Don't Forget to Like, Follow, and Regulate: An Argument for the Expansion of Protections for Child Social Media Influencers

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DON’T FORGET TO LIKE, FOLLOW, AND REGULATE: 
AN ARGUMENT FOR THE EXPANSION OF PROTECTIONS FOR 
CHILD SOCIAL MEDIA INFLUENCERS

Caroline Waldo*

ABSTRACT

Child social media influencers, colloquially known as “kidfluencers,” have skyrocketed to fame alongside the growth of social media. However, traditional child labor laws do not consider online influencing “work” or these kids to be “child performers.” Thus, these children do not receive any form of legal protection for their presence online, leaving them open to exploitation and severe harms. This Note explores the lack of protection provided to kidfluencers, ultimately proposing a new federal labor law to expand child actor protections to kidfluencers. Part I of this Note provides a brief history of the landscape by reviewing landmark Supreme Court cases on the rights of the child, detailing the introduction of child labor laws and child actor protections, and surveying the meteoric rise of social media and “family vlogging” in the field of child labor. Part II explores the potential harms that kidfluencers could face due to the lack of regulation in the “family vlogging” field. Part III proposes a reform for the current legal schema to protect child influencers, ultimately culminating in a new federal labor law expanding current protections to protect child actors and introducing a privacy aspect to preserve children’s right to consent.

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“The advent of social media made it possible for anybody to
become a small-scale celebrity of sorts. The problem there is that your
babies, and your children, are endemic to your brand... [T]hey are your
product.”

— Amanda Montell and Isa Medina

INTRODUCTION

“To any parents who are considering starting a family vlog or monetizing
your children’s lives on the public internet, here is my advice. You
shouldn’t do it.” So begins an anonymous letter written by the teen child
of a popular social media “family vlogger” family and sent to TikToker
Caroline Easom. In her open letter, the teen writes about the struggles

3. Id. at 0:28.
children who are the faces of a social media brand experience: any money that the family gets “will be greatly overshadowed by years of suffering and very hard work for you and your child to keep up with trends and media, and if you do manage to do it, your child will never be normal,” and that “[she’s] been an employee since [she] was five, and [she] hate[s] it.” Of course, the reason this teen could share her letter anonymously and without being immediately recognized is because she is not in a unique situation.

Search “family vlogger” online and you will be bombarded with the names of social media stars and channels: the LaBrant Family, the ACE Family, the Bee Family, the Daily Bumps. All of these families have millions of followers on their social media pages, which focus primarily on their children. In recent years, countless kids have risen to internet stardom on social media and have been deemed “kidfluencers.” It is no surprise that these kids have gone viral: kids have delighted audiences from the big screen to the small screen for generations. From early child stars like Jackie Coogan of Charlie Chaplin movie fame and the incomparable Shirley Temple to the exceptional popularity of reality shows like Jon & Kate Plus Eight and Dance Moms, the use of kids as entertainment has grown and evolved alongside our preferred means of entertainment. But the labor laws that were meant to protect these child stars have not kept up with this evolution.

4. Id. at 0:54–1:05, 2:17–2:20.
9. See The LaBrant Fam, supra note 5; The ACE Family, supra note 6; The Bee Family, supra note 7; Daily Bumps, supra note 8.
This Note explores the lack of protection provided to kidfluencers through a look at the history and current legal landscape of child labor laws and its interaction with the constantly evolving field of entertainment. Part I provides a brief history of the landscape by reviewing landmark Supreme Court cases on children’s rights, detailing the introduction of child labor laws and child actor protections and surveying the meteoric rise of social media and “family vlogging” in the field of child labor. Part II explores the potential harms that kidfluencers face due to the lack of regulation in the “family vlogging” field. Part III proposes a reform for the current legal schema to protect child influencers, ultimately culminating in a new federal labor law expanding current protections to protect child actors and introducing a privacy aspect to preserve children’s right to consent.

I.  BACKGROUND: RIGHTS OF THE CHILD FROM THE FACTORIES TO FACEBOOK

Before discussing the legal schema surrounding child influencers, this Note briefly covers the history that created the child labor laws that stand today. This Part details some of the Supreme Court cases that set lasting precedent in the recognition of rights to control decisions about a child. It then reviews the history of U.S. child labor laws and the effect of the rapid growth of social media.

A.  Defining the Rights of Parent vs. State vs. Child

The legal landscape surrounding children’s rights is complex: laws governing children must balance parental rights against children’s right to autonomy and the state’s responsibility to attend to children’s best interests. While parental rights usually carry the most weight, the exact scope of those rights has been consistently litigated. Many early cases have become lasting precedent for determining the ownership of each right.

Historically, courts have granted much deference to parents to make decisions on behalf of their children. One of the most enduring cases highlighting the power of parents is Meyer v. Nebraska, which established the parental right to determine the education of one’s children. In


Meyer, the Supreme Court invalidated a Nebraska law banning the teaching of foreign languages to schoolchildren, finding that the law violated the Fourteenth Amendment’s due process clause. The Court recognized a liberty interest in parents providing an education for their children and found that the law infringed on that interest without a proper “police power” rationale.

Pierce v. Society of Sisters has become another important Supreme Court precedent for the rights of parents to educate their children. The Court unanimously upheld a lower court ruling that an Oregon law requiring all children to attend public school deprived private school owners of their property without due process of law and interfered with the liberty of parents to choose schools for their children. Citing Meyer for the principle that parents could “direct the upbringing and education of [their] children,” the opinion stated that the state had no power to “standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

In Troxel v. Granville, the Supreme Court built on the foundation of Meyer and Pierce. Here, the Court held that “the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” The majority stated that “… it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” Troxel thus requires courts to give “special weight” to parents’ decisions. The “special weight” requirement allows for deference provided to the parent’s wishes, and can be overcome only by a compelling governmental interest and clear factual circumstances supporting that interest.

14. Id. at 399–403.
15. Id. The “police powers” refers to the concept of the “powers to regulate public welfare and morality” that are reserved for the states by the 10th Amendment. Am. 10.3.2 State Police Power and Tenth Amendment Jurisprudence, Const. Ann., https://constitution.congress.gov/browse/essay/amdt10-3-2/ALDE_00013622/ [https://perma.cc/NT6B7-3CLH] (last visited Nov. 3, 2023).
17. Id.
18. Id. at 534–35.
20. Id. at 65.
21. Id. at 66.
22. Id. at 70.
Legal deference to parental rights extends beyond parenting decisions. Some states have laws that explicitly give parents the right to their children’s earnings—such as Michigan, which has a state law enumerating that the “parents of an unemancipated minor are equally entitled to the custody, control, services and earnings of the minor.”

Although parents have broad discretion in making parenting decisions, courts have held that their discretion is not unlimited. Parents’ rights to make decisions regarding the care, custody, and control of their children have always come secondary to an important or “compelling” state interest in protecting the welfare of children. The landmark case Prince v. Massachusetts showcased the power of the state in regulating child labor. In Prince, the guardian of three children allowed them to sell magazines on the street, arguing it was a form of preaching and therefore a lawful exercise of her freedom of religion. The Supreme Court upheld a Massachusetts regulation that prohibited boys younger than age twelve and girls younger than age eighteen from selling newspapers in streets and public places, finding it did not violate the First Amendment’s free exercise of religion clause. In his majority opinion, Justice Rutledge recognized that past cases had established the rights of parents and children to practice religion, but pointed to laws requiring compulsory vaccination as an indication that such freedom was not intended to be absolute. He noted that, although adults had the right to make martyrs of themselves, they had no similar right to make martyrs of their children.

While courts and legislatures have recognized the power of parents and the state, some argue that certain rights should be reserved for the children themselves. The landmark Supreme Court case Wisconsin v. Yoder addressed the constitutional balance between state police power (a Wisconsin compulsory education statute) and parents’ right to educate their children in conformity with their religious beliefs. In Chief Justice Burger’s majority opinion, he noted: “[H]owever strong the State’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.” But

25. Leah A. Plunkett, Parenthood: Why We Should Think Before We Talk About Our Kids Online 137 (David Weinberger ed., 2019).
27. Id. at 162.
28. Id. at 166–67.
29. Id. at 166.
30. Id. at 170.
32. Id. at 215.
Justice Douglas’s dissent in part in this case left a lasting legacy in the fight for children’s rights. Douglas argued that, in some matters, the child’s opinion should be raised.\textsuperscript{33} He noted that “[T]he Court’s analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. . . . Our opinions are full of talk about the power of the parents over the child’s education. . . . Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.”\textsuperscript{34} Douglas continued that “[O]n this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views.”\textsuperscript{35} While his dissent was not legally binding, it laid the groundwork for the argument that on matters where the children’s life and future are critically affected, the child themselves should have the right to be heard.

B. The Introduction of Child Labor Laws

In 1938, Franklin D. Roosevelt signed the Fair Labor Standards Act (FLSA).\textsuperscript{36} FLSA was enacted to eliminate working conditions detrimental to the health and well-being of workers—thus, along with introducing the forty-four-hour workweek and designating a twenty-five-cent per hour minimum wage, FLSA marked the first federal regulation of child labor.\textsuperscript{37} However, FLSA was not an all-encompassing ban. FLSA, which is still the main piece of federal legislation on child labor, bans only “oppressive child labor,” defined as:

\begin{quote}
\ldots a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between
\end{quote}

\begin{flushright}
\textsuperscript{33} Id. at 244.
\textsuperscript{34} Id. at 241–43.
\textsuperscript{35} Id. at 244.
\end{flushright}
the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children’s Bureau in the Department of Labor [Secretary] shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children’s Bureau [Secretary] certifying that such person is above the oppressive child-labor age. . . . 38

FLSA and other federal regulations provide exceptions to this ban, including “[A]ny child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions,” 39 as well as an exception for parents employing their own children. 40

C. Growth of Child Actor Labor Laws

Given that child acting is expressly permitted in federal child labor regulations, before long it became evident that child actors needed additional protections. The laws protecting child actors are known as Coogan Laws. Coogan Laws were named after the tragic story of Jackie Coogan, California’s first “child star” who performed during the silent film era with Charlie Chaplin and earned millions. 41 After turning 21, Coogan learned all the money he had earned belonged to his parents. The lawyer representing Coogan’s mother declared, “The law is on our side, and Jackie Coogan will not get a cent from his past earnings.” 42 Although he filed a lawsuit to recoup his earnings, Coogan ended up with a settlement of only $35,000. 43 Coogan Laws therefore require parents to

40. 29 C.F.R. § 570.126 (2022).
42. Id.
43. Id.
set aside a percentage of a child performer’s earnings in a blocked trust (now known as a Coogan Account) where it must remain untouched until the child reaches adulthood, as well as requiring state courts to ratify the contracts of child performers.\textsuperscript{44}

Notably, however, Coogan Laws have not been enacted federally—currently, Coogan Accounts are only required by California, New York, Illinois, Louisiana, and New Mexico.\textsuperscript{45} Other legal protections that followed include: requiring child performers to obtain work permits; regulations that limit children’s working hours; requiring “rest and recreation” time on set; and mandating that “work not interfere with their education.”\textsuperscript{46} The film’s producers are accountable for preserving the “health, welfare, safety and moral well being [sic] of the children” on set, including “screening the backgrounds of the cast and crew and ensuring the children are not exposed to age-inappropriate sex or violence.”\textsuperscript{47}

However, even with the Coogan Act, these laws are flawed. There have been many cases of children exploited by their parents in the entertainment industry,\textsuperscript{48} most recently brought back into the spotlight with Jennette McCurdy’s memoir I’m Glad My Mom Died.\textsuperscript{49} In this memoir and in interviews following, McCurdy details the abuse she suffered when her mother forced her to become a child star.\textsuperscript{50} McCurdy even claims she never received the money from her Coogan Account due to paperwork filing errors.\textsuperscript{51}

\textbf{D. The Social Media Boom and the Growth of Family Vloggers}

Of course, film and television are no longer the only places where children can get famous. With the meteoric rise of the internet and social

\begin{itemize}
  \item \textsuperscript{46} Wong, supra note 44.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} See Diana Pearl, 10 Stars Who Tried to ‘Divorce’ Their Parents, PEOPLE (June 16, 2015, 5:50 PM), https://people.com/celebrity/stars-emancipated-from-their-parents-drew-barrymore-macaulay-culkin/ [https://perma.cc/AA8E-VEU7].
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} See Iced Coffee Hour, Jennette McCurdy NEVER Got Paid From iCarly, YouTube (May 26, 2022), https://www.youtube.com/watch?v=hkr4RvWszHU [https://perma.cc/54RG-8HJ4].
\end{itemize}
media sites, children no longer need to attend auditions and get cast to perform. The phenomenon of “family vlogging” took off when Idaho father Shay Butler began uploading videos of his children in 2008.52 The vlogs took the Butler family from living on food stamps to millionaire status, turning the family into a fully-fledged brand that included endorsement deals with Band-Aid and Target, and even the creation of their own clothing line.53 While the Butler family is the original success story, it is far from the only one—“in 2017, New York Magazine reported that the top family vlogs brought in half a billion views a week, and millions of dollars in revenue.”54 This trend has become known as “commercial sharenting,” where parents use their families’ experiences—with a focus on their kids—in an attempt to make money.55 This money can come in a variety of forms, including immediate compensation, development of business interests for future compensation, or other current/potential revenue generation, and from an array of sources, including marketing agreements with businesses to promote a given product or service and other partnerships or deals, such as the YouTube Partner Program.56 This extrinsic motivation of monetary gain has contributed to the increase in family vlogging. In fact, “one former family vlogger stated in a YouTube interview that brands will pay better if children are part of the promotional content.”57 A 2019 Pew Research Center report confirmed this, revealing that videos with children under thirteen years old garner three times more views.58 One of the most well-known of these children is Ryan Kaji, who became one of the highest-paid stars on YouTube due to the success of his online show Ryan’s World, which “features him unboxing toys on camera for his elementary-aged audience.”59 In 2017, Kaji, at the age of six, became the youngest person to ever make a Forbes

55. Plunkett, supra note 25, at 55.
56. Id.
59. Wang, supra note 54.
top earners list, earning $11 million from the videos his parents uploaded to YouTube. Like many trends that blow up overnight, family vlogging was hit with a series of controversies that caused a period of stagnation. The Butler family (colloquially known on YouTube as the “Shaytards”) postponed their videos in 2017, when Shay entered a rehabilitation program, and then again in 2019, due to a cheating scandal between Shay and his wife, Collette. The fall of other well-known family vloggers, such as the ACE Family, 8 Passengers, and DaddyOFive exemplified this downfall. A defining moment occurred in 2021, when Jordan Cheyenne, a single parent and fairly successful “mommy vlogger,” went viral after an unedited portion of a vlog about her dead dog “revealed her coaching her seemingly distressed young son into posing for a sad thumbnail for the vlog.” “Look like you’re crying,” she said at one point in the video. “I am crying,” the child said in response.

However, simultaneous with the fall of the long-form YouTube family vlogger came the rise of the TikTok empire. In 2018, a Chinese tech company acquired TikTok (previously an app called Musical.ly) and merged it with its own lip-synching app. By 2020, TikTok skyrocketed to the most-downloaded app of the year. TikTok users were quick to follow the paths of their YouTube predecessors and figured out what earned the most views: kittens, puppies, and children. The short-form content of TikToks makes it easy for the videos to go viral overnight, turning what might have been intended as a cute video for family and friends into a potential money-making empire. The kidfluencers have bloomed.

61. Wang, supra note 54.
63. See May, supra note 57.
65. Id.
on TikTok, with famous “TikTok babies” like Scout and Violet, Franklin, Abby, Lena, and their parents\(^69\) gaining millions of followers each, and even inspiring content like quizzes to find out which famous TikTok baby matches your personality.\(^70\) As TikTok comedian Caroline Easom, who has repeatedly attempted to bring attention to this issue, noted, “I think before it was, like, these outlier YouTube families. Now, with TikTok, you’ve got so many more people trying their hand at becoming social media famous via their children, and so many more people seeking social media validation via their children.”\(^71\)

II. THE PROBLEM: OUTDATED LAWS LEAVE KIDFLUENCERS UNPROTECTED

The few child labor laws that are on the books have not kept up with the rise of social media and the transformation in what constitutes “work.” This Part discusses how kidfluencers, a concept that was unthinkable at the time FLSA was written, have been left out of labor laws and left unprotected. It then covers the harms that these children face acting as influencers without legal protection, including wage exploitation, lack of workplace regulations, and lack of consent to the information shared about them. The final section of this Part provides an overview of the long-lasting repercussions that these harms could have on kidfluencers.

A. Transforming Entertainment vs. Stagnant Regulations

There is a long history of children being the main income earners for their household. Shirley Temple supported a household of twelve (including her parents); Macaulay Culkin was the primary source of income for his parents for years; and Gary Coleman of Diff’rent Strokes was forced to sue his parents in order to regain millions of dollars of his

\(^{69}\) Tori Murphy, Our Favorite TikTok Babies!, AFTERBUZZTV (Jan. 15, 2022), https://www.afterbuzztv.com/our-favorite-tik-tok-babies/ [https://perma.cc/KQB7-LZC6].

\(^{70}\) Andria Moore, These 5 Babies Took Over TikTok In 2021 — Which One Are You?, BUZZFEED (Dec. 16, 2021), https://www.buzzfeed.com/andriamoore/which-2021-tiktok-baby-matches-your-personality [https://perma.cc/A4KC-PERH].

\(^{71}\) Taylor Lorenz, There Are Almost No Legal Protections for the Internet’s Child Stars, WASH. POST (Apr. 10, 2023, 6:00 AM), https://www.washingtonpost.com/technology/2023/04/08/child-influencers-protections-congress/ [https://perma.cc/T8M4-QF93].
However, with the rise of the internet, it has never been so easy for parents to monetize their children without legal oversight.

When FLSA and Coogan Laws were passed, defining a child performer was more straightforward. Smartphones and social media did not exist, and child performers were limited to traditional forms of media: film, television, and radio. Children who wanted to get into “the business” faced roadblocks to doing so, including moving to areas where movies or shows were filmed, auditioning, and spending time in studios. Yet, with the meteoric growth of phone cameras, anyone can be a celebrity, or at the very least a micro-celebrity. Social media users have fewer barriers between them and their audience than most traditional entertainment paths. You do not need to be in a certain location or have the knowledge and socioeconomic status to obtain an agent; all you need is a smartphone and an internet connection. Child labor laws must be amended to catch up with the twenty-first century’s staggering technological advances.

The current system of child labor laws contains a fundamental oversight in the definition of what it means to perform “labor” in this day and age. Traditional child labor laws do not even extend to the children featured on reality TV shows. Since reality television has been defined as a “hybrid of docu-style filmmaking and dramatic storytelling,” producers can skirt child labor laws by claiming the children are “participants in documentary style programs and not employees.” As documentaries are unscripted, producers further argue that children on reality shows are being documented, not directed as child actors are, allowing production companies to bypass child labor laws and effectively creating a “legal grey zone.” The current legal standard around child influencers seems destined to go down the same path as child reality TV stars. Just like child reality stars, kidfluencers will be forgotten by the legal system that assumes their actions do not constitute acting, and thus should not be regulated as “work.” This outdated understanding of work and who is an “employer” and an “employee” under FLSA does not

73. ALICE E. MARWICK, STATUS UPDATE: CELEBRITY, PUBLICITY, AND BRAND IN THE SOCIAL MEDIA AGE 114 (New Haven: Yale Univ. Press, 2013) (observing that being a micro-celebrity is “a state of being famous to a niche group of people, but it is also a behavior: the presentation of oneself as a celebrity regardless of who is paying attention”).
74. See Wong, supra note 44.
76. Tacher, supra note 75, at 493.
77. Id. at 498.
recognize that a parent monetizing their child’s life and personal data can be that child’s employer.\textsuperscript{78} At the moment, a child influencer’s only form of legal recourse is to sue their parents once they reach the age of eighteen.\textsuperscript{79}

B. Dangers that “Kidfluencers” Face

1. Wage Exploitation

Make no mistake: these kids are not making lemonade-stand-level money. Brands have taken notice of the popularity of child influencers, and they are all in, flocking to the family vloggers, and specifically the children, to advertise their products.\textsuperscript{80} Brands from Crayola to Carnival Cruise Line\textsuperscript{81} are shelling out for kidfluencer promotions, with one parent reporting brands paying between $10,000 to $15,000 for a promotional Instagram post, around $45,000 for a sponsored YouTube video, and anywhere between $15,000 and $25,000 for a thirty- to ninety-second “shout-out” in a longer video.\textsuperscript{82} And any brand can reach out to a kidfluencer for a promotion deal. Although the Federal Communications Commission limits product placement and promotions on children’s television, the internet has no such limitations.\textsuperscript{83}

So where does this money go? Although multiple states have Coogan Laws that protect the income of child performers,\textsuperscript{84} kidfluencers are not covered by Coogan Laws. With no law currently outlining protections for minors earning income in social media,\textsuperscript{85} everything depends on the parents, including the child’s ability to access their wages, or whether any wages are saved for the child at all. Without any protections, these children whose lives have become work stand to lose thousands, if not

\textsuperscript{78} See Podlas, supra note 39, at 44–46.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} See Membership & Benefits: Coogan Law, supra note 45 (describing the Coogan Law protections that California, New York, Illinois, Louisiana, and New Mexico have implemented).
\textsuperscript{85} Lambert, supra note 79.
millions, to their own parents.\textsuperscript{86} For many of them, it seems like they already have. Parents are becoming de facto managers for their children. There are innumerable stories of parents who have quit their jobs to pursue influencing full-time, subsidized by revenue from their children’s social media.\textsuperscript{87} It would be naive to presume that all parents have their children’s best interests in mind. The story of Jackie Coogan speaks to the dangers that could ensue.\textsuperscript{88} Toxics and abusive parenting has been similarly well documented in the family vlogger landscape.\textsuperscript{89} Leaving the money that these children are rightfully earning in the hands of their parents and hoping it will be protected simply is not enough.

2. Unregulated “Workplaces”

Typical child actors are shielded by a complex patchwork of state and federal labor laws, including strict regulations for their time on set.\textsuperscript{90} Various elements of these protections (including the exact amount of time on set and how that time must be spent) vary depending on the state

\textsuperscript{86} Id.

\textsuperscript{87} See, e.g., Katherine Rosman, Why Isn’t Your Toddler Paying the Mortgage?, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/style/viral-toddler-videos.html [https://perma.cc/42QC-2M5H] (stating that “[Katie Stauffer, mother of kidfluencers Mila and Emma] wouldn’t detail exactly how much money the children are bringing in, but . . . [that] she was recently able to leave her position as an escrow officer after 12 years, much to the relief of herself and her husband, a doctor.”); Talia Spillerman, Opinion | TikTok Babies Are a Dilemma With No Clear Answer, PITT NEWS (Apr. 6, 2022), https://pittnews.com/article/172744/opinions/opinion-tiktok-babies-are-a-dilemma-with-no-clear-answer/ [https://perma.cc/CME3-CAUX] (stating that “[twins Scout and Violet]’s mother, Maia Knight, films the twins almost every day and discusses her challenges raising them as a single mom. As these videos gained popularity, Knight’s social media turned into her full-time job—allowing her to financially support her daughters while spending time with them at home”); Wong, supra note 44 (stating that “Ami [McClure, the mother of twins Alexis and Ava] and her husband, Justin, quit their jobs last year to manage their daughters’ careers full time...”).

\textsuperscript{88} Supra Section I.C.


that filming is completed in, as well as the performer's age.\textsuperscript{91} Child actor laws require a minor’s hours on set to be divided between work time (which includes the time spent performing on set, make-up, and wardrobe), school time (hours spent with an on-set tutor or otherwise keeping up with their education), and recreation time.\textsuperscript{92} However, kidfluencers have none of these protections. Their parents serve as the directors, producers, film crew, and talent managers, and as such have full control on how and when filming is completed. As noted by Karen North, a clinical psychologist and professor of communication at the University of Southern California who studies social media, “When kids go on set for TV or film there are a lot of rules. There are no rules yet for what you can do in the privacy of your own home.”\textsuperscript{93}

The legislature and courts in the United States have long bowed to the privacy-centric belief that your “home is your castle.”\textsuperscript{94} But in the case of influencers, and specifically commercial sharenting, where the job has invaded the home, where is the line? Family vloggers like Shay Carl have repeatedly filmed and monetized content, openly inviting viewers into the “sacred” family home, posting long vlogs including family Christmases and birthdays.\textsuperscript{95} When parents break the barrier between the home and the outside world by filming and sharing their family for profit, they invite an audience. We can draw the line here while still respecting the deference the legal system currently grants parents. Although some may still view this approach as too much government regulation, the law must account for when the parent breaks the home’s privacy barriers by filming and sharing their family for profit.\textsuperscript{96}

3. Lack of Consent in Information Sharing

Children have no legal rights when it comes to the choices that their parents make in sharing information about them.\textsuperscript{97} As Leah Plunkett, the

\begin{enumerate}
\item Id.
\item Id.; see also Exhibit G Timesheet, SAG-AFTRA, https://www.sagaftra.org/exhibit-g-timesheet [https://perma.cc/PW67-F8YR] (demonstrating that for SAG productions, hours are recorded via a form which includes a specific column for “Minors Tutoring Time”) (last visited Apr. 30, 2023).
\item See Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. Rev. 1335, 1359 (1992).
\item See Barilla, supra note 62.
\item Zoom Interview with Leah A. Plunkett, Meyer Resh. Lecturer on L., Associate Dean of Learning Experience and Innovation, and Exec. Dir. of Harvard L. Sch. Online at Harvard L. Sch. (Apr. 4, 2023). See infra Section III.
\item Plunkett, supra note 25, at 88.
\end{enumerate}
Meyer Research Lecturer on Law, Associate Dean of Learning Experience and Innovation, and Executive Director of Harvard Law School Online at Harvard Law School, notes, “The law provides superprotection for parents’ decision-making authority over their children’s lives and futures . . . and they get to decide which intimate information about what happens in the home gets shared outside the home. The law assumes that they will do a good job.” Meanwhile, many parents seem not to hesitate about sharing their children’s data; according to a study by Parent Zone, the average child has 1,500 photos of them posted online by age five.

This may seem harmless, even positive—what’s the harm of posting pictures of your child for your extended family to see, or commiserating about your parenthood struggles with others going through the same issues? However, this account fails to recognize the child’s autonomy. Many of these children simply are not asked if they want their data—whether it is in the form of pictures of them on Facebook, online threads of funny stories, or YouTube videos of their tantrums—shared. Researchers at the University of Washington and University of Michigan studied 249 parent-child pairs across forty states. Their study found that, “while children ages ten to seventeen ‘were really concerned’ about the ways parents shared their children’s lives online, their parents were far less worried.” In fact, “about three times more children than parents thought there should be rules about what parents shared on social media.” This data is reiterated over and over again through stories of kids whose parents have bought into the “sharenting” design of parenting. Maisy Hoffman, an eighth grader in Manhattan, wrote that she “really doesn’t like it when my parents post pictures of me on their social media accounts, especially after finding out that some of my friends follow them. … [Her dad] doesn’t always ask if he can post things, so I immediately turn away and ask if he’s going to post it. Or I’ll find out later because my friend saw something of me on his Instagram and I’ll have to ask him to take it down.”

This lack of consent is even more problematic in the realm of commercial sharenting. The intimate details of children’s lives and childhoods are published not only for family and friends, but also for the world to see in

98. Id. at 79.
99. May, supra note 57.
100. Alex Hiniker, Sarita Y. Schoenebeck, & Julie A. Kientz, Not at the Dinner Table: Parents’ and Children’s Perspectives on Family Technology Rules, CSCW ’16, Feb. 2016, at 1376, 1376.
102. Id.
103. Id.
an income-seeking endeavor. In commercial sharenting, kids are filmed and monetized without their consent—oftentimes when they are too young to even protest. In an anonymous letter published on TikTok, the teen child of a popular social media “family vlogger” family wrote:

\[\text{... Because I’m in too deep, there’s no going back now, and I never consented to being online. I wouldn’t have been able to anyway, I was two or three when I went viral for the first time, and now there’s things I just can’t do. There are several things about me and my identity that the world isn’t allowed to know, because I don’t choose what content my parents post, the channel isn’t mine. Again, they’re the boss and I’m the employee.}^{104}\]

Zoe Killen, one of the children featured on her mother’s YouTube channel The Killen Clan (now known as The Circuses),\(^{105}\) noted, “[t]here were times when I was a lot younger that I didn’t want to be filmed but I couldn’t verbalise [sic] that.”\(^{106}\) Her younger sister Piper added, “I used to feel like we were characters in a snow globe and the rest of the world was just outside looking in...”\(^{107}\) The current legal framework must be amended to ensure that children have autonomy over their own digital footprint.\(^{108}\)

4. Future Repercussions of the Unconsented-To Digital Footprint

The extent of parental control over their child’s privacy and life online can also have unintended consequences. A short film about sharenting published by the New York Times aptly observes that this is the “first generation to inherit a social media presence, and privacy risks, they didn’t ask for.”\(^{109}\) As noted by Stacey Steinberg, a legal skills professor and associate director of the Center on Children and Families at the University of Florida Levin College of Law, “[p]arents often intrude on a child’s digital identity, not because they are malicious, but because they haven’t considered the potential reach and the longevity of the digital

\(^{104}\) Easom, supra note 2.


\(^{106}\) Tait, supra note 52.

\(^{107}\) Id.

\(^{108}\) See infra Section III.

information that they’re sharing.”\textsuperscript{110} A study by Barclays estimates that by 2030, “sharenting” will play a role in two-thirds of identity fraud cases facing this generation.\textsuperscript{111} These parents are also unintentionally risking opening up their children to “data broker profiling, hacking, facial recognition tracking, pedophilia, and other privacy and security threats.”\textsuperscript{112}

Aside from the tangible threats to children’s data and wellbeing, sharenting also has a social impact on the child. “As these children come of age, they’re going to be seeing the digital footprint left in their childhood’s wake,” Steinberg said.\textsuperscript{113} “While most of them will be fine, some might take issue with it.”\textsuperscript{114}

Internationally, at least one lawsuit over social media overshar ing has arisen: in 2020, a Dutch mother sued her child’s grandmother to remove pictures of her child from Facebook.\textsuperscript{115} The court sided with the mother, requiring the grandmother to take down the pictures, pay court costs, and face fines if the photos were not promptly removed or if they were reposted later.\textsuperscript{116} In the words of the mother, posting the child’s pictures on social media would “seriously violate their privacy.”\textsuperscript{117}

In the United States, although there is not yet grounds for such social media lawsuits, other privacy litigation related to nonconsensual sharing of children’s images has taken place. Take, for example, the case of Spencer Elden v. Nirvana, LLC, colloquially known as the “Nirvana baby” lawsuit.\textsuperscript{118} In 1991, Nirvana released its debut album Nevermind, whose cover (potentially one of the most iconic album covers of all time) famously features a photo of four-month-old Spencer Elden swimming nude in a pool and reaching for a dollar bill.\textsuperscript{119} Elden sued Nirvana in

\begin{itemize}
\item \textsuperscript{110} Dell’Antonia, supra note 101.
\item \textsuperscript{112} Coughlan, supra note 111.
\item \textsuperscript{113} Dell’Antonia, supra note 101.
\item \textsuperscript{114} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Rose Roobeek & Rob Picheta, Grandmother Must Delete Facebook Pictures Posted Online Without Permission, Court Rules, CNN (May 22, 2020, 12:05 PM), https://www.cnn.com/2020/05/22/europe/netherlands-grandmother-facebook-photos-scli-intl/index.html [https://perma.cc/5YHK-PFHY].
\item \textsuperscript{119} Jenny Desborough, The Story Behind the Baby on Nirvana’s ‘Nevermind’ Album Cover, NEWSWEEK (Aug. 25, 2021, 4:22 AM), https://www.newsweek.com/story-behind-baby-nirvana-
2021, claiming that the image, “with his naked genitals displayed while grabbing at money resembles the actions of a sex worker” and that the cover was a gimmick to “garner attention by using a sexually explicit image that intentionally focused on Spencer’s . . . genitals.” Elden argued that, by distributing this image, the band violated numerous child pornography statutes. Unfortunately for Elden, the court ruled that the case was time-barred by the statute of limitations and subsequently dismissed it. However, since the case was not dismissed on the merits, it leaves open the possibility that kids who go viral will grow up, develop their own opinions on the images or other media that cause them to go viral, and potentially pursue litigation. The United States must create a legal basis providing these kids grounds to sue to remove their images and protect their digital footprint.

III. THE REFORM: A NEW PROBLEM REQUIRES NEW LEGISLATION

A. Need for New Federal Legislation

Without existing federal protections extending to social media, kidfluencers are falling through the cracks of an outdated patchwork of state and federal labor laws. As social media continues to take over the entertainment world, direct action must be taken by the legislature to ensure that these kids are provided with appropriate safeguards to protect their income and their digital identities. A simple expansion of current child actor laws will not be enough: this new legislation must address each of the novel and complex issues regarding privacy and social media that so-called “typical” child actors might not have to deal with. Therefore, this Part argues for the creation of a two-part solution: (1) amending FLSA to include social media influencing in the definition of work and nationalizing Coogan Laws, and (2) creating a national “right to erasure” that would allow kids (once they reach age eighteen) to

nevermind-album-cover-spencer-elden-baby-16227754.jpg...text=Elden%20was%20four%20months%20old,Weddle%20behind%20the%20iconic%20image[https://perma.cc/R4XN-7YJY].
122. Id.
instruct social media platforms to delete media of them that was posted without their consent.

1. Amending FLSA and Nationalization of Coogan Laws

A first step for this new federal legislation should include updating FLSA. As currently written, FLSA does not encompass kidfluencers. FLSA must be amended to expand the definition of “child performer” to incorporate minors that provide entertainment via social media platforms such as Instagram, YouTube, and TikTok. Even though kidfluencers would fall under the “child actor” FLSA exemption, expanding the definition of “work” would provide an important basis for other potential child social media star protections. Including filming for social media platforms as a form of labor would rebut the argument that all the kids are doing is having fun, and thus they are not working.123

To prevent wage exploitation by their parents, this new federal legislation should include a provision based on the precedent set by the Coogan Laws. Coogan Laws are incorporated state by state—124—but the ubiquitous nature of social media and lack of traditional boundaries to entry make it clear that a statewide approach will not be enough.

Two recent attempts have been made to nationalize Coogan Laws into FLSA, in 2005 and 2015. In 2005, Representative Mark Foley (R-FL) introduced the bipartisan Child Modeling Exploitation Prevention Act.125 This bill defined exploitative child modeling as “modeling involving the use of a child under 17 years old for financial gain without the purpose of marketing a product or service other than the image of the child,” noting that such term applies to any such use, “regardless of whether the employment relationship of the child is direct or indirect, or contractual or noncontractual, or is termed that of an independent contractor.”126 While the bill did not directly address the issue of kidfluencer protection, it was a first step in acknowledging the issues that some working children faced, and in suggesting that FLSA could be a solution.

123. See Mooney, supra note 93 (stating that “[s]ome kid influencers’ parents, who in many cases are their children’s managers, don’t see the need for more regulations. They say it’s a family endeavor, their kids are having fun, and it should not necessarily be considered ‘labor’”).
124. See Membership & Benefits: Coogan Law, supra note 45.
126. Id.
The second attempt was in 2015, when Representative Grace Meng (D-NY) introduced the Child Performers Protection Act of 2015.\textsuperscript{127} This bill would have “create[d] the first federal [workplace] protections for children who work as actors and models in the film, television and modeling industries” by expanding the protections of state Coogan laws into federal baseline provisions for child performers.\textsuperscript{128} These protections included: capping the number of hours that child models and actors could continuously work based on age; requiring that compensation be provided in cash wages; requiring that 15 percent of a child’s earnings be placed in a trust account until the child turns eighteen; and creating a private right of action for kids who are sexually harassed.\textsuperscript{129} In her press release regarding the bill, Representative Meng noted:

Working as a child model or actor can be an incredible opportunity, and lead to success for a lifetime. However, the work can come with much risk. Sometimes kids are asked to undress in front of others or are put in compromising positions at a young age. Some reality shows have children being filmed while changing clothes or going to the bathroom. Young performers can also have their earnings taken by their parents, leaving them with nothing when they turn 18. Although there are a patchwork of disparate state laws, these regulations offer inconsistent protections. That’s why we need a national standard; a federal law that would finally ensure that children in acting and modeling are adequately protected.\textsuperscript{130}

Unfortunately, neither bill made it out of its subcommittee.\textsuperscript{131} Today, there seems to be no upcoming legislation that will address this issue.

However, the lack of federal child influencer protections must be addressed at the federal level: without them, kidfluencers nationwide face potential harms. Other countries have already seen the harms of unregulated child influencing and have taken the first steps to rectify

\textsuperscript{127} Child Performers Protection Act of 2015, H.R. 3383, 114th Cong. (as referred to the H. Subcomm. on Workforce Prot., Nov. 16, 2015).


\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{131} See Child Modeling Exploitation Prevention Act, H.R. 1142, 109th Cong. (as referred to the H. Subcomm. on Workforce Prot., Apr. 18, 2005) (showing that the last bill activity was its referral to subcommittees); Child Performers Protection Act of 2015, H.R. 3383, 114th Cong. (as referred to the H. Subcomm. on Workforce Prot., Nov. 16, 2015) (showing that the last bill activity was its referral to subcommittees).
them: for example, on October 6, 2020, the French National Assembly 
unanimously adopted a new law on the commercial use of images of 
children under the age of sixteen on online platforms, protecting child 
influencers under the French Labor Code in a manner akin to child models or 
FLSA to encompass child social media stars and expanding the Coogan 
Laws nationally, Congress can take the first step in protecting children 
from exploitation by their parents.

2. Right to Erasure

Another aspect of this proposed federal legislation should be a 
privacy component based on France’s “right to erasure,”\footnote{Kerry Breen, \textit{New Law Aims to Protect Finances, Privacy of Child Social Media Stars}, \textit{Today} (Oct. 9, 2020, 6:43 PM), \url{https://www.today.com/parents/law-protects-finances-privacy-child-social-media-stars-t193881} [https://perma.cc/MR8G-ZNTH].} also known as 
“right to deletion.” This law ensures that, once child influencers are old 
enough to understand the implications of their parents’ social media on 
their digital footprint, social media platforms will be obliged to take 
down content at the child’s request.\footnote{Id.} The “right to erasure” is based on 
the legal concept of the “right to be forgotten,” which has been recog-
nized across the European Union.\footnote{David L. Hudson Jr., \textit{Right to Be Forgotten}, \textit{Free Speech Ctr. Middle State Tenn. Univ.}, \url{https://www.mtsu.edu/first-amendment/article/1562/right-to-be-forgotten} [https://perma.cc/G4SS-MF42] (last updated Aug. 21, 2023).} A commentator for \textit{The Guardian} has 
described the right as the “assertion of ownership of one’s own identity 
by refusing to give ownership to the platforms that published the 
posts.”\footnote{Suzanne Moore, \textit{The Right to be Forgotten Is the Right to Gave an Imperfect Past}, \textit{Guardian} (Aug. 7, 2017), \url{https://www.theguardian.com/commentisfree/2017/aug/07/right-to-be-forgotten-data-protection-bill-ownership-identity-facebook-google} [https://perma.cc/A9Y7-KGG9].} Unfortunately, the “right to erasure” has not yet been recog-
nized in the United States, as noted by the Ninth U.S. Circuit Court of 
Appeals in affirming the dismissal of Garcia v. Google.\footnote{Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (holding that Garcia—an actress who received death threats due to her performance in an unreleased film that was modified and incor-
}
recognized in the United States.” This is a decision that Congress will have to reckon with in weighing the First Amendment concerns against the compelling government interest in child welfare protection.

The current lack of protection shielding a child’s privacy from their own parents can lead to devastating consequences, both for the interpersonal relationships of the child and the future effects of a digital footprint over which they had no control. By including a “right to erasure” provision in this proposed legislation, Congress could allow children a chance to regain a sense of autonomy in determining their presence on the internet.

B. The Appetite for Online Child Protections

The appetite for this law is strong and seems to be on the rise. Privacy rights of children, especially as related to social media, have been a hot-button issue in the news and in both state legislatures and Congress. During his State of the Union address in early February 2023, President Biden even “made it clear protections for children online are a priority.” However, many of these federally-proposed bills are focused on “protecting children” by restricting kids’ access to social media, through parental supervision requirements, stricter age restrictions to access social media sites, or even banning some social media sites in general. All of these proposals make it clear that lawmakers are overlooking a big issue: what happens when the parents are the ones creating the harmful posts?

A few states are beginning to address this question. Chris McCarty, a student at the University of Washington, has decided to personally champion the issue through an organization called “Quit Clicking Kids,” which is dedicated to stopping the monetization of minors on social media by promoting fair labor standards, fair compensation, and a

138. Id. at 745.
139. See discussion infra Sections II.B.3, II.B.4.
141. Bryant, supra note 140.
142. Id.
reinstatement of childhood privacy. Following advocacy efforts by Quit Clicking Kids, Washington State Representative Emily Wicks introduced H.B. 2032 to the 2022 state legislative session. The bill would financially compensate minors by requiring the parents of child influencers to set aside part of content revenue in separate funds for their children to access upon adulthood, and give them the option to delete videos featuring them once they reach the age of majority. This bill has stalled twice in session—both as H.B. 2032 and in its re-introduction as H.B. 1627, but is on track to be introduced a third time during the next legislative session following adjustments to the bill in the interim. This Washington State legislation has caught the interest of people nationwide, including Cam Barrett, whose mother has posted personal information online about them since they were a child. In their video testimony in favor of H.B. 1627, Cam pleaded with lawmakers “to be the voice of this generation of children because 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.”

Even though it has not yet passed, the Washington State bill has created some significant statewide changes in the child influencer regulatory sphere. The bill inspired high school student Shreya Nallamothu to approach Illinois Senator David Koehler about creating a similar bill.


144. See QUIT CLICKING KIDS, supra note 143.


146. Sung, supra note 143.


150. Id.

Soon after, the Senator introduced S.B. 1782, which contains fundamentally similar language as the Washington State bill, into the Illinois Senate. The Illinois legislature was ready and willing to enact this legislation: after its introduction to the State Senate on February 9, 2023, the bill unanimously passed the Senate and House, and Governor J.B. Pritzker signed it into law on August 11, 2023. With the passing of this law, Illinois has officially become the first U.S. state to enact a law protecting child influencers. However, it will likely not be the last—other states are catching on to the frenzy; in particular, legislators in both Pennsylvania and Maryland have either introduced child influencing protection bills or have promised to do so.

Although no steps have been taken to introduce such legislation on a federal level yet, it seems to have at least one supporter should it be raised. Senator Richard Blumenthal (D-CT) expressed hope that national lawmakers will begin paying attention to the child social media influencing industry. According to the Senator, “Child labor in the online influencer industry seems fraught with problems[,] involving kids in influencing raises serious risks of exploitation—potential sacrifice of privacy, excessive hours, and lack of fair compensation. They may be providing online content without adequate, or any, protection and oversight.”

The nationwide push for greater protection of children online, as well as the uptick in state bills surrounding child social media stars, makes clear that the nation is ready for legislation to protect the income, privacy, and autonomy of kidfluencers.

152. Id.; S.B. 1782, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023); see Bill Status of SB1782, Illinois Gen. Assemb., https://www.ilga.gov/legislation/BillStatus.asp?DocNum=1782&GAID=17&DocTypeID=SB&LegId=146603&SessionID=112&GA=103 [https://perma.cc/8D8L-DBZG] (last visited May 1, 2023) (Similar to the WA bill, S.B. 1782 “provides that upon reaching the age of majority, any individual who was a minor engaged in the work of vlogging may request the permanent deletion of any video segment including the likeness, name, or photograph of the individual from any online platform that provided compensation to the individual’s parent or parents in exchange for that video content” and “that a vlogger who features a minor child in a specified amount of the vlogger’s [sic] content shared on an online platform must set aside a specified amount of gross earnings on the video content in a trust account to be preserved for the benefit of the minor upon reaching the age of majority.”).

153. See id; QUIT CLICKING KIDS, supra note 143.

154. Yang, supra note 151.


156. Lorenz, supra note 71.
CONCLUSION

Social media is not going anywhere—and neither are kidfluencers. According to a report by Influencer Marketing Hub, the influencer marketing industry skyrocketed from a $1.7 billion industry in 2016 to $16.4 billion in 2022, and this doesn’t even account for the money that social media influencers earn through subscriptions, merchandise, and other direct revenue streams.\(^{157}\) The advent of smartphones and social media has largely removed traditional barriers to the field. As a result, home-grown social media child performers have become a nationwide issue, one that needs a federal response. Facing issues including wage exploitation, unregulated “workplaces,” lack of consent or privacy, and future repercussions of their unintended digital footprint, kidfluencers have a difficult path ahead of them.\(^{158}\) To address these issues before they balloon even more than they already have, Congress should consider creating a new federal law to protect child influencers. Moreover, Congress should amend FLSA’s definition of “child performer,” nationalize the protections enshrined in state Coogan Laws, and adopt the EU-promoted “right to erasure.”

No time is better than now. This is a fast-growing issue: every day, new videos are uploaded, and more children’s data is shared to millions online. As the anonymous teen child of “family vloggers” ended her open letter: “To any kids out there struggling like I am, hold on. Keep pushing for getting [sic] off YouTube. Never look up your name on any site, never look at comments, and if all else fails, perfect your thumbnail face and fake smile, and start counting down the days until you leave. And to my parents, if they so happen [sic] to be out there and recognize me, I’m not sorry. I think I have the right to complain on the Internet after you took my childhood away from me.”\(^{159}\)

\(^{157}\) Id.
\(^{158}\) See discussion supra Sections II.B.1, II.B.2, II.B.3, II.B.4.
\(^{159}\) Easom, supra note 2, at 2:25.