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Sharenting and the (Potential) Right to Be Forgotten

KELTIE HALEY*

INTRODUCTION

Social networking sites—like Facebook, Instagram, Twitter, and YouTube—provide parents with the ability to instantly share information about their children with family and friends across the globe. While most parents are content sharing birthday pictures and humorous anecdotes about their toddlers with a select group of Facebook friends, other parents have capitalized (socially and monetarily) on disclosing information about their children to strangers on the internet.¹ Social media accounts dedicated to images, videos, and information about the account holder's children are often remarkably successful in terms of follower or subscriber count. For example, *The Shaytards*, a YouTube channel that posts multiple video blogs (vlogs) per week—documenting everything from bicycle rides and haircuts to the birth of a child—has amassed over five million subscribers in the span of ten years.² This type of extreme internet activity undoubtedly contributes to these children's digital footprints (traceable digital activity), often without their explicit consent, and can pose a serious privacy concern for them later in life.³ Yet, it is not just “internet famous” children whose privacy is at risk, as the average parent generally lacks the experience or expertise to protect their children from the risks associated with online information sharing.⁴

Sharenting is defined as a parent's use of social media to discuss their children's lives by sharing text posts, photographs, and videos that convey personal information about their children.⁵ For many parents, sharenting provides an opportunity to

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1. See Emine Saner, *The “Sharent” Trap – Should You Ever Put Your Children on Social Media?*, GUARDIAN (May 24, 2018, 2:00 PM), <https://www.theguardian.com/lifeandstyle/2018/may/24/sharent-trap-should-parents-put-their-children-on-social-media-instagram> [<https://perma.cc/8NXH-DRG4>]; Amelia Tait, *Is It Safe to Turn Your Children into YouTube Stars?*, GUARDIAN (Sept. 16, 2015, 4:24 PM), <https://www.theguardian.com/technology/2015/sep/16/youtube-stars-vlogging-child-safety-sacconejolys-katie-and-baby> [<https://perma.cc/PH62-KE6S>].

2. Shaytards, *Who Are the Shaytards?*, YOUTUBE (2013), <https://www.youtube.com/user/SHAYTARDS/featured> [<https://perma.cc/8N97-88FZ>]; see also Food Baby (@FoodbabyNY), INSTAGRAM, <https://www.instagram.com/foodbabyny> [<https://perma.cc/8SBT-LUGU>] (posting multiple images a day of the account holder's children with food from various New York City restaurants and gaining 308 thousand followers).

3. GWENN SCHURGIN O'KEEFFE & KATHLEEN CLARKE-PEARSON, AM. ACAD. PEDIATRICS, CLINICAL REPORT—THE IMPACT OF SOCIAL MEDIA ON CHILDREN, ADOLESCENTS, AND FAMILIES 802 (2011).

4. Bahareh Ebadifar Keith & Stacey Steinberg, *Parental Sharing on the Internet: Child Privacy in the Age of Social Media and the Pediatrician's Role*, 171 JAMA PEDIATRICS 413, 413 (2017).

5. See Grace Yiseul Choi & Jennifer Lewallen, “Say Instagram, Kids!”: Examining

connect with friends and family, seek out their support, and experience validation for their parenting decisions, which leads to a greater sense of satisfaction in their role as parents.⁶ Further, the decision to share information about their children is linked to a parent's right to direct the upbringing of their children, which is generally recognized as a fundamental liberty interest in American jurisprudence.⁷ However, there are significant harms from both a developmental and legal perspective associated with parents sharing too much information, or sharing inappropriate or embarrassing information and images, on social media sites.⁸ Parental oversharing can interfere with a child's development of their sense of identity and autonomy⁹ and can put a child at risk for identity theft, bullying by peers and adults (both online and offline), and potential college and job rejections later in life.¹⁰ In some legal contexts, minors have an—albeit limited—right to privacy outside of the context of the familial unit,¹¹ and I argue that this right should be extended to the online setting due to the long-lasting implications of oversharing personal information on the internet.

Part I of this Note serves as an evaluation of parental use of social media and further seeks to draw attention to the social and developmental impact parental oversharing can have on children. Part II examines the tension between parents' constitutional rights to direct the upbringing of their children, as well as their First Amendment interest in online expression, and their children's interest in personal data security and privacy. Part III provides an overview of the European Union's right to be forgotten framework in the sharenting context and considers the plausibility of implementing such a framework in the United States. Given the competing constitutional interests at stake, I argue that a balanced-rights approach should be taken to empower minors to control what personal information can be permanently disclosed about them, while also preventing infringement on the rights of parents to express their views on parenting and direct the upbringing of their children.¹² The right to be forgotten framework—adopted from the European Court of Justice's landmark ruling in *Google Spain v. Costeja*¹³ and codified in the General

Sharenting and Children's Digital Representations on Instagram, 29 HOW. J. COMM. 144, 145 (2018); Holly Kathleen Hall, *Oversharing: Is It Really Your Story to Tell?*, 33 J. MARSHALL J. INFO. TECH. & PRIVACY L. 121, 121–23 (2018); Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 842 (2017).

6. See Claire Bessant, *Sharenting: Balancing the Conflicting Rights of Parents and Children*, 23 J. COMPUTER, MEDIA & TELECOMM. L. 7, 8 (2018); Steinberg, *supra* note 5, at 846.

7. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); see *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

8. See Bessant, *supra* note 6, at 14; Carol Moser, Tianying Chen & Sarita Y. Schoenebeck, *Parents' and Children's Preferences About Parents Sharing About Children on Social Media*, CHI 2017, May 2017, at 5221, 5221; Kirsten Weir, *Parents: Watch Those Social Media Posts*, 48 MONITOR ON PSYCHOL., JULY/AUG. 2017, at 28, 28.

9. Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 772 (2011).

10. Keith & Steinberg, *supra* note 4, at 413–14; Steinberg, *supra* note 5, at 849, 854–55.

11. *Bellotti v. Baird*, 443 U.S. 622, 647–48 (1979).

12. Steinberg, *supra* note 5, at 876–77.

13. Case C-131/12, *Google Spain v. Agencia Española de Protección de Datos (AEPD)*,

Data Protection Regulation as the right to erasure¹⁴—would be an effective means of balancing these competing interests, as parents would still have the ability to disclose information about their children and family life on social media sites, while children would have the option to request that search engines remove links to specific pages when the child’s name is searched.¹⁵

I. UNDERSTANDING PARENTAL USE OF SOCIAL MEDIA AND THE RAMIFICATIONS OF SHARENTING

Studies on parental use of and behavior on social networking sites indicate that a majority of parents with minor children use some form of social media and experience positive benefits from using these sites, including a better connection with family and friends, access to advice, and validation of their parenting choices.¹⁶ Yet, this practice of parental sharing on social media sites can negatively impact their children by putting them at risk for serious threats, like identity fraud, exploitation, loss of educational and employment prospects, and developmental problems.

A. Parental Use of Social Media and Understanding Sharenting

Until recently, studies on children and online privacy tended to focus on concerns about children and teens publishing too much (or inappropriate) information about themselves online rather than parents’ use of social media and their risk of oversharing information about their children online.¹⁷ Expert opinions generally emphasize providing guidance to parents for understanding their children’s online behavior and how best to monitor their children’s use of social media.¹⁸ Yet, based on the high reported incidence of parental oversharing—with 74% of parents in one study reporting that they know of at least one other parent who has shared too much information about a child on social media¹⁹—and the fact that 92% of all U.S. two-year-olds have an online presence,²⁰ there is a real risk that parents lack adequate expertise with social media and privacy to protect their children from the harms associated with online information sharing.²¹

2014 E.C.R 317.

14. Commission Regulation 2016/679, art. 17, 2016 O.J. (L 119).

15. Giancarlo F. Frosio, *The Right to Be Forgotten: Much Ado About Nothing*, 15 COLO. TECH. L.J. 307, 326–27 (2017).

16. See, e.g., Bessant, *supra* note 6, at 8; C.S. Mott Children’s Hospital, *Parents on Social Media: Likes and Dislikes of Sharenting*, 23 MOTT NAT’L POLL ON CHILD. HEALTH, Mar. 16, 2015, at 1.

17. Charlotte Chalklen & Heather Anderson, *Mothering on Facebook: Exploring the Privacy/Openness Paradox*, SOC. MEDIA & SOC’Y, May 2017, at 1, 1–2.

18. Keith & Steinberg, *supra* note 4.

19. C.S. Mott Children’s Hospital, *supra* note 16, at 1.

20. Steinberg, *supra* note 5, at 849.

21. See Keith & Steinberg, *supra* note 4 (highlighting a number of harms associated with parental sharing that parents may not be aware of, including: identity theft, reposting of images on predatory sites, and sharing psychosocial or embarrassing information that should remain private).

A significant majority of parents of minor children indicate participation on at least one social media site, online forum, or blog.²² A 2014 study by C.S. Mott Children's Hospital National Poll on Children's Health indicates that 84% of mothers and 70% of fathers of children under the age of four use some form of social media, forum, or blog.²³ Of parents polled, 56% percent of mothers and 34% of fathers reported discussing child health and other parenting topics on social media.²⁴ Parents reported that social media is helpful to building community and making them feel like they are not alone (72%), for learning what not to do as a parent (70%), and for getting advice from more experienced parents (67%).²⁵ Undoubtedly, social media use plays a positive role in many parents' lives, as it allows parents to connect with family and friends, seek support for difficult parenting decisions, and avoid feelings of isolation.²⁶ Social media also provides a means for parents to draw attention to medical and social issues impacting children and allows parents of children with disabilities and terminal illnesses to develop a sense of solidarity and community in what can be a very isolating parental role.²⁷ Further, social media use can enhance feelings of self-worth and satisfaction, as parents report greater satisfaction in their parenting roles if their friends and family are more likely to comment on photographs of their children that they post online.²⁸

Yet, parents also appear to recognize that sharenting can be problematic, with 74% of parents knowing another parent who has shared too much information about their children online—56% recognizing embarrassing information being shared, 51% recognizing personal information that could identify a child's location, and 27% recognizing inappropriate photos of a child being shared.²⁹ Parents also indicate a concern about their own social media use and its implications for their children's safety and privacy. Of the parents surveyed in the C.S. Mott study, 68% expressed concern that someone could find out private information about their child, 67% were concerned that someone would share a picture of their child on another social media page or website, and 52% expressed concern that their child might be upset with, or embarrassed by, what they posted on social media as the child reaches adolescence.³⁰ A study of Australian mothers of children under the age of five revealed that 78% of those surveyed agreed that privacy issues on Facebook are of concern.³¹ These mothers indicated a number of serious concerns including: concerns about personal data being collected and used for marketing purposes; general unease about contributing to their children's digital footprints; confusion about the use of privacy

22. See C.S. Mott Children's Hospital, *supra* note 16; Keith & Steinberg, *supra* note 4 (citing a Pew study that indicates that seventy-five percent of parents with minor children use some form of social media, including Facebook, Pinterest, LinkedIn, Instagram, and Twitter).

23. C.S. Mott Children's Hospital, *supra* note 16.

24. *Id.*

25. *Id.*

26. Bessant, *supra* note 6, at 8; Keith & Steinberg, *supra* note 4; Steinberg, *supra* note 5, at 846.

27. See Bessant, *supra* note 6, at 8; Keith & Steinberg, *supra* note 4.

28. See Keith & Steinberg, *supra* note 4, at 8.

29. C.S. Mott Children's Hospital, *supra* note 16.

30. *Id.*

31. Chalklen & Anderson, *supra* note 17, at 5.

settings; the effectiveness of privacy settings; and the risk of stalking, bullying, or information collected online being used against them.³² However, despite these privacy concerns, 61% of the surveyed mothers listed posting pictures or comments about their children as their most frequent activity on Facebook.³³

Given the acknowledgement of privacy concerns by parents, it seems surprising that a majority of parents happily continue to post information about their children on social media sites. However, studies on self-disclosure and social media indicate that this is a common phenomenon.³⁴ Chalklen and Anderson refer to this behavior as a privacy paradox: social media users are willing to disclose personal information on social networking sites even though they express concerns over privacy issues on the same sites.³⁵ According to Tsay-Vogel, Shanahan, and Signorielli, “social media users are consistently exposed to mediated forms of self-disclosure, and this prevailing theme of personal information exchange can have a cumulative impact on one’s social reality, particularly perceptions related to the domain of privacy.”³⁶ This relationship between social media usage and relaxed perceptions and attitudes about privacy leads to greater self-disclosure of personal information online, which includes the disclosure of information about the user’s family and children.³⁷ Further, feelings of validation as a result of positive engagement from friends and family on social media create a positive feedback loop and encourage parents to share more information about their children.³⁸

B. Consequences and Risks of Sharenting for Children

Parental oversharing on social media sites can pose significant (immediate and long-term) threats to children’s legal rights. Children and adolescents are particularly vulnerable targets for identity fraud³⁹ and digital kidnapping—the practice of posing as someone else by reposting an individual’s images on other social media pages.⁴⁰ By sharing posts that include a child’s name, birthday, or home address, parents can make it easier for fraudsters to steal their children’s identity. Even if parents limit who can access their posts and images using privacy settings on social media sites,

32. *Id.* at 5–6.

33. *Id.* at 7.

34. See Mina Tsay-Vogel, James Shanahan & Nancy Signorielli, *Social Media Cultivating Perceptions of Privacy: A 5-Year Analysis of Privacy Attitudes and Self-Disclosure Behaviors Among Facebook Users*, 20 *NEW MEDIA & SOC’Y* 141, 142 (2018) (studying self-disclosure—a “communication behavior in which an individual consciously makes [themselves] known to others” through the disclosure of personal information).

35. Chalklen & Anderson, *supra* note 17, at 2.

36. Tsay-Vogel, Shanahan & Signorielli, *supra* note 34, at 143.

37. See *id.* at 154 (“The influx of personal information in the virtual environment appears to cultivate perceptions of privacy such that users are less concerned about privacy risks and pay less attention to privacy safeguards.”).

38. Steinberg, *supra* note 5, at 846.

39. Keith & Steinberg, *supra* note 4; Milda Macenaite, *From Universal Towards Child-Specific Protection of the Right to Privacy Online: Dilemmas in the EU General Data Protection Regulation*, 19 *NEW MEDIA & SOC’Y* 765, 765 (2017); O’KEEFFE & CLARKE-PEARSON, *supra* note 3, at 802.

40. Steinberg, *supra* note 5, at 854.

there is still a risk that images of their children can be saved and later reposted on an unsecured page.⁴¹ Although alteration of images does occur, pictures of children in any state of undress (such as images of potty training and bath time) are popular targets for use on predatory websites.⁴² Personal information about a child's current or frequent location (identified by tagging photos with locations or "checking in" on Facebook) can put children at risk for violent crimes and kidnappings, which is particularly concerning given that 76% of kidnappings and 90% of violent crimes against minors are perpetrated by family members or acquaintances.⁴³

In the long term, parents can negatively impact their children's ability to receive college and job acceptances through their participatory surveillance of their children, which is then made accessible to "dataveillance" firms that collect information and create profiles of people for economic incentives.⁴⁴ The information collected by dataveillance firms is then sold to advertisers, employment agencies, and college admissions offices (among others).⁴⁵ This means that a child's opportunities for employment and education are shaped by forms of social sorting determined by dataveillance and algorithms and based on personal information that they did not consent to making available.⁴⁶

Sharenting can also pose developmental risks to children, as it impacts the development of self-identity, autonomy, and trust and can inform interactions with their peers. By sharing information that should remain private, or by sharing revealing or embarrassing information about a child, parents are putting their children at risk for bullying by their peers, as well as by strangers.⁴⁷ The threat of embarrassment and bullying could severely impact a child's development as they learn to navigate the world as an autonomous individual. Adults with cognitive and physical disabilities have expressed serious concern about parents discussing their children's disabilities online and argue that this information is extremely personal and often embarrassing, which could impact the child's self-identity and how their peers interact with the disabled child.⁴⁸ Both legal and social science scholars recognize children's need for privacy in order to develop their sense of independence, self-reliance, and individuality.⁴⁹

Further, as children near adolescence, many begin to find their parents' intimate surveillance and information sharing on social media intrusive.⁵⁰ A study on parents'

41. *Id.* at 850.

42. Keith & Steinberg, *supra* note 4; Steinberg, *supra* note 5, at 847.

43. Steinberg, *supra* note 5, at 848–49.

44. Deborah Lupton & Ben Williamson, *The Datafied Child: The Dataveillance of Children and Implications for Their Rights*, 19 *NEW MEDIA & SOC'Y* 780, 782 (2017) (defining social or participatory surveillance as voluntary participation in social media through uploading images and videos to social networking sites like Facebook, Twitter, and YouTube, which thereby invites other social media users to surveil or watch).

45. Steinberg, *supra* note 5, at 849.

46. Lupton & Williamson, *supra* note 44, at 787.

47. Steinberg, *supra* note 5, at 854–55; *see also* Keith & Steinberg, *supra* note 4 (noting that embarrassing or revealing information shared by parents can be misused by others).

48. Bessant, *supra* note 6, at 8.

49. Shmueli & Blecher-Prigat, *supra* note 9, at 772–76.

50. Lupton & Williamson, *supra* note 44, at 788; *see also* Tara Haelle, *Do Parents Invade*

and children's preferences about parents sharing information about their children on social media found that children are averse to parents sharing information that is perceived to be embarrassing (such as nude baby pictures or unflattering images), information that discloses the child's bad behavior, and information that is overly revealing or intrusive (such as information about a child's friends or dating life) on social media.⁵¹ However, children generally view positive content about their accomplishments, happy family moments, and flattering photographs as acceptable for parents to post on social media.⁵² Privacy is also an essential component of forming trust and respect in a relationship, which is integral to a healthy parent-child relationship.⁵³ This is especially "relevant to parents' respect for their children's privacy,"⁵⁴ as parents' oversharing about their children on social media (without the child's consent) can limit a child's ability to maintain a trusting relationship with their parent.⁵⁵

Parents appear to be aware of the risks associated with online disclosure of information about their children but continue to post information about their children at relatively high rates,⁵⁶ which indicates a need for external support for children to remove content posted by their parents.

II. CONSTITUTIONAL RIGHTS IN TENSION

The U.S. Supreme Court has historically held parental rights—specifically the right to direct the upbringing of one's child—as among the oldest and most fundamental of the rights afforded by the Constitution.⁵⁷ The Court's general restraint in limiting parental rights arises from the U.S. societal assumption that parents have their children's best interest in mind and will do what is in their children's best interest.⁵⁸ Furthermore, the First Amendment's guarantee of freedom of expression presumably includes a parent's freedom to disseminate information about their children on social networking sites.⁵⁹ Yet, the Supreme Court has held

Children's Privacy When They Post Photos Online?, NPR (Oct. 28, 2016, 5:00 AM), <https://www.npr.org/sections/health-shots/2016/10/28/499595298/do-parents-invade-childrens-privacy-when-they-post-photos-online> [<https://perma.cc/GX6T-WPUV>].

51. Moser, Chen & Schoenebeck, *supra* note 8, at 5224 ("Many examples of content that children do not want parents sharing online were described in terms of photography, for example 'embarrassing photos', [sic] 'ugly pics,' 'baby photos', [sic] or '[p]hotos that can expose intimate life.'").

52. *Id.*

53. *Id.* (recommending that parents take a permission-seeking approach with their children when posting potentially personal information or images); Shmueli & Blecher-Prigat, *supra* note 9, at 788–89.

54. Shmueli & Blecher-Prigat, *supra* note 9, at 789.

55. *Id.*

56. Chalklen & Anderson, *supra* note 17, at 7–8.

57. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *see Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

58. Keith & Steinberg, *supra* note 4, at 414.

59. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

that parental authority is not absolute and can be restricted if doing so will protect the welfare interests of the child and the parent's actions are at odds with the child's welfare interest.⁶⁰ Additionally, the Court has recognized the right to privacy in the penumbra of the Bill of Rights⁶¹ and has held that—in certain contexts—children possess rights outside of the rights associated with their parents.⁶² In the context of sharenting, there is a clear tension between parents' rights to direct the upbringing of their children, as well as their First Amendment interest in online expression, and children's plausible right to privacy.

A. Supreme Court Jurisprudence and Parental Rights

In her majority opinion in *Troxel v. Granville*, Justice O'Connor wrote that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."⁶³ Indeed, the Court has long held out parental rights as among the fundamental liberties guaranteed by the Due Process Clause of the Fourteenth Amendment.⁶⁴ In *Meyer v. Nebraska*, the Court considered the constitutionality of a Nebraska state statute that prohibited the educational instruction of grade school children in any language other than English.⁶⁵ While refusing to precisely define the liberty interests guaranteed by the Due Process Clause of the Fourteenth Amendment, the Court concluded that among those freedoms is the right to "establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."⁶⁶ Therefore, the Court held that while the State can pass laws to improve the quality of its citizens, the right to direct the education of one's children in a language other than English is a fundamental right which necessitates respect by the State.⁶⁷ In *Pierce v. Society of Sisters*, the Supreme Court evaluated an Oregon statute that required children between the ages of eight and sixteen to receive an education in the public school setting, with the manifest purpose of the statute being to compel attendance at public schools for children who had not yet completed the eighth grade.⁶⁸ In following the doctrine established in *Meyer v. Nebraska*, the Court held that the Oregon statute unreasonably interfered with parents' liberty to direct the upbringing and education of their children.⁶⁹ Further, the Court acknowledged that "[t]he child is not the mere creature of the

60. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

61. *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965).

62. *Bellotti v. Baird*, 443 U.S. 622, 647–48 (1979); see also Jessica Ronay, *Adults Post the Darndest Things: [CTRL + SHIFT] Freedom of Speech to [ESC] our Past*, 46 U. TOL. L. REV. 73, 75–76 (2014) (noting that "[s]peech that is otherwise fully protected by the First Amendment may be restricted to protect children").

63. 530 U.S. 57, 65 (2000).

64. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty or property, without due process of law.").

65. 262 U.S. 390, 396–98 (1923).

66. *Id.* at 399.

67. *Id.* at 401.

68. 268 U.S. 510, 530–31 (1925).

69. *Id.* at 534–35.

State” and parents have both a right and a duty to prepare their children for a successful life.⁷⁰ In *Troxel v. Granville*, the Court considered the constitutionality of a Washington statute that permitted any person to have visitation rights when “visitation may serve the best interest of the child.”⁷¹ Again, the Court held that the Due Process Clause of the Fourteenth Amendment prohibits the State from infringing on the fundamental rights of parents solely because a judge believes a “better” decision could be made.⁷²

The First Amendment’s guarantees of the right to free expression and the right to free exercise of religion play a significant role in the promotion of parental rights.⁷³ In *Wisconsin v. Yoder*, the Supreme Court considered the constitutionality of Wisconsin’s compulsory school-attendance law in relation to the Free Exercise Clause of the First Amendment.⁷⁴ The Court found that the compulsory school-attendance law unconstitutionally interfered with the respondents’ religious liberties to direct the upbringing of their children, which the Court deemed as “established beyond debate as an enduring American tradition.”⁷⁵ Here, the Court recognized the respondents’ sincere belief in the Amish faith and belief that traditional secondary education substantially interferes with the religious development of Amish children and their continued integration into the Amish community.⁷⁶ Accordingly, the First Amendment’s guarantee of a right to free speech likely includes protections of a parent’s right to share information about their children on social media.⁷⁷ However, the right to free speech is not absolute, particularly in the context of speech that could be harmful to children.⁷⁸

B. Supreme Court Jurisprudence, Federal Law, and Children’s Rights

While somewhat limited in scope, a number of Supreme Court decisions indicate that children have rights that exist outside of the rights of their parents and the family. In *Prince v. Massachusetts*, the Court considered whether Massachusetts’s child labor laws violated the appellant’s First Amendment right to free exercise of religion and Fourteenth Amendment due process right to direct the upbringing of her ward.⁷⁹ While acknowledging the important and fundamental role that parents play in raising

70. *Id.* at 535.

71. 530 U.S. 57, 60 (2000).

72. *Id.* at 72–73.

73. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”).

74. 406 U.S. 205, 207 (1972).

75. *Id.* at 232, 234.

76. *Id.* at 216–18.

77. See generally Trevor Puetz, *Facebook: The New Town Square*, 44 SW. L. REV. 385, 385 (2014) (describing social networking sites as key sites for self-expression that are “dependent upon freedom of speech”).

78. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (finding that the First Amendment’s right to free speech did not protect against bans on the sale of material depicting children engaging in sexual activity, even if the material itself is not obscene); *Ginsberg v. New York*, 390 U.S. 629 (1968) (finding that the First Amendment permits the regulation of the sale of material that may be harmful to minors, even if the material itself is not obscene).

79. 321 U.S. 158, 164 (1944).

their children, the Court reasoned that the family is not beyond regulation if that regulation is in the public interest.⁸⁰ The Court held that the State's child labor laws do not violate either the First or Fourteenth Amendment, stating that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."⁸¹ In *Bellotti v. Baird*, the Court concluded that if the State requires a pregnant minor to obtain one or both parents' consent to receive an abortion, the State must also provide an alternative means of authorization for the procedure.⁸² Here, the Court recognized the potential conflict of interests between a child and her parents, particularly in settings where the parents have strong objections to abortion and the child is vulnerable to her parents' efforts to obstruct her access to an abortion or the courts.⁸³

The Supreme Court has recognized the existence of a right to privacy in the penumbras of the Constitution's Bill of Rights.⁸⁴ In *Griswold v. Connecticut*, the Court reasoned that the right to privacy has roots preceding the Bill of Rights.⁸⁵ Further, the Children's Online Privacy Protection Rule ("Rule") indicates that the United States recognizes that children possess privacy interests in the context of the internet.⁸⁶ Section 6502 of the Rule requires that operators of websites or online services must provide adequate notice of what information is collected from children under the age of thirteen and disclose what that information is used for.⁸⁷ Additionally, the Rule requires that operators of websites and online services receive parental consent before collecting, using, or disclosing personal information received from children.⁸⁸ While the Rule suggests that children have a recognized privacy interest, it is important to note that the Rule assumes a unified interest between parents and children in relation to the children's online privacy and security.⁸⁹

Parental rights are generally held out among the oldest and most fundamental rights in the United States.⁹⁰ Coupled with the First Amendment's guarantee of free speech, parental rights seem to be an almost impenetrable legal force for children to

80. *Id.* at 166.

81. *Id.* at 170.

82. 443 U.S. 622, 643 (1979).

83. *Id.* at 647.

84. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). In *Griswold*, the Court struck down a law that forbid the use of prescribed drugs or medical devices for the purpose of preventing contraception. *Id.* at 485. The Court found the very concept of searching a married couple's bedroom for signs of the use of contraception to be "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485–86.

85. *Id.* at 486.

86. See Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–06 (2012).

87. *Id.* § 6502.

88. *Id.*

89. Shmueli & Blecher-Prigat, *supra* note 9, at 783.

90. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

overcome.⁹¹ Yet, neither parental rights nor the First Amendment are absolute⁹² and children are not limited solely to the rights their parents can offer them.⁹³ Further, children possess privacy interests in the context of the internet,⁹⁴ which suggests that a balanced-rights approach to protecting children's online privacy and parents' right to freely express views on parenting could be implemented in the United States.⁹⁵

III. THE RIGHT TO BE FORGOTTEN

The right to be forgotten is defined as “the right of an individual to erase, limit, or alter past records that can be misleading, redundant, anachronistic, embarrassing, or contain irrelevant data associated with the person, likely by name, so that those past records do not continue to impede present perceptions of that individual.”⁹⁶ This right—announced in the European Court of Justice's decision in *Google Spain v. Costeja*⁹⁷ and codified in the European Union's General Data Protection Regulation as the right to erasure⁹⁸—recognizes the power struggle between the right to privacy and freedom of expression⁹⁹ and offers to balance the data subject's right to privacy against a search-engine user's right to access information, which is derived from the original poster's freedom of speech.¹⁰⁰ The right to be forgotten framework could alleviate the tension between parents' rights and children's privacy interests in the context of sharenting, as it balances the competing privacy interests of children and their parents' right to disseminate information about their children on social networking sites.

The European Court of Justice's landmark ruling in *Google Spain v. Costeja* formally recognized the right to be forgotten for European citizens.¹⁰¹ In *Google Spain*, the complainant—a Spanish national—lodged a complaint against Google Spain, Google Inc., and a Spanish daily newspaper, *La Vanguardia*, arguing that two pages mentioning his name and a “real-estate auction connected with attachment proceedings for the recovery of social security debts” were no longer relevant.¹⁰² Further, he reasoned that Google Spain or Google Inc. should be required to remove or conceal his personal data, cease to include the links in search results, and remove his personal data in the links to *La Vanguardia*'s website, as the proceedings (which

91. See U.S. CONST. amend. I.

92. See *New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

93. See *Bellotti v. Baird*, 443 U.S. 622, 647–48 (1979).

94. See Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–06 (2012).

95. But see Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 40, 45 (2017) (arguing that due to the right to privacy's limited textual legitimacy, the explicit First Amendment right to free speech would likely prevail over competing privacy rights).

96. *Id.* at 3.

97. Case C-131/12, *Google Spain v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317.

98. Commission Regulation 2016/679, art. 17, 2016 O.J. (L 119).

99. Frosio, *supra* note 15, at 311–12.

100. Kelly & Satola, *supra* note 95, at 10, 39.

101. *Google Spain*, 2014 E.C.R. ¶¶ 88–99.

102. *Id.* ¶¶ 14–15.

occurred over fifteen years prior to the case) were now irrelevant.¹⁰³ The Court of Justice found that, due to the passage of time, accurate data may become inadequate, irrelevant, or excessive and interfere with the data subject's right to privacy.¹⁰⁴ Given this, the Court of Justice found that a data subject may request that information be made unavailable to the public through a search of the subject's name on a search engine.¹⁰⁵ The right to be forgotten is codified in the European Union's General Data Protection Regulation under Article 17 as the right to erasure.¹⁰⁶ Under Article 17, data subjects have the right to request that data controllers erase personal data given that the data is no longer necessary in relation to the purposes for which it was collected, and the controller has the obligation to erase the personal data.¹⁰⁷

The General Data Protection Regulation specifically seeks to bolster the rights of children in relation to online and data privacy. The United Nations Convention on the Rights of the Child ("Convention") recognizes that children, due to their physical and mental immaturity, "need[] special safeguards and care, including appropriate legal protection"¹⁰⁸ Further, Article 16 of the Convention recognizes children's freedom from unlawful or arbitrary interferences with their privacy and prohibits unlawful attacks on their honor and reputation.¹⁰⁹ However, some scholars question the Convention's effectiveness in protecting children and their rights in the context of online privacy and dataveillance.¹¹⁰ The General Data Protection Regulation ("Regulation") expands upon the rights outlined in the Convention by explicitly acknowledging (European) children's rights in the context of data security:

Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. . . . The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.¹¹¹

Article 17 is generally viewed as the most prominent empowering right for children in the Regulation, as it allows children to directly request the removal of personal data from search engine results that could be damaging to their reputation.¹¹² Further, the right to be forgotten recognizes that the passage of time can minimize the value of the disclosed information and allows for the competing privacy interests

103. *Id.* ¶¶ 15–16.

104. *Id.* ¶ 93.

105. *Id.* ¶¶ 97–99.

106. Commission Regulation 2016/679, *supra* note 14.

107. *Id.* §§ 1, 1(a); see Simone van der Hof & Eva Lievens, *The Importance of Privacy by Design and Data Protection Impact Assessments in Strengthening Protection of Children's Personal Data Under the GDPR*, 23 COMM. L. 33, 37–38 (2018).

108. Convention on the Rights of the Child, pmbl., Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

109. *Id.* at art. 16.

110. See Lupton & Williamson, *supra* note 44, at 791.

111. Commission Regulation 2016/679, recital 38, 2016 O.J. (L 119); see also Macenaite, *supra* note 39, at 766.

112. See Macenaite, *supra* note 39, at 769–70.

of the child to be effectuated.¹¹³ Article 8 of the Regulation defines a child as an individual below the age of sixteen but allows member states to provide a law for a lower age so long as the age is not below thirteen.¹¹⁴ However, individuals can still exercise the right to be forgotten once the individual reaches the age of majority.¹¹⁵

Despite concerns about the implementation of the right to be forgotten in the United States, the right to be forgotten framework would be an effective remedy to solve the sharenting dilemma. The main critique of the *Google Spain* decision and the General Data Protection Regulation revolves around the shift in regulatory responsibility from the government to corporate actors, which could suppress free speech.¹¹⁶ However, Article 17 of the General Data Protection Regulation limits data controllers' obligation to erase personal data to the extent that processing personal information is necessary for exercising the right of freedom of expression and information.¹¹⁷ Further, while the power shift from judicial authorities to private/corporate parties may be problematic, the necessary criteria and principles needed for a balanced-rights implementation of the right to be forgotten have been defined in detail by European regulatory and judicial institutions.¹¹⁸

After the *Google Spain* decision, Google formed an advisory council comprised of academic scholars, media producers, data protection authorities, members of civil society, and technologists to establish criteria for the removal of links.¹¹⁹ Google also issued a transparency report,¹²⁰ which indicates a limited chilling effect on free speech and information.¹²¹ However, Google's transparency report indicates that minors, who make up just over five percent of data removal requestors, experience a delisting rate that is nearly twice as high as private nonminors.¹²² According to Google, common scenarios for delisting include: clear absence of public interest,

113. Steinberg, *supra* note 5, at 876.

114. Commission Regulation 2016/679, *supra* note 14, at art. 8, § 1.

115. Macenaite, *supra* note 39, at 770.

116. Kelly & Satola, *supra* note 95, at 15; *see also* Steven M. LoCascio, *Forcing Europe to Wear the Rose-Colored Google Glass: The "Right to Be Forgotten" and the Struggle to Manage Compliance Post Google Spain*, 54 COLUM. J. TRANSNAT'L L. 296, 327 (2015) (arguing that financial incentives could lead search engines to approve deletion requests); Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 90–92 (2012) (arguing that heavy fines could lead data controllers to opt for deletion in ambiguous cases, which could produce a chilling effect on speech).

117. Commission Regulation 2016/679, art. 17, § 3(a), 2016 O.J. (L 119); Frosio, *supra* note 15, at 317.

118. Frosio, *supra* note 17, at 324.

119. Theo Bertram et al., *Three Years of the Right to Be Forgotten*, ELIE 2 (Feb. 2017), <https://pdfs.semanticscholar.org/13f5/e3cd0e8e522238f5df2ce279e6188664165e.pdf> [<https://perma.cc/22UP-AUMR>] (defining delisting as the removal of certain URLs from appearing in search results linked to a particular individual's name).

120. *Id.*

121. *Requests to Delist Content Under European Privacy Law*, GOOGLE: TRANSPARENCY REP. [hereinafter *Transparency Report*], <https://transparencyreport.google.com/eu-privacy/overview> [<https://perma.cc/Q5AX-NV5F>] (indicating that only 46% of erasure requests which had been reviewed as of January 12, 2020 resulted in URLs being delisted); *see* Frosio, *supra* note 15, at 325.

122. Bertram et al., *supra* note 119, at 7.

sensitive information (including information about someone's sexual orientation, race, ethnicity, religion, political affiliation, or trade-union status), and content relating to minors or to minor crimes that occurred when requestor was a minor.¹²³ Furthermore, the right to be forgotten has a limited impact on the right to free speech, as the right only impacts results obtained from searches (on search engines) made based on a person's name, and the original content always remains accessible from individual websites or social media pages.¹²⁴

Notably, the American public appears to be receptive to the implementation of the right to be forgotten framework, at least for children. Based on a 2014 survey of U.S. adults, 61% of those surveyed believe that some form of the right to be forgotten (ability to remove "irrelevant" information) should be implemented in the United States.¹²⁵ Of the 61%, 15% believe that only minors should be afforded the right to be forgotten.¹²⁶ For 21% of Americans surveyed, the biggest concern in implementing the right to be forgotten is the fact that the definition of "relevancy" is too vague.¹²⁷ This indicates that U.S. citizens are aware that personal information found on the internet can be potentially harmful to children and adults and are open to the right to be forgotten.¹²⁸ Indeed, some states are beginning to pass legislation that reflects the European Union's right to be forgotten framework in the context of children.¹²⁹ In 2013, California passed a data privacy law that requires the operator of websites, online services, and mobile applications which are used by minors to permit minors, who are registered users of the online service, to remove content that the user published on the site.¹³⁰ The operator is also required to provide clear instructions to a minor on how to remove or request the removal of content.¹³¹ However, California's law is limited in the sense that it only requires the removal of content posted by the registered minor users, and does not require the removal of content posted by third parties, such as parents.¹³² Still, California's data privacy law, combined with studies suggesting U.S. citizens' interest in adopting a right to be forgotten, suggests that the implementation of a federal right to be forgotten law would be met with popular support.¹³³

123. *European Privacy Requests Search Removals FAQs*, GOOGLE: TRANSPARENCY REP. HELP CTR., <https://support.google.com/transparencyreport/answer/7347822> [<https://perma.cc/5EZ7-LZ6G>].

124. Frosio, *supra* note 15, at 326–27.

125. Daniel Humphries, *U.S. Attitudes Toward the 'Right to Be Forgotten'*, SOFTWARE ADVICE (Sept. 5, 2014), <https://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014/> [<https://perma.cc/C53G-RFSV>].

126. *Id.*

127. *Id.*

128. *See id.*

129. *See* Robert Lee Bolton III, *The Right to Be Forgotten: Forced Amnesia in a Technological Age*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 133, 138–39 (2014).

130. CAL. BUS. & PROF. CODE § 22581(a)(1)–(2) (2014); *see* Hall, *supra* note 5, at 134; James Steyer, *Oops! Button Lets Kids Remove Posts They Regret*, CNN (Sept. 26, 2013, 10:44 AM), <https://www.cnn.com/2013/09/26/opinion/steyer-california-eraser-button-law/> [<https://perma.cc/U84A-MYAR>].

131. BUS. & PROF. § 22581(a)(3).

132. *Id.* § 22581(b)(2).

133. *But see* Bolton, *supra* note 129, at 140–42 (discussing Europe and the United States'.

The right to be forgotten could be implemented in one of two fundamental ways in the United States. First, the United States could simply adopt the European Union's right to be forgotten framework (as is) by assigning search engines the task of evaluating removal requests and by allowing minors (and adults) to directly petition the search engines to remove links to irrelevant data by submitting an online form.¹³⁴ As previously noted, some U.S. privacy and media scholars express concern about placing the burden of evaluating data removal requests solely on search engines and social media providers.¹³⁵ These scholars argue that the search engines could be overly influenced by the financial ramifications of failing to comply with the regulation and would err on the side of caution by removing too much data in ambiguous cases, which could lead to unwarranted suppression of otherwise free speech.¹³⁶ However, Google's transparency report suggests that this concern might be somewhat unfounded, as the search engine has removed data links in less than fifty percent of data removal requests.¹³⁷

Alternatively, the right to be forgotten could be enforced by the court system or an administrative body specifically established to process data removal requests.¹³⁸ As neutral arbiters, the courts would implement the right to be forgotten in a uniform and transparent manner by consistently applying rules of procedure in such cases.¹³⁹ Further, the judiciary possesses specific expertise in applying legal definitions and would eliminate some of the burden from search engines.¹⁴⁰ However, by tasking the judiciary with evaluating data removal requests, the federal court system would likely be overwhelmed by an influx of removal requests,¹⁴¹ with Google alone receiving well over 800,000 delisting requests since May 29, 2014.¹⁴² The establishment of an administrative agency specifically designed to process delisting requests would allow for a more unbiased and uniform approach to evaluating such requests, while also limiting the burden on the court system.¹⁴³ Yet, by implementing a right to be forgotten framework that relies on judicial or administrative decision making, children would be less successful in bringing delisting claims against search engines. Under the Federal Rules of Civil Procedure, minors are only capable of bringing legal claims if they are represented by a general guardian, committee, conservator, or a like fiduciary; or by suing through a next friend or guardian ad litem.¹⁴⁴ Due to the general assumption that parents have their children's best interest in mind, children are often forced to rely on their parents to bring legal claims on

contrasting legal ideals).

134. See generally Macenaite, *supra* note 39, at 769–70.

135. See LoCascio, *supra* note 116 at 326–29; Rosen, *supra* note 116, at 90–92.

136. See LoCascio, *supra* note 116, at 327; Rosen, *supra* note 116, at 90–91.

137. *Transparency Report*, *supra* note 121.

138. See LoCascio, *supra* note 116, at 327.

139. See *id.*

140. See *id.* at 327–28. However, it is worth noting that search engines would still require legal representation in data removal suits, which would be both costly and time-consuming.

141. See *id.* at 328.

142. *Transparency Report*, *supra* note 121 (as of January 2020).

143. See LoCascio, *supra* note 116 at 328–29.

144. FED. R. CIV. P. 17(c).

their behalf.¹⁴⁵ In the context of sharenting, parents are unlikely to bring a suit on behalf of their children for the removal of content that the parents themselves posted.¹⁴⁶ Therefore, the courts would be required to appoint guardian ad litem for children to bring data removal claims,¹⁴⁷ which would be both costly and time-consuming for the courts.

CONCLUSION

The European Union's right to be forgotten framework should be implemented in the United States as a means of alleviating the tension between parental rights and children's privacy interest. The right to be forgotten offers a successful balanced-rights approach, as parents still have the ability to freely express information about their children and families on the internet, and children have the ability to remove search links to that content from search engine results.¹⁴⁸ While the right to be forgotten does not protect children from many of the immediate harms associated with sharenting (such as the disclosure of embarrassing or private information to friends and family on Facebook) nor does it completely remove that content from websites and social media sites, it does help eliminate some of its long-term harms.¹⁴⁹ Although the right to be forgotten is an important means of privacy protection for children, it should be a last resort for children to eliminate some of the long-term damages that parental oversharing can cause. To eliminate many of the immediate harms associated with sharenting and improve parent-child relationships, parents must be made aware of privacy risks and seek out ways to protect their children's privacy in the online setting.¹⁵⁰ Further, parents of teens and adolescents should be cognizant of their children's developing autonomy and seek out their opinion before sharing personal information about them online.¹⁵¹ Still, the right to be forgotten is an essential backend right afforded to children whose parents overshare on the internet and should be implemented as federal law in the United States.

145. See Keith & Steinberg, *supra* note 4, at 413.

146. If parents were willing to bring such a claim on their children's behalf, they would probably agree to simply delete the data from their social media page and avoid the unnecessary litigation.

147. FED. R. CIV. P. 17(c)(2).

148. See Steinberg, *supra* note 5, at 876–77.

149. See Lupton & Williamson, *supra* note 44.

150. See Steinberg, *supra* note 5, at 879–82 (discussing ways in which parents can better protect their children's online privacy and promote children's well-being and sense of autonomy).

151. See Chalklen & Anderson, *supra* note 17, at 7.