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How Social Media is Affecting the Lives of Minors Including Current Legal Safeguards and their Weaknesses

*Erin Carpenter**

Introduction

SOCIAL MEDIA IN GENERAL

At the turn of the millennia, social media began to explode in society, and we have not looked back since. It all started with the use of e-mail, which led to AOL instant messenger, then MySpace, up to the present where we now have countless smartphone applications and social media outlets to connect with millions of people at any given time. Social media is now in our daily lives, typically in more ways than one. No longer are we logging online just to check up on family and friends. “A majority of Americans now say they get news via social media, and half of the public ha[d] turned to these sites to learn about the 2016 presidential election.”¹ Further, “Americans are using social media in the context of work (whether to take a mental break on the job or to seek out employment).”² “Young adults are the most likely to say they use social media sites,” as of July 1, 2015.³ Studies have suggested that “[o]n any given day, teens in the United States spend about nine hours using media for their enjoyment.”⁴

This article will discuss the multitude of issues that minors face from social media. First, the various cognitive and behavioral studies about adolescents and their findings will be briefly explained, along with

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¹Shannon Greenwood et al., *Social Media Update*, (Nov. 11, 2016), available at <http://www.pewresearch.org/2016/11/11/social-media-update-2016/>.

² *Id.*

³*Social Networking Use*, Pew Research Center, (July 2015), available at <http://www.pewresearch.org/data-trend/media-and-technology/social-networking-use/>.

⁴Kelly Wallace, *Teens Spend a 'mind-boggling' 9 hours a day using media, report says* (Nov. 3, 2015, 9:07 PM), available at <http://www.cnn.com/2015/11/03/health/teens-tweens-media-screen-use-report/>.

the policy implications that the studies bring to light. It will also detail various Constitutional rights that minors are afforded as well as the limitations of those rights. Further, the article will explore some of the attempts made by the legislature to protect minors, sorting through its strengths and weaknesses. Finally, the still looming issues that need to be dealt with for minors' protection will be discussed as well as the possible solutions to help these various problems.

As social media is being used more and more in our daily lives, we are discovering some of the negative aspects to society's latest obsession. Internet gossip is now being used as a social tool for public shaming; "modern 'Internet shaming' such as websites like BitterWaitress.com—a site that allows servers to enter information about lousy tipper-and DontDateHimGirl.com, a site that allows women to denounce men who cheated on them" are a few examples.⁵ "Being shamed in cyberspace, is capable of becoming a 'digital scarlet letter.'"⁶ Putting our interactions out into the digital world allows our lives to be exposed to a much greater audience, which in some cases could be detrimental to our personal lives.

In addition, some of the negative aspects found which are targeted towards minors include, "[p]edophiles, child pornographers, and commercial predators are indeed lurking online."⁷ This fact is especially troubling in conjunction with a recent EU-wide study that found 59 percent of 9-16 year olds have a social networking profile.⁸ In recent years, the courts have been grappling with trying to find ways to use or limit social media in a manner that is consistent with the law and individual's various rights.⁹ Trying to implement these measures becomes even more complicated when tailoring them to minors involved in legal proceedings.

⁵Alice E. Marwick et al., *Youth, Privacy and Reputation-Literature Review*, HARV. L. SCH., PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES, Paper No. 10-29, 53 (2010), available at <http://ssrn.com/abstract=1588163>.

⁶ *Id.*

⁷Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUMAN RIGHTS L. REV. 759, 790 (2005), available at www3.law.columbia.edu/hrlr/hrlr_journal/42.3/Shmueli_Blecher.pdf.

⁸Eva Lievens, *Risk-reducing regulatory strategies for protecting minors in social networks*, JOURNAL OF POLICY, REGULATION AND STRATEGY FOR TELECOMMUNICATIONS, INFORMATION AND MEDIA Vol. 13 No. 6, 43 (2011).

⁹See *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F.Supp.3d 842, 842-43 (D. Minn. 2015); see also *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

Background

A. SOCIAL MEDIA AND MINORS

Our youth utilize social media at a growing rate, with much of the activity coming from countless smartphone applications.¹⁰ According to one minor, “I would rather not eat for a week than get my phone taken away. It’s really bad.”¹¹ On a nearly daily basis teenagers and pre-teens are known to take photos of themselves, branded as “selfies,” trying to get the most “likes” from their peers as possible.¹² When minors are uploading all of these photos and posts of their lives, typically the only “filters” they use are choosing between “Valencia” and “Lo-fi” amongst others, depending on if they want to look tanner, or cast an edgy hue on a photo.¹³ A minor’s primary focus is typically how they are being judged by their peers, as stated by a youth, “I like made this google document on all my rules and requirements on how to take a selfie. I take a lot of pictures, but don’t judge, I take like 100 usually, or like 150, maybe 200 if I really can’t get a right one.”¹⁴ According to one study, “61% of teens said they wanted to see if their online posts are getting likes and comments.”¹⁵ This need for peer approval fuels adolescents’ addiction to social media along with the need to be constantly interacting on any of the various social networking platforms.¹⁶

Unfortunately, minors rarely consider the severe repercussions that could result from the things they upload or their social media activity. Many do not even protect themselves from unknown individuals that request to have access to view their accounts. One eighth grader stated, “[a] lot of people follow me that I do not know. There’s actually a lot of people who I have no idea who they are but I just let them follow me

¹⁰ *Id.*

¹¹ Chuck Hadad, *Why Some 13-year-olds check social media 100 times a day* (Oct. 13, 2015, 3:55 PM), available at <http://www.cnn.com/2015/10/05/health/being-13-teens-social-media-study/index.html>.

¹² *Id.*

¹³ Taylor Casti, *Every Instagram Filter, Definitively Ranked* (Apr. 15, 2014 8:03 AM), available at http://www.huffingtonpost.com/2014/04/15/instagram-filters-ranked_n_5127006.html.

¹⁴ Hadad, *supra* note 11.

¹⁵ *Id.*

¹⁶ See Chuck Hadad, *Why Some 13-year-olds check social media 100 times a day* (Oct. 13, 2015, 3:55 PM), <http://www.cnn.com/2015/10/05/health/being-13-teens-social-media-study/index.html>, for information on youths habitual need to check social networking websites.

because the more the merrier.”¹⁷ Dangerous activities such as this can leave minors extremely vulnerable; “children and youth are seen as at risk from online predators, pedophiles, cyberbullies, and other online dangers.”¹⁸

Minors can completely sabotage their future through social media with an inappropriate photo whether it is underage drinking, drug use, or promiscuous activity. “A study of 147 MySpace profiles of 16-17 years old found that 47% contained ‘risk behavior information,’ which the authors defined as sexual activity, alcohol use, cigarette use, and drug use.”¹⁹ This statistic raises alarm as these types of activities have the potential to be viewed by a number of various individuals that could have an impact on a minor’s future. “[R]ecent privacy worries are centered around secrecy, access, and the risks that ‘public living’ on sites like Facebook, MySpace, and YouTube poses from educational institutions, future employers, pedophiles, and child pornographers.”²⁰ A youth’s actions are now able to be cataloged on social media, which puts them in a particularly exposed situation where even minimal missteps can leave a permanent trail.²¹

Problems in relation to social media, “is said to be more acute for young people ‘because we are just at the beginning of the digital age.’”²² Online activity has become a sort of crutch for adolescents, “[t]here’s a lot of anxiety about what’s going on online, when they’re not actually online, so that leads to compulsive checking.”²³ This addiction has led to new troubling behavior that minors are now getting into.²⁴ According to Matt O’Shea, a Chicago police detective, “[i]t’s a new crisis, [g]irls all are sending nude photographs of themselves all over the place.”²⁵

Minors often do not exhibit the cautionary behavior necessary to operate social media sites in an adult manner that can face adult consequences.²⁶ “Various pitfalls associated with minors having unchecked access to social media, includ[e] non-sexual incidents like the

¹⁷ *Id.*

¹⁸ Shmueli, *supra* note 7, at 760.

¹⁹ Marwick, *supra* note 5, at 24.

²⁰ Marwick, *supra* note 5, at 4.

²¹ Marwick, *supra* note 5, at 10.

²² Marwick, *supra* note 5, at 10.

²³ Hadad, *supra* note 11.

²⁴ See, e.g. Tara Kadioglu, *Nude Snapchat selfie spurs discussion about minors’ use of social media* (May 13, 2015, 9:15 AM), available at <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-social-media-danger-st-0513-20150512-story.html>.

²⁵ *Id.*

²⁶ Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 CT. REV. 70, 73 (2012).

arrest in April [of 2015] of a 16-year-old at Marist High School who allegedly posted an online threat directed at a teacher.”²⁷ That student is currently facing a felony charge for making a cyber threat.²⁸ If this student is convicted of a felony while still in high school, he will likely face an uphill battle for the rest of his life in overcoming a decision that he made regarding social media as a minor.

These are the types of detrimental effects that social media is capable of creating, and minors are vulnerable to. Adolescents do not have the foresight to use social media with the kind of restraint and filtering that needs to be practiced. For instance, “a girl posted information about her sweet sixteen party on MySpace, leading so many teens to crash the party and cause so many problems that her father had to call the police.”²⁹ Due to occurrences such as this, safeguards need to be put into place through the law and the legislature. Furthermore, parents and educators need to have a general awareness of online threats that will aid in giving minors the protection that they need from these various potential dangers.

B. COGNITIVE STUDIES DETAILING THE DECISION-MAKING PROCESS OF MINORS AND ITS INFERENCES

Over the past two decades there has been extensive research conducted concerning the development of an adolescent’s brain and its implications.³⁰ This section will divulge the recent findings that have been discovered regarding the development of an adolescent’s brain. Further, the impact that these findings have on the way new policy is shaped concerning minors will be discussed. It does not take a scientist or behavioral specialist to know that kids can be immature and are prone to acting with poor judgment. What science and cognitive studies can help us with is the why, along with how extensive the effects are.³¹ This information can aid the legal realm and public policy in shaping the proper expectations of our youth and the type of punishments that are appropriate for a minor’s actions.³²

It has been shown in the field of neuroscience, with the use of neurological studies, magnetic resonance imaging (MRI), and functional

²⁷Kadioglu, *supra* note 24.

²⁸*Id.*

²⁹Kaveri Subrachmanyam & Patricia Greenfield, *Online Communication and Adolescent Relationships*, 18 *THE FUTURE OF CHILDREN* 119, 138 (2008).

³⁰*See generally* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 *CT. REV.* 70 (2012).

³¹*Id.*

³²*Id.* at 67, 78.

magnetic resonance imaging (fMRI) the ways that the brain works during the stages of adolescents.³³ To briefly explain the way an fMRI works:

[fMRI] [u]ses the technology of regular magnetic resonance imaging adapted to detect changes in hemodynamic (literally “blood movement”) properties of the brain occurring when the subject is engaged in very specific mental tasks. . . . A “stack” of slices comprising the whole brain is acquired every couple of seconds or so, enabling the rapid collection of many of these three-dimensional “volumes” of brain activity over the period of an experimental paradigm.³⁴

This technology has been utilized for new discoveries of the way an adolescent’s brain functions.³⁵

There have been several major distinctions found to distinguish the brain of an adolescent from that of an adult.³⁶ Notably, “[o]ne of the most consistent findings from these MRI studies is that there is a steady increase in white matter in certain brain regions during childhood and adolescence.”³⁷ This increase is primarily a result of a process called myelination.³⁸ Myelination is essentially a process which improves the efficiency of the brain circuits which “are important for higher-order cognitive functions- planning ahead, weighing risk and reward, and making complicated decisions.”³⁹

Therefore, as we get older and our brain goes through this myelination process, we develop better decision-making skills and have foresight as to the future implications that our present choices will have.⁴⁰ Being able to have this functionality is essential when we are faced with difficult and possibly risky decisions that may seem harmless at the time.⁴¹ When logging on to various social media websites and applications, minors are bombarded with images, requests, and

³³Blakemore, S.-J. and Choudhury, S., *Development of the adolescent brain: implications for executive function and social cognition*, 297 (Journal of Child Psychology and Psychiatry, 47:3/4 2006) available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1469-7610.2006.01611.x/epdf>.

³⁴Owen Jones et al, *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, STAN. TECH. L. REV. 5, 5-6 (2009), available at <http://stlr.stanford.edu/pdf/jones-brain-imaging.pdf>.

³⁵ *Id.*

³⁶Blakemore, *supra* note 33, at 296.

³⁷Blakemore, *supra* note 33, at 296.

³⁸Steinberg, *supra* note 26, at 70.

³⁹ *Id.*

⁴⁰Blakemore, *supra* note 33, at 305.

⁴¹Blakemore, *supra* note 33, at 305.

notifications. It is essential that adolescents are aware of the repercussions of allowing a seemingly harmless, unfamiliar person to “follow” them and providing full access to their designated profile page filled with personal information.⁴²

Another significant change is “the density and distribution of dopamine receptors in pathways that connect the limbic system.”⁴³ “There is more dopaminergic activity in these pathways during the first part of adolescence than at any other time in development. Because dopamine plays a critical role in how humans experience pleasure, these changes have important implications for sensation seeking.”⁴⁴

These new developments can have a drastic effect on the way that we hold adolescents accountable for certain risky behavior. “Heightened sensitivity to anticipated rewards motivates adolescents to engage in acts, even risky acts, when the potential for pleasure is high, such as with unprotected sex, fast driving, or experimentation with drugs.”⁴⁵ In our new digital age, many of these risky behaviors by minors are being captured in photos and videos.⁴⁶ Furthering this pleasure high, is the youth’s addiction to getting as many “likes” or “followers” as possible by posting their behaviors online.⁴⁷ “[A] study of 263 Australian teenagers found that ‘peer pressure’ was a major motivator for revealing information on MySpace.”⁴⁸ This impulse for risky behavior is only heightened by their friends and being in groups.⁴⁹

“Scholars claim that young people will be the first to experience the aggregated effect of living a digital mediated life, with corresponding creation of various identities and digital dossiers over a long period of time.”⁵⁰ At this point, we can see how these neuroscience studies on an adolescent’s brain can have huge implications on the way policy and even the law is shaped around minors.⁵¹ Adolescents are notorious for engaging in risky behavior, as their brains are developing they are poor decision makers that are less likely to put the brakes on because they are focused on the anticipated rewards,⁵² often in the form of social acceptance and admiration by their peers.⁵³ These new studies of an

⁴²See Hadad, *supra* note 11.

⁴³Steinberg, *supra* note 26, at 68.

⁴⁴Steinberg, *supra* note 26, at 68.

⁴⁵Steinberg, *supra* note 26, at 70.

⁴⁶Marwick, *supra* note 5, at 10.

⁴⁷Hadad, *supra*, note 11.

⁴⁸Marwick, *supra* note 5, at 21.

⁴⁹Steinberg, *supra* note 26, at 70.

⁵⁰Marwick, *supra* note 5, at 11.

⁵¹Steinberg, *supra* note 26.

⁵²Blakemore, *supra* note 33, at 305, *See also* Steinberg *supra* note 26, at 68, 70.

⁵³Hadad, *supra*, note 11.

adolescent's development are becoming a common influence in the way that society, policy, and the judiciary are deciding what standards to hold minors to.⁵⁴ It is now being argued that minors deserve more leniencies for some of their actions, so that they will not have to live with one mistake committed as a youth for the rest of their lives.⁵⁵

C. ADOLESCENT DEVELOPMENT AFFECTING POLICIES

Taking into account the developmental stages that an adolescent's brain goes through has already had an impact on decision making by judges.⁵⁶ Various opinions have been given with a common theme that minors are still developing, and that development tailors the types of punishments that they face. This section will go through various rights that minors have and the standards that have been implemented by the judiciary. Followed by this, there will be an overview of some of the actions taken by the legislature to continue the progress being made.

To begin, this analysis of underdevelopment can be seen in a recent case that involved a minor who was 16 years old when he committed an armed burglary.⁵⁷ After violating his probation by committing other crimes, he was sentenced to life in prison for the original crime of burglary.⁵⁸ "As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"⁵⁹ The courts were compelled to include the impact that the developmental process has on adolescents in reaching their decision.⁶⁰ As time progresses, the kind of reasoning displayed above needs to continue to be used in the courts and the legislature to try and configure a way to shield adolescents, while still being fair and demanding an appropriate level of accountability.

With social media becoming more ubiquitous, particularly with its use by minors, protecting them from potential hazards is becoming a higher priority. The judiciary is now faced with the question of how to litigate these issues when they arise in the courts, or how to try and keep them from getting into the courts to begin with. As seen above, it is unrealistic to expect that children can fathom the severe repercussions

⁵⁴Steinberg, *supra* note 26, at 67.

⁵⁵See e.g. *Graham v. Florida*, 560 U.S. 48, (2010), as modified (July 6, 2010).

⁵⁶*Id.* at 68.

⁵⁷*Id.* at 48.

⁵⁸ *Id.*

⁵⁹*Id.* at 68.

⁶⁰ *Id.*

that could come from a mistake once it is put out into social media. “Kids trust that a single message to a ‘friend’ will go no farther than his or her phone,” but a single press of a button “releases the message far beyond the intended receiver.”⁶¹

This reasoning is further alluded to in a case regarding a minor’s inability to consent to abortion, “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”⁶² In a multitude of cases regarding minors, judges are using this type of logic while deciding on cases.⁶³ The impact of this will hopefully flow into the legislature to continue to try to understand and protect our children.

A Minor’s Right to Privacy

As society evolves, the law shifts and grows with it to adapt to the times and standards; however, this is a slow and gradual process. Nevertheless, “[t]here is a growing concern over children’s privacy in today’s technological world.”⁶⁴ This concern is due to “a wide recognition that children need privacy to protect them against the manipulations of commercial entities, as well as against the government, child pornographers, pedophiles, and others.”⁶⁵ Under the U.S. Constitution, various amendments allude to an individual’s right to privacy.⁶⁶ Yet, “[n]either the Constitution or the Bill of Rights, nor any of the Amendments to the Constitution contains an express provision protecting the right of privacy.”⁶⁷

Considering this absence, “the Supreme Court has recognized privacy as a concept that is deeply rooted within the Constitution’s framework. The court has also made it clear that this right extends, at least in some instances, to children.”⁶⁸ “Constitutional rights do not mature and come into being magical only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”⁶⁹ Due to the lack of

⁶¹Kadioglu, *supra* note 24.

⁶²*In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989), quoting *Bellotti*, 443 U.S. at 634.

⁶³See e.g. *Graham v. Florida*, 560 U.S. 48, (2010), as modified (July 6, 2010), *See also* *Roper v. Simmons*, 534 U.S. 551 (2005).

⁶⁴Shmueli, *supra* note 7, at 759.

⁶⁵Shmueli, *supra* note 7, at 771.

⁶⁶U.S. CONST. amend. I, IV.

⁶⁷Shmueli, *supra* note 7, at 764.

⁶⁸*Id.*

⁶⁹*Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

specificity as to an individual's right to privacy in the U.S. Constitution, the states have the ability to adopt a more detailed definition of this right within their own respective state Constitutions.

For example, the Florida Constitution is broad in its definition of which individuals have rights to privacy.⁷⁰ "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life."⁷¹ The language used in the Florida Constitution coincides with

[t]he most famous, and still most common formulation of the right to privacy [which] is Samuel D. Warren and Louis D. Brandies' 'right to be let alone,' whereby privacy means the right to decide to break off contact from others and to be free from outside interference.⁷²

The Florida courts have held that minor's privacy interest were implicated and are afforded rights to privacy under their Constitution.⁷³ Therefore, under the Florida Constitution, minors are provided a relatively high level of privacy rights within the spectrum of discretion the states are allotted from the lack of an express provision in the U.S. Constitution.

There are however limits to privacy rights of minors in Florida which can in some cases be overridden. "Florida's right to privacy is a fundamental right that requires evaluation under a compelling state interest standard."⁷⁴ A compelling state interest to override a minor's right to privacy will include an issue such as a pregnant minor attempting to get an abortion without parental consent, or preventing sexual exploitation of children.⁷⁵ Hence, although minors are afforded a fairly high level of privacy rights under the Florida Constitution, there are still limitations to its application.

A contrast in ways that various states' view minor's rights can be seen in California laws. It has been recognized by California courts that "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life[.]' The fact that technology now allows

⁷⁰FLA. CONST. art. I, § 23.

⁷¹*Id.*

⁷²Shmueli, *supra* note 7, at 766.

⁷³*State v. A.R.S.*, 684 So. 2d 1383, 1386 (Fla. Dist. Ct. App. 1996).

⁷⁴*A.H. v. State*, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007).

⁷⁵*See A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007), *See also Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”⁷⁶ However, the California court also feels that they need to act in a function that allows them to protect minors’ analogous to that of a parental role.⁷⁷

“This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor’s constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may ‘curtail a child’s exercise of the constitutional rights ... [because a] parent’s own constitutionally protected “liberty” includes the right to “bring up children” [citation] and to “direct the upbringing and education of children.”’⁷⁸

Due to this reasoning, in California, “a juvenile court may impose a condition of probation that would be unconstitutional in an adult context, ‘so long as it is tailored to specifically meet the needs of the juvenile.’”⁷⁹ Within these conditions, can be one which requires a juvenile to turn over his or her passwords to, and authorize unfettered searches of, all of his or her electronic devices and all of his social media accounts. However, the juvenile court’s discretion is not unlimited. A probation condition is invalid if it: “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.”⁸⁰ As seen, many of our states are attempting to configure a way to address a minor’s right that protects them and their interests, while remaining constitutional.

In addition to the U.S. Constitution, state’s Constitutions, and the Supreme Court, privacy rights coming from the legislature are another step toward providing some sort of a safeguard for adolescents. One of the first actions towards this was in 1998 with the Children’s Online Privacy Protection Act (COPPA).⁸¹ This act’s primary purpose is to serve as “regulation of unfair or deceptive acts or practices in connection with

⁷⁶In re Malik J., 193 Cal. Rptr. 3d 370, 375 (Ct. App. 2015).

⁷⁷*Id.* at 374.

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹15 U.S.C. § 6501 (1998).

the collection and use of personal information from and about children on the Internet.”⁸² This act states:

[i]t is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations.⁸³

This regulation is specifically for a child under the age of thirteen.⁸⁴ A violation of this act can be penalized through civil action.⁸⁵ Although this act does not directly protect minors from their own actions, it does show the fragile position children are in when being exposed to the hidden threats that lurk within the internet and social media. It is one of the initial actions taken with the awareness and intent to protect minors from these threats.

In 2015, the legislature introduced a bill known as the “Do Not Track Kids Act of 2015” to propose specific and important amendments to the original Children’s Online Privacy Protection Act of 1998.⁸⁶ This bill has been proposed to allow further coverage and keep up with the expansion of the internet and social media.⁸⁷ One of the important amendments is, “by striking ‘website or online service’ and inserting ‘website, online service, online application, or mobile application.’”⁸⁸ The change in verbiage suggested is intended to encompass the new forms of Internet and Internet media that is reaching and affecting children.⁸⁹ Amendments such as this are vital to the law and society attempting to keep pace with the always rapidly expanding Internet and technology.

Our minors are constantly being exposed to new forms of social networking and with that, new opportunities for potential dangers. Including what may seem to be minor tweaks such as the word “mobile application,” is necessary to help in reining in some of these dangers.⁹⁰ Guarding a minor’s right to privacy regarding the internet and various applications can help to protect them from themselves when errantly

⁸²15 U.S.C. § 6502 (1998).

⁸³15 U.S.C. § 6502 (a)(1) (1998).

⁸⁴15 U.S.C. § 6501(1) (1998).

⁸⁵15 U.S.C. § 6504 (1998).

⁸⁶Don’t Track Kids Act of 2015, S. 1563, 114th Cong. (2015).

⁸⁷ *Id.*

⁸⁸Don’t Track Kids Act of 2015, S. 1563, 114th Cong. § 2(4)(B) (2015).

⁸⁹ *Id.*

⁹⁰ *Id.*

providing information about their lives that can potentially harm them in the future. It will be a never-ending task keeping up with the technology age and the complications that come with it. But it must continue to be done to protect our youth.

A Minor's First Amendment Rights

The high use of social media by minors has left the courts to face very difficult questions as to how to make current laws, like the U.S. Constitution, which were not written with the Internet age in mind, conform to the new social standards. Adolescents reduced ability to navigate their use of social media in a safe manner has, in several cases, led them into the hands of the law.⁹¹ A recent instance arose when a high school boy was allegedly forced to withdraw from his school after posting lewd comments on social media regarding a teacher at the school.⁹²

On January 26, 2014, someone anonymously posted on a website titled 'Roger confessions' the following: 'did @R_Sagehorn3 actually make out with [name of female teacher at Rogers High School]?'... In response, Sagehorn posted 'actually yes,' which he intended to be taken in jest... The post was made the same day, outside of school hours and not on school grounds.⁹³

There were several issues raised in this case from First Amendment violations, to defamation claims against the police chief involved in the matter.⁹⁴

Regarding the First Amendment rights, "students have a clearly-established first amendment right to free speech both inside and outside a school setting, subject to a limited set of exceptions."⁹⁵ Obscene speech is one of the exceptions.⁹⁶ To determine what is considered obscene,

[u]nder *Miller*, the trier of fact must consider: (a) whether the average person, applying contemporary community standards [,] would find that the work, taken as a whole, appeals to the

⁹¹See *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842 (D. Minn. 2015).

⁹²*Id.* at 849.

⁹³*Id.*

⁹⁴*Id.* at 851.

⁹⁵*Id.* at 852.

⁹⁶*Id.* at 853.

prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁹⁷

It has been established that, “[s]chool districts may impose sanctions on students in response to indecent speech.”⁹⁸ Unfortunately, students do not often think of these consequences when making a post on a social media website. In the present case of *Sagehorn*, the court ruled that there was a violation of his First Amendment rights;⁹⁹ however that is not always the outcome.

Another instance in which a student got in trouble for a social media issue arose when a high school girl created a page on Myspace called “S.A.S.H.” which stood for “Students Against Sluts Herpes.”¹⁰⁰ The primary purpose of the webpage was for the high school girl named Kowalski, to ridicule another female classmate, by posting photos and several comments about this classmate having herpes.¹⁰¹ After the parents of the victimized student became aware of what was going on, they brought it to the school’s attention.¹⁰² “For punishment, they suspended Kowalski from school for 10 days and issued her a 90-day ‘social suspension,’ which prevented her from attending school events in which she was not a direct participant” the school suspension was reduced to 5 days, but the social suspension remained the same.¹⁰³

Kowalski also argued that her First Amendment rights had been violated.¹⁰⁴ The courts explained, “[w]hile students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults.”¹⁰⁵ They further found that “the language of *Tinker* supports the conclusion that public schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.”¹⁰⁶ The courts held that this level of student

⁹⁷ *Id.*

⁹⁸ *Sagehorn*, No. 122 F. Supp. 3d at 853.

⁹⁹ *Id.* at 852.

¹⁰⁰ *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

¹⁰¹ *Id.* .

¹⁰² *Id.* at 568.

¹⁰³ *Id.* at 569.

¹⁰⁴ *Id.* at 570.

¹⁰⁵ *Id.* at 572.

¹⁰⁶ *Kowalski*, 652 F.3d 565at 572.

bullying caused interference and disruption in a school setting that deemed her speech immune from First Amendment protection.¹⁰⁷

In the case above, a student got caught up in social media, and it led to unfortunate repercussions.¹⁰⁸ She claimed that because of the punishment from her mistakes, “she became socially isolated from her peers and received cold treatment from teachers and administrators. She stated that she became depressed and began taking prescription medication for her depression.”¹⁰⁹ This case is sadly one of many instances in which carelessness on social media has gotten minors into trouble. It is for reasons like these that more safeguards need to be put into place to prevent cases such as these from happening. Due to the slow pace of the law however, this change may have to come from other resources.

A Step Toward a Solution: The “Erase Bill”

California has made one of the most recent efforts to protect minors from the consequences of dangerous social media practices.¹¹⁰ In January of 2015, the “Erase Bill” was enacted in the state of California.¹¹¹ This Act attempts to serve a function like that of an adolescent being able to expunge their record of criminal activity.¹¹² It defines a “‘Minor’ as a natural person under 18 years of age who resides in the state.”¹¹³ Further, the Act allows,

a minor who is a registered user of the operator’s Internet Web site, online service, online application, or mobile application to remove or, if the operator prefers, to request and obtain removal of, content or information posted on the operator’s Internet Web site, online service, online application, or mobile application by the user.¹¹⁴

It also declares that these various websites and applications are to make it known to the minor that they can request removal of various content and

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 569.

¹⁰⁹*Id.*

¹¹⁰Cal. Bus. & Prof. Code § 22580 (West 2015).

¹¹¹*Id.*

¹¹²*Help Teens Erase their Web Indiscretions*, THE CHRISTIAN SCIENCE MONITOR, November 19, 2013, <http://www.csmonitor.com/Commentary/the-monitors-view/2013/1119/Help-teens-erase-their-web-indiscretions>.

¹¹³Cal. Bus. & Prof. Code § 22580 (2015).

¹¹⁴Cal. Bus. & Prof. Code § 22581 (West 2015).

the steps that need to be taken to do so.¹¹⁵ “Young people may welcome laws that help them better navigate their evolving use of the Internet as they mature and wish to expunge previous postings, e-mails, or text messages. Many sites already allow such deletions, but the law would ensure they happen.”¹¹⁶ Therefore, if a minor posted something on one of these online applications that they later realize could have a negative impact on their lives, they have the tools and backing of the law to delete such postings and avoid any harm the post may have caused. This Act is a great step forward in recognizing the problems the internet and social media pose to our youth. There are however, some areas for improvement within the Act.

One of the biggest weaknesses is its limitation in not allowing the subject of a photo or post to be deleted if a third party posted it.¹¹⁷

The statute only covers the teen’s own posts and not posts made by others. A child can only erase his or her own statements, not the comments.... A teen cannot erase pictures of him or herself that others have posted, or statements about that teen that third parties posted, no matter how embarrassing or offensive those pictures or statements may be.¹¹⁸

If a third party were to take a photo of another without their consent in a compromising situation, they would not be able to prohibit the third party from posting this, or get it deleted.¹¹⁹ This limitation creates an issue as adolescents often do things as a group and any of them can post or upload photos with all the members of the group, not necessarily with everyone’s knowledge and consent. Teenagers are constantly seeking approval and pushing one another’s boundaries to gain acceptance and admiration from their peers. To do this, minors will take place in excessive amounts of underage drinking or partaking in lude activity or other extreme actions.¹²⁰

All of this is being done while everyone around them has access to a camera at their fingertips via their smartphone, with the ability to upload photos to whatever social media site of their choosing, displaying these acts for hundreds, possibly thousands to see. “Preadolescents and

¹¹⁵*Id.*

¹¹⁶*Help Teens Erase their Web Indiscretions, supra*, note 103.

¹¹⁷Theodore F. Claypoole, *Privacy and Social Media*, 2014, http://www.americanbar.org/publications/blt/2014/01/03a_claypoole.html.

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*See Steinberg, supra* note 26, at 70.

adolescents who lack an awareness of privacy issues often post inappropriate messages, pictures, and videos without understanding that ‘what goes online stays online.’ As a result, future jobs and college acceptance may be put into jeopardy by inexperienced and rash clicks of the mouse.”¹²¹ Although this statute is only limited to minors being able to delete post or photos uploaded by them personally, it is one of the more progressive statutes that have gone into effect in an effort to combat the issues with social media.¹²²

Another criticism of the Act is a question as to whether or not it indeed will be a good thing to let minors delete these comments or photos permanently.¹²³

[F]rom a policy standpoint, is there a downside to permitting young bullies, racists, and fraudsters to eliminate the evidence of their statements? Although some of this speech may have legal implications and may be required in court proceedings, under the new California law these statements may be required to be deleted.¹²⁴

These concerns are indeed valid. If for instance, a student posted threatening messages about orchestrating a school shooting, or a bomb threat, those comments showing the planning of these events would be essential in taking actions to stop it, or as evidence to be used after the event occurred. If that individual can delete these posts permanently, that could have detrimental effects.

With these criticisms taken into consideration, no law is perfect at its inception. With such a complex and ever-changing world with technological advances, there will be many attempts needed before finding the most effective way of monitoring and limiting the hazards of social media. The steps that California legislature took sparked influence across the nation to continue to take action, “[o]ther states, such as New Jersey and Utah, now have similar legislation pending.”¹²⁵ Measures like this statute and hopefully others to follow will continue to shed light on the issues children face regarding social media.

¹²¹Gwenn Schurgin O’Keeffe, MD, Kathleen Clarke-Pearson, MD, Council on Communications and Media, *Clinical Report-The Impact of Social Media on Children, Adolescents, and Families*, American Academy of Pediatrics Volume 127 Number 4, p. 801 (2011), available at <http://pediatrics.aappublications.org/content/pediatrics/127/4/800.full.pdf>.

¹²²Claypoole, *supra* note 117.

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Help Teens Erase their Web Indiscretions supra*, note 112.

Ongoing Issues and Possible Solutions

Although efforts are being made to alleviate the harm that can be caused to minors through social media, it is taking too long. Law making whether it be through Congress or the courts is a long and extensive process. That being said, more aggressive actions need to be taken before our youth have to pay the price. While helping to protect minors' privacy and trying to implement methods so that their poor judgment does not affect the rest of their lives is a great start, it is not enough. The heart of the issue is what needs to be directly addressed, and that is social media itself.

Rather than creating laws to protect minors from social media after the harm has been caused, the safeguards and regulations should be placed on the direct source. As we have seen, while still in the developmental stages of their lives, minors need to be held accountable for their poor decision making, in a different manner than adults.¹²⁶ Many youths lack the foresight and restraint to be solely responsible for decisions that can have an effect that follows them inevitably.¹²⁷ It is reasonable however to make the various social media forums more liable for what is being allowed to be broadcasted.

Social media applications and other websites profit a great deal from all the adolescent users that they appeal to.¹²⁸ It is only fitting that they should take part in protecting this portion of users that help keep them in business. A good initial safeguard would be age limitations for users when they register for social media sites. Some social media platforms such as Facebook already have age limits such as this.¹²⁹ On Facebook for example, if a child under the age of 13 creates an account, to remove it, a form must be filled out and reported to Facebook, and it will then be taken down.¹³⁰ These restrictions would help ensure that certain minors will not have access to some of the web and mobile applications that need a more mature sense to navigate. Social media websites and applications that are knowingly accessed by a reasonable percentage of minors should face liability for harm done to children if they fail to adopt age verification requirements.¹³¹

¹²⁶See *Graham*, 560 U.S. at 38, (2010).

¹²⁷Steinberg, *supra* note 26, at 70.

¹²⁸See *Marwick*, *supra* note 5, at 37-39 (discussing privacy for minors including regulations from COPPA and FTC).

¹²⁹FACEBOOK, <https://www.facebook.com/help/188157731232424>.

¹³⁰FACEBOOK, <https://www.facebook.com/help/157793540954833>.

¹³¹*Marwick*, *supra*, note 5, at 57.

Another option in the alternative would be if a minor wants to operate as a user on a social media site, they will have to do so with a joint account that is linked to their parent or guardian so that it can be monitored. To ensure that these accounts are being operated by someone of appropriate age (which will depend on the social media platform being used) the accounts can require a membership fee. This fee can be merely nominal by charging a minuscule yearly amount such as \$1.00. If a credit or debit card is needed to setup an account, it is much more likely that a parent is aware of what their child is using in terms of social media. Often parents are not even aware of all the different types of media available,¹³² this measure will help bring it to their attention which will in turn make it easier for them to monitor what their child is doing.

Concurrently, with this step of making parents more aware of the social media websites their children are operating, parents, children, and teachers should be provided with social media literacy. Although parents are concerned, it appears that overall they may not know much about their teen's online activities which will inhibit their effectiveness at setting limits and monitoring them.¹³³ "In a 2001 Pew Report, 64 percent of teens believed that they knew more than their parents about communicating online and 66 percent of their parent agreed."¹³⁴ However, as time goes on parents are getting more involved: in a more recent Pew Survey conducted between 2014 and 2015, "60% of parents report that they have checked their teen's social media profiles."¹³⁵

As adults are getting more proactive with minor's social media usage, "the challenge for parents and schools alike is to eliminate the negative uses of electronic media while preserving their significant contributions to education and social connection."¹³⁶ Both the parents and minors need to be aware of the rights that they have while operating a social media account as well as the various forms of consent necessary when posting or commenting about a third party.¹³⁷ Informing teachers, parents, and children about good practice recommendations will enhance the safety of minors.¹³⁸ "[I]t is important for parents to inform themselves about these online forms so they can have meaningful discussions about them with their adolescents."¹³⁹ Learning about these different rights and

¹³²Lievens, *supra* note 8 at p. 47.

¹³³Subrahmanyam, *supra* note 29, at 138.

¹³⁴*Id.* at 137.

¹³⁵Monica Anderson, *Parents, Teens and Digital Monitoring*, (Jan. 7, 2016), available at <http://www.pewinternet.org/2016/01/07/parents-teens-and-digital-monitoring/>.

¹³⁶The Subrahmanyam, *supra* note 29, at 120.

¹³⁷Lievens, *supra* note 8 at 46.

¹³⁸*Id.* at 47.

¹³⁹Subrahmanyam, *supra* note 29, at 119.

boundaries will enhance minors' abilities to enjoy social media while avoiding its hazards.

Parents are an essential first defense in protecting adolescents in a multitude of aspects. "Since children are immature (at least until a certain age), they are in need of adult guidance, and society has delegated the task of child-raising to those most likely to perform it well."¹⁴⁰ In accordance with this premise, "the courts believe that a 'parent possess[es] what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.'"¹⁴¹ Children operating various social media accounts will at times require intervention by parents to practice the discretion needed for the child's best interest. Fortunately, a recent study has shown that, "the vast majority of parents also try to take a proactive approach to preventing problems by speaking with their teen about what constitutes acceptable and unacceptable online behavior."¹⁴²

Unfortunately, many parents can get easily overwhelmed by the rapid pace and constant changing of social media websites.¹⁴³ To help parents with the daunting task of monitoring their child's online activities, many subscription services have emerged in the recent years "to help parents monitor their children's activities on social networks [including companies like] SafetyWeb, SocialShield, and MyChild."¹⁴⁴ These services function by sifting through various social networks to find where the child has accounts, and if possible it will monitor not only what the child writes, but also what others write about the child.¹⁴⁵ The service will compile a list of the child's online activities, "[o]ther items are explicitly red-flagged, like a Facebook friend who is considerably older, or a posting with a keyword like 'kill' or 'suicide.'"¹⁴⁶ This tool, in particular, is somewhat underutilized by parents, with only "39% of parents report using controls for blocking, filtering or monitoring their teen's online activities."¹⁴⁷ While these types of services are a great help, they should be used by parents to supplement measures taken to ensure their child's online safety, and not be used as the sole form of monitoring and communicating with their child.

¹⁴⁰Shmueli, *supra* note 7 at 762.

¹⁴¹*Id.* at 761.

¹⁴²Anderson, *supra* note 135.

¹⁴³Brad Stone, *Now Parents Can Hire a Hall Monitor for the Web*, N.Y. Times, July 4, 2010, available at <http://www.nytimes.com/2010/07/04/technology/04ping.html>.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷Anderson, *supra* note 135.

As a final point, in addition to implementing more stringent restrictions and methods for removal of harmful photos or posts, more strict penalizations need to be implemented. An important thing to note however, is that “it is essential to differentiate between illegal acts or content and harmful acts or content.”¹⁴⁸ If a third-party user is caught posting inappropriate photos or comments of a minor, there should be ways to penalize that individual.

As always however, the punishment needs to fit the violation. The evolving capacities principle could be adapted as an affective option for the implementation of punishment for minors.¹⁴⁹ “Under this principle, children should be granted rights, but in a stage-by-stage manner that accords with and pays attention to their physical and mental development.”¹⁵⁰ Analogous to this principle, punishments should be determined in the same manner that rights are granted, at a stage-by-stage basis that accounts for adolescents’ development as a balancing test on a case-by-case basis.

As already discussed, minors do not use the kind of restraint they should as they are still developing, and therefore minors do not deserve the kind of punishments adults face.¹⁵¹ When a minor posts inappropriate things of themselves or other third parties, repercussions for a first offense could be to disable that minors account and forbidding them from creating a new one for a certain period. This punishment can be seen as way of “grounding” them from social media. Punishing minors in this manner will serve the purpose of deterrence from making these mistakes. Repeat offenses will deem a more severe punishment. Options for repeat offenses could be a longer period of being restricted from the account or in severe cases, banning the account holder from the social media application all together. This stage-by-stage approach to punishment for minors will help them in avoiding drastic issues with the law, while still facing a penalty and learn the severity of their actions.

Conclusion

While some strides have been made in the legal realm to keep up with the rapidly growing Internet age, there is still a long way to go. There are several policy and societal goals that come into play when dealing with social media, such as privacy concerns, our First

¹⁴⁸Lievens, *supra* note 8, at 45.

¹⁴⁹Shmueli, *supra* note 7 at 769-70.

¹⁵⁰*Id.* at 770.

¹⁵¹*See Graham*, 560 U.S. at 38, (2010).

Amendment right to free speech, and the protection of minors.¹⁵² These are all important values to be considered while trying to adapt our laws to the new vulnerabilities social media poses.

The sharing between individuals on social media can blur the lines between public and private even with the various privacy settings that can be put in place on a user's account, making a presumption of privacy rights more difficult to define. Freedom of speech is one of our nation's most highly protected rights, but with respect to minors, particularly as it relates to education, there are limitations.¹⁵³ For policy purposes, it is very important to balance the type of content that we are monitoring and allowing to be deleted.¹⁵⁴ While protecting minors from their own error is very important, ensuring that minors who pose a threat to others need to be held accountable is equally important.¹⁵⁵ Therefore, while various factors must be taken into consideration, the ultimate goal must be to protect minors from the risks of social media and the Internet.

Currently, the developing laws are directed toward protecting us and minors from our own poor judgment. A more direct approach will be the ideal way to limit the potential harms of social media on minors. Placing more stringent restrictions on social media sites along with limiting user access based on age will be a great preventative measure. Also, requiring a credit card to be linked to the account will help ensure the parents awareness of their child's activities. The more involved parents and guardians are with their children's social media use, the better the chance they will have at being able to monitor potentially harmful activity.

As issues arise however, it is imperative that the law and the courts keep in mind adolescents are still in the developmental process with their cognitive functioning.¹⁵⁶ This level of maturity should be taken into consideration while tailoring the appropriate punishment for a minor's inappropriate actions. Although some initiatives are being made to protect minors from the risks of social media, it needs to be done at a faster rate to keep up with the expansive nature of the internet and its rapid rate of change.

¹⁵²See e.g. See *Marwick*, *supra* note 5 (discussing the various privacy concerns, along with pros and cons that minors face in the digital age); *see also* Shmueli, *supra* note 7 (discussing privacy problems for minors' that have been addressed outside of the home and privacy concerns that need further addressing for minors' while in their home).

¹⁵³*Kowalski*, 652 F.3d at 571-72.

¹⁵⁴*Claypoole*, *supra* note 117.

¹⁵⁵*Id.*

¹⁵⁶*Steinberg*, *supra* note 26, at 67.