www.newyorker.com/culture/cultural-comment/instagram-facebook-and-the-perils-of-sharenting> [perma.cc/YZS5-A5V6]; Daved Waschsman, *Sharenting*, COLLINS DICTIONARY (Aug. 20, 2013), <https://www.collinsdictionary.com/submission/11762/Sharenting> [perma.cc/4N7J-VXYF].

among networks of family and friends.³ Recently, however, sharenting has become increasingly commercial. A multibillion-dollar social media advertising industry has created a market hungry for kid-centric content.⁴ Content creators make money through sponsorships from retail giants like Walmart and Target, as well as through advertising revenue integrated into social platforms.⁵

One family that has found huge commercial success across social media platforms is the LaBrant family.⁶ The family’s YouTube channels have a combined 18.1 million subscribers and TikTok accounts have a combined fifty-one million followers.⁷ Parents Cole and Savannah post content heavily featuring the personal lives of their four children.⁸ One of their most popular YouTube videos, which features their daughter’s birth, has twenty-four million views.⁹ Some of their other popular

3. See Maeve Duggan, Amanda Lenhart, Cliff Lampe & Nicole B. Ellison, *Parents and Social Media*, PEW RSCH. CTR. (July 16, 2015), <https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media/> [perma.cc/QT33-SHEW].

4. See Sapna Maheshwari, *Online and Earning Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> [perma.cc/3YN8-SFJT].

5. See (Chloe) Ki, Chung-Wha, Park, Sangsoo, Kim, Youn-Kyung, *Investigating the mechanism through which consumers are “inspired by” social media influencers and “inspired to” adopt influencers’ exemplars as social defaults*, 144 J. OF BUS. RSCH. 264, 264 (2022); see, e.g., Miss Louis, *Affordable EARLY FALL HAUL Walmart Try ON Haul under \$50*, YOUTUBE (Sept. 10, 2022), <https://www.youtube.com/watch?v=rG-I2khIm5U> [perma.cc/BZ7L-7ST3]; Holderness Family Music, *Loaded Cauliflower Fried Rice Sponsored by @Target*, YOUTUBE (Oct. 28, 2020), <https://www.youtube.com/watch?v=UdGZrrks7Eo> [perma.cc/L7XC-3LPT]; Google AdSense Help, *Google Publisher Restrictions*, <https://support.google.com/adsense/answer/10437795?hl=en> [perma.cc/JG8G-BAMG] (last visited Sept. 18, 2020).

6. See Cody Raschelle, *Who is ‘The LaBrant Fam’ and what are their biggest controversies?*, WEGOTTHISCOVERED (Sept. 16, 2022, 3:56 PM), <https://wegotthiscovered.com/social-media/who-is-the-labrant-fam-and-what-are-their-biggest-controversies/> [perma.cc/9QMV-WTU4].

7. Savannah LaBrant, *The LaBrant Fam*, YOUTUBE, https://www.youtube.com/channel/UC4-CH0epzZpD_ARhxCx6LaQ/videos [perma.cc/GV2Q-G7HV] (last visited Mar. 3, 2023); Cole LaBrant, *Cole LaBrant*, YOUTUBE, <https://www.youtube.com/channel/UC-QfsBEvYnuYUdejTiwYnkQ/videos> [perma.cc/ZR5G-R7ZD] (last visited Mar. 3, 2023); Savannah LaBrant, *Everleigh Rose*, YOUTUBE, https://www.youtube.com/channel/UChO2Gib_Jx09ym3xDKjyGhg/videos [perma.cc/RQV8-HXLZ] (last visited Mar. 3, 2023); Savannah LaBrant, *P for Posie*, YOUTUBE, <https://www.youtube.com/@pforposie> [perma.cc/CG5E-V8E8] (last visited Mar. 3, 2023); Savannah LaBrant, *Savv.labrant*, <https://www.tiktok.com/@savv.labrant> [perma.cc/YU5W-MGYX] (last visited Sept. 18, 2022); Cole LaBrant, *TheSupercole*, TIKTOK, <https://www.tiktok.com/@thesupercole> [perma.cc/K3R3-9HJW] (last visited Sept. 18, 2022).

8. See, e.g., The LaBrant Fam, *Meeting Our Baby Girl For The First Time. (Live Birth)*, YOUTUBE (Dec. 31, 2018), <https://www.youtube.com/watch?v=pGSiBhR3eZA&t=12s> [perma.cc/LQN3-8NPV].

9. See *id.*

videos have sparked controversy.¹⁰ In one video that has since been deleted, parents Cole and Savannah pranked their tearful daughter, then six years old, by convincing her that they were giving away the family dog.¹¹ Another video, entitled “She got diagnosed with cancer. (documentary),” detailed a health scare involving their youngest daughter.¹² Despite the misleading title, the parents reveal early in the video that they had merely “convinced [themselves]” their daughter had cancer, never actually mentioning a diagnosis.¹³ Diagnosis or not, the video used the details of their daughter’s personal health situation as a hook to introduce their video topic, which was about childhood cancer more broadly.¹⁴

As in most family channels, the LaBrant children are the channel’s stars.¹⁵ Despite generating massive wealth for their family, the children lack any legal entitlement to the channel’s earnings, have no legal means to object to being featured in their parents’ content, and enjoy none of the protections that child workers enjoy in typical workplaces or even in traditional entertainment production settings.¹⁶ Due to constitutional rights of free speech and parental autonomy, parents have ultimate control over the information shared about their children online with little to no regulatory oversight.¹⁷

10. See Minyvonne Burke, *Youtubers Cole and Savannah LaBrant’s prank on 6-year-old daughter about puppy sparks backlash*, NBC NEWS (Apr. 2, 2019, 2:47 PM), <https://www.nbcnews.com/news/us-news/youtubers-cole-savannah-labrant-s-prank-6-year-old-daughter-n990156> [perma.cc/8Q76-LBNS].

11. See, e.g., Inside Edition, *Cole and Sav Slammed for Pretending to Give Away Kid’s Dog*, YOUTUBE (Apr. 3, 2019), <https://www.youtube.com/watch?v=IjNyfCbtLTM> [perma.cc/PRQ5-VQPW].

12. See The LaBrant Fam, *She got diagnosed with cancer. (documentary)*, YOUTUBE (Aug. 28, 2021), <https://www.youtube.com/watch?v=5mV7r75sil8&t=461s> [perma.cc/4GDL-4NY3].

13. *Id.*

14. *Id.*

15. See, e.g., *The Top 10 YouTube Family Channels in 2023*, TASTYEDITS (Mar. 2, 2023), <https://www.tastyedits.com/best-family-channels-youtube/> [perma.cc/RN4V-7SCA] (providing a list of ten popular family channels with their kids at the heart of their family channel).

16. See Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 U. PA. L. REV. 577, 587–90 (2021).

17. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (recognizing that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Wilmot v. Tracey*, 938 F. Supp. 2d 116, 136 (D. Mass. 2013) (noting that the right to raise one’s children is “among the most venerable of the liberty interests embedded in the Constitution . . . protected by the Due Process Clause.”); U.S. CONST. amends. I, XIV.

This generation of child internet celebrities is rapidly growing¹⁸ and troublingly vulnerable to exploitation. The recent prevalence of sharing children’s personal information online presents a generation with unprecedented risk, including identity theft, financial exploitation, digital kidnapping, exposure to child predators, psychological harm, cyberbullying, and social isolation.¹⁹ With such significant risks implicated, it is imperative that parents carefully consider what content to share about their kids online or whether to share at all. The potential to generate massive wealth from sharing such content skews this delicate risk calculus and introduces perverse incentives that put children at increased risk of experiencing the harmful outcomes listed above. It is possible and necessary for the law to protect children’s rights and privacy on the internet.

Part I of this Note will provide an overview of the current prevalence of sharenting, outline the countervailing parental rights of free speech and parental autonomy that limit efforts to regulate sharenting directly, and survey how the current regulatory scheme governing child labor in the entertainment sector applies to, and ultimately fails to protect, child influencers. Part II of this Note surveys other proposed solutions and analyzes their effectiveness at targeting sharenting. Part III introduces the solution of limiting the right to profit from sharenting, rather than regulating sharenting itself. Limiting the extent to which parents can profit from sharing their children online would eliminate the financial incentive to expose children’s private lives online while leaving the ultimate decision of whether to do so with

18. See generally Taylor Mooney, *Companies make millions off kid influencers, and the law hasn’t kept up*, CBS NEWS (Aug. 26, 2019, 6:19 AM), <https://www.cbsnews.com/news/kid-influencers-companies-make-millions-law-hasnt-kept-up-cbsn-originals/> [perma.cc/649R-9UNX].

19. See Masterson, *supra* note 16, at 593–96; Nila McGinnis, “*They’re Just Playing*”: *Why Child Social Media Stars Need Enhanced Coogan Protections to Save Them from Their Parents*, 87 MO. L. REV. 247, 263–64 (2022); Ana Saragoza, *The Kids Are Alright? The Need for Kidfluencer Protections*, 28 AM. U. J. GENDER SOC. POLY & L. 575, 579–80 (2020); Karen Verswijvel, Michel Walrave, Kris Hardies & Wannes Heirman, *Sharenting, is it a good or a bad thing? Understanding how adolescents think and feel about sharenting on social network sites*, 104 CHILD. & YOUTH SERVS. REV. 7 (2019); PNC, *Child Identity Theft and Sharenting* (Apr. 11, 2019), <https://www.pnc.com/insights/personal-finance/protect/child-identity-theft-and-sharenting.html> [perma.cc/S4H3-RNJJ]; Sean Coughlan, ‘*Sharenting*’ puts young at risk of online fraud, BBC NEWS SERVS. (May 21, 2018), <https://www.bbc.com/news/education-44153754> [perma.cc/L92A-YMYE]; Emma Nottingham, ‘*Dad! Cut that Part Out!*’ *Children’s Rights to Privacy in the Age of ‘Generation Tagged’: Sharenting, Digital Kidnapping and the Child Micro-Celebrity*, in ROUTLEDGE INT’L HANDBOOK OF YOUNG CHILD.’S RTS. (Jane Murray, Beth Blue Swadener & Kylie Smith eds., 2019); Steven Bearak, *Digital Kidnapping: What It Is and How to Keep Your Kids Safe on Social Media*, PARENT MAP (Nov. 16, 2017), <https://www.parentmap.com/article/kidnappers-kids-photos-digital-kidnapping-social-media> [perma.cc/Q7LQ-DA85].

parents, thus overcoming the constitutional obstacles faced by other proposed solutions.

I. BACKGROUND: SHARENTING, PARENTAL RIGHTS, AND THE CURRENT REGULATORY SCHEME

A. *The Prevalence of Sharenting*

Sharenting is a pervasive and increasingly common practice in American society.²⁰ According to a Pew research study, 75 percent of parents use social media.²¹ By another study's count, roughly the same percentage of parents share images of and information about their children on social media.²² Only 24 percent of parents ask their children for consent before publishing their images or information online.²³ Parents are largely comfortable with their children's online presence, even reporting approval of information shared by third parties about their children on social media.²⁴ 88 percent of parents indicate that they have never felt uneasy about content posted about their children by other family members or caregivers on social media.²⁵ Additionally, only 11 percent of parents have ever asked for content about their child posted by third parties to be removed from social media.²⁶

Sharenting admittedly has its benefits.²⁷ A majority of parents using social media report receiving a "high level of support" from their social media networks, including emotional support and useful parenting information.²⁸ However, these benefits come at the cost of children's privacy. For every parenting tip shared, a parenting

20. Duggan et al., *supra* note 3; *Parents' Social Media Habits: 2021*, SECURITY.ORG (May 13, 2021), <https://www.security.org/digital-safety/parenting-social-media-report/> [perma.cc/3M97-QNLP.]

21. Duggan et al., *supra* note 3.

22. SECURITY.ORG, *supra* note 20.

23. *Id.*

24. Duggan et al., *supra* note 3.

25. *Id.*

26. *Id.*

27. *Cf. id.*; Mary Anne Lou T. Tolentino, *Positive Effects of "Sharenting,"* SXU STUDENT MEDIA, <https://sxustudentmedia.com/postive-effects-sharenting/#:~:text=Overall%2C%20sharenting%20has%20more%20positive,to%20parents%20who%20need%20advice> [perma.cc/7WSA-6JTC] (last visited Mar. 6, 2023) ("Overall, sharenting has more positive rather than negative effects and can help parents and the child in many different ways. Sharenting helps us save children who could possibly be suffering from child abuse as well as giving support to parents who need advice."); *see also* Dan Seaborn, *The benefits of 'sharenting,'* HOLLAND SENTINEL, <https://www.hollandsentinel.com/story/entertainment/human-interest/2015/04/10/the-benefits-sharenting/34782859007/> [perma.cc/3CX9-CDEL] (Apr. 10, 2015, 7:43 AM).

28. Duggan et al., *supra* note 3.

struggle—which inherently closely involves a child—is published.²⁹ For every troublesome rash diagnosed, a photo of a child’s troublesome rash has been posted publicly. For every disciplinary strategy offered, a child’s behavioral issue has been broadcast in cyberspace. Even in non-commercial sharenting, information shared reaches at least the parent’s entire network, only one-third of which is typically comprised of their “real friends.”³⁰ Roughly one-quarter of the time, the content is posted with no privacy controls, available for anyone in the world to see.³¹

Beyond private sharenting among relatively close networks of family and “friends,” there is a flourishing industry of commercialized “sharenting.”³² Companies like Walmart and Target have noticed the market among parents for support in childrearing and among children for relatable content featuring kids who are just like them.³³ The social media advertising industry is projected to reach seventy billion dollars in the United States in 2023 and 200 billion dollars worldwide.³⁴ Top-earning family channels producing family- and kid-centric content, like that of Cole and Savannah LaBrant, consistently garner earnings well into the multimillions of dollars.³⁵

The aggregate effect of sharenting in its various forms is that an overwhelming majority of children have “unique digital identities” by

29. See generally L. Lin Ong, Alexa K. Fox, Laurel Aynne Cook, Claire Bessant, Pingping Gan, Marica Grubbs Hoy, Emma Nottingham, Beatriz Pereira & Stacey Barel Steinberg, *Sharenting in an evolving digital world: Increasing online connection and consumer vulnerability*, 56 J. CONSUMER AFFS. 1106 (June 19, 2022) (cataloguing the positive connections sharenting presents to others while simultaneously creating concerns related to children’s privacy and well-being).

30. Duggan et al., *supra* note 3.

31. SECURITY.ORG, *supra* note 20.

32. See, e.g., Leah A. Plunkett, *My So-Blogged Life: Commercial Use of Children’s Private Experiences*, SHARENTHOOD (Aug. 26, 2019), <https://sharenthood.mitpress.mit.edu/pub/hdmbazan/release/1> [perma.cc/5QAB-G6E6]; Ana Jorge, Lidia Marôpo & Anna Novello, *Mummy influencers and professional sharenting*, 25 EURO. J. CULTURAL STUDS. 166–182 (2021).

33. See, e.g., *From Target.com to the Toy Aisle, These Kid YouTube Stars Share What’s Hot for the Holidays*, A BULLSEYE VIEW (Oct. 29, 2015), <https://corporate.target.com/article/2015/10/target-kids-influencer> [perma.cc/2TGX-UMA3]; Holderness Family Music, *supra* note 5; Marijke De Veirman, Liselot Hudders & Michelle R. Nelson, *What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research*, 10 FRONTIERS IN PSYCH. 2685, 2685 (2019).

34. *Social Media Advertising – Worldwide*, STATISTA, <https://www.statista.com/outlook/dmo/digital-advertising/social-media-advertising/worldwide> [perma.cc/3ZHB-6RX2] (last visited June 5, 2023).

35. See, e.g., Elad Schulman, *How much do family YouTube channels make*, THOUGHT LEADERS (Mar. 8, 2023), <https://www.thoughtleaders.io/blog/how-much-do-family-youtube-channels-make> [perma.cc/53K4-ZGYF].

age two.³⁶ With so much to be gained from commercial sharenting, parents face the alluring incentive of spontaneous fame if their casual sharenting goes viral.³⁷ Once a family has made a business out of their social media presence, they may be loath to walk away from the hefty paychecks even if they realize the pernicious effects such widespread notoriety has on their children.³⁸

The consequences of sharenting are varied and troublesome. Known risks include identity theft, financial exploitation, digital kidnapping, exposure to child predators, psychological harm, cyberbullying, and social isolation.³⁹ PNC Bank warns that a social media page is “like a modern-day scrapbook” serving up information that can be accessed and used to steal a child’s identity outright, or to create a “synthetic identity” combining certain aspects of the child’s identity with other unrelated information.⁴⁰ Children are particularly attractive targets for this kind of theft because they ubiquitously lack bad credit history, making it seamless for thieves to open lines of credit in their names.⁴¹ Children may not discover that they’ve been victimized until years down the line, when they apply for student loans or their first jobs.⁴²

The unsettling phenomenon of digital kidnapping occurs when a stranger lifts a child’s photo from the internet and posts it as though the child is their own.⁴³ The director of the Commission of Missing and Exploited Children Len Edwards reports seeing this practice “quite frequently.”⁴⁴ Digital kidnappers mark their lifted photos with hashtags in common to create a community of people role-playing as parents.⁴⁵

36. See Lorenz, *supra* note 1.

37. See, e.g., Susan Scutti, *Accidentally famous: The psychology of going viral*, CNN (Mar. 16, 2018, 6:05 AM), <https://www.cnn.com/2018/03/16/health/social-media-fame/index.html> [perma.cc/5DH2-WCWM].

38. *Why You Feel Like You Can't Quit the Job You Hate*, CAREERS IN DEPTH (Oct. 19, 2020), <https://www.careersindepth.com/post/why-you-feel-like-you-cant-quit-the-job-you-hate> [perma.cc/3LED-BRNJ].

39. See Masterson, *supra* note 16, at 593–96; McGinnis, *supra* note 19; Saragoza, *supra* note 19; Verswijvel et al., *supra* note 19; PNC, *supra* note 19; Coughlan, *supra* note 19; Nottingham, *supra* note 19; Bearak, *supra* note 19.

40. PNC, *supra* note 19.

41. See *id.*

42. See *id.*

43. See Adam Hammond, *Digital Kidnapping Striking Fear in Proud Parents*, WREG MEMPHIS (Apr. 28, 2015, 5:32 PM), <https://wreg.com/news/digital-kidnapping-striking-fear-in-proud-parents/> [perma.cc/2CFN-3KQQ].

44. See *id.*

45. See *id.*

Social media use also opens children up to cyberbullying.⁴⁶ Most children with social media presences experience some form of cyberbullying.⁴⁷ One in five children report having skipped school due to cyberbullying and violence.⁴⁸ Experiencing cyberbullying increases children’s risk of both self-harm and suicidal behaviors.⁴⁹ The statistics available on cyberbullying survey the general population of children who use social media.⁵⁰ The vulnerability to cyberbullying likely grows with the size of a child’s audience. Thus, cyberbullying and its accompanying risk factors are even further magnified for those children who are notable personalities on social media.

Finally, sharing information and photos about children online can expose kids to child predators.⁵¹ Predators are known to pull images of children directly from parents’ social media accounts.⁵² Sometimes these images are reposted as-is to websites frequented by pedophiles, while other times images are edited and transformed into “morphed [child sexual abuse material].”⁵³ “Deepfake” technology, which allows for creation of hyper realistic alterations of images and videos, introduces an additional dimension to this risk.⁵⁴ Beyond the digital realm, crafting posts that include real-time information about location

46. SECURITY.ORG, *supra* note 20.

47. *Id.*

48. UNICEF *Poll: More Than a Third of Young People in 30 Countries Report Being a Victim of Online Bullying*, UNICEF (Sept. 3, 2019), <https://www.unicef.org/press-releases/unicef-poll-more-third-young-people-30-countries-report-being-victim-online-bullying> [perma.cc/A8CU-RPR9] [hereinafter UNICEF].

49. SAFETY NET: CYBERBULLYING’S IMPACT ON YOUNG PEOPLE’S MENTAL HEALTH: INQUIRY REPORT, THE CHILDREN’S SOCIETY 38 (2018).

50. UNICEF, *supra* note 48.

51. Stacey B. Steinberg, *Changed Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 911–12 (2019) [hereinafter Steinberg I]; Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 880 n.285 (2017) [hereinafter Steinberg II].

52. Steinberg I, *supra* note 51, at 936 (citing Sharon Kirkey, *Do You Know Where Your Child’s Image Is? Pedophiles Sharing Photos from Parents’ Social Media Accounts*, NAT’L POST (Apr. 18, 2017), <https://nationalpost.com/news/canada/photos-shared-on-pedophile-sites-taken-from-parents-social-media-accounts> [perma.cc/D5N9-JN28]).

53. See Steinberg I, *supra* note 51. This Note will use “child sexual abuse material” in lieu of “child pornography” in accordance with guidance from federal and international organizations to accurately communicate the victimization and exploitation bound up in the proliferation of this material. See generally *Child Sexual Abuse Material*, NAT’L CTR. FOR MISSING & EXPLOITED CHILD., <https://www.missingkids.org/theissues/csam> [perma.cc/ZFA5-KZW9] (last visited Jan. 20, 2023); *Appropriate Terminology*, INTERPOL, <https://www.interpol.int/en/Crimes/Crimes-against-children/Appropriate-terminology> [perma.cc/WK86-HBMQ] (last visited Jan. 20, 2023).

54. Steinberg I, *supra* note 51, at 936; *Deepfake*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deepfake> [perma.cc/HLT4-3KEL] (last visited Apr. 1, 2023) (“[A]n image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said.”).

can also provide bad actors with information about children's whereabouts or tip them off that a parent may not be home.⁵⁵

There are many consequences yet left unknown. The most popular social media sites have all launched within the last twenty years.⁵⁶ The oldest of today's mainstream social sites, YouTube, first dawned in 2005 and TikTok emerged most recently in 2016.⁵⁷ Two other social media giants, Twitter and Instagram, launched in 2006 and 2010, respectively.⁵⁸ The first generation of children raised publicly on these sites is just now reaching the age where they and others can even begin to analyze the effects that such revolutionary degradation of privacy has had on their well-being.

B. Parental Rights

While concerns relating to children's best interests abound, the countervailing interests of parental rights are strong and have potential to frustrate regulatory efforts targeting sharenting. In the United States, the right to parental autonomy is constitutionally well-established.⁵⁹ A parent's right to raise their children as they see fit is protected by the Due Process Clause of the Fourteenth Amendment.⁶⁰ Of course, this right is not absolute, and the State, too, has a duty to protect children's welfare.⁶¹ For example, parents must not abuse their children and must protect children from known abuse by others.⁶² Parents also have certain duties under common law and state statutes

55. *Social Networking Safety*, NAT'L CRIME PREVENTION COUNCIL, <http://archive.ncpc.org/topics/internet-safety/social-networking-safety.html#:~:text=Accept%20only%20people%20you%20know,working%20sites%20to%20commit%20crimes> [perma.cc/2YLN-VFPV] (last visited Apr. 1, 2023).

56. See *YouTube*, BRITANNICA, <https://www.britannica.com/topic/YouTube> [perma.cc/7HT4-YZWF] (Feb. 26, 2023) [hereinafter BRITANNICA I]; Joe Tidy & Sophia Smith Galer, *TikTok: The story of a social media giant*, BBC NEWS (Aug. 5, 2020), <https://www.bbc.com/news/technology-53640724> [perma.cc/259D-2PPW]; *Twitter*, BRITANNICA, <https://www.britannica.com/topic/Twitter> [perma.cc/G4S8-RM72] (Mar. 31, 2023) [hereinafter BRITANNICA II]; Raisa Bruner, *A Brief History of Instagram's Fateful First Day*, TIME (July 16, 2016, 6:44 AM), <https://time.com/4408374/instagram-anniversary/> [perma.cc/J92F-QMCB].

57. See BRITANNICA I, *supra* note 56; Tidy & Galer, *supra* note 56.

58. See BRITANNICA II, *supra* note 56; Bruner, *supra* note 56.

59. See *Jones v. Cnty. of Los Angeles*, 802 F.3d 990, 1000 (9th Cir. 2015) (holding that parents have an established constitutional right to live with their children without governmental interference); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (recognizing that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

60. See *Jones*, 802 F.3d at 1000; *Moore*, 431 U.S. at 499; *In re A.H.*, 992 N.E.2d 960, 966 (Ind. Ct. App. 2013); U.S. CONST. amend. XIV.

61. See *Jordan v. Jackson*, 876 A.2d 443, 452 (Pa. Super. 2005).

62. See *State v. Rooney*, 788 A.2d 490, 492 (Vt. 2001).

to provide reasonable care for their children and to protect their welfare as an ordinarily prudent person would see fit.⁶³ Family relations and rights are established by state law, and when abuse is shown, a state has a compelling interest in restricting a parent’s rights.⁶⁴

One might argue that, given the known risks of sharenting, parents who share gratuitously about their children online are vulnerable to government intervention because they are not acting in the “best interest of the child.”⁶⁵ However, the best interests of the child standard is alone insufficient to determine appropriateness of state intervention in parental decision-making.⁶⁶ A state’s interest in interfering with parental autonomy in raising a child is only compelling in circumstances involving avoidance of substantial harm.⁶⁷ In the case of sharenting, the uncertainty that risks will materialize into substantial harm in every case could complicate an attempt to classify the practice as substantial harm warranting direct government intervention.

Stemming from parents’ control and dominion over their children, parents in many states are entitled to require their children to work in a family business.⁶⁸ If parents don’t resort to otherwise illegal means to compel their children to work (i.e. engaging in independently criminal conduct or abuse), they are given ample discretion in raising their children, including deciding whether and how much their children will work in a family business.⁶⁹ Furthermore, parents in many states are entitled to their children’s earnings until they reach age eighteen or are emancipated.⁷⁰

Beyond parental autonomy, the right of free speech would also be implicated by any direct effort to limit sharenting.⁷¹ Under the First Amendment, a parent should be able to share whatever they please,

63. See *Humphrey v. City of Homestead*, 224 So. 2d 739, 740 (Fla. Dist. Ct. App. 1969).

64. See, e.g., *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890); *Gehrke v. Gehrke*, 115 A.3d 1252, 1258 (Me. 2015).

65. Kristen L. Walker, George R. Milne & Bruce D. Weinberg, *Optimizing the Future of Innovative Technologies and Infinite Data*, 38 J. PUB. POL’Y & MKTG. 403, 409–10 (2019).

66. See *Sparks v. Sparks*, 65 A.3d 1223, 1232 (Me. 2013).

67. See *Jones v. Jones*, 359 P.3d 603, 610 (Utah 2015).

68. See *FLSA - Child Labor Rules Advisor*, U.S. DEP’T OF LAB., <https://webapps.dol.gov/elaws/whd/flsa/cl/exemptions.asp> [perma.cc/4L6B-S3YQ] (last visited Apr. 1, 2023); 29 C.F.R. § 570.2(a) (2023) (unless the work is in a manufacturing business, another hazardous industry, involves operating heavy machinery, selling age restricted products, or making deliveries, there are no federal legal limits on requiring children to work).

69. See *FLSA- Child Labor Rules Advisor*, *supra* note 68.

70. See *Am. Prods. Co. v. Villwock*, 109 P.2d 570, 579 (Wash. 1941).

71. U.S. CONST. amend. I.

within reason, on their own social media accounts.⁷² The First Amendment bars enactment of certain laws that would infringe on free speech, which is a fundamental right.⁷³ As a result, laws which would limit speech based on their content are reviewed under strict scrutiny—the most exacting standard of judicial review.⁷⁴ Furthermore, the Supreme Court has recognized social media as “one of the most important places to exchange views” in the First Amendment context.⁷⁵ Of course, First Amendment speech rights are not absolute.⁷⁶ For example, obscenity and libel are not protected.⁷⁷ Additionally, threats of injuries to others communicated online are not protected.⁷⁸ As sharenting typically does not implicate any of these narrow exceptions, a parent’s right to share content about their children on their online social accounts is likely well within the protection of the First Amendment.⁷⁹

C. Overview of the Current Regulatory Scheme

1. The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), administered by the Department of Labor, is one of the major federal laws safeguarding workers’ rights.⁸⁰ The FLSA was enacted in large part to protect employees from harmful labor conditions and, importantly, regulates wages and hours.⁸¹ It also includes numerous exceptions.⁸² One such exception is the so-called “Shirley Temple Act,” which contains an exemption for child actors.⁸³ This exemption was motivated in part by

72. See *id.*; *Toffoloni v. LFP Publ’g Grp.*, 572 F.3d 1201, 1206 (11th Cir. 2009); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

73. See, e.g., *Toffoloni*, 572 F.3d at 1207–08; *Packingham*, 137 S. Ct. at 1738.

74. See, e.g., *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000).

75. See *Packingham*, 137 S. Ct. at 1732.

76. See, e.g., *Roth v. United States*, 354 U.S. 476, 483 (1957) (noting that “the unconditional phrasing of the First Amendment was not intended to protect every utterance”).

77. See *id.*

78. See *Elonis v. United States*, 575 U.S. 723, 726 (2015); *Toffoloni*, 572 F.3d at 1208; *Packingham*, 137 S. Ct. at 1732; U.S. CONST. amend. I.

79. See *Toffoloni*, 572 F.3d at 1208; *Packingham*, 137 S. Ct. at 1732; U.S. CONST. amend. I.

80. 29 U.S.C. §§ 201 to 219.

81. *Tomlin v. JCS Enters., Inc.*, 13 F. Supp. 3d 1330, 1335 n.10 (N.D. Ga. 2014); 29 U.S.C. §§ 201 to 219.

82. 29 U.S.C. § 213.

83. *Id.* at § 213(c); see Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L.

the popularity of Shirley Temple in the 1930s.⁸⁴ Her movies provided a morale boost to downtrodden American audiences during the Great Depression, and Congress did not want to cut her career short by imposing restrictive child labor laws.⁸⁵ Furthermore, the child actor exemption was justified by Congress’s belief that child acting was neither oppressive nor dangerous.⁸⁶ Rather, Congress considered work in the entertainment industry to be a beneficial opportunity for children to hone their creative skills and talents.⁸⁷

As child acting was not considered oppressive labor, and was thus excepted under the FLSA,⁸⁸ “kidfluencing” too would likely fall outside the Act’s bounds. Social media production by influencers, which takes place within the home and often captures the minutia of children’s everyday lives, is likely even less oppressive from a labor perspective than is traditional child acting.⁸⁹ There is often no “workplace” involved, no production team commandeering projects, and no lines to be memorized. For these reasons and others, influencing looks even less like “work” than does child acting. Reality TV, too, is a space in which children are exploited for a profit while not necessarily “working” as an “employee” in the way that the FLSA contemplates.⁹⁰ In reality TV, as in social media, the ultimate guardian of a child’s rights is the parent rather than federal labor law.⁹¹

Even if social media production, or child acting in general, were incorporated into the FLSA, the majority of child influencers would still not be covered.⁹² The FLSA has an additional exception for children under age sixteen working in a business owned by their parents.⁹³ Since most social media sites have minimum age requirements to have accounts, child influencers’ accounts, whether presented as the child’s own account or as a family account, are typically run by their parents.⁹⁴

REV. 39, 46–47, 72–73 (2010) (“The public christened this the Shirley Temple Act in honor of the actress.”) (internal citations omitted).

84. See 82 CONG. REC. 1692, 1780 (1937); 83 CONG. REC. 7441 (1938).

85. See 82 CONG. REC. 1780, 1795 (1937).

86. See *id.* at 1780; 83 CONG. REC. 7441 (1938).

87. See 82 CONG. REC. 1780 (1937).

88. 29 U.S.C. § 213.

89. See, e.g., Maheshwari, *supra* note 4.

90. See Podlas, *supra* note 83 (concluding that children who act on reality TV shows, though exploited, are not employees and that therefore they fall outside of the coverage of the FLSA).

91. See *id.* at 72–73.

92. See *FLSA- Child Labor Rules Advisor*, *supra* note 68; 29 C.F.R. § 570.2(a)(2) (2023).

93. See *FLSA- Child Labor Rules Advisor*, *supra* note 68; 29 C.F.R. § 570.2(a)(2).

94. *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> [perma.cc/EX2T-CM8L] (last visited Apr. 1, 2023) (minimum age of 13); *Terms of Service*, TIKTOK,

This FLSA exemption is another example of the extreme deference given to parents when it comes to the exploitation for profit or employment of their children.⁹⁵

2. The Coogan Law

Another consequential piece of legislation for child actors is the Coogan Law.⁹⁶ The Coogan Law's namesake, Jackie Coogan, was a famous child actor who starred in Charlie Chaplin's 1921 film, *The Kid*.⁹⁷ Coogan was immensely successful and popular throughout the 1920s, but was unfortunately left with none of his earnings by the time he would have legally had a right to take possession of them.⁹⁸ California's Coogan Law requires that 15 percent of a minor's gross wages be withheld by the employer and deposited into Blocked Trust Accounts in the first fifteen days of employment.⁹⁹ This ensures that at least a portion of child actor's earnings are preserved for them to take possession of once they reach the age of majority.¹⁰⁰ While Coogan accounts are currently mandated in five states, there is no federal Coogan Law.¹⁰¹

Moreover, social media influencers are not yet mandated to open Coogan accounts in any state.¹⁰² While California lawmakers considered a bill that would incorporate "social media advertising" into the relevant definition of employment in child entertainment law, the version of the bill that passed was vastly underprotective.¹⁰³ A similar bill was introduced in the New York Assembly that would broaden the scope of child performer laws to include "children who participate in online videos that generate earnings," thus requiring the guardians of

<https://www.tiktok.com/legal/page/us/terms-of-service/en> [perma.cc/59FV-B9N2] (last visited Apr. 1, 2023) (minimum age of 18); *Help Center: Terms of Use*, INSTAGRAM, <https://help.instagram.com/581066165581870> [perma.cc/R6EV-7XW4] (last visited Mar. 2, 2023) (minimum age of 13).

95. See *FLSA- Child Labor Rules Advisor*, *supra* note 68; 29 C.F.R. § 570.2(a)(2).

96. CAL. FAM. CODE § 6753 (West 2023); see *Coogan Accounts: Protecting Your Child Star's Earnings*, MORGAN STANLEY (Jan. 2022), available at <https://advisor.morganstanley.com/the-yellowstone-group/articles/global-sports-and-entertainment/protecting-your-child-star-s-earnings#:~:text=Currently%2C%20social%20media%20stars%2C%20or,Coogan%20accounts%20in%20any%20state> [perma.cc/QXP5-FSM4].

97. See *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [perma.cc/DUH3-WYVR] (last visited Apr. 1, 2023).

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.*

102. See MORGAN STANLEY, *supra* note 96.

103. A.B. 2388, 2017-18 Reg. Sess. (Cal. 2018); see MORGAN STANLEY, *supra* note 96.

those children to establish Coogan accounts on their behalf.¹⁰⁴ However, this bill is still in Committee.¹⁰⁵ The current lack of a Coogan account requirement for child internet stars leaves them vulnerable to financial exploitation with no guarantee of seeing the profits from their work.

3. Children’s Online Privacy Protection Act

Another law relevant to the topic of children’s internet privacy rights is the Children’s Online Privacy Protection Act (COPPA), administered by the Federal Trade Commission (FTC).¹⁰⁶ COPPA and its associated rules require operators of websites directed to children under age thirteen to obtain parental consent for collection or use of personal information of minor users.¹⁰⁷ COPPA reflects widespread governmental acknowledgement of children’s right to privacy and the threats to their privacy present online.¹⁰⁸ However, it only addresses the privacy of children in their capacity as internet content consumers, not as content creators and stars.¹⁰⁹ Additionally, it again highlights legal deference to parents regarding the privacy interests of their children.¹¹⁰ Rather than preventing sites’ collection of children’s data online, COPPA only requires that sites obtain parental consent for the collection or use of personal information of minor users.¹¹¹ Thus here, too, parents have ultimate say over whether their children’s information is exploited on the internet.¹¹²

The FLSA and COPPA both give deference to parents when it comes to choosing their children’s working conditions, hours, and exposure online.¹¹³ However, Coogan Laws highlight how the interests of child actors and their parents are not always aligned.¹¹⁴ They demonstrate the need for protection of child actors from their parents,

104. Assemb. Bill A03720, 244th Leg., 2021–22 Reg. Sess. (N.Y. 2021); see N.Y. EST. POWERS & TRUSTS L. § 7–7.1 (McKinney 2004).

105. NY A0370, BILL TRACK 50, <https://www.billtrack50.com/billdetail/1292469> [perma.cc/3NKG-KADA] (last visited Mar. 29, 2023).

106. 15 U.S.C. §§ 6501–05; 16 C.F.R. § 312 (2023); see *Children’s Online Privacy Protection Rule (“COPPA”)*, FTC, <https://www.ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa> [perma.cc/H5YP-DHF5] (last visited Mar. 19, 2023) [hereinafter COPPA].

107. See COPPA, *supra* note 106.

108. See *id.*; 15 U.S.C. § 6501.

109. See COPPA, *supra* note 106.

110. 16 C.F.R. § 312.5.

111. *Id.* at § 312.4–312.5.

112. See *id.*

113. See *FLSA Child Labor Rules Advisor*, *supra* note 68; 29 C.F.R. § 570.2(a)(2); 16 C.F.R. § 312.5.

114. See SAG-AFTRA, *supra* note 97.

particularly when money is involved.¹¹⁵ Child internet stars have fallen through the cracks of each of these existing regulatory schemes. Since child internet stars are exempted from the FLSA, are not the group benefitted by the Child Online Privacy and Protection Act, and are not within the definition of child performers that would entitle them to Coogan accounts, they are vulnerable to exploitation on multiple fronts.¹¹⁶ Child influencers are wholly at the mercy of their parents, whose interests may not always be completely aligned with their own, particularly when there is so much money to be made.

III. ANALYSIS OF ALTERNATIVE SOLUTIONS

As the popularity of internet content centering on children as its stars has grown, scholars have begun recognizing the harmful effects of the practice on children and considering potential solutions to mitigate the harm and defend the rights of children online.¹¹⁷ Proposed solutions approach the situation in a variety of creative ways.¹¹⁸ Though each targets different aspects of the problem, they all fall short of presenting a practicable and effective comprehensive solution.¹¹⁹

A. Tort-Based Approach

One possible solution attacks the sharenting problem with an approach centered in tort law. Under this approach, parental disclosures of their children's sensitive personal information via online platforms would be prohibited where the content has the reasonably foreseeable potential to directly cause a legal injury.¹²⁰ Though this approach would give negatively impacted children a means of legal

115. *See id.*

116. *See* 29 C.F.R. § 570.2(a)(2) (2023); FTC, *supra* note 106; MORGAN STANLEY, *supra* note 96.

117. *See generally* Kate Hamming, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U. L. REV. 1033 (2020); Leah Plunkett, *To Stop Sharenting & Other Children's Privacy Harms, Start Playing: A Blueprint for a New Protecting the Private Lives of Adolescents and Youth (PPLAY) Act*, 44 SETON HALL LEGIS. J. 457 (2020); Amanda G. Riggio, *The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493 (2021); Keltie Haley, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005 (2020) (suggesting that the U.S. implement a framework similar to the EU's "right to be forgotten").

118. *See* Hamming, *supra* note 117, at 1056–63; Plunkett, *supra* note 117, at 481–82; Riggio, *supra* note 117, at 515–16; Haley, *supra* note 117, at 1015–20.

119. *See* Hamming, *supra* note 117, at 1056–63; Plunkett, *supra* note 117, at 481–82; Riggio, *supra* note 117, at 515–16; Haley, *supra* note 117, at 1015–20.

120. *See* Hamming, *supra* note 117, at 1056.

recourse against their parents, it falls short in multiple ways.¹²¹ As a threshold matter, parents are traditionally immune from tort suits by their children.¹²² While children are protected against their parents by criminal law, they typically are not entitled to civil redress.¹²³ Even if a child privacy suit fell into one of the exceptions of the parent-child tort immunity doctrine,¹²⁴ it would still be unsatisfactory in addressing the ills of sharenting for two additional reasons. First, tort law is reactive rather than proactive. In many cases, irreparable damage will already have been done to a child by the time they could bring an action against their parent.¹²⁵ Second, a proposal for such a direct legislative limit on sharenting would be unlikely to overcome the strong countervailing parental rights of free speech and parental autonomy.¹²⁶

B. Public Health Approach

Another possible solution approaches the sharenting problem as one of public health.¹²⁷ By treating sharenting as a public health issue, the solution would primarily rest upon public education campaigns focused on informing parents of the risks associated with sharenting and encouraging them to consider these risks in deciding the degree to which they will share their children online.¹²⁸ This approach recognizes from a parental autonomy and free speech perspective that parents will realistically have the final say when it comes to whether to share their children online.¹²⁹ However, this solution fails to contemplate

121. See *id.* at 1056–57.

122. See generally *Hewlette v. George*, 9 So. 885 (Miss. 1891); *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903); *Roller v. Roller*, 79 P. 788 (Wash. 1905).

123. See generally *Hewlette*, 9 So. at 887.

124. See, e.g., *id.* (“If by her marriage the relation of parent and child had been finally dissolved. . . then it may be the child could successfully maintain an action against the parent for personal injuries.”).

125. See *Hamming*, *supra* note 117, at 1056 (suggesting that children aged sixteen or older could bring suit).

126. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (recognizing that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”); *Wilmot v. Tracey*, 938 F. Supp. 2d 116, 136 (D. Mass. 2013) (noting that the right to raise one’s children is “among the most venerable of the liberty interests embedded in the Constitution . . . protected by the Due Process Clause”); U.S. CONST. amend. I; *id.* amend. XIV, § 1.

127. See *Steinberg I*, *supra* note 51, at 935–37.

128. See *id.*

129. See *Moore*, 431 U.S. at 499 (recognizing that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”); *Wilmot*, 938 F. Supp. 2d at 136 (noting that the right to raise one’s children is “among the most venerable of the liberty interests embedded in the Constitution . . . protected by the Due Process Clause.”); U.S. CONST. amend. I; *id.* amend. XIV, § 1.

commercial sharenting. This lapse is significant for two reasons. First, it overlooks the maligned incentives introduced in the realm of commercial sharenting. While a public education campaign promulgating “best practices” for parents hoping to protect their kids’ privacy online might influence parental decision-making when it comes to casual sharenting, it would unlikely have significant effect on commercial sharenting.¹³⁰ The massive financial incentives driving the commercial sharenting industry might not be upset by an educational campaign encouraging different parental behavior.¹³¹ Second, it prematurely abandons the possibility of regulating sharenting altogether because of the roadblock that countervailing parental rights presents to direct regulation.¹³² While it may be difficult or impossible to regulate casual sharenting directly, the realm of commercial sharenting is ripe for regulation based in commercial incentives.

C. Expanding the Entertainment Law Regime

Another potential solution to the sharenting problem is expanding the existing entertainment law framework to cover child social media stars.¹³³ This approach would involve incorporating child influencers into the relevant definitions of state and federal legislation so that they would enjoy the same protections as similar employees.¹³⁴ Protecting child influencers through these means would surely afford children with greater protections over their earnings, ensure certain minimum standards for working condition, and lead to caps on hours worked.¹³⁵ However, the approach would do little to address the unique harms of commercial sharenting. While current entertainment laws are designed to address working conditions on sets and studios and the Coogan Law protects children’s earnings, they do not aim to limit the dissemination of private information and content shared about children’s personal lives.¹³⁶ Existing legislation covering traditional entertainment workers thus does not address the privacy concerns

130. See Steinberg II, *supra* note 51 at 867–68 (Steinberg asserts that “the vast majority of parents who share personal information about their children on the Internet do not intend to ignore their children’s well-being.” This claim is made in the context of casual sharenting and does not apparently contemplate the incentives introduced in the big business of commercial sharenting).

131. STATISTA, *supra* note 34.

132. See Steinberg II, *supra* note 51, at 869–77.

133. See Riggio, *supra* note 117, at 515–16 (advocating for applying existing entertainment law to family vloggers on YouTube).

134. See *id.* at 516–23.

135. See *id.*

136. See SAG-AFTRA, *supra* note 97.

specially implicated by the broadcasting the intimate details of children’s home lives on the internet.

D. Adopting the “Right to Be Forgotten”

Many countries, particularly European countries, recognize a right to be forgotten.¹³⁷ This right allows individuals to petition internet providers to have their personal information hidden from search results.¹³⁸ One potential solution to the current sharenting problem is applying the “right to be forgotten” in the United States.¹³⁹ Similarly to the tort-based approach, implementing a “right to be forgotten” framework in the United States would be reactive so would potentially also be too little too late. Damage to children would already be done by the time they reached the age at which they could petition for erasure of their information online.

III. SOLUTION: BALANCING INCENTIVES BY LIMITING THE RIGHT TO PROFIT FROM SHARENTING

To balance parents’ constitutional rights to independently raise their children and share freely about their children on the internet with the risks associated with children’s information being publicly available early in their lives, regulatory efforts should focus on limiting the profitability of private content of children on the internet.¹⁴⁰ While directly regulating parents’ ability to freely share about their children on social media may infringe on constitutional due process and free speech rights,¹⁴¹ limiting parents’ ability to profit from sharing that information does not. Additionally, only restricting monetization of certain sensitive content (what this Note will define as “private content”) featuring children, rather than all content featuring children, would protect children from many risks associated with commercial sharenting while avoiding unduly stifling the industries of social media production and advertising.

137. See Commission Regulation 2016/679, art. 17, 2016 O.J. (L 119) (establishing the European “right to be forgotten”).

138. *Id.*; Google Spain v. Agencia Española de Protección de Datos (AEPD), 108 Am. J. Int’l L. 502 (2014).

139. See Haley, *supra* note 117, at 1015–20.

140. See Toffoloni v. LFP Publ’g Grp., 572 F.3d 1201, 1208 (11th Cir. 2009); Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017); U.S. CONST. amend. I.

141. See Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Riggio, *supra* note 117, at 526–27.

A. Overview of Influencer Compensation Models

There are two primary ways in which influencers receive compensation for their content: (1) payments from social media platforms, when the site passes revenue from ads placed by third parties on creator content through to creators; and (2) direct sponsorships, when advertisers contract directly with creators to pay for posts promoting their products.¹⁴² Each social media site administers the first type of compensation differently. However, all sites' compensation models include conditions and requirements for content to be fully monetized.¹⁴³

On YouTube, a primary compensation mode is Google AdSense.¹⁴⁴ AdSense matches ads to creator pages based on their content and viewer demographics.¹⁴⁵ Advertisers pay for the ads once they are matched with a creator's content.¹⁴⁶ There are already limitations on the type of content that is eligible for advertising.¹⁴⁷ Sexual content, shocking content, content featuring explosives, guns and other weapons, tobacco, drug, and alcohol misuse, online gambling, and unapproved pharmaceuticals and supplements are all subject to content restrictions.¹⁴⁸ If videos include restricted content, fewer (or even no) advertising sources will be eligible to bid to place their ads on them.¹⁴⁹

On TikTok, a primary compensation mode for users is the TikTok Creator Fund.¹⁵⁰ The Creator Fund requires that accounts be in good standing, "adhering to the platform's community guidelines and

142. See Candice Georgiadis, *Mark Wolters of Wolters World on Five Ways for Influencers to Monetize Their Brand*, MEDIUM (Nov. 23, 2022), <https://medium.com/authority-magazine/mark-wolters-of-wolters-world-on-five-ways-for-influencers-to-monetize-their-brand-1146120da221> [perma.cc/L63T-7ZM7].

143. *Google Publisher Restrictions*, GOOGLE, <https://support.google.com/adsense/answer/10437795?hl=en> [perma.cc/JG8G-BAMG] (last visited Jan. 3, 2023); *TikTok Creator Fund: Your questions answered*, TIKTOK, <https://newsroom.tiktok.com/en-gb/tiktok-creator-fund-your-questions-answered> [perma.cc/R48Y-F8W8] (Mar. 25, 2021); *Instagram Content Monetization Policies*, INSTAGRAM, <https://help.instagram.com/2635536099905516> [perma.cc/3BJK-MXM2] (last visited Jan. 3, 2023).

144. See *How AdSense Works*, GOOGLE, <https://support.google.com/adsense/answer/6242051?hl=en> [perma.cc/G7GU-KNK7] (last visited Jan. 3, 2023).

145. See *id.*

146. See *id.*

147. See *Google Publisher Restrictions*, GOOGLE, <https://support.google.com/adsense/answer/10437795?hl=en> [perma.cc/JG8G-BAMG] (last visited Jan. 3, 2023).

148. See *id.*

149. See *id.*

150. See TIKTOK, *supra* note 143.

best practices,” and it pays based on a “variety of factors.”¹⁵¹ TikTok’s Community Guidelines already include a section devoted to minor safety.¹⁵² TikTok prohibits activities that “perpetuate the abuse, harm, endangerment, or exploitation of minors.”¹⁵³ In particular, the Community Guidelines prohibit “sexual exploitation of minors,” “grooming behavior,” “nudity and sexual activity involving minors,” “harmful activities by minors,” “physical and psychological harm of minors,” and “crimes against children.”¹⁵⁴ While these limitations on sharing and monetization of kid-centric content are important, they still fall short of the monetization regulation that would effectively disincentivize sharenting. Since TikTok’s limitations on the types of content that can be monetized are one and the same as the types of content that can be posted at all,¹⁵⁵ the bar for demonetization is too high to disincentivize harmful sharenting.

On Instagram, there are multiple options for monetization, including subscriptions¹⁵⁶ (monthly payments from viewer to creator), badges¹⁵⁷ (payments from viewer to creator during live streams), and payments from the platform to the creator for ads which run during IGTV videos (Instagram TV).¹⁵⁸ The last payment distribution scheme is similar to the AdSense system on YouTube.¹⁵⁹ Like in the AdSense system, IGTV payments are limited when content falls into certain restricted categories, including “debated social issues,” “tragedy or conflict,” “objectionable activity,” “sexual or suggestive activity,” “strong language,” and “explicit content.”¹⁶⁰

These platform-administered compensation schemes each attach conditions to content subject matter in order for creators to

151. *Id.*

152. *Community Guidelines*, TIKTOK, <https://www.tiktok.com/community-guidelines?lang=en#31> [perma.cc/4ZS5-34EU] (last visited Jan. 3, 2023).

153. *See id.*

154. *See id.*

155. *TikTok Creator Fund Terms*, TIKTOK, <https://www.tiktok.com/legal/page/global/tiktok-creator-fund-terms/en> [perma.cc/VWX4-ZHV5] (last visited Mar. 19, 2023).

156. *About Instagram Subscriptions*, INSTAGRAM, https://help.instagram.com/856296695055001?helpref=faq_content&fbclid=IwAR1UCM4N8w3PHX9zl56MEVttIb751no_SrMcGZEq3KF2Fp1JGZre911QvzI [perma.cc/S5SJ-56WT] (last visited Jan. 3, 2023).

157. *What are badges on Instagram?*, INSTAGRAM, <https://help.instagram.com/939561509841026> [perma.cc/W33S-XBVA] (last visited Jan. 3, 2023).

158. *Bringing IGTV Ads to Creators Globally*, INSTAGRAM, <https://business.instagram.com/blog/bringing-igtv-ads-to-creators-in-more-countries> [perma.cc/UB8Y-WNK7] (last visited Jan. 3, 2023).

159. Berta Ventura, *IGTV Monetization in 2021 and 2022*, CYBERCLICK, (Oct. 28, 2021), <https://www.cyberclick.net/numericalblog/en/instagram-monetization> [perma.cc/X6TC-C8TY].

160. *See* INSTAGRAM, *supra* note 143.

receive their allotted ad revenue from their posts.¹⁶¹ Direct sponsorships, on the other hand, are administered via contract between advertising company and creator.¹⁶² Social media platforms thus lack control over the profitability of content funded directly by a sponsoring company beyond ensuring that sponsored content comports with the minimum requirements of their community guidelines.¹⁶³

B. How to Limit Profitability of Kid-Centric Content

There are multiple avenues for limiting the profitability of kid-centric content. The first option is a legislative solution. Congress has acknowledged the risks posed to children in the digital age by its passage of COPPA, and some state legislatures have acknowledged the vulnerabilities of child actors by their passage of Coogan Laws.¹⁶⁴ If attention were drawn to the intersectional class of child internet stars and the cracks they fall through in the FLSA and other existing legislation, congressional action would be plausible.¹⁶⁵ An ideal law combatting the harms of commercial sharenting would limit the profitability of private content featuring children, and would apply both to ad payments administered by platforms and to direct contracts between advertisers and creators.

Another path to limiting profitability of kid-centric content is a potential regulatory solution. This avenue is less straightforward because the issue sits at the jurisdictional intersection of multiple regulatory agencies and is not clearly within the purview of any one agency. While the FTC regulates advertising, it focuses on protecting the public from deceptive and unfair business practices, not on protecting the participants in advertising from exploitation.¹⁶⁶ While the Federal Communications Commission (FCC) regulates communications by placing restraints and obligations on broadcasters who use cable, radio, and television, it does not regulate online

161. See *id.*; *Google Publisher Restrictions*, GOOGLE, <https://support.google.com/ad-sense/answer/10437795?hl=en> [perma.cc/JG8G-BAMG] (last visited Jan. 3, 2023).

162. See *Add Paid Product Placements, Sponsorships & Endorsements*, GOOGLE, [https://support.google.com/youtube/answer/154235?hl=en#zippy=%2Cwhere-not-to-include-paid-product-placements-sponsorships-endorsements%20\(last%20visited](https://support.google.com/youtube/answer/154235?hl=en#zippy=%2Cwhere-not-to-include-paid-product-placements-sponsorships-endorsements%20(last%20visited) [perma.cc/3REB-CW7G] (last visited Jan. 3, 2023).

163. See *id.*

164. See FTC, *supra* note 106.

165. See *FLSA Child Labor Rules Advisor*, *supra* note 68; 29 C.F.R. § 570.2(a)(2); Podlas, *supra* note 83.

166. *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> [perma.cc/2GPA-78F7] (last visited Jan. 3, 2023).

content.¹⁶⁷ Various agencies whose missions are to protect children similarly would not have a natural role of controlling profitability of online content.¹⁶⁸

Another avenue for limiting the profitability of kid-centric content would be a solution based in contract law. Under this approach, contracts dealing in private content featuring children might be considered void for public policy. Courts invalidate contracts as unenforceable on grounds of public policy when they circumvent other laws or institutions or go against “some overriding interest of society.”¹⁶⁹ There is no exhaustive list of what kinds of contracts might be unenforceable for public policy, and doctrine evolves over time along with society’s changing interests.¹⁷⁰ As society becomes more attuned to children’s vulnerabilities and privacy on the internet, it is more likely that courts could (and should) consider public policy when encountering contracts involving monetized sharenting. If courts saw contracts dealing in private content of non-consenting children as against societal interest, they could deem such contracts unenforceable on grounds of public policy. This solution would likely primarily affect sponsorships agreed to directly between advertisers and creators and might not impact eligibility for platform-administered ad payouts.

C. Defining Private Content

Regardless of the implementation strategy employed, a clear definition of the content for which profitability is limited is crucial. Major benefits could be gained from limiting profitability of certain

167. *The FCC and Speech*, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/fcc-and-speech#:~:text=The%20FCC%20does%20not%20regulate,restraints%20and%20obligations%20on%20broadcasters> [perma.cc/CL5X-HTUA] (last visited Jan. 3, 2023).

168. *Administration for Children and Families*, USA.GOV, <https://www.usa.gov/federal-agencies/administration-for-children-and-families> [perma.cc/98DG-4N64] (last visited Jan. 3, 2023) (noting that the Administration for Children and Families primarily administers welfare services to children and families). Child protective services, departments of children and family services, and social services vary by state, but all focus on abuse and neglect; sharenting unlikely consistently rises to the level of abuse and neglect. See, e.g., *Child Protective Services*, N.C. DEP’T OF HEALTH AND HUM. SERVS, <https://www.ncdhhs.gov/divisions/social-services/child-welfare-services/child-protective-services> [perma.cc/2DLL-HF4F] (last visited Mar. 3, 2023) (“CPS helps prevent further harm to children from intentional physical or mental injury, sexual abuse, exploitation or neglect.”); *Child Protective Services*, CAL. DEP’T OF SOC. SERVS., <https://www.cdss.ca.gov/reporting/report-abuse/child-protective-services> [perma.cc/9MNV-PXPE] (last visited Mar. 3, 2023) (“Existing law provides for services to abused and neglected children and their families.”).

169. See Restatement (Second) of Contracts ch. 8 (Am. L. Inst. 1981); *In re Baby M*, 537 A.2d 1227, 1255 (N.J. 1988).

170. See Restatement (Second) of Contracts ch. 8 (Am. L. Inst. 1981); *In re Baby M*, 537 A.2d at 1255.

types of content featuring children even without limiting profitability of all content featuring children indiscriminately. Limiting only certain kinds of kid-centric content, those that feature the types of “private content” leaving children vulnerable to specific harms, would impart significant benefits.

As a starting point, there are five types of content that relate to the reported harms of social media exposure of children that should be defined as “private content” and thus be limited in profitability: (1) content shot in the home; (2) content shot while children are seemingly unaware that they are being filmed; (3) content featuring children in any state of undress; (4) content revealing personal information about a child, including but not limited to address, school attended, real-time location, and medical information; and (5) content featuring children in emotional or physical distress. Limiting the profitability of these particular types of content would still allow for a robust social media advertising industry—even one that features children within measure—while still disincentivizing the publishing of content likely to compromise children’s dignity, privacy, and security. While parents would still have ultimate discretion over whether to share content falling into these categories, they could not expect to profit from sharing such content.

D. Benefits of Limiting Profitability of Content Featuring Children

This solution would provide multiple benefits. First, it would remove the monetary incentive for parents to expose children’s private lives to the world. Second, it would leave parents’ rights to free speech and autonomous childrearing undisturbed while empowering them to make decisions with the best interest of the child at heart, unaffected by prospect for monetary gain.¹⁷¹ The benefits of this incentives-based approach overcome many problems that other proposed regulatory solutions face. Specifically, this solution would be more effective than a tort-based approach or an approach based in the “right to be forgotten” because it is prospective rather than retroactive.¹⁷² Given the nature of privacy interests, much of the damage to affected children would already be done by the time a child reached the age at which they could bring a civil suit against their parents or petition a website to take down content. Eliminating the huge profit-driven incentives to share sensitive material about children on the internet would reduce the

171. See U.S. CONST. amend XIV; *id.* amend. I; *Jones v. Cnty of L.A.*, 802 F.3d 990, 1000 (9th Cir. 2015); *Toffoloni v. LFP Publ’g Grp.*, 572 F.3d 1201, 1208 (11th Cir. 2009); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

172. See *Hamming*, *supra* note 117, at 1056; *Haley*, *supra* note 117, at 1015–20.

incidence of harmful sharenting in the first place, thus better protecting children’s interests.

This approach would also be more effective than a public health approach, particularly in combatting commercial sharenting. While a public health campaign informing parents of potential risks to children presented by sharenting may affect the decision-making of individuals engaged in casual sharenting, it might be unlikely to sway individuals presented with the prospect of garnering immense wealth by doing so.¹⁷³ Conversely, this approach would remove that perverse incentive scheme altogether, thus effectively targeting parents engaged in commercial sharenting, which arguably has the broadest and most harmful reach of all types of sharenting. This approach would also be more effective than expanding the entertainment law regime because while expanding the entertainment law regime would secure child internet stars’ right to a portion of the profits their content earns, it would not afford them any increased privacy protections.¹⁷⁴

IV. CONCLUSION

Social media marketing is an established and growing industry.¹⁷⁵ Children’s role in this industry is one that generates views, clicks, likes and, ultimately, profit.¹⁷⁶ At the same time, the prospect of profiting from the use of children in social media advertising through kidfluencing and commercialized sharenting opens featured children to a world of risks.¹⁷⁷ From identity theft to financial exploitation, digital kidnapping to child predator exposure, and psychological harm to cyberbullying, child stars on the internet are thrust into a public and vulnerable position before they are even old enough to give legal consent.¹⁷⁸ These risks might be more palatable if the children involved stood to enjoy a fair portion of the profit from the content in which they star or if their participation were treated as work and thus subject to regulation under the FLSA.¹⁷⁹ At present, child internet stars are neither entitled to their earnings via a protected Coogan account nor protected under the compensation requirements of the FLSA.¹⁸⁰ This situation is ripe for regulation. As parents have strong rights under the

173. See Steinberg II, *supra* note 51, at 867–68.

174. See Riggio, *supra* note 117, at 515–16.

175. See *supra* Section I.A.

176. *Id.*

177. *Id.*

178. *Id.*

179. See *supra* Section I.C.

180. *Id.*

Constitution to publish freely on the internet and to raise their children as they see fit, direct limitation of sharenting would unlikely pass constitutional muster.¹⁸¹ As such, an effective avenue through which to regulate sharenting is an incentives-based approach.¹⁸² Rather than restricting the right to “sharent” at all, limiting the right to profit from certain kinds of particularly harmful sharenting would reduce the incentive for parents to expose their children to such vast risks on the internet.¹⁸³ Whether implemented through a legislative, regulatory, or public policy contract limitation, restricting the right to traffic in private content featuring children that: (1) is shot in the home; (2) is shot while children are seemingly unaware that they are being filmed; (3) features children in any state of undress; (4) reveals personal information about a child, including but not limited to address, school attend, real-time location, medical information; and (5) features children in emotional or physical distress would simultaneously respect parental rights and benefit child stars who themselves have little to no control over the content published about them on the internet.¹⁸⁴ Limiting regulation to these particularly suspect categories of content would preserve a role for children in social media advertising while disincentivizing the publishing of content most likely to compromise children’s dignity, privacy, and security.¹⁸⁵

*Charlotte Yates**

181. *See supra* Section I.B.

182. *See supra* Section III.D.

183. *Id.*

184. *See supra* Section III.C.

185. *See supra* Section III.B.

* J.D. Candidate, Vanderbilt University Law School, 2024; BA, University of Virginia, 2021. The Author would like to thank Davis Price Shugrue, Lauren Bitter, and the editorial staff of the *Vanderbilt Journal of Entertainment & Technology Law* for their support and guidance over the course of writing this Note.