

NOTES

Honey, I Monetized the Kids: Commercial Sharenting and Protecting the Rights of Consumers and the Internet’s Child Stars

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TABLE OF CONTENTS

INTRODUCTION	848
I. PARENTS ARE SHARENTING FOR COMMERCIAL GAIN	854
A. COSTS CAN OUTWEIGH COMMERCIAL SHARENTING’S BENEFITS	857
1. Commercial Sharenting Has Privacy-Related Repercussions.	859
2. Commercial Sharenting Creates Mental Health Concerns	862
II. COMMERCIAL SHARENTING SHOULD BE FRAMED AS A COMMERCIAL INTEGRITY ISSUE	866
A. COMMERCIAL SHARENTING CAN BE MISLEADING	866
B. THE FTC HAS MADE CLEAR THAT MISLEADING CONTENT IS PROBLEMATIC	870
C. COURTS HAVE EXPRESSED CONCERNS REGARDING MISLEADING COMMERCIAL CONTENT.	874
III. COMMERCIAL SHARENTING SHOULD BE FRAMED AS AN ISSUE THAT RAISES CHILD LABOR CONCERNS	877
A. THE CHILD STARS OF COMMERCIAL SHARENTING POSTS LACK LEGAL PROTECTION.	877

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B. WHEN COMMERCIAL SHARENTING, PARENTS CAN ENCOURAGE CHILDREN TO POST AGAINST THEIR WILL FOR THEIR OWN BENEFIT. 881

IV. PRESENTING COMMERCIAL SHARENTING AS A COMMERCIAL INTEGRITY AND/OR CHILD LABOR ISSUE CAN SPUR EFFORTS TO PROTECT CHILDREN 883

A. THE LAW’S STRONG PARENTAL RIGHTS PROTECTIONS ARE NOT ABSOLUTE AND LEAVE ROOM TO ADDRESS COMMERCIAL SHARENTING 883

B. THE PROPOSED FRAMING CAN HELP DRIVE ACTION 885

CONCLUSION 888

INTRODUCTION

According to Adam Ali, his daughter “Samia’s birth video is on YouTube, so she’s pretty much been born into social media.”¹ Katie Stauffer’s twins have “grown up on their mom’s Instagram account.”² Sarah and Johnny Tanner shared posts with their audience of 1.48 million online subscribers of their daughter learning how to shave her legs and shopping for her first bra at age eleven.³

These featured children are objects of commercial sharenting—“[w]hen parents overshare photos and other data about their children on social media”⁴ for commercial gain.⁵ The term “sharenting” was launched in a 2012 *Wall Street*

1. Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html>.

2. Remy Smidt, *This Mom’s Full-Time Job Is Posting to Instagram and This Is What It’s Like*, BUZZFEED NEWS (Jan. 25, 2018, 8:45 AM), <https://www.buzzfeednews.com/article/remysmidt/milamma-katie-stauffer> [https://perma.cc/JB9J-T8W5].

3. Danya Hajjaji, *YouTube Lets Parents Exploit Their Kids for Clicks*, NEWSWEEK (Oct. 4, 2021, 9:00 AM), <https://www.newsweek.com/youtube-lets-lawless-lucrative-sharenting-industry-put-kids-mercy-internet-1635112> [https://perma.cc/P796-3NAK].

4. For a definition of “sharenting,” see Kendall Ciesemier, Taige Jensen & Nayeema Raza, *If You Didn’t ‘Sharent,’ Did You Even Parent?*, N.Y. TIMES, at 00:26 (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/opinion/parents-social-media.html>. “Sharenting” has also been described as applying to “primary caregivers.” Beth Ann Mayer, *Why Parents Overshare on Social Media and When It Might Be Dangerous*, PARENTS (Feb. 1, 2022), <https://www.parents.com/parenting/better-parenting/sharenting-meaning-and-when-it-might-be-dangerous> [https://perma.cc/UQL6-4QGA].

5. Commercial sharenting relates to “sharenting” in a commercial context. In the words of Harvard Law’s Leah Plunkett, when parents commercially sharent, they “are taking [their] child, or in some cases, [their] broader family’s private or intimate moments, and sharing them digitally, in the hope of having some kind of current or future financial benefit.” Katie Collins, *TikTok Parents Are Taking Advantage of Their Kids. It Needs to Stop*, CNET (Aug. 7, 2022, 5:00 AM), <https://www.cnet.com/tech/services-and-software/tiktok-parents-are-taking-advantage-of-their-kids-it-needs-to-stop> [https://perma.cc/6UV7-J3EQ]. Per Plunkett, the gain from commercial sharenting “could be immediate compensation, development of business interests for future compensation, or other forms of current or potential revenue generation. Revenue may come from a variety of sources, including marketing agreements with businesses to promote a given product or service and other partnerships or deals” LEAH A.

Journal article about parents seeking to gain attention online.⁶ This content has grown on parent-managed accounts on a variety of platforms ever since,⁷ including for commercial gain.⁸ Some parents began posting on social media as early as when Facebook launched in 2004;⁹ “mommy bloggers” started sharing their parenting stories online around that time as well.¹⁰ The increase in social media platforms—such as Facebook, Instagram, and TikTok—has furthered this spread,¹¹ as have the opportunities to make immense sums of money online from posts centered around child stars.¹²

PLUNKETT, SHARENTHOOD: WHY WE SHOULD THINK BEFORE WE TALK ABOUT OUR KIDS ONLINE 55 (2019).

6. See Steven Leckart, *The Facebook-Free Baby*, WALL ST. J. (May 12, 2012, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304451104577392041180138910>.

7. See Leah Plunkett, *To Stop Sharenting & Other Children’s Privacy Harms, Start Playing: A Blueprint for a New Protecting the Private Lives of Adolescents and Youth (PPLAY) Act*, 44 SETON HALL LEGIS. J. 457, 460 (2020) (“While social media may be the most visible of these activities, there are countless others.”).

8. University of Western Australia’s Crystal Abidin has been discussing “micro-microcelebrities,” babies and toddlers who have significant online followings and earn thousands of dollars online, since at least 2015. See Crystal Abidin, *Micromicrocelebrity: Branding Babies on the Internet*, 18 M/C J., no. 5, 2015.

9. See *Making the News: “Sharenting” in the Modern World*, FIRST 5 L.A., <https://www.first5la.org/article/making-the-news-sharenting-in-the-modern-world> [perma.cc/TS77-RUUX] (last visited Mar. 17, 2023).

10. “Mommy bloggers” started posting as early as one year later, in 2005. See 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>; see also Kathryn Jezer-Morton, *Inside the World of Stay-at-Home Moms Who Blog for Profit*, BUZZFEED NEWS (Apr. 19, 2019, 11:26 AM) [hereinafter Jezer-Morton, *Inside the World*], <https://www.buzzfeednews.com/article/kathrynjezermorton/stay-at-home-mom-blogs-mommy-blogging-printables-shopify> [https://perma.cc/2M3W-8BR4] (discussing the history of early “mommy blogs”); Kathryn Jezer-Morton, *Online Momming in the ‘Perfectly Imperfect’ Age*, CUT (Apr. 10, 2019), <https://www.thecut.com/2019/04/online-moms-mommyblogs-instagram.html> (same). At the time, perhaps “[t]he world was unprepared for the mom bloggers.” Margaret Wheeler Johnson, *The Kids of Mom Bloggers Are Old Enough to Read It All Now. What Do They Think?*, ROMPER (Aug. 17, 2022), <https://www.romper.com/parenting/kids-of-mommy-bloggers-interview> [https://perma.cc/KHA8-4Z2G]. Nevertheless, the blogs have in part been credited for sparking influencer marketing. See *id.*; Lyz Lenz, *The Mommy Blog is Dead. Long Live the Mommy Blog*, TOPIC (May 2019), <https://www.topic.com/the-mommy-blog-is-dead-long-live-the-mommy-blog> [https://perma.cc/KV5U-H25J]. This credit has not been as robust as it could be. See Johnson, *supra*.

11. Large online followings are not necessarily essential to having persuasive commercial sharenting posts. See Gerardo A. Dada, *What Is Influencer Marketing and How Can Marketers Use It Effectively?*, FORBES (Nov. 14, 2017, 8:00 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2017/11/14/what-is-influencer-marketing-and-how-can-marketers-use-it-effectively> (“One of the biggest misconceptions about influencers is that they are someone with a large social media following. This thinking confuses influence with popularity. The act of influencing requires a specific result: a change in thinking or behavior. An influencer, therefore, is someone who has the power to influence the perception of others or gets them to do something different.”).

12. See Taylor Mooney, *Companies Make Millions Off Kid Influencers, and the Law Hasn’t Kept Up*, CBS NEWS (Aug. 26, 2019, 6:19 AM), <https://www.cbsnews.com/news/kid-influencers-companies-make-millions-law-hasnt-kept-up-cbsn-originals> [https://perma.cc/2HRP-KTUC]. The financial benefits of commercial sharenting will be discussed later in this Note. See *infra* Section III.B.

These featured children are not alone. Over ninety percent of children have an online presence by the time they turn two.¹³ Before the average child turns five, nearly 1,500 images of them are online.¹⁴ This presence has increased as parents have become more comfortable posting about their children online.¹⁵ In the words of social media star Ross Smith, who boasts millions of online followers and collaborates with children on posts, “Kids are the new social influencer.”¹⁶ Instead of sharing materials as actors and actresses, children are sharing content as themselves—which their parents then distribute. Even famous child actress Shirley Temple only took on other characters.¹⁷ These children, meanwhile, are not playing characters when parents’ commercial sharenting posts highlight their identity—they are playing themselves.

The fame that accompanies parents’ online posts is not necessarily celebrated by the child stars themselves. Sixteen-year-old Zoya Garg lamented: “[M]y mom shares my whole life” online.¹⁸ The daughter of mommy blogger Christie Tate expressed concern upon discovering a blog chronicling her life—written by her mother.¹⁹ One frustrated seventeen-year-old told the *New York Times* that she feels “naked” when looking at her parents’ social media platforms, expressing frustration that their privacy and security concerns differ from hers.²⁰ Parents’

13. See Nancy Jo Sales, *American Girls: How Social Media is Disrupting the Lives of Teenagers*, TIME, <https://time.com/americangirls/> [<https://perma.cc/J2YY-A3AM>] (last visited Apr. 13, 2023). Many parents start laying the foundation for their children to have an online presence before they are born. See Katy Holland, *A Quarter of Babies Have an Online Presence Before They're Born*, HUFFPOST (May 22, 2015), https://www.huffingtonpost.co.uk/2010/10/14/a-quarter-of-babies-have-an-online-presence-before-they-re-bom_n_7394686.html [<https://perma.cc/NKJ3-WYDX>]; Ellen Walker, *Nothing Is Protecting Child Influencers from Exploitation*, WIRED (Aug. 25, 2022, 9:00 AM), <https://www.wired.com/story/child-influencers-exploitation-legal-protection>.

14. Anya Kamenetz, Opinion, *The Problem with ‘Sharenting,’* N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/opinion/children-internet-privacy.html>.

15. See Kate Hamming, Comment, *A Dangerous Inheritance: A Child’s Digital Identity*, 43 SEATTLE U. L. REV. 1033, 1057 (2020).

16. Katherine Rosman, *Why Isn’t Your Toddler Paying the Mortgage?*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/style/viral-toddler-videos.html>.

17. Hilary Levey, *Balloon Boy Plus Eight? Children and Reality Television*, CONTEXTS, Spring 2010, at 72, 74. Temple has been called “the greatest child star of all time.” *Id.*

18. Ciesemier et al., *supra* note 4, at 00:13. For more examples of young people who are frustrated about their parents’ online posts, see generally *id.* These examples pertain to noncommercial sharenting but are still useful for identifying concerns.

19. See Christie Tate, *My Daughter Asked Me to Stop Writing About Motherhood. Here’s Why I Can’t Do That.*, WASH. POST (Jan. 3, 2019, 9:00 AM), <https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that>. Tate has refused to remove past pictures, despite her daughter’s complaints. See *id.*; Jen Juneau, *Mom Blogger Defends Her Decision Not to Remove Photos of Her Daughter After Child’s Request*, PEOPLE (Jan. 7, 2020, 11:50 AM), <https://people.com/parents/mom-blogger-wont-take-down-pictures-of-daughter> [<https://perma.cc/TL6D-EJEZ>].

20. Rachel L. Harris & Lisa Tarchak, Opinion, *Mom and Dad, It’s My (Digital) Life*, N.Y. TIMES (Sept. 2, 2019), <https://www.nytimes.com/2019/09/02/opinion/children-internet-privacy.html> (“I work hard to keep my personal social media feeds secure, and to reduce the amount of personal information that I’m able to share through various sites, but my parents don’t have the same privacy and security concerns. Looking on their social media feeds make me feel naked. All the barriers I’ve worked so hard to build are essentially stripped away through their posts. If I ask them to take something down, they

posts can make children feel “disrespected” and “humiliated.”²¹ Young people have taken to Reddit²² to request and give advice about how to stop their parents from commercial sharenting.²³

Parents often hold the reins in driving this content.²⁴ For well over a decade, parents have monetized their children on YouTube.²⁵ To expand their reach, some parents run social media accounts attached to their children’s names,²⁶ despite social media platforms’ age restrictions.²⁷ Although some parents aim to

normally will — but not without a fight, despite my own identity being at stake. I tell them it doesn’t matter how private your account may be or how closely you know all your Facebook friends, my personal information is still being posted without my consent, which is both inconsiderate and unsafe.”)

21. *Id.*

22. Reddit is “a massive collection of forums where people can share news and content or comment on other people’s posts.” Jake Widman, *What Is Reddit?*, DIGITAL TRENDS (Dec. 28, 2022), <https://www.digitaltrends.com/web/what-is-reddit> [<https://perma.cc/PR8P-SGXA>].

23. See, e.g., *AITA for Posting Online About My Family YouTube Channel and How I Don’t Want to Be Filmed?*, REDDIT (Apr. 29, 2022, 4:31 PM), https://www.reddit.com/r/AmItheAsshole/comments/ueuush/aita_for_posting_online_about_my_family_youtube [<https://perma.cc/9FLF-66FU>]. On Reddit, young people have questioned their frustration with their parents’ online posts. See *id.* Parents have also responded to these posts with frustration. See Tama Leaver, *Balancing Privacy: Sharenting, Intimate Surveillance, and the Right to Be Forgotten* (noting that one “Am I the Asshole?” Reddit post by “the daughter of a prominent Instagram influencer . . . upset her mother, who argued that featuring her daughters on Instagram was part of the way the family made their income”), in THE ROUTLEDGE COMPANION TO DIGITAL MEDIA AND CHILDREN 235, 235 (Lelia Green et al. eds., 2021).

24. For some of the children featured, the social media platforms themselves remain a mystery. See Morgan Sung, *Their Children Went Viral. Now They Wish They Could Wipe Them from the Internet*, NBC NEWS (Nov. 3, 2022, 8:30 AM), <https://www.nbcnews.com/pop-culture/influencers-parents-posting-kids-online-privacy-security-concerns-rena55318> [<https://perma.cc/3DJG-4UAW>] (“Children ‘don’t know about the internet,’ said Sarah Adams, a creator who runs the TikTok account Mom Uncharted, which posts videos about the ethics of parents’ content that revolves around children. ‘They don’t know about social media. They don’t know that their images are being blasted worldwide to billions of people, many of whom are predatory toward children. They don’t know that their images are going to live on forever.’”).

25. See 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/8MZE-8LNB>] (“David DeVore, then 7, became an internet sensation [in 2010] when his father posted a YouTube video of his reaction to anesthesia called ‘David After Dentist.’ David’s father turned the public’s interest in his son into a small business, earning around \$150,000 within five months through ad revenue, merch sales and a licensing deal with Vizio.”).

26. For examples of well-known Instagram accounts run by parents, see Koba Molenaar, *18 Top Kid Influencers Making a Name for Themselves*, INFLUENCER MKTG. HUB (Aug. 3, 2022), <https://influencermarketinghub.com/kid-influencers> [<https://perma.cc/WM4W-WNMR>].

27. See *Continuing to Make Instagram Safer for the Youngest Members of Our Community*, INSTAGRAM: ABOUT (Mar. 17, 2021), <https://about.instagram.com/blog/announcements/continuing-to-make-instagram-safer-for-the-youngest-members-of-our-community> [<https://perma.cc/MD6A-TTUX>] (noting age restrictions for use of Instagram); *How Do I Report a Child Under the Age of 13 on Facebook?*, FACEBOOK: HELP CTR., <https://www.facebook.com/help/157793540954833> [<https://perma.cc/4RS2-UMAM>] (last visited Mar. 17, 2022) (noting age restrictions for use of Facebook); *Guardian’s Guide*, TIKTOK, <https://www.tiktok.com/safety/en/guardians-guide/> [<https://perma.cc/7DKF-UHE6>] (last visited Mar. 17, 2023) (noting age restrictions for use of TikTok); *About Parental Consent on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/parental-consent> [<https://perma.cc/9LLT-2PUW>] (last visited Mar. 17, 2023) (noting age restrictions for use of Twitter); *Using Technology to More Consistently Apply Age Restrictions*, YOUTUBE OFF. BLOG (Sept. 22, 2020), <https://>

give the children control over the accounts when they are older,²⁸ others might not share that intention.

Commercial sharenting can be profitable for some families. Katie Stauffer left her twelve-year, full-time job as an escrow officer to market her twins.²⁹ Stauffer notes, “It is really lucrative . . . I wish people knew that this is my job now.”³⁰ Having a broad reach across many platforms can pave the way for success.³¹ Twins Taytum and Oakley Fisher can drive earnings of \$25,000 for a single Instagram post on their parent-driven accounts.³² Sometimes parents will save profits for their children,³³ but not always.³⁴ These posts can appeal to audiences across a wide age range.³⁵ Disclosure issues also abound—a 2018 report found that merely a quarter of those who post on Instagram for profit complied with Federal Trade Commission (FTC) marketing guidelines.³⁶ And children as young as infants can be instrumental to their parents’ success on the platforms.³⁷

Scholars have taken note of sharenting and its potential ramifications. Some have discussed sharenting and how it implicates privacy concerns.³⁸ University of Florida’s Stacey Steinberg, the author of an influential article on sharenting,

blog.youtube/news-and-events/using-technology-more-consistently-apply-age-restrictions [https://perma.cc/7GRZ-7MKY] (noting age restrictions for use of YouTube).

28. See Deborah Linton, *‘When I’m 16, My Baby Brother Will Take Over’: The Rise of the Kidfluencer*, GUARDIAN (Mar. 23, 2019, 2:00 AM), https://www.theguardian.com/media/2019/mar/23/rise-of-the-kidfluencer-tekkerz-kid-mcclure-twins [https://perma.cc/WV2E-HL6P].

29. Rosman, *supra* note 16.

30. *Id.* Stauffer also explains that when she was working outside of the home while marketing her children online, “[her] kids weren’t getting what they needed.” *Id.*

31. See *id.* (“Best Buy wanted to team with the ‘Darnit Family’ because they have broad reach across many digital platforms and are known for family fun.”).

32. Katharine Schwab, *The 2-Year-Old Instagram Influencers Who Make More than You*, FAST CO. (Dec. 17, 2018), https://www.fastcompany.com/90278778/the-2-year-old-instagram-influencers-who-make-more-than-you-do.

33. See Rosman, *supra* note 16 (noting that one parent said that money from the licensing rights they obtained from selling rights to a video of their son Korbin is “Korbin’s money, not ours”).

34. See *id.* (noting the Gaines family neither pays their children nor shares proceeds from their viral videos with them because “[t]he family’s standard of living is improved when the social media business is going well, and all members benefit”).

35. See Pavithra Mohan, *My Kid Is an Instagram Influencer. Here’s What I Do with Her Money*, FAST CO. (May 8, 2019), https://www.fastcompany.com/90343690/my-kid-is-an-instagram-influencer-heres-what-i-do-with-her-money.

36. Robert Williams, *Study: Just 25% of Instagram Influencers Are Compliant with FTC Rules*, MKTG. DIVE (Mar. 14, 2018), https://www.marketingdive.com/news/study-just-25-of-instagram-influencers-are-compliant-with-ftc-rules/519086 [https://perma.cc/HC4C-QS53].

37. See Rebecca Jennings, *The Best Influencers Are Babies*, RACKED (July 9, 2018, 8:00 AM), https://www.racked.com/2018/7/9/17511494/instagram-ads-baby-products [https://perma.cc/2XRN-Q6WY].

38. See generally Holly Kathleen Hall, *Oversharenting: Is It Really Your Story to Tell?*, 33 J. MARSHALL J. INFO. TECH. & PRIVACY L. 121 (2018) (discussing “the current status and potential future of children’s online privacy from a comparative legal approach”); Plunkett, *supra* note 7 (providing a “blueprint” for “digital privacy law that regulates all forms of ‘sharenting,’” and discussing the demand for this legislative effort); Keltie Haley, Note, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005 (2020) (observing that sharenting “can pose a serious privacy concern for [children] later in life”); Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017) (providing an “in-depth legal analysis of the conflict inherent between a parent’s right to share online and a child’s interest in privacy”).

has called for a public health model to address sharenting.³⁹ Others have called for increased child labor protections for child Internet stars⁴⁰ and criticized previously offered legislative efforts to protect children online.⁴¹ Some have raised concerns regarding disclosures yet have not centered sharenting in their work.⁴² This Note offers potential reframing opportunities specifically addressing commercial sharenting.

This Note will argue that, given commercial sharenting's problematic effects on its child stars, commercial sharenting should be reframed to drive more support for regulation that would ultimately help children. Two potential frameworks are that commercial sharenting fosters misleading content online and that this practice implicates child labor concerns. This Note will argue that commercial sharenting's potential to be misleading should be emphasized to protect children and consumers alike. Alternatively, commercial sharenting could be framed as an issue that spurs child labor concerns and needs to be regulated to protect the featured children. Technology moves faster than the law, which has not kept up with regulatory efforts and commercial sharenting. Increased legal protections are needed to help consumers understand the products being advertised to them and, importantly, to support the children behind these online posts.

This Note proceeds in five parts. Part I discusses parental engagement in commercial sharenting and its negative side effects. Part II asserts that commercial sharenting's misleading nature can result in consumer confusion, implicating FTC and judicial concerns. Part III offers additional alternative framing—that commercial sharenting could be framed as a child labor issue. Part IV, noting that

39. See, e.g., Steinberg, *supra* note 38, at 840 (offering “a child-centered, public-health-based model of reform that protects a child’s interest in privacy while also recognizing a parent’s right to share online”). As Steinberg observes, this “public health model attempts to effectuate change by educating professionals, the public, and parents about potential dangers facing children. . . . Through a public health model, parents can gain important knowledge as to how to share their own life stories online while also protecting their children’s privacy.” *Id.* at 866–67.

40. See generally Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 U. PA. L. REV. 577 (2020) (discussing how “kidfluencers fit in the child labor regime,” and proposing that states enact laws to protect these children); Ana Saragoza, Comment, *The Kids Are Alright? The Need for Kidfluencer Protections,* 28 AM. U. J. GENDER, SOC. POL’Y & L. 575 (2020) (asserting that “child labor laws need to evolve to enhance protections for the earnings that children generate”). These protections include compensation. See generally Erin E. O’Neill, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing,* 72 STAN. L. REV. ONLINE 42 (2019) (arguing that “some compensation for child performers’ lost privacy [is] necessary” as states “consider how they can protect the well-being of child performers on social media and compensate social-media child performers for their lost privacy”).

41. For criticism of legislative efforts in California, discussed *infra* note 318, see generally Emily DiRoma, Note, *Kids Say the Darndest Things: Minors and the Internet,* 2019 CARDOZO L. REV. DE-NOVO 43; Stephen J. Astringer, Note, *The Endless Bummer: California’s Latest Attempt to Protect Children Online Is Far Out(Side) Effective,* 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 271 (2015); and E. Wesley Campbell, *But It’s Written in Pen: The Constitutionality of California’s Internet Eraser Law,* 48 COLUM. J.L. & SOC. PROBS. 583 (2015).

42. For examples of calls for increased disclosures for online influencers that neglect to discuss the Internet’s child stars, see Keith Cooper, *Influencers: Not So Fluent in Disclosure Compliance,* 41 LOY. L.A. ENT. L. REV. 77, 94 (2021); Lauryn Harris, Comment, *Too Little, Too Late: FTC Guidelines on “Deceptive and Misleading” Endorsements by Social Media Influencers,* 62 HOW. L.J. 947, 954 (2019).

the Court's strong protection of parental rights can still allow for efforts to regulate commercial sharenting, proposes that these reframing ideas could propel efforts to regulate commercial sharenting and help children and consumers. The Conclusion acknowledges recent legislative efforts to protect children online and emphasizes the importance of addressing commercial sharenting.

I. PARENTS ARE SHARENTING FOR COMMERCIAL GAIN

This Part addresses how parents are partaking in commercial sharenting. Commercial sharenting, although it has benefits, spurs negative repercussions—including regarding privacy and mental health.

The Internet is, in the American Civil Liberty Union (ACLU)'s words, “the most diverse, participatory, and amplified communications medium humans have ever had.”⁴³ Thousands of children are part of the online world because of their parents. Eighty-two percent of parents on social media post about their children.⁴⁴ The majority of parents report that a desire to easily share information with others drives their posting.⁴⁵ Sharenting's appeal is not surprising: many parents want to showcase an integral part of their lives—their children—while connecting with others.⁴⁶ After all, “[i]n the digital age, everything is content.”⁴⁷

Potential for financial gain drives commercial sharenting.⁴⁸ In today's media world “virality means income.”⁴⁹ Over four million American mothers blog about their families and personal lives alone,⁵⁰ which can be lucrative.⁵¹ Commercial

43. *Internet Speech*, ACLU, <https://www.aclu.org/issues/free-speech/internet-speech> [https://perma.cc/8LAM-KS7Y] (last visited Mar. 17, 2023).

44. See BROOKE AUXIER, MONICA ANDERSON, ANDREW PERRIN & ERICA TURNER, PEW RSCH. CTR., PARENTING CHILDREN IN THE AGE OF SCREENS 56 (2020), <https://www.pewresearch.org/internet/2020/07/28/parenting-children-in-the-age-of-screens> [https://perma.cc/NKP3-V9RV].

45. See *id.* at 57 (noting that for many parents being able to “easily share things about their children with family and friends is a major reason” for posting). More broadly, seven in ten adults “use social media to connect with one another.” *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media> [https://perma.cc/ME5N-YJ5H].

46. As further evidence of this appeal and potential for connection, *People Magazine* and *Parents Magazine* recently started an online “Mom Famous” series to document “popular mom influencers in Provo, Utah, the unofficial mom Instagrammer capital of the world.” Georgia Slater, *Mom Influencers Share What Their Lives Are Really Like Behind the Camera in New ‘Mom Famous’ Series*, PEOPLE (Sept. 7, 2022, 11:00 AM), <https://people.com/parents/mom-influencers-go-behind-the-scene-mom-famous-series-exclusive/>.

47. Francesca Johnson, ‘Mommy-Ran Accounts’ and the Dangerous Paedophile Rings Preying on Kidfluencer Content, SCREENSHOT (Mar. 5, 2022), <https://screenshot-media.com/technology/social-media/mommy-ran-accounts> [https://perma.cc/2YCS-VDA7].

48. Simply featuring young children can help increase online engagement on social media accounts. On YouTube, for instance, videos with children who appear to be under thirteen receive triple the number of views as other videos. Hajjaji, *supra* note 3.

49. Taylor Lorenz, *The Original Renegade*, N.Y. TIMES (Aug. 28, 2021), <https://www.nytimes.com/2020/02/13/style/the-original-renegade.html>. Credit and attention alone have their own value. See *id.*

50. See Mackenzie Dawson, *My Mommy Blog Ruined My Life*, N.Y. POST (May 29, 2016, 10:01 AM), <https://nypost.com/2016/05/29/my-mommy-blog-ruined-my-life/>.

51. These parental bloggers can earn thousands through monthly blogging. See Jezer-Morton, *Inside the World*, *supra* note 10 (discussing “six-figure bloggers” who earn thousands annually); Suzi Whitford, *Mom Blogs That Make Money – \$100,000+ per Month with Case Studies*, START MOM BLOG

sharenters can make millions monetizing their online platforms,⁵² from display ads to affiliate and sponsored posts to product sales.⁵³ Commercial sharenting is part of the growing influencer⁵⁴ industry, a market that reached \$16.4 billion in 2022.⁵⁵ Ninety-three percent of marketers have used influencers—including families—to raise awareness about their products,⁵⁶ a strategy with reach across online platforms.⁵⁷ Family-centered online accounts can attract millions of subscribers.⁵⁸ Sometimes families who make a living posting online even have

[hereinafter Whitford, *Mom Blogs That Make Money*], <https://www.startamomblog.com/how-to-make-money-blogging-small-medium-large-mom-bloggers> [<https://perma.cc/7LAH-RZXM>] (last visited Mar. 17, 2023); see also Megan Whitaker, *The Rise of the Mompreneur*, WEEK (Nov. 20, 2017), <https://theweek.com/articles/733157/rise-mompreneur> [<https://perma.cc/7WNQ-ZTP9>] (noting that the average income for an “influencer” is \$700 per month). Mom blogger Megan made \$22 in her first week of blogging alone. Suzi Whitford, *How to Make \$22 in Your First Week of Blogging*, START MOM BLOG, <https://www.startamomblog.com/make-money-first-week-blogging> [<https://perma.cc/N82L-R7SM>] (last visited Mar. 17, 2023). Blogging can also be a jumping off point for parents to post about their children for financial gain on social media platforms. See Jennifer Calfas, *The New Mommy Blogger: Instagram Famous, Highly Paid, and Sponsored by Minute Maid*, MONEY (May 11, 2018), <https://money.com/mommy-bloggers-success> [<https://perma.cc/2FEN-Y4FE>].

52. See Mooney, *supra* note 12.

53. Whitford, *Mom Blogs That Make Money*, *supra* note 51. Blogs even monetize by having guest posts with charged writing fees. See Neil Patel, *9 Things We Can Learn from the Mom Blog Industry*, FORBES (Nov. 3, 2016, 10:00 AM), <https://www.forbes.com/sites/neilpatel/2016/11/03/9-things-we-can-learn-from-the-mom-blog-industry/>.

54. Here an influencer is “a person who is able to generate interest in something (such as a consumer product) by posting about it on social media.” *Influencer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/influencer> [<https://perma.cc/AN8C-SGA7>] (last visited Mar. 17, 2023).

55. Jacinda Santora, *Key Influencer Marketing Statistics You Need to Know for 2022*, INFLUENCER MKTG. HUB (Jan. 11, 2023), <https://influencermarketinghub.com/influencer-marketing-statistics> [<https://perma.cc/U7XV-ECX5>]. The influencer marketing industry “is expected to jump a further 29% to an estimated \$21.1 billion in 2023.” Werner Geysler, *The State of Influencer Marketing 2023: Benchmark Report*, INFLUENCER MKTG. HUB (Feb. 7, 2023), <https://influencermarketinghub.com/influencer-marketing-benchmark-report/> [<https://perma.cc/JH47-YH3J>].

56. Neal Schaffer, *The Top 31 Influencer Marketing Statistics You Need to Know in 2022*, NEAL SCHAFFER (Dec. 9, 2022), <https://nealschaffer.com/influencer-marketing-statistics> [<https://perma.cc/LZR2-N2FA>].

57. As of 2017, eighty percent of Instagram’s 800 million users followed a business and over sixty percent of users discovered new products while on the platform. Schwab, *supra* note 32. YouTube offers pathways for financial gain—including through its partner program, which has over two million creators and “helped turn YouTube into a viable business for top creators.” See Kim Lyons, *YouTube Says Its Partner Program Now Has 2 Million Members*, VERGE (Aug. 23, 2021, 9:00 AM), <https://www.theverge.com/2021/8/23/22636827/youtube-partner-program-2-million-members-creators> [<https://perma.cc/XAG5-TWVY>]. For more on how lucrative YouTube’s partnerships program can be, see *How Much Do YouTubers Make? Facts and Figures for 2022*, INTUIT: MINTLIFE (Aug. 24, 2022), <https://mint.intuit.com/blog/relationships/how-much-do-youtubers-make> [<https://perma.cc/EUQ6-R876>]. Facebook also touts the opportunities its platform creates for influencers. See *Grow Brand Awareness and Sales with Influencer Marketing*, META (Dec. 2, 2021), <https://www.facebook.com/business/news/insights/grow-brand-awareness-and-sales-with-influencer-marketing> [<https://perma.cc/VQ4W-66SW>]. This potential leads parents to feel pressured to make more and more content. See Masterson, *supra* note 40, at 592. Google AdSense can also be lucrative for online posters. See Elizabeth Gravier, *This Millennial Farmer Makes 5 Times More Money from his YouTube Channel than His Crops—Here’s How*, CNBC (Nov. 27, 2019, 10:09 AM), <https://www.cnn.com/2019/11/27/how-much-money-a-social-media-influencer-makes-farming.html> [<https://perma.cc/PL8R-83PP>].

58. See Hajjaji, *supra* note 3; Schwab, *supra* note 32.

multiple platforms to maximize their reach and profit.⁵⁹

Brands have even been encouraged and advised to incorporate influencers into their work.⁶⁰ An October 2021 report from the Digital Marketing Institute found that nearly half of consumers rely on online influencer recommendations when making purchases.⁶¹ Parents see these online posts as examples of what they want to replicate⁶² because the “amazing” parents running these accounts can appear to have it all.⁶³ Companies, in turn, have admitted that parents rely on parental influencer accounts when making purchasing decisions.⁶⁴ Parents and families can help spark additional attention on their own and gain appeal⁶⁵ as the child stars can become seen as “brand extensions” of their parents.⁶⁶

59. See James Hale, *All in the Creator Family: Asa Maass' Daughter Abbie Has Autism. Here's Why He Uses YouTube to Tell the World About Her.*, TUBEFILTER (Feb. 6, 2020), <https://www.tubefilter.com/2020/02/06/all-in-the-creator-fathering-autism> [<https://perma.cc/M2EN-XTUX>]; Asa Maass (@fatheringautism), TIKTOK, <https://www.tiktok.com/@fatheringautism> (last visited Mar. 17, 2023). Cross-platform sharing can be powerful. See Lorenz, *supra* note 49. Changing algorithms can also encourage online posters to use different platforms. See Lenz, *supra* note 10.

60. See *12 Kid Influencers That Can Help You Target the Younger Generation*, GRIN, <https://grin.co/blog/kid-influencers> [<https://perma.cc/T29A-QNTT>] (last visited Mar. 17, 2023); Maede Bakhtiari, *20 Top Kid Influencers On Instagram to Grow Your Brand in 2022*, AINFLUENCER (Aug. 7, 2022), <https://blog.ainfluencer.com/kid-influencers> [<https://perma.cc/U8RU-8JWQ>]. The drive can also come from parents themselves. See Collins, *supra* note 5 (“Increasingly, brands are looking to use smaller, more niche, micro- and nano-influencers, developing popular accounts on Instagram, TikTok and YouTube to reach their audiences. And amid this influencer gold rush there’s a strong incentive for parents, many of whom are sharing photos and videos of their kids online anyway, to get in on the action.”).

61. *Expert Alert: New FTC Guidelines for Social Media Influencers*, UNIV. MINN.: NEWS & EVENTS (May 19, 2022), <https://twin-cities.umn.edu/news-events/new-ftc-guidelines-social-media-influencers> [<https://perma.cc/35KZ-DVN3>] (citing *20 Surprising Influencer Marketing Statistics*, DIGIT. MKTG. INST. (Oct. 19, 2021), <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> [<https://perma.cc/P332-SAZE>]).

62. See Amber Nicole Alston, *It's Cool to Be a Kid (fluencer)*, LICENSE! GLOB., February 2019, at 40, 41. (“Recognizing the new power structure, both parents and children have begun to look for brands associated with kidfluencers at retail. . . . [P]arents use social media accounts that are focused on the tiny titans of fashion and healthy living as a blueprint for their own homes and children.”).

63. For examples of moms who appear to be “amazing” mothers online, see Mike Spohr, *14 Amazing Moms Who Also Happen to Be YouTube Stars*, BUZZFEED (May 11, 2017), <https://www.buzzfeed.com/mikespohr/14-incredibly-relatable-moms-on-youtube-you-need-to-know> [<https://perma.cc/V5B6-ZPD9>].

64. See Defendant Fisher-Price, Inc.’s Opposition to Plaintiffs’ Motion for Class Certification at 10, *Butler v. Mattel, Inc.*, No. CV 13-00306, 2014 WL 764514 (C.D. Cal. Feb. 24, 2014) (“Parents rely on a variety of inputs in making purchasing decisions. The most trusted source of information for parents in the market to buy infant products is other parents, usually friends and family. Next, parents look to the Internet, most notably ‘Mommy Bloggers’ and consumer reviews.” (footnote omitted)).

65. See Jessica Green, *Mother Poses with Lookalike Twins Who Were Hailed as the ‘Most Beautiful Girls in the World.’* DAILY MAIL (Dec. 28, 2020, 3:31 PM), <https://www.dailymail.co.uk/femail/article-9055003/Mother-poses-lookalike-twins-hailed-beautiful-girls-world.html> [<https://perma.cc/ZK5R-FGPX>]. Companies understand the role that mothers specifically have in promoting their own content. For instance, meatless alternative company Quorn recently hired Drew Barrymore as its “first-ever ‘Chief Mom Officer’” to help with product creation and promotion. *Welcome Drew Barrymore Our First-Ever Chief Mom Officer*, QUORN, <https://www.quorn.us/news/welcome-drew-barrymore-our-first-ever-chief-mom-officer> [<https://perma.cc/7BLY-T53X>] (last visited Mar. 17, 2023).

66. See Catherine Archer, *How Influencer ‘Mumpreneur’ Bloggers and ‘Everyday’ Mums Frame Presenting Their Children Online*, 170 MEDIA INT’L AUSTL. 47, 48 (2019).

A. COSTS CAN OUTWEIGH COMMERCIAL SHARENTING'S BENEFITS

Sharenting—commercial or noncommercial—can offer avenues for relatives, especially those far away, to connect.⁶⁷ Bee Fisher's Instagram account featuring her sons and pets originally functioned as “a family photo album” before she gained thousands of followers.⁶⁸ Katie Stauffer started her Instagram account “to chronicle [her] family adventures”; millions now follow her account.⁶⁹ Some parents go so far as to argue that posting online can make a mom “better.”⁷⁰ Many parents experience challenges parenting today—through sharenting, parents can foster relationships and feel less alone.⁷¹ This is especially true for parents of children with disabilities⁷² and grieving parents,⁷³ as well as members of marginalized communities⁷⁴ and those who become stepparents through

67. For instance, one boy's parents started sharing posts of him online when he was three years old so that relatives who lived abroad could stay connected. Emma Grey Ellis, *Child Stars Don't Need Hollywood. They Have YouTube*, WIRED (Feb. 6, 2019, 12:51 PM), <https://www.wired.com/story/age-of-kidfluencers/>. Now his accounts are some of the most popular on the Internet and his brand is worth millions. *See id.*; Belinda Luscombe, *How Ryan Kaji Became the Most Popular 10-Year-Old in the World*, TIME (Nov. 12, 2021, 7:00 AM), <https://time.com/6116624/ryan-kaji-youtube/>. For a discussion of the benefits of mothers specifically posting about their children online, see generally Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 243–50 (2012). Interacting with individuals online can alter social interactions meaningfully. *See* JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 33, 45 (2012).

68. Ellis, *supra* note 67. Here a follower is “a person who follows or subscribes to another's posts on a social media website.” *Follower*, DICTIONARY.COM, <https://www.dictionary.com/browse/follower> [<https://perma.cc/VV8Y-VBLM>] (last visited Mar. 17, 2023). For the interview that made Bee Fisher's family gain a widespread following, see Alice Johnston, *The World's Biggest Babysitters: Family Life with the Couple Who Have Three Young Children and Two GIANT Dogs*, DAILY MAIL (Mar. 31, 2016, 3:30 PM), <https://www.dailymail.co.uk/femail/article-3517108/How-family-s-three-children-best-buddies-two-giant-Newfoundlands.html> [<https://perma.cc/9U7N-8K8U>].

69. *See* Hayden Field, *This Family Has 4 Million Instagram Followers – and the Kids' College Educations Are Already Paid For*, ENTREPRENEUR (Feb. 6, 2019), <https://www.entrepreneur.com/article/327593> [<https://perma.cc/9UM2-CVQV>].

70. Suzi Whitford, *10 Reasons Why Blogging Makes You a Better Mom*, START MOM BLOG, <https://www.startamomblog.com/10-reasons-why-blogging-makes-you-a-better-mom> [<https://perma.cc/4KB3-VK86>] (last visited Mar. 17, 2023) (arguing that “blogging make[s] you a better mom” because it “makes you more conscious about your parenting . . . teaches you how to be a better mom . . . teaches essential human skills . . . enables you to spend more time with your children . . . makes you more compassionate . . . teaches your children to play independently . . . is the best of corporate life and home life . . . gives you a mom outlet . . . is a cheap hobby that saves money . . . [and] has huge upside potential”).

71. *See* AUXIER ET AL., *supra* note 44, at 47.

72. *See* Gerard Goggin & Katie Ellis, *Privacy and Digital Data of Children with Disabilities: Scenes from Social Media Sharenting*, 8 MEDIA & COMM'C'N, no. 4, 2020, at 218, 221–24; Jill Radsken, *The Do's and Don'ts of Sharing About Your Children Online*, HARV. GAZETTE (Oct. 11, 2019), <https://news.harvard.edu/gazette/story/2019/10/leah-plunkett-shares-some-tips-from-her-new-book-sharenthood> [<https://perma.cc/DX56-N4JV>]. For instance, there is a group of autism-focused family content creators called the “Autism Vlog Squad.” *See* Hale, *supra* note 59.

73. *See* Rosman, *supra* note 16 (“Ms. Ryan's sister died and her sharing clips that showed her daughter's emerging sense of humor was a balm for the whole family.”).

74. *See* Lauren Porter, *18 Most Beautiful Black Mommy Bloggers Who Make It Work and Give Us Life*, ESSENCE (Oct. 27, 2020), <https://www.essence.com/lifestyle/parenting/18-mommy-bloggers-who-make-it-work-and-give-us-life> [<https://perma.cc/ZN7T-SW82>]; Dory Zayas, *10 LGBTQ+ Parent*

marriage.⁷⁵ In addition to promoting their families, personal lives, and brands, parents can use their platforms to outwardly raise awareness about medical obstacles.⁷⁶ Some influencers even come together to form community among themselves.⁷⁷

Commercial sharenting can allow for a relatively adaptable schedule, even for those who run accounts with multitudes of followers.⁷⁸ Parents argue that commercial sharenting allows for more flexibility for their children than traditional modeling forms.⁷⁹ Commercial sharenting can allow parents, particularly moms, to be entrepreneurs in their own right.⁸⁰ Mom Suzi Whitford wanted to work but

Influencers to Follow, VERYWELL FAMILY (July 30, 2021), <https://www.verywellfamily.com/lgbtq-influencers-to-follow-on-instagram-5186715> [<https://perma.cc/VT5Z-4AYP>]; Sara Ahmed, *Diversify Your Instagram Feed with These 20 Fabulous Influencer Moms*, POPSUGAR (Aug. 31, 2020), <https://www.popsugar.com/family/diverse-parenting-influencers-to-follow-on-instagram-47638915> [<https://perma.cc/T3CW-2ZLD>].

75. See Mayer, *supra* note 4 (discussing “bonus parenthood”).

76. After her husband got diagnosed with a rare form of cancer, for example, Jaqi Clements featured her daughters on their popular Instagram account to raise awareness about the disease and plead for a transplant. Caitlin Keating, *9-Year-Old Instagram Stars Ask Fans to Help Find Bone Marrow Transplant to Save Their Dad’s Life*, PEOPLE (Dec. 24, 2019, 10:00 AM), <https://people.com/human-interest/instagram-stars-clements-twins-dad-bone-marrow-transplant> [<https://perma.cc/4BSV-8DGD>].

77. See Lenz, *supra* note 10 (discussing the sold-out “three-day Mom 2.0 Summit” that “served as a central meeting place for influencers representing the enormous economic influence of American mothers”). Additionally, parents who speak out against parents posting about their children online have also come together to form community. See Samantha Murphy Kelly, *‘Watchdog Moms’ on TikTok Are Trying to Keep Minors Safe*, CNN: BUS. (June 27, 2022, 8:52 AM), <https://www.cnn.com/2022/06/27/tech/tiktok-watchdog-moms-wellness-parenting/index.html> [<https://perma.cc/2TDN-9BK9>].

78. See Suzi Whitford, *43 Easy and Flexible Side Jobs You Can Start Today*, START MOM BLOG, <https://www.startamomblog.com/side-jobs> [<https://perma.cc/PZ9H-6CCC>] (last visited Mar. 17, 2023).

79. Schwab, *supra* note 32 (“Clements says that doing shoots for Instagram is actually better for her girls than doing traditional modeling. She says regular print advertisement auditions require her to pull the twins out of school and then drive several hours each way for a job they might not even get. For Instagram ads, she can schedule a photographer to come shoot them close to where they live, and be finished far quicker. ‘It doesn’t even compare,’ she says. ‘They’re making four times the amount for a third of the amount of work and time.’”). Additionally, though California law requires an on-set educator when production takes over thirty minutes, these constraints do not apply to families who are commercial sharenting. See Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them from Parents*, HOLLYWOOD REP. (Aug. 20, 2019, 6:00 AM), <https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968> [<https://perma.cc/NVP7-WZ23>].

80. This is particularly notable given the challenges many mothers of young children face entering the workforce, especially during the pandemic. See Caitlyn Collins, Leah Ruppner & William J. Scarborough, *Why Haven’t U.S. Mothers Returned to Work? The Child-Care Infrastructure They Need Is Still Missing*, WASH. POST (Nov. 8, 2021, 7:00 AM), <https://www.washingtonpost.com/politics/2021/11/08/why-havent-us-mothers-returned-work-child-care-infrastructure-they-need-is-still-missing/>; see also Misty L. Heggeness, Jason Fields, Yazmin A. García Trejo & Anthony Schulzetenberg, *Tracking Job Losses for Mothers of School-Age Children During a Health Crisis*, U.S. CENSUS BUREAU (Mar. 3, 2021), <https://www.census.gov/library/stories/2021/03/moms-work-and-the-pandemic.html> [perma.cc/22BG-TKQQ] (explaining that, between March and April of 2020, “some 3.5 million mothers living with school-age children left active work”). Some parents also just started building their online followings by posting their “normal mom quarantine content” during the COVID-19 pandemic. See Sung, *supra* note 24.

did not want to be away from her children.⁸¹ She started a “Mom Blog,” which allowed her to participate in the workforce and “repurpose” skills she had gained previously.⁸² For fashion design school graduate Katie Stauffer, styling her children for commercial sharenting purposes makes her feel like she is using her degree.⁸³ She now has millions of followers, allowing her to “quit her day job” because she made “being a social influencer a full-time gig.”⁸⁴ Stauffer even hired a manager to help navigate her family’s immense publicity.⁸⁵

Despite these benefits, the negative repercussions of commercial sharenting raise concerns. Commercial sharenting has negative implications for the privacy and mental health of the posts’ child stars. These repercussions impact children and parents, creating cause for concern.⁸⁶

1. Commercial Sharenting Has Privacy-Related Repercussions

Parents are concerned others will learn private information about their children.⁸⁷ However, parents’ worries do not necessarily translate into actual behaviors when posting publicly online about their families.⁸⁸ Though parents will use privacy settings,⁸⁹ they do not do so consistently—even when social media sites have “equally available” privacy settings.⁹⁰ This disregard is evident with

81. Suzi Whitford, *I Launched My Mom Blog in January. 10 Months Later, It Brought in \$6,000*, PENNY HOARDER (Dec. 19, 2019), <https://www.thepennyhoarder.com/make-money/heres-how-to-make-money-blogging> [<https://perma.cc/VSY9-UDQA>].

82. *Id.* Explaining why she started blogging, Whitford wrote, “Blogging is a very rewarding and extremely flexible activity. It also has the potential to grow into something amazing.” Suzi Whitford, *Who Is Suzi Whitford*, START MOM BLOG, <https://www.startamomblog.com/who-is-suzi-whitford> [<https://perma.cc/BYH7-QQUW>] (last visited Mar. 17, 2023). For Whitford, the upfront cost at the beginning was not unreasonable. She invested forty-seven dollars per year on her hosting package, which included her domain name, and quickly saw the benefits: soon she was making \$6,000 monthly while parenting her newborn and toddler. Whitford, *supra* note 81.

83. *See* Field, *supra* note 69.

84. *Mother Turns Social Media into Wealth*, FOX 10 PHX. (Nov. 8, 2017), <https://www.fox10phoenix.com/news/mother-turns-social-media-into-wealth> [<https://perma.cc/KC2X-MTRZ>].

85. *Id.*

86. For examples of how commercial sharenting can hurt parents, see Dawson, *supra* note 50 and *The Good, the Bad, and the Ugly*, CLEMENTS TWINS (Nov. 21, 2019), <https://www.theclementstwins.com/post/the-good-the-bad-and-the-ugly> [<https://perma.cc/9NTA-NALA>] (blogging about “The Bad” and “The Ugly” of commercial sharenting).

87. *See* Haley, *supra* note 38, at 1008.

88. *See* Catherine Ferris, *Woman Exposes ‘Creeps’ That Follow Children on Social Media in Viral Video*, NEWSWEEK (Mar. 8, 2022, 4:24 PM), <https://www.newsweek.com/woman-exposes-creeps-that-follow-children-social-media-viral-video-1685701> (observing that “parents work hard to keep their children safe in the physical world, but they do not give the same level of caution to the ‘digital world’”).

89. *See* Davide Cino & Silvia Demozzi, *Social Networking Sites as Virtual ‘Showcases,’* LONDON SCH. ECON. & POL. SCI. (Nov. 14, 2018), <https://blogs.lse.ac.uk/parenting4digitalfuture/2018/11/14/social-networking-sites-as-virtual-showcases> [<https://perma.cc/T6WV-4L6L>]. For commentary from one parent about their privacy concerns with commercial sharenting, see Anna Whitehouse, *Private: No Access*, MOTHER PUKKA (Apr. 27, 2018), <http://www.motherpukka.co.uk/private-no-access> [<https://perma.cc/68RC-Z5GG>].

90. Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1317 (2009) (discussing parents posting photos publicly on Flickr instead of using the platform’s password-protection option). Revealing data can be shared innocently. For a discussion of private data

commercial sharenting. For this practice, publicity is the north star—and when parents commercially sharent, privacy concerns are exacerbated.⁹¹

“Digital kidnapping,”⁹² identity fraud,⁹³ sexualization,⁹⁴ and even pedophilia⁹⁵ can result from parents’ posts featuring their children. Data can spread widely.⁹⁶ Pedophile rings can “exploit” recommendation algorithms and monopolize the comments sections of kid-featured posts, “leaving lewd responses and exchanging links to child pornography.”⁹⁷ One parent shared a picture of her potty training twins online, only to discover that the photo had been modified and spread on a pedophile website.⁹⁸ Sharing on unsecure websites⁹⁹ and posting with certain

arising from ultrasound posts, see Leaver, *supra* note 23, at 237–38. Additionally, parents often do not read the terms and conditions on products. *See id.* at 241.

91. For additional discussion of privacy concerns impacting families, see David Brooks, *In ‘Sharenthood,’ Local Author Explores a Parental Peril Unique to the Digital Age*, CONCORD MONITOR (Sept. 21, 2019, 9:22 PM), <https://www.concordmonitor.com/sharenthood-parenting-digital-28574071> (“Having the A.I. assistant, smart home, tracking or surveillance device actively or passively picking up family data, including kids data. . . . And that data is out there, with data brokers and other commercial providers trading it, largely unregulated. There is a gold rush for data in the private sector, but we have very little ability to get transparency about how it’s being collected and being used.” (omission in original)).

92. *See* Jennifer O’Neill, *The Disturbing Facebook Trend of Stolen Kids Photos*, YAHOO! NEWS (Mar. 3, 2015), <https://www.yahoo.com/news/mom-my-son-was-digitally-kidnapped-what-112545291567.html> [<https://perma.cc/W6UT-3N2L>]; *see also* Steven Bearak, *Digital Kidnapping: What It Is and How to Keep Your Kids Safe on Social Media*, PARENT MAP (Nov. 16, 2017), <https://www.parentmap.com/article/kidnappers-kids-photos-digital-kidnapping-social-media> [<https://perma.cc/5A2E-RTKN>] (“Digital kidnapping is when a stranger steals a minor’s photo from the internet and posts the photo as if it’s their own. They then post these photos across their social media accounts and revel in the ‘likes’ and comments they receive.”).

93. *See* Haley, *supra* note 87, at 1009. For a discussion of fake social media accounts modeled after real users, see Nicholas Confessore, Gabriel J.X. Dance, Richard Harris & Mark Hansen, *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.

94. *See* 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>.

95. *See* Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 935–37 (2019); Max Fisher & Amanda Taub, *On YouTube’s Digital Playground, an Open Gate for Pedophiles*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/world/americas/youtube-pedophiles.html> (discussing YouTube’s system “circulating family videos to people seemingly motivated by sexual interest in children”); *see also* Daisuke Wakabayashi & Sapna Maheshwari, *Advertisers Boycott YouTube After Pedophiles Swarm Comments on Videos of Children*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/technology/youtube-pedophiles.html> (discussing “reports of pedophiles cruising YouTube for videos of minors and leaving lewd or sexual comments”).

96. *See* Mary Elizabeth Williams, *Would You Share Your Kid’s Private Life on a Billboard? Maybe Don’t Put It Online Then*, SALON (Sept. 10, 2019, 3:42 PM), <https://www.salon.com/2019/09/10/would-you-share-your-kids-private-life-on-a-billboard-then-dont-put-it-online> [perma.cc/97GK-W5ZX].

97. Hajjaji, *supra* note 3.

98. Jacqueline Howard, *The Dos and Don’ts of Posting About Your Kid Online*, CNN (Oct. 21, 2016, 3:30 PM), <https://www.cnn.com/2016/10/21/health/posting-about-kids-on-social-media/index.html> [<https://perma.cc/D5EE-4CW5>].

99. *See* Kathleen Liddell, David. A. Simon & Anneke Lucassen, *Patient Data Ownership: Who Owns Your Health?*, J.L. & BIOSCIS., July–Dec. 2021, at 1, 18.

hashtags¹⁰⁰ can heighten these concerns as online predators roam the Internet.¹⁰¹ Commercial sharenting posts are exposed to these risks.

Technology can facilitate facial recognition of online pictures of children,¹⁰² raising additional privacy concerns. University of Florida's Stacey Steinberg describes a photo of her three children together facing a dark window as a "safe for social media moment"¹⁰³—their identities cannot be readily discerned from the image. However, most commercial sharenting posts do not foster this anonymity; on the contrary, the publicity is the point.

Commercial sharenting fans also can invade privacy. Toddler and commercial sharenting star Mila Stauffer poses for pictures with strangers.¹⁰⁴ Bee Fisher and her family spent ninety minutes waiting in a crowded mall for a fan of the family's accounts who had allegedly bought them expensive gifts. He never arrived, and the experience made the whole family feel deeply uncomfortable.¹⁰⁵ Posts of children online can even attract armed stalkers.¹⁰⁶ Those who do not "sharent" largely cite privacy concerns¹⁰⁷—and their reasoning is warranted.¹⁰⁸ Katie Stauffer, Mila's mother, waits until her family leaves a place before tagging the location online and has sought to ensure that her home address is not readily available to the public.¹⁰⁹ Yet not all parents take these precautions. Even when commercial sharenters take privacy-protective steps, invasive information about families is still accessible from their posts.¹¹⁰

A spokesperson for Facebook and Instagram's parent company, Meta, recently said, "We remove accounts that impersonate others or use their content without permission Parents can also let us know directly if they want a picture of

100. See Natalie Harmsen, *How Social Media Hashtags Put Your Kids in Danger—Both Online and Offline*, TODAY'S PARENT (May 7, 2020), <https://www.todaysparent.com/family/parenting/hashtags-put-kids-in-danger-online-and-offline> [<https://perma.cc/7L73-9FNH>].

101. See Collins, *supra* note 5 ("Last year, the FBI ran a campaign in which it estimated that there were 500,000 predators online every day—and that's just in the US.")

102. See Rosie Hopegood, *The Perils of 'Sharenting': The Parents Who Share Too Much*, AL JAZEERA (Oct. 11, 2020), <https://www.aljazeera.com/features/2020/10/11/facing-the-music-the-parents-who-share-too-much> [<https://perma.cc/E45A-ZRCR>].

103. Jennifer Jolly, *Mom, Please Stop: Why Sharing Too Much About Kids on Social Is a Bad Thing*, USA TODAY (Oct. 18, 2021, 9:00 PM), <https://www.usatoday.com/story/tech/columnist/2021/10/17/sharenting-what-is-it-and-why-do-parents-need-to-stop-doing-it/8468426002>.

104. Smidt, *supra* note 2 ("Mila's fame online has real-life implications. People stop her and ask for photos with her so frequently").

105. See Ellis, *supra* note 67.

106. See Elizabeth Williamson, *A Child's TikTok Stardom Opens Doors. Then a Gunman Arrives.*, N.Y. TIMES (Feb. 17, 2022), <https://www.nytimes.com/2022/02/17/us/politics/tiktok-ava-majury.html>.

107. See AUXIER ET AL., *supra* note 44, at 59.

108. As the Court has even acknowledged, privacy concerns can accompany the use of technology. See *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

109. Smidt, *supra* note 2.

110. These risks can be seen as ironic given the emphasis placed on keeping children safe online. See Walker, *supra* note 13. Even the Department of Justice has highlighted these risks. See *Keeping Children Safe Online*, DOJ (Nov. 29, 2022), <https://www.justice.gov/coronavirus/keeping-children-safe-online> [<https://perma.cc/S5T5-YW87>].

their child removed from Instagram.”¹¹¹ However, these measures might not be enough.

2. Commercial Sharenting Creates Mental Health Concerns

Social media usage is overall linked to a decline in young people’s mental health¹¹²—and commercial sharenting is no exception. Commercial sharenting can have negative impacts on children’s mental health. Competition for attention online is intense¹¹³ and online posts can facilitate bullying.¹¹⁴ Upon reflection, commercial sharenting mom Katie Stauffer admits that “[t]he only challenging thing is the negative comments.”¹¹⁵ Comments and posts can hurt young people’s mental health.¹¹⁶ According to the federal government, “mean, hurtful, or

111. Amanda McMaster & Yi-Jin Yu, *Mom Influencer Opens Up About Why She Erased Her Kids’ Faces from Social Media*, GOOD MORNING AM. (Feb. 17, 2022), <https://www.goodmorningamerica.com/family/story/mom-influencer-opens-erased-kids-faces-social-media-82928115> [<https://perma.cc/LNF8-7EQJ>].

112. For a recent report on this connection, see Dylan Walsh, *Study: Social Media Use Linked to Decline in Mental Health*, MIT SLOAN SCH. MGMT. (Sept. 14, 2022), <https://mitsloan.mit.edu/ideas-made-to-matter/study-social-media-use-linked-to-decline-mental-health> [<https://perma.cc/T8JQ-3ZM4>].

113. See Patel, *supra* note 53.

114. See Steinberg, *supra* note 38, at 854–55; Cathy Cassata, *Why It’s Important to Be Cautious When Posting About Kids Online*, VERYWELL MIND (Sept. 17, 2021), <https://www.verywellmind.com/think-about-what-you-share-online-when-it-comes-to-the-kids-in-your-life-5201141> [<https://perma.cc/LGH2-P3F8>].

115. Maressa Brown, *What It’s Like to Be a Mom to YouTube Kid Stars*, PARENTS (Oct. 18, 2019), <https://www.parents.com/parenting/celebrity-parents/katie-stauffer-reveals-what-its-like-to-be-a-mom-to-youtube-kid-stars> [<https://perma.cc/R4T2-8M2P>] (“When we did the Will Smith video where the girls saw him and were yelling his name, people were like, ‘I can’t believe they’re saying Will, and they’re not calling him Mr. Smith!’ and ‘those kids are so disrespectful,’ and I’m like, ‘Really? They just hear people calling him Will, and so that’s what they were saying.’ It’s funny, weird stuff like that.”). One mom, whose son Tariq started appearing on Cameo (charging \$220 for a personalized video) and in commercials, after a TikTok interview “went viral this summer for his love of corn,” said, “I’m not reading the negative comments [online] . . . Before it was really getting to me because people were saying really mean stuff like, ‘He’s being exploited,’ ‘He’s being forced to do these things.’” Madison Malone Kircher, *Corn Kid Is Doing Just Fine*, N.Y. TIMES (Sept. 27, 2022), <https://www.nytimes.com/2022/09/21/style/corn-kid-tariq-tiktok.html>. For more on Cameo, see Kevin Webb & Reece Rogers, *Cameo Lets You Hire Celebrities and Athletes to Create Personalized Videos That Make Memorable Gifts—Here’s How It Works*, INSIDER (May 5, 2022, 5:08 PM), <https://www.businessinsider.com/guides/gifts/what-is-cameo> [<https://perma.cc/EU6L-DP4F>].

116. See O’Neill, *supra* note 40, at 44. Public anonymous commenting is also a concern. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348–51 (1995) (discussing benefits of disclosure and warning of risks pertaining to anonymous materials, which could act “as a deterrent to the making of false statements”). *But see* David A. Shimkin, *Freedom of Anonymous Speech on the Internet Is Not Absolute*, INTELL. PROP. & TECH. L.J., Apr. 2015, at 18, 19 (noting potential benefits of anonymous speech); *Citizens United v. FEC*, 558 U.S. 310, 480–81 (2010) (Thomas, J., concurring in part and dissenting in part) (urging the Court to deem the “disclosure, disclaimer, and reporting requirements” in the Bipartisan Campaign Reform Act of 2002 unconstitutional, and offering concerns about preventing certain forms of speech from being anonymous). For an example of how creating content on its own can lead to troubling mental health concerns, see Kalhan Rosenblatt, *Youtuber ‘Toy Freaks’ May Cause Psychological Damage to His Kids, Experts Say*, NBC NEWS (Nov. 24, 2017, 6:42 AM), <https://www.nbcnews.com/news/us-news/youtuber-toy-freaks-may-cause-psychological-damage-his-kids-experts-n823431> [<https://perma.cc/6N3Q-G64H>]. Comments can also hurt the mental health of parents. See

embarrassing” comments are one of “the most common cyberbullying tactics.”¹¹⁷ Every day Mai Nguyen-Miyoshi blocks negative comments on commercial sharenting posts of her daughter Zooney, as well as followers that look suspicious.¹¹⁸ Not every parent, however, is willing or able to spend time combing through their commercial sharenting accounts to delete vitriolic comments. Other commercial sharenting parents themselves can even be the source of negative comments.¹¹⁹

Commercial sharenting can exacerbate mental health concerns in other ways¹²⁰ as parents profit off cruel interactions with their children.¹²¹ Parents may be ill-equipped to handle their family’s fame.¹²² Children may feel pressure from their parents to continue performing.¹²³ Mental health professionals have sounded the alarm.¹²⁴ In extreme examples, commercial sharenting posts can depict abuse. The notorious DaddyOFive online channel documented family pranks for

Rosman, *supra* note 16 (discussing how one parent “often gets criticized in the comments” of her Instagram).

117. *Cyberbullying Tactics*, STOPBULLYING.GOV, <https://www.stopbullying.gov/cyberbullying/cyberbullying-tactics> [<https://perma.cc/DK2C-ULNN>] (last visited Mar. 17, 2023).

118. Schwab, *supra* note 32.

119. See Tanya Chen & Stephanie McNeal, *A Mummy Blogger Had Admitted to Trashing Other Influencers on an Anonymous Snark Forum*, BUZZFEED NEWS (Nov. 15, 2019, 8:00 AM), <https://www.buzzfeednews.com/article/tanyachen/please-like-me-newsletter-clemmie-hooper-drama> [<https://perma.cc/ZR2N-5L3GJ>].

120. The “commercialization effect,” which can prompt the devaluing of children in society once their appearance generates money and they become commodities, prompts another area of mental health concern. For a discussion of this repercussion regarding reality television, see Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming*, 43 AKRON L. REV. 435, 440–50 (2010).

121. Similar examples where parents have forced their children to pose for commercial gain outside of commercial sharenting context can also be helpful in demonstrating instances where parents’ actions allegedly caused their children harm. For instance, Spencer Elden’s parents brought him to participate in a family friend’s photography project when he was four months old; he was then photographed swimming as a naked infant swimming in a pool. See Samantha Hissong, *‘No Reasonable Person’ Would Consider Nirvana’s ‘Nevermind’ Cover Child Porn, Lawyers Say*, ROLLING STONE (Aug. 27, 2021), <https://www.rollingstone.com/pro/news/nirvana-nevermind-child-pornography-lawsuit-1217786>. The photo was then featured on the cover of the band Nirvana’s famous *Nevermind* album cover. *Id.* Elden has now reported suffering from immense emotional distress in the years following the album’s release. See Verified Complaint Pursuant to 18 U.S.C. 2255 at 14–16, 21, 27–31, *Elden v. Nirvana, L.L.C.*, No. 21-cv-06836, 2022 WL 4079271 (C.D. Cal. Sept. 2, 2022), *appeal docketed*, No. 22-55822 (9th Cir. Sept. 6, 2022). Elden discussed that he found it “kind of creepy that many people have seen [him] naked” and said he felt “like the world’s biggest porn star.” Jack Guy, *Naked ‘Nevermind’ Baby Loses Lawsuit Against Nirvana After Judge Dismisses Child Pornography Complaint*, CNN (Sept. 5, 2022, 10:41 PM), <https://www.cnn.com/2022/09/05/entertainment/spencer-elden-nirvana-ruling-scli-intl/index.html> [<https://perma.cc/4R3X-UWH9>]. In 2021, Elden sued Nirvana band members and associated production companies years after the release of the album cover to seek relief for the alleged damage that arose by the album cover. However, he did not sue his parents. Elden’s lawsuit was dismissed as barred by the statute of limitations, but an appeal is pending. *Elden*, 2022 WL 4079271, at *4.

122. See Lambert, *supra* note 79.

123. See Mike Wright, *‘Change Child Labour Laws’ to Protect £4m-a-year ‘Kidfluencers’ from Pushy Parents*, TELEGRAPH (Nov. 2, 2021, 6:04 PM), <https://www.telegraph.co.uk/news/2021/11/02/regulate-parents-social-media-kidfluencers-make-almost-4m-year> (describing parents of social media stars as “pushy”).

124. See Sung, *supra* note 24.

millions of viewers—including those that upset children, hurt them, and made them burst into tears.¹²⁵ Michael and Heather Martin, the parents behind the channel, even admitted that they “were going for shock value” when posting¹²⁶ and earning hundreds of thousands in advertising revenue.¹²⁷ Commercial sharenting mom Myka Stauffer “rehomed”¹²⁸ Huxley, her four-year-old adopted autistic son, after spending three years profiting off their relationship online.¹²⁹ This monetization included sharing “videos of his adoption process, medical issues, and meltdowns.”¹³⁰

Parents will ask children to fake their emotions to gain clicks and attention online. When Jordan Cheyenne shared a “tearful” video online about her family dog battling canine parvovirus (“a frequently fatal disease”) for her many online followers, Cheyenne’s eight-year-old son sobbed in their car’s passenger seat.¹³¹ Cheyenne asked for prayers, shared appreciation for her viewers, and thought she stopped recording.¹³² Meanwhile, as the camera still rolled, Cheyenne asked her son to “[a]ct like you’re crying.” He said: “But Mom, I’m actually crying.”¹³³ The video went viral as Cheyenne and her son received an ambush of hateful attacks.¹³⁴ Cheyenne promptly apologized and announced she would prioritize her son’s well-being: “I have made the decision that is 100 percent the healthiest

125. Hajjaji, *supra* note 3.

126. *Id.* The parents were ultimately charged with child neglect and sentenced to five years of probation. See Madeline Holcombe, *What Happens When Parents Abuse and Exploit Children for Internet Fame?*, CNN (Mar. 22, 2019, 6:05 AM), <https://www.cnn.com/2019/03/22/us/hobson-parents-youtube-abuse-claims/index.html> [https://perma.cc/M3YK-EBCS].

127. Tama Leaver & Crystal Abidin, *When Exploiting Kids for Cash Goes Wrong on YouTube: The Lessons of DaddyOfFive*, CONVERSATION (May 1, 2017, 10:40 PM), <https://theconversation.com/when-exploiting-kids-for-cash-goes-wrong-on-youtube-the-lessons-of-daddyofive-76932> [https://perma.cc/PS5F-HAEV].

128. Emma Nolan, *Myka Stauffer Loses Thousands of Subscribers After YouTube Mom Gives Up Adopted Son*, NEWSWEEK (May 29, 2020, 8:00 AM), <https://www.newsweek.com/myka-stauffer-huxley-son-adopted-youtube-subscribers-1507319> [https://perma.cc/FW2A-88AB]; see also Stephanie McNeal, *A YouTuber Placed Her Adopted Autistic Son from China with a New Family—After Making Content with Him for Years*, BUZZFEED NEWS (May 28, 2020, 8:45 PM), <https://www.buzzfeednews.com/article/stephaniemcneal/myka-stauffer-huxley-announcement> [https://perma.cc/2DNG-TYVF] (reporting that Myka and her husband “decided to ‘hand-select a family who is equipped to handle Huxley’s needs’”).

129. Hajjaji, *supra* note 3. Stauffer lost thousands of followers within days of the announcement. Nolan, *supra* note 128.

130. Hajjaji, *supra* note 3. Brands such as Chili’s, Danimals, Fabletics, and Suave broke ties with Stauffer after the announcement. *Id.* For more on how “people online” reacted upon discovering “that an American couple was able to use their adopted autistic child in countless ads over the years, and then place him in another home,” see Tanya Chen & Stephanie McNeal, *Will Huxley Stauffer’s Story Be the Wake-Up Call That Leads to Protections for Children of Influencers?*, BUZZFEED NEWS (May 29, 2020, 8:00 AM), <https://www.buzzfeednews.com/article/tanyachen/will-huxley-stauffers-story-be-the-wake-up-call-that-leads> [https://perma.cc/U8A7-UJHV].

131. See Hajjaji, *supra* note 3.

132. See *id.*

133. *Id.*

134. *Id.*

for my child and his mental health to be off the camera.”¹³⁵ Not only was Cheyenne’s son the target of an onslaught of threatening messages, but his own mother instructed him on how to behave in order to draw emotional appeal and boost her own online engagement.¹³⁶ These posts may cause children to lose their own sense of self.¹³⁷ Additionally, twins whose parents post pictures of them together can also struggle to form their own respective identities and see themselves as individuals.¹³⁸

These negative responses to commercial sharenting posts, according to psychologist Ginger Clark, have “the risk of giving the child the sense that they are a commodity in your eyes.”¹³⁹ Though some children deeply value fame,¹⁴⁰ many children do not share this desire.¹⁴¹ The public health ramifications are numerous and concerning.¹⁴² Pediatricians have warned that even the act of parents

135. Eleanor Lees, *Who Is Jordan Cheyenne? Vlogger’s Video of Son Sparks Backlash*, NEWSWEEK (Sept. 10, 2021, 8:43 AM), <https://www.newsweek.com/youtuber-jordan-cheyenne-youtube-video-son-crying-1627834> [https://perma.cc/4CM2-B65Y]. Cheyenne had used her online platform to generate income. See Kat Tenbarge, *The Mommy Vlogger Caught Telling Her Son to Cry for a Video Shared ‘Girl Boss’ Advice and Weight Loss Meal Plans Before Her Viral Blunder*, INSIDER (Sept. 14, 2021, 12:29 PM), <https://www.insider.com/jordan-cheyenne-youtube-bio-age-son-cancelled-vlog-thumbnail-2021-9> [https://perma.cc/GW6X-KRAR].

136. For more on the negative impact commercial sharenting can have on young people, see generally CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, GET THE FACTS: MARKETING AND MATERIALISM (2019), https://fairplayforkids.org/wp-content/uploads/2019/10/materialism_fact_sheet.pdf [https://perma.cc/N3HU-NBYD] and “Like, Subscribe, and Spend!” *Why Kidfluencer Marketing Must End*, FAIRPLAY, <https://fairplayforkids.org/like-subscribe-and-spend-why-influencer-marketing-must-end> [https://perma.cc/Z6FM-FY9T] (last visited Mar. 17, 2023).

137. See Ade Onibada, *The Rights and Privacy of Children Are Due to Take Center Stage in Influencer Culture, and It’s About Time*, BUZZFEED NEWS (May 13, 2022, 2:44 PM), <https://www.buzzfeednews.com/article/adeonibada/momuncharted-on-childrens-privacy-for-youtube-influencers> [https://perma.cc/757M-DHBK].

138. See Ines Novacic, “Twinfluencers” *Multiply on Social Media*, CBS NEWS (Aug. 25, 2019, 11:32 PM), <https://www.cbsnews.com/news/twinfluencers-multiply-on-social-media-kid-influencers-cbsn-originals> [https://perma.cc/FH38-C5WG] (quoting influencer mom Madison Fisher, whose twins Taytum and Oakley Fisher have millions of followers of Instagram, as saying, “I think [the twins are] struggling with forming their own identity, and we need to let them do that more”). Many prominent—and lucrative—commercial sharenting accounts feature twins. See *id.* Identity-related concerns, however, are not limited exclusively to twins. See Sung, *supra* note 24 (noting one child psychologist predicts that she “think[s] what we’re going to see is a lot of fracturing of identity on some level where kids will be even more disjointed when it comes to who they are”).

139. Hayley Krischer, *Meet the Instamom, a Stage Mother for Social Media*, N.Y. TIMES (Nov. 14, 2015), <https://www.nytimes.com/2015/11/15/fashion/meet-the-instamom-a-stage-mother-for-social-media.html>; see also Johnson, *supra* note 10 (“It can be difficult to separate my identity from my family and to figure out who is me rather than this version of me that’s online. It can still be hard sometimes when my mom wants me to help with the bookstore or write something with her, because I appreciate it but I want to find my own way.”).

140. See Rebecca Jennings, *So Your Kid Wants to Be an Influencer*, VOX (Aug. 31, 2022, 9:00 AM), <https://www.vox.com/the-goods/2022/8/31/23328677/kid-influencer-ryans-world-ellie-zeiler> [https://perma.cc/ESS4-5NLU] (noting that “[i]nfluencer’ is now one of the most desired career paths for both children and adults”).

141. See generally Yalda T. Uhls & Patricia M. Greenfield, *The Value of Fame: Preadolescent Perceptions of Popular Media and Their Relationship to Future Aspirations*, 48 DEVELOPMENTAL PSYCH. 315 (2012) (providing examples of children not valuing fame as part of a study).

142. See Hamming, *supra* note 15, at 1045–46; Steinberg, *supra* note 38, at 867.

spending significant time on social media can create cause for concern.¹⁴³ Children can find their parents' posts intrusive.¹⁴⁴ Although Katie Stauffer does not think her twins will be embarrassed by these advertisements when they are older,¹⁴⁵ only time will tell. As children grow older, the effects of commercial sharenting on their mental health will likely become more apparent.¹⁴⁶ Parents' online posts have haunted children into adulthood.¹⁴⁷

II. COMMERCIAL SHARENTING SHOULD BE FRAMED AS A COMMERCIAL INTEGRITY ISSUE

This Part argues that commercial sharenting can be misleading and create consumer confusion. Parents and their children may be advertising products that they neither use nor would have without sharenting incentives. The FTC and the Supreme Court have expressed concern regarding misleading commercial content, demonstrating how this framing could help increase awareness about commercial sharenting.

A. COMMERCIAL SHARENTING CAN BE MISLEADING

Jaqi Clements made an Instagram account featuring her nine-year-old twins, Leah and Ava, that has gained fame and over a million followers.¹⁴⁸ When footwear company Crocs reached out to Jaqi about featuring posts of her twins and Crocs shoes on Instagram, Jaqi asked her daughters: "Do you guys know what Crocs are?"¹⁴⁹ The response was "[n]o."¹⁵⁰ Nevertheless, the twins posed with the shoes, smiled, and promoted the product.¹⁵¹

At a promotional event for clothing company Oshkosh, twins Ava and Alexis McClure indicated they did not know the company.¹⁵² Regardless, when asked

143. See Megan A. Moreno & Jenny Radesky, *Social Media & Your Child's Mental Health: What the Research Says*, HEALTHYCHILDREN.ORG (Nov. 23, 2022), <https://www.healthychildren.org/English/family-life/Media/Pages/social-media-and-your-childs-mental-health-what-research-says.aspx> [<https://perma.cc/3RTU-XUBX>] (instructing parents using social media to "be sure to role model positive actions [such as putting] away your phone at important family times such as during dinner, or during family time").

144. See generally Ciesemier et al., *supra* note 4 (recording conversations between children and parents who post about them online).

145. Smidt, *supra* note 2 ("I didn't post them, like, naked . . . I've tried to never post, like, naked pictures. They have clothes on. They have a diaper that has unicorns on it.").

146. See Steinberg, *supra* note 38, at 882–83 (discussing "the effect sharing can have on the[] child's current and future sense of self and well-being" (capitalization modified)).

147. See Harris & Tarchak, *supra* note 20 (documenting accounts of individuals in their teens, twenties, and thirties that demonstrate frustration with their parents' online posts). Parental harm can last for years beyond childhood. See *supra* note 121 (discussing Elden's alleged distress after he was featured as a naked baby on Nirvana's *Nevermind* album).

148. See CLEMENTS TWINS, <https://www.theclementstwins.com> [<https://perma.cc/J5WQ-D2B8>] (last visited Mar. 17, 2023).

149. Mooney, *supra* note 12.

150. *Id.*

151. See *id.*

152. *Kid Influencers: Few Rules, Big Money*, CBS NEWS, at 04:26 (Aug. 23, 2019), <https://www.cbsnews.com/video/kid-influencers-few-rules-big-money> [<https://perma.cc/5FEP-KFTA>].

what their favorite brand was, their commercial sharenting mom told them to “say Oshkosh!”¹⁵³ Parents are encouraging their children to share information, in their own name, that may not be entirely truthful—with profit as a goal.

Their support could be seen as “misleading.”¹⁵⁴ Even Jaqi has acknowledged “you easily can tell” when online advertisements do not “feel[] organic.”¹⁵⁵ And these statements are all too common in commercial sharenting posts—when children are told to support products that they have not heard of prior to posting—and have the potential to raise concerns related to “truth in advertising” laws.

For Dana Bennett—who runs an Instagram account, followed by thousands, featuring her children—the process for running advertisements “[is] like, here’s a fun product, we’re going to take some pictures while we’re doing this and that. And they’re cool with it.”¹⁵⁶ Yet her children lack agency in deciding what to feature and how. Their smiles in advertisements—like a photo with milk and cookies for “Got Milk?”¹⁵⁷—may not be genuine, even though Dana is featuring the kids as themselves.

Shirley Temple, “the greatest child star of all time,” only ever played fictional characters on screen.¹⁵⁸ The child stars of commercial sharenting social media posts, however, are asked to advertise as *themselves*: they share information, with their own names, that may not reflect their core beliefs. In the words of Harvard Law’s Leah Plunkett, the parents behind these posts are “setting them up to act at being themselves, rather than giving them the privacy to play, to figure out who they actually are.”¹⁵⁹ Unlike typical child advertisers who take on the likeness of another, the child stars of commercial sharenting posts take on their own roles. Yet the process can also be sensationalized,¹⁶⁰ and online depictions about

153. *Id.* at 04:38.

154. Per Black’s Law Dictionary, to “mislead” is “[t]o cause (another person) to believe something that is not so, whether by words or silence, action or inaction; to deceive.” *Mislead*, BLACK’S LAW DICTIONARY (11th ed. 2019).

155. MJ Sandoval, *Life as the Mother of Superstar Influencers, with Jaqi Clements*, COLL. INFLUENCE (Jan. 12, 2021), <https://www.collegeofinfluence.com/blog/b3z4vdkm8ra5bclxzz5m7iuptgvn4> [<https://perma.cc/9EED-PFJV>].

156. Schwab, *supra* note 32.

157. See *Sibling Influencers Teaming Up on Social*, IZEA (Mar. 15, 2022), <https://izea.com/resources/sibling-influencers> [<https://perma.cc/N2CX-R5GK>].

158. Levey, *supra* note 17. Temple ultimately supported her household of twelve during her career, retaining a few thousand dollars and a dollhouse. See Erica Siegel, Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 438 (2000).

159. Onibada, *supra* note 137.

160. Posts can show a world that is unfathomable compared to the typical family experience. See Sayantani Nath, *Who Is Kristina Ozturk? Millionaire Mom, 24, Has 22 Babies with 16 Live-In Nannies*, MEAWW (Oct. 27, 2021, 3:21 AM), <https://meaww.com/kristina-ozturk-millionaire-mom-24-with-22-babies-16-live-in-nannies> [<https://perma.cc/ZNS7-FQ84>]; Josie Griffiths, *I’m a Mom To 21 Babies and Have 16 Live-In Nannies*, N.Y. POST (Oct. 25, 2021, 11:41 AM), <https://nypost.com/2021/10/25/im-a-mom-to-21-babies-and-have-16-live-in-nannies> [<https://perma.cc/Z7GM-MNHK>] (discussing the “daily life on Instagram” of a mom married to a millionaire with twenty-one babies); see also Ciera E. Kirkpatrick & Sungkyoung Lee, *Comparisons to Picture-Perfect Motherhood: How Instagram’s Idealized Portrayals of Motherhood Affect New Mothers’ Well-Being*, 137 COMPUTS. HUM. BEHAV.,

families can be false.¹⁶¹ Children are too young to make their own social media accounts—yet Mattel, Staples, and other companies seek to use children’s online presence for commercial gain.¹⁶²

Online posts, including commercial sharenters’ posts, do not always reflect real life—yet many users and consumers do not recognize this disconnect.¹⁶³ Companies are willing to go to immense lengths to advertise their products.¹⁶⁴ As collaborators, commercial sharenters participate in this process.

Authenticity is paramount to the success of influencing online—and this strength extends to commercial sharenting.¹⁶⁵ Parents have understood their

Aug. 5, 2022, at 1, 1 (noting that “idealized [social media] posts cause significantly higher levels of envy and state anxiety, which may be detrimental to mothers’ mental health”).

161. See Geoff Weiss, *The Smiles Family Is Starting Strong on YouTube. One Catch: They’re Not an Actual Family*, TUBEFILTER (Feb. 23, 2022), <https://www.tubefilter.com/2022/02/23/the-smiles-family-starting-strong-not-actual-family> [https://perma.cc/H3L9-JSST]. Additionally, for twins Mila and Emma Stauffer, their older sister writes the scripts for many of the videos and their mom makes sure to “maintain a lot of creative control.” Field, *supra* note 69. Though the commentary is written by another family member, this content may not be authentic to the twins themselves.

162. Maheshwari, *supra* note 1. Companies even seek out services to find online influencers, including families and children. See *About Us*, INFLUENCER MATCHMAKER, <https://influencermatchmaker.co.uk/about-us> [https://perma.cc/7V8S-J33B] (last visited Mar. 17, 2023); Whitaker, *supra* note 51; see also Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, N.Y. MAG.: INTELLIGENCER (Apr. 17, 2017), <https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html> [https://perma.cc/HW68-TFEG] (discussing the Family Video Network, which “acts as an intermediary between YouTube and individual channels, as well as between the channels themselves” and “provides expertise and advice, encourages cross-promotion, and creates sponsorship opportunities”); Press Release, Mom 2.0 Summit, Mom 2.0 Summit Connects Leading Brands with Parent Creators and Media in Scottsdale, AZ from May 7–9, 2023 (Oct. 5, 2022, 8:07 AM) (available at <https://www.prnewswire.com/news-releases/mom-2-0-summit-connects-leading-brands-with-parent-creators-and-media-in-scottsdale-az-from-may-7-9-2023-301639448.html> [https://perma.cc/AJB3-3TRV]) (highlighting a networking opportunity to connect “mom influencers” with each other and other companies).

163. For one acknowledgement of this disconnect, see Elle Hunt, *Essena O’Neill Quits Instagram Claiming Social Media ‘Is Not Real Life.’* GUARDIAN (Nov. 3, 2015, 2:30 AM), <https://www.theguardian.com/media/2015/nov/03/instagram-star-essena-oneill-quits-2d-life-to-reveal-true-story-behind-images>. For additional discussion of the disconnect between social media and reality, see generally Marika Tiggemann & Isabella Anderberg, *Social Media Is Not Real: The Effect of ‘Instagram vs Reality’ Images on Women’s Social Comparison and Body Image*, 22 NEW MEDIA & SOC’Y 2183 (2020) and Sherry Thomas, *A Virtual Life: How Social Media Changes Our Perceptions*, CHI. SCH. PRO. PSYCH. (Dec. 7, 2021), <https://www.thechicagoschool.edu/insight/from-the-magazine/a-virtual-life> [https://perma.cc/8Y4H-GRHX].

These online posts may obscure obstacles that families may face. For instance, Austin and Catherine McBroom, whose prominent Ace Family YouTube account has millions of followers, have been involved with ample legal scandals that may not be heavily featured on their own accounts. See Kieran Press-Reynolds & Charissa Cheong, *Ace Family’s Year from Hell: The Controversial YouTube Family Channel Faced Foreclosure, Lawsuits, and Widespread Criticism of Their Latest Venture*, INSIDER (July 12, 2022, 12:48 PM), <https://www.insider.com/the-ace-family-austin-mcBroom-catherine-house-mansion-legal-financial-2021-10> [https://perma.cc/94YA-XXZ4]; Charissa Cheong, *Fans Who Said They Attended the Ace Family’s Festival Are Sharing Photos of Collapsed Tents, ‘Crazy’ Expensive Food, and Huge Queues in ‘Blistering’ Heat*, YAHOO! NEWS (July 11, 2022), <https://news.yahoo.com/fans-said-attended-ace-familys-182954483.html> [https://perma.cc/8GBN-FUG5].

164. Companies will even make virtual influencers. See Tiffany Hsu, *These Influencers Aren’t Flesh and Blood, Yet Millions Follow Them*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/business/media/miquela-virtual-influencer.html>.

165. For a discussion about how “authenticity” is “[t]he value at the core of influencer marketing,” see Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 92–93 (2020).

power to credibly share online recommendations.¹⁶⁶ However, through posting about their children, some commercial sharenting parents promote and broadcast items that the parents may not otherwise use themselves. These posts can be “curated.”¹⁶⁷ Since commercial sharenter Katie Stauffer started featuring her children on her own online accounts, she has gained millions of followers.¹⁶⁸ Because of her reach, Katie now has a house full of free items, from rugs to a TV.¹⁶⁹ Though she promotes these products online, it is not clear she would necessarily use them on her own if the companies did not send them for free.

Aleksandra Hoyles appreciates the free products that come from her commercial sharenting posts featuring her daughter Lily. As Lily receives bedroom furniture, Gucci clothing, and tutus in exchange for publicity, Aleksandra notes, “I see what we are doing as creating opportunities to give our children things we could not otherwise afford.”¹⁷⁰ By using their platforms to promote these products online, families like Lily’s can access items that would otherwise be out of reach. Their portrayal of the items—and the family’s relationship with them—may not be as genuine as the online platforms make it seem.

Not all commercial sharenting parents promote products that may be unfamiliar. When reflecting, former “mommy blogger”¹⁷¹ Lyz Lenz says she “had criteria of course” and would only use products she would purchase on her own without the bribery of compensation that could accompany a positive online post.¹⁷² She did not want to be misleading. Other parents, however, have used commercial sharenting to access materials and opportunities that they would not use without this additional incentive.¹⁷³ Stauffer declares her family only “work[s] either with brands we use in our everyday lives or a brand we want to try.”¹⁷⁴ However, there is no guarantee that the sharenting parent will genuinely like products that they had never used prior to their posts, even if they are working with a respected brand. This posting could be misleading on its own, raising concerns about the publicity’s truthfulness.

166. See Cooper Munroe, *3 Truths About Trustworthy Sponsored Social Media Content*, FORBES (Sept. 22, 2022, 7:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2022/09/22/3-truths-about-trustworthy-sponsored-social-media-content> (“Moms in every corner of the world have long been sharing recommendations in real life. When they could financially contribute to their families while being a voice for brands they already knew and loved, they recognized the huge opportunity in front of them. The same dedication to truth when offering advice offline, they took online. Credibility was their currency.”).

167. See Alston, *supra* note 62.

168. See Field, *supra* note 69.

169. Smidt, *supra* note 2.

170. Linton, *supra* note 28.

171. For more on “mommy bloggers,” see Janice D’Arcy, *‘Mommy’ Blogs: What Are They, and How Much Do They Matter?*, WASH. POST (Jan. 30, 2012), https://www.washingtonpost.com/blogs/on-parenting/post/mommy-blogs-what-are-they-and-how-much-do-they-matter/2012/01/28/gIQA0VQubQ_blog.html.

172. See Lyz Lenz, *Is Creating ‘Mommy Blog’ Content the New Child Labor?*, DAILY DOT (May 26, 2021, 1:24 AM), <https://www.dailydot.com/irl/mom-blogging-child-labor> [perma.cc/357D-PDP4].

173. See Linton, *supra* note 28.

174. Field, *supra* note 69.

B. THE FTC HAS MADE CLEAR THAT MISLEADING CONTENT IS PROBLEMATIC

Per the FTC,¹⁷⁵ truth in advertising matters—and this emphasis also applies to social media.¹⁷⁶ Content does not need to be explicitly deceptive to be concerning.¹⁷⁷ The deception can be more subtle, and posts from commercial sharenting parents can be deceiving.¹⁷⁸ This online content is evaluated from the lens of a reasonable person’s understanding of who could be an endorser.¹⁷⁹ “Material connections,” which impact the type of endorsement made by the online poster, can include financial compensation, free gifts, or other rewards that can result from commercial sharenting posts.¹⁸⁰

The FTC has authority to regulate advertisements.¹⁸¹ According to the FTC’s rules, influencers need to disclose relationships with brands in their posts.¹⁸² Violating these rules can lead to penalties.¹⁸³ The FTC started enforcing its authority against online influencers directly in 2016,¹⁸⁴ and the Commission settled its “first-ever” complaint regarding individual social media influencers in

175. The FTC is the federal agency responsible for searching for potentially misleading marketing practices. For more about the FTC, see *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> [<https://perma.cc/QLC7-FTLX>] (last visited Mar. 17, 2023).

176. See *The FTC’s Endorsement Guides: What People Are Asking*, FTC (Aug. 27, 2020) [hereinafter *FTC, Endorsement Guides*], <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/2QVD-DD77>]. “When consumers see or hear an advertisement, whether it’s on the Internet, radio or television, or anywhere else, federal law says that ad must be truthful, not misleading, and, when appropriate, backed by scientific evidence.” *Truth in Advertising*, FTC [hereinafter *FTC, Truth in Advertising*], <https://www.ftc.gov/news-events/topics/truth-advertising> [<https://perma.cc/EQ7H-7B7W>] (last visited Mar. 17, 2023).

177. See *FTC, Endorsement Guides*, *supra* note 176 (“Under the [federal] law, an act or practice is deceptive if it misleads ‘a significant minority’ of consumers.”).

178. See, e.g., Tanya Chen, *A Popular Instagram Family Who Travels the World Is Being Accused of Hiding Details of a Massive Holiday Sweepstakes*, BUZZFEED NEWS (Dec. 27, 2019, 7:01 AM), <https://www.buzzfeednews.com/article/tanyachen/popular-traveling-family-bucket-list-family-accused-of> [<https://perma.cc/VSB8-YKLLH>] (describing confusing instructions for a sweepstakes organized by the Gee family and promoted on their commercial sharenting Instagram page).

179. See *FTC, Endorsement Guides*, *supra* note 176 (clarifying that “the FTC evaluates ads from the perspective of reasonable consumers”).

180. See *The Scoop on Social Media Influencer Disclosure Requirements*, TRUTH ADVERT., <https://truthinadvertising.org/resource/social-media-influencer-disclosure-requirements> [<https://perma.cc/9V7A-CA5X>] (last visited Mar. 17, 2023).

181. See 15 U.S.C. § 45.

182. See *FTC, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS 3* (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/Z83N-JKHX>]; Alessandro Bogliari, *Influencer Marketing and FTC Regulations*, FORBES (Dec. 2, 2020, 7:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2020/12/02/influencer-marketing-and-ftc-regulations>.

183. See Mary Kohler, *Social Media Endorsements Can’t Escape FTC’s Watch*, BLOOMBERG L. (Nov. 9, 2021, 4:01 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/social-media-endorsements-cant-escape-ftcs-watch>.

184. Stasia Skalbania, Note, *Advising 101 for the Growing Field of Social Media Influencers*, 97 WASH. L. REV. 667, 678 (2022); see also Press Release, *FTC, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”* (Mar. 15, 2016) (available at <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/BU2D-VZ3M>]) (describing Lord & Taylor’s deceptive product promotion, including “paying for native advertisements,

2017.¹⁸⁵ The FTC has increasingly sought to crack down on misleading information from influencers¹⁸⁶ and will likely seek monetary penalties.¹⁸⁷ The FTC has also taken steps to investigate this issue further, including exploring efforts to update its Endorsement Guides (Guides).¹⁸⁸ Through the Guides, the FTC offers suggested guidance for companies to ensure that advertisements using endorsements comply with Section 5 of the FTC Act.¹⁸⁹ The Guides were promulgated in 1980 and

including a seemingly objective article in [an] online publication[,] . . . [an] Instagram post, without disclosing that the posts actually were paid promotions”).

185. Press Release, FTC, CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencer (Sept. 7, 2017) (available at <https://www.ftc.gov/news-events/news/press-releases/2017/09/csgolotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers> [<https://perma.cc/4QBQ-SL4B>]).

186. Robert Williams, *FTC Eyes Stricter Rules on Influencer Marketing*, MKTG. DRIVE (Feb. 13, 2020), <https://www.marketingdive.com/news/ftc-eyes-stricter-rules-on-influencer-marketing/572242> [<https://perma.cc/E48U-4MW7>]; Rohit Chopra, Comm’r, FTC, Statement Regarding the Endorsement Guides Review (Feb. 12, 2020), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-rohit-chopra-regarding-endorsement-guides-review> [<https://perma.cc/9RHA-PYLB>]. In 2017, the staff of the FTC proactively sent over ninety letters to online influencers and marketers proactively to spur compliance. See Lesley Fair, *Influencers, Are Your #Materialconnection #Disclosures #Clearandconspicuous?*, FTC (Apr. 19, 2017), <https://www.ftc.gov/business-guidance/blog/2017/04/influencers-are-your-materialconnection-disclosures-clearandconspicuous> [<https://perma.cc/R3M8-2HY5>].

187. For more on the FTC administering penalty offenses related to endorsements, see *Penalty Offenses Concerning Endorsements*, FTC, <https://www.ftc.gov/enforcement/penalty-offenses/endorsements> [<https://perma.cc/EJ7E-RQCF>] (last visited Mar. 17, 2023). In 2020, the FTC issued warning letters to ten influencers who failed to adequately disclose that a detox tea company had paid them to promote its product; the company agreed to a \$1 million fine. *Tea Marketer Misled Consumers, Didn’t Adequately Disclose Payments to Well-Known Influencers*, FTC Alleges, FTC (Mar. 6, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments-well-known-influencers-ftc-alleges> [<https://perma.cc/BP8M-PF3Z>]. For more commentary on recent steps the FTC took to address social media concerns, see *FTC Social Media Actions*, TRUTH ADVERT. (Feb. 16, 2022), <https://truthinadvertising.org/articles/ftc-social-media-actions> [<https://perma.cc/2PQT-4JPC>] and Lesley Fair, *Three FTC Actions of Interest to Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/business-guidance/blog/2017/09/three-ftc-actions-interest-influencers> [<https://perma.cc/XP43-SYZP>].

188. See Press Release, FTC, FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews (May 19, 2022) [hereinafter FTC, *Strengthen Guidelines*] (available at <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-proposes-strengthen-advertising-guidelines-against-fake-manipulated-reviews> [<https://perma.cc/JY8U-Y32S>]); FTC (@FTC), TWITTER (May 24, 2022, 11:53 AM), <https://twitter.com/FTC/status/1529128451503955968> [<https://perma.cc/KHU5-BR59>]. In fall 2022, the FTC held a virtual event about protecting children specifically from influencer advertising. See Lesley Fair, *Starting Soon: Protecting Kids from Stealth Advertising in Digital Media*, FTC (Oct. 19, 2022), <https://www.ftc.gov/business-guidance/blog/2022/10/starting-soon-protecting-kids-stealth-advertising-digital-media> [<https://perma.cc/SCSN-YY6X>]. For the agenda, see Press Release, FTC, FTC Releases Agenda for Virtual Event on Digital Advertising to Kids (Sept. 21, 2022) (available at <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-releases-agenda-virtual-event-digital-advertising-kids> [<https://perma.cc/95VS-VRF5>]).

189. The Guides “represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements.” 16 C.F.R. § 255.0 (2022). Further, the Guides “address the application of Section 5 of the FTC Act to the use of endorsements and testimonials in advertising.” *Id.* (citation omitted). For more on the history of these FTC’s Guides, see *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 87 Fed. Reg. 44288, 44289 (proposed July 26, 2022) (to be codified at 16 C.F.R. pt. 255).

amended in 2009 to reflect the presence of online content sharers.¹⁹⁰ In 2022, the FTC announced that it is actively pursuing efforts to update the Guides for the first time in years.¹⁹¹ The Commission hopes to revise the Guides' language to more comprehensively address advertising on social media platforms and better reflect the growing online influencer industry.¹⁹² Though the Guides are not binding law in their own right, the FTC's efforts to update them demonstrate an increased interest in addressing this issue.

The FTC has "reached out directly to 'educate' social media influencers."¹⁹³ Yet as the influencer industry has expanded (including with commercial sharenters), conducting this outreach effectively has become even harder.¹⁹⁴ This poses challenges for young people who may be unable to access or understand FTC resources.¹⁹⁵ Additionally, FTC regulations can reportedly be "weakly enforced" on online platforms,¹⁹⁶ which can make it harder for viewers to know when content is authentic or misleading. A 2018 report found that twenty-five percent of Instagram influencers complied with FTC marketing guidelines,¹⁹⁷ illustrating this difficulty. Watchdog groups have demanded that the FTC address deceptive advertising in online content featuring children.¹⁹⁸

190. See Press Release, FTC, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009) (available at <https://www.ftc.gov/news-events/news/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials> [<https://perma.cc/9BJF-YX9P>]). For the FTC's 2009 Guide, see 16 C.F.R. § 255 (2022).

191. See FTC, *Strengthen Guidelines*, *supra* note 188.

192. See Statement, Rebecca Kelly Slaughter, Comm'n'r, FTC, Regarding the Request for Public Comment on Amendments to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (May 19, 2022) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/P205400_SlaughterEndorsementsGuideStatement.pdf [<https://perma.cc/CDT8-Y4QF>]).

The FTC's recent proposed changes to the Guides include (1) broadening the definition of "endorsement" to make clear that marketing and promotional messaging could be included in this category; (2) elaborating on the risks stakeholders—including paid influencers, as well as the companies being endorsed themselves—could face regarding liability for online posts; (3) clarifying its policy for endorsement disclosures such that advertisers would need to "clearly and conspicuously" disclose material relationships, analyzed through the lens of an "ordinary customer" in the advertisement's target audience; and (4) calling on companies to proactively train influencers. See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 87 Fed. Reg. at 44290–92, 44305.

193. Alexandra Steigrad, *FTC Puts Influencers on Notice for Potential Disclosure Violations*, WOMEN'S WEAR DAILY (Apr. 19, 2017, 1:52 PM), <https://wwd.com/business-news/media/ftc-puts-influencers-marketers-on-notice-for-disclosure-violations-10869972> [<https://perma.cc/88PC-MVVH>].

194. See Sam Sabin, *A Tough Task for FTC: Regulating Instagram When Anyone Can Be an Influencer*, MORNING CONSULT (May 28, 2019, 3:40 PM), <https://morningconsult.com/2019/05/28/a-tough-task-for-ftc-regulating-instagram-when-anyone-can-be-an-influencer> [<https://perma.cc/42US-CG7J>].

195. For an example of a resource from the FTC that will almost certainly be inaccessible to children appearing in commercial sharenting posts, see FTC, *supra* note 182.

196. Smidt, *supra* note 2; see also Katie Notopoulos, *Sorry, Celebs, Using #Sp on Instagram Ads Isn't Gonna Cut It*, BUZZFEED NEWS (Apr. 19, 2017, 8:21 PM), <https://www.buzzfeednews.com/article/katienotopoulos/ftc-reminds-celebrities-about-instagram-ad-guidelines> [<https://perma.cc/2Z4T-97UQ>] (noting confusion regarding sponsored posts).

197. Williams, *supra* note 36.

198. See Tiffany Hsu, *Popular YouTube Toy Review Channel Accused of Blurring Lines for Ads*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/business/media/ryan-toysreview-youtube-ad-income.html>.

Though Instagram,¹⁹⁹ Facebook,²⁰⁰ Twitter,²⁰¹ and YouTube²⁰² have introduced mechanisms that make it easier to view sponsorship disclosures on posts and increase transparency, these avenues can still be confusing for the average consumer to parse.²⁰³ These disclosures may be hard for the reader to see and there is a chance for misrepresentation.²⁰⁴

The FTC has long scorned misleading information.²⁰⁵ Audience confusion extends beyond actual disclosures.²⁰⁶ Since commercial sharenting parents are asking their children to pose or share information in a certain way, consumers may think posts are genuine when they are advertisements. Consumers may also receive skewed views of products. Per the FTC, online promoters should not lie when discussing their views about products.²⁰⁷ These commercial sharenting posts are about individuals and feature children as themselves. The posts may seem more natural than others that are more obviously advertisements—and this “authenticity” can be deceptive.²⁰⁸

Per the FTC, “[y]ou can’t talk about your experience with a product you haven’t tried.”²⁰⁹ Parents, therefore, should be wary of using their children to

199. See *Instagram Tools for Transparent Partnerships*, INSTAGRAM BUS. (Dec. 29, 2020), <https://business.instagram.com/blog/tools-to-disclose-instagram-partnerships> [<https://perma.cc/5KJB-BYAU>]; *Branded Content on Instagram*, INSTAGRAM: HELP CTR., <https://help.instagram.com/116947042301556> [<https://perma.cc/H2M4-BMDG>] (last visited Mar. 17, 2023).

200. See *Updates to Branded Content and Brand Collaborations on Facebook*, META FOR MEDIA (Oct. 18, 2018), <https://www.facebook.com/formedia/blog/updates-to-branded-content-and-brand-collaborations-on-facebook> [<https://perma.cc/C4LE-UHAQ>].

201. See *Ads Transparency*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/product-policies/ads-transparency.html> [<https://perma.cc/Z3K9-KHTS>] (last visited Mar. 17, 2023); *Paid Partnerships Policy*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/paid-partnerships> [<https://perma.cc/9NCY-R9M8>] (last visited Mar. 17, 2023).

202. See *Add Paid Product Placements, Sponsorships & Endorsements*, YOUTUBE HELP, <https://support.google.com/youtube/answer/154235?hl=en> [<https://perma.cc/V3A9-P8ZX>] (last visited Mar. 17, 2023).

203. Consumer confusion was recently discussed in “a large-scale empirical study” regarding thousands of consumers using platforms from ten countries in five continents. See Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets*, 16 VA. L. & BUS. REV. 217, 217 (2022).

204. Cf. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 Fed. Reg. 44288, 44303 (proposed July 26, 2022) (to be codified at 16 C.F.R. pt. 255) (discussing requirements for “[d]isclosure of material connections,” which “do not need to be disclosed when they are understood or expected by all but an insignificant portion of the audience for an endorsement”).

205. See Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22596 (Apr. 18, 2016); Letter from James C. Miller III, Chairman, FTC, to Rep. John D. Dingell, Chairman, House Comm. on Energy & Com. (Oct. 14, 1983) (available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/M48Q-A5T5>]).

206. This has long been a cause of concern. See Tyler Fredricks, Note, *Not Content with Content Influencers: How the FTC Should Promote Advertisement Disclosure*, 19 VA. SPORTS & ENT. L.J. 29, 40 (2019) (“[I]f the goal of the FTC’s regulations is consumer protection and reducing confusion, it is not clear that its disclosure rules are succeeding.”).

207. FTC, *supra* note 182, at 6 (“If you’re paid to talk about a product and thought it was terrible, you can’t say it’s terrific.”).

208. See Loes van Driel & Delia Dumitrica, *Selling Brands While Staying “Authentic”: The Professionalization of Instagram Influencers*, 27 CONVERGENCE 66, 66 (2021) (noting that “Instagram influencers are seen as more trustworthy than traditional forms of advertising”).

209. FTC, *supra* note 182.

promote products that they have not encountered before working on the commercial sharenting post.²¹⁰ Young people may lack enough experience with certain products to genuinely be able to endorse them.²¹¹ If children believe their views on a product are misconstrued or manipulated to drive sales, this disconnect would go against the principles guiding the FTC's attempts to address commercial advertising.²¹²

Katie Stauffer loves when her family collaborates with Vicks specifically, partially because she believes in and supports the brand.²¹³ However, her children may not necessarily know about the products they are promoting. Furthermore, these promotions are attached to the child's name and associated online account. This connection can further lead viewers to believe that the account posts are genuine, even with the disclosure, and thus facilitates confusion. The potential for commercial sharenting to foster misleading content could lead to FTC-related concerns.

C. COURTS HAVE EXPRESSED CONCERNS REGARDING MISLEADING COMMERCIAL CONTENT

Courts also view misleading commercial speech as problematic. Per the Supreme Court, commercial information is “indispensable”—it influences private decisions that drive the market.²¹⁴ How information is framed can influence its appeal. The Court has acknowledged that “[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest.”²¹⁵ The skepticism accompanying advertising restrictions should carry over into views on commercial sharenting.

Efforts to regulate commercial sharenting may raise constitutional concerns.²¹⁶ The Internet is a “modern public square.”²¹⁷ The First Amendment limits

210. One professional who works with influencers recommends that those promoting content for commercial purposes online “[o]nly endorse things that you have worked with yourself.” Neal Schaffer, *FTC Influencer Guidelines: What You Need to Know Today*, NEAL SCHAFFER (Aug. 4, 2022), <https://nealschaffer.com/ftc-influencer-guidelines> [<https://perma.cc/D2QY-5AHG>].

211. For more on children's reported lack of commercial knowledge, see generally INT'L CONSUMER PROT. & ENF'T NETWORK, *BEST PRACTICE PRINCIPLES: MARKETING PRACTICES DIRECTED TOWARDS CHILDREN ONLINE* 11–12 (2020), <https://icpen.org/news/1086> [<https://perma.cc/FS29-PNQ6>].

212. For more on the FTC's attempted mission in this space, see generally FTC, *supra* note 182.

213. Billy Nilles & Amanda Williams, *Influencer Katie Stauffer Takes Us Inside Her World*, E! NEWS (Oct. 18, 2019, 2:22 PM), <https://www.eonline.com/news/1084295/influencer-katie-stauffer-takes-us-inside-her-world> [<https://perma.cc/32X7-MX4S>].

214. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

215. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

216. For a discussion of potential constitutional concerns with efforts to regulate sharenting broadly, see Haley, *supra* note 87, at 1012–15. This Note assumes that the Court would view commercial sharenting posts as “speech” instead of “conduct.” For more on this distinction, see *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

217. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

interference with freedom of speech and expression.²¹⁸ First Amendment rights are so important that they are elevated “in a preferred position” of the Constitution.²¹⁹ The Court has extended First Amendment speech to include “ever-advancing” technology.²²⁰ Regulation of social media posts, as a “medium of expression,” could be considered through a First Amendment lens.²²¹ Yet First Amendment rights are not “absolute,”²²² including commercial speech rights.²²³ The First Amendment should not hinder efforts to address commercial sharenting.

Commercial sharenting—from “mommy blogging” to Instagram posting and more—is full of lucrative potential.²²⁴ The Supreme Court has yet to evaluate commercial speech in the context of social media,²²⁵ let alone commercial sharenting. Depending on the content of the posts, commercial sharenting posts could potentially be viewed as commercial speech. Per Black’s Law Dictionary, “commercial speech” is “[c]ommunication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech.”²²⁶ Advertisements can be commercial speech²²⁷—and when

218. See U.S. CONST. amend I. Through the Fourteenth Amendment, the First Amendment is made applicable to the states. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–71 (1942); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

219. *Follett v. Town of McCormick*, 321 U.S. 573, 575 (1944) (quoting *Murdock*, 319 U.S. at 115). This is unique to the United States and differs from how other countries approach these issues. See Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J.L. & TECH. 463, 466–67 (2014); Amy Kristin Sanders, *The “Exceptionalist Trap”: Why the Future First Amendment Must Take Fundamental Human Rights into Account*, 65 WASH. U. J.L. & POL’Y 61, 79 (2021) (“Unlike the United States, freedom of expression does not enjoy a preferred position in the EU, as is evidenced by Article 85’s language and directive to Member States to strike the balance largely as they see fit. The European approach, it seems, ensures the balance gives adequate weight to privacy.”); Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2103 (2018); Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 425–26 (2022).

220. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (“And whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952))).

221. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”).

222. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976) (“This Court has frequently denied that First Amendment rights are absolute . . .”).

223. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

224. See Hopewood, *supra* note 102; Ferris, *supra* note 88 (describing the “allure of money” as “blinding these days”).

225. See Harris, *supra* note 42, at 953 (“Only the lower courts have addressed the boundaries of the commercial speech doctrine in the context of social media.”); Lauren Myers, Note, *A Picture Is Worth a Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission’s Endorsement Guides*, 66 DUKE L.J. 1371, 1387–88 (2017); cf. *Bihari v. Gross*, 119 F. Supp. 2d 309, 318 (S.D.N.Y. 2000) (treating as commercial speech a website that contained hyperlinks to other websites that proposed commercial transactions).

226. *Speech*, BLACK’S LAW DICTIONARY (11th ed. 2019). There is ambiguity pertaining to the Court’s definition of commercial speech. See Harris, *supra* note 42, at 953–55 (“The Court has not

parents post about their children on online platforms for financial gain, commercial sharenting posts can function as advertisements.²²⁸ However, the Court has acknowledged that if the commercial speech is linked with noncommercial speech, the advertisements may no longer be deemed “commercial” for First Amendment protection purposes.²²⁹ If the posts were deemed to be purely commercial in scope, the commercial speech doctrine would apply.²³⁰ Further, even if the posts are not deemed to be commercial speech, there are many areas in which disclosure could be required.²³¹

Although commercial speech has an important function of educating consumers, policy arguments can support its limitation.²³² Commercial speech is evaluated under a standard resembling intermediate scrutiny.²³³ Applicable regulations are subject to a less stringent standard than those regarding noncommercial speech.²³⁴ When evaluating commercial speech, considerations include if the speech is or is not misleading.²³⁵ If the speech is misleading, the government has more authority to regulate.²³⁶

defined commercial speech any further since the definitions provided in *Virginia State Board of Pharmacy* and *Bolger* [in 1976 and 1983, respectively].”)

227. See *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

228. See, e.g., Nilles & Williams, *supra* note 213. Commercial speech does receive protection. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.”).

229. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–76 (1988) (“It is not clear that a professional’s speech is necessarily commercial whenever it relates to that person’s financial motivation for speaking. But even assuming, without deciding, that such speech in the abstract is indeed merely ‘commercial,’ we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.” (citation omitted)).

230. If the commercial speech doctrine does not apply, the FTC can still serve as a pathway for regulatory efforts to address commercial influencer speech. See Harris, *supra* note 42, at 954–55.

231. See Fredricks, *supra* note 206, at 41–42.

232. See Benjamin Shmueli, *Children in Reality TV: Comparative and International Perspectives*, 25 DUKE J. COMPAR. & INT’L L. 289, 330 (2015).

233. See *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“[L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be narrowly tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.”). Some have argued that the Court may be heading toward a stricter level of scrutiny for commercial speech. See, e.g., E. Wesley Campbell, Note, *But It’s Written in Pen: The Constitutionality of California’s Internet Eraser Law*, 48 COLUM. J.L. & SOC. PROBS. 583, 588 (2015).

234. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980) (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”). This flexibility can also apply to disclosures. See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 n.14 (1985).

235. These considerations would involve interrogation under the *Central Hudson* test. For the *Central Hudson* test, see 447 U.S. at 566 (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that

Given concerns about the misleading nature of commercial sharenting posts, there may be more opportunities—centered around consumers and child laborers—to regulate and ultimately build consensus.

III. COMMERCIAL SHARENTING SHOULD BE FRAMED AS AN ISSUE THAT RAISES CHILD LABOR CONCERNS

This Part argues that children who appear in commercial sharenting posts lack legal protections afforded to child actors and entertainers on other platforms. Commercial sharenting can raise concerns relating to child labor issues, including parents posting even when the child stars want them to stop.

A. THE CHILD STARS OF COMMERCIAL SHARENTING POSTS LACK LEGAL PROTECTION

When children pose for commercial sharenting posts, they are working. Because federal statutes do not define “work,” that job has been “left to the courts,”²³⁷ and the term has been interpreted broadly.²³⁸ Work-related activities should be undertaken in the interest of the employer.²³⁹ The Court’s definition of work includes common understandings of the term, despite an employer’s formal acknowledgement—or lack thereof.²⁴⁰ Physical exertion is not a requirement, and it is not necessary that all of an employee’s time is spent in a productive manner.²⁴¹ When placing their children in the spotlight of commercial sharenting posts, parents are controlling the children’s activities, further demonstrating how this behavior is “work.”²⁴² Circumstances can facilitate an employer–employee

interest.”). However, the test has been criticized. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528 (1996) (Thomas, J., concurring) (“In my view, the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not.”); *id.* at 517 (Scalia, J., concurring) (“I share [Justice Thomas]’s discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.”).

236. For more on how other countries have sought to address misleading information relating to people online through the “right to be forgotten,” see Haley, *supra* note 87, at 1015–20.

237. See Adam P. Greenberg, Note, *Reality’s Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?*, 82 S. CAL. L. REV. 595, 607 (2009).

238. See Liana M. Nobile, Article, *The Kids Are Not Alright: An Open Call for Reforming the Protections Afforded to Reality Television’s Child Participants*, 17 U.C. DAVIS J. JUV. L. & POL’Y 41, 52 (2013) (“[T]he Supreme Court has interpreted the term ‘working’ broadly. Under the Supreme Court’s interpretation, a person can be working even if he or she is simply sitting idly, waiting for instruction from his or her employer.” (footnote omitted)).

239. See Greenberg, *supra* note 237, at 607–09 (citing case law in support of this claim).

240. See Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 48 (2010) (“The Supreme Court has defined work as ‘physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.’ This focuses on the nature of the activity performed as well as on who controls it and realizes its benefit. This definition is broad, and encapsulates what is commonly understood to be ‘work’ or ‘employment,’ even if the employer has not formally acknowledged it as such.” (footnotes omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944))).

241. See *id.* at 48–49; see also Royal, *supra* note 120, at 455 (observing that “courts have long agreed that ‘work’ occurs despite no compensation or formal employment”).

242. Cf. Podlas, *supra* note 240, at 50 (“When activities are undertaken voluntarily, rather than at the behest of an employer, or for some other purpose, they do not qualify as work. Simply put, these

relationship²⁴³—even without a formal contract, parents could still be responsible for an employment relationship with their children. And parents can create commercial sharenting posts inexpensively.²⁴⁴

Federal child labor provisions were codified under the Fair Labor Standards Act (FLSA) of 1938—long before social media’s launch—“to ensure that when young people work, the work is safe and does not jeopardize their health, well-being or educational opportunities.”²⁴⁵ This law, per the Supreme Court, was meant to be viewed broadly²⁴⁶ and applies to activities constituting “work.”²⁴⁷ Under the FLSA, people generally need to be fourteen years old (one year older than the minimum age to have an Instagram account²⁴⁸) to be employed.²⁴⁹ The FLSA carves out an exemption from its child labor restrictions for child entertainers, determining that the child labor rules “shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”²⁵⁰ Yet posts disseminated through commercial sharenting do not meet this criteria—a parent’s Instagram account or blog differs from “motion pictures[,] . . . theatrical productions, or . . . radio or television productions.”²⁵¹

activities are not ‘controlled and required by the employer.’” (quoting *Leone v. Mobil Oil Corp.*, 377 F. Supp. 1302, 1303–04 (D.D.C. 1974)).

243. *Id.* at 51.

244. *Cf.* Royal, *supra* note 120, at 453 (arguing that reality programming is child labor done “with relatively inexpensive labor costs”).

245. *Child Labor*, U.S. DEP’T OF LAB.: WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/child-labor> [<https://perma.cc/2Z4U-QT7W>] (last visited Mar. 17, 2023). States began regulating child labor on their own before the FLSA, with mixed success. *See* Royal, *supra* note 120, at 456.

246. *See* *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 597 (1944) (discussing that the FLSA “must not be interpreted or applied in a narrow, grudging manner”), *superseded by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. § 251); *Roland Elect. Co. v. Walling*, 326 U.S. 657, 669–70 (1946) (“[The FLSA] seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce . . . substandard labor conditions.”).

247. *See Handy Reference Guide to the Fair Labor Standards Act*, DEP’T OF LAB.: WAGE & HOUR DIV. (Sept. 2016), <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa> [<https://perma.cc/2W7W-B3QD>]; *Tenn. Coal*, 321 U.S. at 597.

248. *See How Do I Report a Child Under the Age of 13 on Instagram?*, INSTAGRAM: HELP CTR., <https://help.instagram.com/517920941588885> [<https://perma.cc/89UQ-LN3S>] (last visited Mar. 17, 2023).

249. *Age Requirements*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/youthlabor/agerequirements> [<https://perma.cc/9X8Q-JU69>] (last visited Mar. 17, 2023).

250. 29 U.S.C. § 213(c)(3); *see also* Nila McGinnis, Note, “They’re Just Playing”: Why Child Social Media Stars Need Enhanced Coogan Protections to Save Them from Their Parents, 87 MO. L. REV. 247, 254 (2022) (“The belief that child acting is non-oppressive, which prevailed when FLSA was written, persists in the age of social media.”); Amanda G. Riggio, Comment, *The Smaller Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493, 517–19 (2021) (noting that current child labor laws do not fully account for child performers); Neyza Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD & FAMILY L.J. 85, 88 (2020); O’Neill, *supra* note 40, at 46–48 (noting that the FLSA “governs child labor but does not apply to children employed by a parent”).

251. 29 U.S.C. § 213(c)(3). *Cf.* Masterson, *supra* note 40, at 590 (“California defines the ‘entertainment industry’ to include any organization employing a minor in ‘[m]otion pictures of any

Federal law has not kept up with technological developments to account for the myriad of ways children promote products.²⁵² Regulation has mostly been left to the states, which can act on their own to protect child entertainers.²⁵³ For instance, in 1939, California's "Coogan Law," named after famous child actor Jackie Coogan, went into effect.²⁵⁴ Under the Coogan Law, a portion of money earned by child actors must be put into a trust for the young actors.²⁵⁵ Fifteen percent of the child's wages must be deposited in these "Coogan Accounts" until the child turns eighteen.²⁵⁶ "Coogan Accounts" are "special blocked trust" funds found at banks, credit unions, or brokerage firms.²⁵⁷ Parents cannot circumvent this law and its restrictions on their own: under the Coogan Law, parents or guardians have "a fiduciary relationship" with the child.²⁵⁸ Restrictions regarding trust funds for child performers are currently in force in California, New York, Illinois, Louisiana, and New Mexico.²⁵⁹ These legal efforts are inherently imperfect.²⁶⁰

type . . . using any format . . . by any medium . . .'. This definition is arguably broad enough to capture social media production, but given the novel and powerful social media marketing industry, it was surely not contemplated by the statutes of any state, and states are not currently applying actor laws to social media production." (alteration and omissions in original) (quoting CAL. CODE REGS. tit. 8, § 11751(a) (2020)); *id.* at 607 ("Social media marketing is new, growing, and distinct from any other industry, including child acting.").

252. The Act's child labor restrictions do not apply to children working for their parents. *See* O'Neill, *supra* note 40, at 46. Mental health professionals have also called for more protections. For instance, the Royal College of Psychiatrists called on the British government "to consider new laws to ensure 'kidfluencers' are not overworked or exploited in the 'gold rush' for internet fame." *See* Mike Wright, *YouTube 'Kidfluencers' Should Have Same Legal Protections as Child Actors, Says Royal College of Psychiatrists*, TELEGRAPH (July 10, 2019, 11:00 PM), <https://www.telegraph.co.uk/news/2019/07/10/youtube-kidfluencers-should-have-legal-protections-child-actors>.

253. Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 431 (2004).

254. *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [<https://perma.cc/B5BK-S5ZA>] (last visited Mar. 17, 2023); *see also* Saragoza, *supra* note 40, at 583 (noting that "California's Coogan Law is also cross referenced in California's Labor Code" (citing CAL. LAB. CODE § 1308.9)).

255. Rosman, *supra* note 16. California's law was overhauled in 1999. *See* Julia Carrie Wong, 'It's Not Play If You're Making Money': How Instagram and YouTube Disrupted Child Labor Laws, GUARDIAN (Apr. 24, 2019, 1:00 AM), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> [<https://perma.cc/AFG2-L2MD>].

256. Masterson, *supra* note 40, at 589.

257. SAG-AFTRA, *supra* note 254.

258. CAL. FAM. CODE § 6752(d). For an example of the fiduciary relationship, see *Watson v. Watson*, No. B158189, 2003 WL 21546062, at *4 (Cal. Ct. App. July 10, 2003).

259. SAG-AFTRA, *supra* note 254. For a collection of child entertainment laws, see *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Jan. 1, 2023), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/4VZV-SYZD>].

260. *See* Siegel, *supra* note 158, at 428 (noting that Coogan Laws have "inherent imperfections that make application difficult and fail to protect all of a child's money"). These imperfections also extend to those who view protecting young people as the primary goal. *See* Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, 32 BEVERLY HILLS BAR ASS'N J. 21, 26 (1997) ("The limited body of case law on the subject suggests that the Coogan law provided far more protection to film makers than to child actors.").

The lack of legal protections for children featured in commercial sharenting posts creates frustration.²⁶¹ Parents who commercially sharent are bound up in their children's lives, yet social media posting is not currently covered under child labor laws.²⁶² Statutes resembling the Coogan Law relate to children employed by a third party—not necessarily to parents featuring their children in a promoted post.²⁶³ As Harvard Law's Leah Plunkett argues, "When parents have made 'sharenting' into a business enterprise, rather than a personal habit, their child stars should have legal protection, just as child stars do on movie sets and Broadway stages."²⁶⁴

Although not legally required, some parents choose to save some profits earned from their sharenting posts for their children. When reflecting on her commercial sharenting, mom Katie Stauffer shares, "The money we make is for the kids—their college and just for them later on—and that's the only reason we do it."²⁶⁵ In addition to saving for her child's future, commercial sharenter Martha Krejci donates fifteen percent of what her daughter Norah earns online to charity.²⁶⁶

Not all families, however, share this outlook²⁶⁷—or acknowledge the real work done by their children, instead viewing their kids as mere building blocks as they

261. See Onibada, *supra* note 137.

262. See Melody Burke, *New Child Labor Laws Needed to Protect Child Influencers*, ONLABOR (Apr. 27, 2022), <https://onlabor.org/new-child-labor-laws-needed-to-protect-child-influencers> [<https://perma.cc/Z6DW-Q86H>] ("[C]urrently, the scope of Coogan Laws is limited to the traditional entertainment industry, and does not extend to children that are earning money via social media."); McGinnis, *supra* note 250, at 254–55 ("As social media, advertising and e-commerce affects interstate commerce and content is seen across state boundaries, federal regulations could legislate to protect the labor performed by children in the realm of social media. Unfortunately, attempts at regulating this industry at the federal level have been historically unsuccessful." (footnote omitted)). For children such as Zoey Nguyen-Miyoshi, who models in addition to being featured in commercial sharenting posts, the Coogan Law may apply. See Mohan, *supra* note 35. However, this is not the case for many children featured in commercial sharenting posts that do not model.

263. See Rosman, *supra* note 16.

264. Onibada, *supra* note 137. This issue is also gaining increased attention across the pond. In the United Kingdom, a new report spearheaded by the House of Commons' Digital, Culture, Media, and Sport Committee called for children who "build such big audiences and revenue opportunities" online to be "registered as 'working children' and protected accordingly." Digit., Culture, Media & Sport Comm., *Influencers: Lights, Camera, Inaction?*, HOUSE COMMONS: COMMS. (May 9, 2022), <https://ukparliament.shorthandstories.com/influencer-culture-DCMS-report> [<https://perma.cc/3LSM-M3ZU>]. Additionally, French law protects children who earn money from online content. See Anthony Cuthbertson, 'Kid Influencers' Classed as Child Labour Under New French Law, INDEP. (Oct. 8, 2020, 2:16 PM), <https://www.independent.co.uk/tech/child-labour-social-media-influencer-france-law-youtube-b861255.html>; see also Kerry Breen, *New Law Aims to Protect Finances, Privacy of Child Social Media Stars*, TODAY (Oct. 9, 2020, 6:43 PM), <https://www.today.com/parents/law-protects-finances-privacy-child-social-media-stars-t193881> [<https://perma.cc/XPA8-PTVR>] ("[France's] Bruno Studer, the politician behind the bill, told the French newspaper Le Monde that the law [that helped protect French social media child stars] would make France a pioneer in the rights of child social media stars.").

265. See Field, *supra* note 69.

266. Mohan, *supra* note 35.

267. Madison Fisher, commercial sharenting mom of young twins Taytum and Oakley, for instance, shares that the money that her daughters earn online goes to raising her family (although they have also created a savings plan for the twins). See CBS NEWS, *supra* note 152, at 17:40.

pursue their own fame. Some parents primarily view this commercial sharenting as their children being key to potential parental fame. One commercial sharenting parent explicitly said in a *CBS News* video that their goal is to be as famous as possible because that will allow their family to make more money.²⁶⁸ Commercial sharenter Simone Gittens views herself as the “creative direct[or]” for her daughter Summer’s account and keeps fifteen-to-twenty percent of her daughter’s online earnings.²⁶⁹ Gittens acknowledges that she is working for a business on behalf of her daughter—and that what she as the mom decides is integral to the family’s commercial success. Children featured in commercial sharenting posts play a leading role—and the law is lacking in terms of how to address concerns regarding their success.

B. WHEN COMMERCIAL SHARENTING, PARENTS CAN ENCOURAGE CHILDREN TO POST AGAINST THEIR WILL FOR THEIR OWN BENEFIT

Parents are profiting off their children’s appearances and actions online. These adults make contracts²⁷⁰ and consent to their children being portrayed in a certain way without necessarily seeking their child’s input. This does not violate current legal boundaries—under current law, children cannot take legal action to obtain their share of commercial sharenting earnings until they turn eighteen.²⁷¹ Yet the delay does not erase the uncomfortable dynamic these posts may facilitate.

Every day parents encourage their children to behave in ways they may not on their own, from brushing their teeth to going to medical appointments to sitting quietly at the table. Yet this influence differs from commercial sharenting parents seeking to encourage their children to do something—in the latter case, the child’s cooperation with posts would directly bring the family financial benefits. Adults will remind children of the importance of fulfilling their commitments to appear in certain posts.²⁷² Parents are coercing children to assist in the family’s business against the children’s own interests.²⁷³ One industry expert notes: “There are definitely times when I look at people’s feeds who are featuring their children, and I think, that doesn’t quite look like something [the children are] having a lot of fun with.”²⁷⁴

268. *Id.* at 01:00.

269. Mohan, *supra* note 35.

270. For those who make money online, signing a contract is an important part of the process. *See* Tanya Chen, *Dear Influencers, Always Sign a Contract*, BUZZFEED NEWS (Sept. 3, 2021, 8:01 AM), <https://www.buzzfeednews.com/article/tanyachen/dear-influencer-always-sign-a-contract> [<https://perma.cc/CU5J-TKT7>].

271. Lambert, *supra* note 79.

272. As commercial sharenting mom Melissa Hunter notes, regarding her boundary setting with her daughter, “If there’s a priority or if we agreed [to film a certain video], I’ll be like, ‘Hey, we agreed. Remember, we agreed to do this? Well, we have to do this right now.’ And she’ll be like, ‘Okay, let’s go do it.’” Dunphy, *supra* note 162 (alteration in original).

273. In a non-sharenting context, parents can also pressure their children to appear online. *See id.* (“‘She wanted me to be famous enough and make enough money where I could provide for the entire family,’ [one child with a monetized YouTube account, discussing her mother,] said. ‘She would be able to quit her jobs; my dad would be able to quit his job . . . She always told me that she would never touch a cent, and then it became, ‘I want 30 percent; I want 50 percent; I’m owed this.’”).

274. Schwab, *supra* note 32 (alteration in original).

It can be challenging to calculate the amount of work involved with partaking in this posting.²⁷⁵ Though Katie Stauffer asserts she posts whenever her children want, she typically has to prepare a certain number of posts every day to meet sponsorship obligations.²⁷⁶ This does not include her non-sponsored posts, taken to ensure that her feed is not exclusively advertisements.²⁷⁷ Though her daughter Mila loves the spotlight, Mila's twin Emma "just doesn't want to do it" and can need incentivization, such as ice cream, to cooperate for posts.²⁷⁸ The commercial and sponsorship-driven pressure can lead to posts even when children involved do not want to partake. Commercial sharenting parent Bee Fisher says that "[i]f there're days [the children are] totally not into it, they don't have to be."²⁷⁹ However, she makes an important exception: "Unless it's paid work Then they have to be there. We always have lollipops on those days."²⁸⁰ Fisher will bribe her children with lollipops to pose for Instagram posts to meet the demands of commercial sponsors.

Commercial sharenting parents are relying on their children to support their business objectives. As former "mommy blogger" Lyz Lenz noted, "Whether [my children] were striking a pose or testing a product, my income depended upon their performance."²⁸¹ Even if parents are shaping and framing the content, none of it is possible without their children. The kids are key to their parents' commercial success.²⁸²

Some parents think of their families through the framework of work. In Katie Stauffer's mind, her daughter Mila is "just like a child actor."²⁸³ Yet not all parents share this mindset. Commercial sharenting dad Kyler Fisher does not think his children work when they "are in a picture."²⁸⁴ According to commercial sharenter Ami Ahmed—who manages an Instagram account featuring her twins, Ava and Alexis, with over two million followers—"[t]he thing I always stress is that we work, the girls do not. The only thing fed to them if we do a brand deal is

275. See Walker, *supra* note 13 (noting that "[c]alculating the work hours, and therefore the salary distribution, of an edited toy review video hosted by a 5-year-old is dependent on mere guesswork").

276. Smidt, *supra* note 2. Per Stauffer, "You can't miss a day. You've always got to be on, you've got to be posting all the time, but very consistent." Nilles & Williams, *supra* note 213.

277. Smidt, *supra* note 2.

278. *Id.*

279. Ellis, *supra* note 67.

280. *Id.*

281. See Lenz, *supra* note 172.

282. Instagram has denied employing child influencers directly. Wong, *supra* note 255. This rejection does not mean that the company is not still fostering or facilitating what is occurring on its platform.

283. Smidt, *supra* note 2; see also Nilles & Williams, *supra* note 213 ("She's definitely an actress . . ."). For a discussion of similarities between "family child vloggers" and "child actors," see Riggio, *supra* note 250, at 511–12. These similarities can also resemble ties with commercial sharenting.

284. Kyler Fisher says, "Who gets to say who does the work? My kids are in a picture, and that's work? I'm not so sure." CBS NEWS, *supra* note 152, at 16:50; Ines Novacic, "It's Kinda Crazy": Kid Influencers Make Big Money on Social Media, and Few Rules Apply, CBS NEWS (Aug. 23, 2019, 8:08 AM), <https://www.cbsnews.com/news/kid-influencers-instagram-youtube-few-rules-big-money-cbsn-originals> [<https://perma.cc/5FEP-KFTA>].

a keyword or concept.”²⁸⁵ Yet BizParentz Foundation’s²⁸⁶ Anne Henry, who spearheaded legislation in California to help child performers, provides an alternative perspective: “If you’re lending your image and you’re doing something to sell a product, it’s work.”²⁸⁷ She calls for expanded reforms to protect children exposed on social media.²⁸⁸ Others have already and may continue to join her call.²⁸⁹

IV. PRESENTING COMMERCIAL SHARENTING AS A COMMERCIAL INTEGRITY AND/OR CHILD LABOR ISSUE CAN SPUR EFFORTS TO PROTECT CHILDREN

This Part argues that the Court’s strong protection of parental rights may not squash efforts to regulate commercial sharenting. Framing commercial sharenting as facilitating misleading content and raising child labor related concerns can advance efforts to ensure the law catches up with this technology usage.

A. THE LAW’S STRONG PARENTAL RIGHTS PROTECTIONS ARE NOT ABSOLUTE AND LEAVE ROOM TO ADDRESS COMMERCIAL SHARENTING

Parents have a strong interest in matters relating to their children and their relationships with them.²⁹⁰ This is an elephant in the room when thinking about addressing commercial sharenting. Courts have assumed children are under their parents’ control²⁹¹ and have held that parents can “direct [their children’s] upbringing and education.”²⁹² Though commercial sharenting can lead to potential side effects, many parents who commercially sharent do not intend to be

285. Linton, *supra* note 28.

286. BizParentz Foundation is an organization “devoted to protecting professional child performers and helping them become healthy and successful adults.” BIZPARENTZ FOUND., <https://www.bizparentz.org> [<https://perma.cc/G77L-K5VE>] (last visited Mar. 17, 2023).

287. Lambert, *supra* note 79.

288. Henry says that “[i]f it’s work, then your money should be protected.” *Id.* Similarly, the Gosselin child stars from the reality television show *Jon & Kate Plus 8* allegedly may have unfairly been denied savings from their hit television show. *See* Levey, *supra* note 17. Though a reality television show is not commercial sharenting, it nevertheless is applicable to think about how children’s likeness is used for this purpose. Additionally, in extreme cases, parents like Machel Hobson have kept their children out of school to dedicate them to influencing. *See* Wong, *supra* note 255.

289. *See generally* Onibada, *supra* note 137 (noting several platforms that have called for changes in federal and state labor laws to help regulate and protect child influencers).

290. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion) (“[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

291. *See* Schall v. Martin, 467 U.S. 253, 265–66 (1984) (“[T]he juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s ‘*parens patriae*’ interest in preserving and promoting the welfare of the child.” (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982))); Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988) (plurality opinion) (noting that children have rights, “but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind”); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents . . .”).

292. Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (“[I]t is the natural duty of the parent to give his children education suitable to their station in life . . .”); Troxel, 530 U.S. at 65 (“[W]e held that the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own.’” (quoting Meyer, 262 U.S. at 399, 401)).

malicious when they post. If a parent sufficiently provides and cares for their children, there are likely limitations on how the state can intervene.²⁹³ However, the Supreme Court views “safeguarding the physical and psychological well-being of a minor” as a “compelling” interest.²⁹⁴

Although some children claim to enjoy the process of commercial sharenting—or at least their parents say they do²⁹⁵—these benefits do not cloud the real risks of commercial sharenting, from low self-esteem to privacy concerns to identity theft and more. Parental influence is not absolute under the law,²⁹⁶ providing potential opportunities to address commercial sharenting through regulation. Children have their own constitutional rights,²⁹⁷ including First Amendment rights,²⁹⁸ they “have a very special place in life which the law should reflect,”²⁹⁹ and they have some agency.³⁰⁰ Young people had autonomy, up until recently, to access abortion care without parental permission.³⁰¹ Parents cannot always decide when a child should be “institutionalized,”³⁰² and many states have parental consent exceptions for substance abuse treatment.³⁰³ This creates more room for the possibility of addressing other manifestations of the parent–child relationship, including commercial sharenting.

Additionally, accountability measures exist for egregious commercial sharenting. Parents can lose custody for “harassing and humiliating” their children online.³⁰⁴ Mom Machel Hobson was estimated to make “between \$106,800 and

293. See *Troxel*, 530 U.S. at 68–69. Parents make decisions every single day that do not result in state intervention, but that could be seen as potentially detrimental to their children from serving them dessert to showing them questionable television shows. These commercial sharenting posts, however, occur on a broader forum—online platforms—and with a broad purpose of benefiting the parents financially.

294. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982).

295. See *Smidt*, *supra* note 2; *Mooney*, *supra* note 12.

296. See *Prince*, 321 U.S. at 166; *Haley*, *supra* note 87, at 1011–12.

297. See *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion) (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”).

298. See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794–95 (2011) (determining that minors “are entitled to a significant measure of First Amendment protection” and that “a State possesses legitimate power to protect children from harm” (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975)); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S., 503, 506 (1969) (noting that First Amendment rights apply to children at school).

299. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

300. This is especially true in criminal law. See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448, 1461–62 (2018).

301. For examples of the Supreme Court supporting this autonomy prior to the Supreme Court’s decision restricting access to abortion care in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), see *Bellotti*, 443 U.S. at 633 n.11, 643–44; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976); and *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 (1977).

302. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

303. Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 *DUKE L.J.* 75, 137 n.260 (2021).

304. *Kamenetz*, *supra* note 14; see Geoff Weiss, *YouTube Finally Terminates Channels Belonging to Notorious ‘DaddyOfFive’ Parents*, *TUBEFILTER* (July 19, 2018), <https://www.tubefilter.com/2018/07/19/youtube-terminates-daddyofive-channels> [<https://perma.cc/9PUR-CJKY>].

\$1.7 million” annually through online content.³⁰⁵ She was ultimately charged with abusing five of her adopted children by “beating, pepper-spraying, molesting and starving children” as young as six.³⁰⁶ Hobson also kept her children out of school to dedicate them to posting and monetizing their content.³⁰⁷ Commercial sharenting is not immune from accountability measures.

B. THE PROPOSED FRAMING CAN HELP DRIVE ACTION

As former child actress Sheila James Kuehl said, “The law needs to be amended to catch up with the technology.”³⁰⁸ This evolution must include accounting for young people exploited through commercial sharenting.³⁰⁹ Technological advancement fosters opportunities to address technology itself³¹⁰—Americans increasingly favor regulation addressing technology³¹¹ and online misinformation.³¹²

However, commercial sharenting has been difficult to regulate, particularly as an activity parents do in the privacy of the home.³¹³ Some commercial sharenting critics have argued that technology platforms may be culprits in expanding its reach.³¹⁴ Legislation to comprehensively address obstacles to regulating sharenting has been introduced in California,³¹⁵ a state “leader in digital privacy protection.”³¹⁶ When the bill was originally introduced, it was intended to incorporate “employment of a minor in social media advertising” as part of a Coogan Law amendment.³¹⁷ However, the bill ultimately signed into law was stripped of

305. Holcombe, *supra* note 126.

306. Wong, *supra* note 255.

307. *See id.*

308. *Id.*

309. Sharenting for personal reasons also poses regulatory challenges. *See* Steinberg, *supra* note 38, at 867 (“While there are laws in place that protect an individual’s privacy in some circumstances, laws do little to protect children from parental oversharing.”).

310. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 180 (3d Cir. 2020) (“[F]aced with new technologies, we must carefully adjust and apply—but not discard—our existing precedent.”).

311. *See* Monica Anderson, *Fast Facts on Americans’ Views About Social Media as Facebook Faces Legal Challenge*, PEW RSCH. CTR. (Dec. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/12/10/fast-facts-on-americans-views-about-social-media-as-facebook-faces-legal-challenge> [https://perma.cc/F38B-BABF].

312. *See* Amy Mitchell & Mason Walker, *More Americans Now Say Government Should Take Steps to Restrict False Information Online Than in 2018*, PEW RSCH. CTR. (Aug. 18, 2021), <https://www.pewresearch.org/fact-tank/2021/08/18/more-americans-now-say-government-should-take-steps-to-restrict-false-information-online-than-in-2018> [https://perma.cc/DR8N-EMF9].

313. *See* Masterson, *supra* note 40, at 598–99, 605; McGinnis, *supra* note 250, at 259, 267; *see also* Brian Mund, *Social Media Searches and the Reasonable Expectation of Privacy*, 19 YALE J.L. & TECH. 238, 242 (2017) (“Citizens may reasonably expect the greatest level of privacy protection against government intrusion when actions and speech transpire within the private confines of an individual’s home.”).

314. *See* Lisa Stiffler, *Kids Are Non-Consenting Stars of Some Family ‘Vlogs’—and a High Schooler Wants to Change That*, GEEKWIRE (Feb. 15, 2022, 11:26 AM), <https://www.geekwire.com/2022/kids-are-non-consenting-stars-of-some-family-vlogs-and-a-high-schooler-wants-to-change-that> [https://perma.cc/7WX8-CGQA]; *see also* Kelly, *supra* note 77 (describing “heightened scrutiny of the impact social media platforms have on younger users”).

315. *See* Masterson, *supra* note 40, at 580, 590–91; Wong, *supra* note 255.

316. Steinberg, *supra* note 38, at 863.

317. Wong, *supra* note 255.

these protections.³¹⁸ The ease of capturing digital content of children for monetization has been praised by commercial sharenting parents yet created hurdles for regulatory efforts.³¹⁹ Requiring cooperation from the tech companies that serve as platforms for commercial sharenting itself can also present regulatory hurdles,³²⁰ impeding efforts to make substantial (and needed) legal change.

Technology moves faster than the law, yet this delay does not invalidate potential remedies. The challenges California faced do not erase the issue that parents are publishing misleading content for commercial gain and potentially exploiting their children's work. Stressing these additional framing options could help achieve consensus on efforts to address commercial sharenting, especially given its prevalence. Concerns about misinformation are rampant as Americans worry that they cannot spot deception.³²¹ The FTC can also be encouraged to focus on addressing this form of misleading commercial speech and ensure consumers viewing commercial sharenting posts are not deceived. For instance, advocates can seize opportunities to share public comments before the FTC.³²² Public pressure can help sound the alarm.³²³ Public education efforts can often be made to ensure that consumers know about the state law remedies available to them to thwart misleading advertisements.³²⁴ The FTC has even acknowledged the importance of sharing information with others to help raise awareness about its enforcement efforts.³²⁵

318. See *AB-2388 Employment: Minors*, CAL. LEGIS. INFO. (Sept. 5, 2018), https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180AB2388&cversion=20170AB238899INT [<https://perma.cc/GBC3-XPGF>] (comparing the bill introduced and the bill enacted). For a discussion of the statute's potential application to social media posts featuring the McClure twins, see Saragoza, *supra* note 40, at 592–93.

319. See Lambert, *supra* note 79.

320. See Silberling, *supra* note 25.

321. See Laura Santhanam, *American Voters Worry They Can't Spot Misleading Information, Poll Finds*, PBS (Jan. 21, 2020, 5:00 AM), <https://www.pbs.org/newshour/politics/social-media-disinformation-leads-election-security-concerns-poll-finds> [<https://perma.cc/2YFR-RQSH>] (demonstrating the pervasiveness of concerns regarding misinformation); see also Laura Silver, *Misinformation and Fears About Its Impact Are Pervasive in 11 Emerging Economies*, PEW RSCH. CTR. (May 13, 2019), <https://www.pewresearch.org/fact-tank/2019/05/13/misinformation-and-fears-about-its-impact-are-pervasive-in-11-emerging-economies> [<https://perma.cc/UA2Q-32HP>] (same).

322. For instance, the FTC shared in spring 2022 that it was seeking public comment on updates related to the Guides, discussed *supra* Section II.B. See FTC, *Strengthen Guidelines*, *supra* note 188. The Commission sought to promote this message on social media platforms. See FTC (@FTC), TWITTER (May 24, 2022, 12:34 PM), <https://twitter.com/FTC/status/1529138840157536261> [<https://perma.cc/2NK4-6J9Q>].

323. State law remedies can also help address influencer confusion. See generally Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV. 247, 254–258 (2019–2020) (discussing a “body of state law modeled after the FTC Act” that creates “a private right of action”).

324. “A number of state laws allow for individual or class action suits by consumers that challenge deceptive advertising practices, but consumers rarely take advantage of them; such suits require resources and motivation that laypeople—particularly those most vulnerable to deceptive claims—tend to lack.” Roberts, *supra* note 165, at 86 (footnotes omitted).

325. See Fair, *supra* note 187 (“If you have any influence over influencers, alert them to three developments . . .”).

Technological developments have continued to cause changes related to the workplace and made previously unfathomable workplace situations possible—including with regard to parents and children.³²⁶ “Minors working as entertainers are frequently left without anyone to look out for them, and it is for this reason that the federal government needs to step in and take action.”³²⁷ Many members of the public do not know about current child labor concerns³²⁸ and speaking out about this topic could spur distress.³²⁹ Advocates who want to promote legislation intended to curb child labor admit there needs to be more awareness raised surrounding these issues.³³⁰ Some advocates, including legal commentators, have called for a standardization of child labor laws,³³¹ yet efforts to address commercial sharenting extend beyond amending existing statutes. For instance, states can explore more social media-specific regulation³³² such that those children who are commodified online are included in these protections.³³³ More awareness can lead stakeholders to explore creative solutions, outside of government, that will ultimately help children.³³⁴

326. “It is clear that ‘[t]echnology is transforming modern employment as new, disruptive ways of conducting business are redefining how the employer-employee relationship functions.’” Samantha M. Adams, Note, “*Influencing*” the Legislature: The Need for Legislation Targeting Online Sexual Harassment of Social Media Influencers, 99 WASH. U. L. REV. 695, 698 (2021) (quoting John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 1 (2018)).

327. Krieg, *supra* note 253, at 429.

328. See Reid Maki, *Child Labor’s Public Perception Problem*, NAT’L CONSUMERS LEAGUE (Dec. 11, 2020), <https://nclnet.org/child-labor-public-perception> [<https://perma.cc/M8CD-3E54>]. Throughout American history, child labor practices were not always easily apparent. See Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Jan. 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm> [<https://perma.cc/C9YM-XJRA>] (“Although many child laborers, such as the newsies, worked in plain view of others on city streets, many did not.”).

329. As Justice Oliver Wendell Holmes noted, “if there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor.” *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting).

330. See Lambert, *supra* note 79 (quoting one California state legislator as saying that child-protection advocates are “not doing enough outreach” and are “relying on social media to . . . promote [a child-protection] bill”).

331. See Christopher C. Cianci, Note, *Entertainment or Exploitation?: Reality Television and the Inadequate Protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L.J. 363, 376 (2009).

332. See Masterson, *supra* note 40, at 590–91.

333. In addition to state-level approaches, for a discussion of opportunities at the federal level to protect children appearing in their parents’ YouTube videos and family vlogs, including a call for Congress to “make an amendment to the FLSA or enact a new law altogether,” see Riggio, *supra* note 250, at 516–17, 527–29.

334. Here stakeholders can include policymakers, educators, industry leaders, parents, and youth advocates. Harvard Law’s Leah Plunkett notes that “[i]nstead of or in addition to legal change [to address sharenting], we could look to create new tech offerings for safe sharenting. We could change our own habits in our homes, schools, and beyond.” PLUNKETT, *supra* note 5, at 142. These examples could be extended to apply to commercial sharenting and to include advertisers, agencies cooperating with advertisers, and other organizations.

In addition, the geographic flexibility of commercial sharenting poses additional regulatory challenges. Advocates of protections for children working in reality television have raised similar concerns. See Royal, *supra* note 120, at 473 (“Unlike traditional programming, which is often localized

If laws explicitly addressing commercial sharenting are not codified, emphasizing this new framing could lead others to adopt practices on their own. Settebello Entertainment, for instance, instituted a policy that it will only work with children protected by “Coogan accounts.”³³⁵ Even if the law moves slowly, organizations may follow Settebello’s lead and adopt policies incentivizing parents to support their children directly.³³⁶ Sponsorship companies can also be encouraged to write checks to the children featured in commercial sharenting posts directly.³³⁷ Additionally, as influencers have sought to unionize with the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA),³³⁸ unions can take proactive steps to protect child performers online.³³⁹ Awareness raising would also allow sponsorship companies to intervene to curb the spread of misleading information, or ensure the production process meets FTC standards. Learning about commercial sharenting and the harm it can facilitate spurs action on its own.³⁴⁰ Building consensus and raising awareness could foster pivotal changes to address commercial sharenting on the ground.

CONCLUSION

Upon meeting Mila Stauffer, a cable news host asked, “So you’re a big internet star, Mila. How does it feel to be so famous?” Mila responded: “Um, I don’t know.”³⁴¹ Mila’s digital footprint is massive. Millions know her name and her likeness from watching her grow up—and advertise products—on her mom’s online channels, where she appears as Mila. She appears as herself even when taking

in certain states, reality programming does not require elaborate production studios or sets and can occur everywhere.”).

335. Lambert, *supra* note 79. Settebello Entertainment’s Byron Austen Ashley has expressed concerns about children working long hours: “If [parents] are using [the child’s earnings] for personal reasons, that amplifies the risk of them planning 10-hour workdays, rather than structured, comfortable workdays.” *Id.* (alterations in original). Firms such as Bottle Rocket Management also compensate for a lack in regulation by referring clients to business managers. *Id.*

336. *See id.*

337. Schwab, *supra* note 32 (pointing to one commercial sharenting parent noting that sometimes checks will come in her children’s names, but that other times “companies will write checks directly” to her).

338. Taylor Lorenz, *TikTok Stars and Social Media Creators Can Now Join Hollywood’s Top Union*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/02/12/style/influencer-union-hollywood-SAG-AFTRA.html>. SAG-AFTRA is a union that “represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals.” *About*, SAG-AFTRA, <https://www.sagaftra.org/about> [<https://perma.cc/V889-TZGM>] (last visited Apr. 15, 2023). For more on the agreement, see *Influencer Agreement Fact Sheet*, SAG-AFTRA, <https://www.sagaftra.org/influencer-agreement-fact-sheet> [<https://perma.cc/GC7M-3CKW>] (last visited Mar. 17, 2023). Nevertheless, the influencer industry remains “overwhelmingly non-union.” *Id.*

339. For examples of steps SAG-AFTRA has taken to protect the Internet’s child stars, see *Protecting Young Performers*, SAG-AFTRA, <https://www.sagaftra.org/protecting-young-performers> [<https://perma.cc/45TS-32UQ>] (last visited Mar. 17, 2023).

340. For instance, a frustrated Reddit post from the daughter of a prominent Instagram influencer attracted over 3,500 comments, many of which were sympathetic to the children impacted by these posts. Leaver, *supra* note 23.

341. Smidt, *supra* note 2.

direction from her relatives. She may not know entirely what she is communicating when she poses for commercial sharenting purposes or what her impact is. There is no guarantee that her opinion on these posts will remain stagnant, especially since children's views on these posts can change dramatically over time. Further, child stars of commercial sharenting posts, such as Mila, may not know how they may be communicating misinformation in the media or how they may be working—without firmly reaping the benefits. Children whose parents overshared may overshare themselves,³⁴² causing the cycle to continue for years to come—unless regulation intervenes.

Congress has taken piecemeal approaches to protect children online.³⁴³ As Americans support technology-centered regulation,³⁴⁴ Congress has explored heightened approaches to protecting children online and advanced efforts to hold technology companies accountable for the potential harm they may bring to young people.³⁴⁵ Along with California's previous legislation,³⁴⁶ new legislation in the state of Washington aims to protect children featured on family-driven monetized social media accounts.³⁴⁷ The legislation, which is championed by a

342. Brooks, *supra* note 91.

343. See Children's Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501–6506. For more on COPPA and parental consent, see Virginia A.M. Talley, Note, *Major Flaws in Minor Laws: Improving Data Privacy Rights and Protections for Children Under the GDPR*, 30 IND. INT'L & COMPAR. L. REV. 127, 147–48, 151 (2019). For more on COPPA and the FTC, see *Complying with COPPA: Frequently Asked Questions*, FTC (July 2020), <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions> [<https://perma.cc/EWW7-9D6X>]. COPPA was passed in part because of parental concern. See Natalie M. Banta, *Minors and Digital Asset Succession*, 104 IOWA L. REV. 1699, 1712 (2019). COPPA enforcement efforts have not always been celebrated by online creators themselves. See Gavin Feller & Benjamin Burroughs, *Branding Kidfluencers: Regulating Content and Advertising on YouTube*, 23 TELEVISION & NEW MEDIA 575, 576 (2022) (noting that a number of YouTube creators referred to efforts to protect children online as the “COPPAocalypse”). Further discussion of COPPA is outside the scope of this Note.

344. See Anderson, *supra* note 311.

345. There has been a new push to explore how tech platforms are hurting young people online, for example. See Kids Online Safety Act, S. 3663, 117th Cong. (2022); Daniela Altimari, *Blumenthal, Blackburn Introduce Kids Online Safety Act to Protect Young People from 'Destructive Content, Addictive Dark Places'*, HARTFORD COURANT (Feb. 16, 2022, 1:08 PM), <https://www.courant.com/politics/hc-pol-kids-online-safety-act-20220216-jwfsmdi5nvavddq4simxulruwe-story.html>; Cecilia Kang, *Lawmakers Urge the Head of Instagram to Better Protect Children*, N.Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/2021/12/08/technology/adam-mosseri-instagram-senate.html>; Shannon Bond, *Senators Aim to Rewrite Child Safety Rules on Social Media*, NPR (Feb. 16, 2022, 8:21 AM), <https://www.npr.org/2022/02/16/1081000056/senators-aim-to-rewrite-child-safety-rules-on-social-media> [<https://perma.cc/BL7J-J8CN>]. President Joe Biden has also shown a recent push to protect children on social media platforms. See Makena Kelly, *Biden Demands Congress Protect Kids Online in State of the Union Address*, VERGE (Mar. 1, 2022, 9:27 PM), <https://www.theverge.com/2022/3/1/22957505/biden-children-kids-privacy-tech-facebook-instagram-frances-haugen-sotu> [<https://perma.cc/RE9F-J9V2>].

346. California recently passed AB 2273, a law requiring online platforms “to consider the best interest of child users and to protect their mental health and wellbeing.” See *Governor Newsom Signs First-in-Nation Bill Protecting Children's Online Data and Privacy*, CA.GOV: OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 15, 2022), <https://www.gov.ca.gov/2022/09/15/governor-newsom-signs-first-in-nation-bill-protecting-childrens-online-data-and-privacy> [<https://perma.cc/MVQ9-NCLM>]. However, the bill does not address child influencers or work protections for them. See Assemb. 2273, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted).

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

student, awaits next steps in the state legislature.³⁴⁸ There is an openness, in Congress and in states across the country, to increasing efforts to protect children online.³⁴⁹ Conversations about efforts to address commercial sharenting matter.³⁵⁰

Per the Supreme Court: “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”³⁵¹ Efforts to regulate sharenting, commercial and otherwise, are challenging. Yet discussing commercial sharenting as being potentially misleading (which could harm consumers) and entrenching child labor concerns, coupled with the negative side effects that commercial sharenting can facilitate, could help encourage the law to catch up with technology. This framing can help increase awareness about detrimental side effects that can accompany commercial sharenting, and help protect social media child stars, such as Mila, who are framed as portraying themselves while appearing in monetized posts on online accounts driven by their parents.

348. Stiffler, *supra* note 314. This legislation was crafted in part by student advocate Chris McCarty. *Id.* McCarty has also prepared advocacy materials aimed at legislators in different states across the country. See *Email Templates by State*, QUIT CLICKING KIDS, <https://quitclickingkids.com/email-templates-by-state/> [<https://perma.cc/3WDA-4PDR>] (last visited Mar. 17, 2023); Silberling, *supra* note 25 (describing how McCarty “started a website called Quit Clicking Kids to raise awareness about problems facing child influencers”).

349. See Stiffler, *supra* note 314.

350. Social media platforms even serve as avenues to discuss efforts to address commercial sharenting. See Onibada, *supra* note 137 (discussing Sarah Adams, who criticizes parents who post about their children online on her TikTok account, “Mom.Uncharted”).

351. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). For instance, California has a statute, known as the “California Eraser Law,” that “require[s] Internet companies to provide an easy-to-use method for a minor to delete a posting or a picture from a Web site before it’s transmitted to a third party.” See Andrea Peterson, *Author of California Online Eraser Law: It’s Not Always Easy to Find the Delete Button*, WASH. POST (Sept. 25, 2013, 5:07 PM), <https://www.washingtonpost.com/news/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/>. For the law, see CAL. BUS. & PROF. CODE § 22581.