

# CHILDREN'S PRIVACY AND THE GHOST OF SOCIAL MEDIA PAST

Shreya Agarwala\*

## ABSTRACT

A picture is worth a thousand words... or likes, or dollars. But is it worth a child's dignity? Social media's youngest stars, or kidfluencers, grow up in the eyes of the public. As their parents engage in sharenting—posting one's child on social media—the kidfluencers lose their privacy, their capacity to create their own reputation, and even their online safety. This Note examines how to provide redress to former kidfluencers whose privacy was traded for social media likes. Part I covers the basics of sharenting and reputation-based law. Part II then covers the problems in regulating sharenting, both in theory and with current proposals. Finally, Part III proposes a new reputational and privacy tort framework that would allow kidfluencers to regain some control over their image.

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## INTRODUCTION

I just want to note that today is the first time that I've introduced myself with my legal name in three years because I'm terrified to share my name. Because the digital footprint I had no control over exists. (voice crack) I apologize. When you Google my name, simply just my first name, childhood photos of me in bikinis will pop up and I'm terrified to have those weaponized against me again . . . I know firsthand what it's like to not have a choice in which a digital footprint you didn't create follows you around for the rest of your life.<sup>1</sup>

Cam, Washington State House Civil Rights  
and Judiciary Committee Hearing

In a hearing for Washington State's House Bill 1627 (HB 1627), which would offer certain protections to child influencers, Cam pleaded with legislators to vote in favor of the landmark bill.<sup>2</sup> Cam is a former child influencer, or "kidfluencer."<sup>3</sup> This growing population of children is featured on social media platforms by their parents' efforts, either through their own active participation in creating content or being the subject of their parents' content.<sup>4</sup> One of the first bills of its kind, HB 1627 would recognize privacy rights for child influencers in a way state legislatures are only now beginning to

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1. Cam (@softscorpio), TIKTOK, at 00:25 (Feb. 14, 2023), <https://www.tiktok.com/@softscorpio/video/7200140651411967278?lang=en> (on file with author). This Note does not use Cam's full name to respect their wish to remain anonymous. See Morgan Sung, *Their Children Went Viral. Now They Wish They Could Wipe Them from the Internet*, NBC NEWS (Nov. 3, 2022), <https://www.nbcnews.com/pop-culture/influencers-parents-posting-kids-online-privacy-security-concerns-rcna55318> [<https://perma.cc/FWA7-7QLT>] (stating Cam's desire to avoid the use of their full name).

2. Cam, *supra* note 1.

3. While some children choose to make social media accounts of their own volition, the terms "child influencers" and "kidfluencers" will henceforth refer exclusively to children on social media because of their parents' posts or insistence.

4. See Catherine Archer & Kate Delmo, *Play Is a Child's Work (on Instagram): A Case Study of the Use of Children as Paid Social Media Influencers to Market Toys*, 26 M/C J. 1, 2 (2023) (noting the rising population of "insta-kidfluencers").

consider.<sup>5</sup> The bill would allow adult-children<sup>6</sup> to request the deletion of social media content featuring themselves as children.<sup>7</sup>

For young adults like Cam who grew up in front of social media, the current absence of such laws means no protection from the world's best paparazzi: one's own parents. Cam's mother documented their childhood for her ten thousand followers, giving her audience open access to observe, comment, and share. Every aspect of their childhood was fair game, from pictures of them in a bikini to the intimate details of their first period.<sup>8</sup> Seemingly protected by the First Amendment, as well as the United States' long history of protecting parental rights, Cam's mother could (and did) reveal anything and everything about Cam's life.

The tendency for parents to want to post their children online is extremely common. Approximately 82% of parents post their children online in some way,<sup>9</sup> often without the permission of their child.<sup>10</sup> While posting one's child online may seem innocent, it can also go too far, in a phenomenon called "sharenting." The definition of "sharenting" varies depending on the author: some describe sharenting as when parents overshare their child's life online to a harmful degree.<sup>11</sup> Others say sharenting is simply sharing one's

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5. Chase DiBenedetto, *A New Washington State Bill Takes the First Step in Legislating Rights for Child Influencers*, MASHABLE (Feb. 17, 2023), <https://mashable.com/article/child-influencer-washington-state-bill> [https://perma.cc/YM26-2VN4].

6. Adult-children refers to the former kidfluencers who are now legally adults.

7. DiBenedetto, *supra* note 5 ("The law also would enshrine a right to privacy for these children once they've reached legal adult status, allowing them to petition to have videos and other content deleted.").

8. See Fortesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made into Content*, TEEN VOGUE (Mar. 10, 2023), <https://www.teenvogue.com/story/influencer-parents-children-social-media-impact> [https://perma.cc/QK7P-3USH] (detailing the nature of the content Cam's mother posted).

9. See BROOKE AUXIER ET AL., PARENTING CHILDREN IN THE AGE OF SCREENS 56 (2020), <https://www.pewresearch.org/internet/2020/07/28/parenting-children-in-the-age-of-screens/> [https://perma.cc/T6E6-VUFR] (reporting findings from a study examining children and parents' engagement with technology).

10. See Aliza Vigderman, *Parents' Social Media Habits: 2021*, SECURITY.ORG (July 16, 2024), <https://www.security.org/digital-safety/parenting-social-media-report/> [https://perma.cc/U7AT-U6MP] ("According to our study, only about a quarter (24 percent) of parents ask their children's permission every time before posting. Not-so-shockingly, 29 percent don't ask for consent at all.").

11. E.g. Steven Leckart, *The Facebook-Free Baby*, YAHOO FIN. (May 15, 2012), <https://finance.yahoo.com/news/the-facebook-free-baby.html>

children on social media, including anything from posting a single photo to creating entire accounts that showcase every aspect of their children's lives.<sup>12</sup> The broadest definition suggests sharenting is any form of adults digitally transmitting a child's private information.<sup>13</sup> This Note will use the definition of parents sharing their children on social media in any capacity, either harmlessly or more exploitatively. Today, it has never been easier for parents to share personal details about their child's life; at the same time, the risks have never been higher.<sup>14</sup> No matter the intentions, good or bad, posting children online creates many risks for the child, as evidenced by Cam's unwanted stint as a kidfluencer.

This Note consists of three parts. Part I is an introduction to sharenting. It lays out what sharenting looks like, the incentives behind sharenting, and how sharenting creates both benefits and hazards for the children involved. Part I additionally explores the legal rights at the heart of regulating sharenting. Part II focuses on the privacy and reputational concerns kidfluencers face as a result of sharenting, analyzes the obstacles to regulating sharenting, and summarizes the current landscape of proposed solutions. Part III constructs a reputational tort-based solution for the adult children who must now reckon with their parents' social media decisions. By focusing on the injury to children's sense of self, rather than their finances, this Note offers a novel route for children who wish to reclaim their identity.

## I. A BEGINNER'S GUIDE TO SHARENTING

To begin to grasp how to solve some of sharenting's reputational harms, it is important to have a practical and legal understanding of how sharenting functions today. Section I.A focuses on setting the stage for what sharenting entails, the motivations behind sharenting, its resulting consequences, and some of the parental rights at the heart of scholarly discussions on sharenting. Just as parents have legal claims to sharenting, children have legal

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[<https://perma.cc/P96D-9PE6>] (discussing different definitions of sharenting and its downsides).

12. See Sarah Simanson, *The Psychology of 'Sharenting': Why Parents Can't Resist Talking About Their Kids Online — and What Experts Say About It*, YAHOO LIFE (Oct. 13, 2023), <https://www.yahoo.com/lifestyle/the-psychology-of-sharenting-social-media-221628986.html> [<https://perma.cc/V46N-MW35>] (quoting author Devorah Heitner defining sharenting).

13. See *id.* (quoting author Leah Plunkett defining sharenting).

14. See *infra* Section I.A.2.

claims against sharenting. Section I.B covers defamation and privacy law and its applicability to a child's reputational risks from sharenting.

## A. Sharenting: The Good and The Bad

### 1. What Is Sharenting and Why Do Parents Do It?

Social media offers countless options for parents to share the life of their child with family, friends, and strangers: a family picture on Instagram, a tweet about a silly story of what their child did, a Facebook post requesting advice on how to help their LGBTQ+ child feel more comfortable with their identity,<sup>15</sup> a TikTok page devoted to teaching their daughter to love her appearance.<sup>16</sup> In a survey of 3,640 U.S. parents about social media, 76% stated that they share their children on social media to easily communicate with friends and family, 36% wanted to show off their children's accomplishments, and 11% shared because other parents share.<sup>17</sup>

In addition, social media is a great way for parents to get community support that they may not be able to get through their local community.<sup>18</sup> Heather Armstrong was one of the earliest so-called "mommy bloggers" and had a massive impact on media which idealized motherhood at the time of starting her blog.<sup>19</sup> She honestly discussed her struggles with depression, parenting, and more, extending a comforting digital hand to mothers grappling with

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15. See Ava Thompson, *A Dallas Mom Started a Facebook Group to Protect LGBTQ+ Youth. It Blew Up.*, DALLAS OBSERVER (Aug. 7, 2023), <https://www.dallasobserver.com/arts/a-dallas-facebook-group-for-parents-of-lgbtq-youth-is-subject-of-a-pbs-documentary-17188748> [https://perma.cc/4Y7C-V6C5] (detailing Liz Dyer's experience starting a Facebook group for parents to learn how to affirm their queer children).

16. See Maya Lockett, *Mother-Daughter TikTok Duo from Myrtle Beach Area Looks to Inspire in First Book*, WBTW NEWS (Dec. 22, 2022), <https://www.wbtw.com/news/grand-strand/myrtle-beach/mother-daughter-tiktok-duo-from-myrtle-beach-area-looks-to-inspire-in-first-book> [https://perma.cc/3JZ3-6VLB] (stating that Tiana Haneline posted videos of daily affirmations with her daughter to inspire confidence in her race and went viral on TikTok).

17. See AUXIER ET AL., *supra* note 9 (discussing study results).

18. Lorin Basden Arnold & Bettyann Martin, *The Digital Maternal: Mothers and Social Media*, in MATERNAL THEORY: ESSENTIAL READINGS 885, 885 (Andrea O'Reilly ed., 2021).

19. DOOCE, <https://dooce.com> [https://perma.cc/3NCB-RLJW].

conflicting feelings about motherhood.<sup>20</sup> Through her candor she won over people's hearts—and book deals.<sup>21</sup>

Armstrong was able to monetize her brand as a mother, but parents can also develop their child as the brand. Concerns of child exploitation reach a peak when parents start “commercially sharenting.” Commercial sharenting is defined as attempts to monetize children's lives through content creation.<sup>22</sup> In 2023 alone, the influencer industry was worth \$21.1 billion, and it is only expected to grow.<sup>23</sup> Sharenting's monetary value derives from brand deals, creator funds, advertising, merchandise, and subscriptions.<sup>24</sup>

Ryan Kaji, an eleven-year-old YouTuber who reviews toys on his channel *Ryan's World*, exemplifies the vast possibilities for monetizing content. The relatively simple content concept has led to Ryan being one of the highest paid YouTubers in the world, with an annual income of \$35 million in 2022.<sup>25</sup> His sources of income include advertisement revenue, endorsements, product lines, books, television

20. See Taylor Lorenz, *Heather Armstrong, Who Made It Okay to Say Motherhood Was Hard, Dead at 47*, WASH. POST (May 10, 2023), <https://www.washingtonpost.com/technology/2023/05/10/heather-anderson-death-mommy-blogger/> [<https://perma.cc/AY4E-VL4P>] (describing Armstrong's blogging journey).

21. Betsy Reed, *Heather Armstrong, Blogger and Force Behind Dooce.com, Dies Aged 47*, GUARDIAN (May 10, 2023), <https://www.theguardian.com/us-news/2023/may/10/heather-armstrong-blogger-dooce-dies> [<https://perma.cc/RU8N-SK26>] (“She parlayed her successes into book deals.”).

22. Katie Collins, *TikTok Kids Are Being Exploited Online, but Change Is Coming*, CNET (Aug. 8, 2022), <https://www.cnet.com/news/politics/tiktok-kids-are-being-exploited-online-but-change-is-coming/> [<https://perma.cc/UYM6-L3XY>] (“‘The distinguishing factor around the paid influencer community is the attempt to monetize these private, in some cases very intimate experiences,’ [author Leah Plunkett] said in an interview last month.”).

23. See Jacinda Santora, *Key Influencer Marketing Statistics You Need to Know for 2022*, INFLUENCER MKTG. HUB (Nov. 6, 2023), <https://influencermarketinghub.com/influencer-marketing-statistics> [<https://perma.cc/EJ39-V26M>] (discussing the continued increase of the influencer market).

24. See Goldie Chan, *5 Ways Creators Can Make Money on Social Platforms*, FORBES (June 2, 2023), <https://www.forbes.com/sites/goldiechan/2023/06/02/5-ways-creators-can-make-money-on-social-platforms> [<https://perma.cc/3UH8-LY9T>] (explaining monetization methods on social media).

25. Deep Das Barman, *How 11-Year-Old Ryan Kaji Built a \$100 Million Empire Reviewing Toys on YouTube*, MKT. REALIST (Aug. 9, 2023), <https://marketrealist.com/what-is-11-year-old-ryan-kajis-net-worth> [<https://perma.cc/R25W-PPD8>].



episodes, videogames, and merchandise.<sup>26</sup> While Ryan’s parents and sisters occasionally appear in his videos, his parents mainly focus on brand management and development.<sup>27</sup> Ryan himself is not only the lead star of Ryan’s World videos; he is also the brand.<sup>28</sup> With the unbelievable amount of money and fame that can be earned from sharenting, it is easy to see how there are concerns about child exploitation, especially when brands are entirely centered on the child. While some parents may engage in sharenting to earn money for their child’s future, others do so to profit off their child.

Sharenting has a lower barrier to entry than traditional routes to fame. Raising a child actor can cost anywhere from \$25,000 to \$36,000 per year in training, business fees for unions, portfolio materials, traveling expenses, living expenses, and potentially private schooling.<sup>29</sup> In comparison, all a parent needs for social media is a kid, a phone or laptop, and some luck—and with that, they have a ticket to stardom. The Ryan’s World channel, for example, became popular after a run-of-the-mill video of three-year-old Ryan playing with toys went viral.<sup>30</sup> The ease of joining social media with the prospect of extraordinary profits can lead to many parents engaging in “hope labor,” or “free work done with the hope of future compensated opportunities.”<sup>31</sup>

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26. See Maressa Brown, *Mom from YouTube’s Ryan’s World Says Setting ‘Boundaries and Realistic Expectations’ Is Key to Success*, PARENTS (July 11, 2022), <https://www.parents.com/parenting/celebrity-parents/moms-dads/mom-from-youtubes-ryans-world-says-setting-boundaries-and-realistic-expectations-is-key-to-success> [<https://perma.cc/F9Z7-USDQ>] (interviewing Ryan’s mom, Shion, about her role in Ryan’s channel).

27. *Id.*

28. Jay Caspian Kang, *The Boy King of YouTube*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/magazine/ryan-kaji-youtube.html> (on file with the *Columbia Human Rights Law Review*) (quoting Ryan’s mother, Shion, saying “[s]o that’s when I realized, OK, we need to kind of step back, and we have to see how we can support Ryan in his branding”).

29. Denise Simon, *How Much Does It Cost to Raise a Child Star?*, BACKSTAGE (July 19, 2019), <https://www.backstage.com/magazine/article/much-cost-raise-child-star-9990> [<https://perma.cc/XBZ2-XKG8>].

30. See John Goodwin, *Ryan’s World: How a Kid in Hawaii Became a YouTube Millionaire*, CBS NEWS (Apr. 24, 2022), <https://www.cbsnews.com/news/ryans-world-how-a-kid-in-hawaii-became-a-youtube-millionaire> [<https://perma.cc/4CKL-T6GS>] (explaining Ryan’s rise to fame).

31. Leah Plunkett, *My So-Blogged Life: Commercial Use of Children’s Private Experiences*, SHARENTHOOD (2019), <https://sharenthood.mitpress.mit.edu/pub/hdmbazan/release/1> [<https://perma.cc/6RM2-578M>] (citing Kathleen Kuehn, *Why Are So Many*

## 2. What Are the Risks of Sharenting?

Some of sharenting's most common risks are entirely unintentional. After all, how bad could it be to post a photo or story of a child on social media? It turns out it can be extremely dangerous, depending on who sees the content. For one, children are prime targets for data miners.<sup>32</sup> Sharenting provides easy access to children's personal information, which companies are happy to take for marketing strategies.<sup>33</sup> Companies are not the only ones on the lookout for children's information. Publishing private information online—such as names, ages, birthdays, personal addresses, mothers' maiden names, schools, pets' names, hobbies, and photographs—creates risks of identity fraud and financial scams.<sup>34</sup> By 2030, sharenting could lead to annual damages of \$709 million<sup>35</sup> as a result of up to 7.4 million instances of online identity fraud.<sup>36</sup> There are also “digital kidnappers” who take images of children and present them as their own.<sup>37</sup> Meredith Steele, for example, found her kids on someone else's account with new names and new identities. The digital kidnapper had amassed thousands of followers just through Steele's

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*Journalists Willing to Write for Free?*, CANADIAN JOURNALISM PROJECT (Feb. 3, 2014) (defining hope labor as “un- or under-compensated work carried out in the present, often for experience or exposure, in the hope that future employment opportunities may follow”).

32. See Elizabeth Ruiz, *Guilty of ‘Sharenting’? Here Are Some Tips from Cybersecurity Experts to Protect Your Children*, DENVER7 (Nov. 10, 2022), <https://www.denver7.com/news/national/guilty-of-sharenting-here-are-some-tips-from-cybersecurity-experts-to-protect-your-children> [https://perma.cc/6JZM-XDVX] (interviewing cybersecurity experts about data mining).

33. See Supreet Kaur & Satinder Kumar, *How Sharenting Drives Sherub Marketing: Insights from an Interpretative Phenomenological Perspective*, 15 J. RES. INTERACTIVE MKT. 750, 751 (2021) (“The term sherub marketing can be defined as an influential and interactive form of marketing strategy wherein the potential customers are identified based on the sharenting activities made by them . . .”).

34. Sean Coughlan, *‘Sharenting’ Puts Young at Risk of Online Fraud*, BBC NEWS (May 21, 2018), <https://www.bbc.com/news/education-44153754> [https://perma.cc/2TU7-WYBN].

35. Coughlan's article lists the sharenting costs as £676 million, *id.*, which was converted to USD when the conversion rate was \$1/£0.91 on November 28, 2023 using EXCHANGE-RATES.ORG, <https://www.exchange-rates.org/>.

36. Coughlan, *supra* note 34.

37. See Jennifer O'Neill, *The Disturbing Facebook Trend of Stolen Kid Photos*, YAHOO! PARENTING (Mar. 3, 2015), <https://www.yahoo.com/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html> [https://perma.cc/GJP9-LPD6] (defining “digital kidnapper” through Lindsey Paris' experience).

Instagram photos. Instagram refused to take the fake account down, and in the end, Steele could only block the account and remove photos of her children from her account.<sup>38</sup>

But on a scarier note, innocent photos and videos of children can be used in more dangerous and inappropriate ways.<sup>39</sup> In the age of image editing<sup>40</sup> and artificial intelligence (AI), these risks become infinitely more serious, as the software can generate new images and videos.<sup>41</sup> Even voices are being stolen. In a congressional hearing on the abuses of AI, Jennifer DeStefano described the harrowing experience of getting a call from her daughter sobbing and screaming “MOM THESE BAD MEN HAVE ME, HELP ME, HELP ME!!”<sup>42</sup> Despite someone around DeStefano trying to tell her that 911 had mentioned the call was likely to be AI, she would not believe them because of how realistic the voice sounded. By the end of the call DeStefano was willing to give \$50,000 in cash to her daughter’s

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38. See Adriana Diaz, *My Kids Were Digitally Kidnapped — Here’s How Parents Can Be More Careful*, N.Y. POST (Dec. 15, 2022), <https://nypost.com/2022/12/15/my-kids-were-digitally-kidnapped-heres-how-moms-can-be-more-careful> [<https://perma.cc/6DQD-Y4TA>] (summarizing Meredith Steele’s encounter with digital kidnapping).

39. See Lucy Battersby, *Millions of Social Media Photos Found on Child Exploitation Sharing Sites*, SYDNEY MORNING HERALD (Sep. 30, 2015), <https://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-20150929-gjxe55.html> [<https://perma.cc/8HBV-BLLJ>] (“Innocent photos of children originally posted on social media and family blogs account for up to half the material found on some paedophile image-sharing sites . . .”).

40. See Lucy Middleton, *Mum Horrified After Finding Pictures of Her Baby on Paedophile Website*, METRO (Aug. 18, 2020), <https://metro.co.uk/2020/08/18/mum-horrified-finding-pictures-baby-paedophile-website-13143110> [<https://perma.cc/T8HG-4VQY>] (noting the use of editing software on pedophile websites).

41. See generally Meg Kinnard, *Prosecutors in All 50 States Urge Congress to Strengthen Tools to Fight AI Child Sexual Abuse Images*, AP NEWS (Sept. 5, 2023), <https://apnews.com/article/ai-child-pornography-attorneys-general-bc7f9384d469b061d603d6ba9748f38a> [<https://perma.cc/7PSQ-5NXD>] (covering the various fears prosecutors have about AI and child abuse); see also Andrew Dorn, *Expert: ‘Sharenting’ Puts Kids at Risk of Being Exploited with AI*, NEWS NATION (Sept. 8, 2023), <https://www.newsnationnow.com/business/tech/sharenting-deepfake-exploited-ai> [<https://perma.cc/F6QP-WVC7>] (“Existing generative AI tools and emerging ones are remarkably sophisticated at producing realistic images based on photographs of real children.”).

42. *Written Statement of Jennifer DeStefano*, U.S. SENATE (June 13, 2023), <https://www.judiciary.senate.gov/imo/media/doc/2023-06-13%20PM%20-%20Testimony%20-%20DeStefano.pdf> [<https://perma.cc/4WZ8-PB8N>].

supposed kidnappers only to receive news that her daughter was safely at home in her bed.<sup>43</sup>

Moreover, kidfluencers may struggle on a personal level with sharenting. Adolescents who use social media already see increased rates of depression, anxiety, poor body image, and loneliness.<sup>44</sup> Sharenting can exacerbate these issues and cause children to suffer mental health risks. First, sharenting prevents children from being able to “impression manage” their reputation. Impression management refers to when “one tries to manage the different elements that contribute to one’s own online representation.”<sup>45</sup> When parents post their children online, it can interfere with adolescents’ preferred self-presentation and reveal more information than desired.<sup>46</sup> Parents’ posts might contradict the image their children want to present,<sup>47</sup> particularly when many kids find sharenting “embarrassing” and “useless.”<sup>48</sup>

Second, children must face judgement from the world when growing up in front of an online audience, which can harm their self-confidence.<sup>49</sup> Embarrassing posts can fuel the bullying and

43. *Id.*

44. See Ágnes Zsila & Marc Reyes, *Pros & Cons: Impacts of Social Media on Mental Health*, BMC PSYCH. (July 6, 2023), <https://bmcpyschology.biomedcentral.com/articles/10.1186/s40359-023-01243-x> [<https://perma.cc/85HR-UGXP>] (listing the effects social media can have on mental health).

45. Gaëlle Ouvrein & Karen Verswijvel, *Sharenting: Parental Adoration or Public Humiliation? A Focus Group Study on Adolescents’ Experiences with Sharenting Against the Background of Their Own Impression Management*, 99 CHILD. & YOUTH SERVS. REV. 319, 325 (2019).

46. Carol Moser, Tianying Chen, & Sarita Schoenebeck, *Parents’ and Children’s Preferences About Parents Sharing About Children on Social Media*, PROC. 2017 CHI CONF. HUM. FACTORS IN COMPUT. SYS. 5221, 5222 (2017).

47. Ouvrein & Verswijvel, *supra* note 45, at 325 (“Several adolescents indicated that they find these kinds of pictures embarrassing and uninteresting, which does not fit with the image they are trying to create.”).

48. See Karen Verswijvel et al., *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. 1, 6 (2019) (explaining the results of their study); see also Eleanor Levy, *Parenting in the Digital Age: How Are We Doing?*, PARENT ZONE (Oct. 2017), [https://parentzone.org.uk/sites/default/files/2021-12/PZ\\_Parenting\\_in\\_the\\_Digital\\_Age\\_2017.pdf](https://parentzone.org.uk/sites/default/files/2021-12/PZ_Parenting_in_the_Digital_Age_2017.pdf) [<https://perma.cc/X2XV-DEAR>] (discussing how children surveyed felt about sharenting).

49. See Latifi, *supra* note 8 (recounting various experiences of kidfluencers).

harassment of children, which can have extreme consequences.<sup>50</sup> Additionally, sharenting can cause children to feel the constant need to perform. When parents are always taking pictures or videos of their child for the purposes of social media, children learn two lessons: to smile regardless of how they feel, and to perceive social media as valuable for self and social worth.<sup>51</sup> Increasingly, preadolescents view fame as an enticing goal as “the notions of fame, audience, and performance” are embedded in private, public, and media discourse.<sup>52</sup>

Finally, some children suffer at the hands of their parents, who have perverse incentives to create dramatic content. Many parents on social media have faced accusations of exploitation and abuse after causing their children distress for videos.<sup>53</sup> For example, parents have cracked eggs on their child’s head causing their child to cry<sup>54</sup> and told their child to cry for a video thumbnail;<sup>55</sup> some have

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50. See Yaron Steinbuch et al., *Dad of NJ Girl Who Committed Suicide After School Beatdown Said Her Death Came After Taunting Text*, N.Y. POST (Feb. 10, 2023), <https://nypost.com/2023/02/10/dad-of-nj-girl-who-committed-suicide-denies-racism-involved-in-attack> [<https://perma.cc/YU64-N5MW>] (“The young New Jersey teen who took her own life after suffering a humiliating bullying attack . . . hours after getting a taunting text about footage of the beating posted online.”); see also Dominic Patten, *The Consequences of Children on Reality TV*, WRAP (July 13, 2009), <https://www.thewrap.com/consequences-children-reality-tv-4288> [<https://perma.cc/YH38-3MSQ>] (quoting former reality television child star Paul Peterson as he discussed the potential of online content to “open [children] up to derision and bullying as they get older”).

51. Quentin Fottrell, *Read This Before Posting Photos of Your Kids on Facebook*, MKT. WATCH (Mar. 9, 2016), <https://www.marketwatch.com/story/read-this-before-posting-photos-of-your-kids-on-facebook-2015-08-05> [<https://perma.cc/N5Q2-CD7C>] (summarizing child psychologist Yalda Uhls’ thoughts on the effects of being a social media child star on children).

52. Yalda Uhls & Patricia Greenfield, *The Value of Fame: Preadolescent Perceptions of Popular Media and Their Relationship to Future Aspirations*, 48 DEV. PSYCH. 315, 324 (2011). A clear example of how a child’s self-worth can be tied to social media is when it hurts young girls’ body image. See Manisha Singh et al., *Social Media’s Seductive Spell—Unraveling the Impact on Teen Girls*, INDIAN J. SOC. PSYCHIATRY 1, 4 (2023) (“The impact of sexualized images on social media can negatively affect body image among teenage girls.”).

53. See generally Tracy Lowe, *Why Family Vlogs Are Toxic*, PARENTOLOGY (May 2023), <https://parentology.com/family-vlogs-are-toxic> [<https://perma.cc/5ULU-Q7XL>] (explaining which online parents she views as toxic).

54. See Kalhan Rosenblatt, *Parents Are Smashing Eggs on Their Kids Heads in New TikTok Prank. Doctors Say They Should Stop.*, NBC NEWS (Aug. 22, 2023), <https://www.nbcnews.com/health/egg-cracking-tiktok-trend-dismays->

even pleaded guilty to child neglect for pranking their children.<sup>56</sup> These kinds of actions can cause children “significant emotional distress.”<sup>57</sup> The relationship between children and parents can be damaged as well, as children may view their parents not as comforting figures, but as sources of humiliation and hurt.<sup>58</sup> As many as 71.3% of children who have experienced sharenting view their parents as sources of disrespect who do not care about their privacy.<sup>59</sup> Poor parent-child relationships can contribute to the mental health issues discussed above and increase rates of anxiety and depression in teens.<sup>60</sup>

Individually, each of these factors is capable of tearing down a child’s self-confidence, resulting in more serious consequences when combined. Most importantly for this Note, the emotional injuries a child experiences are not limited to when they are a minor. Once the

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medical-experts-rcna101077 [https://perma.cc/MMT5-P6N3] (explaining the “#eggprank” video trend and children’s reactions).

55. See Gerrard Kaonga, *Video of YouTuber Jordan Cheyenne Forcing Her Son to Cry Resurfaces, Sparks Fresh Backlash*, NEWSWEEK (Jan. 18, 2022), <https://www.newsweek.com/jordan-cheyenne-mom-youtube-son-dog-fake-tears-crying-viral-1670266> [https://perma.cc/DTN5-KLWZ] (describing how YouTuber Jordan Cheyenne told her crying son to pose for a thumbnail picture).

56. Elyse Wanshel, *Parents Who ‘Pranked’ Their Kids on YouTube Sentenced for Child Neglect*, HUFFPOST (Sept. 17, 2017), [https://www.huffpost.com/entry/parents-prank-kids-youtube-sentenced-five-years-probation-neglect\\_n\\_59b82078e4b086432b01eb6f](https://www.huffpost.com/entry/parents-prank-kids-youtube-sentenced-five-years-probation-neglect_n_59b82078e4b086432b01eb6f) [https://perma.cc/77P3-9CQ3] (noting pranks included “screaming profanities at their children, breaking their toys and blaming them for things the kids didn’t do”). In one case, a father “push[ed] his 10-year-old son into a bookshelf and [gave] him a bloody nose” and “order[ed] one of his step-children to slap his 11-year-old daughter in the face under the guise that it was a game.” *Id.*

57. Ronny Maye, *Parents Are Pranking Their Kids on Social Media. Here’s Why Experts Say It Isn’t Harmless.*, AOL (Oct. 19, 2023), <https://www.aol.com/parents-cracking-eggs-kids-heads-204616092.html> [https://perma.cc/2UWJ-F9X3] (quoting pediatrician “Dr. Niky” describing the impacts of pranks on children).

58. *Id.* (quoting clinical psychologist Amy Marschall discussing pranks and consent).

59. See Andra Siibak & Keily Traks, *The Dark Sides of Sharenting*, 11 CATALAN J. COMM. & CULTURAL STUD. 115, 118 (2019).

60. See Ashely Ebbert et al., *Mapping Developmental Changes in Perceived Parent-Adolescent Relationship Quality Throughout Middle School and High School*, 31 DEV. & PSYCH. 1541, 1543 (2018) (summarizing studies on poor relationship quality between adolescents and their parents).

child has grown up, they are stuck with the reputation built by their parents' digital presence.<sup>61</sup>

### 3. What Are the Legal Protections for Sharenting?

It might seem unbelievable that sharenting has not been regulated in some manner due to the many risks it creates. While regulating sharenting may seem easy in theory, the First Amendment and parental rights precedent protects parents.

The Fourteenth Amendment establishes the expectation that any individual state must not “abridge the privileges or immunities of citizens.”<sup>62</sup> The Constitution, through this clause, has been interpreted to incorporate various parts of the Bill of Rights against the states and require them to ensure such rights are protected, like those in the First Amendment. The First Amendment protects citizens' freedom of all kinds of speech<sup>63</sup> from both federal and state action.<sup>64</sup> “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>65</sup> Social media is a powerful platform for citizens to reach many people at once, the use of which is a “legitimate exercise of First Amendment rights.”<sup>66</sup> As such, parents receive First Amendment protections for their posts. Even indirect impacts on the First Amendment can be unconstitutional if they cause a chilling effect on speech.<sup>67</sup> In other words, if a statute causes a speaker, for fear of punishment, to “refrain from engaging further in the protected activity,” there may exist a cause of action.<sup>68</sup>

While First Amendment rights can be limited,<sup>69</sup> such limitations on speech are usually constrained to select categories<sup>70</sup>

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61. See *infra* Section II.A (discussing privacy and the reputational risks kidfluencers face).

62. U.S. CONST. amend. XIV, § 1.

63. U.S. CONST. amend I.

64. See *e.g.* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the Fourteenth Amendment protects the First Amendment from impairment by the states).

65. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drugs Products Corp.* 463 U.S. 60, 65 (1983) (internal citations omitted)).

66. *Packingham v. North Carolina*, 582 U.S. 98, 107–08 (2017).

67. *Sec'y of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (describing what a chilling effect is).

68. *Id.*

69. *Roth v. United States*, 354 U.S. 476, 482 (1957).

70. *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992).

where the value of the speech is outweighed by the “social interest in order and morality.”<sup>71</sup> These classifications include obscenity,<sup>72</sup> defamation,<sup>73</sup> fraud,<sup>74</sup> incitement,<sup>75</sup> and speech integral to criminal conduct.<sup>76</sup> With the possible exception of defamation, posting one’s child on social media is likely not enough on its own to fall into one of these categories, especially in light of the court’s long history of recognizing the fundamental right of parents to direct the upbringing of their child.<sup>77</sup>

The Fourteenth Amendment also, through the Due Process clause, establishes that states may not “deprive any person of life, liberty, or property.”<sup>78</sup> The Due Process clause has been interpreted to protect certain fundamental rights, such as the right to marry or have children.<sup>79</sup> The government must justify infringing on these rights by a pursuing a compelling interest through narrowly tailored means.<sup>80</sup>

In *Meyer v. Nebraska*, the Court established that the right to direct the upbringing of one’s child is a fundamental right and accordingly receives tremendous legal protection and deference.<sup>81</sup> The Nebraska law in contention in *Meyer* prevented any individual or teacher from teaching in languages other than English until after the eighth grade.<sup>82</sup> After the plaintiff Meyer was convicted for teaching a ten-year-old in German, he appealed his conviction up to the Supreme Court. The Court stated that the Fourteenth Amendment stood for

71. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

72. *See Roth*, 354 U.S. at 483 (classifying obscenity as a First Amendment limitation).

73. *See Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952) (classifying defamation as a First Amendment limitation).

74. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (classifying fraud as a First Amendment limitation).

75. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (classifying incitement as a First Amendment limitation).

76. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (categorizing and citing classes of speech that can be limited); *see also, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (classifying criminal conduct as a First Amendment limitation).

77. *See infra* Section III.A.2 (explaining how posts may be unprotected if classified as defamation).

78. U.S. CONST. amend. XIV, § 1.

79. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1977) (listing fundamental rights).

80. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (noting the standard to infringe on fundamental rights).

81. *See Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (holding states cannot forbid the teaching of children in a specific language).

82. *Id.* at 397.



protecting the liberties “long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>83</sup> Nebraska’s law prevented students from attaining knowledge despite education being a matter of supreme importance.<sup>84</sup> The Court tasked parents with giving their children a suitable education, noting that states enforced this obligation with compulsory laws.<sup>85</sup> Rounding out their opinion, the Court clarified that states could pass laws relating to education if they furthered public safety and were not as arbitrary as Nebraska’s law.<sup>86</sup> *Meyer* represents the enduring belief that parents make decisions that advance their child’s well-being because they know their child best and want to maintain a stable relationship with them.<sup>87</sup>

Since then, parents have enjoyed a century-long period of the Court reaffirming this right in various contexts, from barring mandatory public school laws to preventing state overrides of parents’ decisions on who can visit their child.<sup>88</sup> This deference to parents includes situations where a child’s wishes and a guardian’s decisions conflict.<sup>89</sup> The conflict between parent and child frequently arises in the medical field, where parents generally get to make decisions for minors. In *Parham v. J.R.*, the Court found that guardians, with the permission of a medical professional, could involuntarily commit their child to a psychiatric facility without a judicial hearing.<sup>90</sup> Despite the child raising deprivation of liberty concerns, the Court ultimately found in favor of the parents under the doctrine of parental rights.<sup>91</sup> In education, the Family Educational Rights and Privacy Act gives

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83. *Id.* at 399.

84. *Id.* at 400.

85. *Id.* at 401–02.

86. *Id.* at 401–03.

87. See Clare Huntington & Elizabeth Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 FAM. L. Q. 91, 104, 106 (2020) (explaining the Court’s deference to parental rights and decision-making).

88. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding states cannot require all children to attend public school); see also *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1971) (holding that states cannot force parents to send children to public school if they want to teach their children with at-home religious schooling); see also *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (holding judges cannot permit grandparents to see their grandchildren over the parents’ wishes).

89. *Parham v. J.R.*, 442 U.S. 584, 618–19 (1979) (holding that a child’s liberty interests in avoiding involuntary commitment do not override their parents’ authority in making that decision).

90. *Id.* at 620.

91. *Id.*

parents full access to their child's educational records even if a child does not want to hand them over.<sup>92</sup> Children generally lack privacy rights in the law, as demonstrated in the jurisprudence on abortion, wiretapping, and the internet.<sup>93</sup> In the realm of abortion law, the Court held that mature minors are entitled to some level of privacy when it comes to making weighty decisions;<sup>94</sup> yet, *H.L. v Matheson* eventually clarified that "children have no constitutionally protected right to conceal information from their parents."<sup>95</sup> There, the Court ruled against a minor seeking to strike a law that required physicians to notify parents when their minor sought an abortion.<sup>96</sup> Other contexts further exemplify parents' broad access to their children's personal information. To act in the interest of their child's well-being, parents are allowed to wiretap their children's conversations or control their online privacy due to the Children's Online Privacy Protection Act.<sup>97</sup>

The logic behind these laws and cases comports with the view that even if some parents work against their child's interests, that is not enough to disregard that "parents generally do act in the child's best interests."<sup>98</sup> As such, the law usually defers to parents, and for good reason.<sup>99</sup> There are undoubtedly many situations where children are incapable of making safe and informed decisions. A four-year-old will not understand the intricacies of a necessary surgery or how to

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92. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1974); see also *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC. (last updated Aug. 25, 2021), <https://www.ed.gov/laws-and-policy/ferpa/ferpa-overview> [<https://perma.cc/77YS-583D>] (explaining that FERPA gives parents rights with respect to their children's education records, which transfer to the child when they turn eighteen).

93. Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 777–86 (2011) (covering cases where children's privacy rights are relevant).

94. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.").

95. Shmueli & Blecher-Prigat, *supra* note 93, at 780; see also *H.L. v. Matheson*, 450 U.S. 398 (1981) (finding that a statute requiring parental notice does not violate the minor's rights).

96. *Matheson*, 450 U.S. at 412–13.

97. See Shmueli & Blecher-Prigat, *supra* note 93, at 780–83 (explaining how courts evaluate a parent wiretapping their child and what the Children's Online Privacy Protection Act does).

98. *Parham v. J.R.*, 442 U.S. 584, 602–03 (1979).

99. *Huntington & Scott*, *supra* note 87, at 105 (noting the law's deference to parents).

budget their finances.<sup>100</sup> Understandably, there are some exceptions, generally for older children deemed mature enough to be granted privileges like driving a car.<sup>101</sup> Such concessions can derive from the recognition that certain situations call for a child's self-determination or from judicial proceedings, like when children legally emancipate themselves from parents.<sup>102</sup> But sometimes the state, rather than the judicial branch, must step in when a parent's actions defy the logic of parental rights.

When a child's welfare comes into question, the state can act as a *parens patriae* and restrict a parent's control.<sup>103</sup> *Parens patriae* literally translates to "parent of the country"<sup>104</sup> and legally translates to the empowerment of states to protect "quasi-sovereign" interests to promote societal well-being.<sup>105</sup> Parental rights have fought and fallen against the notion of *parens patriae* before.<sup>106</sup> A state's actions that infringe upon parental rights are constitutional so long as they pass a heightened form of scrutiny.<sup>107</sup> While the Court has not considered the rights of parents in relation to social media, parents can claim that they are raising their child as they see fit when they engage in sharenting. For one, parents can claim they are earning money to support their child. Additionally, parents can argue they are teaching their children how to maintain an online presence in a safe manner. The lack of precedent in this area makes it unclear where courts would draw the line as to when states can restrict parents' ability to share their child online.<sup>108</sup>

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100. See generally Shelly Lundberg et al., *Decision-Making by Children*, 7 REV. ECON. HOUSEHOLD 1 (2009) (discussing what factors influence a child's decision-making process and what age their participation in decision-making with their parents increases).

101. Huntington & Scott, *supra* note 87, at 114 (reasoning why the law defers to parents).

102. *Id.*

103. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control.").

104. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982).

105. *Id.* at 602 (defining quasi-sovereign rights).

106. Prince, 321 U.S. 158 at 170–71 (holding states may override parents to protect a child).

107. Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing a standard of review similar to a balancing test).

108. See Stacey Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 861–62 (2017) ("These cases offer limited guidance with respect to how children's privacy interests might intersect with

## B. The Law of Reputation

### 1. Defamation Law

Reputation is one of the biggest forms of social currency we have.<sup>109</sup> Two sources of law allow people to protect their reputation: defamation and privacy law. There are endless benefits to having a good reputation, both personally and professionally.<sup>110</sup> In a literal sense, our reputation is the “sum of all our actions that is reflected by the people around us in the way they treat us or interact with us.”<sup>111</sup> In a figurative sense, reputation is a “cluster of values.”<sup>112</sup> At times, it is like property, taking on monetary value. At other times, it is a form of honor that is built based on behavior. Finally, at other times, it is similar to dignity, which can be lost through things like satire.<sup>113</sup> “The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society.”<sup>114</sup> Reputable individuals are respected within society while those with poor reputations are stigmatized.<sup>115</sup> The law may thus maintain individual dignity by protecting one’s reputation.<sup>116</sup>

Defamation law allows individuals to defend themselves against false and harmful statements from others, and to get redress

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parents’ rights to share their child’s personal information online, as today’s parental online sharing practices are novel in the legal sphere.”).

109. See Alex Lickerman, *The Value of a Good Reputation*, PSYCH. TODAY (Apr. 22, 2010), <https://www.psychologytoday.com/us/blog/happiness-in-world/201004/the-value-good-reputation> [<https://perma.cc/KHG2-NR78>] (“We only ever have influence over our reputation—never control—as is the case with all things external to us, but it remains one of our most precious assets.”).

110. See Kent Campbell, *Why Is Reputation Important?*, REPUTATION X (Mar. 22, 2024), <https://blog.reputationx.com/why-is-reputation-important> [<https://perma.cc/WJ55-BBF7>] (listing the benefits of a good reputation, such as increasing trust and improving career opportunities).

111. Borderless Tech. Corp., *The Importance and Psychology of Reputation in Human Lives*, MEDIUM (Feb. 9, 2018), <https://medium.com/@Borderless/the-importance-and-psychology-of-reputation-in-human-lives-c72362393c91> [<https://perma.cc/E9Z3-ETCP>].

112. See KENNETH ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 301 (2022) (discussing the value of reputations).

113. *Id.*

114. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 711 (1986).

115. *Id.*

116. *Id.*

for the damage caused by those statements.<sup>117</sup> If a kidfluencer grows up and wants to prevent malicious statements from those who know of them from social media, defamation law would theoretically be the former kidfluencer's solution. Up until 1964, common law principles guided defamation law.<sup>118</sup> To prove defamation at that time, the plaintiff simply had to demonstrate that someone made a false statement that harmed the plaintiff's reputation.<sup>119</sup> The defendant's knowledge of the falsity of the statement, a defendant's intention to harm the plaintiff, and harm done by the statement were all irrelevant.<sup>120</sup> A defendant's main defense was proving the truth of the statement.<sup>121</sup> In other words, defamation was a strict liability claim.<sup>122</sup> This all changed with the Supreme Court's decision in *New York Times Co. v. Sullivan*, where the burden of proof began to shift from the defendant to the plaintiff.<sup>123</sup>

*Sullivan* concerned public officials suing a newspaper for defamation.<sup>124</sup> The Court held that public officials had to prove with "convincing clarity" that the statement was made with "actual malice," knowledge that it was false, or reckless disregard of its truth or falsity.<sup>125</sup> The Court's decision initially seemed limited to public officials, as much of it relied on First Amendment rights to criticize the government.<sup>126</sup>

Eventually, *Sullivan* was expanded to public figures, and then in some capacity to private individuals deemed limited-purpose

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117. RESTATEMENT (SECOND) OF TORTS § 558 cmt. a (AM. L. INST. 1977) ("To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence . . . and (d) either actionability of the statement.").

118. See Marc Franklin & Daniel Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 826 (1984) (summarizing the previous approach to defamation law).

119. *Id.*

120. *Id.*

121. *Id.*

122. See ABRAHAM, *supra* note 112, at 302 (summarizing the previous approach to defamation).

123. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (criticizing the approach at the time to defamation law).

124. *Id.* at 256.

125. *Id.* at 285–86 (holding that the facts do not meet the constitutional standard for defamation).

126. *Id.* at 271.

public figures in *Gertz v. Robert Welch Inc.*<sup>127</sup> *Gertz* dealt with a private individual suing a newspaper for defamation. The newspaper claimed the article was of public interest as it discussed individuals collaborating with Communist organizations to undermine the justice system;<sup>128</sup> accordingly, it argued the individuals became public figures for a limited purpose. The Court held that when a public matter was at issue, courts could not impose strict liability to defamation cases. At minimum, the plaintiff had to prove the defendant had made the relevant statements with negligence. Additionally, damages for defamation could not be presumed without a showing of actual malice; without such a showing, a plaintiff had to prove emotional or economic loss.<sup>129</sup>

Because of *Gertz*, courts can now only apply strict liability to private issues and any claims relating to a public matter cannot presume damages or liability.<sup>130</sup> The residual question from these Supreme Court decisions then becomes what or who is of public interest?<sup>131</sup>

## 2. Privacy Law

Privacy broadly refers to the idea that people have a right to be left alone.<sup>132</sup> The very idea of social media seems antithetical to privacy. Posting on social media is the conscious decision to expose oneself to the world. Sharenting, without true consent from the child, can make a child feel that their parents do not respect their privacy.<sup>133</sup> However, parents generally have no obligation to respect their child's privacy.<sup>134</sup>

The right to privacy has been codified in many different sources of law. It can be derived from constitutional amendments,<sup>135</sup>

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127. *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974); see ABRAHAM, *supra* note 112, at 307 (describing the trajectory of Sullivan's application).

128. *Gertz*, 418 U.S. at 327.

129. *Id.* at 349–50.

130. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (holding that damages can only be presumed when matters are not of public concern).

131. See ABRAHAM, *supra* note 112, at 308 (noting the Supreme Court did not answer what is of public interest in *Sullivan* and its progeny).

132. See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (mentioning the scope of legal rights).

133. Latifi, *supra* note 8.

134. See *infra* Section II.B.1.

135. U.S. CONST. amend. IV.

judicial rulings,<sup>136</sup> and statutes.<sup>137</sup> The right to privacy was officially established in the Supreme Court's jurisprudence in *Griswold v. Connecticut*, where the Court found that there is a "zone of privacy" established in the Constitution through the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>138</sup> But privacy encompasses more than the plain text of the amendments, which prevents government intrusion, such as soldiers staying in one's house or police entering private property without a warrant.<sup>139</sup> Within tort law, there are four general classifications that comprise civil invasion of privacy claims: intrusion upon seclusion, appropriation of name or likeness, public disclosure of private facts, and publicity placing a person in false light.<sup>140</sup>

The first category of claims, intrusion upon seclusion, entails a third party intruding upon a space that the plaintiff can exclude others from, physical or otherwise.<sup>141</sup> Examples include intruding upon one's home or financial records.<sup>142</sup> The second category, appropriation of name or likeness, applies when someone appropriates the plaintiff's name or likeness for their own benefit,<sup>143</sup>

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136. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.").

137. See 5 U.S.C. § 552a(b) (2014) (setting restrictions on records maintained on individuals).

138. *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965) (noting how the Fourth, Fifth, and Fourteenth Amendments establish "a zone of privacy"). Recently, the concurrence in *Dobbs* criticized the concept of the zone of privacy. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

139. *Griswold*, 381 U.S. at 483–85.

140. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 802–18 (4th ed. 1971).

141. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (AM. L. INST. 1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

142. See *Wal-Mart Stores v. Lee*, 348 Ark. 707, 719–20 (2002) (recognizing intrusion as one of four actionable in-state privacy torts); *Nader v. Gen. Motors*, 255 N.E.2d 765, 771 (N.Y. 1970) ("[T]he mere fact that Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing."); see also ABRAHAM, *supra* note 112, at 313 (giving examples of intrusion torts).

143. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (AM. L. INST. 1977) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").

such as when a company uses a celebrity's face to advertise a product without authorization.<sup>144</sup> Such appropriation torts are sometimes inhibited by the First Amendment where, as part of one's creative expression, someone could imitate a public figure's likeness.<sup>145</sup> The third category, public disclosure of private facts, occurs when the defendant discloses private facts in a way that is "highly offensive" and not of public concern.<sup>146</sup> Previous cases have included outing someone's sexuality<sup>147</sup> and disclosing state employees' birthdays.<sup>148</sup> Children may find these very same private facts being shared by their parents online, in addition to countless other aspects of their lives. The fourth category, publicity placing a person in false light, involves a defendant who, with actual malice, places another person in a "highly offensive," false light,<sup>149</sup> such as by falsely advertising someone's house for sale.<sup>150</sup> While this final category of claims sounds

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144. See *Flake v. Greensboro News Co.*, 195 S.E. 55, 64 (N.C. 1938) ("The proposition is to me an inconceivable one that these defendants may unauthorizedly use the likeness of this young woman upon their advertisement.")

145. *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) ("Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope.")

146. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. L. INST. 1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.")

147. See *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 (Colo. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1976)) ("In contrast, facts related to an individual's sexual relations, or 'unpleasant or disgraceful' illnesses, are considered private in nature and the disclosure of such facts constitutes an invasion of the individual's right of privacy.")

148. *Tex. Comptroller of Pub. Accts. v. Att'y Gen. of Tex.*, 354 S.W.3d 336, 347–48 (Tex. 2010) (holding that state employees' privacy interest in not disclosing their birthdays substantially outweighs the public interest).

149. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (AM. L. INST. 1977) ("One who . . . places . . . a false light is subject to liability . . . if . . . (a) the false light . . . would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity.")

150. See *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 990 (Ill. 1989) ("[T]he plaintiff had no intention of selling his farm, and . . . the placement of the advertisements . . . were accomplished without his knowledge . . . Thus, we conclude that the facts alleged state a cause of action based on the tort of publicity placing another in a false light.")



similar to defamation, and can rise to the level of defamation, it is different as it need not injure one's reputation to qualify as a tort.<sup>151</sup>

Each category of privacy tort is a distinct concept, but they are tied together by the common theme of protecting personal dignity.<sup>152</sup> As such, damages can be recovered for more nebulous harms, such as mental or emotional distress, as well as monetary harms, though such abstract damages are not presumed.<sup>153</sup> Each privacy tort category alone cannot perfectly address sharenting and the unique relationship between parents and children, but elements from each can be combined to create an apt solution.

Defamation and privacy law ostensibly seem like solutions to any reputational concerns sharenting might generate for kidfluencers.<sup>154</sup> However, they do not address all potential harms of sharenting. Defamation requires false statements, which are not necessarily at issue when parents share their children's private information. Additionally, defamation cases are much harder to win if one is considered a public figure by the court,<sup>155</sup> which could be the court's perception of certain kidfluencers. Privacy law, on the other hand, does not apply if one never had an expectation of privacy. When parents share their child on the internet, they are presumably making decisions in line with their extensive parental rights.<sup>156</sup> Finally, both areas of law generally have a statute of limitations of one to two years,<sup>157</sup> preventing kidfluencers under the age of sixteen

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151. ABRAHAM, *supra* note 112, at 314 (“[I]n some cases only a narrow definition of the interest in ‘reputation’ protected by the tort of defamation seems to qualify as a portrayal in a false light without its also being defamatory.”).

152. *Id.* at 311 (“What links the four torts together is not simply the umbrella term ‘privacy,’ but their general concern for the protection of personal dignity.”).

153. *Id.* at 310 (“[T]he plaintiff is entitled to recover for the rather abstract non-monetary harm to dignity suffered from the invasion, as well as for resulting mental distress suffered.”).

154. *See supra* Section I.B (describing the foundations of defamation and privacy law).

155. *See supra* Section I.B.1 (recounting the different standards in bringing a defamation claim based on public figure status).

156. *See supra* Section I.A.3.

157. *See Time Limits to File a Defamation Lawsuit: State Statutes of Limitation*, FINDLAW (Sept. 29, 2023), <https://www.findlaw.com/injury/torts-and-personal-injuries/time-limits-to-file-a-defamation-lawsuit-state-statutes-of.html> [<https://perma.cc/7CC5-FMYU>] (listing the statute of limitations for defamation actions in various states); *see also Civil Statutes of Limitations: 50-State Survey*, JUSTIA (June 2023), <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/civil-statutes-of-limitations-50-state-survey/> [<https://perma.cc/JW56->

to seventeen from being able to sue, even though adult-children still feel the repercussions of sharenting and may want to seek redress. Defamation and privacy laws therefore provide a basis for solutions to sharenting's reputational concerns but cannot solve them without revision.

## II. THE PROBLEM

Sharenting's legal implications cover a wide range of law. Section II.A explains the reputational risks children experience through sharenting. Section II.B delves into the clash of rights between parents and children when it comes to regulating sharenting, as well as the practical impediments to statutes. Section II.C summarizes the multitude of proposed solutions within the realm of academia to solve the issues that sharenting can cause. In addition, the section covers sharenting laws implemented in the U.S. and France.

### A. The Reputational Risks of Sharenting Are Intrinsic

The reputational risks from sharenting are core to the concept of social media. When a parent shares their child with the world, the child's entire online identity can be based purely on the edited content of their parent's posts.<sup>158</sup> Parents can disclose information online about their children that is different from the image kids want for themselves.<sup>159</sup> These children often have no control over what their parents share online.<sup>160</sup> As a result, their online reputation is formed by social media posts they do not get a say in creating.<sup>161</sup>

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ZEQ8] (listing the statute of limitations for civil suits, including privacy violations).

158. See *What Is a Digital Footprint? And How to Protect It from Hackers*, KAPERSKY, <https://usa.kaspersky.com/resource-center/definitions/what-is-a-digital-footprint> [https://perma.cc/5KRW-N4XA] ("A digital footprint can determine a person's digital reputation, which is now considered as important as their offline reputation.").

159. See Merike Lipu & Andra Siibak, *Take It Down!: Estonian Parents' and Pre-Teens' Opinions and Experiences with Sharenting*, 170 MEDIA INT. AUSTL. 57, 63 (2019) ("In particular, children did not want their parents to share unflattering visuals (e.g. 'ugly photos' or 'when [their] hair is messed up'), which would reflect negatively on their self-images."); see also *supra* Section I.A.2 (discussing how sharenting can interfere with a child's preferred self-presentation and prevents them from being able to "impression manage").

160. See Maddy McTigue, *Communication Ethics of "Sharenting": A Content Analysis of Instagram Mom Meso-Influencers*, 37 STUDENT RES. 1, 4 (2021) ("From a communication ethics standpoint, the problem here is that many children have

As these children grow older and the world becomes increasingly connected online, that reputation will follow them and form their digital footprint. A digital footprint is the “body of data” left from online activities, like website visits, item purchases, and of course, social media posts.<sup>162</sup> Digital footprints are “relatively permanent” as individuals have little control over what others do with the data.<sup>163</sup> This information can be used against kids through cybervetting,<sup>164</sup> which can impact children as they apply to college,<sup>165</sup> search for jobs,<sup>166</sup> or even just form relationships with those around them who may look them up.<sup>167</sup> Due to its digital footprint, sharenting often continues to haunt children into their adult life.

The potential harm to kidfluencers mirrors the harms child reality stars face.<sup>168</sup> For example, reality television and sharenting

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little-to-no agency over who consumes their photographs or personal information once their parents make it public online.”).

161. Cam, *supra* note 1.

162. See Ben Lutkevich, *Digital Footprint*, TECHTARGET (Feb. 2023), <https://www.techtarget.com/whatis/definition/digital-footprint> [<https://perma.cc/S69U-AAFS>] (defining a “digital footprint” and giving examples of where the data to form one comes from).

163. KAPERSKY, *supra* note 158 (“Digital footprints matter because: They are relatively permanent, and once the data is public . . . the owner has little control over how others will use it.”).

164. Cybervetting is the practice of searching for personal information of someone online. Annika Wilcox et al., *Is Cybervetting Valuable?*, 15 INDUS. & ORG. PSYCH. 315, 315 (2022).

165. See Dan Levin, *Colleges Rescinding Admissions Offers as Racist Social Media Posts Emerge*, N.Y. TIMES (Jul. 2, 2020), <https://www.nytimes.com/2020/07/02/us/racism-social-media-college-admissions.html> (on file with the *Columbia Human Rights Law Review*) (describing how a student had a college offer revoked after their racist social media posts were found).

166. See Wilcox et al., *supra* note 164, at 315 (“Cybervetting, or using information drawn from the internet and social media websites to screen job candidates . . . is widely practiced by employers.”).

167. See Stacy Jo Dixon, *U.S. User Actions Before Meeting Somebody via Online Dating 2021*, STATISTA (Apr. 28, 2022), <https://www.statista.com/statistics/976154/following-actions-completed-adults-prior-meeting-someone-met-dating-app-usa> [<https://perma.cc/RAS3-YN72>] (“44 percent of respondents who used dating apps or websites searched the social media profile of the person . . . before meeting them in real life. 40 percent of respondents also indicated they searched online the name of the person . . . while 13 percent did a reverse-image search using their photos.”).

168. See Donna Freydkin, *Why Do Some Child Stars Implode?*, USA TODAY (Aug. 6, 2013), <https://www.usatoday.com/story/life/people/2013/08/06/child-star-issues/2609493> [<https://perma.cc/3TBA-DVGE>] (discussing child stars who have

negatively impact the children involved in many of the same ways. These young stars are marketed as products to the public, left vulnerable to audience criticism, and robbed of their privacy. Child reality stars find their life documented with no regard to their personal privacy and are opened up “to a level of public scrutiny, of shame and of failure.”<sup>169</sup> Child influencers, similarly, have no ability to retreat from the public eye in their own home or gain an online persona separate from their parents’ edited posts.<sup>170</sup>

The traditional “sense of separation between the actor and the audience” does not exist as forcefully on social media.<sup>171</sup> The ability to see social media stars frequently and in their private moments of life cracks the wall separating media figures and the public, leading audiences to form parasocial relationships or socio-emotional connections with media figures.<sup>172</sup> Additionally, parents have a much easier time introducing their child to the influencer lifestyle with just their phones as compared to television, which requires casting directors, media companies, and labor law regulations.<sup>173</sup> For kidfluencers, these circumstances may heighten

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had hard times, such as Amanda Bynes who had to be hospitalized for a psychiatric evaluation).

169. See Dominic Patten, *The Consequences of Children on Reality TV*, WRAP (July 13, 2009), <https://www.thewrap.com/consequences-children-reality-tv-4288> [<https://perma.cc/9FCP-8ZWH>] (quoting Dr. Drew Pinsky).

170. Cf. James Di Fabrizio, *After Surviving the Trauma of Going Viral at 13, Rebecca Black Underwent an Immense Personal Journey to Return as Pop's Most Unlikely Prodigy*, ROLLING STONE (Sept. 10, 2021), <https://au.rollingstone.com/music/features/rebecca-black-interview-29863> [<https://perma.cc/5MMH-MBGT>] (discussing the years-long impact of going viral on Rebecca Black). Child star Rebecca Black’s song “Friday” “garnered millions of views, attracted news stories from around the globe, mockery from the Late Night circuit, and was called the ‘worst song ever’ and ‘mind-meltingly horrific’ by a popular music blog at the time.” *Id.* Beginning at age thirteen, “Black suffered years of online abuse that took a heavy toll on her mental health. The trauma of it all left her with a deeply seeded anxiety.” *Id.*

171. Joy Herrera, *Opinion: Child Influencers Have It Worse Than Child Stars Do*, ARCADIA QUILL (Nov. 6, 2020), <https://arcadiaquill.com/12864/opinion/child-influencers-have-it-worse-than-child-stars-do> [<https://perma.cc/CX3R-UC7C>].

172. Cynthia Hoffner & Bradley Bond, *Parasocial Relationships, Social Media, & Well-being*, 45 CURRENT OP. PSYCH. 1, 1 (2022) (“Social media platforms provide fans with momentary glimpses into the professional and personal backstage of their favorite media figures that would otherwise be unknown. The frequency and perceived authenticity of media figures’ self-disclosures on social media accelerate people’s socio-emotional connections.”).

173. See Simon, *supra* note 29 (discussing the costs of raising a child star).

the long-lasting psychological issues experienced by many reality child stars, such as “stunted senses of identity and self.”<sup>174</sup>

Not only must kidfluencers reconcile their online persona with their identity, but they must also risk classification as a public figure without willingly choosing to expose themselves to the public. The case in point is *Sidis v. F-R Publishing Corporation*. Plaintiff William Sidis was a famous academic prodigy who did everything in his power to live a life of anonymity after graduating from Harvard College at the age of sixteen.<sup>175</sup> Years later, the New Yorker published an in-depth article covering countless private details of Sidis’ life.<sup>176</sup> Sidis sued under the privacy tort of public disclosure of private facts.<sup>177</sup> The court held that he, by virtue of being famous as a child, was of interest to the public.<sup>178</sup>

Despite the case’s age, the logic may still apply to modern cases.<sup>179</sup> Kidfluencers who amass a certain level of fame may face a similar classification as a public figure. A person can become a public figure if they assume a role of especial prominence, fame, or notoriety within society,<sup>180</sup> even if just by inserting oneself into public discourse.<sup>181</sup> Courts must weigh a variety of factors to determine if someone using social media is a private, limited-purpose public, or public figure.<sup>182</sup> There may need to be standards to determine what

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174. Nicole Damron, *The Plight of Children on Reality Television*, CURRENT (July 25, 2023), <https://thecurrentmsu.com/2023/07/24/children-on-reality-television/> [<https://perma.cc/3S7T-W9N4>] (“As these children grow up with potentially stunted senses of identity and self, it can make them vulnerable to manipulation later in life.”).

175. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 807 (2d Cir. 1940) (stating the facts of the case).

176. *Id.*

177. *Id.* at 808 (stating the facts of the case).

178. *Id.* at 809 (analyzing Sidis’ case and if he counts as a public figure).

179. See Steinberg, *supra* note 108, at 861 (explaining that *Sidis* may still be relevant today).

180. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974) (describing the determining factors for public figure status).

181. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (“Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.”).

182. See Sumra Wahid, *The Viral Spiral: How a Minute of Internet Fame Can Lead to a Lifetime of Unwinnable Defamation Actions*, AM. UNIV. J. GENDER, SOC. POL. & LAW (2022), <https://jgspl.org/the-viral-spiral-how-a-minute-of-internet-fame-can-lead-to-a-lifetime-of-unwinnable-defamation-actions> [<https://perma.cc/4FF4-HRAQ>] (“In order to be classified as a limited-purpose public figure, the court considers the individual’s access to media, assumption of

types of social media activity would qualify someone as a public figure,<sup>183</sup> such as the number of followers, the number of posts, the level of follower engagement, and the reach of content, including instances of singular viral posts.<sup>184</sup> The unclear relationship between defamation law and social media must evolve to account for the age of social media influencers so that regular people do not unintentionally find themselves labeled as a public figure.

## B. The Difficulty in Regulating Sharenting

### 1. Legal Problems

The legal intricacies of regulating sharenting become apparent when comparing the rights of parents and children outlined in Part I. The leeway given to parents when it comes to making decisions for their children<sup>185</sup> conflicts with children's personal desire to control their own reputation and privacy.<sup>186</sup> To succeed in regulating sharenting, legislatures must defeat a parent's claim to free speech, parental rights, and the notion that a parent will always do what is best for their child.<sup>187</sup>

The clash of a child's rights against their parents' rights is exemplified in the parent-child immunity doctrine. Under parental immunity doctrine regimes, children cannot sue their parents.<sup>188</sup> This doctrine states that an unemancipated child cannot sue their parents for personal injuries if the injury was caused by a parent's

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the risk, and whether the individual voluntarily thrust themselves into a specific public controversy in order to influence the outcome.”).

183. Dusty Baxter-Wright, *The Number of Social Media Followers that Makes You a 'Celebrity'*, COSMOPOLITAN (July 5, 2019), <https://www.cosmopolitan.com/uk/worklife/a28302319/number-of-followers-celebrity> [<https://perma.cc/AM2Z-QXKP>] (noting that the Advertising Standards Authority, which creates guidelines that influencers follow, stated that an influencer becomes a celebrity for the purposes of advertising rules when they reach thirty thousand or more followers).

184. See Wahid, *supra* note 182 (discussing the difficulties in classifying social media users as private or public figures).

185. See *supra* Section I.A.3 (articulating the capacity parents have to make decisions for their children).

186. See *supra* Section I.A.2.

187. See *supra* Section II.B.

188. See generally Gail Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982) (discussing the parent-child immunity doctrine).

negligence.<sup>189</sup> There are various concerns underlying this doctrine: protecting the family unit and family harmony, protecting a parent's control, preventing fraud, preventing financial issues between family members, and more.<sup>190</sup> Not all states have this doctrine, and many have limited it in some capacity.<sup>191</sup> In states with this doctrine, any law that would require kidfluencers to sue their parents as the enforcement mechanism would be rendered useless.

## 2. Practical Problems

The complexities of sharenting make it difficult for legislatures to regulate. For one, there is no clear line between benign and harmful sharenting. For example, if a teenage child becomes embarrassed when a parent shares a few of their baby pictures with their friends, does that constitute an invasion of privacy? When attempting to draw this line, a parent's intention alone is an insufficient metric, as many parents have genuinely good intentions and want to protect their child's privacy. At the same time, many parents fail to safeguard their child, either intentionally or unintentionally.<sup>192</sup> Intentions aside, the actual impact of sharenting on children can range from small and ultimately harmless to severe.<sup>193</sup>

Even if legislatures overcome the challenge of tailoring sharenting laws to address these nuances, they face additional hurdles. Claims that a child consented to sharenting may be tenuous. Children may feel pressured by their parents to say yes to

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189. See *id.* at 489 (“The parent-child tort immunity rule denies a minor child a cause of action for personal injuries inflicted by his parents.”).

190. See Caroline E. Johnson, Comment, *A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U. L. REV. 617, 626–27 (1993) (describing the reasoning behind the parental immunity doctrine).

191. See Isabel Wingerter, *Parent-Child Tort Immunity*, 50 LA. L. REV. 1131, 1137 (1990) (noting that courts have had to carve out exceptions to the parental immunity doctrine, if they still use it at all); see also Johnson, *supra* note 190, at 658 app. (listing states' positions on the parental immunity doctrine).

192. Devorah Heitner, *How ‘Sharenting’ Boundaries on Social Media Protect Kids’ Privacy and Trust*, MASHABLE (Sept. 12, 2023), <https://mashable.com/article/sharenting-parent-boundaries-social-media> [<https://perma.cc/AXY3-6WSD>] (identifying “when well-intentioned oversharing becomes a problem”).

193. See *supra* Section I.A.2.

sharenting.<sup>194</sup> In other areas of law, legal questions concerning consent often come with specific guidelines that provide clear answers. In medicine, children usually cannot consent to medical care without a parent's permission.<sup>195</sup> There are exceptions for certain kinds of care<sup>196</sup> and for children who are either legally emancipated<sup>197</sup> or who have proven themselves to be a mature minor, meaning they are deemed mature enough to make medical decisions.<sup>198</sup> These laws are based upon the belief that children's brains are not fully developed and as such their judgement hinders true consent.<sup>199</sup>

Further, labor laws governing child acting cannot simply be expanded to include kidfluencers. For example, these laws generally include metrics such as hours worked, which would require courts to distinguish between recording a child "playing" versus a child "working."<sup>200</sup> After all, unlike child actors who are on set with a clear role, kidfluencers often appear to be doing normal activities in many

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194. Scott Smith, *Parents Often Don't Realize They Can Be a Big Part of Teenage Stress*, CAP. GAZETTE (Feb. 26, 2019), <https://www.capitalgazette.com/lifestyles/ac-cn-column-smith-20190225-story.html> (on file with *Columbia Human Rights Law Review*) (noting children sometimes succumb to pressure to agree with parents).

195. Huntington & Scott, *supra* note 87, at 113 ("American law withholds many rights and privileges from minors that adults enjoy, including . . . the right to consent to most medical treatment.").

196. See U.S. Dept. of Health & Hum. Servs., *Minors' Consent Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 25, 2022), <https://www.cdc.gov/hiv/policies/law/states/minors.html> [<https://perma.cc/6BJV-5MZR>] (compiling state laws for minors' ability to consent to treatment for sexually transmitted infections).

197. Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 240 (1992) ("[S]tatutory emancipation, the process by which minors attain legal adulthood before reaching the age of majority.").

198. Cheryl Preston & Brandon Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 U. KAN. L. REV. 343, 361 (2012) ("In healthcare law, some courts have recognized a 'mature minor' doctrine, which is an ad hoc equivalent of the emancipated minor.").

199. See Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. MED. & PHIL. 256, 262 (2013) (discussing how the state interest in preventing minors from making medical decisions is heavily concerned with minors' capacity).

200. See Maggioni Casseus, Note, *Mom's Social Media Account Featuring Her Kids: New York's Amended Coogan Act Exemplifies the Method to Regulate Parental Exploitation*, 52 HOFSTRA L. REV. 753, 773 (explaining the difficulties in determining how long a child worked).



videos.<sup>201</sup> Workplace conditions would additionally be hard to regulate. Recording videos often takes place in the privacy of one's home, without supervision, making it hard to figure out if parents are meeting the correct standards—or if legislatures can even infringe on family privacy and regulate personal homes at all.<sup>202</sup> Solutions to address the harms caused by sharenting must take these pitfalls into account in order to create effective change.

### C. A Summary of Commonly Proposed Solutions to Increase Protections for Kidfluencers

There are a vast number of solutions proposed to address the concerns of sharenting. Each is insufficient to solve the problem on its own, though a combination of various solutions may prove effective. Most of the proposals focus on kidfluencers when they are minors, forgoing protections for those who have grown up and received no help. Some concentrate on the monetary aspects of sharenting, while others focus on the conditions of content creation. Importantly, however, most have no direct way to address kidfluencers' loss of privacy, and the resulting impact on their dignity and mental health.

#### 1. The New Child Actors: An Entertainment Labor Law Approach

Expanding child entertainment laws is one of the most prominent proposals to help prevent exploitation.<sup>203</sup> The commercial sharenting industry is similar to the child entertainment industry as both revolve around children “working” under the supervision of adults for money. Yet today, child actors receive many protections that child social media stars do not. States vary in their child entertainment laws, but they often include restrictions on the number

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201. See Marina Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers”*, 169 U. PA. L. REV. 577, 592 (2021) (“[S]ocial media content often purports to be capturing the child’s normal activities.”).

202. *Id.* at 597, 605 (discussing the difficulties of regulating labor in the home).

203. See, e.g., Melanie Fineman, Note, *Honey I Monetized the Kids: Commercial Sharenting and Protecting the Rights of Consumers and the Internet’s Child Stars*, 111 GEO. L.J. 847, 883 (2023) (proposing commercial sharenting be addressed under labor law); Masterson, *supra* note 201, at 599–607 (proposing sharenting solutions based on labor laws).

of hours a child can work, educational requirements, consent forms, work permits, and workplace restrictions.<sup>204</sup>

One suggestion is to simply broaden the definition of child performer to include kidfluencers for the purposes of the Fair Labor Standards Act.<sup>205</sup> Scholars advocate for adopting statutes that could be translated to social media, like production regulations, licensing that includes children in media content, and work permits.<sup>206</sup> This may prove difficult, however, since social media stars work in different conditions than child actors. As discussed above, the experiences of child performers are easier to regulate due to certain features, like being on set rather than at home with parents filming, or having clear work responsibilities, such as acting out a scene. To illustrate, imagine trying to prevent unsafe work conditions when a parent is filming their child in a car rather than on a movie set. There is no one to approve the conditions, ensure safe conditions are maintained, or physically stop dangerous filming. Moreover, it is unclear how helpful labor laws would be for addressing privacy concerns. At most, labor laws could prevent extreme invasions of privacy with set regulations on long work hours, reducing the amount of time a child can be filmed.<sup>207</sup> But the laws overall cannot directly address the invasions of privacy that kidfluencers experience.

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204. See *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [https://perma.cc/EJ3H-MM34].

205. See Caroline Sisson, Comment, *All Work and No Play Can Make a Kid a Millionaire: Child Labor Laws and the Role of the DOL to Protect Minors in the Growing Industry of Social Media Employment*, 7 ADMIN. L. REV. ACCORD 160, 179 (2022), [https://administrativelawreview.org/wp-content/uploads/sites/2/2022/09/ALR-Accord-7.3\\_Sisson\\_Cropped.pdf](https://administrativelawreview.org/wp-content/uploads/sites/2/2022/09/ALR-Accord-7.3_Sisson_Cropped.pdf) [https://perma.cc/5FXG-KUKR] (“First, various labor unions should advocate for Congress to expand the definition of child performers in the [Fair Labor Standards Act] to include minors employed through social media platforms like Instagram, YouTube, and TikTok.”).

206. See Nila McGinnis, Note, *“They’re Just Playing”: Why Child Social Media Stars Need Enhanced Coogan Protections to Save Them from Their Parents*, 87 MO. L. REV. 247, 265–66 (2022) (advocating for production regulations); Amanda G. Riggio, Note, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493, 521–23 (2021) (suggesting sharenting require licensing to include children in content); Jessica Pacht-Friedman, Note, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 351, 380–83 (2022) (proposing the creation of work permits and hour restrictions for kidfluencers).

207. See N.Y. COMP. CODES R. & REGS. tit.12, § 186 (2017) (laying out New York’s child entertainer restrictions).

## 2. They Just Don't Know Better: A Public Health Approach

A different proposed approach focuses on the unintentional risks of sharenting. A public health model, relying on health organizations, would focus on disseminating information to parents in an educational manner rather than requiring legal action to effectuate change.<sup>208</sup> While public health programs are not always successful, there are many programs that have created change in communities.<sup>209</sup> Family-centered campaigns have seen significant and long-lasting improvements when families are engaged with the campaign.<sup>210</sup> The public health model is just starting to address sharenting. The ShareWithCare campaign, run by Deutsche Telekom, shows how deepfake technology can generate extensive harmful content using just one online photograph of a child.<sup>211</sup> Similar campaigns could be used to teach parents about the potential harms of sharenting, both legal and personal, with the hope that parents will either avoid posting online or do so in a way that respects their child's privacy and health.

However, public health models fail if the target audience does not believe the campaign or ignores it.<sup>212</sup> From 2020 to 2022, during the COVID-19 pandemic, many citizens did not buy into the importance of receiving the vaccine, which lowered vaccination rates and caused some state governments to offer other incentives.<sup>213</sup> There is no way to force people to listen to public health campaigns; parents

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208. See Steinberg, *supra* note 108, at 866–67 (detailing public health models and their applicability to educating parents on the dangers of sharenting).

209. See N.Y. Acad. of Med., *A Compendium of Proven Community-Based Prevention Programs*, TRUST FOR AM.'S HEALTH (2013), <https://www.tfah.org/report-details/a-compedium-of-proven-community-based-prevention-programs> [<https://perma.cc/6G9T-LP52>] (compiling successful public health programs).

210. See Lynne Kirsten Novilla et al., *Supporting and Engaging Families: An Examination of Publicly-Funded Health Promotion Programs in the Intermountain West, USA*, 8 FRONTIERS PUB. HEALTH 1, 3 (2020) (“[S]tudies have found that promotion of health . . . will be more beneficial and sustainable when family networks are engaged.”).

211. See “ShareWithCare”: Telekom Raises Awareness for Responsible Use of Children's Photos on the Internet, DEUTSCHE TELEKOM AG (July 3, 2023), <https://www.telekom.com/en/company/details/share-with-care-telekom-raises-awareness-1041810> [<https://perma.cc/X8P7-Q2ZR>] (discussing the method and goal of the Share-With-Care campaign).

212. See Beatriz C. Domínguez et al., *A Survey of Public Health Failures During COVID-19*, 14 CUREUS 1, 6 (2022) (describing vaccine hesitancy and its negative impact on curbing the COVID-19 pandemic).

213. *Id.*

can decide to ignore the warnings of any sharenting campaigns, leaving children without help if their parents' content becomes harmful.

### 3. Less Money, Less Problems: A Financial Approach

Some scholars, inspired by California's Child Actor's Bill, or the Coogan Law, want to restrict the amount of money parents can earn from sharenting in the hopes of reducing the incentive to exploit their children.<sup>214</sup> The Coogan Law itself was created in response to former child actor Jackie Coogan's unfortunate legal battle with his mother.<sup>215</sup> Despite earning millions as a child, his parents squandered away his money, leaving him only a fraction of his hard work.<sup>216</sup> California then passed the Coogan Law, to ensure child actors had a protected trust they could access once they got older.<sup>217</sup> Money could be limited for content creators by implementing profit caps for content that features children, or by creating Coogan-like trust funds to save money for the kidfluencer and limit present cash flow.<sup>218</sup>

California itself has taken inspiration from the Coogan Law and passed SB 764 and AB 1880.<sup>219</sup> SB 764 requires parents to set aside a portion of earnings if their videos in a thirty-day period feature a child sixteen or younger for at least 30% of content for which the parent is paid.<sup>220</sup> AB 1880 is a direct expansion of the

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214. See Masterson, *supra* note 201, at 600 (“[S]tates can readily provide financial protection to kidfluencers through Coogan trusts.”).

215. See Sisson, *supra* note 205, at 174 (explaining the origin of the Coogan Law).

216. *Id.*

217. See *Coogan Law*, SAG-AFTRA [hereinafter *Coogan Law*], <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [https://perma.cc/8MYJ-Q6K5] (tracing the history and requirements of the law).

218. See Charlotte Yates, Note, *Influencing “Kidfluencing”: Protecting Children by Limiting the Right to Profit from “Sharenting”*, 25 VAND. J. ENT. & TECH. L. 845, 866 (2023) (“An ideal law combatting the harms of commercial sharenting would limit the profitability of private content featuring children.”); see also Masterson, *supra* note 201, at 600 (“[S]tates can readily provide financial protection to kidfluencers through Coogan trusts.”).

219. Katie Kindelan, *California Becomes 2nd State to Require Parents to Save Earnings for Child Influencers*, ABC NEWS (Sept. 27, 2024), <https://abcnews.go.com/GMA/Family/parenting-influencers-speak-new-law-designed-protect-kids/story?id=111580202> [https://perma.cc/M7RP-GLFW] (summarizing the new California content creator laws).

220. *Id.*

Coogan Law's definition of child actor to include content creating minors and requires 15% of earnings to be set aside by employers.<sup>221</sup>

Trust funds ensure kidfluencers are eventually compensated for their "work." These trust funds decrease the incentive for parents to exploit their child, without directly restricting what can be posted online. In particular, those most inclined to infringe on their child's privacy to maximize earnings are given less of a reason to do so.<sup>222</sup> At the same time, reducing the amount of money earned from sharenting does not completely eliminate all monetary incentives. Parents may continue to post content for profit, even if it is a lesser amount, either for themselves or their child. This solution also does not affect parents that post for any non-monetary reasons discussed above.<sup>223</sup>

#### 4. Joint Custody: A French Approach

France's Law n°2024-120 enacted sharenting restrictions that make parents jointly responsible for their child's online presence.<sup>224</sup> The child also becomes involved in decision-making of content deletion once they are mature enough to give their opinion or revoke consent.<sup>225</sup> If there is a disagreement between the parents about their child's image, a judge can ban a parent from sharenting unless the other parent agrees.<sup>226</sup> Additionally, if parents engage in commercial sharenting or post videos for personal fame and in the process "seriously undermine" the dignity or integrity of a child, the courts can revoke a parent's right to share their child online.<sup>227</sup> These

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221. *Id.*

222. See John Maltby et al., *Implicit Theories of a Desire for Fame*, 99 BRITISH J. OF PSYCH. 279, 290 (2008) (finding various factors that drive the desire for fame that are not just money).

223. See *supra* Section I.A.1.

224. See Magalie Le Clerc & Juliette LePortios, *France Introduces New Law to Enhance the Protection of Children's Rights in France*, CONNECT ON TECH (Mar. 19, 2024), <https://connectontech.bakermckenzie.com/france-introduces-new-law-to-enhance-the-protection-of-childrens-rights-in-france/> [<https://perma.cc/87EA-UQ7U>] (describing Law n°2024-120, passed February 19, 2024, that allows requests for the deletion of sharenting posts).

225. See Laura Kayali, *France Aims to Protect Kids from Parents Oversharing Pics Online*, POLITICO (Feb. 28, 2023), <https://www.politico.eu/article/emmanuel-macron-france-law-aims-to-protect-kids-against-oversharing-parents> [<https://perma.cc/A7BN-JRET>] (describing France's law's enforcement mechanism).

226. *Id.*

227. See Nikolina Koevska Kharoufeh, 'What Have I Done?': Mum's Fear as France Introduces Bold New Laws Against 'Sharenting', HONEY (2023),

measures make parents more vigilant about what they post, either for personal reasons or profit.<sup>228</sup> Due to the strong deference U.S. courts give to free speech rights and to parents, whether or not these measures could be implemented in the United States is a difficult question.<sup>229</sup> Even if the law were to overcome those impediments, it would not be as helpful for children whose parents do not post for fame or reputational gain, yet still post frequently and harmfully.

##### 5. The Right to Be Forgotten: A European (and Recently American) Approach

In the 2014 case *Google Spain v. Costeja*, the European Union's Court of Justice established that people have a right to be forgotten online.<sup>230</sup> The right to be forgotten grants individuals the right to have data about themselves erased if certain circumstances occur.<sup>231</sup> Examples of such circumstances include if an organization sends a child's personal data to information services,<sup>232</sup> or, as in the case of *Costeja*, if the data is no longer relevant.<sup>233</sup> The plaintiff, Mario Costeja González believed "[he was] fighting for the elimination of data that adversely affects people's honour, dignity and exposes their private lives. Everything that undermines human beings, that's not freedom of expression."<sup>234</sup>

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<https://honey.nine.com.au/parenting/if-i-lived-in-france-i-could-soon-be-in-trouble-for-posting-photos-of-my-kids-online/2d75e00b-eea1-4a9e-b965-486dc5086a60> [<https://perma.cc/8CL3-5CHN>] (setting out the standards of evaluation for the French sharenting law).

228. *Id.* (discussing the potential effects of the French sharenting law).

229. *See supra* Section I.A.3 (discussing potential legal protections for sharenting).

230. *See* Ben Wolford, *Everything You Need to Know About the "Right to Be Forgotten"*, GDPR.EU, <https://gdpr.eu/right-to-be-forgotten> [<https://perma.cc/H3AQ-M74X>] (noting the origin of the right to be forgotten); *see also* Case C-131/12, *Google Spain SL & Google Inc. v. Agencia Española de Protección de Datos & Mario Costeja González*, ECLI:EU:C:2014:317, ¶¶ 15 (May 13, 2014) (establishing the right to be forgotten).

231. Wolford, *supra* note 230 (explaining what the right to be forgotten is).

232. *Id.* (exemplifying when the right to be forgotten applies).

233. *See Google Spain SL & Google Inc.*, ECLI:EU:C:2014:317, ¶¶ 15 (establishing that such data is covered by the right to be forgotten).

234. *See* Ashifa Kassam, *Spain's Everyday Internet Warrior Who Cut Free from Google's Tentacles*, GUARDIAN (May 13, 2014), <https://www.theguardian.com/technology/2014/may/13/spain-everyman-google-mario-costeja-gonzalez> [<https://perma.cc/AUV8-35U5>] (reciting the facts of González's legal troubles).

Some scholars posit that the right to be forgotten could be applied to kidfluencers by allowing them to request the deletion of social media content featuring themselves.<sup>235</sup> The policy is starting to make its way into state legislatures. The proposed HB 1627 in Washington State mentioned in the introduction would include allowing adult-children to request deletion of certain data.<sup>236</sup> While these are not full implementations of the right to be forgotten, as the laws only allow people to request deletion of social media content of themselves and not all forms of internet content,<sup>237</sup> it does give a first step to allowing kidfluencers to restrict their social media presence.

The right to be forgotten and its state derivatives balance free speech and privacy issues by allowing parents to post whatever they want while letting children protect their privacy as they get older, when the content becomes less valuable.<sup>238</sup> The main drawback is that the proposals only apply to content that has already been posted by the parent. The protection would not apply to content posted on other pages.<sup>239</sup> If someone else takes a screenshot or downloads video content, removing the post from the parent's account will not eliminate the content from the internet. Additionally, any deletion proposals may face First Amendment challenges if the way courts understand a child's privacy rights does not change.<sup>240</sup> A parent could argue the information is still relevant to them and their speech

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235. See Keltie Haley, Note, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1019 (2020) (describing how the United States could adopt the right to be forgotten for sharenting); Steinberg, *supra* note 108, at 866 (“Under the right to be forgotten, young adults would be able to argue that information shared by their parents is no longer necessary and that the disclosures are potentially harmful to their overall well-being.”).

236. See H.B. 1627, 68th Leg., Reg. Sess. (Wash. 2023) (requiring the creation of a trust fund for children featured in monetized video content and allowing qualifying adults to request permanent deletion of any content featuring their likeness, name, or photograph from when they were a minor from any internet platform or network that compensated their guardian).

237. See DiBenedetto, *supra* note 5 (describing the content deletion provisions in the Washington State bill).

238. See Steinberg, *supra* note 108, at 866 (“Under the right to be forgotten, young adults would be able to argue that information shared by their parents is no longer necessary and that the disclosures are potentially harmful to their overall well-being.”).

239. See Diaz, *supra* note 38 (summarizing Meredith Steele's encounter with digital kidnapping, the content of which would not be subject to these proposals).

240. See Steinberg, *supra* note 108, at 865 (discussing the First Amendment-related difficulties in enacting the right to be forgotten).

rights. Perhaps with a new class of reputational tort, courts could legally recognize an adult-child's right to privacy.

### III. A TORT-BASED SOLUTION

The solutions discussed in Section II.B are all viable, but incomplete, options for protecting kidfluencers from harmful sharenting. Apart from the right to be forgotten, however, most solutions only protect current kidfluencers, leaving out those who have grown up without a method of redress. Section III.A proposes this Note's solution to rectifying some of the harms that sharenting causes: a reputational tort to allow former kidfluencers to sue their parents for financial and emotional damages from sharenting. Section III.B explains how this solution might curb reputational risks and justify an expansion of tort law. Section III.C defines the benefits and potential obstacles of the proposal, for both current and former kidfluencers.

#### A. The Tort of Unwanted Publicity

Adult-children should be able to sue their parents in a civil suit for damages under a new hybrid of privacy and defamation torts.<sup>241</sup> The tort would function on a sliding scale with increasing requirements of proof. On the lower end of the spectrum, former kidfluencers could sue under a privacy tort. Under certain requirements, the tort could scale up to a defamation-esque tort. Since parents share their children online in various ways, the law would require flexibility in the framework used to analyze a parent's actions.<sup>242</sup>

##### 1. The Privacy Tier

At the lower level of the scale, adult-children could establish a violation of a privacy tort. Each of the four categories of privacy torts

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241. While it may seem implausible for a child to sue their parents over a social media post, it has been done before. See Ashley May, *18-Year-Old Sues Parents for Posting Baby Pictures on Facebook*, USA Today (Sept. 16, 2016), <https://www.usatoday.com/story/news/nation-now/2016/09/16/18-year-old-sues-parents-posting-baby-pictures-facebook/90479402> [https://perma.cc/2PQA-7S4F] (describing a case where a child sued their parents over posting baby pictures online).

242. This Note's solution is a template for how states could enact such a tort, as implementation would have to accommodate individual state laws. Thus, the tort would have to be adapted on a state-by-state basis.



as they exist today can apply to former kidfluencers: intrusion upon seclusion, appropriation of name or likeness, public disclosure of private facts, and publicity placing a person in false light.<sup>243</sup> Apart from the first category, each category of privacy tort involves the publicization of private information. These are likely to be viable options for kidfluencers, like Cam, whose life was upsettingly exposed. The new tort would recognize that former kidfluencers should have been entitled to privacy from the internet, assuming the adult-child can prove harm from sharenting.<sup>244</sup> For example, when a parent creates embarrassing blog posts about their child's life without permission, they could be liable for the tort of publicizing private information.

## 2. The Defamation Tier

At the higher end of the scale, adult-children could sue for a novel kind of defamation. Unlike a privacy suit, defamation is concerned with the truth or falsity of information being published, as well as the intention of the actor in the wrong, and thus requires a higher burden of proof for the plaintiff.<sup>245</sup> This Note's proposed suit is modeled off a typical defamation suit which requires (1) a statement (2) that was published, (3) caused injury, (4) was false, (5) was not privileged, and (6) in which the defendant is at fault.<sup>246</sup> Social media posts constitute published statements, fulfilling the first two conditions.<sup>247</sup> The requirement to prove injury changes depending on the statement in question. Some statements are clearly defamatory, such as falsely calling someone a thief.<sup>248</sup> A reasonable person would

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243. See *supra* Section I.B.2.

244. See *supra* Section I.A.2.

245. See *supra* Section I.B.1.

246. RESTATEMENT (SECOND) OF TORTS § 558 cmt. a (AM. L. INST. 1977) (“To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence . . . ; and (d) either actionability of the statement irrespective of special harm or the existence of special harm . . .”). Note that if the kidfluencer is classified as a public figure, they must prove actual malice. See *supra* Section I.B.1 (articulating the *Sullivan* standard for defamation suits by public figures).

247. See *Lowell v. Wright*, 512 P.3d 403, 418 (Or. 2022) (“In practice, there is no difference between a statement being posted on social media, Google reviews, on a sign carried around outside the plaintiff's home, or written in the sky: The statement is the same no matter how it reaches the public.”).

248. *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 841 (Ill. 2006) (stating that calling a company full of “deeply greedy people” “clearly impugns the plaintiffs' integrity”).

understand that statement can harm someone's reputation.<sup>249</sup> For the purposes of this suit, former kidfluencers could show that their parents created an online persona of them using fabricated information. While small tidbits a parent exaggerates about their child may not amount to a dishonest statement, repeated remarks about their child's character can create a false online persona of their child. Since a false persona would not necessarily meet the false statement and actual malice requirements of traditional defamation law, the new suit would require a negligence standard to show that parents recklessly shared information.<sup>250</sup>

As an example of the application of this new defamation suit, picture a parent-run YouTube channel based on the premise of their young son learning how to cook. As a young child, he had a fleeting fancy of cooking and was lucky (or unlucky) enough to go viral. He ties his personality to the cooking channel, enjoying the praise but not understanding the full implications of how it will impact him in the long-term. But growing older, he no longer enjoys cooking. He wants to do anything but cook, yet his livelihood is now based on the YouTube channel his parents have been running. To the internet, he is simply the child that cooks. Personally, he wants to be anyone else. By forcing this child to continue to film, his parents are not necessarily posting false content to the YouTube channel, but they are building a fabricated personality for a child who has now publicly become one with the "character" he plays on the YouTube channel. When he turns 18, he may leave the kidfluencer title behind, but its legacy will follow him. His interactions will be shaped by what the world thinks they know about him, rather than who he truly is, and his life will become irrevocably intertwined with the viral videos of his past.

This kind of nebulous reputational injury based on parents sharing a false persona becomes complicated to prove, as the

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249. *Id.* at 839.

250. It may seem farfetched for parents to explicitly lie about their child's life, but it may not be far from reality. Fourteen-year-old kidfluencer Lil Tay accused her father of faking her death after a message was posted on her Instagram stating that she died. The world believed her to be dead as stories spread about her death. Following the post's appearance, she told a media outlet that she was still alive and later posted on her Instagram to say that her father faked the whole thing. He denied the claims and it was never confirmed if he was truly the culprit behind the hoax. To read more, see Danielle Cohen, *What We Know About Lil Tay's Rumored 'Death'*, CUT (Sept. 16, 2024), <https://www.thecut.com/2023/09/lil-tay-death-hoax.html> [<https://perma.cc/Z7TB-VWXH>].

statements are not defamatory at face value. A former kidfluencer must use extrinsic evidence to show how they were harmed, such as reputational harm, financial harm, and emotional harm.<sup>251</sup> Finally, the plaintiff must show their parents were at fault. Since the plaintiff would most likely be a public figure as a former influencer, they would need to demonstrate their parents acted with actual malice.<sup>252</sup>

### 3. Compensation

Compensation could scale based on the injury experienced. Adult-children who suffered financial or emotional damages from their parents' social media posts could make a claim for monetary recovery as the form of relief for any of the above torts. If deletion of social media content becomes a legally-feasible remedy in the United States, as advocated for in Washington State's proposed HB 1627, that option could also be provided as a form of relief.<sup>253</sup> To prove financial damages for monetary relief, plaintiffs could show that they never received any of the profits generated through the use of their image. Additionally, loss of income from merchandise or other forms of monetization could also be used to show financial harm. If the plaintiff could show that the social media posts prevented them from getting a college acceptance or job, they would potentially be able to prove loss of wages. For emotional damages, plaintiffs could show the intensity, the duration, and the underlying cause of the emotional distress, as well as use medical records to demonstrate the psychological impact.<sup>254</sup>

### 4. Rescinding Public Figure Status

Another potential issue with sharenting is that kidfluencers can become public figures if their social media accounts are popular enough. Courts have not ruled on this topic frequently, but as the only case on the topic indicates, the conventional understanding is

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251. See *infra* Section III.A.3 (articulating how a plaintiff might prove types of harm for compensation purposes).

252. See *supra* Section I.B.1.

253. See *supra* Section II.C.5; H.B. 1627, 68th Leg., Reg. Sess. (Wash. 2023) (providing for content deletion as a potential remedy).

254. Nicholas Carroll, *Emotional Distress Damages in Defamation Cases*, ABA (Apr. 30, 2019), <https://www.americanbar.org/groups/litigation/resources/newsletters/trial-evidence/emotional-distress-damages-defamation-cases/> (on file with *Columbia Human Rights Law Review*).

that once one is a public figure, they are always a public figure.<sup>255</sup> An internet-famous child may still be of interest to the public as an adult, thus maintaining public figure status. As part of the suit, adult-children should be able to petition for the courts to rescind their public figure status in the eyes of the law. For example, if a company writes an article on a former child influencer and the adult-child wants to sue, they should not have public figure status for the purposes of their suit, as the status makes such suits more difficult.<sup>256</sup>

Such a petition has not been used before. Nonetheless, given that former kidfluencers did not necessarily choose to take on public figure status, forcing them to accept it runs contrary to the *Gertz* decision, which emphasized voluntariness in assessing the petitioner's entrance into the public eye.<sup>257</sup> When a child has countless videos of themselves posted online by their parents, they are being put into the limelight by someone else. Since true consent from a child can be difficult to verify, there is no established way to determine if the decision to be online is voluntary.<sup>258</sup> As a practical

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255. See *supra* Section II.A; see also *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (holding that even though plaintiff had left the public eye and "cloaked himself in obscurity," his subsequent history is still of interest to the public).

256. See *supra* Section I.B.1 (explaining the creation and impacts of public figure status).

257. The Court explained, "[r]espondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). First, "an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* Second, and "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Id.* The *Gertz* opinion does mention a vague third category of involuntary public figures, stating "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345. It stresses that "[f]or the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.* However, this category has not been brought up by the Court since. The *Gertz* decision emphasizes its rarity, so it would presumably not apply to kidfluencers as it would be contrary to the very notion of social media. Influencers are common and, while popular, do not often have such power and influence that they occupy special prominence in the affairs of society.

258. See *supra* Section II.B.2 (describing the difficulty of consent in the sharenting context).

matter, it is illogical to allow a tortfeasor to skirt liability by rendering their victim a public figure.

## B. The Principles Behind the New Tort

### 1. The Principles of Tort Law Support the Solution's Mechanism

The values and policy concerns furthered by privacy and reputational torts would support a new tort to protect child influencers. Any tort has four basic elements: (1) a duty (2) that was breached, and (3) caused (4) harm.<sup>259</sup> Within the general body of tort law, the creation of torts is justified by both ex-post and ex-ante aims. Rights-based principles, or ex-post principles, include corrective justice, civil recourse, and compensation.<sup>260</sup> Corrective justice refers to repairing imbalances in the moral equilibrium between the wrongdoer and the injured party.<sup>261</sup> Civil recourse, on the other hand, establishes the right of the plaintiff to take legal action against the defendant for private wrongs.<sup>262</sup> As such, the state is obligated to provide a means for plaintiffs to seek redress of civil wrongs since under this view, tort law is more about the plaintiff achieving vindication than becoming whole.<sup>263</sup> Finally, ex-post principles can justify giving compensation to tort victims.<sup>264</sup>

Instrumental principles, or ex-ante principles, include optimal deterrence, loss distribution, and redress of social grievances.<sup>265</sup> Optimal deterrence suggests that tort law can impose liability at an optimal rate that prevents losses from risky activities and promotes wealth maximization.<sup>266</sup> Loss distribution aims to spread the costs of tort suits amongst multiple defendants or other parties, like insurance companies.<sup>267</sup> Finally, tort law offers redress for social

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259. See ABRAHAM, *supra* note 112, at 2 (articulating the common law elements of a tort claim).

260. *Id.* at 17–23 (summarizing the justifications for tort laws).

261. See *id.* at 17–18 (defining corrective justice).

262. *Id.* at 18 (defining civil recourse).

263. *Id.*

264. See *id.* at 21–23 (describing ex-post principles of tort law).

265. See *id.* at 18–23 (describing ex-ante principles of tort law).

266. See Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. MICH. J. L. REFORM 745, 754–55 (2015) (defining optimal deterrence).

267. See Riaz Tajani, *National Geographics: Toward a “Federalism Function” of American Tort Law*, 51 SAN DIEGO L. REV. 81, 93 (2014) (defining loss distribution).

grievances, especially against large institutions such as big corporations.<sup>268</sup>

The sharenting tort would incorporate many of the aims of tort law, both ex-ante and ex-post. For one, the financial damages prong of the sharenting tort would allow for plaintiffs to achieve corrective justice and compensation for the work they contributed to their parents' earnings from social media. Importantly, for adult-children who feel they were stripped of their ability to create their own identity as a child, the tort would also offer the chance for corrective justice. Living in the shadow of one's social media persona can be a heavy burden to bear and such a tort may allow former child influencers to reclaim their lost dignity.<sup>269</sup> Furthermore, the tort would open up the possibility for optimal deterrence. Establishing a cause of action against harmful forms of sharenting would hopefully lead parents to change their behavior and avoid harm to their child. Following the theory of deterrence, the creation of a tort could educate parents on the harms of sharenting and cause them to post content of their child more cautiously, if at all, lest they get sued later on. Alternatively, parents with innocent intentions regarding sharenting may feel they want to avoid sharing personal information about their child online if they learn that sharenting can become so harmful that it creates a cause for a tort. In these ways, legislatures passing statutes can engage in a public education campaign.<sup>270</sup> Either instance would reduce parents' incentive to post embarrassing and/or damaging content about their child.

## 2. Privacy and Reputational Law's Purpose Would Justify a New Class of Torts

This Note's tort would align with the evolution and purpose of privacy law. The four current categories of privacy torts were introduced by the "chief architect" of privacy law, William Prosser, in his influential article *Privacy*.<sup>271</sup> Prosser's musings on tort law were embraced by courts and his influence is apparent in tort law today.<sup>272</sup>

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268. See ABRAHAM, *supra* note 112, at 23 (defining redress of social grievances).

269. See *supra* Section I.A.2.

270. See *supra* Section II.C.2.

271. See Daniel J. Solove & Neil M. Richards, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1888 (2010) (labeling Prosser as the chief architect of privacy law); see *supra* Section I.B.2 (listing categories of privacy law).

272. Solove & Richards, *supra* note 271, at 1890 (noting Prosser's influence on tort law).

The article challenges the previous vision of privacy torts, which protected individuals from the press.<sup>273</sup> Instead, Prosser speculates on how to create order and legitimacy within privacy law by defining four rigid categories of tort law.<sup>274</sup> His theories rest upon his desire to protect the “emotional, reputational, and proprietary injuries” that result from privacy invasions.<sup>275</sup> Prosser asserts that “when a picture is taken surreptitiously, or over the plaintiff’s objection, in a private place . . . the plaintiff’s appearance which is thus made public is . . . still a private thing, and there is an invasion of a private right.”<sup>276</sup> Harm from privacy infringements does not cease to exist just because it is a child experiencing it. Accordingly, courts should recognize that once a parent crosses the bounds of family privacy and shares their child’s information with the world, they have violated that child’s privacy.

Similarly, defamation law protects individuals from false and malicious statements. If adult-children can prove the factors that defamation law has historically required, they should be justified in pursuing a civil action. The type of speech that would be targeted is already something the courts view as harmful and thus, recognizing it as a tort would be a valid use of state power.<sup>277</sup>

### C. The Solution in Practice

#### 1. The Practical Benefits

Beyond the principled benefits this tort offers, it also has many practical benefits. The reputational tort offers a compensatory route for adult-children to reclaim funds from their parents that were made from sharenting. Additionally, former influencers can relinquish their public figure status to better guard their reputation should they find themselves needing to protect their personal information from the public.<sup>278</sup>

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273. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388–89 (1960) (articulating four categories of tort to replace the old version of tort law).

274. Solove & Richards, *supra* note 271, at 1890.

275. See Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805, 1809 (2010) (discussing Prosser’s intention in reinterpreting privacy law).

276. Prosser, *supra* note 273, at 395.

277. See *supra* note 76.

278. See *supra* Section I.B.1 (discussing how public figure status makes reputational suits harder due to the removal of strict liability).

A more speculative prospect sees the sharenting tort could lead to the development of a new body of law in the realm of social media. As cases proliferate, companies might start worrying about their own legal risks. To avoid being pulled into claims as contributorily negligent parties, social media companies, entertainment companies, advertising companies, and the like may create stringent policies for working with kidfluencers. This could lead to improvements in kidfluencers' workplace conditions reductions in profit opportunities for kidfluencers, which would lower their parents' monetary incentives of their parents, and more.

## 2. Potential Obstacles: Statute of Limitations

The statute of limitations is a potential obstacle to the tort. Since sharenting occurs when one is a child, a plaintiff would likely be unable to file claims within the traditional statutes of limitations for defamation and privacy suits. For example, in New York defamation claims must be filed within one year of the defamatory statement.<sup>279</sup> To solve this issue, courts could modify the statute of limitations to trigger once a kidfluencer turns eighteen. This mirrors behavior in other civil causes of action, like cases of abuse, where children are allowed to sue their parents once they turn eighteen, at which point the timer on the statute of limitations begins.<sup>280</sup>

## 3. Potential Obstacles: First Amendment

The proposed tort facially avoids previous concerns about a parent's First Amendment rights as it does not create preemptive First Amendment restrictions. Rather, it works reactively within the bounds of what courts have already deemed to be unacceptable forms of speech: defamation and privacy violations.<sup>281</sup> The Court in *Gertz* stated that defamation is low value speech as "there is no constitutional value in false statements of fact."<sup>282</sup> Similarly, claiming First Amendment protection does not give someone free reign to

279. FINDLAW, *supra* note 157.

280. *Child Sexual Abuse: Civil Statutes of Limitations*, NAT'L CONF. STATE LEGISLATURES (Nov. 29, 2023), <https://www.ncsl.org/human-services/state-civil-statutes-of-limitations-in-child-sexual-abuse-cases> [https://perma.cc/X847-E79H] (surveying state laws on statutes of limitations for child abuse and any differences in statute of limitation timelines).

281. *See supra* Section I.B (discussing which types of speech harming reputation can be regulated under the First Amendment).

282. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).



infringe on another's privacy.<sup>283</sup> States protect privacy in various ways, even over First Amendment claims, often falling in line with the four privacy tort categories.<sup>284</sup> The value of speech largely depends on whether the subject is of public or private concern.<sup>285</sup> As stated, the tort would allow kidfluencers to challenge their public figure status and thus make the speech a matter of private concern. Such categorization allows states flexibility in rolling back First Amendment protections in favor of protecting private individuals.<sup>286</sup> Even if First Amendment protections are invoked, a court could still uphold the tort statute as long as it passes strict scrutiny.<sup>287</sup>

Parents would still have the choice to post what they want online. But they would also be aware that there might be consequences for their actions, making them think carefully about what they are posting. A parent could theoretically create the same content but hide their child's identity. Blog posts could use fake names. Videos could blur a child's face while still voicing the same message. Alternatively, parents could simply not post at all, prioritizing their child's safety over a social media post.

Critics may argue that the proposed tort would produce a chilling effect. Courts find chilling effects problematic when statutes are over inclusive or are so vague as to prevent individuals from understanding what speech is protected.<sup>288</sup> However, this Note's proposed tort framework is not vague as it requires high standards of proof, making it clear that the tort would regulate only severe cases. Parents could completely avoid financial liability if they pay the

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283. See, e.g., *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 641–42, 647 (Tenn. 2001) (applying the standard of negligence against private citizens to find a tort of false light invasion of privacy in a matter concerning speech).

284. See *Welling v. Weinfeld*, 866 N.E.2d 1051, 1053 (Ohio 2007) (applying the standard of negligence against private citizens to find a tort of false light invasion of privacy—as well as the other three forms of privacy torts—in a matter concerning speech).

285. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

286. *Gertz*, 418 U.S. at 352.

287. See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (“A law [governing speech] that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”)); see *infra* Section III.C.4 (completing a strict scrutiny analysis for this tort).

288. See *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (expressing concern about the vagueness of the Communications Decency Act of 1996 and its effect on speech).

kidfluencer the hourly rate or lump sum required by a state's child labor laws. Furthermore, parents could repeatedly seek consent from their child—if they are old enough to give it—to continuously ensure the child is comfortable with their posts. If a child clearly expresses that they are unhappy with their parents' posts, it would be a clear step towards liability. Finally, parents could assess potential mental health impacts on their child by taking them to a psychologist, moderating hateful comments, and giving the child some creative control.

Some may argue that instead of pursuing lawsuits that implicate the First Amendment, the appropriate “remedy for speech that is false is speech that is true,” or counterspeech.<sup>289</sup> However, sharenting engenders a unique situation where counterspeech is not viable. For one, some may attribute harmful speech to the child. When a parent acts as a manager of their kidfluencer's account or requires certain reactions from their children in videos, it may appear for all intents and purposes that the child's words are their own. A child would thus have to engage in counterspeech against their own persona. Moreover, counterspeech relies on the idea that both speakers are on an even playing field, which is not the case here. Parents have general authority over their child and can control a child's social media accounts, phone, and ability to speak out, such that children cannot engage in counterspeech.<sup>290</sup> Finally, young children most likely cannot engage in counterspeech because they may not know the contents of their parent's post, how to speak out, or what the future consequences of sharenting are. Though they may speak out after growing up, the time delay prevents genuine counterspeech as the adult-child is responding long after the speech has already done its damage.<sup>291</sup>

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289. *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (plurality opinion).

290. See Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today—Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 110–11 (2002) (noting that children subject to the “inherently authoritarian framework” of schools may not access counterspeech).

291. *Alvarez*, 567 U.S. at 727–28 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”)).

#### 4. Potential Obstacles: Parental Rights

Another impediment to this tort is the counterclaims available to parents. Parents can claim that the parental rights and immunity doctrine should bar any suit by their own child, even if that child is now an adult.<sup>292</sup> There are two routes a court could take to help children overcome these claims.

First, a court could assert that once a child becomes an adult, they should have the freedom to sue as they wish. Parental rights generally cease once a child becomes an adult, including any parental immunity bars to suits.<sup>293</sup> Alternatively, if a court decides that parental rights extend to the case since the actions occurred during childhood, that court can grant states leeway to regulate sharenting as a *parens patriae* and prioritize the right to intervene over a family's right to privacy with a balancing test-like mechanism. This is the approach taken to child abuse, for example. Because of how harmful child abuse is, adult-children can sue their parents despite the harm occurring in the past while they were under their parents' control.<sup>294</sup>

Assuming that restricting a parent's right to direct the upbringing of their child is subject to the highest tier of scrutiny, a state would need to prove a compelling interest and narrowly tailored means.<sup>295</sup> Protecting the well-being of a child is always a compelling interest, and in the case of sharenting, there is clear rationale that a child's well-being is at risk.<sup>296</sup> The state must then prove that it is using narrowly tailored means which are not over or under

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292. See *supra* Sections I.A.3, II.B.1 (discussing parental rights and the parental immunity doctrine).

293. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Johnson, supra* note 190, at 621 ("[C]hildren may sue their parents, and vice versa, once the children become emancipated.").

294. See Florence Kaslow, *Children Who Sue Parents: A New Form of Family Homicide?*, 16 J. MARITAL & FAM. THERAPY 151, 159 (1990) (discussing the statute of limitations in regards to retroactive abuse suits).

295. See *supra* Section I.A.3 (establishing the criteria to limit a fundamental right).

296. See *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor is a compelling [interest]."); see *supra* Section I.A.2 (detailing how sharenting can harm children).

inclusive.<sup>297</sup> Notably, the existence of alternatives does not prevent a policy from being narrowly tailored.<sup>298</sup>

The means of the tort are self-limiting and not over or under inclusive for a couple of reasons. First, the tort requires a child's willingness to sue their parents, which often indicates an already dysfunctional and frayed relationship.<sup>299</sup> Second, the tort would largely only apply to parents who have committed extreme levels of sharenting where documentation of reputational, financial, and emotional harm exists. A parent occasionally posting a picture of their child on social media for friends and family would have little risk of repercussion as a child would likely be unable to offer the proof necessary for this Note's proposed tort. On the other hand, the tort would be simpler to prove in cases of commercial sharenting, where there is generally much clearer documentation. The monetization of the child's image, the frequency of content, and the heightened fame are easy to demonstrate and connect to harms like financial loss, mental health problems, and reputational troubles. Finally, the tort accounts for different tiers of harm and proof, preventing over and under inclusivity. Over inclusivity is deterred by recognizing that not all sharenting is equal and deserving of the same treatment. Under inclusivity is similarly eliminated by allowing for lower levels of proof for actions within the privacy tier, accounting for children who may not have as substantial of proof as kidfluencers whose parents engaged in constant commercial sharenting.

The best solution to the risks posed by sharenting incorporates multiple elements of the solutions presented by scholars and governments. Each solution has its own benefits and limitations, and cannot singlehandedly address all the negative implications of sharenting. While the proposal described in this Note would help adult-children seek redress for reputational and exploitation harms, it would have more limited benefits for children presently experiencing sharenting since they face additional barriers to filing claims—though the existence of the proposed tort may have a deterrence effect. The limitations of this solution should not be interpreted as a reason to write it off, but rather as cause for legislatures to enact a medley of laws that together provide sufficient protections and remedies for kidfluencers.

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297. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (describing narrow tailoring).

298. *King v. Governor of N.J.*, 767 F.3d 216, 239–40 (3d Cir. 2014).

299. See Kaslow, *supra* note 294, at 154–55 (discussing the “seeds of discontent” evident in inter-family lawsuits).

## CONCLUSION

Protecting children must come with a recognition that parents sometimes act in ways that harm their children. The act of sharenting can have ripple effects throughout a kid's entire life, preventing them from even forming their own sense of identity. To allow children to be children is to give them the freedom to construct their own path, make their own mistakes, and grow. Parents must share content about their kids responsibly to ensure that children can be themselves, un beholden to the judgements and expectations of the internet. The solution proposed in this Note would curb the incentives parents have for posting content beyond what is acceptable to share on social media and provide adult-children redress for the childhood they never got.