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How to (Not) Exploit Your Internet Child Star: Unregulated Child Labor on YouTube, Instagram and Social Media

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The introduction of social media has forever changed communication, politics, and business. Like with many new forms of technology, children are more likely than their elders to use and be affected by social media.¹ The consequences of social media on children are far-reaching and federal and state governments are still grappling with how to protect children from the effects of social media.² While states generally entrust parents with the care of their children, the introduction of social media has raised new questions about how to regulate child labor in this new landscape. Children involved in social media production are facing the types of threats that have long existed in the entertainment industry, including the risk of financial exploitation and harm to their well-being. Social media has raised new questions about balancing the parents' right to raise their children with the government's responsibility to act in a child's best interest. These tensions become all the more complicated considering that social media has given rise to new forms of profit.³

Influencer marketing is a form of marketing involving endorsements and product placement from individuals and organizations who have a social media audience and who profess to be experts in their niche.⁴ While brand endorsements have been around for decades, they were traditionally only available for celebrities, usually actors or athletes.⁵ The rise of social media has

¹ Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RESEARCH CENTER (Mar. 1, 2018), <https://www.pewresearch.org/internet/2018/03/01/social-media-use-in-2018/>.

² American Academy of Pediatrics, *Media Use in School-Aged Children and Adolescents*, 138 PEDIATRICS 5 (Nov. 2018) (describing the general risks of social media use including mental health issues, academic performance, and sleep disorders to illustrate some of the far reaching effects social media can have on children).

³ Thomas Smale, *How to Make Money with Social Media*, ENTREPRENEUR (April 22, 2016), <https://www.entrepreneur.com/article/274687>.

⁴ Jenn Chen, *What is influencer marketing: How to develop your strategy*, SPROUT SOCIAL (Sept. 17, 2020), <https://sproutsocial.com/insights/influencer-marketing/>.

⁵ Leah W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 Fordham Intell. Prop. Media & Ent. L.J. 97, 106 (2011).

allowed average individuals to obtain a path to stardom by obtaining followers on social media platforms such as YouTube or Instagram. While these “entertainers” may enjoy the same levels of wealth stardom as traditional celebrities who appear in film or television, the law does not always see it that way. Although both federal and state laws have developed to cover and protect child entertainers,⁶ the law has not yet caught up to modern technology. There is a growing rise in children appearing on social media including “kidfluencers,” minors who engage in sponsorship for product placements, brand promotion, and entertainment, and children appearing in other social media content such as YouTube.⁷ Since the laws of the traditional entertainment industry do not apply to children on social media, there is a likely risk that these children may not enjoy the same protections that have traditionally been provided to child entertainers. It is time for federal child labor regulation to extend to children on social media.

This paper will explain the need for regulating children when they produce social media content and suggest the types of regulation that should be explored. Part I briefly discusses social media, a few social media platforms and how widely they are used today. Part II provides a history of child labor regulation, including how child entertainers are excluded from federal regulation, and how and why states have regulated children in the entertainment industry. This section will also include a state legislation that is relevant to children working in the entertainment industry and serves to protect the earnings of their work. Part III will discuss how parental rights can serve as a potential barrier to any regulation. Part IV discusses how the current regulatory scheme does not cover children in social media and how social media differs from traditional entertainment. It also illustrates the risks that arise with children in social media by looking at recent examples. Part

⁶ See *infra* Part II

⁷ Sapna Maheshwari, *Online and Making Thousands at Age 4: Meet the Kidfluencers*, THE NEW YORK TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html>.

V will address the reforms I propose including amending current child labor regulations. Specifically, this paper calls for requiring parents to set aside earnings from social media production involving children, creating a definition of what qualifies as monetized social media production, and requiring work permits for children who regularly earn money from social media production.

I. The New Frontier (HISTORY OF YOUTUBE AND INSTAGRAM)

YouTube was launched in 2005 by three individuals.⁸ More than fifteen years later, YouTube has evolved into a multi-billion-dollar company, with 1.3 billion users and over 5 billion views daily.⁹ Starting in 2010, YouTube introduced advertising into its platform, allowing for companies to purchase ad space before and during the time when a video is played.¹⁰ It has allowed individuals to produce and share content with anyone in the world and to make a living while doing so.¹¹

Instagram is a photo and video-sharing application that was launched in 2010.¹² It was acquired by Facebook in 2012.¹³ Jump forward to today and it is one of the most popular social networking services in the world. In 2018, Instagram reached one billion users.¹⁴ It is the third

⁸ Ace Exford, *The History of YouTube*, ENGADGET (Nov. 10, 2016), <https://www.engadget.com/2016-11-10-the-history-of-youtube.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Branded Content*, INSTAGRAM <https://business.instagram.com/a/branded-content-ads> (last visited Mar. 17, 2021).

¹² Ignazio Mattola, *The history of Instagram*, MEDIUM (Oct. 8, 2016), <https://medium.com/@ignaziomottola/the-history-of-instagram-ff266eb75427>.

¹³ *Id.*

¹⁴ Josh Constine, *Instagram hits 1 billion monthly users, up from 800M in September*, TECHCRUNCH (June 20, 2018), <https://techcrunch.com/2018/06/20/instagram-1-billion-users/>.

most daily used social network in the world.¹⁵ By allowing users to connect and follow each other, users are able to share content.¹⁶

With the rise of social media, companies now have a way to advertise their products directly to their target consumer. Using social media in advertising is becoming the best way for companies to reach younger demographics. Roughly 50% of Generation Z and 42% of millennials believe that social media is the best place for advertising.¹⁷ What had originally been a platform for people to share and connect, has evolved into an advertising powerhouse. User-generated content on social media platforms has also become a modern form of entertainment.¹⁸ As social media grows, we can be certain that multi-billion dollar companies will continue to incorporate it into attracting new viewers.

II. History of Child Labor and Child Entertainment

In the United States, prior to the 1900s, children were viewed as an essential part of the household and workforce, and they were expected to participate in assisting the household.¹⁹ Particularly during the Industrial Revolution up until the 1930s, children were expected to work, whether it be in an industrial setting, retail store, farm, or in the home.²⁰ While children worked so that their families could have some form of compensation, child labor was also viewed as serving

¹⁵ Maryam Moshin, *10 Instagram stats Every Marketer Should Know in 2021*, OBERLO (Feb. 16, 2021), <https://www.oberlo.com/blog/instagram-stats-every-marketer-should-know>.

¹⁶ William Antonelli, *A beginner's guide to Instagram, the wildly popular photo-sharing app with over a billion users*, BUSINESS INSIDER (Dec. 14, 2020), <https://www.businessinsider.com/what-is-instagram-how-to-use-guide>.

¹⁷ *The Cost of Social Media Advertising: Where's the Value?*, DIGITAL MARKETING INSTITUTE (Feb. 12, 2019), <https://digitalmarketinginstitute.com/blog/the-cost-of-social-media-advertising-wheres-the-value>.

¹⁸ Nelson Granados, *Digital Video and Social Media Will Drive Entertainment Industry Growth in 2019*, Forbes (Dec. 18, 2018 7:25 AM), <https://www.forbes.com/sites/nelsongranados/2018/12/18/digital-video-and-social-media-will-drive-entertainment-industry-growth-in-2019/?sh=3e979fab4661>.

¹⁹ Michael Schuman, *History of child labor in the United States – part 1: little children working*, U.S. Bureau of Labor Statistics, Monthly Labor Review (Jan 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm>.

²⁰ *Id.*

a positive function, “avoiding the sin of idleness.”²¹ With the advances in machinery brought about during the Industrial Revolution, children were able to contribute to society despite being untrained and unskilled.²² With factories needing labor to operate the machines, children were the most obvious source of labor. Since children are younger, more vulnerable, and less educated, they were viewed as less likely to strike for benefits or participate in any organized labor movement.²³

Anyone familiar with the work of Charles Dickens probably knows that the working conditions during the Industrial Revolution were horrible for children.²⁴ Children would work long hours, sometimes as long as 14 hours a day or 70 hours a week.²⁵ Children would breathe in poisonous fumes.²⁶ Aside from working in hazardous conditions, it was argued that working took time away from educational pursuits and as adults, they would be ill-prepared for employment opportunities.²⁷ It was not until the New Deal of the 1930s when society’s view toward child labor changed, and it became a heavily regulated area of law where children were given protections commensurate with their status as the most vulnerable in our society.

The Fair Labor Standards Act of 1938 (FLSA) was implemented during the New Deal to protect minor child laborers after years of neglect and lack of oversight.²⁸ The child labor laws contained in the legislation were enacted to establish that work was safe and that work would not jeopardize the health, well-being, or educational opportunities of child workers.²⁹ It included a

²¹ *Id.*

²² *Id.*

²³ *The Industrial Revolution*, MT. HOLYOKE COLLEGE <https://www.mtholyoke.edu/~hicks22a/classweb/Childlabor/WebsiteChildlabor/History.html#:~:text=The%20conditions%20that%20children%20worked.or%2070%20hours%20per%20week> (last visited Mar. 19, 2021).

²⁴ *See, e.g.*, CHARLES DICKENS, *OLIVER TWIST* (Penguin Classics, 2003) (1838).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Gerald Mayer, *Cong. Research Serv.*, RL31501, 2 (2013).

²⁸ Peter Cole, *The Law That Changed the American Workplace*, TIME (June 24, 2016), <https://time.com/4376857/flsa-history/>.

²⁹ *Child Labor*, U.S. Dep’t of Lab., <https://www.dol.gov/agencies/whd/child-labor#:~:text=The%20federal%20child%20labor%20provisions.well%2Dbeing%20or%20educational%20opportunities> (last visited Mar. 18, 2021).

provision, banning “oppressive child labor,” banning children under the age of fourteen from employment, banning fourteen and fifteen-year-olds from working under oppressive conditions, and restricting sixteen and seventeen-year-olds from working in hazardous occupations.³⁰ This new piece of federal legislation was designed to protect children across the country. However, it did not apply to all child labor. Section 213 of the FLSA exempts “any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”³¹ The federal government exempted children from the entertainment industry because it did not believe that child entertainment was labor, but instead, it was an opportunity to allow gifted children to exercise and develop their talents.³²

Instead, the federal government assigned the role of protecting child entertainers to the states. Consequently, there is a great disparity among the states and the protections they provide to children. In states where the entertainment industry is more prevalent, such as California and New York, there are comprehensive protections for child entertainers.³³ Other states only have minimal protections.³⁴ In fact, eighteen states do not even regulate child entertainment.³⁵ Understandably, states like Mississippi, Montana, and Utah, states where very little, if any, production takes place, have not enacted child labor laws for entertainers. By understanding the protections of child labor laws for traditional child entertainers, one can gain insight into how these regulations would apply when regulating children in social media. Specifically, it is time to define

³⁰ 29 U.S.C. § 203(l) (1938).

³¹ 29 U.S.C. § 213(c)(3) (2020).

³² See 83 Cong. Rec. 7441 (1938).

³³ See e.g., *New York Film Production Labor Laws*, FIFTH PLANET FILMS (last visited Mar. 18, 2021). <http://fifthplanetfilms.com/new-york-film-production-labor-laws/>.

³⁴ See e.g., ALA. CODE § 25-8-60(a)(2021) (which does not have time restrictions but allows the Department of Labor to set their own restrictions) and ARIZ. REV STAT. ANN. § 23-235(A)(2021) (which exempts child entertainers under the age of sixteen from work hour limitations).

³⁵ *Child Entertainment Laws as of January 1, 2021*, U.S. Dep’t of Lab. <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> (last visited Mar. 18, 2021).

the type of labor that children on social media are engaging in, protecting the earnings of their work, and making sure that children’s mental and physical well-being is not at risk. These protections need to be extended to children involved in social media production.

A. California

As one of the largest hubs of the entertainment industry, California has worked to create a comprehensive framework to sufficiently ensure child actors are protected by the law. Perhaps the most significant and long-lasting impact arising from California has been the Coogan Law.³⁶ The Coogan Law was originally enacted in 1939 to protect the earnings of young actors.³⁷ The Coogan Law is named for the famous child actor, Jackie “The Kid” Coogan, who was one of the first child actors in Hollywood. Coogan, who first appeared on film in 1919, worked as an actor during his entire childhood, earning millions of dollars.³⁸ His earnings were managed by his mother who would go on to spend them.³⁹ Under California law at the time, the earnings of a child actor were the property solely of the parent and not the child.⁴⁰ Coogan sued his mother for his earnings, but would only recover a “small portion” of his earnings.⁴¹ Jackie Coogan may have been the first child actor to have his earnings mismanaged by his parents, but he was not the last. Various child actors such as Shirley Temple, Macaulay Culkin, and Gary Coleman had their earnings mismanaged or squandered by their parents.⁴²

³⁶ See Jessica Krieg, Comment, *There’s No Business Like Show Business: Child Entertainers and the Law*, 6, U. Pa. J. Lab. & Emp. L., 429, 433-434, (2004) (discussing the impact of the Coogan Law).

³⁷ *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> (last visited Mar. 17, 2021).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Bryn Sandberg, *Why Young Stars Sue Their Parents: Whose Money Is It Anyway?.*, THE HOLLYWOOD REPORTER (Aug. 13, 2018, 6:00 AM), <https://www.hollywoodreporter.com/news/young-stars-sue-parents-money-is-it-1132846>.

To protect children, the California Family Code requires that a “Coogan Account” or “Coogan Trust” be created, in which the child’s employer set aside fifteen percent of the child’s gross earnings which must be “preserved for the benefit of the minor.”⁴³ The California Family Code further requires that a parent or legal guardian be appointed as the trustee of the funds for the benefit of the minor, “unless the court shall determine that the appointment of a different individual, individuals, entity, or entities as trustee is required in the best interest of the minor.”⁴⁴ The Coogan Law in effect created a fiduciary relationship between the parent and the child, and the child entertainer would have a cause of action against a parent who mismanages the funds set aside in the Coogan Account.⁴⁵ The Coogan Law was amended several times over the decades to protect children after loopholes were found.⁴⁶ Many other states such as New York, Louisiana, and New Mexico followed California’s example and require parents of child entertainers to open trust accounts.⁴⁷

While California clearly recognizes the potential for mismanaging a child’s funds, the type of work that the California Family Code covers only extends to the traditional entertainment industry.⁴⁸ The types of work and contracts that the California Family Code covers includes artistic or creative services, including acting, singing, dancing, comedic work, directing, producing, composing or designing; a contract involving the sale or lease of someone’s likeness in the

⁴³ CAL. FAM. CODE § 6752(b)(1) (Deering 2021).

⁴⁴ CAL. FAM. CODE § 6752(b)(2). (Deering 2021).

⁴⁵ Coogan Law, *supra* note 37.

⁴⁶ Krieg, *supra* note 36, at 437 (describing some of the amendments).

⁴⁷ CAL FAM. CODE § 6750 (Deering 2021); N.Y. COMP. CODES. R. & REGS. tit. 12, § 186-3.5(a) (2020); LA REV. STAT. ANN. § 51:2133 (2020); N.M. STAT. ANN. § 50-6-19 (2019).

⁴⁸ See Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, THE HOLLYWOOD REPORTER (Aug. 20, 2019, 6:00 AM), <https://www.hollywoodreporter.com/news/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968>. See also Erin E. O’Neil, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing*, 72 Stan. L. Rev. Online 42, 46 (2019) (discussing that state laws do not cover social media).

entertainment field; and contracts where the minor is a participant or player in a sport.⁴⁹ The law does not mention child entertainers making money from social media.

California also has a strict permitting process for a child entertainer to work and only lets child entertainers work at certain times.⁵⁰ Any minor under the age of sixteen years working in the entertainment industry needs the written consent of the California Labor Commission.⁵¹ The Labor Commission will only give consent if the following conditions are met:

(a) The environment in which the performance, concert, or entertainment is to be produced is proper for the minor. (b) The conditions of employment are not detrimental to the health of the minor. (c) The minor's education will not be neglected or hampered by his or her participation in the performance, concert, or entertainment.⁵²

After a child obtains their work permit, the California Labor Code restricts the number of hours the child can work.⁵³ A minor cannot work for more than eight hours a day or 48 hours a week, can only work between the hours of 5 a.m. and 10 p.m. on any day preceding a school day, or until 12:30 a.m. of a non-school day.⁵⁴ Violating the minor's maximum work hours amounts to a misdemeanor, "punishable by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000), or imprisonment in the county jail for not more than 60 days, or both."⁵⁵

Ensuring that child entertainers receive an adequate education is also a priority for the state of California. Employers are required to provide a studio teacher for minors age fifteen and up and must have a studio teacher present on set for every ten minors.⁵⁶ The teacher on set is charged with the responsibility of caring for minors under sixteen, and the teacher shall take note of the working

⁴⁹ CAL. FAM. CODE § 6750 (Deering 2021).

⁵⁰ CAL. LAB. CODE § 1308.5 (Deering 2021); CAL. LAB. CODE § 1308.7(a) (Deering 2021).

⁵¹ CAL. LAB. CODE § 1308.5 (Deering 2021).

⁵² CAL. LAB. CODE § 1308.6 (Deering 2021).

⁵³ CAL. LAB. CODE § 1308.7(a) (Deering 2021).

⁵⁴ *Id.*

⁵⁵ CAL. LAB. CODE § 1308.7(c) (Deering 2021).

⁵⁶ CAL. CODE REGS. tit. 8, § 11755.2 (2021).

conditions and signs of the minor’s physical and mental state.⁵⁷ The studio teacher may also refuse to allow the minor to work on set if the teacher determines that the working conditions are a danger to the health, safety, or morals of the minor.⁵⁸ The State of California has taken these measures to ensure that the minor is not being exploited and that their best interests are taken into consideration by a neutral party.

B. New York

Another state that maintains a strong presence in the entertainment industry, New York, has also adopted a strong legal framework designed to protect children. Like California, New York is focused on protecting child entertainers by ensuring finances are not mismanaged, that children have good working conditions, and that they are being educated.⁵⁹ New York requires that the parent or guardian of a child entertainer obtain a permit that the New York Department of Labor issues.⁶⁰ The application for the permit contains the child’s name, address and a physical description of the child.⁶¹ The application must also contain a copy of the child’s birth certificate, identification of the parent or guardian, proof that the child has a satisfactory academic record or is no longer required to attend school and a signed statement by a physician that the child is physically capable to engage in work without endangerment to their health.⁶² New York has reserved the power to suspend or revoke a permit if the parent or guardian has provided false information, has endangered the child’s welfare, has failed to provide trust account information to the employer, or has caused the performer to engage in activity that is dangerous to the welfare of

⁵⁷ CAL. CODE REGS. tit. 8, § 11755.3 (2021).

⁵⁸ *Id.*

⁵⁹ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.5 (2020); N.Y. COMP. CODES R. & REGS. tit. 12, § 186-6.1 (2020); N.Y. COMP. CODES R. & REGS. tit. 12, § 186-5.1 (2020).

⁶⁰ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.1 (2020).

⁶¹ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.2(a) (2020).

⁶² N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.2(b) (2020).

the child.⁶³ A permit is valid for 12 months after it is obtained and must be renewed thirty days prior to its expiration.⁶⁴ The state will decline the renewal permit if the parents have not complied with any laws or regulations related to the employment of child performers.⁶⁵

Like California, New York requires that a parent or guardian establish a trust account for the benefit of the child.⁶⁶ They also require that a minimum of fifteen percent of earnings are placed into the account.⁶⁷ New York does differ from California in its use of Coogan Accounts. Once an account reaches \$250,000, the parent has to ensure that a trust company is appointed as the trustee of the account and that the appointment be disclosed to the New York Department of Labor in the next permit renewal.⁶⁸ This differs from California, which does not require professional financial management of the trust account.⁶⁹

New York has also implemented regulations to protect child entertainers by regulating the production environment. Child entertainers can only work from 5:00 a.m. to 10:00 p.m. on days before a school day or to 12:30 a.m. on days when there is not school.⁷⁰ Children have to have twelve hours of rest after being dismissed before they can return to work.⁷¹ New York breaks down how long child performers can work by age bracket. Children from six to eight can only work up to eight hours a day, children from nine to fifteen can work for up to nine hours a day, and children sixteen and seventeen can work up to ten hours a day.⁷² Children working on school days must

⁶³ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-9.2 (2020).

⁶⁴ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.2(c); N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.3(a) (2020).

⁶⁵ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.3(c) (2020).

⁶⁶ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.5(a) (2020).

⁶⁷ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.5(c) (2020).

⁶⁸ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.5(f) (2020).

⁶⁹ See CAL. FAM. CODE § 6752 (Deering 2021) (notice the statute lacks any mention of professional financial management)

⁷⁰ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-6.2(a) (2020).

⁷¹ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-6.2(c) (2020).

⁷² N.Y. COMP. CODES R. & REGS. tit. 12, § 186-6.2(h-j) (2020).

have at least 3 hours of schooling and up to one hour of rest.⁷³ Employers are also required to set aside an area where child entertainers can sufficiently study and provide a qualified teacher on set who has credentials recognized by the State of New York.⁷⁴ To protect a child's safety and health, employers of child performers are required to provide information or instruction to the child and the parent to protect the child's health and safety when the child performs and to be given training when their performance requires it.⁷⁵ New York's strict regulatory scheme is designed to protect child entertainers and ensure that they are safe and well educated in their work environment.

C. Other States

Since the FLSA exempted the entertainment industry from federal regulation and left it to the states to develop and implement their own child labor standards for child entertainers, many states have fewer protections or no protections at all. For example, Georgia, has become a major home to the entertainment industry since 2008 that now rivals New York and California.⁷⁶ Georgia's Child Labor Regulations cover many of the same areas as New York and California, such as the time a minor can work, the educational requirements for a minor, and working conditions.⁷⁷ However, Georgia does not require Coogan Accounts. New Mexico and Louisiana do require Coogan Accounts, but New Mexico requires only when the contract for the work is \$1000 or greater.⁷⁸ Eighteen other states do not have any regulations for child entertainers, so child entertainers in those states receive no protection.⁷⁹

⁷³ *Id.*

⁷⁴ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-5.1(e)(1)(2) & (5)(2020).

⁷⁵ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-6.5(a)-(b)(2020).

⁷⁶ Eliana, Dockterman, *How Georgia Became the Hollywood of the South*, TIME (July 26, 2018, 7:20 AM), <https://time.com/longform/hollywood-in-georgia/>.

⁷⁷ GA. COMP. R. & REGS. 300-7-1-.01 (2020).

⁷⁸ N.M. CODE R. § 11.1.4.13 (LexisNexis 2021).

⁷⁹ *See e.g.*, MONT. CODE ANN. § 41-2-104(5)(2021) (exempting minor actors); S.D. CODIFIED LAWS § 60-12-1 (specifying that the provisions do not apply to child actors or performers).

The consequences of the disparity in the laws and regulations among the different states means that the industry can engage in a sort of forum shopping when setting up a production that involves child entertainers. Until social media, many states did not need to consider how to regulate child labor in the entertainment industry since it was not an industry that concerned that state. But the advent of the digital age and social media is changing how we think about what regulations should be in place and who should put them in place. This issue is still developing, but the consequences of lack of regulation over children on social media are becoming clearer as it becomes an increasingly visible part of society.⁸⁰ Some already identifiable issues include the highly mobile nature of social media work, letting parents choose where to produce content, a lack of accountability, allowing parents to choose when and how to produce, including inside the home, and that the parent is also acting as an “employer” or “manager” of the child, blurring the line between when a parent is being a parent or when they engaging in labor themselves.⁸¹

III. Potential Limits of the Law

The Supreme Court has long recognized that the parent’s right to raise their children is fundamental.⁸² The government cannot interfere with the rights of parents to “direct the upbringing and education of children under their control.”⁸³ However, child labor has been an area where the government does have the authority to regulate.⁸⁴ The government will step in when there exists a

⁸⁰ See Maheshwari, *supra* note 7.

⁸¹ *Ryan’s World (@ryansworld)*, INSTAGRAM, <https://www.instagram.com/ryansworld/> (last visited Mar. 17, 2021).

⁸² Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

⁸³ Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-35 (1925).

⁸⁴ Prince v. Massachusetts, 321 U.S. 158, 167-68 (1944) (holding that restrictions can be imposed on parents when it is in the interest of protecting the child).

significant risk to the well-being of a child.⁸⁵ Balancing the rights of parents to raise their children against the state’s interest in protecting children can be difficult.

Any claim against a governmental regulation into how parents can raise their children would be subject to a substantive due process Fourteenth Amendment analysis since the regulation would interfere with the parents’ fundamental right to “make decisions concerning the care, custody, and control of their children.”⁸⁶ To survive a violation of substantive due process, the regulation would have to be necessary to achieve a compelling state interest, narrowly tailored to achieve that compelling state interest, and the least restrictive means available to achieve that interest.⁸⁷ The Supreme Court has recognized that the government’s interest in “safeguarding the physical and psychological well-being of a minor” is “compelling.”⁸⁸ Child labor can pose a risk to the well-being of a child and child labor regulations are designed to ensure that “children’s employment will not physically harm them.”⁸⁹ Courts have found that there is a particularly compelling interest in protecting the health and well-being of working children.⁹⁰ However, since parents have a fundamental right, any regulation that would interfere with that right would need to ensure the well-being of the child without intruding too far into how parents choose to raise their children.⁹¹

⁸⁵ *Id.*

⁸⁶ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

⁸⁷ *Id.*

⁸⁸ *Globe Newspaper v. Superior Court*, 457 U.S. 596, 607 (1982).

⁸⁹ *Thirsty’s, Inc., v. United State Dept. of Lab.*, 57 F. Supp. 2d 431, 434 (S.D. Tex. 1999).

⁹⁰ *Lenroot v. Interstate Bakeries, Corp.*, 146 F.2d 325 (8th Cir. 1945).

⁹¹ The right for parents to raise their child could also involve Fourth Amendment concerns and privacy rights. Social media production involving children largely takes place at home, with parents managing their children. Filming or photographing your children and putting it online would fall within a parent’s liberty in how they raise their children. These types of privacy concerns and interference with parental autonomy within the home will not be addressed in this piece.

IV. Lack of Regulation on Social Media Production and Kidfluencers

Social media production involving children is a relatively new phenomenon and operates somewhat differently from the use of children in the traditional entertainment industry. While this is still new, some trends appear to be common. Children in social media often appear to film in their own homes.⁹² Since a user of Instagram needs to be thirteen, the account of a child is managed by the parents.⁹³ As parents have the “liberty... to direct the upbringing and education of children under their control,”⁹⁴ parents have wide latitude in how they can direct their children to produce more content. This amount of control gives rise to the risk of financial exploitation and harm to the child’s well-being. Already there have been cases of physical and mental abuse to children.⁹⁵ Reports of financial exploitation have yet to occur, but there are strong incentives, especially in the absence of regulations.

YouTube’s terms of service have not evolved enough to sufficiently address the issue of child safety. In its Terms of Service policy, YouTube prohibits the posting of content that endangers the emotional and physical well-being of a child including sexualization of minors; harmful or dangerous acts involving minors; infliction of emotional distress on minors; misleading family content; and harassment involving minors.⁹⁶ YouTube does not address child labor in its terms and conditions. Instead, YouTube advises that it is the parent’s responsibility to understand

⁹² See Lambert, *supra* note 48.

⁹³ *Terms of Use*, INSTAGRAM

[https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Privacy%20and%20Safety%20Center](https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Privacy%20and%20Safety%20Center) (last visited Mar. 17, 2021) (Since children need to be thirteen, children under thirteen have their parents create and manage the account); Maheshwari, *supra* note 7 (statement from a Staples representative explaining that all contracts and negotiations are done either through a parent or talent agency); *Ryan’s World (@ryansworld)*, *supra* note 81.

⁹⁴ See *Pierce*, 268 U.S. at 534-35.

⁹⁵ Elizabeth Chuck, *Child Abuse Charges against YouTube channel’s mom underscore lack of oversight for kids*, NBC NEWS (Mar. 21, 2019, 1:13 PM), <https://www.nbcnews.com/news/us-news/child-abuse-charges-against-youtube-channel-s-mom-underscore-lack-n985526>.

⁹⁶ *Child Safety Policy*, YOUTUBE, <https://support.google.com/youtube/answer/2801999?hl=en> (last visited Mar. 19, 2021).

local child labor laws and to comply with them.⁹⁷ As we have seen, the child labor laws in even the strictest states like California and New York do not sufficiently regulate social media and parents can claim that their children are not actors since they are not participating in acting productions. Instagram's Terms of Service do not even address this issue.⁹⁸ Instagram does not allow for the posting of abusive or exploitive content involving children and has a way for users to report such content.⁹⁹

Child entertainers have been around since the time of Jackie Coogan.¹⁰⁰ As a child, he proved to be quite a value to the public since he was made millions in his career.¹⁰¹ Social media is proving to be no different. Kidfluencing and other social media production involving children are somewhat of a legal grey area.¹⁰² Some parents of kidfluencers have claimed that what their child is doing is not technically work but they are instead playing, while others have acknowledged that the child is working.¹⁰³ It would appear that children who receive money from appearing in social media content are in fact working and not playing. One former child entertainer turned California State Legislator, Sheila James Kuehl, was quoted as saying, "It is not play if you're

⁹⁷ *Best Practices for Content with Children*, YOUTUBE <https://support.google.com/youtube/answer/9229229?hl=en> (last visited Mar. 19, 2021).

⁹⁸ INSTAGRAM, *supra* note 93.

⁹⁹ *Abuse and Spam*, INSTAGRAM,

[https://help.instagram.com/165828726894770/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Privacy%20and%20Safety%20Center&bc\[2\]=Report%20Something](https://help.instagram.com/165828726894770/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Privacy%20and%20Safety%20Center&bc[2]=Report%20Something) (last visited Mar. 19, 2021); *Exploitation*, INSTAGRAM, [https://help.instagram.com/659118497466447/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Privacy%20and%20Safety%20Center&bc\[2\]=Report%20Something](https://help.instagram.com/659118497466447/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Privacy%20and%20Safety%20Center&bc[2]=Report%20Something) (last visited Mar. 19, 2021). (These terms do not include anything related to child labor or compliance with local laws.)

¹⁰⁰ Coogan Law, *supra* note 37.

¹⁰¹ *Id.*

¹⁰² Pavithra Mohan, *My Kid is an Instagram Influencer. Here's What I do With Her Money*, FAST COMPANY (May 18, 2019), <https://www.fastcompany.com/90343690/my-kid-is-an-instagram-influencer-heres-what-i-do-with-her-money>.

¹⁰³ *Id.*

making money off of it.”¹⁰⁴ Kuehl has advocated that it is time to understand how parents and adults are making money off of minors on social media.¹⁰⁵

While the differences between work or play may be seen as semantics, the consequences are not. Instagram’s marketing business was estimated to be worth \$8 billion in 2019 and is estimated to be worth \$15 billion by 2022.¹⁰⁶ Children involved in social media production have a few ways of making money, including by creating or endorsing sponsored content in exchange for compensation, i.e. kidfluencing.¹⁰⁷ Companies pay to have their products visible with the child as a form of advertising. The most common way to accomplish this is through Instagram. Another method is through Google AdSense. AdSense is Google’s advertising program that allows Google to run ads on a user’s YouTube account and then pays the user when a video has reached a certain number of views or the user’s account has a certain number of subscribers.¹⁰⁸ This incentivizes users to create content that will attract a lot of viewers. To achieve this goal, the user creates high-quality content that has the potential to attract a wide audience.

Many individuals have used social media to gain attention and launch their careers.¹⁰⁹ Children have not been excluded from this growing industry, with many children achieving fame

¹⁰⁴ Julia Carrie Wong, *It’s not play if you’re making money: How Instagram and YouTube Disrupted Child Labor Laws*, THE GUARDIAN (April 24, 2019), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws>.

¹⁰⁵ *Id.*

¹⁰⁶ *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, BUSINESS INSIDER (Jan 6, 2021, 10:19 AM), <https://www.businessinsider.com/influencer-marketing-report#:~:text=The%20influencer%20marketing%20industry%20is,gold%20standard%20for%20the%20group>.

¹⁰⁷ See e.g. Shane Barker, *Instagram v. YouTube: Which Platform is Best for Your Influencer Marketing Campaign?*, SHANE BARKER, <https://shanebarker.com/blog/instagram-vs-youtube-influencer-marketing-campaign/> (last updated Mar. 10, 2021).

¹⁰⁸ *How to Make Money from Blogging*, GOOGLE <https://www.google.com/adsense/start/resources/how-to-make-money-from-blogging/> (last visited Mar. 20, 2021).

¹⁰⁹ Cheyenne Lentz, *10 Celebrities Who Used Social Media to Launch Their Careers*, INSIDER (Oct. 22, 2019, 5:51 PM), <https://www.insider.com/celebrities-who-started-on-social-media-2019-2>.

and fortune.¹¹⁰ One study found that YouTube videos that feature children receive nearly three times as many views as other types of videos.¹¹¹ Sometimes parents start the social media account, and sometimes children start their own.¹¹² The economic opportunities available in child-based social media are astounding. Everleigh Rose Soutas is a seven-year-old with 5.1 million Instagram followers, who charges up to \$16,867 a post.¹¹³ Twins Aca and Leah Clements have 1.8 million followers on their account and can earn between \$3,500 and \$6,000 a post.¹¹⁴ Nine-year-old Ryan Kaji made \$29.5 million in 2019 through ad generated revenue from his YouTube channel “Ryan’s Toys Review.”¹¹⁵ Ryan’s Toys Review debuted in 2015 and currently has over 23 million subscribers.¹¹⁶ Kaji (or perhaps his parents) was even able to use his YouTube fame to launch a television show starring Kaji and his parents on Nickelodeon.¹¹⁷ Despite the amount of money being generated and exchanged in this new landscape, there is growing concern that kidfluencers do not receive the traditional protections that child entertainers might have and are at risk of being financially exploited.¹¹⁸

¹¹⁰ Philippe Guinaudeau, *The Rise of Kidfluencers – Meet the Kids Making Millions on Social Media*, BRAND TRENDS (June 2, 2019), <https://brandtrends.com/influencers/the-rise-of-kidfluencers-meet-the-kids-making-millions-on-social-media/>.

¹¹¹ Patrick Van Kessel, Skye Toor, Aaron Smith, *A Week in the Life of Popular YouTube Channels*, PEW RESEARCH CENTER (July 25, 2019), <https://www.pewresearch.org/internet/2019/07/25/a-week-in-the-life-of-popular-youtube-channels/>.

¹¹² See, e.g., Allie Vople, *How Parents of Child Influencers Package Their Kids’ Lives for Instagram*, THE ATLANTIC (Feb. 28, 2019), <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/>.

¹¹³ Haylee Richardson, *The Real Rich Kids of Instagram!*, DAILY MAIL (Oct. 7, 2020), <https://www.dailymail.co.uk/femail/article-8814333/The-REAL-rich-kids-Instagram-Highest-earners-10-revealed.html>.

¹¹⁴ *Id.*

¹¹⁵ Kara Weisenstein, *This 9-Year-Old Earned over \$200 Million Last Year from Opening Toys*, MIC (Dec. 22, 2020), <https://www.mic.com/p/this-9-year-old-earned-over-200-million-last-year-from-opening-toys-52219916>.

¹¹⁶ *Id.*

¹¹⁷ James Zahn, *From YouTube to Nickelodeon: Ryan’s Mystery Playdate is the Next Move for Ryan’s Toy Review*, TOYBOOK (Feb. 14, 2019), <https://toybook.com/from-youtube-to-nickelodeon-ryans-mystery-playdate-is-the-next-move-for-ryan-toysreview/>.

¹¹⁸ See Lambert, *supra* note 48 (explaining the possibility of financial exploitation by parents of young influencers).

The unregulated nature of social media does not require parents to set aside the child's earnings. While Coogan Accounts are only required in four states, they were enacted to protect traditional child entertainers from losing their earnings.¹¹⁹ In *Philip v. Bank of America*, California's Court of Appeals reviewed the legislative intent behind California's Coogan Law and found the purpose of Coogan Trust Accounts was to "preserve a portion of the minor's earnings for the minor's use when he or she reaches the age of majority."¹²⁰ While Coogan Accounts require parents to hold the money that child entertainers earn until the child is eighteen, there is no such requirement for parents of children appearing in social media.¹²¹

If a parent decides to manage the money for their child, they do it at their will and that decision can be rescinded without legal consequences. In 2019, the online magazine, *Fast Company*, asked parents of kidfluencers how they spent their children's money.¹²² One parent said that she paid herself 15-20 percent of her child's earnings, comparing that payment to a managerial fee, while putting the rest of it into a trust account, charitable giving, or using the earnings on business expenses.¹²³ While this particular parent's actions would be in line with the legislative intent of the Coogan Act, the parent has no responsibility to set aside any of her child's earnings and could in fact pay herself 100 percent of her child's earnings. Another parent, who has monetized her 7-year-old daughter on Instagram, places her daughter's earnings into a college fund, IRA, and a trust fund, but allows her daughter to access her earnings whenever she wants.¹²⁴ Parents of kidfluencers who are aware of the Coogan Trust have mixed opinions.¹²⁵ Some parents

¹¹⁹ Coogan Law, *supra* note 37.

¹²⁰ *Phillips v. Bank of America*, 186 Cal Rptr. 3d 434, 438 (Cal. Ct. App. 2015) *citing* Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 1162 (1999–2000 Reg. Sess.) as amended Aug. 18, 1999, pp. 6–7).

¹²¹ Lambert, *supra* note 48.

¹²² Mohan, *supra* note 102.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

feel that the Coogan Law is insulting and that the law is anti-parent.¹²⁶ But other parents seem more than willing to go beyond what the Coogan Law requires.¹²⁷ The parents of social media stars Annie and Hayley Bratayley have set up accounts where 100 percent of their child's earnings are deposited.¹²⁸ While many parents seem to be operating in their child's best interest, an honor system without any oversight means that it is likely that a kidfluencer would have nothing when they turn eighteen and the past of Jackie Coogan would repeat itself. A kidfluencer's only resource right now would be to sue their parents for misappropriating their earnings once they reach the age of 18.¹²⁹ The problem is that the child would be left attempting to force a judgment when the parents have already spent the child's earnings and there may or may not be sufficient funds. Perhaps one day, the Jackie Coogan of social media will achieve greater fame for suing his parents for mismanaging earnings from social media; that has not yet happened.

The unregulated nature of social media means that there is a great risk to the health and well-being of children in social media production. Social media production takes place primarily in the family home and under the supervision and control of the parents.¹³⁰ In 2019, Machel Hackney, the creator of the YouTube channel "*Fantastic Adventures*" was arrested for abusing her seven adopted children who appeared in the channel's sketch videos.¹³¹ Hackney reportedly withheld food and water, restricted bathroom use, and pepper-sprayed her children in order to get them to perform.¹³² The children also claimed that they were abused when they forgot their lines or did not do as they were instructed.¹³³ The privacy of the family unit provided extra obstructions

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See Lambert, *supra* note 48.

¹³⁰ Allie Volpe, *How Parents of Child Influencers Package Their Kid's Lives for Instagram*, THE ATLANTIC (Feb. 28, 2019), <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/>.

¹³¹ See Chuck, *supra* note 95.

¹³² *Id.*

¹³³ *Id.*

to the regulation of children in social media that would not exist in a television set. The abuse these children endured reminds us that there is a risk that any parent who is managing their children in social media production has the ability to abuse their children in a production that would not be possible or tolerated in a traditional entertainment environment.¹³⁴

There have been other controversies involving at-home social media production and allegations of abuse.¹³⁵ *DaddyOFive*, a YouTube channel, that involved Maryland parents, Heather and Mike Martin pulling pranks on their children, gained public attention in 2017 for the way the parents engaged with their children.¹³⁶ The channel involved prank videos where the parents would trick their children into thinking that they were being punished or ridicule them only to say it was a prank.¹³⁷ Some of their more upsetting videos contained actual abuse including Mr. Martin shoving a child or engaging in other acts of abuse.¹³⁸ Several psychological professionals agreed that the parents had engaged in “abusive behavior.”¹³⁹ After being notified, YouTube reported the couple to the Maryland Child Protection Services.¹⁴⁰ The situation was so alarming that the biological mother of two of the five children was able to obtain temporary emergency custody of the two children.¹⁴¹ The Martins faced charges of child neglect and ultimately entered a plea where they did not admit guilt but admitted there was enough evidence to convict them.¹⁴² They were sentenced to five years of supervised probation and were ordered not to post any videos or photos

¹³⁴ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-1.1 (2020) (state regulations to protect the safety, morals health and well-being of child performers).

¹³⁵ Abby Ohlheiser, *The saga of a YouTube family who pulled disturbing pranks on their own kids*, THE WASHINGTON POST (Apr. 26, 2017 12:15 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/04/25/the-saga-of-a-youtube-family-who-pulled-disturbing-pranks-on-their-own-kids/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Neal Augenstein, *DaddyOFive’ parents found guilty of neglect, avoid jail*, WTOP NEWS (Sept. 11, 2017 1:05 PM), <https://wtop.com/frederick-county/2017/09/parents-behind-daddyofive-prank-videos-plead-guilty-neglect/>.

of their children on social media unless it was for family use.¹⁴³ At the time of Martin’s arrest, *DaddyOfFive* had 750,000 subscribers and Mr. Martin was able to make a living off the monetization from his YouTube channel.¹⁴⁴ In response to these scandals, YouTube updated its guidelines, removed content that featured the endangerment of children, and banned accounts that feature that child endangerment.¹⁴⁵

These reports of child abuse may seem anecdotal, but they give rise to greater questions about the potential for child abuse that social media production can enable and the resulting consequences for how an unregulated production environment can affect kidfluencers and other children in social media productions. While a company’s willingness to amend its policies is admirable,¹⁴⁶ it does not adequately address the financial incentives involved, meaning that the risk to children still exists.

States have laws to ensure that the best interests of children who work in the entertainment industry are protected. When these protections apply depends on how the state defines when the child is working. California law defines the employer “entertainment industry” as

any organization, or individual, using the services of any minor in: Motion pictures of any type (e.g. film, videotape, etc.), using any format (theatrical film, commercial, documentary, television program, etc.) by any medium (e.g. theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances where minors perform to entertain the public.¹⁴⁷

Similarly, New York’s Rules and Regulations defines artistic or creative services as

services in connection with a performance, or an appearance in a reality show, including, but not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist, or other performer or entertainer,

¹⁴³ *Id.*

¹⁴⁴ Ohlheiser, *supra* note 135.

¹⁴⁵ Darren Reynolds, *YouTube to crack down on videos showing child endangerment*, ABC NEWS (Nov. 22, 2017 9:31 PM), <https://abcnews.go.com/US/youtube-crack-videos-showing-child-endangerment/story?id=51336368>.

¹⁴⁶ *Id.*

¹⁴⁷ CAL. CODE REG. tit. 8, § 11751 (2021).

or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer.¹⁴⁸

While these definitions could be broad enough to encompass social media production, most commentators and even some legislators believe that state laws regulating child actors do not apply to most social media productions.¹⁴⁹ However, the children involved in social media productions are making money from their image or their natural talents, and are working the same way that children in the traditional entertainment fields are. With the prevalence of social media, it is time to adopt protections that ensure the health and well-being of children who appear in social media for money, in the same ways that states do for child labor in traditional entertainment media.

V. Solutions

Social media production involving children is uniquely different from other forms of child labor in the entertainment industry because it is typically done in the confines of the home or under the direct supervision of the family unit. Policing this new phenomenon requires modernizing the initiatives that protected children in the child entertainment industry, while also accounting for concerns about practicality that did not need to be addressed before. In developing a solution to this impending problem, it would be helpful to look at what has worked in the past and how it could be adapted to work now.

While the FLSA has been an enduring piece of legislation, it is outdated. The types of “oppressive child labor” involving hazardous occupations that it was designed to address are now less prevalent in America.¹⁵⁰ From 2003 to 2016, there were 462 work-related child fatalities, most

¹⁴⁸ N.Y. COMP. CODES R. & REGS. tit. 12, § 186-2.1 (2020).

¹⁴⁹ Ana Saragoza, Comment, *The Kids are Alright? The Need for Kidfluencer Protections*, 28 Am. U.J. Gender Soc. Pol’y & L 575, 588-92 (2020) (discussing what California’s laws cover and how the laws are currently not interpreted to apply to kidfluencers).

¹⁵⁰ 29 U.S.C. § 203(l) (2020).

coming from the agricultural industry.¹⁵¹ The entertainment industry experienced fourteen deaths.¹⁵² While the FLSA left it to states to address how to deal with child entertainers, the states that have laws to regulate child entertainment do not apply for social media production.¹⁵³ The gap left open by the FLSA needs to be filled. Implementing federal child-labor laws that cover children in social media production can eliminate the risk of parents abusing their children or enriching themselves from their child’s work. Congress should either amend the FLSA or create a new law altogether that addresses how to regulate children involved in social media production. Whatever the decision, protecting children involved in social media production is necessary.

The regulations should adopt a comprehensive definition of child actor or child labor that encompasses and applies to children involved in social media production for monetization purposes and in paid advertisements. Such legislation would then cover YouTube, Instagram, and any other existing similar social media platforms, as well as ones that may be developed in the future. For example, California requires “any organization, or individual using the services of any minor” to comply with its child entertainment labor regulations.¹⁵⁴ While the social media company would be an organization, and parents would be individuals, it is also important for regulations to cover the type of content that is being created. Since most of this content is distributed online either via video or photo-sharing services, the regulation needs to sufficiently cover companies that share user content.

California’s most significant achievement, the Coogan Account, would be useful for protecting the money that children on social media are earning. Coogan Accounts for children

¹⁵¹ U.S. Gov’t Accountability Office, Report to Congress, GAO-19-26, *Working Children: Federal Injury Data and Compliance Strategies Could be Strengthened* 29 (2018), <https://www.gao.gov/products/gao-19-26>.

¹⁵² *Id.* at 89.

¹⁵³ See Saragoza, *supra* note 149.

¹⁵⁴ CAL. CODE REGS. tit. 8, § 11751 (2021).

involved in social media production would ensure that parents put aside a portion of the money their child earns. Since parents tend to be the account holders of their child's account, they have the ability to spend the money however they want.¹⁵⁵ Something to take from New Mexico would be a monetary threshold limit. Not every parent who is posting images of their children on social media is doing it for money or earning significant money. Implementing a threshold limit would be useful to distinguish between individuals who occasionally post content about their children and those who are posting content involving children with the purpose of making money and whose social media presence is analogous to a job. No framework should overregulate families or intrude into their private life unless it is to protect the interests of the child. Since the state wants to protect the earnings of a child, only children who are making regular or significant income on social media should be required to have a Coogan Account. There are constitutional protections to family autonomy and the right for parents to raise children the way they want.¹⁵⁶ A financial threshold limit would reflect that the government is intruding on family autonomy only to ensure that the child is not being exploited. With the threshold limit, parents would not need to open a Coogan Account when posted content that is intended to be financially successful fails to earn significant funds.

While parents may serve as producers and editors of content, it might serve to allow the parents to share in the profits equal to what is attributable to fair fee or percentage of the work. Once the threshold limit is reached, parents would be entitled to what the industry deems fair for their labor and contributions to the production. While some parents are doing this,¹⁵⁷ having a fee

¹⁵⁵ See Mohan, *supra* note 102 (showing how parents have control of money earned from social media involving children).

¹⁵⁶ *Pierce*, 268 U.S. at 534-35

¹⁵⁷ Mohan, *supra* note 102 (explaining how Simone Gittens, pays herself for managing the work in which her child appears).

for working behind the scenes would be fair as long as it is not depriving the child of the earnings of their labor. Entertainment industry accountants should be consulted about what is appropriate for parents to pay themselves as a production manager, but the fee should be minor since the child is the one working and since without the child working, the parent would have nothing to manage.

Most states require child entertainers to obtain work permits.¹⁵⁸ Requiring a work permit for every child working in social media would be difficult but not impossible. But once again the nature of social media makes it somewhat impracticable. Social media production is highly mobile and can be completed in a short amount of time. Instead of a federal work permit initiative, a disclosure requirement would be more practicable. Since the amendment involves Coogan Accounts when the income received reaches a threshold limit, the deposit of funds would also serve as constructive notice to the Department of Labor that money is being made involving the child. This disclosure requirement from parents would require the parents to disclose where the money is coming from, how much money is being exchanged, and the type and nature of the work that is going on. For example, with YouTube, it would also involve information like the name of the account holder's channel, the dates of recording, and when the video was uploaded. By requiring parents to make these disclosures, it would serve as a check to make sure that parents are not engaging in abusive conduct and would allow the Department of Labor to have a sufficient amount of data to check that the work is legal and safe. Once again, this is not something that should be left to states since it would allow parents to forum shop, which might encourage parents to engage in conduct that is not in the child's best interest.

Federal regulations on the hours and work conditions for children involved in social media production would be difficult to implement and probably be seen to be an overstep into the family

¹⁵⁸ See U.S. Dep't of Lab., *supra* note 29.

unit. Limiting how parents could work with their children when producing content for social media production would reduce the risks that children are harmed or abused as seen in the *DaddyOfive* and *Fantastic Adventures* situations. Though these types of work regulations would be beneficial to the children, they are much more difficult to impose and enforce than in a traditional situation where the child works on a set or stage. It would presumably involve a federal regulator to either observe or regularly monitor production that occurs inside the home, which is both impractical for social media production and unnecessarily intrudes on family privacy since the parents are controlling the production. Furthermore, while these types of work regulations make sense in a studio setting, a highly regulated environment with multiple individuals involved, they do not necessarily make sense in social media production where home and work are so connected. To address workplace conditions, local and state child welfare laws will have to suffice. Existing safety and child welfare regulations cover the same type of concerns that the child entertainment regulations do.

The production of content does not inherently interfere with a child's education in the way that filming for a movie or a television show does. Creating social media content can occur at any time of the day for any duration. For this reason, children involved in social media production are not exposed to the same type of risks as children in the traditional entertainment setting because their educational needs are not necessarily at risk of being disrupted by social media production. Because social media production can happen at any time of the day for an unspecified duration, it does not need to take place during normal school hours.

The production of child entertainment has been a state issue for almost a century.¹⁵⁹ But the nature of social media production is so different from film or television production that it can

¹⁵⁹ 29 U.S.C. § 213(c)(3) (2020).

no longer be left to the states. Social media production and advertising transcend state lines. It is easily mobile and people are creating content all over the country. If this issue is left to the states, there is nothing to prevent a parent in a state with strict state regulations on social media production involving children, from moving to a state that does not regulate the industry. Leaving it to the states will allow parents to forum shop for the state that most suits their needs. While some parents may choose to act in their child's best interest independently¹⁶⁰, we have already seen that there is a risk to children when the parents have free reign in social media production and that parents of child entertainers cannot always be counted on to act in the best interest of their children.¹⁶¹ Amending the FLSA to cover children involved in social media production would be in line with the Supreme Court's willingness to interfere with a parent's fundamental right to raise their children when the child's well-being would be at stake.

A reimagining of the FLSA should only include social media and not the type of traditional entertainment that has been left to states for so long. The traditional entertainment industry is largely a state or regional business that has been developed over time. It has been subject to strict schedule and studio oversight, given the number of parties involved. Social media productions, on the other hand, can be filmed wherever and whenever a creator wants. Social media growth has changed the entertainment industry and is expected to have an increasing impact on the industry.¹⁶² With the amount of control that parents have over the creation of content involving children, as well as the interstate nature of social media companies like YouTube and Instagram, a federal response is required instead of a state one.

¹⁶⁰ See Mohan, *supra* note 102 (illustrating how some parents are putting aside the money that is earned on social media when the child is involved).

¹⁶¹ See Sandberg, *supra* note 42.

¹⁶² Granados, *supra* note 18.

At the state level, regulation has gained some traction. In 2018, Kansen Chu, a California state assemblyman introduced a bill to amend California’s Labor Code to include minors employed in social media advertising.¹⁶³ The proposed amendment would have defined social media advertising as the “use, demonstration, or placement of a product through social media communication pursuant to a contract...”¹⁶⁴ The proposed version of the bill did not pass. The bill had attempted to require minors in social media productions to comply with the California work permit requirement.¹⁶⁵ However, exempting the work permit requirement would eliminate minors in social media from Coogan Account eligibility, since California work permits require evidence of Coogan Accounts.¹⁶⁶ The bill’s opponents also argued that it would be difficult to impose education requirements and it would be impracticable for California to require a teacher to come to someone’s private home where children are doing YouTube videos.¹⁶⁷ However, even if a state passes such a regulation, there is nothing to stop a parent from moving to a state that does not regulate social media production involving minors. The potential for parents to escape regulation by forum shopping indicates that a federal solution to social media production involving minors is the appropriate solution. State regulation, whatever the good intentions, would fail to sufficiently address the problems raised by this new industry.

VI. Conclusion

The current child labor laws do not recognize children involved in social media production as entertainers, exempting these children from the types of protection that many of their other

¹⁶³ See 2017 Cal. Assemb. B. No. 2388, Cal. 2017-2018 Reg. Sess. (proposed May 21, 2018).

¹⁶⁴ *Id.*

¹⁶⁵ Lambert, *supra* note 48.

¹⁶⁶ CAL. LAB. CODE § 1308.9(a) (2021).

¹⁶⁷ Lambert, *supra* note 48.

working peers are subject to when performing similar work. The nature of the entertainment industry has grown, evolved, and changed exponentially in the last decade. As with many areas of technology, the law has once again been slow to catch up and recognize and solve the issue at hand. Tech companies and social media companies find ways to avoid liability by placing children's well-being solely in the hands of the parents.¹⁶⁸ When social media companies do acknowledge child labor, they simply require parents to comply with child labor laws.¹⁶⁹ Since the law has not yet evolved to respond to social media companies, the parents are the ones that are in control. While many families do not intend to exploit or abuse their children, the potential exists if the law does not hold these parents to the same standards imposed on parents and organizations in the traditional entertainment industry. For the last eighty years, the law has always stepped up to protect children. It should be no different today. Protecting the future, safety, and well-being of children appearing in monetized social media content is a compelling state interest that needs to be addressed by holding parents and social media platforms to the same applicable standards seen in the traditional entertainment industry.

¹⁶⁸ See YOUTUBE, *supra* note 96.

¹⁶⁹ See *Best Practices for Content with Children*, *supra* at note 97.