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J.D., Barry University, Dwayne O. Andreas School of Law, May 2022. I would like to thank my husband for supporting me during the many sleepless nights which led to the completion of this note. Thank you to my boys for always calling to check in and visiting often. Also, I wish to thank my Senior Editor for helping me to clarify the intention of my note. Finally, thank you to Professor Sonya Garza for her extensive comments and direction—I am truly humbled by the time you dedicated to my success.

Child Entertainers and Their Limited Protections: A Call For an Interstate Compact

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[*] J.D., Barry University, Dwayne O. Andreas School of Law, May 2022. I would like to thank my husband for supporting me during the many sleepless nights which led to the completion of this note. Thank you to my boys for always calling to check in and visiting often. Also, I wish to thank my Senior Editor for helping me to clarify the intention of my note. Finally, thank you to Professor Sonya Garza for her extensive comments and direction—I am truly humbled by the time you dedicated to my success.

I. INTRODUCTION

At the age of fourteen, a young Taylor Swift with big dreams and bigger talent was determined to make it in the music industry. With the emotional and financial support of her parents, this blonde-haired, blue-eyed girl took her guitar and a notebook full of songs and headed to Nashville, Tennessee. In 2005, following a performance by Swift at The Bluebird Café, Scott Borchetta, of Big Machine Records, signed a fifteen-year-old Taylor Swift to her first recording deal.[1] Recently, news reports have covered the events stemming from that fateful 2005 contract. Big Machine has collected up to eighty percent of its overall revenue from the music Taylor Swift created[2] under a contract she signed at the ripe young age of fifteen. In 2019, Big Machine was purchased by Scooter Braun (Ithaca Holdings), who now controls the masters to Taylor Swift's "first six albums."[3] Masters are important in the music industry because they are the "physical copies of original recordings and the copyrights associated with them."[4]

Although Swift released her first record at the age of sixteen, under existing law, Swift will not gain the masters until the age of fifty-one—in the year 2041.[5] Taylor Swift is one of many artists who realize their interests were not protected during their youth. While Swift was supported by her parents and there is no indication that she had been exploited for parental gain, her experience is not indicative of all children in the entertainment industry. Furthermore, children are now more apt to be cast on reality television shows or gain celebrity stutus through the internet, with little to no legal counsel, nor protection.

The rights and interests are numerous and multifaceted for children in the entertainment industry, as with any area of law. Among the rights to be explored are in those involving publicity, privacy, and labor. All of these rights are intertwined with multiple layers interwoven within these laws, which have a significant impact on the legal interpretation of the correlating rights for children in entertainment. The existing applicable

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[1] *Taylor Swift Biography*, BIOGRAPHY, https://www.biography.com/musician/taylor-swift, (last visited Feb. 11, 2021).

[2] Erin Vanderhoof, Taylor Swift, the Universal Backlot Fire, and Why Masters are the Next Battleground in Music: Artists Have Always Wanted to Have Some Control Over their Work, But Recent Fights Over Ownership Make a Showdown Increasingly Likely, VANITY FAIR (July 3, 2019), https://www.vanityfair.com/style/2019/07/taylor-swift-universal-backlot-fire-master-recordings.

[3] Id.

[4] Id.

[5] Id.

law for children in entertainment draws from tort law, contract law, property law, and constitutional law. The intersection of these laws highlights the lack of uniform laws amongst the states that protect the rights of children in entertainment.

Partly to blame for the lack of uniform laws that protect the rights of children in entertainment is the modern advancement of technology, however, there have been legal issues regarding children in the spotlight since the early 1900s.[6] This note will attempt to examine the historical developments in the law related to child performers and relevant aspects of state legislation—which has generally controlled the legal landscape. Due to the need for uniformity in the law, this note will look at other scholars who call for federal legislation to be used to preempt state law in order to afford greater protections for children. Further, this note will examine the call for state legislators to enact stronger, more effective legislation.

Part II of this note will delve into the substantive law surrounding child entertainers by exploring the foundations of several fundamental legal fields. Part III will examine how the intersection between the fundamental legal fields had formed as the right of publicity, which morphed from the right to privacy.[7] Although the right of publicity and the right of privacy are distinct, courts seem to intermingle—and at times confuse—the concepts in application.[8] Part IV, will discuss the differing theories on applying a uniform federal statute versus the piecemeal legislation available in the states. Finally, Part V will propose an interstate compact as the best means to satisfy the tense legal debate.

II. SUBSTANTIVE LAW—LEGAL ISSUES AND CHILD ENTERTAINERS

A. Contracts

Taylor Swift's poorly negotiated contract, which ultimately provided little protection for the child star, is not a new dilemma. Brooke Shields was a child model and actress in the 1970s.[9] At the age of ten, Shields was chosen through the Ford Model Agency to pose for photos to be used in a publication originally to be called *Portfolio 8*.[10] These

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[6] Liana M. Nobile, *The Kids Are Not Alright: An Open Call for Reforming the Protections Afforded to Reality Television's Child Participants*, 17 U.C. DAVIS J. JUV. L. & POL'Y 41, 49 (2013) (discussing the "Shirley Temple Exception" for child entertainers within the Fair Labor Standards Act).

[7] *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAWYER 14, 14 (2011).

[8] *Id*.

[9] Shields v. Gross, 448 N.E.2d 108, 109 (N.Y. Ct. App. 1983).

[10] *Id*.

photos were shot and included in the publication and were later used in other magazines, and even by Shields in her own biography.[11] At the time, consents for the photos were signed by Shields' mother.[12] The limitations—or lack thereof—of this consent was later challenged in court.[13]

During its review of Brook Shields' mother's consent to be photographed and subsequently, for these photos to be used, the Court looked at Section 50 of the New York Civil Rights Code, which requires that the written consent of a minor's parent or guardian be obtained before a film or corporation uses the child's name, portrait or picture.[14] If consent is not obtained, then the offender may be guilty of a misdemeanor.[15] "Once written consent is obtained, however, the photograph may be published as permitted by its terms."[16] Ultimately, the New York Court of Appeals held that a minor may not disaffirm written consent given by their parent for the use of their "name, portrait or picture for advertising purposes;" but a parent who desires to place limitations on use must include the terms of limitation when offering the consent.[17] Given that "a defendant's immunity from a claim for invasion of privacy is no broader than the consent executed to him,"[18] a child whose parent authorized the contract through consent cannot disaffirm those freely given consents.

Minors can typically disaffirm a contract entered into prior to reaching the age of majority by invoking the contract theory of capacity, specifically, the infancy doctrine. [19] Although disaffirmance of a contract is an option, there are several exceptions to this theory, most notably the "'retained benefit' exception." [20] Under the retained benefit exception the minor is not allowed to retain the benefit of the bargain while summarily disaffirming there ever was a contract.[21] This exception is relevant today because many minors enter into online contracts without reading the bargain they are obligated to complete. The retained benefit exception

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[11] *Id*.
[12] *Id*.
[13] *See* Shields v. Gross, 448 N.E.2d 108, 109 (N.Y. Ct. App. 1983).
[14] *Id.* at 110.
[15] *Id.*
[16] Shields, 448 N.E.2d at 110.
[17] *Id.* at 112.
[18] *Id.*
[19] Megan Diffenderfer, Note, *The Rights of Privacy and Publicity for Minors Online: Protecting the Privilege of Disaffirmance in the Digital*, 54 U. OF LOUISVILLE L. REV. 131, 146-48 (2016).
[20] *Id.* at 147 (Other exceptions to the infancy doctrine would be for necessities, "emancipated and employed minors," and "minors who misrepresent their age").
[21] *Id.* at 146.

was addressed in a 2008 case that held "a minor cannot retain the benefits of a contract without also taking the burden."[22]

The development of disaffirmance of a contract has led to interesting actions by states. California for example, enacted a statute which afforded the court with the power of approval. [23] The Supreme Court of California reasoned:

> In professions in which one frequently begins a career at a tender age, it is to the interest of minors that they be able to make contracts with employers reasonably protecting the interests of both parties. To accomplish this purpose broad discretion has been vested in the court to which such contracts are submitted. The court may consider whether the terms of the contract are reasonable in the light of the then financial and educational interests of the minor as well as the proper development of his talents and his chances for success in the profession. This discretion, which has been vested in the court to enable the parties to adjust their contract relations to their needs. . . .[24]

Another example is New York, which enacted the New York Protection of Child Performers and Models Act; this Act implemented several steps in solidifying a contract and eliminating disaffirmance as a defense.[25] Among the criteria are: (1) the court must obtain parental consent for un-emancipated minors (or make an emancipation determination); (2) there be a three-year term for the contractual obligations to be fulfilled; and (3) subsequent revocation by the court is allowed where the minor is being "impaired."[26] As these statutes indicate, there is a strong court presence in making determinations on disaffirmance and the minor's obligations typically relate to employment. The ever-present existence of the judiciary will provide some ease in implementation to any uniform legislation enacted in the future.

B. Right to Privacy

> An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing

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[22] *Id.* at 147 (examining the decision in *A.V. v. iParadigms, LLC,* 544 F. Supp. 2d 473 (E.D. Va. 2008), where children accused of plagiarism were arguing the contract with the creators of the software was voidable under the infancy doctrine).

[23] Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability,* 21 OHIO N. U. L. REV. 481, 511 (1994).

[24] Warner Bros. Pictures v. Brodel, 192 P.2d 949, 953 (1948).

[25] DiMatteo, *supra* note 23, at 512.

[26] *Id.*

> of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[27]

Warren and Brandeis wrote their famous article advocating a right to privacy in 1890.[28] In the early 1900s, "[t]he right of privacy was first recognized in cases of unauthorized advertising of names and likeness."[29] In a right to privacy claim, because it was difficult to prove damages for those individuals living in the spotlight since celebrities voluntarily displayed themselves to the public,[30] celebrities were granted a property right in their image; this later led to the right of publicity first announced in *Haelean Laboratories, Inc. v. Topps Chewing Gum, Inc.*[31] in 1953.[32]

Warren and Brandeis are touted with positing that every person has a right 'to be let alone.'[33] The right of privacy is '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.'[34] While the right to privacy is traditionally an individual right, Americans have morphed into a society comfortable with disclosing their private lives to the public via social media.[35] For children in America, one of the difficulties with establishing their right to privacy stems from the opposing—at least at times—parental right to privacy. "While parents have a right to privacy in the rearing of their children . . . that right is not without its limits."[36]

Even though children's rights have gained worldwide recognition, the United States Constitution still serves to hinder development of rights

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[27] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 569 n.4 (1977) (quoting Housh v. Peth, N.E. 2d 340, 341 (1956)).

[28] Cristina Fernandez, *The Right of Publicity on the Internet*, 8 MARQ. SPORTS L.J. 289, 307 (1998).

[29] *Id.* at 308.

[30] *Id.*

[31] Haelean Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (dubbing the "right of publicity" to mean the prominent person must have a right to determine who is able to commercially benefit from the use of any photos, images, etc. or, in the absence of that right, there would be little value in such things).

[32] Fernandez, *supra* note 28, at 309.

[33] Shannon Sorensen, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 CHILD. LEGAL RTS. J. 156, 162 (2016).

[34] *Id.*

[35] *Id.*

[36] Moore v. Pattin, 983 So. 2d 663, 664 (Fla. Dist. Ct. App. 2008) (citing Forbes v. Chapin, 917 So.2d 948, 951 (Fla. 4th DCA 2005)).

for American children.[37] The United Nations Convention on the Rights of the Child ("UNCRC") established an international recognition of privacy rights for children.[38] Under the UNCRC, the "principle of evolving capacities" notes children possess both inherent rights and autonomous rights.[39] Inherent rights, "such as food or security," are quite basic and apparent from birth.[40] In contrast, autonomous rights refer to those rights children are gradually permitted to possess as their age and maturity allow.[41] Although these rights would seem intuitive, the United States has not formally established a right to privacy for children. Unlike other countries, the U.S. Senate did not sign the UNCRC.[42] This decision seems to be rooted in property theory, affected by interpretations of the U.S. Constitution, and buoyed by social media.

1. Rooted In Property Theory

There are "deep roots in the theory that children are the property of their parents" and history has revealed "tensions between parents' and children's rights."[43] Parental rights have been recognized by the Supreme Court of the United States as the fundamental "'interest of parents in the care, custody, and control of their children—[it] is perhaps the oldest of the fundamental liberty interests recognized by this court.'"[44] While the tension between a parent's fundamental right and a child's right continues, one scholar argues for a shift in the judicial landscape to account for the individual interests of the child through the replacement of parental rights with parental privilege. Parental privilege would enable parents the privilege of acting in "child-rearing behaviors," rather than allowing parental rights that "infringe on children's rights of self-determination."[45]

The shift from parental right to parental privilege has proven to be a difficult task to achieve. In the 1920s, the Court in *Meyer*[46] and *Pierce*[47]

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[37] Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 22 (1999).

[38] Benjamin Shmueli, *Children in Reality TV: Comparative and International Perspectives*, 25 DUKE J. COMPAR. & INT'L L. 289, 325 (2015).

[39] *Id.* at 326.

[40] *Id.*

[41] *Id.*

[42] Woodhouse, *supra* note 37, at 9.

[43] Sorensen, *supra* note 33, at 167.

[44] *Id.*

[45] *Id.* at 167-68.

[46] Meyer v. Nebraska, 262 U.S. 390 (1923) (holding parents have a liberty interest under the Due Process Clause of the Fourteenth Amendment to raise their child free from state interference).

entered a decision that clearly marked liberty rights for parents and formed the continued basis for parental control over their children.[48] Here, children were interpreted "as a form of private property, and the parent-child relationship as a liberty interest of the parent."[49] For those advocating for children's rights, this interpretation has served to create barriers that continue to be difficult to break down.[50]

2. Constitutional Rights

Even though there is recognition of certain rights through jurisprudence, "the role of the family, education, or a combination of religion, family, and education" is not discussed within the United States Constitution.[51] Furthermore, although there have been due process and privacy rights recognized in constitutional law, the U.S. Constitution is "silent as to children's rights."[52] As a result, case law, and more specifically, *Meyer* and *Pierce*, has taken center-stage in the substantive due process argument that bolsters continued opposition to programs including mandatory public school, child labor restrictions, and health care programs for mothers and infants.[53]

Although there is no explicit language in the Constitution granting children rights, constitutional rights for children have been recognized.[54] There are two primary theories regarding children's rights: (1) choice rights and (2) need-based rights.[55] Choice rights aim to protect children from themselves given the concern for a child's ability to make good decisions;[56] whereas, need-based rights aim to protect children from third parties, such as "businesses, government, child pornographers, and predators."[57]

When viewed as a whole, children's constitutional rights are primarily related to equal protection and due process rights in criminal

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[47] Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding an Oregon act compelling children to attend a public school was a violation of the Due Process Clause of the Fourteenth Amendment because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

[48] Woodhouse, *supra* note 37, at 28-29.

[49] *Id.* at 29.

[50] *Id.*

[51] Charlotte P. Hopson, *The Family v. The State: Protecting the Rights of Parents to Raise and Educate Their Children,* 18 GEO. J.L. & PUB. POL'Y 605, 614 (2020).

[52] Woodhouse, *supra* note 37, at 4.

[53] *Id.* at 27.

[54] Sorensen, *supra* note 33, at 164.

[55] *Id.* at 164-65.

[56] *Id.* at 165.

[57] *Id.*

proceedings because "children's rights (generally called 'interests') are conceptualized as subsumed within the right of parents."[58] In the United States, children have no constitutionally protected right to be safeguarded from abuse or exploitation; no right to education; and "no rights to the basic nutrition, income supports, shelter, and health care" secured within the right to life,[59] given that those basic needs have not reached the heightened regard in order to qualify as children's rights, even though they seem to be foundational principles of good parenting. Courts have, however, interpreted "the rights of freedom of speech and assembly and the right to peaceful protest" to be among those fundamental rights held by children,[60] yet, there is still no blanket acceptance of equal rights for both adults and children.[61]

For Americans, the value of the First Amendment right to free speech is among our greatest fundamental rights. When legislators attempt to limit this right, there is immediate opposition against "compell[ed] self-censorship."[62] This voice of opposition serves as a backdrop for legislative reservations regarding any prohibitions or self-censorship.[63] In addition to free speech, the First Amendment right to freedom of expression is "very difficult to limit."[64] These freedoms tend to create obstacles for social media and internet legislation, thus making it difficult when addressing the rights of children in the spotlight.

3. Social Media

"Thanks to social media, 'ordinary people' can become famous, overnight or over the course of a few years, without help or interference from the 'Hollywood gatekeepers.'"[65] Nothing is off the table, and parents throw caution to the wind by posting content involving their children—with humorous and outrageous conduct hitting the internet quickly.[66] Even though this seems entertaining, creating such posts involving children "effectively deprives children of retaining privacy of expression until they reach an age where they can exercise their

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[58] Woodhouse, *supra* note 37, at 8-9.

[59] *Id.* at 9.

[60] Barbara Bennett Woodhouse, *Advocating for Every Child's Right to a Fair Start: The Key Roles of Comparative and International Law,* 71 Fla. L. Rev. F. 26, 33 (2019).

[61] *Id.* at 34.

[62] Kate Hamming, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U.L. REV. 1033, 1052 (2020).

[63] *Id.*

[64] Shmueli, *supra* note 38, at 329.

[65] Grace Greene, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age,* 168 U. PA. L. REV. ONLINE 153, 186 (2020).

[66] Sorensen, *supra* note 33, at 164.

judgment as to what they should post online and what they will not."[67] There are foreign countries leading the way with protections for children's privacy, meanwhile the United States continues to navigate the protections it provides children.[68]

One example of a protection enacted to protect children online is the Children's Online Privacy Protection Act ("COPPA"), which was enacted by Congress in 1998 to provide privacy and safety for children while online by requiring websites to have "knowledge that they are collecting personal information from a child under [thirteen] years of age," amongst other requirements.[69] A criticism of COPPA is the lack of protection it offers to children above the age of thirteen.[70] Also, in the current climate of Facebook, Instagram, YouTube, and TikTok, where parents and other third parties can consent to the collection of information on behalf of children, it seems COPPA may need to be redrafted so that the collection of information from children does not occur to those unable or incapable of protecting themselves. One of COPPA's requirements allows for the removal of any online activity prior to age thirteen.[71] Unfortunately, any activity that is a derivative of parental consent is not likely to be removed.[72] Ultimately, COPPA continues to allow parental consent to be sufficient for online activity pertaining to their minor child.[73]

Most children show no regard for their privacy and many times overshare "personal details" on social media.[74] Many parents follow the same pattern and even have online accounts not only for themselves, but also for their children.[75] There are as many as ninety-two percent of American children who "have an online presence before the age of two."[76] Critics of the current culture comment that the current use of social media exposes children to embarrassment and possible exploitation leading to issues with "the child's self-image and . . . future

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[67] *Id.*

[68] Hamming, *supra* note 62, at 1050. This article discusses France's "Law 78-17 on Information Technologies, Data Files and Civil Liberties." Through several amendments aimed at tackling arising privacy and data protection issues, Law 78-17 has been amended to grant minors the exclusive "right to be forgotten."

[69] Diffenderfer, *supra* note 19, at 138. See *Children's Online Privacy Protection Rule ("COPPA")*, FTC, https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule, (last visited May 1, 2021).

[70] Diffenderfer, *supra* note 19, at 140.

[71] Hamming, *supra* note 62, at 1048.

[72] *Id.*

[73] *Id.*

[74] Shmueli, *supra* note 38, at 323.

[75] *See* Sorensen, *supra* note 33, at 158.

[76] *Id.*

embarrassment."[77] Although there is a presumption that parents will maintain the best interest of the child until the child is sufficiently developed to make those decisions on their own,[78] social media has raised the question as to whether the parents are truly looking out for their children's interest when exposing them online for profit. While parental ownership may have theoretical underpinnings in the mind of American parents, parents should instead steward their children and act as trustees, thus, requiring the parents to protect their children's rights.[79] As such, parents who share their children's lives for profit must be regulated.

One scholar argues there are four challenges to privacy birthed from the internet: "(1) persistence (the durability of online expressions and information), (2) visibility (information's potential audience), (3) spreadability (the ease with which information is shared), and (4) searchability (the ability to find information)."[80] These four challenges have amplified the privacy issues present in the physical world, thus, parents and children must be careful with what they expose in the virtual world.[81] However, as parental control of information seems prevalent, "sharenting" is a new type of oversharing by parents on the internet.[82] Sharenting may result from a parent's desire to maintain contact with family or a desire to help others navigate a hardship they have personally experienced.[83] Whatever the rationale, sharenting creates two privacy concerns: "(1) general child safety or security and (2) psychosocial development."[84] Safety or security concerns are related to the ease of access sharenting allows for others to exploit the child.[85] For example, a picture shared online of an innocent baby in an exposed pose may end up in the hands of pedophiles.[86] Furthermore, the psychosocial development of children too early may lead to hinder "the creation of the child's digital identity."[87] Relying upon Erik Erikson's theory on the eight stages of psychosocial development, scholars posit development stages may be inhibited by online parental sharing.[88] When parents inhibit children

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[77] *Id.*at 160.
[78] *Id.* at 165.
[79] *Id.* at 171-72.
[80] Hamming, *supra* note 62, at 1043-44.
[81] *Id.* at 1044.
[82] *Id.* at 1045.
[83] *Id.*
[84] *Id.*
[85] Hamming, *supra* note 62, at 1045.
[86] *Id.* (explaining a blogger who photographed her twins during potty training and those pictures ended up on a site frequented by pedophiles)
[87] *Id.* at 1045-46..
[88] *Id.*

from learning to control their online presence, it may result in immature development and an inability to aid the "child from acting 'with intention, [and] within reason and limits.'"[89] Children who inherit their digital identity from their parents may not be capable of "independently developing a sense of self."[90] This may lead to "insecurity and confusion for the child and the child's future."[91]

As previously noted, Sorensen explains the traditional notion of parenthood as an extension of ownership or property rights is in opposition "with the United States' developing recognition of children as individuals with individual rights."[92] As such, parenting should "require parents to function as trustees over children's future rights while acting in their best interest."[93] By implementing the choice-theory approach to children's rights, parents may take on a trustee role until the children "are sufficiently developed in their decision-making capabilities to make decisions themselves."[94] Placing children in control of their social media privacy may begin the shift from children being treated as property toward a parent-child relationship with the characteristics of a fiduciary duty, so the parent acts to the benefit of the child.[95] As a result, parents would be allowed to post about children on social media; however, they would do so without adopting an online persona for the child before the child can do that him or herself.[96]

C. Tort: Right of Publicity

In 1960, Dean Prosser wrote an article introducing four different invasions of privacy.[97] Amongst the four invasions, Prosser included the "appropriation of the plaintiff's name and likeness," which morphed into the right of publicity.[98] "The right of publicity is the right of each individual to control and profit from the value of his or her name, image,

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[89] *Id.*
[90] Hamming, *supra* note 62, at 1046-47.
[91] *Id.*
[92] Sorensen, *supra* note 33, at 171.
[93] *Id.* at 170.
[94] *Id.* at 172.
[95] *Id.* at 171-72.
[96] *Id.* at 173.
[97] Fernandez, *supra* note 28, at 310. Prosser's four types of invasion are: (1) "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private"; (2) "public disclosure of embarrassing private facts about the plaintiff"; (3) "publicity which places the plaintiff in a false light in the public eye"; and (4) "appropriation, for the defendant's advantage, of the plaintiff's name or likeness." William L. Prosser, *Privacy,* 48 CAL. L. REV. 383, 389 (1960).
[98] Fernandez, *supra* note 28, at 310.

likeness, and other indicia of identity."[99] Generally, celebrities utilize the right of publicity to "generate significant economic value."[100] For example, through information on their lives, paraphernalia, and "advertising of collateral products," celebrities can receive income through their name, image, or likeness.[101]

This right of publicity doctrine developed from a right to "privacy interest into a legal mixture of the tort of misappropriation, unfair competition law, and property jurisprudence."[102] In the modern age of social media, cell phones, and file sharing, one scholar argues the best way to combat the invasion of an individual's privacy is through the tort of public disclosure of private fact.[103] He argues the privacy torts introduced by Prosser are inadequate to conquer the task at hand and cannot remedy the inadvertent climb to stardom through YouTube bloopers and unsolicited uploads.[104] Even though the argument may have merit, this is outside the scope of this Note's purpose: to protect children who are thrust into the spotlight by their parents.

Another scholar explains Prosser's privacy tort of appropriation of likeness requires that any defendant prove their "voice, likeness, or name has been used without permission 'for commercial purposes.'"[105] Further, this scholar emphasizes that properly defining commercial purpose is crucial to succeeding in an appropriation of likeness case because commercial speech does not hold the same place among other protected First Amendment rights and is provided a lower level of protection.[106] For speech to find protection under the First Amendment, the Supreme Court reasoned in *New York v. Sullivan* that it must "fit[] the broad definition of 'newsworthy.'"[107] By extending the right of publicity to non-celebrities, courts actually inhibit the "First Amendment's protection of commercial speech" in relation to the newsworthiness exception.[108]

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[99] *Id.* at 306.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 307.
[103] Matthew R. Porio, *Off-Guard and Online: The Unwitting Video Stars of the Web and the Public Disclosure Tort*, 18 SETON HALL J. SPORTS & ENT. L. 339, 342 (2008).
[104] *Id.* at 343.
[105] Zahra Takhshid, *Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort*, 68 BUFF. L. REV. 139, 152 (2020).
[106] *Id.*
[107] *Id.* at 190-91.
[108] Alicia M. Hunt, *Everyone Wants to be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech,* 95 NW. U. L. REV. 1605, 1609 (2001).

The debate over extending the right of publicity to non-celebrities has resulted in a split amongst the courts.[109] Although both right of publicity and appropriation of likeness "protect against unauthorized commercial exploitation of an individual's identity," a key difference between the two torts is damages.[110] While right of publicity protects "monetary and commercial interests," appropriation of likeness remedies intangible interests, such as "dignity and integrity."[111] Given this difference, advocates call for the right of publicity to only be used to protect the commercial interests held by celebrities.[112]

In looking to additional legal interpretations of the right of publicity and appropriation of likeness, three emerging interests protected under the tort of appropriation seem apparent: (1) privacy from unwanted exposure; (2) control of personal autonomy in images presented to others; and (3) "an economic interest in the value of one's image."[113] Given the similarities in the interests protected between the right of publicity and the right of appropriation, courts and practitioners have found it difficult to make the distinction between the two torts. Legal researcher Harold R. Gordon attempted to remedy the problem by encouraging courts to apply the right of publicity in cases for commercial exploitation, whereas the right of appropriation should be reserved for cases where injured feelings have resulted from the defendant's harm.[114] Also, a key difference between the right of publicity and the appropriation of likeness is that there are survivorship rights associated with the right of publicity;[115] whereas, appropriation of likeness is personal and does not allow for benefits to survive following the death of the individual whose picture is at issue.[116] In addition, some states now recognize a need for economic gain in appropriation of likeness cases, which has managed to compound the confusion.[117] In contrast to right of publicity, "appropriation of likeness was initially a response to unwanted exposure."[118]

There are "three justifications for the right of publicity:" (1) a person's "moral right . . . 'to reap the fruit of their labors;'" (2) economic incentives, including "protecting the value of one's persona;" and, (3)

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[109] *Id.* at 1607.
[110] *Id.* at 1606.
[111] *Id.* at 1607.
[112] *Id.* at 1608.
[113] Takhshid , *supra* note 104, at 154.
[114] *Id.*
[115] *Id.* at 156.
[116] *Id.*
[117] *Id.* at 157.
[118] Takhshid, *supra* note 104, at 157.

"protection of the consumer from advertising deception."[119] While the right of publicity is available to all, in reality the right of privacy is enough for "non-celebrities."[120] The commercial use of one's identity may be available to all, but the right of privacy is likely a right most people need to claim.[121]

Another legal dilemma that arises with the right of publicity is that of preemption. In September 1985, the parents of Stephan Fleet entered into an agreement with a Polish film entity for Fleet to appear in a motion picture.[122] Along with an additional appellant, Fleet brought suit following nonpayment for his work on the film and the use of his picture on the videotape box.[123] Under California's Civil Code section 3344, the pair brought suit against the film entities claiming right of publicity.[124] The court, however, held there was no right of publicity because "[a] claim asserted to prevent nothing more than the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed by copyright law and preempted."[125] Typically, "if another appropriates for his advantage an individual's name, image, identity, or likeness," the individual's right of publicity is offended under California law.[126] Since an actor's performances are copyrightable, a state law of right of publicity is subject to preemption by federal copyright law.[127]

Zacchini is the only Supreme Court case interpreting the legal implications of the right of publicity.[128] In this case, a news reporter sat in the stands and filmed as he watched a human cannonball perform.[129] The reporter was asked by the performer not to film the act, and the reporter did not film on the day of the request.[130] However, he returned later and filmed "the entire act," which was claimed as proprietary to the performer and his family.[131] The issue posed to the Court was "[w]hether the First and Fourteenth Amendment immunize[] [the reporter] from

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[119] Fernandez, *supra* note 28, at 314.
[120] *Id.* at 320.
[121] *Id.*
[122] Fleet v. CBS, Inc., 50 Cal. App. 4th 1911, 1914 (1996).
[123] *Id.* at 1914-15.
[124] *Id.* at 1916.
[125] *Id.* at 1924.
[126] *Id.* at 1918.
[127] *Fleet*, 50 Cal. App. 4th at 1918-19.
[128] Sara Kimball, *A Family Affair: Extending the Right of Publicity to Protect Celebrity Children,* 18 SETON HALL J. SPORTS & ENT. L. 181, 190 (2008); Takhshid, *supra* note 104, at 154.
[129] *Zacchini*, 433 U.S. at 563.
[130] *Id.* at 564.
[131] *Id.*

damages for [his] alleged infringement of [the injured performer's] state-law 'right of publicity.'"[132] The Court held there is no immunity from the First or Fourteenth Amendments which allows the media to "broadcast a performer's entire act without [the] consent" of the performer.[133] However, through the protection of the performer's right to compensation, the Court provided an incentive for the performer to continue creating entertainment for the public.[134]

D. Uniformity of Labor Laws

The Federal Fair Labor Standards Act ("FLSA") exempts the labor of "any child employed as an actor or performer in motion pictures or theatrical production, or in radio or television productions."[135] This means that under federal law children in the entertainment industry and children who derive their income from social media and other online platforms are afforded little to no protection[136] depending on the individual state laws put in place.[137] Due to the financial benefits these states derive from having movies, theaters, and other performances, the child's best interests are not always served.[138] Therefore, parents are left to protect the children from being overworked, abused, or neglected.[139] Many parents, however, "often get swept up in the money and perks of fame," leaving children to deal with the results of excessive work hours

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[132] *Id.* at 566.
[133] *Id.* at 575-76.
[134] *Zacchini*, 433 U.S. at 576.
[135] 29 U.S.C. § 213(c)(3) (2018).
[136] As a teen, the world is a big place and you still rely upon your parents to provide for most necessities. The scenario changes when the child is the breadwinner and the parents have now become dependent upon that resource for their livelihood. For example, Mischa Barton became a household name following her starring role on *The O.C.*. Although it may be easy to forget the entertainment viewed as the final product began with a lot of work, that is exactly what a child or teen is doing in such instances—they are working at a job under varying conditions within whatever limitations the law of the state may establish. Barton joined the list of teenage stars whose parents have misappropriated their child's earnings. Shannon Quinn, *10 Child Stars Who Sued Their Parents*, TopTenz (May 7, 2018), https://www.toptenz.net/10-child-stars-who-sued-their-parents.php. Barton's mother managed her daughter's money as a child and into her adult years. *Id.* "Typically, a manger only keeps 10% of an actor's earnings," however the matriarch inevitably left Barton with no other option than to file suit against her for "stealing her money." *Id.* The hard-earned money that Barton accrued as a child led to her mother's purchase of a $7.8 million home. *Id.* Although the suit was ultimately dropped, Barton filed after her own mortgage was not being paid by her mother and there was a threat of foreclosure. *Id.*
[137] Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law,* 6 U. PA. J. LAB. & EMP. L. 429, 429 (2004).
[138] *Id.* at 431-432.
[139] *Id.* at 432.

and "unhealthy environment[s] without any guarantee that the money they earn will be protected."[140] Headlines depicting the troubles of child stars[141] have become too common.[142] When these children reach adulthood or gain emancipation, they may receive a percentage of their hard-earned dollars, or they may receive nothing at all.[143] The possibility of even one child being subjected to this is enough to show parents cannot be the end-all regarding child entertainers.[144]

There has been a growing trend in which children are the primary cast members of reality television shows.[145] While some may feel the best protection for children is to ban their participation in reality television that is both "unreasonable and unrealistic."[146] The Shirley Temple Exception has been used to "exempt children entertainers from [the FLSA's] protection."[147] However, one scholar feels these children cast in reality television, as well as all children in the entertainment industry, may benefit from a federal regulation on their treatment while participating.[148] In the mind of at least one scholar, a comprehensive regulatory scheme related to the labor produced by children would provide protections for children.[149]

Although performers are currently represented in many state statutes, there is uncertainty as to "whether these laws apply to reality children."[150] State laws tend to be lax and do not "adequately serve the best interests of reality children," due to prevalent "loopholes in states with inadequate protections for child entertainers."[151] *Kid Nation* remains to be recognized as an example of a failure by the state to protect

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[140] *Id.*

[141] *See* Mary Bowerman, *Timeline: Duggar Sex-Abuse Scandal*, USA TODAY (May. 28, 2015), https://www.usatoday.com/story/life/people/2015/05/28/timeline-josh-duggar-19-kids-and-counting-tlc-sex-abuse-scandal/28066229/ (telling of the harrowing Duggar family story where older brother, Josh, sexually abused several young girls, including his sisters).

[142] Krieg, *supra* note 137, at 432 (explaining the cases of Macaulay Culkin, Gary Coleman, and Dominique Moceanu—all who lost millions of dollars due to their parent's financial mishandling of earnings).

[143] *Id.*

[144] *Id.*

[145] Nobile, *supra* note 6, at 43.

[146] *Id.*

[147] *Id.* at 49.

[148] *Id.* at 44.

[149] *Id.* at 50.

[150] Nobile, *supra* note 6, at 50.

[151] *Id.* at 51.

children in reality television.[152] Thankfully, New Mexico rewrote its laws in the aftermath of *Kid Nation*.[153]

There is still a lack of uniformity among the states with regard to the labor of children in entertainment. While many states do not want to quash the creative nature of entertainment by overregulation, some states have placed protections for children regarding the number of hours they work, continued education of minors, and trust accounts[154] put in place to prevent the squandering of proceeds.[155] However, just as some states have announced labor protections for reality stars and child performers in common, other states still allow for uncertainties regarding the protections to be afforded to reality stars in contrast to other professional child performers.[156] When it comes to reality stars, innovative producers tend to exploit these loopholes to their benefit.[157] The disparity in application of the law stems from definitions on the rehearsed and trained character of child performers versus the alleged "regular activities" children in reality television are filmed doing.[158]

III. THE INTERSECTION OF RIGHT TO PRIVACY AND RIGHT TO PUBLICITY

The right to privacy, or the "right to be let alone," has been espoused within legal doctrine since it was first announced by Samuel D. Warren and Louis D. Brandeis in 1890.[159] In 1950, publicity rights began

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[152] In this reality television series, children were taken to a remote location away from their parents, where they were under the care and control of the producers. They were required to work unrestricted hours and complete several emotionally and physically challenging tasks. *See* Maria Elena Fernandez, *'Kid Nation' Parents Speak Out, Though Bound By a Confidentiality Pact, they tell Advocacy Groups of Concerns that Children were Fed Lines*, L.A. TIMES, http://articles.latimes.com/2007/aug/31/entertainment/et-kidnation31.

[153] Nobile, *supra* note 6, at 54-55.

[154] In a 2020 *People* Exclusive, Jill Duggar Dillard spoke about the recovery efforts she had to resort to in order to receive any compensation for her years on the TLC reality show *19 Kids and Counting*. Emily Strohm, *Jill Duggar Dillard Says She Wasn't Paid for Time on Reality Show: 'We Had to Get an Attorney,'* PEOPLE (Oct. 22, 2020), https://people.com/tv/jill-duggar-dillard-says-she-wasnt-paid-for-time-on-tlc-show/. Jill's family was "highly-religious, ultra-conservative" and had a "staggering number of children." *Id.* The show's name was the reality for the family—mom, Michelle, had birthed nineteen children and they were not done. *Id.* This show followed Jill and her family through many of Jill's childhood years. *Id.* There was no trust in place or any publicly documented way the Duggar parents accounted for their children's compensation from a reality television show that provided "an estimated $25,000 to $45,000 per episode paycheck." *Id.* Jim Bob, the father of the Duggar clan, was apparently the primary payee. *Id.*

[155] Nobile, *supra* note 6, at 54-55.

[156] *Id.* at 57-58.

[157] *Id.* at 58.

[158] *Id.*

[159] Diffenderfer, *supra* note 19, at 134.

to gain recognition, and currently nineteen states recognize the right by statute and twenty-eight states recognize the right at common law.[160] Most states that recognize the right to publicity have structured their laws surrounding celebrities.[161] With all the debate over the right of publicity, however, there is still "little commentary on the right of publicity and children" available.[162]

A. Modern Scope

Advances in technology now allow for the dissemination of information "on a national, if not international, scale."[163] The right of publicity grew from the right of privacy.[164] Even with the growth of the right of publicity, some courts continue to confuse it with the right of privacy.[165] This confusion ignores the property right contained within the right of publicity, which may affect the postmortem benefits provided for heirs.[166] A lack of uniformity in the law results in each state "recogniz[ing] [its own] right of publicity by statute and/or common law."[167] There are thirty-one states with right of publicity in their law; however "the scope and substance of the rights of publicity" lacks uniformity.[168] "The patchwork of the right of publicity laws encourages forum shopping by plaintiffs."[169]

Justification for a federal preemption statute may be recognized through the commerce powers afforded to Congress.[170] The Commerce Clause grants Congress broad powers to regulate interstate commerce.[171] Under the commerce power, the right of publicity may be federally regulated based upon the potential for exploitation "via channels of interstate commerce such as the Internet, television and radio," and advertising campaigns impacting multiple states.[172] Additionally, the sale of products and distribution via channels of interstate commerce affords ample foundation for federal regulation using the commerce power.[173] While a federal law is advocated by many scholars, this note posits that

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160 *Id.* at 136.
161 *Id.*
162 Kimball, *supra* note 128, at 195.
163 Vick, *supra* note 7, at 14.
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.* at 15.
168 Vick, *supra* note 7, at 15.
169 *Id.* at 16.
170 *Id.* at 17.
171 *Id*.
172 *Id*.
173 Vick, *supra* note 7, at 17.

an interstate compact would provide a more swift solution to the present issues. There has been no uniformity amongst the states, and, even with the vast commerce powers available to Congress, it is unlikely the legislature will act with such a broad exercise of power when it has been hesitant to do so in the past.

B. Reality Television Presents A Need For Greater Protections

Using three "prototypes" as examples, Shmueli examines different reality television shows with children as participants.[174] These three are: "talent competitions" (*America's Got Talent*), parenting shows (*Nanny 911),* and "competitive challenges" (*Kid Nation*).[175] Talent competitions tend to feature children performing acts, followed by either criticism/praise from professional or celebrity judges, and ending with a vote on elimination or progression.[176] Parenting shows offer an opportunity for parents to receive expert advice on how to discipline a disobedient child—who is usually filmed hitting, yelling, or throwing a temper tantrum.[177] Finally, competitive challenges are competitions, with "[s]uccess measured over time," and features children usually being filmed around the clock.[178] Reality television is "receiving mass, even global, appeal," and proving to be "inexpensive to produce as compared to the production costs of scripted programs."[179] The question remains: what is the physical, emotional, and financial cost to the children to produce these reality television shows?

Kid Nation was a highly criticized reality program which aired in 2007 and portrayed a cast of children.[180] These children were involved in what the executive producer dubbed a "social experiment" where they were allowed to take on the roles of adults and run an abandoned town in New Mexico for forty days.[181] Prior to filming, the parents were required to sign a twenty-two-page agreement that amounted to a general waiver.[182] Among the waived rights, parents agreed their children "would have almost no privacy during this process."[183] Aside from using the

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[174] Shmueli, *supra* note 38, at 295.
[175] *Id.*
[176] *Id.* at 296.
[177] *Id.* at 297-98.
[178] *Id.* at 298-99.
[179] Christopher C. Cianci, *Entertainment or Exploitation: Reality Television and the Inadequate Protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L.J. 363, 363 (2009).
[180] *Id.* at 364.
[181] *Id.* at 366.
[182] *Id.* at 368.
[183] *Id.* at 370.

bathroom to shower, urinate, or defecate, or while utilizing "changing rooms," children would have no privacy from the rolling cameras.[184] The fact that parents signed these waivers is troubling. However, it is even more troubling that these parents signed the general waivers without receiving "adequate representation in negotiating these terms."[185] Essentially, these parents signed away most their children's legal rights, while simultaneously giving "producers close to full responsibility over the health and safety of their children."[186]

Most contracts negotiated on behalf of reality stars are not likely to receive any review by a manager or competent representation, thus, children rely solely on the unknowing parents to discern the legal ramifications.[187] Just as with the twenty-two-page agreement signed by the parents of the *Kid Nation* child participants, many parents are signing away rights that children have no say in, and parents may not even understand, in order for them to participate in these reality television shows.[188] In the instance of *Kid Nation*, the parents even signed a confidentiality agreement "imposing a five million dollar [sic] penalty for any violation."[189] Although New Mexico amended their laws after the *Kid Nation* backlash to afford greater protections for children in the entertainment industry, it remains ambiguous as to its enforcement for children in reality television.[190] "Unfortunately, many of these shows involve children who are seemingly exploited by fame-hungry parents and money-hungry producers."[191] *Kid Nation* did not define the relationship between the children and producer as an employee/employer relationship[192]—which is an obvious implication of the uneven playing fields between parents and those parties representing the production company, who know the implications of employee/employer to a contract.

Another bizarre characteristic of *Kid Nation* is producers claimed the show depicted children at a "summer camp."[193] Additionally, the $5,000 given to every child was labeled "a stipend and not a salary."[194] Many of the younger participants were bullied and traumatized, and

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184 Cianci, *supra* note 179, at 370-71.
185 *Id.* at 371.
186 *Id.*
187 Nobile, *supra* note 6, at 60.
188 *Id.*
189 *Id.*
190 *Id.* at 62
191 *Id.* at 67-68.
192 Shmueli, *supra* note 38, at 302.
193 *Id.*
194 *Id.* at 303.

some will likely suffer from lingering psychological effects.[195] The potential psychological effects of the *Kid Nation* cast lead to another problem stemming from reality shows: inadequate protection of the child's projected persona.

In creating reality television, producers film the children doing "regular activities," and later splice pieces of footage together for airing; the participants typically have no say as to the portrayal presented to the public at large.[196] While this is supposed to be an accurate portrayal of real life, the distortion of the child's persona may render "harsh results" for children "appearing on reality television shows."[197] With the advent of the internet, these portrayals live on in cyberspace and may lead to detrimental effects for the child as any embarrassing or negative moments are replayed over many years.[198] Children require protection because unlike adults, they are unlikely "to fully comprehend the risks involved with being on a reality television show."[199] Although Nobile calls for a federal statute to be grounded in the FLSA, given the potential consequences children can face, an even broader and more comprehensive regulation accounting for privacy, right of publicity and labor may be the best option to fully protect America's children. To fully protect American children, states need to come together to negotiate an interstate compact.

C. Protecting Kidfluencers

Mom-influencers[200] have found a way to work from home by using their children to supply an income for the household.[201] Since ten percent of communications by digital marketers are devoted to influencer marketing, it has become a lucrative moneymaker.[202] One scholar explains that in an attempt to protect the privacy interests of children and provide for earnings made using children on their social media platforms, these parents (inclusive of all parents, not just moms) should be required

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[195] *Id.* at 301.
[196] Nobile, *supra* note 6, at 68.
[197] *Id.* at 68-69.
[198] *Id.* at 69.
[199] *Id.*
[200] An influencer is a person "who use[s] their platforms to deliver a particular message to a wide audience." Erin E. O'Neill, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing*, 72 STAN. L. REV. ONLINE 42, 43 n.3 (2019). A mom-influencer is "a social-media user who earns money posting content about her children." *Id.* at 44, n.12.
[201] *Id.* at 43.
[202] *Id.*

to follow state work-permit requirements that have been implemented for child performers and Coogan laws for trust accounts.[203]

Just as there are adult influencers, "kidfluencers" are children who obtain "lucrative sponsorships for product placement in photographs for social media."[204] Instagram has a multi-billion-dollar marketing business as a result of influencers and children have now been added to that classification.[205] In fact, the fastest path to becoming a kidfluencer is by being born to an influencer.[206] Parents are not obligated to set aside a percentage of earnings for kidfluencers[207], so it is unclear if these children are being compensated.[208] In response to public litigation of mismanaged funds by parents, California, New Mexico, Louisiana, and New York enacted legislation to protect fifteen percent of a minor's gross earnings through trust accounts.[209] Even so, "[w]hether kidfluencers can consent to the use of their image or likeness in advertisements or use the Coogan Law as a recourse still remains unsettled."[210]

In 2018, California Assemblyman Kansen Chu addressed an amendment to California's Labor Code.[211] Although there were drafts of the code which included "social media advertising," the final bill did not include the term within "the definition of employment under child entertainment law.[212][213] Among arguments for the exclusion of these kidfluencers from the statute was an argument that these children could

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[203] *Id.* at 48-49.

[204] Ana Saragoza, *The Kids Are Alright? The Need for Kidfluencer Protections*, 28 AM. U. J. GENDER SOC. POL'Y & L. 575, 576 (2020).

[205] *Id.*

[206] *Id.* at 577.

[207] Kidfluencers are making staggering salaries from product-placement and sponsorships, but who is protecting them from exploitation. Vanessa Cezarita Cordeiro, *"Kidfluencers" and Social Media: The Evolution of Child Exploitation in the Digital Age,* HUMANIUM (Feb. 23, 2021), https://www.humanium.org/en/kidfluencers-and-social-media-the-evolution-of-child-exploitation-in-the-digital-age/. "[T]he influencer marketing industry is expected to grow to $15 billion by 2022." *Id.* Due to the fact these children tend to be filming within their home, the lack of employee-employer relationship places Kidfluencers outside of traditional labor law work-related activities and treats children as performers instead. *Id.* As of the date of this note, the efforts to revise existing Coogan's laws to include Kidfluencers have been unsuccessful. *Id.* These children remain unprotected under American law. *Id.* However, France has taken the Coogan law and enacted legislation to protect the earnings of children whose images appear online for exploitation. *Id.* This new law also includes the "right to be forgotten" movement which enables children to sue for the removal of child content from social media. *Id.*

[208] Saragoza, *supra* note 204, at 577.

[209] *Id.* at 579, n.24.

[210] *Id.* at 579.

[211] *Id.* at 583.

[212] *Id.*

[213] *Id*. 583.

be filmed at any time, therefore making oversight difficult and adherence to education requirements in the existing legislation hard due to the kidfluencers'[214] work occurring outside of school hours. The fact that regulation may be difficult or hard does not negate the need for adults to act to protect the best interests of these children. Given the current climate of global online learning and accountability for the education of minors since the pandemic, this argument seems much weaker than it may have been in previous years.

IV. CONFLICTING POSITIONS ON RECOURSE

In 2015, a news article noted that animals tend to get more protection than children.[215] To drive home the issue, the author draws attention to the American Humane Association's strict guidelines which require the inclusion of the disclaimer "No animals were harmed [in the making of this movie],"[216] yet, there is currently no federal right of publicity.[217] Similarly, the United States Constitution does not grant a right to privacy to children equivalent to the protections afforded to adults. In addition, the FLSA protects children workers, but not those who are defined as performers, entertainers, or actors.[218] Although there is a federal exemption for child performers, many states have enacted laws regulating children working in the entertainment industry.[219] Furthermore, in the absence of legislation for a federal right of publicity, states are left to interpret their laws as they see fit, resulting in a lack of uniformity.[220] As previously stated, there are eighteen states with statutes recognizing the right to publicity and twenty-eight states that recognize a common law right of publicity.[221] However, states are inconsistent with their protections and applications. The following subsections will look at some of the present arguments for a uniform federal statute and the piecemeal legislation by some states.

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[214] Saragoza, *supra* note 204, at 583-84.

[215] Josh Tager, *Are Reality Shows Safe For Kids?*, ET ONLINE (Feb. 26, 2015), https://www.etonline.com/news/160338_are_reality_shows_safe_for_kids.

[216] *Id*.

[217] Kimball, *supra* note 128, at 192.

[218] 29 U.S.C. §213(c)(3); Nobile, *supra* note 6, at 49; Krieg, *supra* 137, at 429.

[219] Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming,* 43 AKRON L. REV. 435, 458 (2010).

[220] Kimball, *supra* note 128, at 184.

[221] Diffenderfer, *supra* note 19, at 134.

A. Uniform Federal Statute

For some, the right of publicity is argued to be more synonymous with a property right, rather than a privacy right.[222] Specifically, the right of publicity is trumpeted as "an intellectual property right created by state-law whose violation gives rise to a cause of action for a commercial tort of unfair competition."[223] Historically, property rights are left to the states and this would be no different, but it is still debatable as to how the right of publicity should be defined.

A federal law for right of publicity has been supported for years.[224]A federal law establishing a right of publicity would likely lead to the greatest uniformity.[225] Supporters argue the existing "patchwork" of state statutes and common law that control provides little regularity.[226] Though there is some merit to the argument, a uniform federal law seems unlikely. Political agendas tend to move legislatures away from any sort of children's rights which may be viewed as "undermin[ing the] constitutional rights of parents to raise their children as they see fit."[227]

Many believe regulating the labor of children in entertainment seems to be best suited to a federal statute.[228] While there may be some debate as to how to achieve a uniform federal labor standard, given the different types of child entertainers—dancers, singers, athletes, actors, reality television performers, etc.—the supporters believe it is the best way to achieve consistency.[229] Additionally, one scholar argues the FLSA exemption of child entertainers could be repealed, and those children would be included within all the benefits and limitations in the statute.[230] With all of the varying opinions, this issue seems up for debate.

B. Piecemeal Legislation By The States

Privacy has been central to the discussion of right of publicity and its evolution, however, the right to privacy has been interpreted in

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[222] *Id.* at 191.
[223] *Id.*
[224] Hunt, *supra* note 108, at 1607.
[225] Kimball, *supra* note 128, at 205.
[226] *Id.*
[227] Woodhouse, *supra* note 60, at 9 (examining the United States' decision not to join the U.N.'s Convention on Children's Rights and establish many fundamental human rights for children).
[228] Nobile, *supra* note 6, at 67.
[229] *See* Nobile, *supra* note 6, for a discussion on a federal statute for reality children; *see also* Royal, *supra* note 219 (discussing a federal statute regulating reality children with "a sliding scale of prohibition based primarily upon age").
[230] Royal, *supra* note 219, at 475.

various ways among the states. In Georgia, for example, the right to privacy is personal to the person whose privacy has been invaded, and since Georgia state law does not recognize a "relational right to privacy," a parent cannot claim an invasion on behalf of the child.[231] A New York court relied upon two Supreme Court cases regarding minor's right to privacy in contraception[232] and procreation[233] when the court held choices involving sexual orientation as protected where the minor "demonstrates sufficient maturity."[234] Justice Douglas dissented in *Wisconsin v. Yoder*,[235] and proclaimed a child whose asserted "rights [are] in opposition to his parent must be 'mature enough to have that desire respected.'"[236] His suggestion was children were "moral[ly] and intellectual[ly] matur[e]" at fourteen years old.[237] As demonstrated with these two examples, although there are privacy rights established within individual states, the only thing clear is the rights lack uniformity.

At least one scholar believes states are the most expeditious vehicle for a right of publicity.[238] Protection for the right of publicity may be afforded to children in the entertainment industry based upon the state law; but where a celebrities' child is concerned, the definition of protection under the law is a little fuzzy.[239] If the child is not an entertainer, they may not be covered by the law; so, defining entertainer or performer becomes much more important.

C. Interstate Compact

The note proposes an interstate compact to solve the issues surrounding children in entertainment. An interstate compact is an agreement between states related to a certain area of law.[240] These compacts are approved by the legislatures of states who wish to take part in the agreement, and then Congress must agree for the legislation to be

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[231] McClendon v. Warner Bros. Ent, Inc., No. 1:10-CV-3254-CAP, 2012 WL 13005477, at *1-4, *2-3 (D.C.N.D. Ga., Atl. Div. July 4, 2012).

[232] Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

[233] Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[234] *In re* Lori M., 496 N.Y.S.2d 940, 942 (N.Y. Fam. Ct. 1985).

[235] Wisconsin v. Yonder, 406 U.S. 205, 242 (1972).

[236] *In re* Lori M., 496 N.Y.S.2d 940, 942 (N.Y. Fam. Ct. 1985) (quoting Douglas, J., dissenting).

[237] *Id.*

[238] Kimball, *supra* note 128, at 205.

[239] *Id.* at 185.

[240] Library of Congress, *Interstate Compacts: United States*, https://www.loc.gov/law/help/interstate-compacts/us.php, (last visited Jan. 23, 2021).

effective.[241] Basically, the states establish a "contract" which they all must adhere to or suffer the consequences.[242]

The Interstate Compact for the Placement of Children ("ICPC") is frequently used by states in adoption proceedings. "The ICPC is an agreement among all fifty states, the District of Columbia and the United States Virgin Islands, establishing uniform legal and administrative procedures governing the interstate placement of children."[243] There are many considerations in determining the best interests of the child in a permanent home placement; however, those are beyond the scope of this note. The ICPC is mentioned simply to show the degree of coordination, communication, and consistency which may be used to benefit a child's future. Similar contractual obligations between states should be explored to remedy the current discord and dysfunction found in right to privacy, right of publicity, and labor laws in relation to child entertainers.

CONCLUSION

Children have historically been viewed as property of their parents. This theory of children as property has contributed to the current state of children's rights where those rights tend to be an extension of parental rights. While in many situations the attribution of control over a child's life to a parent is understandable, there are some parents who are unable to provide wise counsel for their children or make decisions on behalf of their child performer. There are several legal and emotional consequences children must then face as a result of their parents' decisions, whether they are made in good faith or not. With Taylor Swift, she will not have access to the masters of her music until the she is in her fifties, Brook Shields is unable to control who has access to use a photograph taken of her when she was ten years old, and the children from *Kid Nation* may face several psychological issues well into adulthood. This deficit in protections for children requires a remedy.

This note has examined the current climate of child entertainers, including kidfluencers and reality television stars. While this note is by no means comprehensive, there is a suggestion to reach beyond the advocacy for a uniform federal law or continued remedies through the states. Further, the solution may lie within the tried-and-true method of an interstate compact. An interstate compact would be highly beneficial in the world of the internet. Additionally, child performers have the ability to travel to multiple states in order to fulfill their contractual

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[241] *Id.*

[242] *Id.*

[243] *In re* Adoption of Adoptive Child R., 828 N.Y.S.2d 846, 848 (N.Y. Fam. Ct. 2006).

obligations. All the details mentioned within this note support a call for a new approach to a very old problem.