

NO CHILD LEFT ONLINE: INFLUENCER “SHARENTING” AS A BREACH OF FIDUCIARY DUTY

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TABLE OF CONTENTS

INTRODUCTION	1214
I. BACKGROUND.....	1217
A. <i>Sharenting and the Social Media Industry</i>	1217
1. Development of the Influencer Industry.....	1217
2. Methods of Monetizing Content.....	1218
3. Sharenting and Privacy.....	1220
B. <i>History of Parents’ and Children’s Rights in U.S. Law</i>	1223
II. ANALYSIS.....	1228
A. <i>Survey of Proposed Solutions</i>	1228
1. European Model: Right to be Forgotten.....	1228
2. Child Entertainer Laws Monitoring Mechanism.....	1230
3. Best Practices Public Awareness Campaign	1232
B. <i>The Parent-Child Fiduciary Relationship</i>	1234
1. Development of Fiduciary Duties in the Law.....	1234
2. The Fiduciary Nature of the Parent-Child Relationship.....	1237
III. PROPOSAL.....	1241
A. <i>Breach of Fiduciary Duty Action for Privacy Harms Due to Sharenting</i>	1241
B. <i>The Parental Judgment Rule</i>	1243
1. Proposed Social Norms.....	1244
2. Rebutting the Parental Judgment Rule.....	1245

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CONCLUSION.....1245

INTRODUCTION

A controversy erupted on the video-sharing app TikTok in the summer of 2022, with audiences accusing a parenting influencer of exploiting her toddler daughter by posting compromising videos of her on the platform.¹ The child's mother, Jacquelyn, who runs the account @wren.eleanor, frequently shared videos of then-two-year-old Wren engaged in everyday activities such as riding a bicycle, going to the park, and eating snacks with the duo's 17.1 million followers.² Jacquelyn also regularly posted paid partnerships with brands such as SHEIN³ and Kohl's,⁴ and, in lieu of working a regular job, provided for Wren through earnings from online content creation.⁵ Followers began expressing suspicion because of TikTok's "save video" function that allows viewers to save videos made by other accounts to watch again later⁶: "Videos of Wren that could, in the wrong hands, be interpreted as suggestive, such as those depicting her eating pickles or hot dogs, playing with a tampon, or wearing a crop top, were saved tens of thousands of times each, exponentially more than other videos."⁷ Comments on these videos also included discussion about Wren's appearance, with some comments attributed to accounts run by grown men.⁸ Viewers and other creators

¹ EJ Dickson, *A Toddler on TikTok Is Spawning a Massive Mom-Led Movement*, ROLLING STONE (July 20, 2022), <https://www.rollingstone.com/culture/culture-news/tiktok-wren-eleanor-moms-controversy-1385182> [<https://perma.cc/GE4B-W7UM>].

² Wren & Jacquelyn (@wren.eleanor), TIKTOK, <https://www.tiktok.com/@wren.eleanor> [<https://perma.cc/Q2Q6-V4JE>].

³ Wren & Jacquelyn (@wren.eleanor), TIKTOK (June 24, 2022), <https://www.tiktok.com/@wren.eleanor/video/7112833815587933482> [<https://web.archive.org/web/20220804000149/https://www.tiktok.com/@wren.eleanor/video/7112833815587933482>].

⁴ Wren & Jacquelyn (@wren.eleanor), TIKTOK (Nov. 29, 2021), <https://www.tiktok.com/@wren.eleanor/video/7036151983912504623> [<https://perma.cc/85DF-WDH5>].

⁵ Wren & Jacquelyn (@wren.eleanor), *FALSE RUMORS: What You Need to Know*, TIKTOK (Aug. 5, 2022), <https://www.tiktok.com/@wren.eleanor/video/7128469642921807150> [https://web.archive.org/web/20220909051254/https://www.tiktok.com/@wren.eleanor/video/7128469642921807150?is_from_webapp=v1&item_id=7128469642921807150].

⁶ Claudia Rucpich, Irina Gonzalez & Karell Roxas, *Think Twice Before Posting Your Kids' Photos Online, Here's Why*, THE SKIMM (Sept. 29, 2022), <https://www.theskimm.com/parenting/posting-pictures-kids-online> [<https://perma.cc/TCA8-XV9D>].

⁷ The original videos have been deleted, but other users created commentary videos to bring awareness to the issue. jessica (@justlivingmyjesslife), TIKTOK (July 16, 2022), <https://www.tiktok.com/@justlivingmyjesslife/video/7121071562781986090> [<https://perma.cc/67ZZ-9S72>].

⁸ *Id.*

criticized Jacquelyn for “exploit[ing]” Wren by posting images that could fall into the hands of child predators⁹ and continuing to expose her daughter to such an audience to bring in sponsorships and income from TikTok.¹⁰

This example is at the more extreme margin of a phenomenon known as “sharenting,” the act of parents sharing information about their children on social media.¹¹ The term encompasses a wide range of activity, from posting a casual photo to detailing the child’s personal information.¹² The quickly evolving nature of social media trends has resulted in a lagging response by lawmakers to address current and potential legal concerns surrounding sharenting.¹³ A discourse is developing around the privacy of children whose parents “sharent” as the public becomes more aware of dangers such as identity theft, data harvesting, and emotional harms to children from the public exposure of their personal information and private moments.¹⁴ A parent who generates income from sharenting faces a particular dilemma—the methods for deriving income from social media create an incentive for family-centric accounts to post a large volume of content, including information about their children, while the children stand to incur more risk and harm with increased exposure.¹⁵

In the ever-changing online landscape, difficulty lies in determining how to guide parents toward making informed decisions when posting about their children and how to sanction parents that go outside the parameters of acceptable practice.¹⁶ Given the common law tradition in the United States of familial autonomy and broad discretion for parents to make decisions for their children, courts are generally unwilling to

⁹ See *id.*; Lindsay Dodgson, *A Controversy over Major Momfluencer Wren & Jacquelyn Sparks a Campaign over Child Predators on TikTok*, BUS. INSIDER (July 25, 2022, 8:06 AM), <https://www.insider.com/wren-jacquelyn-tiktok-online-predators-momfluencer-2022-7> [<https://perma.cc/ZAT2-45VX>].

¹⁰ Dickson, *supra* note 1.

¹¹ Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 842 (2017).

¹² See *id.*

¹³ See Gianna Melillo, *Why ‘Sharenting’ Is Sparking Real Fears About Children’s Privacy*, THE HILL: CHANGING AM. (Sept. 16, 2022), <https://thehill.com/changing-america/enrichment/arts-culture/3644577-why-sharenting-is-sparking-real-fears-about-childrens-privacy> [<https://perma.cc/TC3A-FS3K>] (“In the absence of legal reform, Cook suggested parent influencers concerned about their children’s well-being shift their content to focus more on the parents’ own experiences and cut their children out of the content altogether.”).

¹⁴ Elaine Roth, *The Real Risk of Posting Your Kids’ Pictures on Social Media*, SHEKNOWS (Aug. 2, 2022, 6:49 AM), <https://www.sheknows.com/feature/posting-kids-pictures-on-social-media-2604627> [<https://perma.cc/BVN8-8DFB>].

¹⁵ See discussion *infra* Section I.A.

¹⁶ See discussion *infra* Section II.A.

intrude upon a parent's judgment.¹⁷ Additionally, the nature of social media production, which occurs primarily in the home with no outsiders involved, makes the prospect of monitoring sharenting activity onerous.¹⁸

This Note explores balancing the privacy interests of children on the internet with the historic latitude given to parental rights—which serves important functions of its own—and proposes that fiduciary duty principles, akin to those governing corporations, be used to harmonize the inherent conflict of interest between a parent's financial incentive to sharent on a monetized social media account and the child's overall well-being.¹⁹ This Note proposes that children, once they reach the age of majority, be given a right of action for breach of fiduciary duty against their parents for harms incurred through egregious forms of sharenting.²⁰ This right of action would work alongside expert-driven, extralegal social norms and primarily serve as a deterrent, incentivizing parents to prioritize their children's online privacy, while also preserving enough latitude in parental decision-making to maintain the level of liberty well established in parental rights jurisprudence.²¹

Part I first explores the evolution of sharenting and its intersection with the development of the influencer industry and social media in general, as well as the risks posed by sharenting, particularly monetized sharenting.²² Part I then discusses how the Supreme Court has approached parental rights throughout the past century, as well as other government responses to the issue of parents' versus children's rights.²³ Part II explores potential remedies to the risks presented by sharenting and analyzes the drawbacks associated with each, before outlining the framework of fiduciary duties and how it can be used to accommodate the parent-child relationship within the sharenting context.²⁴ Part III proposes granting children, upon reaching the age of majority, a right of action for breach of fiduciary duty against their parents, the scope of which should be defined by social consensus and expert guidance.²⁵

¹⁷ See discussion *infra* Section I.B.

¹⁸ See discussion *infra* Section II.A.2.

¹⁹ See discussion *infra* Section II.B.2.

²⁰ See discussion *infra* Part III.

²¹ See discussion *infra* Part III.

²² See *infra* Section I.A.

²³ See *infra* Section I.B.

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.

I. BACKGROUND

A. *Sharenting and the Social Media Industry*

“Sharenting” has become the industry term for online sharing about parenting.²⁶ Before sharenting on social media became popular, many parents wrote blogs in which they discussed family life and received support from other parents,²⁷ a practice that evolved onto social media platforms in recent years.²⁸ Parents of young children use social media for multiple purposes: to develop new relationships and find validation with others in a similar phase of life; to share their experiences; and to gather tactics for making parenting more manageable.²⁹ Content creators in the family and parenting sphere share information such as nutrition and mealtime advice, homeschooling tips,³⁰ and parenting styles.³¹ Many creators also post photos and videos of their children, ranging from curated dances³² to purportedly candid day-in-the-life content.³³

1. Development of the Influencer Industry

The concept of a career as an influencer is still a recent phenomenon; however, it has taken off in the past several years. The term “influencer” refers to a person who can “generate interest in something (such as a

²⁶ Steinberg, *supra* note 11, at 842.

²⁷ Kathryn Jezer-Morton, *Did Moms Exist Before Social Media?*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/parenting/mommy-influencers.html> [https://perma.cc/AV8Z-J5Z7].

²⁸ *Id.*

²⁹ *The Social Media Mom: Why Social Media Impacts the Way We Feel*, NURTURE THERAPY (June 29, 2018), <https://nurture-therapy.com/blog/2018/6/29/the-social-media-mom-why-social-media-impacts-the-way-we-feel> [https://perma.cc/2ZDZ-UMJY]; Maeve Duggan, Amanda Lenhart, Cliff Lampe & Nicole B. Ellison, *Parents and Social Media*, PEW RSCH. CTR. (July 16, 2015) <https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media> [https://perma.cc/NC4H-N9A6].

³⁰ *See, e.g.*, a l l i s o n (@herheartshomeschool), INSTAGRAM, <https://www.instagram.com/herheartshomeschool> [https://perma.cc/WPY5-JVCX].

³¹ *See, e.g.*, Momma Cusses (@mommacusses), TIKTOK, <https://www.tiktok.com/@mommacusses?lang=en> [https://perma.cc/3Q74-NQ8W].

³² *See, e.g.*, Savannah LaBrant (@savv.labrant), TIKTOK, <https://www.tiktok.com/@savv.labrant?lang=en> [https://perma.cc/SRS6-R3R9].

³³ *See, e.g.*, Dougherty Dozen (@doughertydozen), TIKTOK, <https://www.tiktok.com/@doughertydozen?lang=en> [https://perma.cc/2G9R-8VYW].

consumer product) by posting about it on social media.”³⁴ The global influencer market has especially boomed in the early 2020s, with brands discovering that potential customers are more likely to take product recommendations from creators of social media accounts whom they find authentic and trustworthy.³⁵ Brands are turning toward influencer marketing more than ever, with seventy-two percent of marketers agreeing that influencer marketing campaigns provide higher quality customers than other types of marketing campaigns.³⁶ Parenting influencers, also known as “momfluencers,” share relatable content and advice about raising children, interspersed with affiliate links and brand partnerships.³⁷ Parenting influencers are particularly valuable to influencer marketing as they use and promote products in multiple categories, including baby and kids products as well as beauty, fashion, and home goods, to their audiences of other women and parents.³⁸

2. Methods of Monetizing Content

One of the most common methods for deriving income from social media is through a paid partnership with a brand, usually one whose products or mission align with the content that the account posts.³⁹ The person running the popular account makes a photo or video post, or a series of posts, featuring the product in a way that feels natural to their style of content.⁴⁰ Influencers are typically compensated according to the size of their platform and their engagement rate and, therefore, the

³⁴ Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 U. PA. L. REV. 577, 583 (2021) (quoting *Influencer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/influencer> [<https://perma.cc/2NTG-S3AV>]).

³⁵ Samantha Scott, *The Most Important Influencer Marketing Statistics for 2023*, MELTWATER (Dec. 1, 2022), <https://www.meltwater.com/en/blog/influencer-marketing-statistics> [<https://perma.cc/HND6-CS2F>].

³⁶ Werner Geysler, *The State of Influencer Marketing 2021: Benchmark Report*, INFLUENCER MKTG. HUB (July 29, 2022), <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2021> [<https://perma.cc/ZF2T-HQAR>].

³⁷ *Mom-fluencer*, REBEL, <https://perma.cc/W99L-CUFQ>.

³⁸ HireInfluence, *5 Reasons Mom Influencers Are the Key to Conversions*, LINKEDIN (Oct. 8, 2021), <https://www.linkedin.com/pulse/5-reasons-mom-influencers-key-conversions-hireinfluence> [<https://perma.cc/QR5E-93R5>].

³⁹ See generally Alex Cox, *Sponsored Content: Everything You Need to Know (+ Examples)*, BRAFTON (Mar. 16, 2021), <https://www.brafton.com/blog/content-marketing/sponsored-content> [<https://perma.cc/3EUA-TTX8>].

⁴⁰ *Id.*

anticipated reach of the advertisement.⁴¹ Influencers can also derive income through direct monetization from social media platforms, such as YouTube, Instagram, and TikTok, which compensate creators who reach a certain threshold of followers and views on their posts.⁴² Additionally, many influencers use their social media to promote their own businesses and merchandise.⁴³

Direct monetization, brand partnerships, and promoting one’s own businesses through social media all incentivize influencers to create a high volume of content and generate more traffic to their accounts in order to increase their income, which, in a child- or family-centric account, often correlates with more exposure of the children.⁴⁴ Concern is growing that the overexposure of children on social media through sharenting can create harms now and in the future through lack of compensation for their “labor” or participation in content creation, as well as having private or sensitive information exposed to a large audience.⁴⁵ This Note focuses on the latter issue: the potential privacy harms faced by children when their parents run monetized family-centric social media accounts and potential remedies for the child’s harm.⁴⁶

⁴¹ Amanda Perelli & Nathan McAlone, *How Influencers Get Paid and Make Money on Tiktok, Instagram, and Youtube*, BUS. INSIDER (May 23, 2023, 4:00 PM), <https://www.businessinsider.com/how-much-influencers-get-paid-on-instagram-tiktok-and-youtube-2021-7> [<https://perma.cc/GS76-BKTM>].

⁴² *Id.*

⁴³ See, e.g., Emma Richardson, *Kylie Jenner: The Journey of Instagram’s Most Powerful Influencer*, INFLUENCER MATCHMAKER, <https://influencermatchmaker.co.uk/news/kylie-jenner-the-journey-of-instagram-s-most-powerful-influencer> [<https://perma.cc/Q285-ADJN>]. One of the most famous examples of influencers promoting their own products is Kylie Jenner, who launched a cosmetics brand by leveraging her social media following and, at first, sold her products exclusively in the online space by advertising to her own large social media following. *Id.*

⁴⁴ See Cox, *supra* note 39; Masterson, *supra* note 34, at 583 (noting that “research has shown that videos featuring a child under 13-years-old receive three times as many views as those without children”).

⁴⁵ More articles are being published outlining the dangers of sharenting. See, e.g., Liezel Gordon, *The Dangers of Parental Oversharing: Is Social Media Where a Child’s Right to Privacy Ends?*, NEWS24 (Oct. 18, 2022), <https://www.news24.com/life/wellness/mind/the-dangers-of-parental-oversharing-is-social-media-where-a-childs-right-to-privacy-ends-20221018-2> [<https://perma.cc/N2HW-6C4C>]; Jessica Maddox & The Conversation, *When Sponsored Content Meets ‘Sharenting,’ Kids Are Powerless to Stop Their Influencer Parents Using Them as Props*, FORTUNE (Jan. 18, 2023, 2:10 PM), <https://fortune.com/2023/01/18/influencers-children-social-media-laws-sponsored-content-sharenting> [<https://perma.cc/U9X7-D3DJ>].

⁴⁶ See *infra* Section I.A.3.

3. Sharenting and Privacy

The content that parenting influencers sharent about their children ranges from innocuous to egregious, with more alarming content including sensitive or embarrassing information and personal information that could implicate safety concerns for the child.⁴⁷ Oversharing on social media creates three primary categories of risk to children: (1) “criminal or dangerous” risks, (2) harm to the child’s current or future opportunities, and (3) harm to the child’s “sense of self and identity.”⁴⁸

One risk of criminal harm is theft of the child’s identity.⁴⁹ This risk is heightened by sharing the child’s personally identifiable information (PII).⁵⁰ Many parents post birth announcements that include their baby’s name and the date and time they were born,⁵¹ share information about their child’s experiences at school, or even disclose the name of their child’s school.⁵² Barclays forecasted that, by 2030, sharenting will be a primary cause of identity theft due to parents sharing information such as children’s dates of birth, schools, photographs, home addresses, and names of pets.⁵³ Sharenting PII can also increase the risk of other types of physical harm, including stalking.⁵⁴

Secondly, harm to a child’s current and future opportunities can arise from practices such as data harvesting, the collection of online

⁴⁷ See *infra* text accompanying notes 54, 64–66. A University of Michigan study found that “56% of parents shared (potentially) embarrassing information about their children online, 51% provided information that could lead to an identification of their child’s location at a given time, and 27% of participants shared (potentially) inappropriate photos.” Steinberg, *supra* note 11, at 848 (footnotes omitted).

⁴⁸ See Roth, *supra* note 14.

⁴⁹ *Id.*

⁵⁰ Julie Brown, ‘Sharenting’: How to Safeguard Your Kids’ Personal Information on Social Media, NBC NEWS (Sept. 24, 2019, 1:08 PM), <https://www.nbcnews.com/better/lifestyle/sharenting-how-safeguard-your-kids-personal-information-social-media-ncna1058006> [<https://perma.cc/9T2H-Z4XF>].

⁵¹ *Id.*

⁵² See *id.* (discussing the fact that many parents post a first-day-of-school picture which can reveal PII).

⁵³ Sean Coughlan, ‘Sharenting’ Puts Young at Risk of Online Fraud, BBC (May 21, 2018), <https://www.bbc.com/news/education-44153754> [<https://perma.cc/9JD2-MCWB>].

⁵⁴ *Id.*; see Ean Tam, *Oversharing on Social Media: The Dangers of An Overly Transparent World*, SBU Brooklogue (May 10, 2022), <https://sbrooklogue.com/2022/05/10/oversharing-on-social-media-the-dangers-of-an-overly-transparent-world> [<https://perma.cc/XF7K-QEX2>] (“[I]f you overshare your location, daily routine, and social activities, people can track you and have a good idea of where you will be and when.”). This can also apply to parents who post the whereabouts of their children.

information about individuals, typically for business purposes.⁵⁵ Companies compile information from a user’s online activity as well as information posted by or about them.⁵⁶ Businesses use this data to improve their marketing, as well as the user’s experience, by sending the user advertisements for products they are more likely to purchase.⁵⁷ In the case of children whose parents generate their digital footprint for them via sharenting, experts say, the digital footprint can be harmful in itself as the information may be misaligned with the child’s identity and was created, at the very least, without the child’s consent.⁵⁸

The parenting influencer who showcases their children on social media can harm the child’s development; for instance, a child whose activities are constantly filmed and posted online can become overly self-conscious about their actions, and their creativity and exploration can be stunted.⁵⁹ Sharenting also contributes to children being “shamed, mocked, and cyberbullied” in the present or future by peers or other online users who see content of them as young children.⁶⁰ This can be exacerbated by parents who sharent sensitive or embarrassing information about the child,⁶¹ often as an illustration of the child reaching various milestones or engaging in relatable activities.⁶² One example comes from TikTok account @leansquad1, which shared a video entitled “Realistic (Crazy) First Day Potty Training Twins,” which featured two toddlers running around their house and yard, wearing no pants and sitting on a training toilet, while the parents followed them around with a camera, showing the struggles and successes of each child’s potty-

⁵⁵ Melillo, *supra* note 13.

⁵⁶ *Id.*

⁵⁷ *Your Data Is Shared and Sold . . . What’s Being Done About It?*, KNOWLEDGE AT WHARTON (Oct. 28, 2019), <https://knowledge.wharton.upenn.edu/article/data-shared-sold-whats-done> [<https://perma.cc/F86E-PX23>].

⁵⁸ Melillo, *supra* note 13.

⁵⁹ *Id.*

⁶⁰ Lindsay Dodgson, *A Controversy Over Major Momfluencer Wren & Jacquelyn Sparks a Campaign Over Child Predators on TikTok*, BUS. INSIDER (July 25, 2022, 8:06 AM), <https://www.insider.com/wren-jacquelyn-tiktok-online-predators-momfluencer-2022-7> [<https://perma.cc/J45A-PFGJ>].

⁶¹ *See id.*

⁶² The following examples feature users that monetize their account in some way or would be eligible for direct monetization from the platform. *See infra* notes 64–66 and accompanying text.

training experience.⁶³ Another TikTok account, @alyx_and_willow_,⁶⁴ frequently posts videos that feature the daughter breastfeeding.⁶⁵

Some parenting influencers also post medical information about their children,⁶⁶ often with the intention of promoting a sense of support and community for other families experiencing similar diagnoses.⁶⁷ Some accounts with larger followings even make these posts in tandem with promoting a product.⁶⁸ For instance, the TikTok user then known as @travelingthelunaverse created a partnership post promoting an alternative communication device in the context of discussing her daughter's intellectual disabilities.⁶⁹ Infants, toddlers, and small children are too young to consent to their information being posted on social media, the downsides of which are heightened when the information itself is of a sensitive nature.⁷⁰

Becoming a public figure at a young age has been well-documented to have negative effects later in the child's life.⁷¹ An early example is the case of William James Sidis, a child prodigy who was considered a public figure in childhood.⁷² Upon becoming an adult, Sidis sought to live a completely private life, going into hiding and often using aliases.⁷³ He sued the publisher of the *New Yorker* after the publication printed a cartoon about him without his consent, alleging the cartoon was an

⁶³ LEANSQUAD (@leansquad1), TIKTOK (July 11, 2022), <https://www.tiktok.com/@leansquad1/video/7119259406478445830> [<https://perma.cc/E69A-5S5X>].

⁶⁴ Alyx & Willow (@alyx_and_willow_), TIKTOK, https://www.tiktok.com/@alyx_and_willow_ [<https://perma.cc/87E6-66SD>].

⁶⁵ *Id.* Alyx, the mother running the account, frequently discusses her belief that breastfeeding should be normalized and addresses criticism of the revealing nature of her videos. *Id.*

⁶⁶ *See, e.g.,* daugh fam (@baidaugh), TIKTOK, <https://www.tiktok.com/@baidaugh> [<https://web.archive.org/web/20220316024039/https://www.tiktok.com/@baidaugh>]; Cassie & Luna (@travelingthelunaverse), TIKTOK, <https://web.archive.org/web/20220406170625/https://www.tiktok.com/@travelingthelunaverse>.

⁶⁷ *See* Steinberg, *supra* note 11, at 877; *see, e.g.,* Carrie + Haidyn (@haidynshope), TIKTOK, <https://www.tiktok.com/@haidynshope> [<https://perma.cc/CF2E-ECJ2>] (the mother of a child with Sanfilippo Syndrome, a rare and terminal form of childhood dementia, posts videos of her daughter to bring awareness to the condition).

⁶⁸ Cassie & Luna (@travelingthelunaverse), *supra* note 66.

⁶⁹ Cassie & Luna (@travelingthelunaverse), TIKTOK (Sept. 22, 2022), <https://www.tiktok.com/@travelingthelunaverse/video/7146267091270765870> [<https://perma.cc/BDE8-AKJ6>].

⁷⁰ Melillo, *supra* note 13.

⁷¹ *See* All Things Considered, *Meet William James Sidis: The Smartest Guy Ever?*, NPR (Jan. 23, 2011, 2:44 PM), <https://www.npr.org/2011/01/23/132737060/meet-william-james-sidis-the-smartest-guy-ever> [<https://perma.cc/2CUR-HPZK>].

⁷² *Id.* Sidis's parents are described as "pushy and aggressive," using their means to develop Sidis's unusual intellect as much as possible. *Id.* Sidis "made . . . headlines" for his abilities, including reading at two years old, speaking at least eight languages by age six, and being admitted to Harvard University at the age of eleven. *Id.*

⁷³ *Id.*

invasion of his privacy.⁷⁴ The Second Circuit concluded that, because Sidis had been a famous child prodigy, the matters of his life remained a matter of “considerable interest and discussion to the rest of the population,” and, therefore, he could not recover for invasion of privacy.⁷⁵ This precedent raises concerns for a new generation of unwilling public figures: children who have become famous due to their parent’s sharenting to a large audience.⁷⁶

B. *History of Parents’ and Children’s Rights in U.S. Law*

State intervention into family life, particularly that of the “intact family,” has historically been limited by U.S. law.⁷⁷ Earlier Supreme Court opinions, such as *Meyer v. Nebraska*, subordinated the interests of the state in favor of parents’ liberty to raise their children however they saw fit.⁷⁸ In *Meyer*, the statute at issue prohibited any schoolteacher from teaching a foreign language to a student who had not completed the eighth grade.⁷⁹ The Court’s interpretation of Nebraska’s interest was for the English language to become the “mother tongue of all children reared in this state”⁸⁰ and to prevent “foreigners” from being educated in sentiments “inimical to [Nebraskans’] safety.”⁸¹ *Meyer*, a teacher at a parochial school, had been convicted of unlawfully teaching German to a ten-year-old child.⁸² The Court held, however, that the Fourteenth Amendment’s Due Process Clause protects parents’ desires for their children to learn German as well as teachers’ right to teach the language.⁸³

Pierce v. Society of the Sisters, a Supreme Court case contemporary to *Meyer*, likewise affirmed due process protection of parental liberty interests.⁸⁴ Corporations that owned private schools in Oregon

⁷⁴ *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 807 (2d Cir. 1940).

⁷⁵ *Id.* at 809.

⁷⁶ *See id.*

⁷⁷ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2430 (1995); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 43.

⁷⁸ 262 U.S. 390, 400–01 (1923).

⁷⁹ *Id.* at 397.

⁸⁰ *Id.* at 398.

⁸¹ *Id.* at 397–98. This case was brought shortly after the end of World War I at a time when the United States sought to foster nationalism. William G. Ross, *A Century of Meyer v. Nebraska: The SCOTUS Case that Defined Personal Liberties*, JURIST (June 2, 2023, 9:08 AM) <https://www.jurist.org/commentary/2023/06/meyer-v-nebraska> [<https://perma.cc/MV9R-G5CP>].

⁸² *Meyer*, 262 U.S. at 396.

⁸³ *Id.* at 399–400. The opinion made no mention of the child’s right or interest in learning a foreign language.

⁸⁴ 268 U.S. 510, 534–35 (1925).

challenged the State's Compulsory Education Act, which required all children between eight and sixteen years of age to attend only public schools, arguing that the law interfered with private institutions' rights to conduct business as well as the parents' liberty to choose their children's mode of education.⁸⁵ The Court unanimously found that the Act abridged parental rights, opining that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁸⁶

Especially at the time, *Meyer* and *Pierce* represented successes for family autonomy and parents' personal liberty, with *Meyer* reaffirming the substantive due process rights to "marry, establish a home and bring up children."⁸⁷ Some argue that the emphasis on the rights of parents as it relates to their children's education is derived from the historical notion of ownership of children, particularly by their fathers.⁸⁸ Through most of the nineteenth century, parents could indenture their child to the labor of another in exchange for that person providing basic necessities and education to the child.⁸⁹ At common law, derived from English law and accepted by almost every state, parents had an absolute right to their children's earnings while their children were still in their care,⁹⁰ and, in some cases, the parents could sue to recover damages from a third party for the loss of a child's earning capacity.⁹¹ Child labor was a facet of the agricultural economy of the United States well into the twentieth century.⁹² During the Industrial Revolution, children regularly worked unregulated hours in factories and mines, and early attempts to regulate child labor at the federal level had failed.⁹³ The Fair Labor Standards Act, which constrained oppressive child labor, was not passed until 1938, more than a decade after *Meyer* and *Pierce*.⁹⁴ The not-too-distant

⁸⁵ *Id.* at 530–31, 535.

⁸⁶ *Id.* at 534–35.

⁸⁷ *Meyer*, 262 U.S. at 399; see Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 WM. & MARY L. REV. 995, 997 (1992).

⁸⁸ See, e.g., Woodhouse, *supra* note 87, at 997.

⁸⁹ *Id.* at 1046.

⁹⁰ Jules D. Barnett & Daniel K. Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings*, 5 PEPP. L. REV. 673, 675, 678 (1978).

⁹¹ *Id.* at 688 (citing *Finnerty v. Cummings*, 22 P.2d 37 (Cal. Ct. App. 1933)).

⁹² Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, MONTHLY LAB. REV., Jan. 2017, at 11, <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm> [<https://perma.cc/DAT7-VCQW>]. Farming families relied on their children to work on their farms or as hired hands on another's farm. *Id.* In 1900, sons of farmers accounted for sixty percent of all male farmhands. *Id.*

⁹³ See generally *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁹⁴ 29 U.S.C. § 212.

memory of children as property arguably colored both opinions, with children’s education functioning as an instrument of the parents’ rights rather than as an independent right of the child.⁹⁵

To be sure, familial autonomy serves important functions in society.⁹⁶ Limited state intervention, particularly in the context of removing the child from the parents’ home, promotes stability in the parent-child relationship, the destabilization of which carries the risk of harm to the child.⁹⁷ Parents are generally understood to be in a better position to make decisions about their children because they have more knowledge of their own children than outsiders do,⁹⁸ and the legal system presumes that parents are motivated to act in their children’s best interests due to “natural bonds of affection.”⁹⁹

Parental rights are particularly important in protecting families of color and those in lower socioeconomic strata.¹⁰⁰ These communities have been historically overrepresented in the welfare system and foster care, and many children who are removed from their homes subsequently have worse outcomes.¹⁰¹ Black families are subject to more reports of suspected child maltreatment to child protective services, and Black children are less likely to be reunified with their families after entering foster care.¹⁰² This systemic inequity weighs in favor of limiting state intervention in families.¹⁰³

As the twentieth century progressed, the United States gave more consideration to children’s rights and welfare in various ways.¹⁰⁴ In a 1944 case, *Prince v. Massachusetts*, the Supreme Court imposed limits on parental liberty interests when it held that the government enjoys broad authority to regulate the actions and treatment of children.¹⁰⁵ There, the Court prevented a parent from allowing their child to sell religious pamphlets on a public street in violation of a Massachusetts child labor

⁹⁵ Woodhouse, *supra* note 87, at 1114–15.

⁹⁶ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1417 (2020).

⁹⁷ *Id.* at 1416.

⁹⁸ *Id.*

⁹⁹ See *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

¹⁰⁰ Huntington & Scott, *supra* note 96, at 1377.

¹⁰¹ *Id.* at 1389 n.89 (stating that Black, Native American, and Native Alaskan children are adopted at lower rates than other groups).

¹⁰² CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 3 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [https://perma.cc/A95D-RPYG].

¹⁰³ See *id.* at 10, 13.

¹⁰⁴ See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

¹⁰⁵ *Id.* at 165–66.

statute.¹⁰⁶ The Court opined that parental authority is not absolute and can be permissibly restricted if doing so is in the interest of a child's welfare.¹⁰⁷ Children face different potential harms than adults do from the same activities, and the state can exercise more regulation over the activities of children than similar activities undertaken by adults.¹⁰⁸ *Prince* recognized that parental rights are limited by the possibility of harm to the child, but did not establish a framework to determine when this possibility supersedes parental rights.¹⁰⁹

A later case, *Wisconsin v. Yoder*, reaffirmed that a parent's right to choose their child's education was greater than the State's interest in universal education.¹¹⁰ The Supreme Court refused to extend *Prince* to recognize a child's substantive right to secondary education regardless of their parent's wishes, instead confining *Prince* to situations implicating potential harm from child labor.¹¹¹ Justice Douglas dissented, arguing that the Court had only balanced the parents' interest with that of the State rather than considering the child's interest, even though recent cases had found that a child has "constitutionally protectible interests."¹¹² However, the Court continued to uphold broad parental discretion, noting that *Prince* would only apply to limit parents' power where their conduct risks harm to the child's health or safety, or increases the potential of the child becoming a burden on society.¹¹³

In the 1979 case *Bellotti v. Baird*, the Supreme Court held that abortion is among the "few" decisions facing a minor that are too grave to allow parental discretion to supersede the minor's autonomy.¹¹⁴ The Court held unconstitutional a Massachusetts statute that, if a judge could not independently approve a minor's abortion, required the minor to get their parents' permission.¹¹⁵ This case represents the Court's preservation, albeit narrow, of a minor's right to make their own decisions even in direct opposition to their parents' wishes.¹¹⁶

¹⁰⁶ *Id.* at 159–160, 171.

¹⁰⁷ *Id.* at 167–68.

¹⁰⁸ *Id.* at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."). The Court cites the dependence of democracy on the healthy development of children into adults as justification for stepping in to regulate potentially harmful activities. *Id.* at 168.

¹⁰⁹ Huntington & Scott, *supra* note 96, at 1414 n.240.

¹¹⁰ 406 U.S. 205, 214 (1972).

¹¹¹ *Id.* at 229–30.

¹¹² *Id.* at 242–43 (Douglas, J., dissenting) (citing *Haley v. Ohio*, 332 U.S. 596 (1948)).

¹¹³ *Id.* at 233–34 (majority opinion).

¹¹⁴ 443 U.S. 622, 642–44 (1979).

¹¹⁵ *Id.* at 647–48.

¹¹⁶ *Id.* at 642.

Meanwhile, during the twentieth century, the government seemed to invest more resources into the welfare of children. In 1998, Congress passed the Children’s Online Privacy Protection Act (COPPA) to prevent and regulate websites harvesting personal information about children.¹¹⁷ COPPA requires companies to, inter alia, limit the amount of personal information they collect from children from online games and contests, obtain parental consent before collecting personal information from children under thirteen years of age, and, upon the request of a parent, allow the parent to review the information the company collected or delete the information collected.¹¹⁸ COPPA protects children’s safety by relying on parents to monitor their child’s online activity in order to prevent them from oversharing their own information online.¹¹⁹ The passage of COPPA indicates the law’s recognition of children’s privacy rights, but also illustrates that parents are the stewards of keeping their children safe.¹²⁰ Other federal children’s privacy laws, such as the Health Insurance Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA), also place the protection of children’s privacy in the hands of parents.¹²¹

Despite increasing awareness of children’s interests, the United States stopped short of protecting children through the ratification of the United Nations Convention on the Rights of the Child (UNCRC),¹²² which is the most widely adopted human rights treaty in the world.¹²³ The UNCRC has been ratified by every member nation other than the United

¹¹⁷ 15 U.S.C. §§ 6501–6506.

¹¹⁸ *Children’s Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business*, FED. TRADE COMM’N (June 2017), <https://www.ftc.gov/business-guidance/resources/childrens-online-privacy-protection-rule-six-step-compliance-plan-your-business> [https://perma.cc/ZZ9B-FRH8].

¹¹⁹ *See id.*

¹²⁰ *See* Keltie Haley, Note, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1014 (2020).

¹²¹ Steinberg, *supra* note 11, at 869–70. Under HIPAA, a parent can provide written consent for a medical professional to share their minor child’s medical information with other adults. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.); 45 C.F.R. § 160, 164. FERPA prevents teachers and administrators from disclosing a child’s educational records to anyone except a minor student’s parents, but the parent is free to share that same data with anyone they see fit. 20 U.S.C. § 1232g.

¹²² Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/news/human-rights/theres-only-one-country-hasnt-ratified-convention-childrens> [https://perma.cc/F3QA-VCR3]; *Background to the Convention*, UNITED NATIONS OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/crc/background-convention> [https://perma.cc/3TRF-PW7D].

¹²³ *Background to the Convention*, *supra* note 122.

States.¹²⁴ The UNCRC calls on signatories to protect children's rights including "the right to a name and nationality; freedom of speech and thought; access to healthcare and education; and freedom from exploitation, torture, and abuse."¹²⁵ Opposition relates to the concern that the treaty "would limit the [United States'] sovereignty or would cause unlimited interference in family life."¹²⁶ This attitude illustrates the contemporary tension between, on the one hand, preserving autonomy and individual liberty within the family unit¹²⁷ and, on the other, protecting children from harm. An answer to the sharenting issue must take into account the unique features of the United States' allocation of rights between parents and children in order to find the appropriate balance between oversight and intervention.

II. ANALYSIS

Some scholars and other jurisdictions have proposed or implemented various solutions to the issue of privacy in sharenting; however, unique features of U.S. law and the contours of the sharenting problem itself—particularly in the context of monetized sharenting—preclude any of them from being workable or optimal solutions.

A. Survey of Proposed Solutions

1. European Model: Right to be Forgotten

As part of the General Data Protection Regulation (GDPR), the European Union formally recognizes the "right to be forgotten" or the "right of erasure," which allows citizens to request that personal information be delisted from internet search results when one of several grounds is met, including when the information has been unlawfully

¹²⁴ Mehta, *supra* note 122. The four general principles of the treaty are: (1) the best interests of the child; (2) the views of the child; (3) the right to life, survival, and development; and (4) nondiscrimination toward all children regardless of race, sex, religion, or other protected status. *Background to the Convention*, *supra* note 122.

¹²⁵ LUISA BLANCHFIELD, CONG. RSCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD summary (2015), <https://crsreports.congress.gov/product/pdf/R/R40484/25> [<https://web.archive.org/web/20231119115730/https://crsreports.congress.gov/product/pdf/R/R40484/25>].

¹²⁶ Lida Minasyan, *The United States Has Not Ratified the UN Convention on the Rights of the Child*, ATLAS CORPS (Sept. 30, 2018), <https://atlascorps.org/the-united-states-has-not-ratified-the-un-convention-on-the-rights-of-the-child> [<https://perma.cc/CND2-UQ39>].

¹²⁷ *See id.*

processed, or when the data is “no longer necessary in relation to the purposes for which they were collected.”¹²⁸ Some scholars and lawmakers argue for adopting the right to be forgotten in the United States.¹²⁹ California passed a similar law, the California Consumer Privacy Act, which regulates businesses that store consumer information and gives residents a right to have their information removed from businesses’ databases.¹³⁰ The California law is much narrower in scope than the European model, only providing a cause of action against for-profit businesses.¹³¹

France adopted a new law in 2020 under its Labor Code that aims specifically to address the risk and harm suffered by child influencers.¹³² The law regulates the child’s labor and compensation by extending France’s existing legal framework for child entertainers.¹³³ It also addresses some privacy risks by implementing regulations on video-sharing platforms to encourage users to report content of minors that would undermine their dignity, to prevent commercial processing of minors’ personal data, and to improve the platforms’ ability to detect

¹²⁸ Regulation 2016/679, art. 17, 2016 O.J. (L 119) 43–44; Recent Case, *Google Spain SL v. Agencia Española de Protección de Datos, C131/12 (May 13, 2014)*, 128 HARV. L. REV. 735 (2014). In 2014, the Court of Justice of the European Union interpreted a 1995 European Council directive that called for data-processing systems to “protect[] the fundamental rights and freedoms of natural persons, and in particular their right to privacy.” Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317, ¶ 3 (May 13, 2014). The court held that the directive created a presumption of a person’s right to have their personal information removed from internet search results. *Id.* ¶ 98.

¹²⁹ See, e.g., Haley, *supra* note 120, at 1020; Amanda Silberling, *There Are No Laws Protecting Kids from Being Exploited on YouTube—One Teen Wants to Change That*, TECHCRUNCH (Apr. 12, 2022, 11:57 AM), <https://techcrunch.com/2022/04/12/family-vlogs-child-influencers-exploitation-youtube-laws> [<https://perma.cc/5MJR-FAMS>].

¹³⁰ Navdeep K. Singh, *What You Need to Know About the CCPA and the European Union’s GDPR*, AM. BAR ASS’N (Feb. 26, 2020), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2020/what-you-need-to-know-about-the-ccpa-and-the-european-unions-gdpr> [<https://perma.cc/J2H4-DDGA>].

¹³¹ *Id.*

¹³² Loi 2020-1266 du 19 octobre 2020 visant à encadrer l’exploitation commerciale de l’image d’enfants de moins de seize ans sur les plateformes en ligne [Law 2020-1266 of October 19, 2020 Aiming to Regulate the Commercial Exploitation of the Image of Children Under the Age of Sixteen on Online Platforms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 20, 2020.

¹³³ *France: Parliament Adopts Law to Protect Child “Influencers” on Social Media*, LIBR. OF CONG. (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/U53D-H3FE>]. Under the law, parents of children who are not in a labor relation but earn income above a certain threshold from online content or spend more than a certain amount of time creating online content have to get authorization from the government and “receive information on the rights of their child and on the potential consequences of the release of images of their child on the internet.” *Id.*

content that harms the dignity or physical or moral integrity of minors under sixteen.¹³⁴ The law also extends the right to be forgotten to children under sixteen, regardless of their parents' consent.¹³⁵

First Amendment concerns are a major obstacle to the United States adopting a similar scheme to protect children.¹³⁶ The European Union, and thereby its Court of Justice, is based on civil law tradition, which places emphasis on privacy rights. In contrast, common-law jurisdictions, including the United States and Canada, prioritize freedom of speech more highly than the right to privacy.¹³⁷ In the United States, when the constitutional right of free speech “collides” with the judicially created right of privacy, free speech generally takes precedence.¹³⁸ Additionally, the United States adopting the right to be forgotten as it exists in the European Union would not deter sharenting before the act, as the Regulation does not sanction the party that published the information online.¹³⁹ In the case of a parent whose account is monetized, a right to be forgotten also would not remove the parent's financial incentive to sharent.

2. Child Entertainer Laws Monitoring Mechanism

Child entertainers and their parents are subject to monitoring due to a historical problem of parents squandering their children's earnings.¹⁴⁰ Although there are similarities in both the nature of the work and the harms borne by traditional child entertainers and children of parenting influencers, a monitoring mechanism akin to the oversight protections for child entertainers would likely not be feasible due to the

¹³⁴ Law 2020-1266 of Oct. 19, 2020, art. 4 (Fr.).

¹³⁵ *France: Parliament Adopts Law to Protect Child “Influencers” on Social Media*, *supra* note 133.

¹³⁶ Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 40.

¹³⁷ *Id.* at 38–39.

¹³⁸ Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1375 (explaining that privacy is a “mere tort” while free speech is famously a Constitutional right, and stating that “privacy enjoys no preferred status in the law and is routinely flattened when it comes into conflict with the First Amendment”).

¹³⁹ Regulation 2016/679, art. 17, 2016 O.J. (L 119) 43–44.

¹⁴⁰ *See, e.g., Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [<https://perma.cc/8KG3-7NV4>]. Several contemporary former child stars, including Macaulay Culkin and LeAnn Rimes, have also sued their parents for allegedly mishandling their earnings. Destiny Lopez, *7 Celebs Whose Parents Decimated Their Fortunes*, BUS. INSIDER (Apr. 2, 2014, 5:47 PM), <https://www.businessinsider.com/7-celebs-whose-parents-decimated-their-fortunes-2014-4> [<https://perma.cc/SBA7-2BN3>].

lack of third-party involvement in social media content creation, along with family privacy considerations.¹⁴¹

California was the first state to enact legislative protections for child actors in 1939 after Jackie Coogan, a former child star, sued his parents for spending all of his earnings from his films.¹⁴² California’s Coogan Law has evolved to become even more protective of child entertainers’ earnings since then, and it now requires fifteen percent of the child’s gross earnings to be deposited into a blocked trust (commonly known as a Coogan account).¹⁴³ Third-party involvement by employers and the courts act as enforcement mechanisms, ensuring that parents do not evade the trust requirement.¹⁴⁴ In California, many child entertainer contracts are approved by the courts, which prevents the minor from disaffirming the contract before or upon reaching the age of majority.¹⁴⁵ If the minor’s parent or guardian does not establish a trust for the child, the employer is required to send “15 percent of the [child]’s gross earnings . . . to the Actor’s Fund of America,” which then becomes the trustee.¹⁴⁶ New York law similarly subjects child performers and their parents to oversight, first requiring all child performers to hold a permit.¹⁴⁷ The New York Department of Labor will also enforce the establishment of a child performer trust account.¹⁴⁸ This level of monitoring and the incentives to establish trust accounts sharply contrasts the little oversight available for social media creators, including those who use their children for content.¹⁴⁹

Because of this lack of oversight, sharenting would not fit easily into the framework of child entertainer labor laws. Social media content creation is generally conducted from within the home, and is run almost exclusively by parents.¹⁵⁰ While this insular environment can breed a heightened risk of exploitation and harm to the child, monitoring in-home activity would cause even more infringement on parental rights

¹⁴¹ See discussion *supra* Section I.B; Masterson, *supra* note 34, at 591–93.

¹⁴² *Coogan Law*, *supra* note 140; Maham Javaid, *Before Child Influencers, a 1920s Movie Star Sued His Mother for Wages*, WASH. POST (Aug. 25, 2023, 7:30 AM) <https://www.washingtonpost.com/history/2023/08/25/illinois-child-influencer-earnings-law-history-jackie-coogan> [https://perma.cc/E6ZX-RCVX].

¹⁴³ *Coogan Law*, *supra* note 140. Only four other states—Louisiana, New York, New Mexico, and Illinois—have similar requirements for Coogan-style blocked trust accounts. *Id.*

¹⁴⁴ See *Minor’s Contract in the Entertainment Industry*, STERLING FIRM, <https://thesterlingfirm.com/minors-contract> [https://perma.cc/SZE2-XJ8R].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ N.Y. LAB. LAW § 151 (McKinney 2023).

¹⁴⁸ Child Performer Education and Trust Act of 2003, ch. 630, § 1, 2003 N.Y. Laws 3294, 3294.

¹⁴⁹ See Masterson, *supra* note 34, at 592; *Coogan Law*, *supra* note 140.

¹⁵⁰ Masterson, *supra* note 34, at 591–92.

and familial privacy.¹⁵¹ Experts have also called attention to the related phenomenon of “kidfluencing” wherein the child themselves is the personality behind a social media account, and may be featured modeling clothes or reviewing toys.¹⁵² Some experts propose establishing Coogan accounts for depositing earnings from sponsored content contracts over a certain amount.¹⁵³ However, though Coogan-style protections may regulate the child labor aspect of social media production, they would not sufficiently address the privacy risks. With sharenting, the child’s information, rather than their labor, is the commodity, and the parents’ act of sharing information about the child may not involve the child doing any work or performance, or even appearing in the content, and in that case, the laws would not apply.¹⁵⁴ Furthermore, simply requiring that a relatively small fraction of the earnings be deposited in a trust, with the rest still going to the parents, would not sufficiently deter parents from oversharing information.¹⁵⁵

3. Best Practices Public Awareness Campaign

Sharenting expert Stacey Steinberg believes that an extralegal solution is the best way to address most mainstream forms of sharenting, assuming that most “sharents” “do not intend to ignore their children’s well-being”; rather, they simply do not understand the risks.¹⁵⁶ Steinberg suggests a package of “best practices,” rather than rules, that encourage parents to consider the possible effects of the disclosure on the child and to limit the amount of PII and sensitive information shared.¹⁵⁷ Steinberg’s suggested sharenting best practices include sharing anonymously,¹⁵⁸

¹⁵¹ See *id.* at 593–94; discussion *supra* Section I.B.

¹⁵² Masterson, *supra* note 34, at 583–84; Madeline Berg, *The Highest-Paid YouTube Stars of 2019: The Kids Are Killing It*, FORBES (Dec. 18, 2019, 7:05 AM), <https://www.forbes.com/sites/maddieberg/2019/12/18/the-highest-paid-youtube-stars-of-2019-the-kids-are-killing-it/?sh=6ad6d81e38cd> [<https://perma.cc/EH8B-986W>].

¹⁵³ Masterson, *supra* note 34, at 600–01. In fact, in August 2023, Illinois passed a Coogan-style amendment to its child labor laws entitling children to a percentage of profits for online content based on the frequency that their likeness is featured. Act of Aug. 11, 2023, Pub. Act No. 103-0556, 2023 Ill. Laws.; Taylor Lorenz, *There Are Almost No Legal Protections for the Internet’s Child Stars*, WASH. POST (Sept. 1, 2023, 11:37 AM), <https://www.washingtonpost.com/technology/2023/04/08/child-influencers-protections-congress> [<https://perma.cc/8GTJ-V66D>].

¹⁵⁴ See Steinberg, *supra* note 11, at 847; Masterson, *supra* note 34, at 602.

¹⁵⁵ See Masterson, *supra* note 34, at 601; Steinberg, *supra* note 11, at 842.

¹⁵⁶ Steinberg, *supra* note 11, at 867–68.

¹⁵⁷ *Id.* at 878, 882.

¹⁵⁸ *Id.* at 879–80. Sharing anonymously, especially in the context of a community surrounding a child’s issues or medical needs, would allow the parent to maintain the community support and advice they seek without compromising the child’s interest. See *id.*

using caution before sharing a child’s location,¹⁵⁹ not posting pictures of a child in a state of undress,¹⁶⁰ and giving a child “[v]eto [p]ower” over any post before sharing.¹⁶¹ Disseminating information about sharenting best practices to groups such as parents, doctors, and the media would ideally provoke a widespread discourse about sharenting that would give parents the opportunity to reevaluate their sharing practices to align with expert guidance.¹⁶²

While a public awareness campaign would be designed to address sharenting activity by parents who merely do not understand the gravity of the risk to the child, this Note argues that the more extreme “margins” of sharenting activity necessitate legal rules that complement extralegal norms.¹⁶³ Monetized sharenting falls into this category, as parents who earn money from posting child-centric content have an incentive to disregard guidance that might inhibit their earning potential. However, even nonmonetized accounts that flout best practices and create a high risk of harm to the affected child should be subject to legal redress.¹⁶⁴

Experts have drawn a comparison to the effects of the public awareness campaign about the dangers of smoking cigarettes in public: when doctors learned that secondhand smoke was unhealthy for children, they embarked on a public health campaign encouraging parents not to smoke around children.¹⁶⁵ Some parents heeded this advice, while others did not; in response, some states enacted laws prohibiting parents from smoking in cars with children.¹⁶⁶ The codification of antismoking laws provided a backbone for nonsmokers to use extralegal mechanisms, such as verbal censure, to sanction smokers who violate the norm-turned-law.¹⁶⁷ Similarly, sharenting norms would benefit from a legal backbone, partly because purely informal sanctions may not work as effectively through the internet as a word or a look would in a physical space.¹⁶⁸ On the internet, one can curate their information intake by following only people with similar ideologies, which social

¹⁵⁹ *Id.* at 880.

¹⁶⁰ *Id.* at 881.

¹⁶¹ *Id.*

¹⁶² *See id.* at 878.

¹⁶³ *Id.* at 877.

¹⁶⁴ *See id.*; *supra* note 44 and accompanying text (discussing financial motivations that potentially encourage parents to over-sharent).

¹⁶⁵ Steinberg, *supra* note 11, at 866–67.

¹⁶⁶ *Id.* at 866.

¹⁶⁷ Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1270 (1999) (pointing out that “[i]f a legal rule is adopted to ban smoking in [public] places, many of the norm-compliers who previously had kept silent,” attempting to enforce the norm only through informal sanctions such as “words or looks,” would then “speak out”).

¹⁶⁸ *Cf. id.*

media algorithms return in kind by prioritizing content that aligns with ideologies that one has expressed through their social media use.¹⁶⁹ Discourse on the internet also has a tendency to become more vitriolic than face-to-face interaction,¹⁷⁰ often causing the party on the receiving end to become insulted or dismissive, or to remove the offensive comment.¹⁷¹ This can inhibit or entirely preclude the widespread adoption of best practices through civil discussion, or can cause it to become a divisive topic.¹⁷² Because the pitfalls of online discourse impede informal enforcement of extralegal norms, a legal mechanism to buttress extralegal norms is even more imperative for conduct occurring online, such as sharenting.¹⁷³

B. *The Parent-Child Fiduciary Relationship*

1. Development of Fiduciary Duties in the Law

As social attitudes have evolved from the notion of the child as property to recognizing the independent interests of children, some scholars have characterized the parent-child relationship as a fiduciary relationship.¹⁷⁴ The fiduciary model takes account of the inherent vulnerability of children by reconciling the duties parents owe toward their children with the high level of deference the law affords parents.¹⁷⁵

Fiduciary principles are designed to protect relationships defined by an unequal power balance resulting from one party's dependence on the other to act in their best interest—for example, a trustee who has control

¹⁶⁹ *How Filter Bubbles Isolate You*, GCFGLOBAL, <https://edu.gcfglobal.org/en/digital-media-literacy/how-filter-bubbles-isolate-you/1> [<https://perma.cc/324P-HBLD>]. The term “filter bubble,” coined by Eli Pariser, describes this phenomenon. *Id.* Filter bubbles can make norm enforcement by peers more difficult because if a parent is not exposed to opposing viewpoints regarding sharenting, there would not likely be as much discussion of what is appropriate to share. *See id.*

¹⁷⁰ Maria Konnikova, *The Psychology of Online Comments*, NEW YORKER (Oct. 23, 2013), <https://www.newyorker.com/tech/annals-of-technology/the-psychology-of-online-comments> [<https://perma.cc/7VX7-KB8B>]. Psychologists have found that “[w]ithout the traditional trappings of personal communication, like non-verbal cues, context, and tone, comments can become overly impersonal and cold.” *Id.* As a result, “the nastier the comments, the more polarized readers [become] about the contents of the” internet post. *Id.*

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.*; Eisenberg, *supra* note 167, at 1270.

¹⁷⁴ Scott & Scott, *supra* note 77, at 2401–02.

¹⁷⁵ *Id.*

over another person’s estate.¹⁷⁶ This type of relationship risks creating “distorted incentives” if the fiduciary realizes they have the opportunity to gain personally from their position of control.¹⁷⁷ For instance, the trustee could profit financially if they sell the trust’s property to themselves at less than market value.¹⁷⁸ Fiduciary principles deter the fiduciary from abusing the beneficiary’s trust by removing financial incentives to do so; in this example, the trustee is legally prohibited from self-dealing, including in the above-described transaction.¹⁷⁹

Fiduciary duties arise in a wide range of contexts in the law.¹⁸⁰ Any agency relationship carries fiduciary duties where one party (the principal) authorizes another (the agent) to act on the principal party’s behalf.¹⁸¹ In the context of corporate law, directors of a corporation are fiduciaries of the shareholders, on whose behalf the directors make business decisions to best serve the shareholders’ interests.¹⁸² In each of these relationships, the beneficiary depends on the fiduciary’s duties—the legal responsibility of the fiduciary to act in the beneficiary’s best interest¹⁸³—because of the typical “information asymmetry” between the fiduciary and the beneficiary.¹⁸⁴ In the corporate context, shareholders generally do not have the knowledge or control to make decisions on behalf of the corporation.¹⁸⁵ Likewise, in a trustee context, the beneficiary of a trust might be a minor, disabled, or lacking in some capacity to make decisions for themselves or their assets.¹⁸⁶

¹⁷⁶ Leonard I. Rotman, *Understanding Fiduciary Duties and Relationship Fiduciarity*, 62 MCGILL L.J. 975, 985–88 (2017); JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 385 (9th ed. 2013) (“A trust is a . . . legal arrangement created by a settlor in which a trustee holds property as a fiduciary for one or more beneficiaries.” (emphases omitted)).

¹⁷⁷ Rotman, *supra* note 176, at 987 (quoting Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 794 (1978)).

¹⁷⁸ See *id.* at 1005–06; Anderson, *supra* note 177, at 738.

¹⁷⁹ Rotman, *supra* note 176, at 984; Anderson, *supra* note 177, at 760.

¹⁸⁰ See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 306–07 (1999). In addition to the trustee-beneficiary relationship, fiduciary rules also apply to the relationship between attorney and client, agent and principal, guardian and ward, and partners in a business. *Id.* at 306.

¹⁸¹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

¹⁸² FitzGibbon, *supra* note 180, at 306, 308.

¹⁸³ *Id.* at 308.

¹⁸⁴ Donald D. Bergh, David J. Ketchen, Jr., Ilaria Orlandi, Pursey P.M.A.R. Heugens & Brian K. Boyd, *Information Asymmetry in Management Research: Past Accomplishments and Future Opportunities*, 45 J. MGMT. 122, 122 (2019) (defining information asymmetry as a “condition wherein one party in a relationship has more or better information than another”).

¹⁸⁵ See FitzGibbon, *supra* note 180, at 322–23; Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 416, 420–21.

¹⁸⁶ Cf. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432 (1993).

To protect the interests of the vulnerable person for whom the agent or trustee acts, courts have long enforced fiduciary duties that complement moral and social norms.¹⁸⁷ “[T]he term ‘fiduciary’ originated in Roman law” and was used to represent a person obligated to act like a trustee, whose position required “scrupulous good faith and candor.”¹⁸⁸ In English law, courts of equity used fiduciary principles to grant relief to persons who suffered “an abuse of confidence” by someone in whom the victim had placed their trust.¹⁸⁹

As jurisprudence around business organizations developed, fiduciary duties were an apt source of legal rules because, like trustees, corporate directors have the power to act in the interest of others.¹⁹⁰ Delaware, the most common state of incorporation for publicly traded companies,¹⁹¹ adjudicates corporate disputes in its Court of Chancery, which is a court of equity.¹⁹² Judge Cardozo famously articulated the heightened moral standard for the “undivided loyalty” of fiduciaries in his *Meinhard v. Salmon* opinion, stating that “the punctilio of an honor the most sensitive[] is then the standard of behavior,” which courts of equity enforce with “[u]ncompromising rigidity.”¹⁹³

The two primary fiduciary duties in corporate fiduciary relationships are the duties of care and loyalty.¹⁹⁴ The duty of care requires corporate directors to inform themselves “prior to making a business decision, of all material information reasonably available to them.”¹⁹⁵ The duty of loyalty prohibits the fiduciary from profiting from their position as fiduciary (known as self-dealing), and requires the fiduciary to act in the best interest of the company at all times.¹⁹⁶ An element of the duty of loyalty is the duty of good faith, a breach of which is characterized by a

¹⁸⁷ Blaine F. Aikin & Kristina A. Fausti, *Fiduciary: A Historically Significant Standard*, 30 REV. BANKING & FIN. L. 155, 157–59 (2010).

¹⁸⁸ *Id.* at 158.

¹⁸⁹ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880.

¹⁹⁰ *Id.* at 880–81.

¹⁹¹ Chauncey Crail, Rob Watts & Jane Haskins, *Why Incorporate in Delaware? Benefits & Considerations*, FORBES ADVISOR (Dec. 29, 2022, 11:33 PM), <https://www.forbes.com/advisor/business/incorporating-in-delaware> [<https://perma.cc/V99A-C37P>]. More than fifty percent of publicly traded companies in the United States are incorporated in Delaware. *Id.*

¹⁹² *See id.* Delaware is one of the only states to not merge courts of law and equity. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999 n.2 (2015).

¹⁹³ 164 N.E. 545, 546 (N.Y. 1928).

¹⁹⁴ Julian Velasco, *The Diminishing Duty of Loyalty*, 75 WASH. & LEE L. REV. 1035, 1037, 1045.

¹⁹⁵ 488 A.2d 858, 872–73 (Del. 1985) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

¹⁹⁶ *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006); Velasco, *supra* note 194, at 1054 (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993)).

conscious disregard of responsibilities.¹⁹⁷ However, these duties are qualified by the business judgment rule, which grants significant deference to the decisions and expertise of the corporate directors.¹⁹⁸ The business judgment rule presumes that corporate directors or officers act “on an informed basis, in good faith,” and with the belief that their actions are in the best interest of the company.¹⁹⁹ In *Smith v. Van Gorkom*, the Delaware Supreme Court held that liability under the duty of care is predicated on gross negligence, and the standard for determining whether the board members informed themselves before making a decision is also gross negligence, which creates a wide latitude for director discretion, mirroring the latitude that parents receive in United States law.²⁰⁰

2. The Fiduciary Nature of the Parent-Child Relationship

Several features of the parent-child relationship fit readily into the fiduciary framework.²⁰¹ The considerable asymmetry in information, expertise, and control between parent and child gives the parent significant discretion and legal power to make decisions for the child, and the child is entirely dependent on the parent.²⁰² Elizabeth and Robert Scott propose that characterizing the parent-child relationship as fiduciary accommodates the unique features of the relationship by acknowledging the conflict between children’s interests and the rights of biological parents.²⁰³ Specifically, the authors liken parents’ duties to those of corporate directors because both roles encompass a wide scope of tasks and broad discretion in accomplishing those tasks, which is reflected in the historical judicial deference to parental rights.²⁰⁴ The deference built into corporate law rules, such as the business judgment rule, aims to maximize role satisfaction to encourage directors and officers to invest effort into their positions.²⁰⁵ Similarly, the significant

¹⁹⁷ *Stone*, 911 A.2d at 369–70.

¹⁹⁸ *Smith*, 488 A.2d at 872.

¹⁹⁹ *Id.* (quoting *Aronson*, 473 A.2d at 812).

²⁰⁰ *Id.* at 873.

²⁰¹ Scott & Scott, *supra* note 77, at 2430–31.

²⁰² *Id.* at 2418–19.

²⁰³ *Id.* at 2475–76.

²⁰⁴ *Id.* at 2431.

²⁰⁵ *Id.* at 2429–31 (explaining that the business judgment rule motivates the fiduciary to subordinate its own interests to that of its beneficiary through a “quid pro quo” that includes “broad grants of authority and discretion that enhance [the fiduciary’s] reputation and self-esteem”).

discretion given to parents in rearing their children is designed to encourage people to undertake the task of parenting.²⁰⁶

The parent-child relationship differs from other fiduciary relationships in that the scope of parental duties is broader than that of other fiduciaries, as the parent takes charge of practically every area of a child's life.²⁰⁷ Some scholars argue that the fiduciary model is not an appropriate analogy for the parent-child relationship because, among other reasons, "children are a significant [financial] drain."²⁰⁸ Rather than earning financial compensation typical for fiduciaries, parents derive nonfinancial compensation from their roles,²⁰⁹ such as (1) their bond to the child and the fact that parenting is central to their identity, and (2) fulfillment of social parenting norms enforced by approval or disapproval of parenting decisions by the community.²¹⁰ Because of the amount of resources parents are expected to expend in raising their children, a blanket rule against self-dealing as in other types of fiduciary relationships would have the adverse effect of deterring potential parents from undertaking the duties of child-rearing entirely.²¹¹

This Note proposes that fiduciary duty rules are aptly applied to sharenting, in particular monetized sharenting, due to the additional conflict of interest presented by the possibility of financial gain.²¹² Rather than primarily considering the interests of the child when posting the child's likeness or information on social media, a parenting influencer is swayed toward creating more content by the allure of gaining a larger following and, in turn, more lucrative sponsorships and income.²¹³ At the same time, sharenting lacks the built-in monitoring mechanisms common to other circumstances in which parents use their children for financial gain, such as traditional child entertainers, thus further necessitating legal rules.²¹⁴

Other types of fiduciary relationships that involve control over an individual's money, such as adult family guardianships and parent-child entertainer relationships, are similarly subject to greater oversight.²¹⁵ As previously discussed, child entertainers and their parents are subject to

²⁰⁶ See *id.* at 2430–31.

²⁰⁷ *Id.* at 2402.

²⁰⁸ *Id.* at 2417.

²⁰⁹ *Id.* at 2417–18.

²¹⁰ Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 227, 229–30 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

²¹¹ See Scott & Scott, *supra* note 77, at 2430.

²¹² See *infra* notes 221–223 and accompanying text.

²¹³ See *id.*

²¹⁴ See discussion *supra* Section II.A.2.

²¹⁵ Scott & Chen, *supra* note 210, at 243; see discussion *supra* Section II.A.2.

monitoring by the state.²¹⁶ New York law requires parents to establish a trust for a child entertainer, specifying that the parent or legal guardian may serve as a custodian for the trust, but that in the event the account balance reaches \$250,000 or more, a trust company is appointed as custodian.²¹⁷

The law uses more stringent fiduciary requirements to regulate familial ward-guardian relationships, such as that between an adult child and an elderly parent, or between a parent and a disabled adult child.²¹⁸ For example, an Illinois court applied the rule against self-dealing when removing a mother as guardian of her disabled adult daughter despite providing “excellent care” after the mother utilized funds from the daughter’s “substantial” estate for the mother’s and family’s expenses without prior authorization.²¹⁹ Factors that trigger more stringent fiduciary requirements in a guardianship context include, *inter alia*, that “the guardian may have an expectation of financial gain on the death of the incapacitated family member that creates a potential conflict of interest in the expenditure of guardianship assets.”²²⁰ Similarly, a sharenting social media parent also has an expectation of financial gain from sharing information about their children, which creates an explicit conflict of interest.²²¹ The more a parent shares on social media, the more their exposure and following grow, which increases their potential earnings from both the social media platforms themselves as well as brand partnerships. In turn, the parent’s increased earning potential incentivizes them to share more, thereby increasing the risk of harm to the child from oversharing.²²² This conflict of interest arising from the temptation of financial gain from sharenting compels a comparable level of legal intervention as guardianships and child entertainer relationships.²²³

Another similarity to guardianships is that the nature of sharing online also creates lasting harm: information posted about a child will still

²¹⁶ See discussion *supra* Section II.A.2.

²¹⁷ N.Y. EST. POWERS & TRUSTS LAW § 7-7.1(2)(b) (McKinney 2023).

²¹⁸ Scott & Chen, *supra* note 210, at 228.

²¹⁹ *In re Estate of O’Hare*, 34 N.E.3d 1126, 1128–29, 1131 (Ill. App. Ct. 2015) (finding that the mother “almost completely disregarded her obligation to preserve and manage the estate to provide for Sarah’s needs; instead [the mother] drew upon estate funds for the support and comfort of the family as a whole.”); Scott & Chen, *supra* note 210, at 249.

²²⁰ Scott & Chen, *supra* note 210, at 240.

²²¹ See *id.*; Cox, *supra* note 37.

²²² See discussion *supra* Section I.A.2.

²²³ See discussion *supra* Section II.B.

be searchable beyond when the child reaches adulthood.²²⁴ Another reason guardianships are subject to greater oversight is because of the beneficiary's self-determination: an older person has developed "a stable identity with established values and preferences," and therefore "the guardian's role, to the extent possible, is to make decisions consistent with the elderly person's self-defined interest, a constraint that appropriately limits the guardian's authority."²²⁵ This appears to contrast to the lack of "dignitary interest in personhood" that a child possesses.²²⁶ However, the permanence of content on the internet creates a parallel. While a person may not have established values during childhood, when they reach adulthood, the content the parent has decided to share will still exist online, and a graphic potty-training or breastfeeding video may conflict with the now-adult child's identity and values.²²⁷

These similarities between these types of fiduciary relationships and the parent-child relationship lend the application of fiduciary principles to the issue of sharenting. More extreme sharenting activity, including monetized sharenting, can be governed by fiduciary principles similar to that of corporate law with the use of what Elizabeth and Robert Scott term the "parental judgment rule," a version of the business judgment rule.²²⁸ David Meyer suggests that the Supreme Court adopted a similar idea in its *Troxel v. Granville*²²⁹ opinion, in which the Court held unconstitutional a Washington statute that gave grandparents the right to visitation of a grandchild when the child's parent opposed the visitation.²³⁰ Although the Court ruled in favor of parental rights, Meyer argues that it employed a "constitutional rule of reasonable deference" to parental decision-making in which "a court's mere disagreement with the parent's 'best interests' assessment is not enough" to interfere with parental rights.²³¹ Therein, the Court implied an outer standard, akin to the business judgment rule, beyond which courts can challenge parental decision-making.²³² While the parental judgment rule concept has been used primarily to analyze custody and visitation disputes, it can also be

²²⁴ See discussion *supra* Section II.A.1. The United States does not grant a right to be forgotten akin to that of the European Union; therefore, any information remains searchable indefinitely. See *supra* Section II.A.1.

²²⁵ Scott & Chen, *supra* note 210, at 240.

²²⁶ *Id.*

²²⁷ See *id.*

²²⁸ Scott & Scott, *supra* note 77, at 2437–38.

²²⁹ 530 U.S. 57, 75 (2000).

²³⁰ David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 713–14 (2001).

²³¹ *Id.* at 714.

²³² *Id.*

applied to regulating sharenting behaviors,²³³ given that much social media content creation occurs within the home and without parties outside of the family regularly involved in production,²³⁴ and the government’s precedent of nearly unfettered parental rights.²³⁵ Having a range of acceptable sharenting conduct encompassed within the parental judgment rule allows parents to continue to receive deference by the courts, but puts outer boundaries in place beyond which the child can challenge the parent’s decision and obtain relief.²³⁶

III. PROPOSAL

A. *Breach of Fiduciary Duty Action for Privacy Harms Due to Sharenting*

Like breach of fiduciary duty actions against corporate officers and directors, a cause of action for harms a child incurred through monetized sharenting would accompany and reinforce extralegal norms of parental behavior.²³⁷ The cause of action would primarily function as a deterrent to exploitative behavior by parents in order to preemptively protect children against risky or harmful sharenting, but would also provide recourse for children against their parents in the event of particularly egregious sharenting that results in harm to the child. A child who, upon reaching majority, wants to bring an action against their parents for breaching their parental fiduciary duty by oversharing on social media in a way that caused harm to the child would need to plead and prove the elements of a breach of fiduciary duty claim according to state law.

First, the element of duty—that the defendant parent owed the plaintiff child a fiduciary duty arising from an express or implied fiduciary relationship—must be established.²³⁸ Courts have found informal fiduciary relationships where the plaintiff placed a high level of reliance on the defendant while the defendant exercised dominance and

²³³ See *id.* at 714–15; see Scott & Scott, *supra* note 174, at 2475 (“The relational model of parents as fiduciaries provides a purchase from which to evaluate the evolution of contemporary family law on issues relating to the state’s role in the family.”).

²³⁴ See *supra* notes 149–51 and accompanying text.

²³⁵ See discussion *supra* Section I.B.

²³⁶ See Scott & Scott, *supra* note 77, at 2437–38.

²³⁷ See discussion *supra* Section II.B.

²³⁸ See *People ex rel. Cuomo v. Coventry First LLC*, 915 N.E.2d 616, 620 (N.Y. 2009).

control over the plaintiff.²³⁹ In the context of the parent-child relationship, the parent holds fiduciary authority for the benefit of the child.²⁴⁰ The child's very existence arises without its consent, upon the action of its parents procreating, and thus the parent becomes responsible for acting on behalf of and in the interest of the helpless child.²⁴¹

Second, the plaintiff must prove that the defendant breached this duty through misconduct.²⁴² Here, the plaintiff would argue that the defendant-parent's sharenting was, in itself, a breach of fiduciary duty based on the amount or type of information the parent posted.²⁴³ The plaintiff could allege that the parent breached the duty of care by posting the child's PII or sensitive information in violation of widely held sharenting norms at the time, such as posting the child in a state of undress or posting the child's personal information such as their birth date, school, or other identifying information that could lead to their identity being compromised.²⁴⁴ The argument for violation of the duty of care is that by ignoring or being unaware of sharenting best practices, the parent did not avail themselves of all the information to make the best decisions for the child as part of their fiduciary duty.²⁴⁵

Third, the plaintiff must prove that the defendant's breach of duty caused the plaintiff harm.²⁴⁶ Here, the plaintiff must connect the sharenting to harm that they have incurred; for instance, that the name of the child's school or their home address caused their identity to be stolen, or that they faced stalking due to exposure of their personal information online.²⁴⁷

An effective cause of action for a now-adult plaintiff also must reconcile the statute of limitations for harm that may have occurred while the plaintiff was a minor. The statute of limitations for breach of fiduciary duty in New York, for instance, is three years where the plaintiff seeks

²³⁹ See *supra* Section II.B (discussing parents as fiduciaries); see also *Benson v. Stafford*, 941 N.E.2d 386, 398 (Ill. App. Ct. 2010) (explaining that Illinois courts consider "degree of kinship between the parties, the disparity in age, health, education, or business experience . . . and the extent to which the servient party entrusted the handling of its business to the dominant party" to find the existence of a fiduciary relationship).

²⁴⁰ *Miller & Gold*, *supra* note 176, at 523 ("Parental authority is a sui generis form of fiduciary authority recognized by law.").

²⁴¹ See *id.*

²⁴² *Litvinoff v. Wright*, 54 N.Y.S.3d 22, 24 (App. Div. 2017) (quoting *Rut v. Young Adult Inst., Inc.*, 901 N.Y.S.2d 715, 717 (App. Div. 2010)).

²⁴³ See *id.*

²⁴⁴ See *Roth*, *supra* note 14; *Brown*, *supra* note 50.

²⁴⁵ See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

²⁴⁶ *Litvinoff*, 54 N.Y.S.3d at 24 (listing the third element of a claim for breach of fiduciary duty as "damages directly caused by the defendant's misconduct" (quoting *Rut*, 901 N.Y.S.2d at 717)).

²⁴⁷ See discussion *supra* Section I.A.3.

purely monetary damages.²⁴⁸ Under New York’s tolling statute, if the parent’s breach occurred more than three years before the plaintiff reached the age of majority, the plaintiff “is under a disability because of infancy” and the start of the statute of limitations is suspended.²⁴⁹ Applying this to a child’s cause of action against their parent, the statute of limitations would begin running once the child reaches the age of majority.²⁵⁰

B. *The Parental Judgment Rule*

To bring a case for breach of fiduciary duty against corporate directors or officers, along with establishing the elements of a breach of fiduciary duty, the plaintiff assumes the burden of proving that the defendant’s conduct exceeded the scope of the business judgment rule—that is, the defendant breached either the duty of care, loyalty, or good faith, the contours of which are informed by moral and social norms.²⁵¹ Likewise, the parental judgment rule is informed by and complements the use of extralegal norms, as in the public health approach Steinberg recommends.²⁵² Experts say that predicting the exact rules in advance would be “problematic” because the conflict of interest rules delineating the outer edges of the parental judgment rule would only be established “when a societal consensus about the impact of the regulated conduct on children dictates a particular choice.”²⁵³ Sharenting has come into the public consciousness recently, with the Oxford English Dictionary adding the term in June 2022,²⁵⁴ so a social consensus is still under construction. However, we can predict such social consensus based on current recommendations by experts, as well as current public sentiment.

²⁴⁸ *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 272 (N.Y. 2009) (“Where the remedy sought is purely monetary in nature, courts construe the suit as alleging ‘injury to property’ within the meaning of CPLR 214(4)” (quoting N.Y. C.P.L.R. 214(4) (McKinney 2023))).

²⁴⁹ N.Y. C.P.L.R. 208(a) (McKinney 2023).

²⁵⁰ *See id.*

²⁵¹ Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 530 (2013).

²⁵² *See discussion supra* Section II.A.3; Steinberg, *supra* note 11, at 866–67.

²⁵³ Scott & Scott, *supra* note 174, at 2438.

²⁵⁴ The Conversation, *Should I Post Photos of My Children Online? Here’s What New Parents Need to Know About Sharenting*, INDIAN EXPRESS (Nov. 10, 2022, 11:44 IST), <https://indianexpress.com/article/parenting/family/post-photos-online-sharenting-8230132> [https://perma.cc/NFB2-FFGF].

1. Proposed Social Norms

As social consensus about sharenting becomes stronger, perhaps bolstered by a public awareness campaign, parents not complying with the rules could be characterized as breaching the duty of care by not informing themselves before making a decision that affects their children, to whom they are acting as fiduciary.²⁵⁵ The following are examples of social norms based on common guidance from experts.

Parents should refrain from posting pictures or videos of children in a state of undress.²⁵⁶ These can be saved or repurposed by child sexual predators.²⁵⁷ Parents should avoid sharing PII such as their child's exact birthday, posting on their birthday, or sensitive location information such as the child's school.²⁵⁸ Experts also suggest that rather than sharing all of their children's milestones on public profiles, parents can make private family- and friends-only accounts, or share privately through other means such as text or shared Google Photos albums.²⁵⁹

Social consensus can inform the specific types of content deemed within the parental judgment rule, as well as the treatment of monetized sharenting: a 2018 *Business Insider* poll showed that only about twelve percent of people think that it is acceptable for parents to profit from posting their children on social media.²⁶⁰ The parent's pecuniary interest in sharenting about their child would be considered a conflict of interest because the parent stands to gain from sharing more about their child.²⁶¹ In corporate law, this would implicate the duty of loyalty.²⁶² However, because a zero-tolerance policy to self-dealing would discourage people from becoming parents, simply sharing about the child on a monetized account would not be enough to rebut the parental judgment rule.²⁶³ Still, a parent profiting from the disclosure of their child's information would factor into the court's consideration, along with the type of information they shared.

²⁵⁵ See discussion *supra* Section III.A.; *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985) (stating that the duty of care entails making informed business decisions).

²⁵⁶ Steinberg, *supra* note 11, at 881.

²⁵⁷ Rucich, Gonzalez & Roxas, *supra* note 6.

²⁵⁸ Steinberg, *supra* note 11, at 848, 880.

²⁵⁹ Rucich, Gonzalez & Roxas, *supra* note 6.

²⁶⁰ Jacob Shamsian, *Nearly 90% of Americans Think It's Wrong to Make Money from Photos of Children on Social Media*, BUS. INSIDER (Dec. 28, 2018, 2:57 PM), <https://www.insider.com/poll-parents-profit-children-social-media-photos-instagram-youtube-2018-12> [<https://perma.cc/3CTV-B6KV>].

²⁶¹ See discussion *supra* Section II.B.2.

²⁶² See discussion *supra* Section II.B.1.

²⁶³ See Scott & Scott, *supra* note 174, at 2437.

2. Rebutting the Parental Judgment Rule

The plaintiff-child would have to rebut the parental judgment rule in order to shift the burden to the parent to prove that the sharenting was not a breach of the parent’s fiduciary duty.²⁶⁴ To rebut the parental judgment rule, courts would consider factors including but not limited to the type of information the parent shared, how closely aligned the sharenting was with the social consensus of best practices, and if the account or the specific post in question was monetized.²⁶⁵ For example, if a post was monetized and the child suffered harm from some information that was disclosed therein, the child could allege self-dealing, a breach of the duty of loyalty by the parent that would rebut the parental judgment rule.²⁶⁶ The burden would then shift to the parent to prove that the money they earned from the post did not affect their decision to post the information, or that the information they posted was within the sharenting norms at the time, such that the harm to the plaintiff did not arise from their breach of fiduciary duty.²⁶⁷ In that case, the plaintiff’s claim would be dismissed.²⁶⁸

CONCLUSION

The purpose of allowing children a right of action against their parents for breach of their fiduciary duty for sharenting is not to have scores of children suing their parents upon reaching the age of majority, but rather, in tandem with well-established social norms around sharenting, to serve as an effective deterrent to parents who are otherwise tempted to overshare by the lucrative family influencing industry. A parent faces a conflict of interest in their fiduciary relationship with their children when they weigh the competing interests of safeguarding their child’s personal information with a potentially large profit from

²⁶⁴ This mirrors the principle that in corporate breach of fiduciary duty actions, the business judgment rule provides that a company’s board of directors is presumed to be acting in good faith unless the opposing party establishes facts to rebut the presumption. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

²⁶⁵ These factors help the court assess whether the parent was acting in accordance with the duties of good faith, care, and loyalty, or if the parent engaged in self-dealing. *See supra* notes 196–99 and accompanying text.

²⁶⁶ *See Aronson*, 473 A.2d at 812 (explaining that once a conflict of interest has been established, the business judgment rule no longer applies).

²⁶⁷ *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162–63, 1179–80 (Del. 1995) (discussing burden-shifting and the entire fairness standard).

²⁶⁸ *See id.* at 1179–80.

disclosing that information to a wide online audience.²⁶⁹ Sharenting and the social media industry present novel challenges in legal oversight compared to, for instance, the regulation of the child entertainer industry, due to the fact that most content is produced within the home with few to no third parties, such as a production company, involved.²⁷⁰ The private nature of this work would make a monitoring mechanism more intrusive on family life and parents' rights, which have been given broad protection under U.S. law.²⁷¹ Therefore, giving a child the right of civil action against their parent can work to deter egregious sharenting conduct by parents while still preserving family privacy and deference to parents' choices. Parents retain the benefits of sharenting, including the community and support that it brings, while making simple changes that decrease risks to their children.

After the Wren and Jacquelyn sharenting scandal died down, Jacquelyn returned to posting content heavily featuring her daughter.²⁷² Meanwhile, other parents have sworn off showing their children on social media entirely,²⁷³ whereas still others are focused on raising awareness on social media of the potential harms of sharenting.²⁷⁴ It is not clear what, if any, actionable harms Wren or other sharented children may incur now or in the future as a result of their online exposure.²⁷⁵ However, the law can play a role in centralizing best practices for parents' social media activity, using the option for children to bring a lawsuit for harms as a deterrent, which can reduce harmful sharenting across the board.

²⁶⁹ See Masterson, *supra* note 34, at 592.

²⁷⁰ See *id.*

²⁷¹ See discussion *supra* Section I.B.

²⁷² Wren & Jacquelyn (@wren.eleanor), *supra* note 2.

²⁷³ Fortesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made into Content*, TEEN VOGUE (Mar. 10, 2023), <https://www.teenvogue.com/story/influencer-parents-children-social-media-impact> [<https://perma.cc/5Y9W-GEEH>] (discussing the growing trend of prominent social media creators who protect their children's identity using techniques such as covering their faces in photos or using aliases when posting about them); see, e.g., Bobbi (@bobbialthoff), TIKTOK, <https://www.tiktok.com/@bobbialthoff?lang=en> [<https://perma.cc/L3N6-LAVJ>]; Maia Knight (@maiaknight), TIKTOK, <https://www.tiktok.com/@maiaknight?lang=en> [<https://perma.cc/65ZR-QHZ2>].

²⁷⁴ mom.uncharted (@mom.uncharted), TIKTOK, <https://www.tiktok.com/@mom.uncharted> [<https://perma.cc/L9S8-8RWM>] (posting about common types of exploitative sharenting content).

²⁷⁵ See *supra* notes 243–45 (discussing the causation element of a breach of fiduciary duty claim).