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## Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights

By Shannon Sorensen\*

*"[That] the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature of such protection."*

- Samuel D. Warren and Louis D. Brandeis, 1890<sup>1</sup>

### I. INTRODUCTION

Parents who post about their children online are hard pressed to view themselves as a threat. The constant stream of photos and videos is a public display of love and pride for their little ones. But the simple fact is that parents post photos of private moments with their kids all the time without their children's permission. While it is uncomfortable to point the finger at parents as compromising their children's rights, it is time to consider how we might protect children's privacy from even loving parents because even the most well-intentioned parent may be unknowingly compromising the autonomy of their child. The advent of social media has led to a new frontier in individual privacy, particularly so for children, whose appearance on social media is involuntary. Pictures that were reserved for the family photo album are now available to the entire online world through social media. Most people post about their own lives and it's common for parents to post about their children.

Academic discourse has not yet addressed the question of whether children have a right to choose online publicity or anonymity. Current discussions regarding children's privacy rights in social media center around two ideas: protecting children from online predators and the right of older children to interact online free from parental intrusion. Scholars have addressed the question of whether parents have a right to monitor their children's activity online and many advocate that doing so protects children's safety.<sup>2</sup> Some argue for increased protection of the right of parents to raise their children, free from unnecessary state intervention that results when law enforcement agents or government officers discover questionable photos posted online and take them out of context.<sup>3</sup> Numerous resources promote increased parental responsibility and restraint in what they post online to protect their children from online predators.<sup>4</sup> But no scholars have engaged the next

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<sup>1</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>2</sup> See, e.g., Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 759-60 (2011) [hereinafter Shmueli & Blecher-Prigat].

<sup>3</sup> For example, in one instance, a Florida mother posted what she intended to be a humorous photograph of her baby next to drug paraphernalia (a bong), and she was investigated by the state. LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY, 139 (2012). Other situations include when parents have lost custody in divorce disputes. "A woman who posted sexually explicit comments on her boyfriend's Myspace page lost custody of her child as a result." *Id.* at 142. "When a woman created Myspace pages for her seven- and ten-year-old daughters and friended them, they could then view her Myspace page, which contained photos that the judge said showed her posing "provocatively" in lingerie." *Id.* at 143.

<sup>4</sup> See, e.g., INTERNETSAFETY101.ORG, <http://www.internetsafety101.org> (last visited March 24, 2016) (this website lists the dangers of the Internet for children as including pornography, predators, and cyber bullying); *Net Smartz*

important step in the area of children's privacy online: privacy for its own sake. This Article aims to address how parents might be jeopardizing the privacy rights of their children by posting about them without their consent, or how they might be infringing on their child's ability to create and shape their own image, and presents a theoretical paradigm through which we might better achieve children's privacy interests online.

Around the twentieth century, there was a gradual shift from a property view between parents and children towards a concept of parents as trustees of their children's best interests.<sup>5</sup> This shift was beneficial, though only partial: theoretically analogous treatment of children and property still underpin much of the current discussion around children's rights.<sup>6</sup> The next step in this shift is a new theoretical approach: set the analysis of balancing children's right to privacy against their parents' right to parentage and free speech against the backdrop of parents as trustees of their children's rights. This requires examining the continuing impacts of the property paradigm and replacing it with the modern view of children as individuals with rights that deserve protection—even from their parents.

In this Article, I revisit the question that Warren and Brandeis first presented in 1890 in their well-known *Right to Privacy* article: “whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is,”<sup>7</sup> and specifically answer it in terms of what protections are afforded to children's right to privacy. Part I will discuss the impact of the advent of social media on privacy in general and its specific impact on children. Part II will follow the analytical framework presented by Warren and Brandeis, first examining the principles contained in existing law which can be invoked to defend children's rights to privacy in social media, then discussing how to apply and adapt the fundamental underlying principles to better protect children's rights to privacy.

## II. SOCIAL MEDIA HAS CHANGED PRIVACY FOR CHILDREN

Prior to the age of social media, family and children's lives were generally private. The only children who received publicity, or whose image or stories were made public, were child actors and models, children of celebrities, and the occasional exceptional child mentioned in a newspaper or magazine. Back then, vacation photos were scrapbooked. Personal stories about child-rearing were told in personal diaries or on the phone to Grandma. Then social networking sites were invented and the sociology of sharing changed.

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*Workshop*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, <http://www.netsmartz.org/InternetSafety> (last visited March 24, 2016); *Protecting Children's Privacy Online*, in PRIVACY AND THE INTERNET: YOUR EXPECTATIONS AND RIGHTS UNDER THE LAW 57–58 (Margaret C. Jasper ed., 2d ed. 2009) (the author cautions parents to carefully supervise their children's activity online because they “till lack maturity and judgment, which may lead them to divulge personal information that should not be revealed”).

<sup>5</sup> Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child As Property*, 33 WM. & MARY L. REV. 995, 1038–39 (1992) (stating that historians suggest that by the twentieth century, “[T]he concept of parental obligations as an outgrowth of divinely conferred paternal ownership and control of children had given way to that of parental trusteeship in the child's ‘best interests.’”).

<sup>6</sup> *Id.*

<sup>7</sup> Warren & Brandeis, *supra* note 1, at 197.

The year: 2004. The invention: Facebook.<sup>8</sup> Only ten months after its launch, Facebook's usership had grown to one million.<sup>9</sup> Initially only for college students, and then high school students, two and a half years after its birth, Facebook expanded its registration to everyone.<sup>10</sup> A year later, in October 2005, Facebook Photos made its debut,<sup>11</sup> and it caught on like wildfire.

Over the last twelve years, Americans' social media use has become prolific. Over 69% of Americans who use the Internet use some sort of social networking site; 66% of those use Facebook.<sup>12</sup> Facebook boasts 1.59 billion active users,<sup>13</sup> and Instagram, Facebook's photography smartphone app and website, has 400 million active monthly users.<sup>14</sup> On any given day, millions of photos are posted online, including 80 million on Instagram alone.<sup>15</sup> These numbers are particularly significant in the wider context: over three billion people in the world currently have Internet access.<sup>16</sup> That means a third of the Internet users in the world are using social media, posting over 29 billion photos on Instagram alone per year.<sup>17</sup> It is important to note that posts are not distributed equally among social media users. Pew Research Center identified a subset of Facebook users dubbed "power users," who contribute more than the typical user and tend to specialize in different activities.<sup>18</sup>

Perhaps most active of all are parents. Studies show that 78% of American moms have a social media account, and about half use it multiple times a day.<sup>19</sup> Facebook-using moms check the site more than other demographics.<sup>20</sup> The current canon on children suggests that "today's children are 'the most watched over generation in memory,'" <sup>21</sup> not to mention the most posted about. Currently, 81% of the world's children have an online presence before the age of two, and that number increases to 92% for United States children.<sup>22</sup>

Children are posted about so much that it has become a pop culture joke: look no further than the Google Chrome extension that started out as a third-party Facebook app, UnBaby.Me.<sup>23</sup> Designed by developers who lamented that their feeds were being "hijacked by over-sharing

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<sup>8</sup> Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007), <http://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

<sup>9</sup> FACEBOOK NEWSROOM, [newsroom.fb.com/company-info](http://newsroom.fb.com/company-info) (last visited Nov. 6, 2014).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> MEREDITH RINGEL MORRIS, SOCIAL NETWORKING SITE USE BY MOTHERS OF YOUNG CHILDREN (2014), [http://research.microsoft.com/en-us/um/people/merrie/papers/moms\\_and\\_social\\_networks\\_csw2014.pdf](http://research.microsoft.com/en-us/um/people/merrie/papers/moms_and_social_networks_csw2014.pdf).

<sup>13</sup> *Stats*, FACEBOOK.COM, <http://newsroom.fb.com/company-info/> (last visited March 24, 2016).

<sup>14</sup> *Celebrating a Community of 400 Million*, INSTAGRAM.COM (Sep. 22, 2015), <http://blog.instagram.com/post/129662501137/150922-400million> [hereinafter *Celebrating a Community*]; *Stats*, INSTAGRAM.COM. <https://www.instagram.com/press/?hl=en> (last visited March 24, 2016).

<sup>15</sup> *Stats*, *supra* note 13.

<sup>16</sup> *Internet Users*, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users/> (last visited March 24, 2016).

<sup>17</sup> *Celebrating a Community*, *supra* note 14.

<sup>18</sup> *Social Networking Fact Sheet*, PEW RESEARCH CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet>.

<sup>19</sup> EDISON RESEARCH, MOMS AND MEDIA 2014 (2014), <http://www.edisonresearch.com/wp-content/uploads/2014/05/Moms-and-Media-2014-FINAL-REPORT.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> Shmueli & Blecher-Prigat, *supra* note 2, at 761–62.

<sup>22</sup> *Digital Birth: Welcome to the Online World*, BUS. WIRE (Oct. 6, 2010), <http://www.businesswire.com/news/home/20101006006722/en/Digital-Birth-Online-World#.VJPGosAAJ>.

<sup>23</sup> *See Unbaby.me*, SOFTONIC, <http://unbabyme.en.softonic.com> (last visited Feb. 12, 2016).

parents,” the app replaces baby pictures on Facebook with photos of things like “cats, sunsets, and bacon.”<sup>24</sup> Innocent bystanders are not the only ones fed up with parents’ social media habits: the kids are, too. Saturday Night Live performed a “Damn It, My Mom Is On Facebook Filter” skit satirizing the embarrassing things parents do on social media: commenting embarrassing things on your photos (“Who is your new friend? She looks ill.”), and offering helpful, but uncool advice (“I have a five dollar coupon for Kohl’s”).<sup>25</sup> The satirical piece resonated with viewers because it was grounded in reality.<sup>26</sup> It manifested a real concern: teens, young adults, and people in general want control over their image online.<sup>27</sup> For the current generation of young adults, parents have become a threat to that control.

But it may be a lot worse for the next generation. Imagine if your entire life was on Facebook: pre-birth ultrasounds, birth pictures,<sup>28</sup> baby pictures, and first-day-of-school pictures. Despite these rather benign images potentially creating a violation of privacy themselves, the extent of sharing about kids does not stop there. Entire websites and blogs are dedicated to toddler-shaming where parents in an ironic show of parental solidarity share embarrassing things about their kids.<sup>29</sup> What parents do not realize, when they e-mail off their submission to Reasons Why My Son is Crying Dot Com, is that it is out of their hands forever.<sup>30</sup>

Parents who share can take it to the extreme. One mother posts a vlog (a video clip) on YouTube every single day. She documented her entire pregnancy and now documents every day of her children’s lives.<sup>31</sup> Other parents create Facebook or Instagram accounts for their children. According to a survey by Gerber.com, millennial moms are the biggest culprits: “close to 40 percent of mothers aged 18 to 34 created [independent] social media accounts for their baby.”<sup>32</sup>

<sup>24</sup> Austin Considine, *Making Facebook Less Infantile*, N.Y. TIMES (Aug. 8, 2012), <http://www.nytimes.com/2012/08/09/fashion/unbabyme-keeps-baby-pictures-off-facebook.html>.

<sup>25</sup> *Saturday Night Live: Season 36, Episode 3, “Damn It, My Mom Is On Facebook Filter,”* (NBC television broadcast Oct. 9, 2010), <http://www.nbc.com/saturday-night-live/video/moms-on-facebook/n12879>.

<sup>26</sup> MORRIS, *supra* note 12, at 1; Saturday Night Live, *Mom is on Facebook*, YAHOO VIDEO, <https://screen.yahoo.com/mom-facebook-000000431.html> (last visited Feb. 12, 2016). (The segment “satirizes concerns of teens and young adults whose privacy or ‘cool’ reputation may be compromised by their mother’s presence in their online social network.”) I suggest to my readers to view the clip themselves, because as succinct as Mr. Morris’s explanation is of why it resonates with young people, the actual source is always funnier than its explanation. See E.B. White, *Some Remarks on Humor, Preface to A SUBTREASURY OF AMERICAN HUMOR* (1941) (“Humor can be dissected, as a frog can, but the thing dies in the process.”).

<sup>27</sup> KJ Dell’Antonia, *Don’t Post About Me on Social Media, Children Say*, THE NEW YORK TIMES (March 8, 2016, 6:45 AM), [http://well.blogs.nytimes.com/2016/03/08/dont-post-about-me-on-social-media-children-say/?smid=fb-nytimes&smtyp=cur&\\_r=1](http://well.blogs.nytimes.com/2016/03/08/dont-post-about-me-on-social-media-children-say/?smid=fb-nytimes&smtyp=cur&_r=1) (“[P]arents can also present a problem for the child who prefers to control how she appears online . . . [A] high school sophomore in Natick, Mass., said, ‘I definitely know people who have parents post things they wish weren’t out there. There was a girl in my eighth grade class whose mom opened a YouTube account for her in the fourth grade to show off her singing . . . [O]n one of the last months of middle school, a peer played the song in class and almost the entire class laughed hysterically over it.”).

<sup>28</sup> See BIRTH PHOTOGRAPHERS.COM, <http://birthphotographers.com> (last visited Feb. 12, 2016) (A website for the International Association of Professional Birth Photographers, who offer their services to be present at a live birth and take photographs of everything from labor, birth, and post-birth photos of the baby).

<sup>29</sup> See REASONS MY SON IS CRYING, <http://reasonsmysoniscrying.com> (last visited Feb. 12, 2016) (A website devoted to documenting instances where a child is upset about something minor or absurd).

<sup>30</sup> THE SOCIAL NETWORK (Columbia Pictures 2010) (“The Internet’s not written in pencil . . . it’s written in ink.”).

<sup>31</sup> Judy Travis, *itsJudysLife*, YOUTUBE, <https://www.youtube.com/user/itsJudysLife/videos> (last updated May 2, 2016).

<sup>32</sup> Alesandra Dublin, *Have a Social Media Account for Your Baby? 40 Percent of Millennial Moms Do*, TODAY (Oct. 18, 2014),

One woman who created an Instagram feed for her son explained:

I think everything [he] does is cute and I would love to post pictures all day long of what he does—but, I didn't want him to hijack my page... I'm still me—I'm a mom, but I'm also a daughter, girlfriend, employee. Although [name omitted] is the most important thing in my life, it's a step I took to make sure I remained me.<sup>33</sup>

Other moms disagree on the posting-as-the-child front:

I would never create any social media profile in my child's name and update it as if I were him. My son should have the choice as a young adult about if he wants a social media presence, and what that presence will look like. I don't think it's a parent's place to make that decision on behalf of their child.<sup>34</sup>

Ironically, despite this astute reasoning, this same mother actively posted pictures of her child on her own Instagram account, and even created a hashtag for her son during pregnancy.<sup>35</sup> She missed the point: privacy issues do not come from only setting up personal accounts for kids but rather from posting about them online at all.<sup>36</sup> Parents should be concerned not only about the privacy issues, but also with preserving the child's self-image and preventing them from future embarrassment.<sup>37</sup>

Looking forward, one disconcerting reality is that mothers are not the only active social media users. Millennials dominate social media, and as they reach childbearing age, their increased social media use does not slow down.<sup>38</sup> Pairing that with the general trends of parents to post a lot online about their kids, it is safe to say that with the introduction of the first Millennials' babies, it is full steam ahead with over-sharing. Unfortunately, this has consequences that many do not anticipate when posting online:

Unlike in a democracy, Facebook is unilaterally redefining the social contract—making the private now public and making the public now private. Private information about people is readily available to third parties. At the same time, public institutions, such as the police, use social networks to privately undertake activities that previously would have been subject to public oversight. Even though cops can't enter a home without a warrant, they scrutinize Facebook photos of parties held at high school students' homes. If they see the infamous red plastic cups suggesting that kids are drinking, they prosecute the parents for

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<http://www.today.com/parents/have-social-media-account-your-baby-40-percent-millennial-moms-1D80224937>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Specifically, privacy issues surrounding potential predators or identity theft. However, the author points out that the biggest risk of setting up an account for their child is that "Your children might be embarrassed later." (quoting security specialist Bruce Schneier).

<sup>38</sup> *Social Networking Fact Sheet*, *supra* note 18. This source shows that 18–29 year-olds use social media at higher percentages than other age groups, and these numbers have been steadily increasing over the last few years.

furnishing alcohol to minors.<sup>39</sup>

One researcher warned, “social networks reveal aspects of a parent’s life that judges have not had access to before.”<sup>40</sup> Another warned that some posts can come back to bite parents, and to prevent this future harm, parents either have to “act like a Stepford parent and post only positive and glowing things about your every moment with your child,” or “never to have ... a social network page.”<sup>41</sup> However, Andrews failed to acknowledge that even creating a glowing reputation for your child online could infringe on their right to self-definition.

There are some benefits to our social media craze. The Pew Research Center has found that social networking helps us maintain our social ties, have more close ties and be less likely to face social isolation.<sup>42</sup> Facebook users in particular are more trusting and have more close relationships than non-Facebook users, and Facebook itself revives “dormant” relationships.<sup>43</sup> However, despite the benefits of social media, the problem remains that children largely have no say in whether or not they will have an online presence.

### III. THE WARREN AND BRANDEIS ANALYSIS: FUNDAMENTAL RIGHTS IN EXISTING LAW

#### A. *Right to Privacy*

In 1890, the Harvard Law Review published one of the most cited articles on privacy law: *The Right to Privacy*.<sup>44</sup> The article discussed that the growing need for privacy was due to “column upon column ... filled with idle gossip, which can only be procured by intrusion upon the domestic circle.”<sup>45</sup> They viewed this intrusion negatively, due to the effect of such gossip: “invasions upon his privacy, subjected him to mental pain and distress...”<sup>46</sup> The authors also discussed that in addition to a right to be free from the gossip of others, people have a right not to express, or in other words, to keep things private. They provide a hypothetical of a man who writes in his diary that he decided not to dine with his wife on a particular day, and assert that not only is he the only one allowed to publish that writing, but that the right of privacy extends to the act itself.<sup>47</sup>

The Warren and Brandeis article “established a method for judging new technologies,”<sup>48</sup> the basis for which is the fundamental values that are inherent in the Constitution and common law.<sup>49</sup> Technology’s impact on individuals, institutions, and society on a wide scale was important

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<sup>39</sup> ANDREWS, *supra* note 3, at 5.

<sup>40</sup> *Id.* at 141.

<sup>41</sup> *Id.*

<sup>42</sup> *Social Networking Fact Sheet*, *supra* note 18.

<sup>43</sup> *Id.*

<sup>44</sup> Fred R. Shapiro, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (June 2012).

<sup>45</sup> Warren & Brandeis, *supra* note 1, at 196.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 201 (“What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence.”).

<sup>48</sup> ANDREWS, *supra* note 3, at 57.

<sup>49</sup> *Id.* at 57–58.

to Warren and Brandeis' analysis.<sup>50</sup> They advocated for society to employ technology consistently with fundamental societal values, rather than requiring individuals to adapt to the technology.<sup>51</sup>

In response to this article, courts created several privacy torts to remedy the harms that Warren and Brandeis wrote about,<sup>52</sup> rooted in the "more general right of the individual to be let alone."<sup>53</sup> These torts included "(1) intrusion upon seclusion; (2) public disclosure of private facts; (3) false light; and (4) appropriation."<sup>54</sup> In *Lake v. Wal-Mart*, the U.S. Supreme Court held that the right to privacy included protection from "truthful but embarrassing revelations that cause emotional harm to the subject of the disclosures."<sup>55</sup> The Court did not, however, recognize "false light", the dissemination of "inaccurate materials that are hurtful to the feelings of the subject but do not rise to the level of harm to the reputation," as a tort.<sup>56</sup>

Courts have also recognized a closely related, though different, right to publicity. The right of privacy is generally "the right of the individual to be let alone; to live quietly, to be free from unwarranted intrusion, to protect his name and personality from commercialization."<sup>57</sup> The right of publicity is the complementary opposite: a person's right to "reap the benefit of his personality, name and likeness,"<sup>58</sup> or in other words, to "control the commercial use" of his identity.<sup>59</sup> This right is driven by recognition that someone's persona or identity should be legally recognized as their property, and that aspect of their self should be protectable against commercial use without their consent.<sup>60</sup>

The question of who should be allowed to contribute to the development of one's image is complicated by the fact that technology has enabled people to create a robust personal (and yet public) digital history, whether they realize it or not. As Warren and Brandeis feared in 1890 with the development of technology that enabled candid photos for the first time, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"<sup>61</sup> However, Warren and Brandeis did not foresee how willingly complicit individuals would be in the invasion. In fact, we are the ones who disclose and make public our own private lives. Instead of the clandestine intrusion into our closets, we broadcast our own whisperings with a digital megaphone. As one

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<sup>50</sup> Warren & Brandeis, *supra* note 1, at 195. ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'").

<sup>51</sup> *Id.* at 58.

<sup>52</sup> DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 58, (2004).

<sup>53</sup> Warren & Brandeis, *supra* note 1, at 205.

<sup>54</sup> SOLOVE, *supra* note 52, at 58.

<sup>55</sup> Marshall H. Tanick, *The Privacy Paradox*, 65 *BENCH & BAR OF MINNESOTA* 22, 23 (2008) (analyzing *Lake v. Wal-Mart Stores, Inc.*, 566 N.W.2d 376, (Minn. Ct. App. 1997). (The article summarizes the analysis of the Supreme Court: "The majority decision articulated three forms of protectable privacy: (1) intrusion against seclusion . . . (2) misappropriation or exploitation for commercial purposes, normally known as the "right of publicity" . . . and (3) truthful but embarrassing revelations that cause emotional harm to the subject of the disclosures.").

<sup>56</sup> *Id.*

<sup>57</sup> ALEXANDER LINDEY & MICHAEL LANDAU, 1A *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 14:1 (3d ed. 2007) (citing Warren & Brandeis, *supra* note 1).

<sup>58</sup> *Id.*

<sup>59</sup> J. THOMAS MCCARTHY, 1 *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 3:1, 113 (2d ed. 2007).

<sup>60</sup> LINDEY & LANDAU, *supra* note 57, § 3:1.

<sup>61</sup> Warren & Brandeis, *supra* note 1, at 195.



scholar put it, “Facebook is unilaterally redefining the social contract—making the private now public and making the public now private.”<sup>62</sup> This is only possible through the willful volunteering of private information. One conclusion to draw is that “privacy is dead”, that there is no way to protect privacy in the digital age.<sup>63</sup> One author asserted:

[I]t is already far too late to prevent the invasion of cameras and databases. The *djinn* cannot be crammed back into its bottle. No matter how many laws are passed, it will prove quite impossible to legislate away the new surveillance tools and databases. They are here to stay. Light *is* going to shine into every corner of our lives.<sup>64</sup>

David Brin argues that a transparent society, rather than a private society, is a good thing if it means greater transparency in government actions.<sup>65</sup> But Professor Solove’s rejoinder is particularly powerful. He notes, “affording mutuality of access to information will do little to empower ordinary individuals.”<sup>66</sup> As he sees it, ordinary individuals lack the resources to utilize vast amounts of information; large bureaucracies have the means to make information an effective tool.<sup>67</sup> Instead, “[i]n order to solve the problem, a transparent society would have to make each individual as competent as bureaucratic organizations in processing information into knowledge.”<sup>68</sup>

As new technologies develop, courts tend to vindicate fundamental rights of privacy—with one exception: social media.<sup>69</sup> In *Kyllo v. United States*, the U.S. Supreme Court held thermal heat imaging of a home unconstitutional, and noted that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”<sup>70</sup> On a non-technological note, Justice Stevens of the Supreme Court, in his dissent in *Cruzan by Cruzan v. Director, Missouri Department of Health*, advocated for a woman’s “interest in being remembered for how she lived rather than how she died,” a nod to a right to control one’s image.<sup>71</sup>

Rather than an all-or-nothing, public-or-private proposition, Warren and Brandeis asserted that individuals should have control over the degree of publicity they intend for their speech to have:

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them

<sup>62</sup> ANDREWS, *supra* note 3, at 5.

<sup>63</sup> SOLOVE, *supra* note 52, at 73 (“Some commentators suggest that there is little the law can do to protect privacy in the Information Age.”).

<sup>64</sup> *Id.* (citing DAVID BRINN, *THE TRANSPARENT SOCIETY* (1998)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 73–74.

<sup>68</sup> *Id.* at 74.

<sup>69</sup> ANDREWS, *supra* note 3, at 51.

<sup>70</sup> *Kyllo v. U.S.*, 533 U.S. 27, 33–34 (2001).

<sup>71</sup> *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 353 (1990).

expression, he generally retains the power to fix the limits of the publicity, which shall be given them.<sup>72</sup>

This concept of agency in the right to privacy provides interesting advice for social media use; while a vast majority of things we post online are public, we have the right to choose what we post online. There is a chance that something you say to another person, but choose not to post online, will end up publicly available anyway, but should you choose not to express it at all, you can be sure it will never end up anywhere adverse. However, this is not true for children. Children's self-control develops with age, and decisions about how or whether to express certain emotions develop along with that.<sup>73</sup> Unfortunately, children are not the ones posting online and parents do not seem to have a very astute filter as to what they should post about their children's expressions online. The funnier or more outrageous the expression of a child, the more likely a parent is to post it on the Internet.<sup>74</sup> This effectively deprives children of retaining privacy of expression until they reach an age where they can exercise their judgment as to what they should post online and what they will not.

### *B. The Conflicting Rights of Children and Parents*

A key value in children's rights is the best interest of the child. As early as 1877, the phrase was codified in statute: 1877 Revised Codes of the Territory of Dakota referred to "what appears to be for the best interest of the child."<sup>75</sup> The notion made its first appearance in case law four years later in an 1881 case decided by the Supreme Court of Kansas, which held that "the paramount consideration is, what will promote the welfare of the child?"<sup>76</sup> While the phrase has rightfully been criticized for its ambiguity, it has stood the test of time as "an expression of the need to keep the interest and perspective of the child foremost in the minds of adult decision makers."<sup>77</sup> There has long been a tradition in American law that presumes that the best interest of the child is ultimately served by parental autonomy in child rearing.<sup>78</sup> I challenge that assumption in this Section with regards to parental discretion online.

Children possess recognized Constitutional rights. In *In re Gault* in 1967, the U.S. Supreme Court recognized that minors are legal individuals, entitled to the protection of those rights.<sup>79</sup> Again, in *Tinker v. Des Moines Independent Community School District*, the Court held that students "are possessed of fundamental rights."<sup>80</sup> In both cases, parents asserted their children's

<sup>72</sup> Warren & Brandeis, *supra* note 1, at 198 n.2 ("It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.").

<sup>73</sup> Sudi Kate Gliebe, *The Development of Self-Control in Young Children*, LUTHERAN EDUCATION JOURNAL (July 14, 2011), <http://lej.cuchicago.edu/research-in-education/the-development-of-self-control-in-young-children/>.

("[R]esearchers have observed that self-control increases with age . . .").

<sup>74</sup> See, e.g., REASONS MY SON IS CRYING, *supra* note 29.

<sup>75</sup> CYNTHIA PRINCE COHEN & HOWARD A. DAVIDSON, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 4, 5 (1990) [hereinafter COHEN & DAVIDSON].

<sup>76</sup> Chapsky v. Wood, 26 Kan. 650, 654 (1881).

<sup>77</sup> COHEN & DAVIDSON, *supra* note 75, at 4.

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *In re Gault*, 387 U.S. 1, 12 (1967) (finding juveniles, like adults, are entitled to notice, counsel, and privilege against self incrimination).

<sup>80</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

claims for protection against the state. The U.S. Supreme Court in *Planned Parenthood v. Danforth* shed light on their approach to how children's rights come about, holding rather frankly that "Constitutional rights do not mature and come into being magically only when one attains state-defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights."<sup>81</sup> The protection of those rights is where the main controversy lies: questions remain as to when children should be allowed to make decisions for themselves, who is the best steward over those rights in the meantime, and how to balance the rights of children with the rights of parents.

The two prominent current theories of children's rights are autonomy, or choice, rights and need-based rights. Need-based rights center around children's protection from third parties—protection against businesses, government, child pornographers, and predators.<sup>82</sup> Choice theory centers on the idea that children's rights are curtailed by their limited decision-making capabilities.<sup>83</sup> The Court has approached children's rights consistently with choice theory, as it expressed "concern over the inability of children to make mature choices" in *Bellotti v. Baird*.<sup>84</sup> Judges and scholars alike have acknowledged that autonomous decision-making capabilities develop over time.<sup>85</sup> Choice theory posits decision-making capabilities as a prerequisite to exercising autonomy.<sup>86</sup> Children's decision-making allowance should be parallel to their developing decision-making capacity. Before they have sufficiently developed, the responsibility for making decisions for children rests upon the parents, because the law "presum[es] that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."<sup>87</sup>

One oft-accepted notion is that children presumably have a different set of characteristics from adults that prevents them from functioning as fully autonomous decision-makers.<sup>88</sup> In the interim between birth and autonomous adulthood, parents are given authority over their children, based on the premise that parents are the "first best" caregivers for their children.<sup>89</sup> However, with the development of the child welfare system and juvenile courts, emerged the wide acceptance of the idea that the state has a responsibility for providing for the well being of children. While this does not necessarily need to restrict the rights of parents, measures designed to benefit children can, on occasion, preempt parental authority.<sup>90</sup>

Courts and others have recognized that some rights belong to children intrinsically, and are not limited by development. Scholars have recognized that children need privacy to "develop their

<sup>81</sup> *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

<sup>82</sup> Shmulei & Blecher-Prigat, *supra* note 2, at 771.

<sup>83</sup> Anne C. Daily, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2106 (2011) ("children lack certain rights accorded to adults because they lack the capacity for autonomous decision making necessary for the exercise of those very rights.").

<sup>84</sup> *Bellotti v. Baird*, 443 U.S. 622, 636 (1979).

<sup>85</sup> *Id.* at 637–38 ("the guiding role of parents," is the "affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens."); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."); Daily, *supra* note 83, at 2115.

<sup>86</sup> Daily, *supra* note 83, at 2100.

<sup>87</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>88</sup> SAMUEL M. DAVIS ET. AL., *CHILDREN IN THE LEGAL SYSTEM* 112 (5th ed. 2013).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 213.

individuality, their independence and their self-reliance.”<sup>91</sup> The UN Declaration on the Rights of the Child also reflects this mentality, stating “(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation. (2) The child has the right to the protection of the law against such interference or attacks.”<sup>92</sup>

Cases about children’s rights to privacy reflect this balance between the fundamental nature of some rights and a developmental approach to children’s decision-making. *Planned Parenthood v. Danforth* in 1976 established that a minor may have a right to obtain an abortion without requiring consent of her parents in certain circumstances.<sup>93</sup> *Carey v. Population Services International* recognized the rights of minors to contraceptives, holding that the “right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”<sup>94</sup> The Court took an interesting turn in children’s privacy jurisprudence in *Belotti v. Baird*, where it invalidated a statute requiring children to obtain parental consent before obtaining an abortion.<sup>95</sup> This holding closely resembles that from *Danforth*, but in this case the Court also held that if a minor is mature then the court must authorize her to act absent parental consent—a notable nod toward choice theory.<sup>96</sup> Though these cases expressly mention privacy, some scholars argue that they are actually grappling with the issue of autonomy.<sup>97</sup> Children’s right to privacy in these situations was not totally unlimited; while the Court invalidated measures requiring parental consent, it did not invalidate statutes requiring parental notification.

There are some complications with recognizing children’s rights as individuals, especially when those rights pit the rights of family members against each other because the law has a longstanding tradition of bundling familial privacy rights together.<sup>98</sup> Parents’ rights often come into conflict with theories of autonomous development of children. Courts differentiating on these cases tend to cite very different rationales—reflecting whether they find a fundamental right in a child’s autonomy, and whether they have strong commitments to the rights of parents. For example, in *H.L. v. Matheson*, the Court addressed a Utah statute requiring parental notification in advance of an abortion for a minor.<sup>99</sup> It held that “parents have an important ‘guiding role’ to play in the upbringing of their children [citation], which presumptively includes counseling them on important decisions.”<sup>100</sup> While that rationale seems to reflect an approach that heavily values the best interest of the child, it is framed in such a way that it values the right of parents to counsel their children, rather than the right of children to receive counsel from their parents (notably in this case, the children did not want the counsel of their parents).<sup>101</sup> The Court held that the parents’

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<sup>91</sup> Shmulei & Blecher-Prigat, *supra* note 2, at 772.

<sup>92</sup> G.A. Res. 44/25, Convention on the Rights of the Child, at art. 16 (Nov. 20, 1989).

<sup>93</sup> *Planned Parenthood of Central Missouri, v. Danforth*, 428 U.S. 52, 74 (1976).

<sup>94</sup> *Carey v. Population Serv. Int’l*, 431 U.S. 678, 693 (1977).

<sup>95</sup> *Belotti*, 443 U.S. at 647.

<sup>96</sup> *Id.*

<sup>97</sup> Shmulei & Blecher-Prigat, *supra* note 2, at 778.

<sup>98</sup> *Id.* at 773–74 (“[R]ecognizing the rights (in general, not just the right to privacy) of individual family members against each other does not seem to fully fit the family setting, where family members are believed to share some sense of collectivity . . .”).

<sup>99</sup> *H.L. v. Matheson*, 450 U.S. 398, 399–400 (1981).

<sup>100</sup> *Id.* at 410.

<sup>101</sup> *Id.* at 411 (discussing the benefits of parent’s counseling to the minor: “the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical,

claim to authority in their own household "...is basic in the structure of our society."<sup>102</sup> In *Pollock v. Pollock*, a privacy case concerning video-recording a child, the Sixth Circuit Court of Appeals also displayed a commitment to the inherent rights of parents, holding that a child's ability to consent does not preclude a parent from being allowed to consent on the child's behalf.<sup>103</sup> They upheld the parents' actions, so long as they were "objectively reasonable."<sup>104</sup>

These cases demonstrate tensions in the law between the rights of children and the rights of parents. The right to parenting has long been recognized by the Court.<sup>105</sup> The U.S. Supreme Court recently stated that the "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>106</sup> The right to parent is not limited to responding to a child's need for a caregiver; the right to parent one's children is a constitutional right in and of itself.<sup>107</sup> However, this clashes with the theory of children's right to decide for themselves as they become autonomous beings.

These historical tensions between parents' and children's rights have deep roots in the theory that children are the property of their parents. It is not surprising that the theory is pervasive, given how long it has been around: Aristotle, for one, purported that a child was "a parent's possession because it came physically from the parent, like a tooth or a lock of hair."<sup>108</sup> This theory of children as property has largely been elbowed out by the new commitment to acting in a child's best interest.<sup>109</sup> However, while it may have lost its prominence, the underlying assumptions of property theory persist in contemporary discussions of parental rights. The law's contemporary understanding of and its approaches to parental rights are "deeply analogous" to those of property rights.<sup>110</sup> Some scholars argue that any recognition at all of a parent's rights is indicative of a paradigmatic view of children as property, and therefore should be fundamentally invalid.<sup>111</sup> To posit the existence of parental rights due solely to being a parent requires recognition that, because of parentage status, one individual has a right to control another.

One scholar argues that parental rights should be done away with and replaced by parental privilege, which means that parents would not be entitled to direct a child's life as they want, but would have a privilege of carrying out normal child-rearing behaviors, necessarily including some

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emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.").

<sup>102</sup> *Id.* at 410 (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

<sup>103</sup> *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

<sup>104</sup> *Id.*

<sup>105</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that a right to parenting includes the ability to make education decisions for a child: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); see also *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) ("[A] natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children" is an interest far more precious than any property right.").

<sup>106</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>107</sup> Shmulei & Blecher-Prigat, *supra* note 2, at 761.

<sup>108</sup> Woodhouse, *supra* note 5, at 1043.

<sup>109</sup> *Id.* at 1038–39 ("[T]he concept of parental obligations as an outgrowth of divinely conferred paternal ownership and control of children had given way to that of parental trusteeship in the child's 'best interests.'").

<sup>110</sup> *Id.* at 1042.

<sup>111</sup> James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1373 (1994) ("it becomes apparent that the claim that parents should have child-rearing rights—rather than simply being permitted to perform parental duties and to make certain decisions on a child's behalf in accordance with the child's rights—is inconsistent with principles deeply embedded in our law and morality.").

life direction.<sup>112</sup> Rights, he argues, are protections of individual self-determination.<sup>113</sup> To allow parents parental rights that infringe on children's rights of self-determination is fundamentally paradoxical to the concept of personal liberty. Altering our understanding of the parents' role in the child's life from parental rights to parental privilege would resolve this paradox. It would not force us to abandon the value of the institution of the family, but would adapt the view of parental rights within a family to allow breathing room for children's individual rights to exist. It would enable courts to make decisions solely based on the welfare interests of the child, rather than engaging in a sometimes impossible balancing act of parents' rights to parent and children's rights as individuals.<sup>114</sup>

### C. *First Amendment Implications and Communication Privileges*

The question of what parents should be allowed to post about their children online does not occur in a vacuum where only children and parental rights exist. The First Amendment also bears heavily on this question. Generally, content-based restrictions on free speech are subject to strict scrutiny, and the government must show a compelling interest that the statute employed is narrowly tailored to the goal, and is the least restrictive option for achieving it.<sup>115</sup> The U.S. Supreme Court has shown a willingness to limit speech in favor of other values. These values bear on the question of children's privacy.

Defamation is an area of limited First Amendment protection. When a statement is defamatory and harmful to its subject, the U.S. Supreme Court has limited free speech protection to allow the victim to recover, so long as the plaintiff meets their burden of proof.<sup>116</sup> The Supreme Court held in *Gertz v. Welch* that a private figure plaintiff must establish fault to prevail on a defamation claim, but left it up to the states to decide what exactly that meant.<sup>117</sup> Some have suggested that the standards of defamation should be lower online due to the ease with which someone can respond when they have allegedly been defamed.<sup>118</sup> This rationale does not extend easily to situations where children have been defamed, particularly children who have not yet learned to use the Internet. One federal court in California agreed that the standard should be different online, but for a different reason: in the context of the Internet, things are expected to be hyperbolic.<sup>119</sup> Therefore, statements that would have been defamatory were held not to be defamatory based on the expectation and understanding that things are often exaggerated online.<sup>120</sup> If this standard is upheld in other courts, it will have difficult implications for online defamation, particularly for children, unless exceptions are carved out for those who do not have comparable access to the forum. A court could follow that same reasoning to conclude that parents often exaggerate for effect on the Internet, maybe when they are talking about or, more saliently, complaining about their children.

The Supreme Court has also limited first amendment protection to speech with regards to

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<sup>112</sup> *Id.* at 1375.

<sup>113</sup> *Id.* at 1410.

<sup>114</sup> *Id.* at 1376.

<sup>115</sup> *Simon & Schuster v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

<sup>116</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–348 (1974).

<sup>117</sup> *Id.*

<sup>118</sup> MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 83 (1998).

<sup>119</sup> *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999).

<sup>120</sup> *Id.*

child pornography. The Supreme Court has held that the State's interest in protecting children from the harms of child pornography outweighs free speech rights, nearly without question.<sup>121</sup> The Court has upheld laws barring child pornography because they serve to protect harm to the child's physical and emotional health, and privacy.<sup>122</sup>

There are multiple instances where the government has demonstrated its willingness to recognize free speech limitations in special relationships that deal with sensitive information. Attorneys owe a duty of confidentiality to their clients under attorney-client privilege.<sup>123</sup> The Supreme Court formally recognized this privilege in 1826, holding that the privilege of confidential communications belonged to the client, and is "indispensable for the purpose of private justice."<sup>124</sup> The central reason behind attorney-client privilege is that to obtain effective assistance of counsel, clients need to be able to communicate and consult with their attorney freely.<sup>125</sup> To do so, they must "feel safe that in so doing their private thoughts and remarks [will] be protected from disclosure."<sup>126</sup> Notably, it is only the client who can waive the attorney-client privilege.<sup>127</sup> This rule is imposed on all attorneys by the American Bar Association's Model Rules of Professional Conduct Rule 1.6, which has been adopted by state bar organizations.<sup>128</sup>

The value of confidentiality has deep roots in the medical community. The Hippocratic Oath requires doctors to swear to protect the privacy of their patients, stating "Whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret."<sup>129</sup> United States Code requires confidentiality of medical "records of the identity, diagnosis, prognosis, or treatment of any patient" absent one of the specified and limited exceptions.<sup>130</sup> The statute permits disclosure of information if the patient has given consent, if the record is needed in a criminal proceeding, or if the record is needed by the Department of Veterans Affairs to furnish healthcare to veterans.<sup>131</sup> Many states have similar statutes.<sup>132</sup> Generally, courts

<sup>121</sup> *New York v. Ferber*, 458 U.S. 747, 761–62 (1982).

<sup>122</sup> *Id.* at 754 (holding that "the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *Id.* at 757–58, n.9 ("When such performances are recorded and distributed, the child's privacy interests are also invaded.").

<sup>123</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6(a)(AM. BAR. ASS'N 2015) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .").

<sup>124</sup> *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826).

<sup>125</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) ("[Attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice.").

<sup>126</sup> RONALD GOLDFARB, *IN CONFIDENCE: WHEN TO PROTECT SECRECY AND WHEN TO REQUIRE DISCLOSURE* 62–63 (2009).

<sup>127</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §78 (AM. LAW INST. 2000).

<sup>128</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2015).

<sup>129</sup> GALEN & HIPPOCRATES, *10 GREAT BOOKS OF THE WESTERN WORLD* vii (Encyclopedia Britannica ed., 1952).

<sup>130</sup> 42 U.S.C. § 290dd-2 (2012).

<sup>131</sup> *Id.*

<sup>132</sup> *See, e.g.*, N.C. GEN. STAT. ANN. § 58-2-105 (West 2016) ("All patient medical records in the possession of the Department are confidential and are not public records . . . . As used in this section, 'patient medical records' includes personal information that relates to an individual's physical or mental condition, medical history, or medical treatment, and that has been obtained from the individual patient, a health care provider, or from the patient's spouse, parent, or legal guardian"); FLA. STAT. ANN. § 440.125 (West 2016) ("Any medical records and medical reports of an injured employee and any information identifying an injured employee in medical bills which are provided to the department . . . are confidential . . . except as otherwise provided by this chapter."); TENN. CODE ANN. § 10-7-504 (West

have held that the confidentiality of the information cannot be breached unless good cause can be shown to justify the disclosure.<sup>133</sup> Further, when disclosure is permitted, it is generally limited in scope, and there are designated means to disclose the material in the most confidential and limited way possible.<sup>134</sup> The rationale behind medical privilege is similar to that behind attorney-client privilege—health is so important that patients “must disclose all information in [their] consultations with [their] doctors—even that which is embarrassing, disgraceful or incriminating... there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors.”<sup>135</sup>

The government has also limited free speech by recognizing that financial institutions bear a duty of confidentiality to their customers. The U.S. Code states, “each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information.”<sup>136</sup> The statute also authorizes governmental agencies to establish appropriate standards for the financial institutions they oversee to enforce this confidentiality by implementing safeguards.<sup>137</sup>

There is also a recognized interest in the privacy of students, weighed against the free speech of an institution. The U.S. Code prohibits funding to schools and other institutions that have a practice of permitting the release of educational records of students without the written consent of their parents to individuals other than school officials with a legitimate educational interest in accessing the records.<sup>138</sup> This willingness of the courts to limit what is disclosed about another person is unique to contexts where the person prohibited from disclosure is privy to sensitive information about someone, and has a duty to protect that information.

#### IV. SOLUTIONS: HOW TO ENSURE RESPONSIBLE PARENT PRESERVATION OF CHILDREN’S RIGHTS

##### *A. A New Theoretical Approach to Children’s Rights*

Statutes and the common law reflect a balancing act between children’s best interests and the rights of parents. Inherent in this balancing act is a compromise of children’s rights to some degree. The right to parent as a continuation of parental ownership of children is inconsistent with fundamental rights. Instead, this Article suggests an approach to parenting that would require parents to function as trustees over children’s future rights while acting in their best interest in situations that require immediate action.

Ultimately, the property theory of parents and children is inconsistent with the view of children as having fundamental rights and developing into autonomous decision-makers. When

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2016) (“The medical records of patients in state, county and municipal hospitals and medical facilities, and the medical records of persons receiving medical treatment, in whole or in part . . . shall be treated as confidential and shall not be open for inspection by members of the public.”).

<sup>133</sup> See, e.g., Carr v. Allegheny Health, Educ., & Research Found., 933 F. Supp. 485, 487 (W.D. Pa. 1996); O’Boyle v. Jensen, 150 F.R.D. 519, 521 (M.D. Pa. 1993).

<sup>134</sup> See *supra* note 130. (This section designates the method for disclosure: written consent is required, and then the contents of the records can be disclosed to medical personnel “to the extent necessary to meet a bona fide medical emergency,” or to “qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient.”).

<sup>135</sup> Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965).

<sup>136</sup> 15 U.S.C. § 6801(a) (2012).

<sup>137</sup> 15 U.S.C. § 6801(b) (2012).

<sup>138</sup> 20 U.S.C. § 1232g(b)(1) (2012).



children are young and lack judgment capacity, a parent deciding for them does not look suspect. However, as children get older and grow in their ability to choose for themselves, their autonomy is directly infringed upon if parents assert a fundamental right as a parent to decide for their child. A developmental approach, divorced from the sticky complications with parental rights theories, would solve this problem. Parents can be stewards over the rights of their children until the children have reached a point in their mental development that they can act to protect their own interests. However, parents should not have a recognized fundamental right to decision-making where their child is able.

To do away with the remnants of property theory, we need to bring about a shift in our view of parenthood as a fundamental right. The theory of parenthood as a fundamental right is ultimately rooted in conceptions of parenthood as ownership over children, which is fundamentally inconsistent with the United States' developing recognition of children as individuals with individual rights. Parenthood should instead be viewed as a duty to act as a responsible steward over the rights of a child until such time as the child can act as a steward over herself.

### 1. Parents as Trustees of Their Children's Rights

There are myriad examples of parents acting in violation of their children's rights because they were permitted to do so. The U.S. Supreme Court recognized this in *Parham v. J.R.*, holding that "some parents 'may at times be acting against the interests of their children.'"<sup>139</sup> Parents have "extraordinary power over their children's bodies"<sup>140</sup> and often exercise that power regardless of the wishes of their children and in circumstances no autonomous adult would consent to.<sup>141</sup> Parents have used that power to westernize the eyes of children adopted from Asia, to subject their teenage children to breast enlargements or liposuction, to sterilize their children with disabilities, and to extract bone marrow from a nine year old girl who had been sexually abused by her brother for use by that brother.<sup>142</sup> Unfortunately for children, their voices are not represented in these medical procedures. The decision of whether to perform the procedure is based on a cost-benefit analysis, weighing the risks of the procedure against its potential outcomes.<sup>143</sup> These are just a few examples of the invasive harm to children's individual rights that occur when parents are given discretion to act in the best interest of their children. In other words, parents often do not act in the best interest of their child. The broad discretion afforded to parents to act like this is rooted in an archaic hierarchical property view of the family. Parents' rights give parents a degree of control over their children that "would be impermissible in any other relationship."<sup>144</sup> While the overall view has been replaced with individual rights of children, the lingering roots still need to be excavated.

The dilemma of reconciling children's rights as they develop with parental rights can be solved by adopting a view of parents as stewards of their children's rights. Because viewing children as property is fundamentally incompatible with both American values and a developmental conception of individual rights for children, it should be replaced with a view of

<sup>139</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (quoting *Bartley v. Kremens*, 402 F.Supp., 1039, 1047-48 (E.D. Pa. 1975)).

<sup>140</sup> Alicia Oullette, *Shaping Parental Authority Over Children's Bodies*, 85 IND. L.J. 955, 956 (2010).

<sup>141</sup> *Parham*, 442 U.S. at 602 (discussing whether or not children can be voluntarily committed to a mental health hospital by their parents).

<sup>142</sup> Oullette, *supra* note 140, at 956.

<sup>143</sup> *Id.* at 957. ("The typical analysis weighs the risks of harm against the benefits of the procedure.")

<sup>144</sup> *Id.* at 977.

the parent-child relationship as one of fiduciary obligations. A fiduciary relationship exists where a person is “under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.”<sup>145</sup> The responsibilities of a trustee are consistent with a choice-theory developmental approach to children’s rights. Parents should act as a trustee of the rights of children until they are sufficiently developed in their decision-making capabilities to make decisions themselves. A trust-based relationship has been suggested for parents and children in regards to medical care.<sup>146</sup> The Author proposes to extend that to their duties to their children in regards to their privacy on social media.

Imposing the obligations of a fiduciary relationship on a parent would require the parent to act in preservation of the rights of their child: to act for their best interest where action is required, and to reserve decisions that do not need to be made immediately for children to make for themselves when they are able. This has support from contemporary children’s advocates, who argue that the law should not entitle parents “to make decisions for a child that [belong] to the child’s adult self.”<sup>147</sup> An example of a decision that does not need to be made immediately is ear piercing. Some parents pierce the ears of their infant daughters. While not necessarily harmful or detrimental to the baby, it removes her ability to make that decision for herself, while she could easily make the decision for herself a few years down the road, and preserve her autonomy to make permanent decisions about her body.

Confidential relationships are closely related to fiduciary relationships. A confidential relationship exists between two individuals when one has “gained the confidence of the other and purports to act or advise with the other’s interest in mind.”<sup>148</sup> Confidential relationships are a step down from fiduciary relationships—even where a relationship does not reach the level of fiduciary, it can still be confidential in nature. This type of relationship requires that people not violate or abuse the confidence that is placed in them.<sup>149</sup> Trust-like obligations on parents would include preservation of children’s rights that can be preserved, and looking out for their best interest (taking a balancing act against the possessory rights of the parents out of the equation entirely).

Several modern child rights advocates have made similar proposals to better serve the interests of children that also support the idea of looking at a parent-child relationship in a similar fashion to a trustee-beneficiary relationship. Barbara Bennett Woodhouse introduced what she dubbed a “generist perspective.”<sup>150</sup> She proposed to view “parenthood as stewardship, not ownership,” the purpose of which is to serve the needs of the child, as a replacement for a possessive, property type view of children.<sup>151</sup> Joel Feinberg, a legal philosopher, advocates for children’s right to an open future.<sup>152</sup> His philosophy provides a framework for the trustee relationship between children and their parents. He distinguishes several classes of rights, one of

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<sup>145</sup> RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (AM. LAW INST. 1979).

<sup>146</sup> Oullette, *supra* note 140, at 959 (suggesting a “. . . trust-based construct of the parent-child relationship for medicine, in which the parent has trustee-like powers and responsibilities over a child’s welfare and developing rights, as well as fiduciary-like duties to the child.”).

<sup>147</sup> *Id.* at 977.

<sup>148</sup> RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (AM. LAW INST. 1959).

<sup>149</sup> *Id.*

<sup>150</sup> Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 *Cardozo L. Rev.* 1747, 1754–55 (1993).

<sup>151</sup> *Id.*

<sup>152</sup> WILLIAM AIKEN & HUGH LAFOLLETTE, *WHOSE CHILD?: CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124 (1980).

which is “rights-in-trust,” which are rights that an autonomous adult has, but children cannot exercise due to their maturity level.<sup>153</sup> These rights, Feinberg asserts, should be saved for children until they are adults. However, these rights “can be violated ‘in advance,’ so to speak, before the child is even in a position to exercise them. The violating conduct guarantees *now* that when the child is an autonomous adult, certain key options will already be closed to him.”<sup>154</sup> It is exactly that violation of rights that preempts a child from having options open to him when he becomes an adult that occurs when parents establish an online reputation for their child before the child has a chance to do it himself. Feinberg asserts that the interest the future self exerts comes “in the form of a claim to prudence,”<sup>155</sup> which may be a helpful guideline for parents.

## 2. Implications of Trustee Theory on Children’s Privacy on Social Media

Implementing a trust-based approach to children’s rights would greatly increase the amount of protection that children have for their right to privacy. If parents are required to act as trustees, they will be under obligation to protect children’s rights-in-trust, including their right to self-definition. The right to self-definition can be viewed as a right-in-trust because developing a social media presence online as a child is arguably unnecessary. Baby photos, stories about toddlers and kids, first day of school pictures, etc. can all be posted by the child, when they have developed sufficient capabilities to make that choice for themselves. However, it is not entirely reasonable to suggest that parents post nothing at all about their children, because arguably not all speech about children infringes on their right to privacy. Parents can post moderately, while still refraining from creating a defined image, personality, or reputation for their child online. There is room for prudent posting—such as announcing that a baby has been born, or posting a formal family photo that does not give outsiders insight into the private life of the child.

The First Amendment concern that imposing this requirement on parents to refrain from certain speech involving their children does not seem to hold water, given the willingness of the government to limit free speech in fiduciary relationships. As parents are privy to private and sensitive information about their children, similar to financial fiduciaries and medical providers are privy to sensitive information about their clients, it is reasonable to make them responsible for a higher degree of privacy and protection of their child. Thus, limitations on parents disclosure of private information about their in light of the interest in preserving the children’s right to privacy and their future right to self-definition is eminently reasonable.

### *B. Balancing the Best Interest of a Child with the Child’s Right to Privacy*

This Section discusses two courses of action that could be taken to ensure that children’s rights are protected, and weighs the merits of each. The goal for either mechanism must be balancing the best interest of the child currently with the child’s right to privacy and their interest in future self-definition.

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<sup>153</sup> *Id.* at 125.

<sup>154</sup> *Id.* at 125–26.

<sup>155</sup> *Id.* at 128.

## 1. Legislative Recognition of a Fiduciary-type Relationship for Parents and Children

A statutory requirement similar to those imposed on other fiduciary relationships might be an effective means of protecting children's right to privacy online. A statute of this sort should reflect that parents are in a unique position to have sensitive information about their children, and that they have a fiduciary-type relationship based on the trust and reliance their children place on them. However, laws carry consequences, and the Author is hard pressed to agree that parents should be penalized for posting about their children. Instead, as a way to address the societal need for greater awareness of children's rights, without penalizing parents, resolutions rather than laws reflecting this paradigmatic shift would be appropriate.<sup>156</sup>

As far as a statutory requirement would go, the impacts would be similar to other confidential relationships. The ethical and legal duty of attorneys prevents them from voluntarily disclosing confidential information about a client.<sup>157</sup> Penalties for violating attorney-client privilege are determined by the state bar. In Georgia, violating confidentiality is punishable by disbarment, however, there is no criminal penalty for violating client confidentiality.<sup>158</sup> The same is true for medical personnel—a violation of doctor-patient confidentiality is grounds for a tort cause of action, and patients can recover damages for the harm that resulted from the breach.<sup>159</sup>

Parents, in their capacity as parents to teach, mentor, and guide their children into becoming autonomous adults can be considered to have a duty of confidentiality to their children. The information parents have about their children is of the most intimate and detailed form possible. To fully protect a child's privacy, personal details and information that parents have in the process of their upbringing should be kept between the parent and child, until the child can choose to disclose it (or refrain from disclosing it) himself as an autonomous adult.

The difficulty with the civil nature of confidentiality violation remedies is that it pits child against parent. There are times when the state will step in to represent the interests of a child, though are largely exclusive to criminal actions.<sup>160</sup> Further, familial discord is detrimental to everyone involved. A form of injunction or fine might be effective, though extensive interference with the parental responsibility to look out for the best interests of their children might bring about more harm than good. Thus, the Author proposes that instead of a statute carrying injunctive power, a resolution to increase awareness is more appropriate.

### *C. Educating Parents to Increase Awareness and Personal Responsibility*

Educating parents on the potential detriments to their children from their posting online seems like a simple way to solve the problem. Certainly a few viral articles and a social media campaign would be far-reaching and arguably much faster than passing legislation without leaving

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<sup>156</sup> *About Bills, Resolutions, and Laws*, LEXISNEXIS.COM

[https://www.lexisnexis.com/help/CU/Serial\\_Set/About\\_Bills.htm](https://www.lexisnexis.com/help/CU/Serial_Set/About_Bills.htm) (last visited April 26, 2016) (“A simple resolution . . . is a proposal that addresses matters entirely within the prerogative of one Chamber or the other. It requires neither the approval of the other Chamber nor the signature of the President, and it does not have the force of law.”).

<sup>157</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2015).

<sup>158</sup> RULES OF PROF'L CONDUCT, r. 1.6 (STATE BAR GA. 2001), <http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=57>.

<sup>159</sup> DAVID A. ELDER, *PRIVACY TORTS* § 5:2 (2015).

<sup>160</sup> Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 665–66 (2006).

tricky criminal or civil penalties for parents. The first strains of what could turn into a campaign like that have already manifested: there have been a handful of articles by parents advocating for children's anonymity and privacy online.<sup>161</sup> While many posts still focus on restraint in posting about children as a means of protecting children from third parties,<sup>162</sup> some recognize that creating an online image for their children may be inherently problematic because it takes away the child's right to choose whether they will have an online presence and what form it will take. One blogger said that she attempts to paint an "abstract" picture of her daughter when she posts about her online.<sup>163</sup> She explains that she likes to make sure that she doesn't share details that her child would later not want shared, "because she's a person and I think that's something I have to remember a lot... I don't want her to feel hindered by the way I portrayed her on the Internet when she was a child."<sup>164</sup> Another online mom posed the question, "is it safe, or even ethical to publish something about someone who can't give their consent?"<sup>165</sup>

One couple voluntarily assumed a role as trustees of their daughter's online reputation after recognizing that another couple that posted about their child frequently had essentially created "a trove of data that will enable algorithms to learn about her over time. Any hopes Kate [name changed] may have had for true anonymity ended with that ballet class YouTube channel."<sup>166</sup> They created what they called "a digital trust fund" by creating an email address, Facebook, Twitter, and Instagram accounts, and registering a URL in their daughter's name.<sup>167</sup> But they do not post anything about her. When they determine she is sufficiently mature, they will give her access to the accounts and "ensure that she's making informed decisions about what's appropriate to reveal about herself, and to whom."<sup>168</sup> This approach protects their daughter's ability to create her own reputation online; however, parents with similar mentalities appear to be few and far between.

The challenge of an educational campaign is multi-faceted. First, some experts believe that sharing about our children online is an evolutionary trait, that "...we're biologically wired to promote our children, and the Internet and social media provides a convenient and effective way to do this."<sup>169</sup> Others argue that social media helps parents gain a sense of connectedness in the struggles of parenthood.<sup>170</sup> One mother claimed that while she was not generally a blogger, she

<sup>161</sup> See Kelly Wallace, *'BatDad' and Other Parents: To Post or Not to Post?*, CNN (Oct. 7, 2014, 12:16 PM), <http://www.cnn.com/2013/10/07/living/parents-kids-online-privacy>; Amy Webb, *We Post Nothing About Our Daughter Online*, SLATE (Sep. 4, 2013, 5:30 AM),

[http://www.slate.com/articles/technology/data\\_mine/1/2013/09/facebook\\_privacy\\_and\\_kids\\_don\\_t\\_post\\_photos\\_of\\_your\\_kids\\_online.html](http://www.slate.com/articles/technology/data_mine/1/2013/09/facebook_privacy_and_kids_don_t_post_photos_of_your_kids_online.html); Aisha Sultan & Jon Miller, *'Facebook Parenting' is Destroying Our Children's Privacy*, CNN (May 25, 2012, 2:55 PM), <http://www.cnn.com/2012/05/25/opinion/sultan-miller-facebook-parenting/>.

<sup>162</sup> See, e.g., Bethany Hardy, *Do We Reveal Too Much About Our Kids Online?*, PBS,

<http://www.pbs.org/parents/childrenandmedia/article-revealing-too-much-about-kids-online.html> (last visited Dec. 16, 2014). The article provides five tips for keeping children safe, including using privacy settings, being careful about disclosing information through which a child's identity could be stolen, not allowing children to create relationships with strangers, being judicious about posting photos that identify the location where it was taken, and choosing hack-proof passwords).

<sup>163</sup> Wallace, *supra* note 161.

<sup>164</sup> *Id.*

<sup>165</sup> Linda Geddes, *Does Sharing Photos of Your Children on Facebook Put Them at Risk?*, THE GUARDIAN (Sep. 21, 2014), <http://www.theguardian.com/technology/2014/sep/21/children-privacy-online-facebook-photos>.

<sup>166</sup> Webb, *supra* note 161.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Hardy, *supra* note 162.

<sup>170</sup> *Id.*

felt compelled to share her experience with a bipolar daughter to provide moral support for other parents dealing with similar situations.<sup>171</sup> However, that same mother admitted that she worries about her daughter's privacy: "I only have concerns that as my daughter gets older, teachers, future employers, or others don't put two and two together and figure out it's her."<sup>172</sup>

Another complication is that some people are just simply not worried that online privacy will ever become a problem for them. When parents were asked what it meant to raise children in this era of diminished privacy, "the most common responses are: I really have nothing to hide, and who would be interested in my life, anyway?"<sup>173</sup> However, the people proffering these reasons miss the point, "because privacy is one of those nebulous rights that don't matter until it matters. Who worries about Miranda rights until an arrest?"<sup>174</sup>

Ultimately, what might be the most effective tool for promoting parental responsibility is not available yet: actual harm a child, or a child who has grown up to feel that they were deprived of their right to self-definition. The reality is that the children whose entire lives are on the Internet are still young. In the meantime, it is worth continuing to support efforts to spread the word about children's privacy online.

## V. CONCLUSION

Despite questions yet to be answered about how to best achieve children's privacy, it is clear that to protect the rights of children there must be a shift in the theoretical foundations of children's law. The new approach to children's rights must do away with the property-like underpinnings of parental rights and instead view parents as trustees who are responsible for acting in the best interest of their children. This means parents should act in the best interest of their child for immediately-required decisions, and reserve other decisions for their child to make at the appropriate age. In regards to social media, this approach cautions parents to exercise prudence in posting about their children online, and to leave the decisions about what type of online presence to have for their children to make when they are old enough to have an online presence of their own.

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Sultan, *supra* note 161.

<sup>174</sup> *Id.*