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The Kids Are Not Alright: A Look into the Absence of Laws Protecting Children in Social Media

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THE KIDS ARE NOT ALRIGHT: A LOOK INTO THE ABSENCE OF LAWS PROTECTING CHILDREN IN SOCIAL MEDIA

By Libby Morehouse

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I. INTRODUCTION AND DEFINITION OF THE ISSUE

In the age of social media, children do not have the same privacy at home as previous generations. Imagine a child growing up in 2023, going to school, playing with friends, and getting into fights with siblings and parents. Picture the temper tantrums thrown, the tears and screams, or the child falling and getting injured learning to ride a bike. At first, the child might not be aware their parents are filming them. However, as they grow older, the child will inevitably learn that throughout their entire childhood, their parents were filming and posting these videos, without consent, online for millions of strangers to view. If you were the child, would you feel embarrassed, feel like your privacy had been violated? Would you expect, if your parents had been profiting from these videos, to receive a cut of the earnings when you grow up? Would you be shocked when you learned the law was silent in protecting your youth in this process?

This is the reality for more and more children as parents find money and success in the online sphere of family and mommy vlogging.¹ Tempted by fame and financial freedom,² many parents have filmed and posted their children online, all while the law has failed to protect our most vulnerable population. “Social media influencers who market video content of their families, or ‘vloggers’ can profit from the personal property rights of their children without restriction. Some children are filmed, with highly personal details of their lives shared on the internet for compensation, from birth.”³ In addition to the potential extreme loss of privacy, these children receive no payment or financial security for the use of their name or image.⁴ Where children are not protected under federal labor or child actor laws, nor protected under comprehensive legislation designed specifically for social

1. Valeriya Safronova, *Child Influencers Make Big Money. Who Gets It?*, N.Y. TIMES (Oct 10, 2023, 4:17 PM), <https://www.nytimes.com/2023/10/10/style/children-influencers-money.html> [<https://perma.cc/XA5R-5SQ7>]; *Vlog*, DICTIONARY.COM, <https://www.dictionary.com/browse/vlog> [<https://perma.cc/DLH7-VSNU>].

2. Madyson Edwards, Comment, *Children Are Making It Big (for Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, 31 UCLA ENT. L. REV. (forthcoming 2024) (manuscript at 2) (“[T]he most successful child influencers earn upwards of \$29 million each year.”).

3. H.B. 2032, 67th Leg., 2022 Reg. Sess. (Wash. 2022).

4. *Id.*

media, they are vulnerable to working every day without any salary guarantees and can be exploited by their parents without their consent.⁵

This note will first look at the modest protections in California protecting child actors, including maximum working hours, school mandates, required permission from the labor commissioner to work, and a mandatory trust created for the child.⁶ In light of courts' refusal to apply the Coogan Law to social media,⁷ this note will instead look to how France, with stronger privacy laws already in place, has dealt with this exact issue to protect children.⁸ Lastly, this note will suggest potential paths towards protection for these children, whose parents include them in their social media content.⁹ These will range from changes in how we protect a child's right of publicity and protect their likeness to, in a post-*Dobbs* America,¹⁰ ways the federal legislature might be able to pass laws under the Commerce Clause to regulate the use of children in a parent's social media content.¹¹ The last option this note will propose is, in the absence of comprehensive federal legislation, for individual social media platforms to update their terms and conditions and implement more stringent policies when children are involved.¹²

5. See Tiffany Labatut, *L'exploitation Commerciale De L'image Des Enfants Sur Les Plates-Formes En Ligne: Enfin Une Proposition De Loi!*, ACTU-JURIDIQUE (Sept. 02, 2020), <https://www.actu-juridique.fr/civil/personnes-famille/lexploitation-commerciale-de-limage-des-enfants-sur-les-plates-formes-en-ligne-enfin-une-proposition-de-loi/> [https://perma.cc/45ER-SNQZ].

6. See *infra* Section II(B); see also *infra* Section III(A).

7. Brianna Kovit, *Considering the Ethics of Family Vloggers*, THE MUHLENBERG WEEKLY (Nov. 11, 2021), <https://muhlenbergweekly.com/op-ed/considering-the-ethics-of-family-vloggers/> [https://perma.cc/CZX9-GARN].

8. See *infra* Section III(D).

9. See *infra* Section IV.

10. See *infra* Section IV(C) (discussing how *Dobbs v. Jackson* overturning *Roe v. Wade*, which relied in part on a privacy argument in favor of abortion, made the status of privacy as a fundamental right less certain).

11. See *infra* Section IV(C).

12. This note is not seeking to regulate all posts made by parents containing their minor children, but rather only those posts from which the parent can earn money.

II. BACKGROUND: DESCRIPTION OF THE HISTORICAL DEVELOPMENT OF THE LAW

A. *The Need for Privacy and Labor Protections for Children of “Mommy Vloggers”*

The home is supposed to be the most private place,¹³ but family and mommy vloggers are putting the most intimate parts of their children’s lives online for views, fame, and monetary gain.¹⁴ Children rely on their parents to protect them and act in their best interest.¹⁵ However, there are many instances of influencer parents who decide to pull harmful pranks on their children or share private moments and conversations, from potty training to talking about sex.¹⁶ There are currently no federal laws in the U.S. protecting these private moments and no policy regulations from YouTube preventing this content from being posted on its platform.¹⁷

One example of this lack of privacy surrounds potty training. A mommy influencer, who posted about her parenting journey, shared frequent updates of her toddler as he was going through potty training.¹⁸ Details of

13. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977) (acknowledging a “private realm of family life which the state cannot enter”) (quoting *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

14. Madyson Edwards, Comment, *Children Are Making It Big (for Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, 31 UCLA ENT. L. REV. (forthcoming 2024) (manuscript at 2).

15. *Id.* (manuscript at 20).

16. Rachel Caitlin Abrams, *Family Influencing in the Best Interests of the Child*, 2 CHICAGO J. OF INT’L L. 97, 103 (2023); Madeline Holcombe, *What Happens When Parents Abuse and Exploit Children for Internet Fame?*, CNN (Mar. 22, 2019), <https://www.cnn.com/2019/03/22/us/hobson-parents-youtube-abuse-claims/index.html> [<https://perma.cc/868D-L7XC>].

17. Monica Reilly, *Family Vlogging: Blurring the Line Between Parent and Employer*, THE SCIENCE SURVEY (Jan 18, 2023), <https://thesciencesurvey.com/editorial/2023/01/18/family-vlogging-blurring-the-line-between-parent-and-employer/> [<https://perma.cc/JCC8-YKTS>]; see also *Terms of Service*, YOUTUBE KIDS (Dec. 15, 2023), <https://kids.youtube.com/t/terms#:~:text=Who%20may%20use%20the%20Service%3F,-Age%20Requirements&text=You%20must%20be%20at%20least,a%20parent%20or%20legal%20guardian> [<https://perma.cc/UH8V-SNRV>] (stating a user must be 13-years-old to use the platform, but not providing restrictions of minimum age of people posted in videos).

18. Kate Land, *Sharenting: Do You Share Too Much About Your Children on Social Media?*, U.S. NEWS HEALTH (Feb. 13, 2017), <https://health.usnews.com/wellness/for-parents/articles>

his progress and experience were shared to over 1 million Instagram followers via the mother's stories.¹⁹ The mother, seemingly caring more about sharing her parenting journey and making money as an influencer than her child's discomfort, notes her child's request for privacy from his parents when he was going to the bathroom.²⁰ It can be assumed if this young child, who likely had no concept of the internet, wanted privacy from his own parents when going to the bathroom, he would also want privacy from strangers on the internet during this vulnerable and private point in his life.²¹ This is just one example of mommy vloggers sharing private moments in the home for views, despite a clear want for privacy from their children.²²

In addition to privacy concerns, the demanding working conditions of being a child of a mommy vlogger is becoming more and more evident.²³ While it is easier for viewers to understand the hours kids work when the channel or account has their name on it, the children of family vloggers are often forced to work and reshoot conversations, outbursts, and real-life moments for their parents' videos, with parents often asking children to play up their reactions.²⁴ The children are working and "being told how to act and

/2017-02-13/sharenting-do-you-share-too-much-about-your-children-on-social-media [https://perma.cc/FE5H-UQTW].

19. *Id.*

20. *Id.*

21. *Id.*

22. See also Valeriya Safronova, *Child Influencers Make Big Money. Who Gets It?*, N.Y. TIMES (Oct. 13, 2023), <https://www.nytimes.com/2023/10/10/style/children-influencers-money.html> [https://perma.cc/XA5R-5SQ7] ("I'm terrified to share my name because a digital footprint I had no control over exists," Ms. Barrett said. She recalled her mother sharing intimate details of her first period, of a car accident she was in, and of a serious illness she once had.").

23. See Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577, 594 (2021) (discussing how these children are "exerting hours of labor each week" without guaranteed pay. "[T]he sheer volume of content that influencers are expected to post means that they are on-camera and in front of audiences constantly.").

24. See Reilly, *supra* note 17.

told what to say and do for their parents' pay and profit,²⁵ much as if they were filming in a Hollywood studio, but without the same restrictions.²⁶

Two main differences exist, however, between the acting on a television set and what we see in mommy vlogs. First, in television programs children are playing characters and can retain privacy over their personal lives and personalities.²⁷ Second, work permits are required for children to act in Hollywood, but no such permits are required in California before working in social media because it was never recognized as entertainment under the Coogan Laws.²⁸ These fundamental differences impact the rights children are potentially giving up and the current labor regulations in place, both of which need to be addressed with the reality of social media in mind. While labor protections for child actors in California protect the maximum hours a child can work, minimum age requirements, and guarantees for their money to be saved and protected until they are 18,²⁹ the current federal legal scheme provides no such protections for wage and labor conditions for children in social media.³⁰

25. Safronova, *supra* note 22.

26. See Reilly, *supra* note 17.

27. Edwards, *supra* note 14 (manuscript at 10–11); see also Kristi Pahr, *Daughter of Mom Influencer Was So Tired of Having Her Picture Taken, She Put 'No Pictures' on Her Sweatshirt*, PARENTS (Nov. 17, 2022), <https://www.parents.com/news/daughter-of-mom-influencer-was-so-tired-of-having-her-picture-taken-she-put-no-pictures-on-her-sweatshirt/> [<https://perma.cc/N2NB-YUVL>] (discussing where the child of a mommy blogger did not want to be on her mom's Instagram anymore because of concerns of all of the easily accessible content available about her).

28. CAL. LAB. CODE § 1308.5 (West 2012); Jessica Pacht-Friedman, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 361, 364 (2022).

29. CAL. FAM. CODE § 6752(b)(1) (West 2020); CAL. LAB. CODE § 1308.7 (West 1993); CAL. LAB. CODE § 1308.8 (West 2020). For work and school hour requirements by age bracket, see generally I.A.T.S.E. LOCAL 884 THE STUDIO TEACHERS, *THE BLUE BOOK: EMPLOYMENT OF MINORS IN THE ENTERTAINMENT INDUSTRY* (6th ed. 2021).

30. Reilly, *supra* note 17.

B. *A Quick History of Federal Child Labor Laws and California State Coogan Laws in Hollywood*³¹

In 1938, Congress passed the Fair Labor Standard Act of 1938 (FLSA), a labor law regulating the minimum working age for children.³² These laws were geared particularly towards children working in dangerous conditions, such as mines.³³ Notably, however, there was an exception for child actors under this law which remains to this day.³⁴ Under the federal labor law, there were no protections given to child actors, from minimum working age to maximum hours worked per week, or even regarding wages.³⁵ The FLSA was passed at the height of child actor Shirley Temple's career and legislators were hesitant to interrupt her career.³⁶ Additionally, they did not view acting as a dangerous job which needed regulation to protect children.³⁷ That logic remains to this day. Due to this exemption from the FLSA, child actors became dependent on individual states to pass protection laws.³⁸

Without the protection of federal labor laws, child actors were exposed and vulnerable to be taken advantage of, both by adults in the industry and their own parents.³⁹ In response to these issues, and prompted by the case of Jackie Coogan, California enacted Sections 6750 et. seq. of the California Family Code to protect child actors.⁴⁰

31. For a more in-depth history of the passage of the FLSA and child actor protections, see Masterson, *supra* note 23, at 585–91.

32. Edwards, *supra* note 14 (manuscript at 4).

33. *Id.*

34. Masterson, *supra* note 23, at 587.

35. 29 U.S.C. §213(c)(3) (stating the FLSA “shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions”).

36. Masterson, *supra* note 23, at 587.

37. *Id.*

38. *Id.*

39. Edwards, *supra* note 14 (manuscript at 5).

40. See CAL. FAM. CODE § 6750(c) (West 2020).

Jackie Coogan was a child actor who rose to fame, earning millions in Hollywood.⁴¹ He was especially well-known for his role in Charlie Chaplin's *The Kid*.⁴² By the time Jackie reached adulthood, much of his money had been squandered away by his parents and he could not enjoy the riches of his hard work as a child actor.⁴³ Jackie subsequently sued his mother and step-father for their failure to put the money he earned aside for him.⁴⁴ While Jackie won in court, the damage was already done and there was little of his own money left for him to recover.⁴⁵

Jackie Coogan's case, and the growing realization that Jackie was just one of many child actors in this situation, prompted California to pass legislation that is colloquially known as the Coogan Law.⁴⁶ While the federal child labor laws excluded child actors nationally, the Coogan Law protected child actors within California.⁴⁷ Currently, all but 17 states in the U.S., and Puerto Rico, have adopted some form of state law to protect child actors.⁴⁸

C. Coogan's Inapplicability to Social Media

As social media began to take off, vlogging, which is a combination of the words "video" and "blogging," was not seen as work or acting.⁴⁹ Rather,

41. See generally Jennifer Gonzalez, *More Than Pocket Money: A History of Child Actor Laws*, LIBRARY OF CONGRESS BLOGS (June 1, 2022), <https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/> [<https://perma.cc/YG3V-34WG>].

42. *Id.*

43. Edwards, *supra* note 14 (manuscript at 6).

44. Gonzalez, *supra* note 41.

45. Edwards, *supra* note 14 (manuscript at 6).

46. Gonzalez, *supra* note 41.

47. Edwards, *supra* note 14 (manuscript at 6–7) (Jackie Coogan's case prompted the California State Legislature to enact a law to protect child actors. However, "[b]ecause the FLSA does not include or encompass child entertainers, they must rely solely on state law to protect them.>").

48. See *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T OF LAB. (Jan. 1, 2023), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/N9J3-VC6F>].

49. *Vlog*, DICTIONARY.COM, <https://www.dictionary.com/browse/vlog> [<https://perma.cc/DLH7-VSNU>] (stating the origin of the word comes from a combination of "v(ideo) + (b)log"); Edwards, *supra* note 14 (manuscript at 1).

it was seen as just capturing everyday moments on camera to share with friends and family.⁵⁰ In 2023, however, it is clear people have made successful careers by vlogging and posting on social media, making millions of dollars every year in ad revenue and brand sponsorships.⁵¹ Despite this, the laws have not caught up.⁵²

Section 6750 of the California Family Code states the provisions of the Coogan Laws are applicable to a minor employed in “artistic or creative services.”⁵³ These services include, among other things, employment as an actor, singer, dancer, or “other performer or entertainer.”⁵⁴ Despite this expansive language, in 2018, California lawmakers decided social media stars did not qualify for protection under the Coogan Law.⁵⁵ “The legislature determined that the roles played by social media kids are much less substantial than those on a Hollywood set.”⁵⁶ For that reason, the legislature did not feel the “pressures made on their lives” were comparable to child actors, and thus child social media stars were “not considered worthy of financial protection.”⁵⁷ This exclusion has left children vulnerable to parental exploitation on social media.⁵⁸

50. Edwards, *supra* note 14 (manuscript at 2).

51. See Laura Ceci, *Worldwide Advertising Revenues of YouTube as of 4th Quarter 2023*, STATISTA (Feb. 7, 2024), <https://www.statista.com/statistics/289657/youtube-global-quarterly-advertising-revenues/> [<https://perma.cc/6DJQ-SLJZ>].

52. Lisa Bubert, *I Made Money Off Pictures of My Kid on Instagram—What Should I Do With It?*, YAHOO! NEWS: PARENTS (June 2, 2021), <https://news.yahoo.com/made-money-off-pictures-kid-185323540.html> [<https://perma.cc/LXV3-A6DP>]; *but see* Ill. Comp. Stat. 103-0556, 2024 Leg., 103rd Sess. (Ill. 2024) (effective July 1, 2024).

53. CAL. FAM. CODE § 6750 (West 2020).

54. *Id.*

55. Brianna Kovit, *Considering the Ethics of Family Vloggers*, THE MUHLENBERG WEEKLY (Nov. 11, 2021), <https://muhlenbergweekly.com/campus-voices/considering-the-ethics-of-family-vloggers/> [<https://perma.cc/E9KP-WFJ2>]; *but see* A.B. 1880, 2023 Leg., Reg. Sess. (Cal. 2024) (proposing amending CAL. FAM. CODE §6750(a)(1) to include “child influencer in paid online content on internet websites, social networks, and social media applications”). This bill was proposed in 2024 after completion of this note and is not analyzed any further herein.

56. Kovit, *supra* note 55.

57. *Id.*

58. *Id.*; *see also* Julia Carrie Wong, ‘It’s Not Play if You’re Making Money’: How Instagram and YouTube Disrupted Child Labor Laws, THE GUARDIAN (Apr. 29, 2019), <https://>

As more YouTubers talk about what the job entails, including long hours, setting up equipment, and editing on the backend, it is hard to argue that vlogging is not a job that requires time and energy.⁵⁹ Furthermore, like with reality shows, “real life” moments are often staged or re-filmed, especially if they were not initially captured on camera.⁶⁰ Clips from family vlogs have surfaced showing moms directing their children to cry, be upset, or otherwise how to act when she picks up the camera again, forgetting to edit this direction out of the final video.⁶¹ These clips show the vlogs are a production in and of themselves, and parents are often directing, producing, starring in, and editing these vlogs, much like what happens on a film or TV set.⁶² Children are receiving acting direction from their parents but are not receiving any legal protections seen in Hollywood for child actors.⁶³

Despite the clear time and energy put into filming these vlogs, and the unedited instances where parents are shown directing their children how to behave for the camera, the California and federal legislatures have not brought social media content creators and their children under the protection of federal labor or child actor laws.⁶⁴ In fact, “[t]here is no regulation around

www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws [<https://perma.cc/W56V-U2V2>].

59. See, e.g., Cathrine Manning, *Influencer Management 101 // When to Get a Manager, How to Find a Manager, + Getting Brand Deals*, YOUTUBE (March 16, 2021), <https://www.youtube.com/watch?v=dq2JXQqWH9E> [<https://perma.cc/6Q6F-H4ZN>] (discussing the long hours it took to edit the previous video in the series at 0:09); see also Laura Ceci, *Worldwide Advertising Revenues of YouTube as of 4th Quarter 2023*, STATISTA (Feb. 7, 2024), <https://www.statista.com/statistics/289657/youtube-global-quarterly-advertising-revenues/> [<https://perma.cc/6DJQ-SLJZ>]; Edwards, *supra* note 14 (manuscript at 10).

60. See, e.g., Chantal Waldholz, *EXCLUSIVE: Kim Kardashian’s Divorce Scenes on ‘KUWTK’ Were Reshot and Scripted*, LIFE & STYLE (Mar. 13, 2013), <https://www.lifeandstylemag.com/posts/exclusive-kim-kardashian-s-divorce-scenes-on-kuwtk-were-reshot-and-scripted-31956/> [<https://perma.cc/KDA3-79VH>] (discussing reshoots and scripting in the unscripted reality television series “Keeping Up With the Kardashians”); Rachel Paula Abrahamson, *Family YouTuber Deletes Account After Criticism Over Video Coaching Son to Cry*, TODAY (Sept. 14, 2021), <https://www.today.com/parents/jordan-cheyenne-speaks-out-about-youtube-video-son-crying-t231055> [<https://perma.cc/6XXQ-V659>] (discussing reshoots and scripting in family vlogs).

61. Abrahamson, *supra* note 60.

62. Safronova, *supra* note 22.

63. *Id.*

64. Kovit, *supra* note 55.

compensation for children appearing in social media content produced by their parents.”⁶⁵ This note will argue with this knowledge of directing in the vlogs coming to light, at a minimum, children involved in social media should receive the same type of protection as the Coogan Laws where they appear and perform in content created and directed by their parents.⁶⁶

III. DIFFERENT TREATMENT OF MINORS UNDER STATE, FEDERAL, AND INTERNATIONAL LAW

As seen above, there are not currently federal labor laws in place to protect children working in social media.⁶⁷ Additionally, “[t]here are currently no laws in place in the U.S. aimed at protecting children from being posted online by their parent.”⁶⁸ Without any such protections, children in social media, both children who themselves are the influencers and those who are the children of mommy vloggers, are left vulnerable and must rely on parents for protection online.⁶⁹ Parents are supposed to be the ones protecting their child’s information, yet when they are the one disclosing personal information online, they act as “gate openers” for the internet to learn

65. Bubert, *supra* note 52; *but see* Jordyn Milewski & Wendy Stryker, *Illinois Enacts Novel Law Regulating Children in Content*, FRANKFURT KURNIT KLEIN + SELZ PC (Aug. 17, 2023), <https://advertisinglaw.fkks.com/post/102im7b/illinois-enacts-novel-law-regulating-children-in-content> [<https://perma.cc/FW9T-JE3C>] (discussing the enactment of S.B. 1782, 103rd Gen. Assemb. (Ill. 2023), which requires vloggers to compensate minors who appear in their content).

66. *See infra* Section IV.

67. *See supra* Section II(A).

68. Monica Reilly, *Family Vlogging: Blurring the Line Between Parent and Employer*, THE SCIENCE SURVEY (Jan 18, 2023), <https://thesciencesurvey.com/editorial/2023/01/18/family-vlogging-blurring-the-line-between-parent-and-employer/> [<https://perma.cc/JCC8-YKTS>]; *but see* Jordyn Milewski & Wendy Stryker, *Illinois Enacts Novel Law Regulating Children in Content*, FRANKFURT KURNIT KLEIN + SELZ PC (Aug. 17, 2023), <https://advertisinglaw.fkks.com/post/102im7b/illinois-enacts-novel-law-regulating-children-in-content> [<https://perma.cc/FW9T-JE3C>] (discussing the passage of S.B. 1782, 103rd Gen. Assemb. (Ill. 2023), which creates a private right of action for minors who are posted online by vloggers in Illinois).

69. *See* Nila McGinnis, Comment, “*They’re Just Playing*”: *Why Child Social Media Stars Need Enhanced Coogan Protections to Save Them from Their Parents*, 87 MO L. REV. 247, 260–64 (2022).

about their child.⁷⁰ These parents face an inherent conflict between the “lure of profit” and the desire for public attention on one side and the underexplored nature of children’s rights in these instances on the other.⁷¹

There are currently no federal laws regulating children’s labor in social media, much less regulating children being filmed or photographed and posted online by their parents.⁷² This section will look at the relevant laws in place across the United States and internationally which can serve as a foundation for a new federal law on the issue.⁷³ Further, this section will survey a selection of bills which have been introduced federally and within specific states which help address the lack of legal protection for children who are being put online by their parents for profit.⁷⁴

A. *Child Labor and Coogan Law for Child Actors*

As introduced above, California implemented the Coogan Law to protect children working in entertainment and to bridge the gap where federal labor laws offered no protection.⁷⁵ Prior to amendments to the Coogan Law in 2000, parents were still able to financially exploit the earnings of their child actors through poor money management, custody battles, or by paying themselves as managers.⁷⁶ The 2000 amendments provided stricter

70. Danya Hajji, *YouTube Lets Parents Exploit Their Kids for Clicks*, NEWSWEEK (Oct. 4, 2021, 9:00 AM), <https://www.newsweek.com/youtube-lets-lawless-lucrative-sharenting-industry-put-kids-mercy-internet-1635112> [<https://perma.cc/PAC6-XCB2>].

71. *Id.*

72. Claire Savage & Associated Press, *New Law Entitles Child Social Media Influencers to a Percentage of Earnings: ‘It’s Kind of a New World’*, FORTUNE (Aug. 12, 2023), <https://fortune.com/2023/08/12/new-law-entitles-child-social-media-influencers-to-percentage-of-earnings-kidfluencers-sharenting/> [<https://perma.cc/4BV6-8X8T>]; see also Lisa Bubert, *I Made Money Off Pictures of My Kid on Instagram—What Should I Do With It?*, YAHOO! NEWS: PARENTS (Jun. 2, 2021), <https://news.yahoo.com/made-money-off-pictures-kid-185323540.html> [<https://perma.cc/LXV3-A6DP>].

73. See *infra* Sections III(A) (discussing U.S. law), III(D) (discussing European law).

74. See *infra* Section III(C).

75. See *supra* Section II(B).

76. See Madyson Edwards, Comment, *Children Are Making It Big (for Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, 31 UCLA ENT. L. REV. (forthcoming 2024) (manuscript at 2); see also Jennifer Gonzalez, *More Than Pocket Money: A History of Child*

requirements for savings.⁷⁷ Coogan Law protections also now include a minimum age at which the child may be employed, with maximum working and mandatory schooling hours based on age brackets.⁷⁸ Additionally, the amendments required an employer to get the written consent, in the form of work authorization from the Labor Commissioner, to employ someone under the age of 16.⁷⁹

The amendments, which became effective in 2000, instituted the requirement for a minimum of 15% of the minor's gross earnings through work in entertainment to be saved in a blocked trust account, also known as a Coogan Account, until the child reaches the age of 18.⁸⁰ The 2000 amendments clarified this amount was to be taken from the minor's gross earnings, not net profit, stating, "[f]or purposes of this chapter, the minor's 'gross earnings' means the total compensation payable to the minor under the contract."⁸¹ The requirement for a minimum of 15% of the minor's earnings to be deposited into a blocked trust account applies regardless of whether the contract was approved by the superior court or not.⁸² Further, the amended law expressly makes all earnings by a child in the entertainment industry property of the minor.⁸³ With this amendment, money cannot be withdrawn from the account before the child has turned 18 without judicial approval,

Actor Laws, LIBRARY OF CONGRESS BLOGS (June 1, 2022), <https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/> [<https://perma.cc/YG3V-34WG>].

77. Edwards, *supra* note 76 (manuscript at 6) (clarifying the 15% minimum was from the child's gross income, as opposed to net income).

78. CAL. LAB. CODE § 1308.5 (West 2012); CAL. LAB. CODE § 1308.7 (West 1993); CAL. LAB. CODE § 1308.8 (West 2020); *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [<https://perma.cc/AVU7-EVZP>].

79. LAB. § 1308.5; *see also* Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577, 589 (2021).

80. CAL. FAM. CODE § 6752(b)(1) (West 2020); *California Strengthens "Coogan Law" to Provide Child Actors with More Protection for Their Earnings by Requiring At Least 15% Be Put in Trust*, 21 No. 6 ENT. L. REP. 19, 19 (1999) [hereinafter *California Strengthens "Coogan Law"*].

81. FAM. § 6750(c).

82. Saira Din, *Family / Chapter 667: Instituting Proper Trust Funds and Safeguarding the Earnings of Child Performers from Dissipation by Parents, Guardians and Trustees*, 35 MCGEORGE L. REV. 473, 475 (2004).

83. *California Strengthens "Coogan Law"*, *supra* note 80.

making it more difficult for parents to exploit the earnings of their children.⁸⁴ This provided children with greater rights over their money, even though only 15% on their gross income must be saved in their Coogan Account.⁸⁵

Employers in the entertainment industry must obtain written consent from the Labor Commissioner to employ a minor under the age of 16.⁸⁶ Additionally, an employment contract between the studio/employer and the minor may be approved in its entirety by the superior court in the county in which the minor resides or is employed.⁸⁷ Once the contract has been approved, the minor cannot disaffirm the contract before or upon reaching majority.⁸⁸ The California Labor Code works in conjunction with this provision of the California Family Code to require a permit to employ a minor in entertainment, including “employment or appearance of any minor pursuant to a contract approved by the superior court” as stated in Cal. Fam. Code §6750 et. seq.⁸⁹

The last major protection provided under California’s child actor protections surround maximum working hours each day and the requirements for schooling and rest periods.⁹⁰ These requirements are broken down by age brackets to ensure children are still receiving proper education while working and to protect their time for rest, recreation, and meals.⁹¹ Generally, minors are required to have 1–2 hours of rest/recreation time and half an hour for meals per day worked.⁹² The exact hours required of schooling and for work depend largely on age, and the minor cannot be called on set for more

84. *Id.*

85. Edwards, *supra* note 76 (manuscript at 6).

86. Masterson, *supra* note 79.

87. CAL. FAM. CODE § 6751 (West 2000).

88. *Id.*

89. CAL. LAB. CODE § 1308.5(a)(8) (West 2012).

90. I.A.T.S.E. LOCAL 884 THE STUDIO TEACHERS, THE BLUE BOOK: EMPLOYMENT OF MINORS IN THE ENTERTAINMENT INDUSTRY 13 (6th ed. 2021).

91. *Id.* at 9–14.

92. *Id.* at 11.

than the total hours of work, schooling, rest and recreation, and mealtime allotted for their age.⁹³

The above regulations have been implemented to protect the wage and labor of child actors in California, and ensure they retain the financial benefit of their work once they reach 18 years old.⁹⁴ Currently, a majority, but not all, states have some level of protection for child actors, but the level of protection and the requirement for work permits varies widely across the states.⁹⁵ Additionally, Coogan Accounts are only required in California, New Mexico, New York, Illinois, and Louisiana.⁹⁶

B. Illinois Public Act 103-0556 Amending the State Child Labor Law

On August 11, 2023, the governor of Illinois signed Illinois S.B. 1782 into law, amending the Illinois Child Labor Law to expressly protect minors in social media.⁹⁷ While they do not go into effect until July 1, 2024, the amendments to the Child Labor Law are novel in the U.S. as the law seeks to protect minors whose name, likeness, or photograph are used in qualifying videos.⁹⁸ A vlogger must compensate a minor appearing in their content if, over a 12-month period, the following criteria are met:

93. *See id.* (Maximum/Required Hours: children age 6 months – 2 years: 2 hrs work, 2 hrs rest/recreation, ½ hr meal; children age 2–5 years: 3 hrs work, 3 hrs school or rest/recreation, ½ hr meal; children age 6–8 years on school days: 3 hrs school, 4 hrs work, 1 hr rest/recreation, ½ hr meal; children age 6–8 years on non-school days: 0 hrs school, 6 hrs work, 2 hrs rest/recreation, ½ hr meal; children age 9–15 years on school days: 3 hrs school, 5 hrs work, 1 hr rest/recreation, ½ hr meal; children age 9–15 years on non-school days: 0 hrs school, 7 hrs work, 2 hrs rest/recreation, ½ hr meal; children age 16–17 years on school days: 3 hrs school (if not graduated), 6 hrs work, 1 hr rest/recreation, ½ hr meal; children age 16–17 years on non-school days: 0 hrs school, 8 hrs work, 2 hrs rest/recreation, ½ hr meal.).

94. Maham Javaid, *Before Child Influencers, a 1920s Movie Star Sued His Mother for Wages*, WASHINGTON POST (Aug. 25, 2023), <https://www.washingtonpost.com/history/2023/08/25/illinois-child-influencer-earnings-law-history-jackie-coogan/> [<https://perma.cc/XG9E-63FX>]; McGinnis, *supra* note 69, at 256–257.

95. *See Division of Fair Labor Standards Act and Child Labor, Child Entertainment Laws As of January 1, 2023*, U.S. DEP'T OF LAB. (Jan. 1, 2023), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/342V-MFSA>].

96. *Coogan Law, supra* note 78.

97. ILL. COMP. STAT. 103-0556, 2024 Leg., 103rd Sess. (Ill. 2024).

98. Milewski & Stryker, *supra* note 68.

The minor featured is under the age of 16; [a]t least 30% of the vlogger’s compensated video content produced within a 30-day period includes the likeness, name, or photograph of the minor (which is measured based on the percentage of time the minor visually appears or is the subject of an oral narrative, as compared to the total length of a video segment); [and t]he vlogger received actual compensation for the video content equal to or greater than \$0.10 per view per video segment (*or*, the number of views received per video segment on any online platform meets the online platform’s threshold for the generation of compensation equal to or greater than \$0.10).⁹⁹

If these requirements are met, the new law requires compensation for the minor to be set aside in a trust account until the minor reaches majority.¹⁰⁰ The law further specifies “that the minor(s) who meet the above criteria are entitled to at least half of the gross earnings on any video segment that includes the minor such that it satisfied the 30% threshold.”¹⁰¹ Additionally, if multiple minors appear in the same qualifying content, the above amount must be split equally between the minors, regardless of the potential differences in percentage in which the minors appear or are discussed.¹⁰² The law further clarifies the funds required to be placed in a minor’s trust are available only to the minor, making the money earned expressly the property of the minor.¹⁰³

Lastly, the Illinois amendments create a private right of action for the minors to enforce the provisions of the law.¹⁰⁴ If the vlogger “knowingly or recklessly violates this Section,” a minor can pursue civil action to ensure proper compensation for the use of their name, image, or photograph.¹⁰⁵ This novel law passed in Illinois can act as a helpful template for the type of

99. *Id.*

100. *Id.*

101. *Id.*

102. 820 ILL. COMP. STAT. 205/0.5 (2023).

103. 820 ILL. COMP. STAT. 205/12.6 (2023).

104. *Id.*

105. 820 ILL. COMP. STAT. 205/0.5 (2023); Milewski & Stryker, *supra* note 68.

legislation that should be passed at least at the state level, if not federally. The California State assembly has introduced bills in both chambers seeking to address this issue.¹⁰⁶

C. *What Has Been Proposed Federally in the U.S.*

While no laws have been passed federally in the U.S. addressing this issue, bills have been introduced addressing this, as well as the larger issue of children’s safety online, which act as helpful templates for implementing federal protections for children working in social media.¹⁰⁷

1. Child Modeling Exploitation Prevention Act as Insight into Regulating the Digital World

In 2002, Representative Mark Foley introduced H.R. 4667, titled the “Child Modeling Exploitation Prevention Act of 2002.”¹⁰⁸ The act, which was introduced but never passed through the House of Representatives, sought to amend the Fair Labor Standards Act of 1938 to “protect children from exploitive child modeling.”¹⁰⁹ The bill defined exploitive child modeling as “the display of a minor, through any medium without a direct or indirect purpose of marketing a product or service other than the minor.”¹¹⁰ The act argued that the purpose of such exploitive modeling is to satisfy pedophiles, and as such can lead to the direct harm of children through the ability of these pedophiles to contact the child model online.¹¹¹ The bill further

106. See Andrew Oxford, *Underage YouTube Stars Could Get Labor Protections in California*, BLOOMBERG LAW (January 25, 2024), <https://news.bloomberglaw.com/in-house-counsel/underage-youtube-stars-could-get-labor-protections-in-california> [https://perma.cc/PW3Y-HTQZ]. The Assembly Bill would bring child influencers under the protection of the Coogan Law. A.B. 1880, 2023 Leg., Reg. Sess. (Cal. 2024). The Senate Bill seeks to amend CAL. FAM. CODE §6650 et. seq. with similar language to the Illinois act. S. 764, 2023 Leg., Reg. Sess. (Cal. 2024).

107. See *infra* Sections III(C)(1)–(5).

108. Child Modeling Exploitation Prevention Act of 2002, H.R. 4667, 107th Cong. (2002).

109. *Id.*

110. H.R. 4667.

111. *Id.*

classified this sort of child modeling as a form of abuse, leading to physical and psychological harm to the children involved.¹¹²

Much like social media, this type of child modeling involves marketing the children themselves instead of advertising products to consumers.¹¹³ In announcing the introduction of the bill, Rep. Foley stated these child modeling sites are not selling products or services.¹¹⁴ Rather, these sites are merely serving “young children on a platter for America’s most deprived.”¹¹⁵ For these reasons, the bill was proposed to protect child models.

To protect child models from such exploitation, the Child Modeling Exploitation Prevention Act of 2002 would have added the following provision to the existing federal child pornography statute:

Whoever displays, in or affecting interstate or foreign commerce, the image of a child who has not attained the age of 17 years, with the intent to make a financial gain thereby, or offers, in or affecting interstate or foreign commerce, to provide an image of such a child with the intent to make a financial gain thereby, without a purpose of marketing a product or service other than an image of a child model, shall be fined under this title or imprisoned not more than 10 years, or both.¹¹⁶

Additionally, the bill proposed to amend the Fair Labor Standards Act of 1938 by providing that “[n]o employer may employ a minor under 17 years old to work in exploitive child modeling.”¹¹⁷ The amendment would have “ma[d]e it illegal to use a minor in the production of child modeling sites.”¹¹⁸

112. *Id.*

113. *Id.*

114. Clay Calvert, *Opening Up an Academic Privilege and Shutting Down Child Modeling Sites: Revising Child Pornography Laws in the United States*, 107 DICK. L. REV. 253, 278 (2002).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

While the Child Modeling Exploitation Prevention Act of 2002 was specific to exploitive child modeling, a similar method of exploitation is used on social media and elsewhere online in disseminating images and videos of children.¹¹⁹ Similar reasoning and intent from this bill could be used to help pass legislation protecting vulnerable children in social media, particularly in regard to the exploitation of a child’s image for financial gain, irrespective of a product or service. While this exact bill would not address the issues of exploitation of children by mommy vloggers, it serves as an example of what has been introduced in the past and reasoning that could support federal protections.

2. Representative Grace Meng’s Bill to Adopt Coogan-like Laws Nationally

H.R. 3383 was another bill introduced federally by Representative Grace Meng to the House of Representatives, titled “Child Performers Protection Act of 2015.”¹²⁰ This bill sought to federally regulate the requirement for Coogan-like blocked trust accounts for child actors and regulate the number of hours child actors may work.¹²¹

The bill set forth clear federal guidelines for the number of hours a child actor may remain per day at their place of employment or contracting for all purposes.¹²² The hours proposed per day were as follows: (I) no more than two hours for children under six months, (II) no more than four hours for children age six months to two years, (III) no more than six hours for children age two to six years, (IV) no more than eight hours for children age six to nine years, and (V) no more than nine hours for children age nine to sixteen years.¹²³ Under the bill, an employer “may not employ any child performer unless a trust account has been established on behalf of the child performer,”

119. See Alexandra S. Levine, *These TikTok Accounts Are Hiding Child Sexual Abuse Material in Plain Sight*, FORBES (Nov. 14, 2022, 6:30 AM), <https://www.forbes.com/sites/alexandralevine/2022/11/11/tiktok-private-csam-child-sexual-abuse-material/> [<https://perma.cc/NJ49-YFYP>] (discussing the illegal sexual content of minors “hidden” on TikTok).

120. Child Performers Protection Act of 2015, H.R. 3383, 114th Cong. (2015).

121. *Id.*; Masterson, *supra* note 79, at 607.

122. H.R. 3383.

123. *Id.*

and proof of the blocked account has been obtained by the employer.¹²⁴ The Child Performers Protection Act of 2015 would have imposed the same requirements as the Coogan Law for a minimum of 15% of the child's earnings to be placed in the account, to which they do not have access until they are 18 years old, and to which the child's parents or legal guardians do not have access except in the case of extreme financial hardship.¹²⁵ Lastly, the bill held any employment of a child actor not in accordance with the provisions would constitute oppressive child labor.¹²⁶

While this bill only addresses child actors, it does show Congress has begun to think of imposing federal regulations similar to California's Coogan Law.¹²⁷ Because California has explicitly excluded social media influencers from the definition of entertainers within the Coogan Law,¹²⁸ any law like the one introduced by Rep. Meng would likely have to expressly include influencers within the meaning of entertainers to extend protection to them. With this in mind, federal regulation to protect children in social media may be within the realm of possibilities, imposing similar protections federally as Rep. Meng proposed in H.R. 3383.¹²⁹

3. Senator Schatz's Protecting Kids on Social Media Act (S. 1291)

In April of 2023, Senator Brian Schatz, on behalf of himself and Senators Thomas Cotton, Chris Murphy, and Katie Britt, introduced a bill to the Senate titled "Protecting Kids on Social Media Act."¹³⁰ This bill was introduced to "require that social media platforms verify the age of their users," requiring parental consent for social media use for children under 18, prohibiting access to social media for those under 13, and "prohibit[ing] the use of algorithmic recommendation systems on individuals under age 18."¹³¹

124. *Id.*

125. *Id.*

126. *Id.*

127. Edwards, *supra* note 76 (manuscript at 2).

128. *Id.*

129. *Id.*

130. Protecting Kids on Social Media Act, S.B. 1291, 118th Cong. (2023).

131. *Id.*

The first major requirement under this bill is for social media platforms to implement a system to verify users' age beyond mere attestation.¹³² "Platforms that aren't exempted would have to take 'reasonable steps' to confirm a user's age, 'taking into account existing age verification technologies' and going beyond simply checking a box that says you're over 18."¹³³ Through age verification, the bill would also require social media sites to not permit access to their platforms to an individual not reasonably believed to be at least 13 years old.¹³⁴

The second major requirement under the Protecting Kids on Social Media Act is affirmative parental consent for minor children to create an account on social media platforms.¹³⁵ Social media platforms will need to create and implement a mechanism which allows parents or legal guardians to give consent for their children's use of the platform beyond mere attestation, as required under the bill.¹³⁶ Parents will retain the ability to revoke their consent, at which time the social media platforms must suspend, delete, or disable the minor's account.¹³⁷

This bill can serve as an insightful tool for passing legislation regarding minor safety online, as it was sponsored by both progressive Democrats as well as one of the "most ardent" conservatives in the Senate.¹³⁸ However, the bill has also been faced with considerable skepticism across the ideological spectrum, which might indicate the difficulty in passing any federal legislation surrounding new media, even when aimed at protecting children.¹³⁹ Despite this skepticism, sponsors of this bill are optimistic that the bipartisan

132. *Id.*

133. Jay Peters, *New Bill Would Add Mandatory Age Verification to Social Networks*, THE VERGE (Apr. 26, 2023, 11:56 AM), <https://www.theverge.com/2023/4/26/23699255/senators-bill-age-verification-protecting-kids-on-social-media-act> [<https://perma.cc/L9AH-VRD4>].

134. S.B. 1291.

135. *Id.*

136. Peters, *supra* note 133.

137. S.B. 1291.

138. Matt Laslo, *A US Bill Would Ban Kids Under 13 from Joining Social Media*, WIRED (Apr. 26, 2023, 3:28 PM), <https://www.wired.com/story/protecting-kids-social-media-act/> [<https://perma.cc/MPK3-5QNG>].

139. *See id.*

support of this bill shows Congress is finally ready pass such legislation, be it this bill or others which have been introduced.¹⁴⁰

4. Kids Online Safety Act (S. 3663)

The Kids Online Safety Act was introduced into the Senate by Senator Richard Blumenthal in 2022.¹⁴¹ In its current state, the bill includes a requirement for social media platforms to have a reporting feature to report unsafe or harmful activities directed towards children.¹⁴² The bill also requires the platforms to have a system to handle these reports in a timely manner, which cannot be greater than 14 days.¹⁴³ The exact requirements for reports by parents, minors, and schools are as follows:

A covered platform shall provide – (A) a readily-accessible and easy-to-use means to submit reports to the covered platform of harms to minors; (B) an electronic point of contact specific to matters involving harms to a minor; and (C) confirmation of the receipt of such a report and a means to track a submitted report.¹⁴⁴

This bill is intended to protect all minors online, not just the children posting or featured in content.¹⁴⁵ As such, it is a helpful step towards a safer online experience for minors but does not directly address the issues facing child influencers and children of mommy vloggers. However, the type of reporting function called for by the bill could be a helpful template to adopt for reporting to the platforms when children are being heavily featured in an adult's content. As discussed below, this would help foster community regulations on social media platforms to work collaboratively with the

140. *Id.* (“Schatz, the Hawaii Democrat who helped negotiate this new effort, is an original cosponsor of that EARN IT Act. He says all these efforts coming from different angles show that Congress is finally serious about the impact the internet has on children.”).

141. Kids Online Safety Act, S.B. 3663, 117th Cong. (2022).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

platforms' internal monitoring and reporting of violating content.¹⁴⁶ If laws or guidelines are established to limit the presence of children in such content before pay becomes necessary, a similar reporting mechanism to what the bill discusses can be used to monitor and report content which surpasses this limit.

5. Kids PRIVACY Act (H.R. 2801)

The final federal bill this note will discuss is the Kids PRIVACY Act, introduced to the House of Representatives in April of 2023 by Representative Kathy Castor to amend the Children's Online Privacy Protection Act of 1998.¹⁴⁷ The bill is geared towards protecting the privacy of identifying data for all children on social media and creates a private right of action for violations.¹⁴⁸

If enacted, the act would protect "covered information" of minors, except for purposes of employment.¹⁴⁹ The operator of a site geared towards or frequently used by minors would be required to process only the minimum amount of covered information as necessary for each process.¹⁵⁰ Furthermore, such online services would be required to provide clear notice to children and their parents of the information processed and obtain consent for the processing of covered information.¹⁵¹ Lastly, similar to the provision in the Protecting Kids on Social Media Act, the services must provide a mechanism to withdraw consent to data processing, as well as a simple and reasonable mechanism for the minor or parent to request the site delete or correct their covered information.¹⁵² This type of mechanism can serve as a blueprint for a system allowing children to revoke consent to the use of their

146. *Id.*

147. Kids PRIVACY Act, H.R. 2801, 118th Cong. (2023).

148. *Id.*

149. *Id.* (defining "covered information" as "any information that is linked or reasonably linkable to a specific teenager or child or to a specific consumer device used mainly by a teenager or child").

150. *Id.*

151. *Id.*

152. *Id.*

likeness upon reaching the age of 18,¹⁵³ as well as for a system to provide children the right to erasure.¹⁵⁴

These types of proposed acts are a great step forward in protecting the overall safety of children online. However, they do not do much to protect children who are put online by their parents, on an account under their parent's name, by a parent who can legally consent to this activity on their behalf. Despite multiple bills being introduced to Congress since the rise of the internet, it is clear the U.S. still lacks comprehensive federal legal protection explicitly geared towards child influencers and "children featured in their parents' monetized social media content."¹⁵⁵

D. French Laws and Their Approach

Other countries have begun to address this issue of child labor in social media.¹⁵⁶ Working in conjunction with the European Union regulations, the French Labor Code offers protection for the hours worked and wages earned through work in social media as a minor, while EU regulations help protect minors' privacy.¹⁵⁷

1. Right to Be Forgotten in the EU

The right to be forgotten, also known as the right to erasure, gives people the right "to ask organizations to delete their personal data."¹⁵⁸ However, organizations do not always have to delete this information upon request.¹⁵⁹

153. H.R. 4667.

154. See discussion *infra* Sections III(D)(1) (explaining the European Union's Right to be Forgotten), IV(D) (suggesting internal mechanisms social media platforms can use to protect children).

155. Hajjiagi, *supra* note 70.

156. See CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 1–8 (Fr.).

157. Regulation 2016/679 of the European Parliament and of the Council of Apr. 27, 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 17, 2016 O.J. (L 119) (EU) [hereinafter GDPR]; C. TRAV. art. 1–8.

158. Ben Wolford, *Everything You Need to Know About the "Right to Be Forgotten,"* GDPR EU, <https://gdpr.eu/right-to-be-forgotten/?cn-reloaded=1> [<https://perma.cc/EN9E-89F3>].

159. *Id.*

Article 17 of the General Data Protection Regulation of the European Union states “[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay” if one of the stated conditions applies.¹⁶⁰ These conditions include where the data were obtained illegally; where the data subject withdraws consent to the process by which the data were obtained; where the data subject objects to the processing of their data and there is no overriding legitimate ground for processing the data; and where the data have to be erased in compliance with the laws of a Member or Union State.¹⁶¹ If at least one condition applies, the data should be erased without undue delay, which is understood to be about a month.¹⁶² This right, however, is not absolute.¹⁶³

An organization’s right to process personal data might override an individual’s right to erasure.¹⁶⁴ Although the right to erasure works in conjunction with Article 15 and the individual’s right to access their personal data, an organization’s right to process data can seriously limit what information must be erased, in part to protect free expression and information.¹⁶⁵ This might occur when the data are being used to establish a legal defense or in the exercise of a legal claim; when the data are being used to comply with a legal ruling; where the data information serves the public interest, scientific or historical research, or statistical purposes and the erasure would impair progress towards the goal for which the data was collected; or when the data are being used to exercise the right to freedom of expression and information.¹⁶⁶ “Furthermore, an organization can request a ‘reasonable fee’ or deny a request to erase personal data if the organization can justify that the request was unfounded or excessive.”¹⁶⁷

160. GDPR art. 17.

161. *Id.*

162. Wolford, *supra* note 158.

163. *Id.*

164. *Id.*

165. *Id.*

166. GDPR art. 17.

167. Wolford, *supra* note 158.

2. October 2020 Law Protecting Child Influencers Under French Labor Code

In 2020, an amendment to the French Labor Code passed through both the Senate and National Assembly before being promulgated into law by President Macron that October (hereinafter “2020 Amendments”).¹⁶⁸ The law filled the existing void of protections for child influencers, now protecting these minors in the same way child actors and models are protected under the French Labor Code.¹⁶⁹ While the mechanisms for regulation differ from the Coogan Law in California, similar protections for child actors in France now apply to child influencers, including a requirement for a portion of income to be saved in a special savings account for when the child reaches adulthood and a requirement for government authorization prior to entering a labor relationship.¹⁷⁰ It should be noted this law does not impact all children posting on social media, but is designed to target and protect those who spend a significant amount of time working and posting online where the work generates substantial income.¹⁷¹

Child labor is largely illegal in France.¹⁷² Exceptions have been made for child artists to perform with prior authorization under Labor Code article L. 7124-1.¹⁷³ However, prior to 2020, children in social media had escaped the need for prior work authorization, and were not considered to be

168. Nicolas Boring, *France: Parliament Adopts Law to Protect Child “Influencers” on Social Media*, LIBRARY OF CONGRESS (Oct. 30, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-10-30/france-parliament-adopts-law-to-protect-child-influencers-on-social-media/> [<https://perma.cc/F5SM-ZPRD>].

169. *Id.*

170. *Id.*

171. *France Passes New Law to Protect Child Influencers*, BBC (Oct. 7, 2020, 3:12 PM), <https://www.bbc.com/news/world-europe-54447491> [<https://perma.cc/2HTM-KTDG>].

172. Tiffany Labatut, *L'exploitation Commerciale De L'image des Enfants Sur Les Plates-Formes En Ligne: Enfin Une Proposition De Loi!*, ACTU-JURIDIQUE (Sept. 02, 2020), <https://www.actu-juridique.fr/civil/personnes-famille/lexploitation-commerciale-de-limage-des-enfants-sur-les-plates-formes-en-ligne-enfin-une-proposition-de-loi/> [<https://perma.cc/45ER-SNQZ>].

173. *Id.*

“working,” despite the income earned by influencers.¹⁷⁴ These amended provisions apply to children under the age of 16.¹⁷⁵

Prior to engaging in video activities online that can be considered operating within a labor relation, the 2020 Amendments require the same government authorization as is required for child artists.¹⁷⁶ A labor relation exists, for example, where a child is taking direction from a video producer.¹⁷⁷ These producers or directors are often the child’s parent(s).¹⁷⁸ The 2020 Amendments extend not only for children who are hired for on-demand video content, but also children whose image is disseminated for profit on video-sharing platforms.¹⁷⁹ The law makes explicit that any company wishing to employ child social media stars will “need to be granted permission from local authorities.”¹⁸⁰ It stands to reason that this law would extend to children who are posted at their parents’ discretion.

This law now also requires prior work authorization in what is known as the “grey zone,” where a child is not in a labor relation, but receives a high direct or indirect income from their content or has spent a significant amount of time cumulatively making the videos.¹⁸¹ The threshold determination for requiring a work permit will be done on an ad hoc basis until the French government issues a decree defining the limit.¹⁸² If this threshold of income earned, number of videos produced, or cumulative length of videos is exceeded, the child’s parents need to submit a declaration to the government to

174. *Id.*

175. C. TRAV. art. 1–8.

176. Boring, *supra* note 168.

177. Labatut, *supra* note 172.

178. *Id.*

179. *Id.*

180. Anthony Cuthbertson, ‘Kid Influencers’ Classed as Child Labour Under New French Law, THE INDEPENDENT (Oct. 8, 2020, 5:16 AM), <https://www.independent.co.uk/tech/child-labour-social-media-influencer-france-law-youtube-b861255.html> [<https://perma.cc/ALJ5-PLQQ>].

181. Boring, *supra* note 168; Labatut, *supra* note 172.

182. Boring, *supra* note 168; Labatut, *supra* note 172.

obtain work authorization.¹⁸³ All employment applications under the 2020 Amendments are granted for a fixed renewable period and may be withdrawn at any time.¹⁸⁴

The 2020 Amendments also open the exercise of the right of erasure to all children, obligating online platforms to take down content of a minor at their request.¹⁸⁵ Prior to these amendments, parents were able to post videos of their children online without the child's consent.¹⁸⁶ When the content was posted by parents, children lacked the ability to delete it.¹⁸⁷ Now, in the event of a parent obtaining the aforementioned work permit, the administrative agency authorizing the minor's work shall provide the child's legal representative information on the protection of the child's rights in the context of videos and content posted online, which include the consequences of broadcasting their image on a social media site on the child's private life.¹⁸⁸ This provision of the law is designed to cause parents to think of the potential embarrassment—or even danger—of posting their child online before doing so.¹⁸⁹ This is similar to the bill proposed in Washington State, discussed below, allowing a child to exercise their right to be forgotten and “request that the content they appear in be taken off the internet.”¹⁹⁰

The 2020 Amendments also provide for the protection of income earned through posting content online.¹⁹¹ The 2020 Amendments require the

183. Boring, *supra* note 168.

184. C. TRAV. art. 1–8.

185. Labatut, *supra* note 172; *France Passes New Law to Protect Child Influencers*, *supra* note 171.

186. Labatut, *supra* note 172.

187. *Id.*

188. C. TRAV. art. 1–8.

189. 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. 361, 385 (2022).

190. Amanda Silberling, *There Are No Laws Protecting Kids from Being Exploited on YouTube — One Teen Wants to Change That*, TECHCRUNCH (Apr. 12, 2022, 8:57 AM), <https://techcrunch.com/2022/04/12/family-vlogs-child-influencers-exploitation-youtube-laws/> [<https://perma.cc/D4BB-H4G2>]; Cuthbertson, *supra* note 180.

191. C. TRAV. art. 1–8.

amount earned from published content, either directly or indirectly, exceeding the threshold discussed above be paid without delay to the Caisse des dépôts et consignations.¹⁹² This excess paid to the Caisse des dépôts et consignations will be managed by this fund until the child reaches the age of majority.¹⁹³ A portion of income, however, may be left to the disposal of the child's legal authority at the discretion of competent authority.¹⁹⁴

Additionally, any advertiser who makes a product placement on a video whose main subject is under 16 years old is required to check if the person has declared they are obligated to place their earnings in excess of the stated threshold under the protection of the Caisse des dépôts et consignations.¹⁹⁵ Where this is required, the advertiser must pay the amount due for the product placement to the Caisse des dépôts et consignations, which will remain responsible for managing the money until the child has reached majority or has become emancipated.¹⁹⁶ Failure for the advertiser to comply results in a fine of €3,750, which creates an incentive for all involved parties to comply with the law.¹⁹⁷ This formal and codified protection of minors working or appearing in social media content should be followed federally in the U.S.

IV. ANALYSIS/CRITIQUE OF DEVELOPMENT OF LAW

A. Coogan Laws Will Not Be Sufficient When Homes Are Turned into Studios for "Family Vlogs"

A major issue in imposing Coogan-like regulations on social media is the lack of a labor relationship under current law where a parent simply films

192. *Id.* The Caisse des dépôts et consignations is a public financial institution responsible for managing popular savings funds and managing pensions, among other financial responsibilities. See *Gouvernance*, CAISSE DE DÉPÔTS GROUPE, <https://www.caissedesdepots.fr/modele-unique/gouvernance> [https://perma.cc/G8A5-LB2T].

193. C. TRAV. art. 1–8.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

their child at home and uploads the video online.¹⁹⁸ However, it is clear these homes are being turned into studios to produce family and mommy vlogs to rake in large profits.¹⁹⁹ With this in mind, laws must account for the reality that a majority of the work done by children on vlogs happens within the home, and implement specific regulations targeted to protect these minors when their homes are turned into studios.

1. Lack of Oversight Inside the Home

The first issue with regulating such social media activity under existing laws is the high deference given to parents, constitutionally and statutorily, to make decisions about the welfare and upbringing of their children within the confines of their own homes.²⁰⁰ Ultimately, any law passed by Congress would “need to balance the state’s right to protect vulnerable citizens with the parents’ right to raise their children as they see fit.”²⁰¹

a. Constitutional Law Favors Parents’ Right to Choose How to Parent Their Child

The word “liberty” in the Due Process Clause of the 14th Amendment has been interpreted to include the parental right to decide how to raise a child.²⁰² Family autonomy cases decided by the Supreme Court first involved the right of parents to control the upbringing of their children, particularly as it pertained to education.²⁰³ The logic focused on substantive due

198. See Lisa Bubert, *I Made Money Off Pictures of My Kid on Instagram—What Should I Do With It?*, YAHOO! NEWS: PARENTS (Jun. 2, 2021), <https://news.yahoo.com/made-money-off-pictures-kid-185323540.html> [<https://perma.cc/LXV3-A6DP>].

199. See Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers”*, 169 U. PA. L. REV. 577, 591–93 (2021) (discussing the filming and scope of production done within the home for this type of social media content).

200. Nila McGinnis, Comment, *“They’re Just Playing”: Why Child Social Media Stars Need Enhanced Coogan Protections to Save them from their Parents*, 87 MO. L. REV. 247, 260 (2022).

201. Valeriya Safronova, *Child Influencers Make Big Money. Who Gets It?*, N.Y. TIMES (Oct 10, 2023, 4:17 PM), <https://www.nytimes.com/2023/10/10/style/children-influencers-money.html> [<https://perma.cc/XA5R-5SQ7>].

202. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 942 (6th ed. 2020).

203. *Id.* at 942–46.

process language and is still followed today.²⁰⁴ Two foundational cases articulating this right both involve a parent's right to make choices about their child's education.²⁰⁵

In *Meyer v. Nebraska*, the Court stated parents have the right to control their children.²⁰⁶ Corresponding with this right, the Court also found it was the "natural duty of the parent" to provide their child with the education they deem suitable.²⁰⁷ This right for a parent to choose the appropriate education for their child was rooted within the concept of liberty in the 14th Amendment's Due Process Clause.²⁰⁸ Similarly, the Court in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* held the state law requiring children to attend public school violated parents' liberty to "direct the upbringing and education of children under their control."²⁰⁹ Further, the Court noted a constitutional right "may not be abridged by legislation which has no reasonable relation to some purpose within" states' power.²¹⁰ In so holding, the Court found the education regulation deprived parents of their right to make decisions about their children's upbringing, violating the 14th Amendment.²¹¹

The above cases, in finding a right to choose how to parent a child is within the scope of the 14th Amendment's Due Process Clause, deemed this a fundamental right subject to strict scrutiny.²¹² To overcome a challenge to strict scrutiny, the government must prove the regulation was narrowly

204. *Id.*

205. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 518 (1925).

206. *Meyer*, 262 U.S. at 400.

207. *Id.*

208. *Id.* at 399–400.

209. *Pierce*, 268 U.S. at 533–35.

210. *Id.* at 535.

211. *Id.* at 534–35.

212. *Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. at 535.

tailored to achieve a compelling government interest.²¹³ In other words, for the regulation to survive strict scrutiny, there must be no less restrictive of a means to achieve the end.²¹⁴ This makes it more challenging to impose regulations within the household, as the government must overcome a strict scrutiny analysis.²¹⁵ However, overcoming strict scrutiny is not impossible, especially where a child's safety is involved.²¹⁶

The constitutional right to make parental choices was again affirmed in 1979 by the Court in *Parham v. J.R.*²¹⁷ The Court stated the law begins with the rebuttable presumption that parents act in the best interests of their children, even though some parents may at times act against the interest of their child, as seen in cases of neglect and abuse.²¹⁸ Despite the potential for parental abuse and neglect, the Court stated government power should not “supersede parental authority in *all* cases because *some* parents abuse and neglect children.”²¹⁹ Further, the Supreme Court has held the “custody, care and nurture of the child” are primarily the responsibility of the parent.²²⁰

Despite this primary responsibility being held by the parents or legal guardians of a minor, the state is not without power to protect children.²²¹ When acting to protect the well-being of a child, “the state as *parens patriae* may restrict the parent's control by requiring school attendance [or] regulating or prohibiting the child's labor.”²²² One example of the federal government exercising this power was the passage of the FLSA, restricting and

213. APRIL J. ANDERSON, CONG. RSCH. SERV., IF12391, EQUAL PROTECTION: STRICT SCRUTINY OF RACIAL CLASSIFICATIONS (2023).

214. CHEMERINSKY, *supra* note 202, at 688.

215. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

216. RESTATEMENT (FIRST) OF CHILD. AND LAW ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018).

217. *Parham v. J.R.*, 442 U.S. 584, 620 (1979).

218. *Id.* at 602–03, 610.

219. *Id.* at 603 (italics in original).

220. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

221. *Id.* at 166.

222. *Id.* (italics in original).

regulating child labor.²²³ All states have also implemented compulsory school attendance laws.²²⁴ Although the exact age requirements vary from state to state, the minimum age of required school attendance typically falls between 5 and 7 years old, while the maximum age for required school attendance ranges between 16 and 19 years old.²²⁵ It is thus clear that while parents have a general right to make parenting decisions regarding their minor children,²²⁶ the state has authority to regulate children's activities, especially when matters of employment are involved.²²⁷

b. Child Welfare and Dependency Law – When the Law is Willing to Step in

Modern law constrains state intervention to respect family privacy.²²⁸ Support for substantial deference to parents' decisions when raising their children is rooted in family liberty, promoting child welfare, and the value of pluralism in society.²²⁹ The courts and legislatures act to preserve the parent-child relationship, assuming parents are motivated to promote the child's best interests.²³⁰ That being said, the law does not leave parents free to make decisions which place their children at a substantial risk of harm or which do not protect a child's health and well-being.²³¹

While parents generally have a right to make parental decisions under the constitutional precedent of the 14th Amendment, in matters of child welfare and dependency, the state can more easily intervene for the safety of a

223. *See supra* Section II(B).

224. *Table 1.2. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CENTER FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [<https://perma.cc/6C8J-CDYS>].

225. *Id.*

226. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

227. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

228. RESTATEMENT (FIRST) OF CHILD. AND LAW ch. 1, intro. note.

229. *Id.*

230. *Id.*

231. *Id.*

child.²³² In connection with the Supreme Court’s recognition of a state’s *parens patriae* authority to protect children, child welfare law clarifies the state may intervene “only if there is evidence of serious harm to the child’s physical or mental health.”²³³ There must be a substantial justification for state intervention, which is shown when there is a heightened level of harm to a child, but the state cannot intervene simply because the parent’s behavior is less than optimal.²³⁴ A parent’s constitutional right to parent is limited when the child’s welfare is threatened, and thus the state has an overriding police power when it is necessary to act to protect the health and safety of children.²³⁵

One such instance which justifies state intervention is where the child faces maltreatment by their parent or legal guardian.²³⁶ The Child Abuse Prevention and Treatment Act defines child maltreatment as “serious harm (e.g., physical abuse, sexual abuse, emotional abuse, neglect) caused to children by parents or primary caregivers.”²³⁷ This includes harm specifically caused by the parent or caregiver, as well as harm they do not prevent from happening.²³⁸ California’s Welfare and Institution Code considers a child a dependent of the state if they are suffering emotional damage or are at a “substantial risk of suffering serious emotional damage,” including severe anxiety and depression, as the result of conduct by their parent or guardian or due to having a parent or guardian who is not capable of providing them with the appropriate care.²³⁹

232. *Id.*

233. *Id.*

234. RESTATEMENT (FIRST) OF CHILD. AND LAW ch. 1, intro. note.

235. *Id.*

236. *How the Child Welfare System Works*, CHILD WELFARE INFORMATION GATEWAY (Oct. 2020), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cpswork.pdf?VersionId=1OJwA21AGsRB.0WoXB_CW9a6Hw1MbGpy [https://perma.cc/CR6N-6XKA].

237. *Id.*

238. *Id.*

239. *Definitions of Child Abuse and Neglect - California*, CHILD WELFARE INFORMATION GATEWAY (May 2022), <https://www.childwelfare.gov/resources/definitions-child-abuse-and-neglect-california/> [https://perma.cc/WU2B-GFNY].

As it relates to children in social media, extreme, albeit rare, cases have been seen in family vlogging, where parents play cruel “pranks” on their children, or threaten adoption, all for a reaction.²⁴⁰ In these extreme cases, the documentation and posting of such mental and emotional abuse on their social media platforms has led to a loss of custody.²⁴¹ One such case was the vlogger known as “DaddyOfFive” on YouTube.²⁴² YouTube suspended his account after the parents were charged by the state with child abuse, after repeatedly yelling in rage during “pranks” against their children.²⁴³ This charge of child abuse and suspension of the account, however, only seemed to happen after extreme behavior and not from the ordinary exploitation of their children across multiple family vlogging channels.²⁴⁴ While it is important the law protects children when parental behavior amounts to a level of child abuse, the law needs to go further to protect the children from their parents’ exploitation of their image and labor on social media.

2. Parents Control the Accounts, and They Control the Money

Through the systems of monetization in social media accounts, parents further their control over their children’s content and money.²⁴⁵ Influencers are incentivized to regularly post on YouTube by the integrated payments for advertisement revenue based on viewership.²⁴⁶ YouTube has created the

240. Brianna Kovit, *Considering the Ethics of Family Vloggers*, THE MUHLENBERG WEEKLY (Nov. 11, 2021), <https://muhlenbergweekly.com/campus-voices/considering-the-ethics-of-family-vloggers/> [<https://perma.cc/E9KP-WFJ2>].

241. *Id.*

242. *Id.*

243. *Id.*; Tasneem Nashrulla, *Parents Who Were Charged with Child Neglect for “Pranking” Their Kids on YouTube Are Still Making Videos with Their Children*, BUZZFEED NEWS (Jul. 18, 2018, 2:26 PM), <https://www.buzzfeednews.com/article/tasneemnashrulla/youtube-daddyofive-videos-criticism> [<https://perma.cc/2NWW-ULV8>].

244. Kovit, *supra* note 240; see also Madyson Edwards, Comment, *Children Are Making It Big (for Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, 31 UCLA ENT. L. REV. (forthcoming 2024) (manuscript at 2).

245. See, e.g., *AdSense for Youtube*, YOUTUBE HELP, https://support.google.com/youtube/answer/11602441?hl=en&ref_topic=11449917&sjid=17412026650156677546-NA [<https://perma.cc/Y7R4-8A3J>].

246. Advertisements on YouTube cost the brand paying for advertisement space on average \$0.10-\$0.30 per view, which gets split between the platform and the channel. By posting consistently to satisfy the platform’s algorithm, influencers can maximize the number of people watching

YouTube Partner Program to let creators monetize their videos.²⁴⁷ Once a creator reaches the requirements for monetization through the program,²⁴⁸ they can apply to the Partner Program.²⁴⁹ The program creates revenue sharing between the creator and YouTube, where the platform keeps 45% of the ad revenue earned through the partner creators.²⁵⁰ This incentivizes YouTube to help family vlogs, which have been deemed “advertiser friendly” in the algorithm in order to make more money as a platform through these ads.²⁵¹

To set up monetization on YouTube, the account owner needs to set up direct deposit and provide tax documentation that matches the name used.²⁵² The payment from YouTube gets deposited into the linked AdSense account, which means that no matter who else is working or deserves to be paid, the

advertisements on their videos and increase payment from the platform. Stephanie Heitman, *Starter Guide to YouTube Advertising Costs in 2023 (+ 5 Ways to Spend Less)*, LOCALIQ (Feb. 17, 2023), <https://localiq.com/blog/youtube-advertising-cost/> [<https://perma.cc/CCH9-G9JH>]; see also Michel Janse, *Juicy Q+A: What It Is REALLY Like Working as an Influencer (+ the Most I've Been Paid!)*, YOUTUBE (June 19, 2023), <https://www.youtube.com/watch?v=Li30aJ3UCwo> [<https://perma.cc/F6UF-8VLT>] (discussing advertising revenue through YouTube, and the payment split between creators and YouTube at 3:00; discussing optimization of posting recommended by YouTube at 23:45).

247. *YouTube Partner Program Overview & Eligibility*, YOUTUBE HELP, <https://support.google.com/youtube/answer/72851?hl> [<https://perma.cc/FT4Q-9S4D>].

248. 1,000 subscribers and 4,000 hours of watch time in 12 months, or 1,000 subscribers and 10 million public views on shorts in a 90 day period. See Lydia Sweatt, *How to Join the YouTube Partner Program and Monetize Your Channel in 2023*, VIDIQ (Apr. 26, 2023), <https://vidiq.com/blog/post/youtube-partner-program-guide/> [<https://perma.cc/A7GW-MQD9>].

249. For creators within eligible countries, including the United States, YouTube expanded their Partnership Program. The requirements in the eligible countries are now for the account to have 500 subscribers, three valid public uploads in the last 90, and either 3,000 valid public watch hours in the last year or 3 million valid public views on YouTube Shorts in the last 90 days. See *Overview of the Expanded YouTube Partner Program*, YOUTUBE HELP, <https://support.google.com/youtube/answer/13429240?sjid=17412026650156677546-NA>. [<https://perma.cc/4QHQ-VH6C>].

250. Sweatt, *supra* note 248.

251. Julia Alexander, *YouTube Videos with Kids Get Three Times as Many Views as Videos Without Kids*, THE VERGE (Jul. 25, 2019, 8:35 AM), <https://www.theverge.com/2019/7/25/8930070/youtube-videos-kids-pew-research-study-ace-family-jake-paul> [<https://perma.cc/MDJ5-6KTN>].

252. *AdSense for YouTube*, *supra* note 245.

account owner controls the money.²⁵³ In the current system, there is not a way that YouTube could enforce sharing of these funds, as only one AdSense account needs to be linked for payments to be made from YouTube to the creator.²⁵⁴ While there is potential room to negotiate contracts when it comes to brand sponsorships, it is unlikely stipulations are being made to specifically set a portion of the payment aside for a child. Despite the work they are doing for the brand, the brands likely pay the channel as an entity or simply contract with the parents to avoid potential issues of contracting with minors.²⁵⁵

The channel and AdSense account are both run by the parents who have the parental power to decide how to use or save such funds. Without any regulations controlling the money coming into the AdSense accounts or being paid externally to creators, there is currently no way to guarantee children appearing in their parent's content are being compensated adequately.²⁵⁶ Federal legislation must be passed, therefore, to address the multiple streams of income earned by family channels for these children to see full protection under the law.

B. Protection of Child's Likeness

The right of publicity protects the right of an individual to control the commercial use of their identity through control of their name, image, and likeness.²⁵⁷ While this right applies to children, in California parents can consent to the commercial use of their child's name or likeness.²⁵⁸ This section argues to grant children the full ability to control the use of their image under the right of publicity. Children should have the right to revoke consent and the right to erasure where consent for the use of their image is revoked.

253. *Id.*

254. *Id.*

255. *See, e.g.*, CAL. FAM. CODE §§ 6710, 6712 (West 1994) (allowing minors to disaffirm contracts when they reach the age of majority).

256. Edwards, *supra* note 247 (manuscript at 2).

257. *Right of Publicity*, INT'L TRADEMARK ASSOC., <https://www.inta.org/topics/right-of-publicity/> [<https://perma.cc/5JYH-4FSK>].

258. CAL. CIV. CODE § 3344 (West 1984).

Posting vlogs of children online utilizes a child's name and likeness, often for financial benefit of the parent. Many mommy vloggers not only make money from featuring their children in content through Google Ad-Sense on YouTube videos, but also work with brands on paid sponsorships or affiliate links and coupons, further profiting from the inclusion of their child's image in their content.²⁵⁹ California provides an individual with a statutory right of publicity to protect against the use of their name or likeness by another, without consent, on or in goods or merchandise in commerce, or for purposes of advertising or selling.²⁶⁰ Liability is found when someone uses another's name or likeness without their consent, however, in the case of a minor, parents retain the ability to consent to such use on behalf of their child.²⁶¹

Even absent the parent's ability to consent to use of likeness in an advertisement or sponsored post, Section 3344(e) provides parents a loophole to avoid liability for such use of their child.²⁶² This section states the use of a name or likeness in a commercial medium is not the type of use which requires consent under Section (a) simply because the material in which the name or likeness is used is sponsored or contains a paid advertisement.²⁶³ To find liability for the use of likeness, the use would have to be so connected to the sponsorship or paid advertisement.²⁶⁴ Therefore, a parent using their child's name or likeness in a post or video which is sponsored by, or contains a paid advertisement for, a brand could avoid liability both by consenting on behalf of their minor child²⁶⁵ and by ensuring any sponsored portion of the post or video does not contain their minor children or only contains the children incidentally.²⁶⁶

259. See *France Passes New Law to Protect Child Influencers*, BBC NEWS (Oct. 7, 2020, 3:12 AM), <https://www.bbc.com/news/world-europe-54447491> [<https://perma.cc/R355-7RR6>].

260. CIV. § 3344.

261. *Id.*

262. CIV. § 3344(e).

263. *Id.*

264. *Id.*

265. CIV. § 3344(a) (stating in the case of a minor, parents may consent to the use of their child's name or likeness for commercial purposes).

266. CIV. § 3344(e).

The issue of protecting a child's likeness arises in the area of consent. A minor's right to consent is vested in their parents, which allows parents to unilaterally decide to use their children's image and identity in paid videos and advertisements.²⁶⁷ Furthermore, the Parental Immunity Doctrine would make it hard for children to sue their parents for consenting to the use of their likeness in advertising through brand partnerships and sponsorships, as parents are generally trusted to make these types of decisions for their family.²⁶⁸ Unless a child was able to establish clear abuse, neglect, or criminal activity, the court would likely not interfere absent a threat to the child's safety.²⁶⁹

One solution this note suggests is a law providing for the right of rescission of commercial use of one's name or likeness. Under contract law, once a minor reaches the age of maturity, they are able to affirm or disavow the contracts made as a minor, unless it was for necessities.²⁷⁰ This protects a minor's ability to fully consent to a contract as a competent individual, as they are not seen as a sophisticated party under the law when entering contracts as a minor.²⁷¹ While the right of publicity covers use of a minor's

267. Civ. § 3344(a)

268. Brittany Wong, *In the Future, Will Your Kids Be Able to Sue You for Oversharing Online?*, HUFFPOST (Apr. 22, 2019, 2:21 PM), https://www.huffpost.com/entry/parents-overposting-online_1_5cb4dd23e4b082aab08a5c10 [<https://perma.cc/SS9C-LED5>]; see *supra* Section IV(A)(1).

269. See *supra* Section IV(A)(1); but see Julia Carrie Wong, *'It's Not Play if You're Making Money': How Instagram and Youtube Disrupted Child Labor Laws*, THE GUARDIAN (Apr. 24, 2019), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> [<https://perma.cc/W56V-U2V2>] (suggesting an alternative way brand deals involving a child's likeness could be invalid before the law, stating “[David] Pierce also theorized that influencer deals made by parents on behalf of their children could be invalid unless the earnings are owned entirely by the child, because a parent consenting to the use of their child's image in advertising in order to enrich himself would be ‘self-dealing and in breach of the covenant of good faith and dealing’”).

270. CAL. FAM. CODE §§ 6710, 6712 (West 1994).

271. *Doe v. Roblox Corp.*, 602 F. Supp. 3d 1243, 1257 (N.D. Cal. 2022); RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. L. INST. 1981) (“A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is [. . .] an infant.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST. 1981) (noting that infancy refers to a natural person who has not reached age of majority, which in most states, by statute, is 18).

name or likeness, the right is balanced with First Amendment right to free speech when their parents post content online.²⁷²

This note proposes, as a solution to parents' ability to consent on behalf of their child to the use of their identity for commercial purposes, to implement a similar ability to rescind this consent once a child reaches 18 years old. Taking inspiration from the purpose of the proposed Child Modeling Exploitation Prevention Act of 2002,²⁷³ where a child's image is exploited solely for financial gain, the child should be able to either demand erasure of the offending content and/or be compensated in the amount earned by their parent from the use of the child's image. While this would not protect the child when their parents are creating the content, this could give children a right to regain privacy, expunge certain content from the internet, and retroactively control of the use of their likeness.²⁷⁴

C. Privacy Is Not a Constitutional Right Post-Dobbs. Congress Can Legislate This Protection via the Commerce Clause, But Is it Constitutional?

To pass legislation, Congress must find relevant authority, either express or implied, within the Constitution.²⁷⁵ While authority can be found throughout the Constitution, including the Amendments, the modern Congress tends to rely strongly on its authority to pass legislation under the Commerce Clause.²⁷⁶ When *Roe v. Wade* was decided, the Court interpreted that a woman's right to have an abortion stemmed both from "liberty" within the 14th Amendment, as well as precedent recognizing the right of personal privacy and certain zones of privacy under the Constitution.²⁷⁷ While not

272. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391 (2001).

273. Child Modeling Exploitation Prevention Act of 2002, H.R. 4667, 107th Cong. (2002).

274. The proposed rescission of consent for the use of likeness could operate similarly to the EU's right to be forgotten, where any post where consent has been rescinded would have to be removed from the internet, or damages paid to the person revoking consent in the amount earned by the parent through use of the child's likeness as a minor. *See supra* Section III(D)(1).

275. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 119 (6th ed. 2020).

276. *Id.* at 155.

277. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), *holding modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

unqualified, the Court again emphasized the right of personal privacy as an unenumerated right guaranteed by the Constitution.²⁷⁸ However, in 2022, the Supreme Court overruled *Roe v. Wade*.²⁷⁹ The Court did not find the right to abortion even implicitly protected by the 14th Amendment, as it was not rooted in American history and tradition or implicit in ordered liberty.²⁸⁰ In overruling *Roe* at large, the Court also rejected the previous reliance on the right of privacy to protect abortion.²⁸¹

Privacy is not a right expressly enumerated in the Constitution.²⁸² The Court in *Dobbs* was reluctant to find the 14th Amendment's Due Process Clause protects many unenumerated rights.²⁸³ While this decision does not make explicitly clear whether the right to privacy is still viewed as a fundamental right under the Constitution, it is clear the *Dobbs* Court does not have issues in overturning precedent it does not agree with.²⁸⁴ With this in mind, arguing children in social media should be protected under their fundamental right to privacy is likely a weaker argument post-*Dobbs* than it was before 2022. Thus, to support legislation, the strongest argument for federal protection is under the Commerce Clause.

1. Background on the Commerce Clause

The Constitution grants Congress power to regulate commerce with foreign nations as well as commerce between the states, as long as the legislation passed does not violate another provision of the Constitution.²⁸⁵ The modern Congress relies greatly on the Commerce Clause for its authority to pass a wide array of legislation, and it is under this authority that Congress

278. *Id.* at 154.

279. *See Dobbs*, 142 S. Ct. at 2242.

280. *Id.*

281. *Id.*

282. *Roe*, 410 U.S. at 152, *overruled by Dobbs*, 142 S. Ct. at 2228, *holding modified by Casey*, 505 U.S. at 833.

283. *Dobbs*, 142 S. Ct. at 2242.

284. *See generally id.*

285. U.S. CONST. art. I, § 8, cl. 3.

could pass federal legislation to protect children from their parents posting and exploiting them online.²⁸⁶

Under the current interpretation and Supreme Court jurisprudence, “the meaning of ‘commerce’ in ‘interstate commerce’” includes communications and transmissions of intelligence across state lines, whether for commercial purposes or not, as well as the traditional movement of people or things across state lines.²⁸⁷ Social media platforms are “global commercial enterprises” through which users are able to post information and reach other users across state and country borders.²⁸⁸ Therefore, social media posts should be understood to qualify as “commerce” in “interstate commerce” as communications crossing state lines.

Through a modern interpretation of the Commerce Clause, Congress has the power to regulate if it is regulating activity which is deemed “economic.”²⁸⁹ “Economic” has been defined as “the production, distribution, or consumption of commodities.”²⁹⁰ Despite the fact that the consumption of social media content is largely free to users, the content creators are profiting from posting (i.e., distributing) this content through advertisement money, sponsored content, and affiliate links for products.²⁹¹ Often, the amount creators profit from their content is directly tied to the number of people who

286. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 155 (6th ed. 2020); Madyson Edwards, Comment, *Children Are Making It Big (for Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, 31 UCLA ENT. L. REV. (forthcoming 2024) (manuscript at 2).

287. *ArtI.S8.C3.2 Meaning of Commerce*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-2/ALDE_00013404/ [<https://perma.cc/KJT2-YPKE>].

288. Ayesha Rasheed, *Dormant Commerce Clause Constraints on Social Media Regulation*, 25 YALE J. L. & TECH. (SPECIAL ISSUE) 101, 104 (2023).

289. *United States v. Lopez*, 514 U.S. 549, 559, 560, 567 (1995) (stating the third category of congressionally regulated activity is economic activity where it substantially affects interstate commerce, but no such economic activity was found in the Gun-Free School Zones Act of 1990).

290. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005).

291. See, e.g., *How to Make Money on YouTube*, YOUTUBE: YOUTUBE CREATORS, <https://www.youtube.com/creators/how-things-work/video-monetization/> [<https://perma.cc/XXY5-SW4Y>]; see also *How to Earn Money on YouTube*, YOUTUBE HELP, <https://support.google.com/youtube/answer/72857?hl=en> [<https://perma.cc/USP9-G929>].

view (i.e., consume) their content.²⁹² Therefore, this is inherently economic activity under *United States v. Lopez* and *Gonzales v. Raich*.²⁹³

Further, due to the transient nature of the internet, the dormant Commerce Clause should prohibit states from regulating internet activity which would lead to dangerously inconsistent regulations between the states.²⁹⁴ While the dormant Commerce Clause has not been used to categorically prohibit states from passing any internet regulations, modern courts balance the states' ability to regulate with the potential threat of inconsistent regulations while Congress also retains power under the Commerce Clause to regulate.²⁹⁵ Because of this potential dormant Commerce Clause analysis for state regulations of online activity, federal legislation would be the best vehicle for the proposed regulations and protections, particularly to avoid inconsistent regulations protecting children online.

2. First Amendment Rights and a Compelling Reason to Regulate These Rights

First Amendment free speech is a fundamental right enumerated and protected under the Bill of Rights.²⁹⁶ Under the Fifth Amendment Due Process Clause, the federal government shall not deprive any person of "life, liberty, or property, without due process of law."²⁹⁷ As mentioned above, government actions which seek to regulate fundamental rights are generally subject to strict scrutiny.²⁹⁸ Thus, if challenged, the federal government would need to prove the regulation was a narrowly tailored means to achieve a compelling government interest.²⁹⁹

292. *Understand Ad Revenue Analytics*, YOUTUBE HELP, [https://support.google.com/youtube/\[https://perma.cc/7TUT-A7C5\]](https://support.google.com/youtube/[https://perma.cc/7TUT-A7C5]).

293. *See Lopez*, 514 U.S. at 559; *see also Gonzales*, 545 U.S. at 25.

294. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L. J. 785, 786 (2000).

295. *Id.* at 785, 798, 802–03.

296. U.S. CONST. amend. I.

297. U.S. CONST. amend. V.

298. CHEMERINSKY, *supra* note 205, at 906.

299. *See id.* at 903–04.

Here, it can easily be argued that protecting the privacy, wage, and labor of children is a compelling government interest, as the federal government has already passed the Fair Labor Standards Act.³⁰⁰ If the legislation is challenged, the government would have to show the law is narrowly tailored to not usurp more of the parent's First Amendment rights in sharing their children online than necessary to protect their children.³⁰¹ This constitutional requirement must be considered in drafting legislation but is beyond the scope of this note.

3. Requiring a Portion of Sponsorship or Brand Partnership Payment Be Made Directly into Coogan-like Account for the Child

Ordinary videos or photos posted to social media do not have contracts regulating the filming, editing, and posting of the content.³⁰² However, all legitimate sponsorships from brands should involve a contract between parties, including what is requested of the content creator, any control the brand has over the sponsored portion of the video (including final approval), and the price of the sponsorship.³⁰³ Sponsored content posted to social media can be viewed online across state lines and internationally.³⁰⁴ For a sponsored post, the influencer is paid to promote a product specifically, a promotion or sale, or the brand at large.³⁰⁵ Because these posts are shared online, they should fall under the current case law's understanding of communications within the Commerce Clause, which Congress has the constitutional power to regulate.³⁰⁶

300. See Fair Labor Standards Act, 29 U.S.C. § 201, et. seq.

301. CHEMERINSKY, *supra* note 205, at 906.

302. See *Terms of Service*, YOUTUBE (Dec. 15, 2023), <https://www.youtube.com/terms#27dc3bf5d9> [<https://perma.cc/A433-UWQJ>] (discussing uploading content, which, unlike distribution with traditional entertainment, does not require any contract to upload and share).

303. See *Tips for Getting Brand Deals*, YOUTUBE HELP, <https://support.google.com/youtube/answer/12928947> [<https://perma.cc/S4PN-24NY>].

304. Rasheed, *supra* note 288, at 104.

305. See Emma Kumer & Rachel Lerman, *How Much Money Do Influencers Make? 10 Creators Give Us the Real Numbers*, WASHINGTON POST (Dec. 22, 2023, 5:00 AM), <https://www.washingtonpost.com/technology/2023/12/22/how-much-influencers-make-youtube-tiktok/> [<https://perma.cc/U4H4-ZVL2>].

306. See *supra* Section IV(C)(1).

This note is proposing that for any paid sponsorship or partnership which specifically involves or shows the children, the contract must specify the amount the child is getting paid for the work or the portion allotted to the child based on their presence in the sponsored video or post. If the child is to be expressly involved in a sponsored video or post, or the sponsored portion of a video, the company sponsoring the content should be required to obtain a work permit from the Labor Commissioner or get the sponsorship contract approved by the superior court. Further, under the contract, the brand paying for the sponsorship must pay at least 15% of that gross income for the child directly into a blocked trust account. Fines should be imposed for failing to do so, some of which could be reimbursed to the child through the trust account. This proposed legislation would only impact posts or the portion of videos which are paid for and sponsored, or are brand advertisements, including the entirety of a video if the entire video is sponsored. Therefore, the requirements would not be triggered if the parent does not include their children in the paid portion of the content.³⁰⁷ If the content is a video in which only a portion of the video is sponsored, the parent could include the child in the unsponsored portion of the video under this proposed legislation, without triggering the specific contract requirements with the sponsoring brand.

Following the Coogan Law in California,³⁰⁸ Congress should pass legislation to mandate that any brand or sponsorship contract in social media which includes the use of the minor children is a contract for limited employment.³⁰⁹ Under this law, Congress could require the contract be approved by either the Labor Commissioner of the state where the sponsoring company has their primary place of business or is incorporated, or the state in which the child is domiciled. Alternatively, the contract could be approved by the lower state court where the child is domiciled, ensuring the contract terms are fair to the child and that the child cannot later rescind the

307. *But see, e.g.*, 820 ILL. COMP. STAT. 205/0.5 (2023) (requiring an amount of money proportional to the amount a minor was featured to be paid directly to a trust account, regardless of sponsorship).

308. CAL. FAM. CODE § 6750 (West 2020).

309. *Limited-Term Employment*, INSTITUT NATIONAL DE LA STATISTIQUE ED DES ÉTUDES ÉCONOMIQUES (Feb. 22, 2023) <https://www.insee.fr/en/metadonnees/definition/c1752#:~:text=Limited%2Dterm%20jobs%20are%20those,the%20employee%20to%20his%20employer> [<https://perma.cc/QC9J-39EX>] (“Limited-term jobs are those which have a fixed term, defined in the employment contract which binds the employee to his employer.”).

contract. Further, as this would create a labor relation, Congress should mandate under such law the payment of a minimum 15% of the child's portion of the sponsorship payment be made directly into their blocked trust account.

Washington State House Bill 2032 sets an example upon which Congress could base such a law.³¹⁰ This bill is aimed at addressing the current lack of legal protections federally for these children, protecting them against parental exploitation while trying to rectify the loss of privacy from being posted widely online without their consent.³¹¹ If this bill were to be passed in the Washington State Legislature, it would apply to content which has a minor featured at least 30% of the time and generates at least 10 cents per view.³¹² If applicable, a percentage of the income from the family vlog must be set aside into a blocked trust to be given to the child once they turn 18.³¹³ This law would also give children the ability to request that any content in which they appear be removed from the social media platform.³¹⁴

Washington State House Bill 2032 would be applicable to vloggers who meet the bill's compensation requirements at any point within a 12-month period.³¹⁵ If those criteria are met, the vlogger must compensate the minor child whose name, likeness, or photograph is being used by setting aside gross earnings in a proportion equal to, or greater than, the percentage

310. H.B. 2032, 67th Leg., 2022 Reg. Sess. (Wash. 2022).

311. Monica Reilly, *Family Vlogging: Blurring the Line Between Parent and Employer*, THE SCIENCE SURVEY (Jan. 18, 2023), <https://thesciencesurvey.com/editorial/2023/01/18/family-vlogging-blurring-the-line-between-parent-and-employer/> [<https://perma.cc/JCC8-YKTS>].

312. Amanda Silberling, *There Are No Laws Protecting Kids from Being Exploited on YouTube — One Teen Wants to Change That*, TECHCRUNCH (Apr. 12, 2022, 8:57 AM), <https://techcrunch.com/2022/04/12/family-vlogs-child-influencers-exploitation-youtube-laws/> [<https://perma.cc/D4BB-H4G2>].

313. *Id.*

314. *Id.*

315. Wash. H.B. 2032 § 3(2)(a)(i) (“The number of views received per video segment on any internet platform or network met the platform or network’s threshold for generation of compensation; or (ii) The vlogger received actual compensation for video content equal to or greater than \$0.10 per view; and (b) At least 30 percent of the vlogger’s compensated video content produced within a 30-day period included the likeness, name, or photograph of the vlogger’s minor child. Content percentage is measured by the percentage of time the likeness, name, or photograph of the vlogger’s minor child visually appears or is the subject of an oral narrative in a video segment, as compared to the total length of the segment.”).

of the content which contains the minor child.³¹⁶ These funds must be set aside in the child's trust account.³¹⁷

Lastly, Washington House Bill 2032 creates a right to be forgotten once the minor children reach the age of majority.³¹⁸ Where the above criteria are met, a child may request "permanent deletion of any video segment including [their] likeness, name, or photograph" from any platform or network that provided compensation to the child's parents for such content.³¹⁹ This helps protect a minor's ability to control the use of their name and likeness when often they are too young to understand what their parents are posting, much less to consent to that use of their image.³²⁰

This Washington State bill serves as a helpful template for the type of federal legislation Congress needs to pass to protect the children of mommy and family vloggers nationally.³²¹ Whether a child is protected under such a law as proposed in Washington State,³²² or the one recently passed in Illinois,³²³ should not depend on where the parent, and thus child, reside. To ensure all children are equally protected, Congress must pass federal legislation, much as they did in 1938 with the passage of the FLSA.³²⁴

D. If All Else Fails, Social Media Platforms Should Impose Their Own Regulations to Protect Children on Their Platforms

Suppose Congress fails to pass comprehensive legislation to protect children that are being posted online for profit by their parents. In that case, the various social media platforms can, and should, impose their own regulations to protect minors. Family content is considered advertiser friendly,

316. Wash. H.B. 2032 § 3(3).

317. *Id.*

318. Wash. H.B. 2032 § 4(1).

319. *Id.*

320. Silberling, *supra* note 312.

321. *See* Wash. H.B. 2032; *see also* 820 ILL. COMP. STAT. 205/0.5 (2023).

322. Wash. H.B. 2032.

323. 820 ILL. COMP. STAT. 205/0.5 (2023).

324. *See* Fair Labor Standards Act, 29 U.S.C. §§ 201–262.

so platforms profit significantly from these channels.³²⁵ With such profits,³²⁶ the platforms should be obligated to protect these vulnerable minors.

In her article “Children are Making it Big (For Everyone Else): The Need for Child Labor Laws Protecting Child Influencers,” author Madysen Edwards provided a series of proposed regulations surrounding the establishment of Coogan Trust Accounts for child influencers and production regulations within social media content creation.³²⁷ While these regulations put forth in the article are geared specifically at child influencers and the contracts they enter into,³²⁸ social media platforms could implement similar requirements into their terms of service.

First, social media platforms can establish regulations surrounding the money earned directly from their platform, excluding outside brand deals and sponsorships.³²⁹ This should require the child’s parent or legal guardian to submit proof of the child’s age³³⁰ and proof of a blocked trust account set up in the child’s name.³³¹ Often with family vlog accounts, the parents, as well as multiple children, are featured in the content.³³² Where multiple people, particularly minors, are featured and present in the content posted, the

325. Associated Press & Kelsey Vlamis, *YouTube Made \$959 Million in Ad Revenue Off Children Last Year, Followed Closely by Instagram: Harvard Study*, BUS. INSIDER (Dec. 27, 2023), <https://www.businessinsider.com/youtube-instagram-made-most-money-off-children-last-year-study-2023-12> [<https://perma.cc/XR93-AEDE>].

326. YouTube generated almost \$30 billion in revenue in 2022, with quarterly earnings for 2023 exceeding those of 2022 through the first three quarters. Mansoor Iqbal, *YouTube Revenue and Usage Statistics*, BUS. OF APPS (Jan. 8, 2024), <https://www.businessofapps.com/data/youtube-statistics/> [<https://perma.cc/A8NT-8VCD>].

327. See Edwards, *supra* note 244 (manuscript at 11).

328. See *supra* Sections IV(B), IV(C).

329. See, e.g., YouTube Partner Program Overview & Eligibility, YOUTUBE HELP, <https://support.google.com/youtube/answer/72851?hl> [<https://perma.cc/FT4Q-9S4D>] (creating regulations on YouTube for monetizing videos from advertiser revenue).

330. The system for verifying age of the children appearing in content could be modeled after the requirements set forth in Senator Schatz’s proposed bill, S.B. 1291. See Protecting Kids on Social Media Act, S.B. 1291, 118th Cong. (2023); see *supra* Section III(C)(3).

331. See Edwards, *supra* note 244 (manuscript at 12).

332. See Belinda Luscombe, *The YouTube Parents Who are Turning Family Moments into Big Bucks*, TIME (May 18, 2017), <https://time.com/4783215/growing-up-in-public/> [<https://perma.cc/33UA-TV6E>].

platforms must establish a formula for allotting the percentage or relative amounts each party involved will receive and have methods in place to protect those earnings rightfully allotted to the minor children.³³³ Social media platforms should have an established equation within their terms of service for an equitable distribution of the money earned through a parent's posts. For YouTube, TikTok, or other video-sharing platforms, this should be based on the percentage of time the child appeared in the video or is referenced and the ad revenue earned from the video (through Google AdSense or the TikTok Creator Fund).³³⁴ For Instagram, Pinterest, or other photo-sharing platforms, this equation should be based on the percentage of photographs in which the child appears, averaging the amount of money the parents make per unsponsored post. Both of these methods create a more objective, formulaic way to determine payment for minor children based on the content posted in which they appear.

Additionally, with the programs and systems YouTube already has in place, there are many platform-specific regulations and requirements YouTube can, and should, implement.³³⁵ After content creators apply to the YouTube Partner Program, YouTube reviews the channel to ensure they have met the stated requirements before accepting them into the program and allowing the content creator to earn money through Google AdSense.³³⁶ YouTube and other platforms that have programs and/or applications for channel monetization should also require the assessment of the account include an assessment of family content and the inclusion of children in the content as part of this review. If the qualifying percentage of videos or cumulative time set by the platforms involves showing their children, the

333. Edwards, *supra* note 244 (manuscript at 12) (“In cases where the contract includes more than one child, an adult or multiple adults, or any combination, the parties or parties to the contract must, prior to the execution of the contract, allot the percentage or amount of funds each party to the contract will receive.”).

334. See H.B. 2032, § 3(3)(a), 67th Leg., 2022 Reg. Sess. (Wash. 2022).

335. See Julia Carrie Wong, ‘It’s Not Play if You’re Making Money’: How Instagram and YouTube Disrupted Child Labor Laws, THE GUARDIAN (Apr. 24, 2019), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> [<https://perma.cc/W56V-U2V2>] (It has been argued with the control over the content posted and control over the dissemination of money earned on the platforms, these social media platforms should be treated as joint employers. This would require platforms, based in California, to comply with California wage law and child labor laws.).

336. Lydia Sweatt, *How to Join the Youtube Partner Program and Monetize Your Channel in 2023*, VIDIQ (Apr. 26, 2023), <https://vidiq.com/blog/post/youtube-partner-program-guide/> [<https://perma.cc/A7GW-MQD9>].

platforms can impose additional requirements to protect these minors. These requirements should include at least separate AdSense or other payment accounts, a portion of pay coming from the platforms to go directly into the minors' accounts (if not directly into blocked trust accounts), approval by the courts or labor commission for the channel to profit from the use of the child's name or likeness, and/or work applications for minor children.

While these proposed regulations are a start, as worded they would only benefit the children who appeared in videos prior to when the YouTube Partner Program or similar applications were approved. For this reason, these regulations should be part of a larger reporting system, discussed below, for those who begin to or increase the featuring of children after being accepted into a platform's monetization program.

Using YouTube as an example of these regulations, the platform could require separate accounts for the AdSense money to be distributed into for the money earned on a channel's videos. From the amount designated for any children involved or featured, YouTube should use a formula created to determine the child's earnings based on the time they appear in content, as described above, and require a minimum of 15% of those earnings be placed in a Coogan-like blocked trust account. The safest way to ensure the money was properly placed in such trust would be for YouTube to directly pay the amount to the trust, as employers do for child actors in California.³³⁷

Implementation of the split payment regulation would require either (1) parents to report to YouTube the children who are in their videos, and the amount of time they are in each video (which requires honest cooperation from the parents who are already exploiting their children for views and money); (2) a review team designated to reviewing and determining the time (which seems impossible and cost-prohibitive given the amount of content that gets posted daily); or (3) AI/computer programming beyond the scope of this note to identify the different children/faces in each video and calculate the amount of time that face appears (which might have its own technical issues, would only track where their face is shown, and could raise further issues of AI tracking the children and recording more data on them). Failure for parents to report this or to otherwise try to work around the system put in place could result in a fine, with a portion of that fine specifically paid into the trust account.

To help combat parental avoidance of these systems, platforms can also implement a notice system akin to that required under the Digital Millennium

337. CAL. FAM. CODE § 6752(b)(1) (West 2020).

Copyright Act (DMCA).³³⁸ Instead of a notice triggering takedown of content for potential copyright infringement, as under the DMCA,³³⁹ a notice system should be designed for viewers to put the platform on notice of a channel or account featuring minors, other than where the account is in the minor's name.³⁴⁰ If the channel has not already verified that it features minors, this notice would trigger a review from the platform to analyze its content for use of a minor child's name or likeness and compliance with the above payment requirements for the minor.³⁴¹ If minors were found being featured more than incidentally, the platform could either block or restrict uploads, or withhold payments from the platform until verification of a trust account for each regularly appearing minor has been established and work permits have been secured. This system would work hand in hand with the reporting system described in the "Kids Online Safety Act" by creating a system both to report unsafe or harmful activities directed at children as well as to report an unverified account which regularly posts children.³⁴²

This notice system can also work in conjunction with the right to be forgotten. Platforms should implement expungement policies akin to the EU's Right to be Forgotten to protect the use of a child's image.³⁴³ When a child featured on a parent or legal guardian's platform reaches the age of majority, the proposed notice system should allow them to report content utilizing their image, for which they have not been compensated, for the platform to remove. This will help children who were posted online without consent by their parents to regain control of the use of their name and image across social media platforms.

Lastly, this note proposes social media platforms impose stricter regulations regarding paid or sponsored content. For example, if the paid portion of a sponsored video (or a fully sponsored photo/post) involves a child,

338. 17 U.S.C. § 512 (2010).

339. *Id.*

340. Neyza Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD AND FAMILY L. J. 86, 113 (2020).

341. This note is proposing a voluntary feature when applying for monetization, or later, requiring proof of blocked trust accounts for minors and a minor's work permits to avoid a review from the platform after a viewer has flagged their page.

342. Kids Online Safety Act, S. 3663, 117th Cong. (2022).

343. *See supra* Section III(D)(1).

written proof would need to be given to the platform showing the total payment for the sponsored post and the percentage owed to the children based on the payment division described above.³⁴⁴ The parent would also have to provide proof through financial records and/or bank statements that the corresponding 15% of the amount allocated to the child for the sponsored post was put into the trust account, either from the parent or directly from the company sponsoring the post. Additionally, sponsored posts with brands involve contracts with the brand laying out expectations and payment.³⁴⁵ Social media platforms could require that in order to upload, proof of a work permit for the sponsorship must be presented if minor children are included in the sponsored content.³⁴⁶

V. CONCLUSION AND FINAL RECOMMENDATIONS

As long as family content remains profitable, parents will continue to post content featuring minor children. Based on the invasion of the child's privacy, the amount of money being made, and the time spent creating this content, these children need the law to protect them. The best way to regulate the issue and protect children is for Congress to implement federal legislation protecting the hours worked and wages earned by these children in social media³⁴⁷ and implement a right to be forgotten once the child reaches the age of maturity.³⁴⁸ Without such laws, these children remain vulnerable to their parents' exploitation without the promise of seeing a penny in return for their work and potential embarrassment.

344. See *supra* Section IV(D).

345. Jim Tobin, *10 Secrets of Successful Influencer Contracts*, FORBES (Nov. 10, 2021), <https://www.forbes.com/sites/forbesagencycouncil/2021/11/10/10-secrets-of-successful-influencer-contracts/?sh=6a669aed5ee4> [https://perma.cc/H9RT-QAGU].

346. However, it likely would be hard for platforms to regulate and keep track of this, which is why the best solution would be for federal legislation requiring work permits for minors involved in sponsored content.

347. Madyson Edwards, Comment, *Children Are Making It Big (for Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, 31 UCLA ENT. L. REV. (forthcoming 2024) (manuscript at 11).

348. See GDPR art. 17, 2016 O.J. (L 119) (EU).