

## **“THE INTERNET IS FOREVER”: EVALUATING ERASER LAWS AS A VIABLE LEGISLATIVE SOLUTION TO THE SHARENTING EPIDEMIC**

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*Sharenting—a portmanteau of “share” and “parenting”—occurs when parents use social media to share aspects of their children’s lives by posting messages, photographs, and videos that convey personal information about their children. While sharenting can help parents stay connected and share aspects of their life with others, it can also present a genuine threat to children. Many parents forget that “the internet is forever” and that when intimate details of children’s personal lives are shared, it creates an online reputation and triggers data collection that they cannot undo as adults. Furthermore, sharenting presents such a novel and complex problem that existing privacy-focused legislation doesn’t provide adequate relief. Instead, this note looks to another potential solution for the harm caused by sharenting: eraser laws. While such eraser laws haven’t yet found any footing in the United States (U.S.), this note examines House Bill 1627 before the Washington state legislature, a now dead bill that was the first example of a potential eraser law in the U.S. This note finds that, while groundbreaking, this bill, like other eraser laws, is narrow in scope, would likely be challenged on constitutional grounds, and faces many obstacles in its path to enactment. Similar to HB 1627, eraser laws would likely struggle to be enacted and enforced in the U.S. and presumably would not be a viable legislative solution. However, the mere fact that HB 1627 was proposed indicates a greater concern by Americans for their online privacy, which is promising for future legislation.*

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## INTRODUCTION

Shay Carl Butler’s first taste of fame came in 2007 when a goofy video of the father-of-two dancing in his wife’s workout unitard went viral.<sup>1</sup> Excited by this, he began recording his family’s daily life and posting the videos online.<sup>2</sup> His YouTube channel, known as *The Shaytards*, became wildly popular, boasting a combined 2.6 billion views on its videos.<sup>3</sup> What started as simple and

1. Belinda Luscombe, *The YouTube Parents Who are Turning Family Moments into Big Bucks*, TIME (May 18, 2017, 6:00 AM), <https://time.com/4783215/growing-up-in-public> [<https://perma.cc/9QUR-AY2C>].

2. *Id.*

3. *Id.*

lighthearted videos—like bicycle rides and haircuts—evolved over the next decade to document a wide span of topics, following intimate details of a weight loss journey, the birth of three more children, and the growing wealth of the family.<sup>4</sup> At its height, the channel posted multiple video blogs (“vlogs”) per week, some documenting personal, emotional, and intimate moments in the children’s lives, to the account’s more than five million followers.<sup>5</sup> The family’s most popular video to date, amassing over twenty three million views, features multiple shots of the children in swimsuits as the family embarks on a “wholesome” pool day.<sup>6</sup>

The content posted by *The Shaytards* was far from the most egregious example of parents posting private, emotional, or downright embarrassing moments of their children to social media. In 2017, a family vlog faced criticism after “pranking” their children by spraying disappearing ink on the carpet of the children’s bedroom.<sup>7</sup> The parents yelled at their two sons for ruining the carpet while the boys cried and tried to explain that they had no idea what caused the spill.<sup>8</sup> In 2018, yet another family vlogger faced criticism after he “pranked” his children by poisoning their ice cream with laxatives and filming them crying out in pain while following them into the bathroom as they tried to close the door.<sup>9</sup> The level of public criticism received by the parents in both of those instances indicates how easy it is to identify and be critical of parental oversharing online where abusive behavior is displayed. However, even channels like *The Shaytards*, which simply strive to document everyday life, often reveal copious amounts of personal information about their children online, which can cause exceedingly long-term and nuanced harm.

Additionally, the privacy of child social media influencers, also called “kidfluencers”, is at risk; with the viral nature of social media, information posted by regular parents about their children can have consequences that parents never considered. In 2018, a video of a toddler named Roman, who was diagnosed with spina bifida,

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4. *Id.*

5. Keltie Haley, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1005 (2020).

6. Luscombe, *supra* note 1.

7. Abby Ohlheiser, *The Saga of a YouTube Family who Pulled Disturbing Pranks on Their own Kids*, WASH. 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> [https://perma.cc/ZDG3-MDM6].

8. *Id.*

9. KC Ellen Cushman, *Family Vlogging Shows us the Dangers of Sharing our Kids Online*, UTAH DAILY CHRON. (Jan. 19, 2022), <https://dailyutahchronicle.com/2022/01/19/cushman-family-vlogging-danger-kids-online> [https://perma.cc/YA4M-BKWS].

walking for the first time on his own against all odds went viral online.<sup>10</sup> His parents posted this viral video on a Facebook page they created called “Defying Odds: Roman’s Journey,” through which they tried to shed light on spina bifida and share medical updates about Roman to the page’s nearly four hundred thousand followers.<sup>11</sup> While those videos may have inspired strangers, garnered support for Roman, and advocated for children with spina bifida, Roman’s parents overshared intimate details about his medical condition before he was old enough to consent or understand the implications of doing so. The decision to disclose the details of one’s medical condition is a very personal one, and Roman’s parents took away his control over that information in a way that will follow him on the internet and may shape his digital identity for the rest of his life.

Incidents of parents oversharing personal information about their children create serious implications for the children’s privacy rights. However, since this phenomenon has only developed over the past decade, American jurisprudence is severely lacking in this new area of law. This Note explores potential legislative protections for the privacy rights of kidfluencers or children who otherwise suffer the negative consequences of sharenting. It will review existing legislation aimed at protecting children online and discuss how this legislation fails to adequately protect children because it relies heavily on parental authority. This Note will then examine Washington state’s House Bill 1627, the first bill in America proposing an “eraser law”—legislation allowing children to erase parts of their online presence when they reach the age of majority. It will then end by analyzing the now-dead HB 1627 as an example to evaluate the strengths and limitations of eraser laws and their future in American legislation.

## I. THE RISE OF “SHARENTING” AND THE “KIDFLUENCER”

Sharenting occurs when parents use social media to share aspects of their children’s lives by posting messages, photographs, and videos that convey personal information about their children.<sup>12</sup> As social media usage has increased, many families now use it to

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10. Nicole Pelletiere, *Toddler with Spina Bifida Warms Hearts After Showing his Dog he can Walk*, GOOD MORNING AM. (Aug. 10, 2018), <https://www.goodmorningamerica.com/family/story/toddler-spina-bifida-warms-%20hearts-showing-dog-walk-57132496> [https://perma.cc/8X27-QFF5].

11. Kate Hamming, *A Dangerous Inheritance: A Child’s Digital Identity*, 43 SEATTLE U. L. REV. 1033, 1034 (2020).

12. See Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 842 (2017); see also Grace Yiseul Choi & Jennifer Lewallen, “Say Instagram, Kids!”: *Examining Sharenting and Children’s Digital Representations on Instagram*, 29 HOW. J. COMM’N. 144, 145 (2018).

share their children with the world. A study by the Pew Research Center found that 82 percent of parents who use social media say they have posted photos, videos, or other information about their children on these sites, with that percentage being even higher among women (89 %) and younger parents aged 18-29 (87 %).<sup>13</sup> Fifty two percent of social media-using parents said that others share too much about their young children.<sup>14</sup> In another study, as many as 74 percent of parents reported that they knew at least one parent who overshared about their child on social media, with 56 percent recognizing oversharing embarrassing information, 51 percent recognizing oversharing personal information that could reveal a child's location, and 27 percent recognizing oversharing of inappropriate photos of children.<sup>15</sup> In addition, "92% of all American two-year-olds already have an online presence," and about one-third of those children have an online presence as mere newborns.<sup>16</sup> Many babies have an online presence before they are even born, since parents in roughly 25 percent of pregnancies share ultrasound photos of their babies in utero.<sup>17</sup> All these statistics demonstrate that, despite the newness of the phenomenon, sharenting is popular.

This pervasive trend of sharenting often arises from well-intentioned parents. Parents frequently overshare in this way because it allows them to connect with or gain support from their friends and family online and receive validation for their parenting, which leaves them feeling more satisfied in their parental roles.<sup>18</sup> Among American parents who have shared things about their children on social media, 76 percent say that wanting to share things about their children with family and friends is a major reason for doing so, and 36 percent allege that showcasing their children's accomplishments as a major reason.<sup>19</sup> Parents of children with medical conditions have also shared their children's medical details

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13. Brooke Auxier et al., *Parents' Attitudes -and Experiences- Related to Digital Technology*, PEW RSCH. CTR. (July 28, 2020), <https://www.pewresearch.org/internet/2020/07/28/parents-attitudes-and-experiences-related-to-digital-technology> [https://perma.cc/999B-MSGX].

14. *Id.*

15. C.S. Mott Children's Hospital, *Parents on Social Media: Likes and Dislikes of Sharenting*, 23 MOTT NAT'L POLL ON CHILD. HEALTH, Mar. 16, 2015, at 1.

16. Steinberg, *supra* note 12, at 849.

17. *Digital Birth: Welcome to the Online World*, BUS. WIRE (Oct. 6, 2010, 1:02 PM), <https://avg.typepad.com/files/digitalbirthsglobal.pdf> [https://perma.cc/ZX2N-587P].

18. See Steinberg, *supra* note 12, at 846; see also Claire Bessant, *Sharenting: Balancing the Conflicting Rights of Parents and Children*, 23 J. COMM'NS. L. 7, 8 (2018).

19. Auxier et al., *supra* note 13.

on social media as a way to find support and advocate for their children.<sup>20</sup>

While sharenting is not inherently harmful, certain forms of sharenting can be significantly more destructive than others. Sharenting can interfere with children's ability to develop their individuality, independence, and self-reliance<sup>21</sup>, and "can put a child at risk for identity theft, bullying by peers and adults (both online and offline), and potential college and job rejections later in life."<sup>22</sup> Alarming, "investigations into pedophile image-sharing sites have shown that over twenty million images were directly sourced from social media," demonstrating how such oversharing can risk handing this information to child predators and stalkers.<sup>23</sup> Today, private information about children is often shared online before those children are old enough to navigate the internet, let alone understand the dangerous consequences of internet exposure. "While many kids may not yet have accounts themselves, their parents, schools, sports teams, and organizations have been curating an online presence for them since birth."<sup>24</sup>

The internet presents four distinct problems for the oversharing of children's personal information online, as compared to oversharing in a physical public space or on traditional television media: persistence, visibility, spreadability, and searchability.<sup>25</sup> Persistence indicates the truism that "the Internet is forever," meaning that once information is shared, it "does not expire once viewed or read by another, and it could be kept or exist for decades."<sup>26</sup> Visibility means that, once such information is shared online, it can reach an audience far wider than the original poster ever anticipated, reaching many people that the information could never have by word of mouth. Spreadability indicates that information shared online can be shared with others with greater ease

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20. See Sarah Catrin Titgemeyer & Christian Patrick Schaaf, *Facebook Support Groups for Rare Pediatric Diseases: Quantitative Analysis*, 3 JMIR PEDIATRICS & PARENTING 1, 8 (2020) (finding that the use of Facebook by parents as a tool for pediatric disease support groups is expected to increase); see also Pelletiere, *supra* note 10.

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

22. Haley, *supra* note 5, at 1006.

23. Lucy Battersby, *Millions of Social Media Photos Found on Child Exploitation Sharing Sites*, SYDNEY MORNING HERALD (Sept. 30, 2015, 12:23 PM), <https://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-20150929-gjxe55.html> [<https://perma.cc/5DW9-7RDQ>] (discussing a certain child-exploitation site with over 45 million images).

24. Taylor Lorenz, *When Kids Realize Their Whole Life Is Already Online*, THE ATLANTIC (Feb. 20, 2019, 4:53 PM), <https://www.theatlantic.com/technology/archive/2019/02/when-kids-realize-their-whole-life-already-online/582916> [<https://perma.cc/ME38-JNKT>].

25. Hamming, *supra* note 11, at 1043-44.

26. *Id.* at 1044.

than ever before, “whether by intentionally or indirectly encouraging sharing ‘with the click of a few keystrokes,’ in ways that can be easily downloaded or forwarded to others.”<sup>27</sup> Finally, the searchability of online information allows individuals to seek out specific information that they never would have been able to uncover through in-person conversations.<sup>28</sup> Accordingly, the characteristics of online sharing give personal information far greater longevity and a broader audience, amplifying the potential negative consequences of such sharing.

The average parent typically lacks the specific experience or expertise to protect their children against the risks that can result from parental oversharing.<sup>29</sup> Such risks aren’t even on the radar of most parents who share information about their children on social media, with 83 percent saying they “rarely or never worry that in the future their children might be upset about the things they posted about them on social media sites.”<sup>30</sup> Even “the viral nature of today’s Internet provides ways for the average citizen to achieve a celebrity status that would have been unachievable before the boom of the digital age.”<sup>31</sup> While sharing school accomplishments, sports team scores, family vacation photos, and humorous anecdotes might not seem as invasive as the examples above, each is shared without the child’s consent and inhibits the child’s ability to shape—or not shape—their online image. Since search engines, like Google, index and cache the information uploaded by “sharents,” this personal information can be rediscovered long after the original posts have been deleted, creating an uncontrollable digital footprint that lasts a lifetime.<sup>32</sup> Teens and tweens have increasingly been forced to confront the shock of realizing that personal details about their lives—and sometimes, an entire narrative crafted around their lives—have been shared online without their consent or even their knowledge.

Even when children express dissatisfaction with their lives being shared online, which often occurs when they reach adolescence and become embarrassed or upset by their parents’ oversharing, their requests for their parents to stop are sometimes met with parental disapproval. One frequent “sharenter” stated that even when her teenage daughter begged her to refrain from sharing details

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27. *Id.* (citing Danah Boyd, *It’s Complicated: The Social Lives of Networked Teens*, in INTERNET LAW: CASES & PROBLEMS 143, 144 (9th ed. 2019)).

28. *Id.*

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

30. Auxier et al., *supra* note 13.

31. Hamming, *supra* note 11, at 1043.

32. Steinberg, *supra* note 12, at 844.

about her life online anymore, she felt as though she could not stop because sharenting had become a part of her online identity as a mommy blogger.<sup>33</sup> Parents often feel compelled to keep posting personal information about their children because it can create a feedback loop: “[w]hether by the award of a ‘like,’ a ‘share,’ or a gratuitous comment, public sharing of personal information often results in positive stimuli, which, in turn, encourages a parent to continue to put personal information in the public domain.”<sup>34</sup>

This explosion in social media use has created a new type of social media star: the “kidfluencer.” Parents now post content about their children online to sites like YouTube and Instagram and regularly monetize this content of their children through corporate sponsorships.<sup>35</sup> Brands, such as Walmart, pay the parents of kidfluencers to use their products or clothes and share the experience online with their followers to advertise the brand and expand their customer base.<sup>36</sup> In fact, kidfluencers were among the highest-paid YouTube stars of 2022, with two children ranking amongst the top ten highest-paid YouTubers: a seven-year-old named Nastya, whose parents chronicle aspects of her daily life, earned \$28 million; and Ryan Kaji, a 10-year old who has been playing with and reviewing toys on YouTube since he was only four years old, earned \$27 million.<sup>37</sup> This potential for high payouts with relatively low starting costs—accessible to anyone with a smartphone or computer—has made “kidfluencing” a lucrative business.

Family vlogging, or video blogging, has become a booming industry, particularly on YouTube. This is when parents frequently take and upload personal videos of their whole family and post them to social media. Since roughly 40% of the United States is made up of families with children who are under the age of eighteen, “there

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33. Christie Tate, *My Daughter Asked Me to Stop Writing About Motherhood. Here's Why I Can't Stop Doing That*, WASH. POST (Jan. 3, 2019), <https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that> [<https://perma.cc/PN8B-ZS55>].

34. Steinberg, *supra* note 12, at 846.

35. See Allie Volpe, *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> [<https://perma.cc/RK3D-EQZG>]; Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, N.Y. MAG. (Apr. 17, 2017), <https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html> [<https://perma.cc/GM7T-TZLH>].

36. Sapna Maheshwari, *Online and Earnings Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> [<https://perma.cc/3ZU7-Z89P>].

37. Abram Brown & Abigail Freeman, *The Highest-Paid YouTube Stars: MrBeast, Jake Paul And Markiplier Score Massive Paydays*, FORBES (May 11, 2022, 11:10 PM), <https://www.forbes.com/sites/abrambrown/2022/01/14/the-highest-paid-youtube-stars-mrbeast-jake-paul-and-markiplier-score-massive-paydays/?sh=550a97071aa7> [<https://perma.cc/P5VG-5PJP>].

is a large market for family- and children-oriented products and social media content.”<sup>38</sup> Family vloggers try to appeal to this demographic by creating fun and relatable family content; families like The Shaytards, Not Enough Nelsons, and The Ace Family have garnered a following of millions of subscribers, “chronicling their children’s morning routines, holiday traditions, and even visits to the emergency room.”<sup>39</sup> The demand for this type of video is only growing, with Time Magazine reporting that time spent watching family vloggers on YouTube increased by 90 percent from 2016 to 2017.<sup>40</sup>

However, kidfluencers, especially those featured on family vlogs, are highly susceptible to the abovementioned privacy concerns. While regular parents who share information about their children online already list compelling social reasons for doing so, parents of kidfluencers are further incentivized by the money they earn,<sup>41</sup> and this can weigh against the child’s best interests when they make decisions. In some cases, families become reliant on the money earned from a child’s social media content, which comprises the entire household income, thus creating a powerful financial incentive for parents to continue pressuring their children to disclose private information, even when they protest.<sup>42</sup> Furthermore, as parents in family vlogs strive to document “relatable” content, they can end up showcasing private moments from their children’s everyday lives, whether that be sharing an embarrassing moment or documenting private details about their child’s medical condition to thousands, or even millions of followers.<sup>43</sup> As they try to create more vulnerable content to connect with their followers emotionally, the difference between private and public moments can quickly become blurred, and the parent’s boundaries for what is “acceptable” to be posted online are pushed further and further.

## II. EXISTING GENERAL LEGISLATIVE SOLUTIONS ADDRESSING PRIVACY FALL SHORT

Many current American laws aimed at protecting children’s privacy “reflect the strong tradition of parental rights to control and shape the lives of their children” by taking a paternalistic approach, giving the parent exclusive control over the disclosure of a child’s

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38. Amber Edney, “*I Don’t Work for Free*”: *The Unpaid Labor of Child Social Media Stars*, 32 UNIV. FLA. J.L. & PUB. POL’Y 547, 555 (2022).

39. Ellen Walker, *Nothing Is Protecting Child Influencers from Exploitation*, WIRED (Aug 25, 2022, 9:00 AM), <https://www.wired.com/story/child-influencers-exploitation-legal-protection> [<https://perma.cc/Y5U4-NR4B>].

40. Luscombe, *supra* note 1.

41. Dunphy, *supra* note 35.

42. *Id.*

43. *See* sources cited *supra* notes 1-10.

personal information.<sup>44</sup> These laws offer children who have been harmed by their parents' sharenting very little guidance, prohibitions, or remedial measures.<sup>45</sup> This lack of protection is largely based on the societally-accepted presumption that parents will always do what is best for their children.<sup>46</sup> Because of this, "these laws are designed to protect information about children generated outside the home, primarily in school and healthcare settings" and do not consider parents as a potential third-party source for harmful disclosures.<sup>47</sup>

#### A. Federal Legislation Addressing Digital Privacy Concerns

Most federal privacy laws are not explicitly aimed at protecting children but instead apply broadly and include children within their scope. As a result, they prohibit certain third parties from disclosing a child's personal information.<sup>48</sup> However, such laws often include exceptions giving parents the right to access, control, disseminate, and consent to the disclosure of their child's personal information when acting on the child's behalf.<sup>49</sup> These federal laws recognize that minors have an interest in maintaining privacy over basic information such as name, address, age, grades, health, and behavior records, but they often only afford rights to control that information to the parents.<sup>50</sup> But in the context of sharenting, the third-party actor disclosing the harmful information is the parent, and there becomes a conflict as the parent occupies the roles of both the third-party actor and the guardian authorized to give consent.<sup>51</sup>

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44. Steinberg, *supra* note 12, at 861.

45. *Id.* at 862.

46. Shmueli & Blecher-Prigat, *supra* note 21, at 771-72 ("In all these contexts, children's interest in and right to privacy is considered to be best protected by their parents. After all, it is parents who are obliged by law and by nature to provide for their children's needs, and who are considered to be in the best position to do so.")

47. Steinberg, *supra* note 12, at 862 ("The fact that children need privacy from individuals and entities external to the family is well recognized, both in law and academic literature").

48. *Id.* at 870.

49. *Id.* at 870-871.

50. See, e.g., Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-6506 (2012) (providing parents with control over the information collected from children by websites aimed at children under the age of 13); Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2012) (protecting children's educational records from disclosure to third parties); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.); 15 U.S.C. § 6502(a) (2012) (prohibiting the collection of personal data from children by website operators, and making an exception to liability when personal data is requested by the parent).

51. Steinberg, *supra* note 12, at 873.

## 1. The Children’s Online Privacy Protection Act of 1998

Congress enacted the Children’s Online Privacy Protection Act (COPPA) in 1998, and the Federal Trade Commission (FTC) updated the Act in 2013 to account for changes in technology in order to govern the gathering and disclosure of online data pertaining to children aged thirteen and under.<sup>52</sup> COPPA specifically requires compliance by “any operator of a Website or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child.”<sup>53</sup> COPPA further defines ‘operator’ as:

any person who operates a Web site located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such Web site or online service, or on whose behalf such information is collected or maintained, or offers products or services for sale through that Web site or online service, where such Web site or online service is operated for commercial purposes involving commerce among the several States or with 1 or more foreign nations.<sup>54</sup>

This definition ensures that COPPA regulates entities collecting personal information from children, typically commercial actors, and not individuals disclosing children’s personal information. Persons injured by COPPA violators can sue under the FTC’s prohibition against unfair or deceptive practices.<sup>55</sup> Thus, while commercial websites in violation of COPPA may be forced to pay civil penalties,<sup>56</sup> COPPA imposes no civil penalties on parents for harmful sharenting.

Moreover, the language of COPPA reinforces the traditional role of a parent as the guardian of their child’s privacy rights and personal information. COPPA requires operators “to provide notice on the website of what information is collected from children by the operator, how the operator uses such information, and the

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52. Children’s Online Privacy Protection Act of 1998; 15 U.S.C. §§ 6501-6506 (2012).

53. See Children’s Online Privacy Protection Act of 1998, 15 U.S.C. § 312.3 (2012).

54. *Id.* at § 312.2.

55. See Children’s Online Privacy Protection Act of 1998 15 U.S.C. at §§ 6502(c), 6504(a)(1)-(c).

56. FTC Staff Report, *Protecting Children’s Privacy Under COPPA: A Survey On Compliance* (2002), <https://www.ftc.gov/sites/default/files/documents/rules/childrens-online-privacy-protection-rule-coppa/coppasurvey.pdf> [https://perma.cc/Q6H7-NF8H]; FTC, *Children’s Online Privacy Protection Rule: A Six- Step Compliance Plan for Your Business*, FTC (June 2017), <https://www.ftc.gov/business-guidance/resources/childrens-online-privacy-protection-rule-six-step-compliance-plan-your-business> [https://perma.cc/BK3U-VN5R].

operator's disclosure practices for such information."<sup>57</sup> This law also requires that operators "obtain verifiable parental consent before any collection, use, or disclosure of personal information from children" and notes that "an operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties."<sup>58</sup> As a result, COPPA gives parents the ultimate authority to make decisions about their children's privacy rights, following traditional notions of parental authority over a child's personal information.<sup>59</sup>

## 2. The Health Insurance Portability and Accountability Act of 1996

The Health Insurance Portability and Accountability Act (HIPAA) pertains to the privacy and security of protected health information held by covered entities, including healthcare clearinghouses, healthcare providers, health plans, and any hybrid of those entities.<sup>60</sup> Under HIPAA, medical professionals at these covered entities are prohibited from sharing personal information about patients of any age without written consent.<sup>61</sup> For children under eighteen years old, their parents act as their personal representatives, and HIPAA specifies that covered entities must "treat a personal representative as the individual under HIPAA."<sup>62</sup> Accordingly, parents are authorized to provide written consent regarding with whom to share the minor's private health information.<sup>63</sup>

Similar to COPPA, HIPAA does not apply specifically to parents' disclosure of their child's private information, instead applying to covered entities. In contrast to COPPA, HIPAA goes even farther to enshrine the parental role as guardian of the child's privacy rights by giving parents the power to consent on behalf of the child.

## 3. The Family Educational Rights and Privacy Act of 1964

The Family Educational Rights and Privacy Act of 1964 (FERPA) was created to help protect against the disclosure of

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57. Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6502(b)(1)(A)(i) (2012).

58. *Id.* at § 312.5(a).

59. Hamming, *supra* note 11, at 1048; *Id.* at § 6502(b)(2).

60. 45 C.F.R. § 160.102(a)(1-3) (2023).

61. See Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

62. 45 C.F.R. § 164.502(g)(1-3) (2023).

63. *Id.* at § 164.502(g)(3).

personal information in a child's educational record and to support a parent's right to raise their children as they see fit.<sup>64</sup> FERPA conditions federal education funding by making it unavailable for schools with a "policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information" or as permitted in other statutory exceptions,<sup>65</sup> unless the student's parent consents.<sup>66</sup> Such parental consent must be written and narrowed to specify the "records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents."<sup>67</sup> By doing so, FERPA effectively prohibits teachers and administrators working in education from disclosing a child's academic record to anyone except the child's parent or guardian unless such consent exists.<sup>68</sup>

Initially, "FERPA appears to confer a privacy right on a child, but in actuality, the Act protects the child from public disclosures of educational information in all instances except when a parent wants to view or share the same data."<sup>69</sup> Accordingly, under FERPA, the parent, rather than their child, holds the privacy interest in the child's academic record until the student turns eighteen when the right and ability to consent transfers to the now-adult student.<sup>70</sup> Because the parents control the disclosure of information from those education records, this reinforces the role of parents as the guardians of the children's privacy rights. Thus, FERPA equally fails to address instances where parents disclose that information to the child's detriment.

### B. *Relevant State Privacy Protection Laws*

In addition to those federal legislative efforts, states—like California, which has often been recognized as a leader in digital

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64. See 20 U.S.C. § 1232g (2012).

65. *Id.* at § 1232g(b) (noting certain exceptions where parental consent is not required, such as if such academic information were to be provided to other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, or in connection with a student's application for, or receipt of, financial aid).

66. *Id.* at § 1232g(b)(2).

67. *Id.* at § 1232g(b)(2)(A).

68. *Id.* at § 1232g(b).

69. Steinberg, *supra* note 12, at 870; *see id.*

70. 20 U.S.C. § 1232g(d); *What is FERPA?*, U.S. DEP'T OF EDUC., <https://studentprivacy.ed.gov/faq/what-ferpa#:~:text=The%20Family%20Educational%20Rights%20and,identifiable%20information%20from%20the%20education> [<https://perma.cc/NK45-79SP>] (last visited Jan. 26, 2025).

privacy protection<sup>71</sup>—have begun to address Americans’ growing concerns related to individual privacy for their personal information. But, just as with federal privacy laws, two of California’s key privacy laws addressing children fail to protect children from the harms that may result from sharenting.

### 1. The California Consumer Privacy Act

In June 2018, California enacted the California Consumer Privacy Act (CCPA), which gives Californian consumers an expansive set of rights concerning their personal information.<sup>72</sup> It allows the right to “request that a business delete any personal information about the consumer which the business has collected from the consumer,”<sup>73</sup> and the right to access and know what personal information is being collected.<sup>74</sup> The CCPA also gives Californian consumers the right to opt out of the sale of their information, allowing them “to direct a business that sells or shares personal information about the consumer to third parties not to sell or share the consumer’s personal information.”<sup>75</sup> With respect to children, the CCPA provides that:

[A] business shall not sell or share the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of consumers at least 13 years of age and less than 16 years of age, or the consumer’s parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized the sale or sharing of the consumer’s personal information.<sup>76</sup>

Like other legislation, the rights afforded by the CCPA are “centered around misconduct by a ‘business,’ and a private right of action does not appear to exist for those wishing to bring suit against another individual for unapproved disclosure of personal information” so it does not protect children against harmful disclosures by their parents.<sup>77</sup>

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71. Somini Sengupta, *Sharing, with a Safety Net*, N.Y. TIMES (Sept. 19, 2013), <https://www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html> [<https://perma.cc/54DL-LBBL>].

72. California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.100-120 (2023) (effective Jan. 1, 2020) [hereinafter CCPA].

73. *Id.* at § 1798.105(a).

74. *Id.* at § 1798.110.

75. *Id.* at § 1798.120(a).

76. *Id.* at § 1798.120(c).

77. Hamming, *supra* note 11, at 1049; *Id.* at § 1798.150(a)(1).

## 2. California Online Eraser Law

California's Online Eraser Law provides minors with the right to delete posts from online forums.<sup>78</sup> Signed into law on September 23, 2013, SB 568 includes an "Internet Eraser" provision.<sup>79</sup> Under this provision, operators of Internet websites, online services or applications, and mobile applications that are either "directed to minors" or whose operators "[have] actual knowledge that a minor is using" the service must "permit a minor who is a registered user . . . to remove or, if the operator prefers, to request and obtain removal of, content or information posted."<sup>80</sup> While this law is intended to apply primarily to social media sites, its broad language allows for internet users to request that any material they have posted online be removed.<sup>81</sup> The law also requires that internet operators "provide notice and clear instructions to users who are minors to guide them through the removal process."<sup>82</sup> "[T]hese laws protect children from information they post and provides them the right to later change their mind and delete the information."<sup>83</sup>

Many have touted this law as the "Right To Be Forgotten Lite," analogizing the limited privacy protections afforded to minors under this law to the European Union's "Right To Be Forgotten."<sup>84</sup> However, others have commented that this law falls short of any "Right To Be Forgotten," at worst noting that the law is a "series of smoke and mirrors that only provides the illusion of protection for California minors."<sup>85</sup> Critics of the law have noted that its most obvious shortcoming is that the statute only allows for the removal of content posted by the minor themselves, not content posted by a third party, such as a parental authority.<sup>86</sup> Accordingly, while this law functions as a good illustration of what an eraser law looks like, this particular law does nothing to solve the problem of sharenting.

Furthermore, "removing the original copy of the content would only accomplish the goal of the law if it were the only copy online," and "given how often publicly available information gets copied and shared (think retweets on Twitter and post shares on Facebook),

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78. Cal. Bus. & Prof. Code § 22581(a)(1) (West 2013).

79. Wesley Campbell, *But It's Written in Pen: The Constitutionality of California's Internet Eraser Law*, 48 COLUM. J.L. & SOC. PROBS. 583, 584-85 (2015).

80. Cal. Bus. & Prof. Code § 22581(a)(1) (West 2013).

81. Campbell, *supra* note 79, at 585.

82. *Id.*

83. Steinberg, *supra* note 12, at 863.

84. Shaudee Dehghan, *How Does California's Erasure Law Stack Up Against the EU's Right to Be Forgotten?*, INT'L ASS'N OF PRIV. PRO. (Apr. 17, 2018), <https://iapp.org/news/a/how-does-californias-erasure-law-stack-up-against-the-eus-right-to-be-forgotten> [<https://perma.cc/6J6U-ZNLA>].

85. *Id.*

86. *Id.*

this law only gives minors the illusion of control, not actual control, over their content.”<sup>87</sup> The statute acknowledges this, requiring Internet operators to provide additional notice to minors to inform them that the procedures mandated by the law “[do] not ensure complete or comprehensive removal of the content or information posted.”<sup>88</sup>

### III. EVALUATING ERASER LAWS AS A LEGISLATIVE SOLUTION

Laws that attempt to allow individuals to erase or deindex information about themselves online function as a sort of “right to be forgotten,” the idea popularized by the EU’s General Data Protection Regulation that “individuals have the right to delete information about themselves that is not legally required to remain online.”<sup>89</sup> While this idea has become more popular in recent years, “the United States has no law or regulatory requirement about removal of personal information from search results or databases.”<sup>90</sup> “Several states have considered ‘right to be forgotten’ laws, but none have adopted provisions like the EU court’s ruling.”<sup>91</sup> To see what a potential eraser law might be like, we look to a bill that was previously introduced before the Washington state legislature. While this bill died in committee,<sup>92</sup> it was the first proposed eraser law in the United States, and its contents can nonetheless lend key insight into what a future proposed eraser law may require.

#### A. *House Bill 1627 (“Protecting the Interests of Minor Children Featured on For-Profit Family Vlogs”)*

Recognizing the lack of alternative avenues for protecting children’s privacy rights, representatives in Washington state’s legislature recently sought to make Washington the first state in the nation to grant privacy protections specifically targeted at child

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<sup>87</sup> *Id.*

<sup>88</sup> Campbell, *supra* note 79, at 585; CAL. BUS. & PROF. CODE § 22581(a)(4) (West 2013).

<sup>89</sup> Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, TIME MAGAZINE (May 14, 2014), <https://time.com/98554/right-to-be-forgotten> [<https://perma.cc/N6X8-RP7F>].

<sup>90</sup> Brooke Auxier, *Most Americans support right to have some personal info removed from online searches*, PEW RSCH. CTR. (Jan. 27, 2020), <https://www.pewresearch.org/short-reads/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches> [<https://perma.cc/79WE-D73M>].

<sup>91</sup> *Id.*

<sup>92</sup> HB 1627, 68<sup>TH</sup> LEG., 2023 REG. SESS. (WASH. 2023), <https://app.leg.wa.gov/billsummary?BillNumber=1627&Year=2023&Initiative=false> [<http://perma.cc/73SM-SUWY>] (last visited Aug. 1, 2024).

influencers.<sup>93</sup> Introduced in 2023, House Bill 1627 (“Protecting the interests of minor children featured on for-profit family vlogs”) recognized that “[u]nlike in child acting, these children are not playing a part, and lack legal protections.”<sup>94</sup> The legislature noted that “[s]ome children are filmed, with highly personal details of their lives shared on the internet for compensation, from birth,” and this can result in “a severe loss of privacy.”<sup>95</sup> To ameliorate this problem, legislators intended, through HB 1627, “to provide for minors to exercise control over specified personal property rights upon reaching the age of majority.”<sup>96</sup>

While this bill includes sections to address the financial and labor rights of child social media influencers,<sup>97</sup> it also includes a groundbreaking provision regarding the privacy rights of such children. This bill provides that, when they reach eighteen years old, individuals to whom the act applied when they were minor children “may request the permanent deletion of *any video segment* including the likeness, name, or photograph of the individual from any internet platform or network that provided compensation to the individual’s parent or parents in exchange for that video content.”<sup>98</sup> Notably, this language doesn’t specify who the poster of the video must be, allowing these individuals to petition for the removal of a video made by a parent or any other person, so long as the parent or parents of the individual received money from the internet platform or network. This type of true “eraser” law is very distinct from laws like California’s Online Eraser law, in which removal requests can only be for content posted by the individual submitting the request.

After they submit this petition to take the content down, HB 1627 requires that “[a]n internet platform or network must take all reasonable steps to permanently delete the video segment.”<sup>99</sup> Furthermore, the bill states that “[a]ny contract with an internet platform or network for the exchange or use of video content that would reasonably be anticipated to include greater than a de minimis use of a vlogger’s minor child *must* include notification to the internet

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93. Kiara D. Benac, *Family Channels & Child Exploitation: How Washington State’s Proposed Legislation Protects the Future of Child Influencers*, J. HIGH TECH. L. BLOG (Apr. 7, 2023), <https://sites.suffolk.edu/jhtl/2023/04/07/family-channels-child-exploitation-how-washington-states-proposed-legislation-protects-the-future-of-child-influencers> [https://perma.cc/GUW6-K26B].

94. H.B. 1627, 68th Wash. Leg. § 1(1) (2023).

95. H.B. 1627, 68th Wash. Leg. § 1(2) (2023).

96. H.B. 1627, 68th Wash. Leg. § 1(3) (2023).

97. H.B. 1627, 68th Wash. Leg. § 3 (2023).

98. H.B. 1627, 68th Wash. Leg. § 4(1) (2023).

99. H.B. 1627, 68th Wash. Leg. § 4(2) (2023).

platform or network of the minor child's future rights as provided in this section."<sup>100</sup>

### 1. Limitations and Ambiguities in the Bill's Language

This bill, while groundbreaking, suffered from certain serious limitations. One such limitation in scope is that this bill only applies to a narrow group of individuals. First and most obviously, this law only applies to individuals who, when they were minors, maintained their principal place of residence in the state of Washington.<sup>101</sup> These individuals must have also been the minor child of a vlogger, which the bill defines as "an individual or family that creates video content in exchange for compensation, and includes any proprietorship, partnership, company, or other corporate entity assuming the name or identity of a particular individual or family for purposes of that content creation."<sup>102</sup>

Furthermore, this vlogger must meet the following two conditions within the previous 12-month period.<sup>103</sup> First, the vlogger must have either "[t]he number of views received per video segment on any internet platform or network me[e]t the platform or network's threshold for generation of compensation" or have "received actual compensation for video content equal to or greater than \$0.10 per view."<sup>104</sup> Second, "[a]t least 30 percent of the vlogger's compensated video content produced within a 30-day period included the likeness, name, or photograph of the vlogger's minor child."<sup>105</sup> Accordingly, those who petition for content removal must have been a Washington resident and the child of a vlogger who meets the above specifications.

Because of these specifications, the bill is very narrow in scope, only applying to parents who have reached a certain level of online popularity and monetized a sufficient amount of content of their children. The definitions are very economic-focused, perhaps because of the bill's other financial requirements for such vloggers to set aside the proceeds from such videos for their children. However, applying these same narrow definitions to those who are eligible to petition under the bill's privacy clause severely restricts the pool of individuals harmed by parental oversharing who would benefit from this bill. For example, children like Roman,<sup>106</sup> discussed above, who have significant amounts of private health information

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100. H.B. 1627, 68th Wash. Leg. § 4(3) (2023).

101. H.B. 1627, 68th Wash. Leg. § 2(7) (2023).

102. H.B. 1627, 68th Wash. Leg. § 2(13) (2023).

103. H.B. 1627, 68th Wash. Leg. § 3(2)(a) (2023).

104. H.B. 1627, 68th Wash. Leg. § 3(2)(a) (2023).

105. H.B. 1627, 68th Wash. Leg. § 3(2)(b) (2023).

106. Pelletiere, *supra* note 10.

shared online by their parents, would not benefit from this bill because Facebook has not compensated their parents.

The scope of the content applicable under this bill is similarly narrow. The bill specifically applies to any “video segment,” which is said to include “the likeness, name, or photograph” of the child.<sup>107</sup> This would be particularly helpful for kidfluencers on video-based platforms like YouTube and TikTok. However, it doesn’t allow for the removal of private information shared via text or photo, such as content on popular social media platforms like Facebook, Instagram, or X. As such, the bill certainly helps children of the most prevalent family vloggers, but it neglects to address the many other content mediums that parents routinely use to overshare intimate details about their children’s lives.

Additionally, given the relatively short length of the bill, many of its key provisions contain serious ambiguities, leaving many open questions regarding the interpretation and potential enforcement of the bill. Notably, the bill offers limited examples to social media platforms about how to enforce the petition mechanism; for example, the bill never specifies what kind of information should be included in a petition to remove content. Similarly, the bill requires that internet platforms or networks take all “reasonable steps” to permanently delete a video segment,<sup>108</sup> but never details what such “reasonable steps” entail nor what steps would be considered unreasonable. Additionally, while the bill notes that applicable individuals can begin exercising these removal rights “upon the age of majority,” which is eighteen years old, the bill does not specify whether there is a window in which the individual can request the takedown or if they retain these rights for the remainder of their adult life. Furthermore, while this bill is primarily aimed at social media platforms, the law doesn’t define “internet platform” or “network” anywhere, so this language could even be read broadly to extend to online crowdfunding platforms such as GoFundMe, music streaming platforms like Spotify, or general search engines like Google. The broader the definition, the greater the number of conceivable scenarios where former kidfluencers could request the removal of video content.

The final and perhaps most obvious criticism of this legislation is that this solution is reactive rather than proactive. As noted above, information shared online, particularly that which has gone viral, can reach a wide audience in a relatively short time, quickly causing irreparable damage to a child’s digital footprint long before a child reaches eighteen years old and can finally exercise their

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107. H.B. 1627, 68th Wash. Leg. § 4(1) (2023).

108. H.B. 1627, 68th Wash. Leg. § 4(2) (2023).

removal rights. Furthermore, “once information is shared, despite its future deletion, companies might retain the previously available data.”<sup>109</sup> Thus, even if the platform successfully deletes a video after an eighteen-year-old requests its removal, other users may have reposted the video, or data from that video that companies collected may still exist. In short, the adage that “the internet is forever” remains true and often makes reactive solutions, such as this bill, a poor fit for the indelible nature of online information.

## 2. Balancing Conflicting Constitutional Rights of the Parent with the Rights of the Child and State Interests

Eraser laws like HB 1627 also implicate the constitutional rights of Americans. While they likely touch on state constitutional rights, such an analysis exceeds the scope of this note. Instead, this note briefly discusses federal constitutional rights—specifically, how eraser laws may be bolstered by a state’s interest in protecting a child’s right to privacy, but that such eraser laws also conflict with parental rights to control the upbringing of their child and parental freedom of speech.

### i. The Child’s Right to Privacy

It is unclear whether eraser laws like HB 1627 would be supported by a child’s right to privacy. Unlike other rights, the right to privacy is not explicitly guaranteed in the U.S. Constitution.<sup>110</sup> The Supreme Court first declared that an individual has a constitutional right to privacy in the landmark 1965 case *Griswold v. Connecticut*.<sup>111</sup> The Court found that this right can be inferred from the “penumbras” or “zones” of freedom created by the rights enumerated within the Bill of Rights.<sup>112</sup> The Court subsequently decided a series of cases protecting different private personal decisions regarding abortion and an individual’s intimate sexual life.<sup>113</sup>

In *Whalen v. Roe*, the Court expanded this substantive due process right to privacy, holding that the “zone of privacy” protected by the Constitution encompasses not just “the interest in

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109. Lee Jin-man, *Experts: Deleted Online Information Never Actually Goes Away*, DALLAS MORNING NEWS (Aug. 23, 2015, 8:29 PM), <https://www.dallasnews.com/business/2015/08/24/experts-deleted-online-information-never-actually-goes-away> [<https://perma.cc/DV7J-S6TH>]; Zack Whittaker, *Facebook Does Not Erase User-Deleted Content*, ZDNET (Apr. 28, 2010, 12:50 AM), <https://www.zdnet.com/article/facebook-does-not-erase-user-deleted-content> [<https://perma.cc/29ZS-Z4UU>].

110. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 35 (7th ed. 2021).

111. *Griswold v. Connecticut*, 318 U.S. 479, 483 (1965).

112. *Id.* at 484.

113. Solove & Schwartz, *supra* note 110, at 35.

independence in making certain kinds of important decisions” but also the “individual interest in avoiding disclosure of personal matters.”<sup>114</sup> This other interest encompassed within the right to privacy has become known as the “constitutional right to information privacy.”<sup>115</sup>

However, the current Supreme Court has recently raised concern about the basis of an implied right to privacy underlying other important protections. In *Dobbs v. Jackson*, the Court overturned *Roe v. Wade*, rejecting that there is any right to abortion as part of a broader right to privacy.<sup>116</sup> While the Court noted that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,”<sup>117</sup> the Court’s narrow framing of the rights at issue as abortion rights, rather than a general right to privacy, combined with its reliance on history and tradition, may spell trouble for those arguing that eraser laws like HB 1627 are supported by a child’s right to online information privacy. As a result, the future of the right to privacy and its application to more modern problems and technologies is unclear, particularly when weighed against the established rights of parents.

## ii. The Parental Right to Direct the Upbringing of their Children

If passed, eraser laws like HB 1627 would likely run afoul of the constitutional right of parents to raise their children as they please. Over the years, the Supreme Court has repeatedly recognized the well-established “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>118</sup> The rationale is child-focused, with the Supreme Court stating the rebuttable presumption that “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions” and that “natural bonds of affection lead parents to act in the best interests of their children.”<sup>119</sup> The Court firmly upholds this presumption, even while recognizing that some parents may, at times, act against the best interests of their children, as evidenced by cases of child neglect or abuse.<sup>120</sup>

While this right is not absolute, the government’s ability to intervene in the parent-child relationship is heavily limited, further

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114. *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

115. SOLOVE & SCHWARTZ, *supra* note 110, at 35-36.

116. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

117. *Id.* at 221.

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

119. *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

120. *Id.* at 602–03.

demonstrating how parental rights act as an obstacle to the passing of eraser laws. The Court has previously found laws infringing on parental rights to be subject to strict scrutiny—the most rigorous standard of judicial review.<sup>121</sup> Accordingly, to pass constitutional muster, the federal government must prove any eraser law to be a narrowly tailored means to achieve a compelling government interest.<sup>122</sup>

While overcoming strict scrutiny is possible, particularly when child safety is involved, state intervention is not compelling when it is based on the child's best interests alone.<sup>123</sup> Rather, “[a] state’s interest in interfering with parental autonomy in raising a child is only compelling in circumstances involving avoidance of substantial harm.”<sup>124</sup> While sharenting is often not in the child’s best interest, judges may not appreciate the substantial harm that could result, mainly because it is such a recent phenomenon. Furthermore, “[i]n the case of sharenting, the uncertainty that risks will materialize into substantial harm in every case could complicate an attempt to classify the practice as substantial harm warranting direct government intervention.”<sup>125</sup> Even if the state’s compelling interest in passing eraser laws was upholding the child’s privacy rights, the “courts tend to ignore a child’s rights or find that parental rights supersede them when conflict arises.”<sup>126</sup>

### iii. First Amendment Freedom of Expression Concerns

Like any other law granting a limited “right to be forgotten,” even if passed, eraser laws like HB 1627 would likely be challenged on First Amendment grounds. The First Amendment to the United States Constitution grants citizens the right to free speech, creating arguably the strongest shield against government censorship to date.<sup>127</sup> Since free speech is a fundamental right, laws that restrict speech based on its content are reviewed under strict scrutiny.<sup>128</sup> Accordingly, like the tenuous right to privacy, the federal government must prove any eraser law to be a narrowly tailored means to

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121. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *see also Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

122. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 903-04 (6th ed. 2020).

123. Charlotte Yates, *Influencing “Kidfluencing”: Protecting Children by Limiting the Right to Profit from “Sharenting”*, 25 VAND. J. ENT. & TECH. L. 845, 855 (2023).

124. *Id.*

125. *Id.*

126. Soo Jee Lee, *A Child’s Voice vs. A Parent’s Control: Resolving a Tension Between The Convention On The Rights of The Child and U.S. Law*, 117 COLUM. L. REV. 687, 702 (2017).

127. U.S. CONST. amend. I.

128. CHERMERINSKY, *supra* note 122, at 906.

achieve a compelling government interest in order to pass constitutional muster under the First Amendment.<sup>129</sup>

The federal government could easily argue that protecting children’s privacy online is a compelling state interest. However, it may struggle to argue that HB 1627 or any other eraser law is “narrowly tailored to not usurp more of the parent’s First Amendment rights in sharing their children online than necessary to protect their children.”<sup>130</sup> Such eraser laws are hardly narrowly tailored when they do not address the irreparable damage to a child’s digital footprint that occurs before the child can exercise their removal rights.

Such an uphill battle seems even more difficult in light of the historic triumph of free speech rights over privacy concerns. “Privacy law has been in conflict with free speech principles since the beginning of American mass media culture, ‘and when First Amendment values and . . . privacy conflict . . .,’ the First Amendment almost always wins.”<sup>131</sup> “[S]ince privacy law is derived from statutes, common law, and an implicit guarantee in the Bill of Rights, whereas free speech finds its source in an explicit provision of the Constitution, it is not surprising that the scales have historically tipped in favor of free speech.”<sup>132</sup>

This attitude is similarly reflected in the United States Supreme Court’s jurisprudence. The judicial opinion presenting the most serious obstacle to the right to privacy is that in *Cox Broadcasting Corp. v. Cohn*, in which the U.S. Supreme Court held that “a Georgia law allowing the father of a deceased rape victim to sue a television station for invasion of privacy by broadcasting the victim’s name violated the First Amendment.”<sup>133</sup> Since that opinion, other courts have affirmed this understanding, suggesting minimal momentum amongst judges for a potential “right to be forgotten.”<sup>134</sup> So, “[w]ithout a tremendous cultural push, and up against Supreme Court precedent (not to mention the tremendous litigation power of

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129. *Id.* at 903-04.

130. Libby Morehouse, *The Kids Are Not Alright: A Look into the Absence of Laws Protecting Children in Social Media*, 44 LOY. L.A. ENT. L. REV. 74, 118 (2024).

131. James J. Lavelle, *Search Query: Can America Accept a Right to Be Forgotten as a Publicity Right?*, 83 Brook. L. Rev. 1115, 1123 (2018) (quoting Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 357 (2011)).

132. *Id.* at 1224.

133. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *See also* Danielle Bernstein, *Why the “Right to be Forgotten” Won’t Make it to the United States*, MICH. TELECOMM. & TECH. L. REV. BLOG, <https://mttlr.org/2020/02/why-the-right-to-be-forgotten-wont-make-it-to-the-united-states> [<https://perma.cc/A9VT-RSLB>].

134. *See, e.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 745–46 (9th Cir. 2015) (stating that a ‘right to be forgotten’ is not recognized in the United States); *Manchanda v. Google*, 16-CV-3350 (JPO), 2016 U.S. Dist. LEXIS 158458 (S.D.N.Y. Nov. 16, 2016) at n. 2 (noting that a ‘right to be forgotten’ is only recognized in legal systems other than our own).

corporations like Google),”<sup>135</sup> current signs point to a “right to be forgotten” never finding its way in the U.S.

Given this existing dynamic between the First Amendment and attempts to introduce more stringent privacy laws, it is unlikely that HB 1627 would pass constitutional muster. Since its removal requirement calls for platforms to take down content created by third parties, not the requester, this would likely violate the Constitution, especially given that the current Supreme Court may not recognize any countervailing right to privacy to protect the bill.

To conclude, parents’ fundamental rights to direct the upbringing of their children and to free speech have a far greater stronghold in American constitutional jurisprudence than a child’s potential right to information privacy. Accordingly, eraser laws such as HB 1627 would likely be deemed unconstitutional, representing an insurmountable obstacle to any “right to be forgotten” for American children.

### 3. Political Obstacles that Bills Like HB 1627 Face in Their Path to Enactment

Finally, certain non-legal factors will affect the likelihood of enactment of eraser laws like HB 1627. On one hand, privacy is more important to Americans than ever before: “given the option, 74% of U.S. adults say it is more important to be able to ‘keep things about themselves from being searchable online’” than to have that information freely discoverable to others.<sup>136</sup> This makes privacy legislation a hot topic. “Bills ostensibly aimed at making the internet safer for children and teens have been popping up all over the United States recently. Dozens of bills in states including Utah, Arkansas, Texas, Maryland, Connecticut, and New York have been introduced in the last few months.” With Congress’ ability to pass new legislation near an all-time low, more than ever before states have been taking privacy legislation into their own hands and improving the existing patchwork of privacy protection laws.<sup>137</sup> Furthermore, since children are a particularly sympathetic cause, it is easy to imagine how voting against a bill aimed at protecting children could look extremely bad for politicians who care deeply about protecting their image. In this way, the paternalistic notion of protecting children pushes in favor of enactment.

On the other hand, privacy bills often face massive opposition from big tech companies since eraser laws such as HB 1627 would put a lot of responsibility on platforms to administer and respond

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135. Bernstein, *supra* note 133.

136. Brooke Auxier, *supra* note 90.

137. Luckerson, *supra* note 89.

to these petitions. As mentioned above, many of the bills in the recent wave of state-level privacy legislation “are already being challenged by Big Tech lobbyists, activists, and other groups” who “argue that enforcement is extremely onerous, and in some cases even technically impossible.”<sup>138</sup> Parts of this argument may strike a chord with Americans at a time when they appear to be more suspicious of big tech than ever before.<sup>139</sup> Consequently, the American public might be uncomfortable with companies like Meta deciding what constitutes a reasonable effort and, thus, which petitions require compliance.

## CONCLUSION

The modern epidemic of sharenting is very harmful to children, and it is clear from our examination of existing privacy laws that such laws are insufficient to protect children from these harms or make them whole for harm done in the past. While eraser laws have effectively minimized these harms in other countries, in the United States such laws are difficult to enact and enforce. Our examination of HB 1627, the groundbreaking but ultimately unsuccessful eraser bill proposed in the state of Washington, demonstrates just that. The language of this law itself limits the scope, illustrating the difficulty of drafting eraser laws that are broadly applicable to the many children harmed by sharenting each year. Additionally, given how eraser laws that target sharenting restrict parents’ speech and their ability to control their child’s upbringing, these laws risk violating the U.S. Constitution. Furthermore, lobbying efforts by big tech companies and public concerns about putting privacy decisions in the hands of those companies weigh against such eraser bills ever being enacted. Thus, in the current legal landscape, eraser laws do not offer child privacy advocates a promising legislative solution to sharenting.

While HB 1627 suffered from serious flaws, its existence and the sharenting problem that it sought to remedy are nonetheless important. Without effective legislation, children will continue to suffer the long-term harm of their parents’ sharenting. The mere proposal of such an eraser law by a state legislature is significant since it demonstrates that online child privacy is a growing concern

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138. Tate Ryan-Mosley, *Why child safety bills are popping up all over the US*, MIT TECH. REV. NEWSL. (Apr. 24, 2023) <https://www.technologyreview.com/2023/04/24/1071992/child-safety-privacy-bills-us-tech-policy> [https://perma.cc/GBK4-RBFF].

139. See Sean Kates et al., *How Americans’ Confidence in Technology Firms Has Dropped*, BROOKINGS (June 14, 2023), <https://www.brookings.edu/articles/how-americans-confidence-in-technology-firms-has-dropped-evidence-from-the-second-wave-of-the-american-institutional-confidence-poll> [https://perma.cc/3L9D-P6YR].

among Americans. Only time will tell whether HB 1627 was simply a “one of a kind” proposal without any lasting legislative impact, or if it marked the beginning of a much-needed legislative movement toward greater privacy for children online.