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COMMENT

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WHEN PLAY BECOMES WORK:  
CHILD LABOR LAWS IN THE ERA OF “KIDFLUENCERS”

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*In the past few years, “kidfluencers,” or children with large social media followings, have been integral to the rise of an \$8-billion social media advertising industry. The most successful kidfluencers make up to \$26 million in a year by posting sponsored content and monetizing ad space on their social media pages. Because kidfluencers have no legal right to these earnings or safe working conditions, the risk of exploitation is extreme and immediate. Still, the issue is nuanced because parents significantly control the production of their children’s online content, and states are limited in how much they may regulate a parent’s decisions in raising their child.*

*This Comment addresses how kidfluencers fit in the child labor regime, specifically by comparing child actor law. Child actors are not covered by federal statutory labor laws, resulting in a patchwork of state regulations. This Comment proposes that states should enact laws, akin to child actor Coogan Laws, to financially protect kidfluencers. However, it concedes that certain common child actor regulations, like those involving work permits and workplace conditions, are difficult, if not impossible, to impose on kidfluencers. Ultimately, current child actor laws should not simply be expanded to include social media influencers, but instead, tailored legislation is needed.*

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## INTRODUCTION

In 2018, viewers regularly tuned in to watch the seven Hobson children play and laugh on their YouTube channel, *Fantastic Adventures*.<sup>1</sup> The channel had more than 700,800 followers and more than 242 million views.<sup>2</sup> Not only did the viewers benefit from this free entertainment, but Machelles Hobson, the channel's producer and mother of the children, made nearly \$300,000 from the series.<sup>3</sup>

But if viewers could look through their screens and glimpse the real lives of these young YouTube stars, they would find that five of the seven Hobson children had not attended school in years, according to police records.<sup>4</sup> Their mother reportedly took them out so they could focus on the YouTube series.<sup>5</sup> The children said that if they forgot their lines or were difficult during

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<sup>1</sup> The YouTube channel has since been deleted.

<sup>2</sup> Julia Carrie Wong, *It's Not Play if You're Making Money: How Instagram and YouTube Disrupted Child Labor Laws*, THE GUARDIAN (Apr. 24, 2019, 1:00 AM), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> [<https://perma.cc/66KN-38CT>].

<sup>3</sup> *Id.*

<sup>4</sup> *YouTube Mom Charged with 30 Counts of Child Abuse*, CBS NEWS (Mar. 26, 2019, 9:40 PM), <https://www.cbsnews.com/news/machelle-hobson-charged-youtube-mom-behind-fantastic-adventures-channel-indicted-30-counts-child-abuse> [<https://perma.cc/U5N6-KPG5>] [hereinafter *YouTube Mom Charged*]; Wong, *supra* note 2 (quoting Pinal Cnty. Sup. Ct., 190313035, Release Questionnaire: Machelles L, Logan D. Hackney, Ryan D. Hackney, <https://assets.documentcloud.org/documents/5776169/Reporte-De-Policia-Mujer-Arrestada.pdf> [<https://perma.cc/X782-6K3Y>]).

<sup>5</sup> *YouTube Mom Charged*, *supra* note 4.

production, their mother would beat, pepper-spray, molest, and starve them.<sup>6</sup> Hobson pleaded not guilty to charges of child abuse.<sup>7</sup>

This tragic story reminds us that monetizing children risks unconscionable exploitation, even by their own parents. What's more, the Hobson children had no legal right to the \$300,000, even though it was earned through their talents and sacrifices. States have not formally recognized social media production as a form of labor or acting for adults or children, so these entertainers have no specific labor protections.<sup>8</sup>

Children who have large social media followings, like the Hobsons, are colloquially called “kidfluencers.”<sup>9</sup> Unlike traditional child acting, parents do not need industry connections or expensive acting classes to make their child a social media star; they just need an idea, a social media account, some filming skills, and luck. As part of a budding \$8-billion industry,<sup>10</sup> kidfluencers make money both from companies that pay for the children to advertise their products and from social media platforms that sell advertisement space on kidfluencers' channels.<sup>11</sup> Some will even post content for a company in exchange for free products instead of monetary compensation.<sup>12</sup> Because social media has turned children into potential sources of fame and income, kidfluencers face many threats, including financial exploitation, psychological harm, and extreme loss of privacy.

<sup>6</sup> Wong, *supra* note 2.

<sup>7</sup> Jay Croft & Amanda Watts, *YouTube Mom Pleads Not Guilty to Abusing Children*, CNN (Mar. 29, 2019, 1:56 PM), <https://www.cnn.com/2019/03/29/us/youtube-mom-hobson-abuse-claims-plea/index.html> [<https://perma.cc/E7UR-TZVH>].

<sup>8</sup> Though states do not currently provide protections to influencers, the FTC has at least recognized the industry in its Endorsement Guide, which says that influencers should disclose that their endorsements are paid advertisements. See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.5 (2009).

<sup>9</sup> See *infra* notes 31–47 and accompanying text.

<sup>10</sup> Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, BUS. INSIDER (Dec. 17, 2019, 2:07 PM), <https://www.businessinsider.com/influencer-marketing-report> [<https://perma.cc/V9ZS-HZEF>].

<sup>11</sup> See Sapna Maheshwari, *Online and Making 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/3VER-95BG>] (reporting that some kidfluencers make up to \$50,000 per sponsored video); Elizabeth Gravier, *This Millennial Farmer Makes 5 Times More Money from His YouTube Channel than His Crops—Here's How*, CNBC MAKE IT (Nov. 27, 2019, 9:00 AM), <https://www.cnbc.com/2019/11/27/how-much-money-a-social-media-influencer-makes-farming.html> [<https://perma.cc/65PZ-6S88>] (reporting on how one influencer makes money through advertisements and sponsorship deals).

<sup>12</sup> Sapna Maheshwari, *Are You Ready for the Nanoinfluencers?*, N.Y. TIMES (Nov. 11, 2018), <https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html> [<https://perma.cc/3U42-H59L>] (explaining that brands will give nanoinfluencers—influencers with between approximately 1,000 and 5,00 followers—free products in exchange for the influencer's posts about the product, rather than money).

In this Comment, I propose that state governments need to financially protect child social media influencers. Some states have enacted labor and family statutes to protect traditional child actors from harm, though they do not extend to kidfluencers. A notable way that some states protect child actors is through Coogan Laws.<sup>13</sup> These laws generally mandate state-approved work permits and require that a certain percentage of the child actor's earnings be protected in a trust account, rather than under the control of the parents.<sup>14</sup> States should require Coogan trusts for high-earning social media influencers to protect against financial exploitation,<sup>15</sup> though permits and other production regulations common for child actors are less easily applied in this context.

Though simple in theory, this proposed expansion of labor law raises a host of uncharted policy decisions. As an illustration, California attempted to extend its Child Actor's Bill to social media influencers, but the provision was entirely removed before the bill's amendments passed.<sup>16</sup> Kansen Chu, the California Assemblymember who introduced the so-called "kidfluencer" provision, pointed out the novel challenges of applying existing Coogan Laws to this industry, including how to regulate compensation in the form of "tickets and toys and clothes and other little things."<sup>17</sup> As a solution to this particular issue, this Comment proposes that Coogan requirements should only apply to contracts worth \$500 or more because it allows the most commodified kidfluencers to receive immediate protection while the industry works out how and if to regulate other forms of compensation.<sup>18</sup> This is just one example of the open issues addressed in this Comment that need further exploration before another bill is likely to succeed.

While states are considering protective measures, they must bear in mind that child labor law inherently conflicts with family law and the constitutional right to parental authority, particularly in the social media context. Parents traditionally have the right to raise their children how they see fit,<sup>19</sup> but that right is not without limits.<sup>20</sup> Social media production is often overseen by the

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<sup>13</sup> See *infra* notes 73–84 and accompanying text.

<sup>14</sup> *Id.*

<sup>15</sup> During the editing of this Comment, France became the first country to pass such a law, protecting the earnings of child influencers and limiting the hours they can work. *France Passes New Law to Protect Child Influencers*, BBC NEWS (Oct. 7, 2020), <https://www.bbc.com/news/world-europe-54447491> [<https://perma.cc/U5PC-2ZPV>].

<sup>16</sup> Assemb. B. 2388, 2017–18 Reg. Sess. (Cal. 2018) (as introduced).

<sup>17</sup> Wong, *supra* note 2.

<sup>18</sup> *Infra* notes 137–41 and accompanying text.

<sup>19</sup> See *infra* notes 118–28 and accompanying text (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) as the two foundational cases for the constitutional right to parental authority).

<sup>20</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (holding that the state may impose restrictions on parental authority in the interest of child welfare).

parents within their own home, and it can look like family play, not work.<sup>21</sup> But at the same time, parents of kidfluencers may have perverse motivations when they stand to gain fame and money from exploiting this “play.”<sup>22</sup> Thus, states must balance the right to family autonomy with the interest in protecting child performers.

This Comment explores the history of child labor laws and its interaction with entertainment industries, concluding that social media influencers require similar, but not identical, protections to traditional child actors. There are new calls for regulation in this field,<sup>23</sup> but this Comment is the first to take an in-depth look at the family law implications and address how workplace regulations, like hour limits and tutoring requirements, struggle to fit in this context. Protecting child earnings through Coogan trusts is a practicable way to financially protect kidfluencers, but regulating the content production itself is more difficult. Many states have permit and workplace requirements in studio production to address things like health and education,<sup>24</sup> but these regulations are largely unworkable in the fast-paced

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<sup>21</sup> For example, Ryan Kaji, the star of a YouTube channel called Ryan’s World, rose to fame after his parents began posting videos of him playing with new toys and reviewing them. See Amanda Perelli, *8-Year-Old Ryan Kaji is the World’s Top-Earning YouTube Star. His Parents Took Us Inside His Business, Which Had Over \$200 Million in Retail Sales Last Year and Employs a 30-Person Production Team*, BUS. INSIDER (Oct. 12, 2020, 1:17 PM), <https://www.businessinsider.com/inside-ryans-world-business-interview-youtube-tv-toys-2020-9> [<https://perma.cc/WLW4-4EJN>]. He is now the highest-paid YouTube star in the world, earning about \$20 million from YouTube and more than \$200 million in retail sales in 2019. *Id.* His channel posts videos most days and, since its creation in 2015, has posted at least 1,830 videos at the time of writing. *Ryan’s World*, YOUTUBE, <https://www.youtube.com/c/RyanToysReview/featured> [<https://perma.cc/MMY3-UX5F>].

<sup>22</sup> See *infra* notes 101–05 and accompanying text.

<sup>23</sup> See Assemb. B. 2388, 2017–18 Reg. Sess. (Cal. 2018) (as introduced by Assemb. Chu, Feb. 14, 2018) (demonstrating a legislative effort in California to include social media influencers under child actor laws); Neyza L. Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD & FAM. L.J. 85, 109–10 (2020) (presenting three possibilities for reform to protect child video bloggers); Erin E. O’Neill, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing*, 72 STAN. L. REV. ONLINE 42, 45 (2019), <https://www.stanfordlawreview.org/online/influencing-the-future/> [<https://perma.cc/W3PP-A2MT>] (proposing that social media influencers be included under child actor laws to compensate children for their loss of privacy); Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, HOLLYWOOD REP. (Aug. 20, 2019, 9:00 AM), <https://www.hollywoodreporter.com/news/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968> [<https://perma.cc/7V6N-ZRUL>] (reporting on the public discourse surrounding kidfluencer regulation); Wong, *supra* note 2 (discussing ongoing legislative efforts to improve Coogan laws); Mike Wright, *YouTube ‘Kidfluencers’ at Risk of Exploitation, Children’s Commissioner Warns*, TELEGRAPH (Sept. 20, 2019, 9:30 PM), <https://www.telegraph.co.uk/news/2019/09/20/youtube-kidfluencers-risk-exploitation-childrens-commissioner> [<https://perma.cc/7NXW-S25V>] (describing efforts in the United Kingdom to regulate kidfluencers).

<sup>24</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 12 § 186-2.1(e) (2017) (requiring child actors in New York to apply for a state-issued work permit); CAL. CODE REGS. tit. 8, § 11753(a) (2020) (requiring child actors in California to apply for a state-issued work permit); *id.* § 11760 (limiting the number of hours child actors may work in a day and mandating the number of hours of schooling they need per day); *id.* § 11755.2 (requiring studios to provide a teacher for minors while on set).

social media context, which is generally confined to the family unit. Thus, states should appropriately analyze these issues before simply including kidfluencers under existing child actor regulations.

Part I discusses the rise of “influencing” as a multibillion-dollar industry, ripe for regulation. Part II provides an overview of the history of child labor laws to help explain why child actors, and likely kidfluencers by extension, are excluded from federal labor law coverage. This history has resulted in piecemeal regulation of child actors under state law, which becomes an issue given the mobile nature of social media production. Part III explains why social media production is work, not play, even though it is often performed at home within the family. This work makes child stars vulnerable to risks including financial exploitation, psychological harm, and unprecedented loss of privacy. While states have an interest in protecting kidfluencers from these harms, this context is uniquely family based, with parents often directing the production and using the platforms, not only for profit, but also as unpaid expression and recreation. Thus, states must balance parental rights against the interest in protecting child performers. Finally, Part IV proposes a partial-protection plan that states should adopt. Financial protection is immediately possible through Coogan Laws, but regulating the content production itself presents new and challenging questions that require states to consider the specific needs of the social media industry.

## I. THE RISE OF KIDFLUENCERS

“Samia’s birth video is on YouTube, so she’s pretty much been born into social media.”<sup>25</sup> LaToya Ali, the mother of four-year-old influencer Samia, is not alone in introducing her child to the world of social media, even before birth. According to a 2010 study, more than 90% of two-year-olds in the United States have an online presence.<sup>26</sup> This phenomenon of parents sharing content of their children, sometimes called “sharenting,” has garnered significant public concern.<sup>27</sup> Still, a 2015 report by Pew Research Center found

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<sup>25</sup> Maheshwari, *supra* note 11.

<sup>26</sup> Adrienne LaFrance, *The Perils of ‘Sharenting’*, THE ATLANTIC (Oct. 6, 2016), <https://www.theatlantic.com/technology/archive/2016/10/babies-everywhere/502757> [<https://perma.cc/KN5V-QWD3>].

<sup>27</sup> See, e.g., *id.* (discussing the importance of online privacy for children); Anya Kamenetz, Opinion, *The Problem with ‘Sharenting’*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/opinion/children-internet-privacy.html> [<https://perma.cc/N98V-9USW>] (describing the potentially damaging effects of sharenting, such as the selling of children’s personal information to advertisers and risking discovery of potentially damaging information about the child by future employers); Hua Hsu, *Instagram, Facebook, and the Perils of ‘Sharenting’*, NEW YORKER (Sept. 11, 2019), <https://www.newyorker.com/culture/cultural-comment/instagram-facebook-and-the-perils-of-sharenting> [<https://perma.cc/LLR4-DTZK>] (discussing how sharenting exposes children to the larger digital world without their consent, robbing them of their agency).

that 75% of parents use social media, and 88% of all parents said they feel comfortable when content is posted about their child on social media.<sup>28</sup>

The word “influencer” was added to the Merriam-Webster Dictionary in 2019 and refers to “a person who is able to generate interest in something (such as a consumer product) by posting about it on social media.”<sup>29</sup> Though influencing is a remarkably new phenomenon, a study found that 54% of surveyed Americans between the ages of 13 and 38 would become an influencer if they could and 86% are willing to post sponsored content for money.<sup>30</sup>

“Kidfluencers” are children with large followings on social media and, most importantly to this Comment, who receive compensation for posting sponsored content.<sup>31</sup> Twenty-five-year-old influencer Ross Smith described the rise of kidfluencers concisely: “Kids are the new social influencer . . . Kids grow up and become less relevant. The sweet spot is between 2 and 4, [after which] they’re not that cute.”<sup>32</sup> Indeed, research has shown that videos featuring a child under 13-years-old receive three times as many views as those without children.<sup>33</sup> The social media marketing industry relies on parents dressing up their toddlers, feeding them lines that they may not understand, and advertising products that they may have never used.

Whatever moral hesitation we have with the kidfluencer industry, the ship may well have sailed—the influencer marketing industry was worth as much as \$8 billion in 2019 and is still expanding.<sup>34</sup> One parent told *The New York Times* that their child can fetch up to \$45,000 for posting a sponsored YouTube

28 Maeve Duggan, Amanda Lenhart, Cliff Lampe & Nicole B. Ellison, *Parents and Social Media*, PEW RSCH. CTR. (July 16, 2015), <https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media/#fnref-13802-3> [<https://perma.cc/FS5F-TCJB>].

29 *Influencer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/influencer> [<https://perma.cc/2NTG-S3AV>].

30 *The Influencer Report: Engaging Gen Z and Millennials*, MORNING CONSULT, <https://morningconsult.com/influencer-report-engaging-gen-z-and-millennials/> [<https://perma.cc/F5QZ-QQHC>]; see also *The LEGO Group Kicks Off Global Program to Inspire the Next Generation of Space Explorers as NASA Celebrates 50 Years of Moon Landing*, LEGO (July 15, 2019), <https://www.lego.com/en-us/aboutus/news/2019/july/lego-group-kicks-off-global-program-to-inspire-the-next-generation-of-space-explorers-as-nasa-celebrates-50-years-of-moon-landing> [<https://perma.cc/LU7L-5YUC>] (referencing a survey of 3,000 children that found kids are three times more likely to aspire to be a YouTuber than an astronaut).

31 See Maheshwari, *supra* note 11.

32 Katherine Rosman, *Why Isn't Your Toddler Paying the Mortgage?*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/style/viral-toddler-videos.html> [<https://perma.cc/5BSH-STK4>] (quoting Ross Smith).

33 Patrick Van Kessel, Skye Toor & Aaron Smith, *A Week in the Life of Popular YouTube Channels*, PEW RSCH. CTR. (July 25, 2019), <https://www.pewresearch.org/internet/2019/07/25/a-week-in-the-life-of-popular-youtube-channels/> [<https://perma.cc/V3B6-DZAZ>].

34 Schomer, *supra* note 10.

video.<sup>35</sup> The highest-paid YouTuber in 2019 was eight-year-old Ryan Kaji, who made \$26 million in one year for posting videos reviewing toys.<sup>36</sup>

Kidfluencers make money in a few ways. First, they may receive compensation for sponsored content. Companies like Walmart, Mattel Toys, and Crayola will pay the child to post videos playing with their products as an advertising scheme.<sup>37</sup> The second main source of income is Google AdSense,<sup>38</sup> an advertising program that allows Google to run ads on influencers' YouTube accounts and pays the influencer on a per-click basis.<sup>39</sup> Influencers also make money through merchandise and other related contracted work.<sup>40</sup>

Given the potential for high sums of money, parents have a significant incentive to create as much content as possible. One family posted more than 250 YouTube videos of their children in a four-year span,<sup>41</sup> and Ryan Kaji's channel accumulated at least 1830 videos<sup>42</sup> over a five-year span.<sup>43</sup> By my count at the time of writing, the Stauffer family, which has nearly 4 million Instagram followers, posted content of their young daughters on their Instagram account 142 times in 2019, not including temporary Instagram stories which delete after twenty-four hours or posts on other social media platforms.<sup>44</sup> The Stauffers' account features sponsored content and product placement by companies including Disney,<sup>45</sup> Nickelodeon,<sup>46</sup> and Amazon.<sup>47</sup>

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<sup>35</sup> Maheshwari, *supra* note 11.

<sup>36</sup> Madeline Berg, *The Highest-Paid YouTube Stars of 2019: The Kids are Killing It*, FORBES (Dec. 18, 2019, 7:05 AM), <https://www.forbes.com/sites/maddieberg/2019/12/18/the-highest-paid-youtube-stars-of-2019-the-kids-are-killing-it> [<https://perma.cc/7RWP-NZVW>].

<sup>37</sup> Maheshwari, *supra* note 11.

<sup>38</sup> *We Value Your Content*, GOOGLE ADSENSE, <https://www.google.com/adsense/start> [<https://perma.cc/Q5H2-FP2Z>].

<sup>39</sup> Gravier, *supra* note 11.

<sup>40</sup> *See, e.g.*, Perelli, *supra* note 21 (reporting that, in 2019, YouTube star Ryan Kaji made \$20 million directly from YouTube, an additional \$200 million in retail sales from branded products, and also starred in Nickelodeon and Roku shows that capitalized on his YouTube fame).

<sup>41</sup> Wright, *supra* note 23 ("Those videos have now been viewed more than five billion times and last year earned the channel more than £1.2 million in advertising revenue.")

<sup>42</sup> YOUTUBE, youtube.com (search "Ryan's World") (last visited Dec. 3, 2020).

<sup>43</sup> *Uploads*, Videos in *Ryan's World*, YOUTUBE, <https://www.youtube.com/c/RyanToysReview/videos?view=0&sort=da&flow=grid> [<https://perma.cc/YSS4-ZCEV>].

<sup>44</sup> Stauffer Family (@kcstauffer), INSTAGRAM, <https://www.instagram.com/kcstauffer/?hl=en> [<https://perma.cc/H9AK-V24C>].

<sup>45</sup> Stauffer Family (@kcstauffer), INSTAGRAM (Sept. 13, 2019), <https://www.instagram.com/p/B2XEhoagtq3/> (video of the children dancing with Mickey Mouse as a paid partnership with Disney Junior).

<sup>46</sup> Stauffer Family (@kcstauffer), INSTAGRAM (Dec. 12, 2019), [https://www.instagram.com/p/B5\\_mWitBVpF/](https://www.instagram.com/p/B5_mWitBVpF/) (picture of the kids watching Nickelodeon's "Blue's Clues & You" to promote its new episodes).

<sup>47</sup> Stauffer Family (@kcstauffer), INSTAGRAM (Aug. 21, 2017), <https://www.instagram.com/p/BYE8sqWnz-8/> (picture of the daughters playing with art supplies to advertise Amazon's back-to-school offerings).

This industry introduces opportunities for wealth to virtually any family with a camera and internet access, and also the risk that parents seeking fame or money will exploit their children at the expense of education and welfare. In response to these concerns, there have been some lobbying efforts to protect kidfluencers under existing child actor laws, though these efforts have been primarily focused in California.<sup>48</sup>

## II. THE EVOLUTION OF CHILD ACTOR LAW

To understand how (and if) the child labor regime accommodates child actors and now social media influencers, we start by considering its origins. Advocates fought hard for federal child labor regulation, and for over eighty years, the Fair Labor Standards Act of 1938 has protected American child workers from perhaps the most hazardous and exploitative occupations while symbolically prioritizing education over labor.<sup>49</sup> But, as this Comment discusses, national child labor laws were never concerned with less traditional forms of labor and intentionally leave children exposed in certain industries.

The underlying purposes of federal child labor law do not encompass social media work. Accordingly, like for child actors, protections for child social media stars are likely to be addressed on a state-by-state basis. This section discusses how child acting fell under the purview of state law and how states have attempted (or failed) to protect child performers.

### A. *A Brief History of Child Labor Laws*

One need not look far back in American history to find the oppressive circumstances that motivated the child labor law movement. At the turn of the twentieth century, an estimated 400,000 children were employed in New York alone.<sup>50</sup> The increase in the child labor force coincided with a national urbanization, so many children worked in industrial cities.<sup>51</sup> Factory work involved sawdust-filled air, exposure to open fire, dangerous chemicals, and crude machinery.<sup>52</sup> Because they were often given the least desirable jobs in these workplaces, one book estimated that boys under sixteen-years-old had

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<sup>48</sup> See sources cited *supra* note 23.

<sup>49</sup> Fair Labor Standards Act of 1938, Pub. L. No. 718, § 12, 52 Stat. 1060, 1067 (current version at 29 U.S.C. § 212).

<sup>50</sup> Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. CHILD & FAM. ADVOC. 89, 102 (2010).

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

<sup>52</sup> *Id.* at 103–04, 103 n.60.

twice as many workplace accidents as adult men and girls under sixteen had three times as many accidents as adult women.<sup>53</sup>

Despite these clear dangers, much of the public was resistant to child labor regulations, in part because families relied on their children's income.<sup>54</sup> Traditionally, and as this Comment will explore in relation to child actors, parents have the right to their child's income, which incentivizes putting one's child to work.<sup>55</sup> This was important at the turn of the twentieth century when a large number of families were struggling economically.<sup>56</sup> Thus, the American economy and family depended on child labor much more than is standard today.

Even against this resistance to child labor restrictions, the early 1900s harbored unprecedented momentum in the child labor rights movement. This movement, paired with growing public concern over the dangers of child labor, led 42 states to adopt child labor legislation by 1906.<sup>57</sup> At the federal level, however, attempts at labor reform were derailed by the *Lochner* era debates over federal power. When the federal Fair Labor Standards Act (FLSA) eventually passed and earned validation by the Court,<sup>58</sup> it contained a child labor provision banning "oppressive child labor."<sup>59</sup> This meant that children under fourteen could not be employed, fourteen- and fifteen-year-olds could work except under oppressive conditions, and sixteen- and

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<sup>53</sup> EDWIN MARKHAM, BENJAMIN B. LINDSEY & GEORGE CREEL, CHILDREN IN BONDAGE 158-59 (1914).

<sup>54</sup> See Moskowitz, *supra* note 50 at 101-02 ("Parents commonly sent their children to work and often opposed child labor reform because of the desperate need for additional income."); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 66-70 (Princeton Univ. Press 1994) (1985) (discussing the middle-class resistance to child labor laws because of reliance on children's income, especially when children could often make more money working than adults).

<sup>55</sup> See *Eustice v. Plymouth Coal Co.*, 13 A. 975, 976 (Pa. 1888) ("It is a rule as old as the common law that the father is entitled to the custody and control of his minor children, and to receive their earnings."); see also, e.g., CAL. FAM. CODE § 7503 (West 2020) ("The employer of a minor shall pay the earnings of the minor to the minor until the parent or guardian entitled to the earnings gives the employer notice that the parent or guardian claims the earnings."); MICH. COMP. LAWS § 722.2 (2020) (stating that parents are generally entitled to the earnings of their minor children); N.J. STAT. ANN. § 9:1-1 (West 2020) (same for New Jersey); 33 R.I. GEN. LAWS § 33-15.1-1 (2020) (same for Rhode Island).

<sup>56</sup> This was especially true for the more than ten million immigrants who moved to the United States between 1860-1890 and needed their children to work to make ends meet. See Moskowitz, *supra* note 50 at 101 n.49, 102 (citing OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 11, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2002/IMM2002.pdf> [<https://perma.cc/54BB-5LVD>]). At the same time, children in the post-Civil War South were encouraged to work in the growing textile mill industry as a cheap substitute for the men lost in the war. *Id.* at 101.

<sup>57</sup> 41 CONG. REC. 1809-1810 (1907).

<sup>58</sup> See *United States v. Darby*, 312 U.S. 100, 125 (1941).

<sup>59</sup> 52 U.S. Stat. 1060, 1067 § 12(a)(1938) (current version at 29 U.S.C. § 212).

seventeen-year-olds were only restricted from “particularly hazardous” occupations.<sup>60</sup>

Today, the oppressive labor that the FLSA was built upon has largely disappeared in America. The great majority of work currently performed by children is in relatively safe industries, like babysitting and yardwork, and is concentrated outside of the school calendar.<sup>61</sup> But still, approximately 150,000 children are employed in violation of the FLSA in any given week, most often because they are working excessive hours or hazardous jobs before the age of eighteen.<sup>62</sup> And just because the nature of the work has changed from industrial factories and mines to restaurants and retail does not mean that the law should cease to protect child workers from modern harms.

### B. *Child Actor Protections*

Having reviewed the history of federal child labor protections, it should be no surprise that child acting is excluded from its scope. Since its origins, the FLSA has been limited to only “oppressive” child labor, and thus the Act categorically excludes certain employment.<sup>63</sup> Relevant here, federal child labor laws do “not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”<sup>64</sup>

Child acting is exempted from the FLSA for two primary reasons. First, Congress did not consider child acting to be oppressive but rather an opportunity for children to develop talents.<sup>65</sup> And second, child actress Shirley Temple had great fame during the statute’s construction and passing, and if Congress had barred children under 16 from acting, she would have been restricted from performing.<sup>66</sup> The FLSA exemption for child actors has accordingly been coined “the Shirley Temple Act.”<sup>67</sup>

Because of this federal exemption, child-actor law is state-based. This has resulted in wide variance among protections depending on where the child is

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<sup>60</sup> *Id.* at 1061 § 3(1).

<sup>61</sup> HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 295-97 (2002); Michael Schuman, *History of Child Labor in the United States—Part 2: The Reform Movement*, MONTHLY LAB. REV. (Jan. 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm> [<https://perma.cc/CD6H-9N92>].

<sup>62</sup> HINDMAN, *supra* note 61 at 298.

<sup>63</sup> 29 U.S.C. § 213(c)–(d) (providing the exemptions to federal child labor provisions, including certain agricultural workers, newspaper deliverers, child performers, and other specific jobs).

<sup>64</sup> 29 U.S.C. § 213(c)(3).

<sup>65</sup> 82 Cong. Rec. 1780 (1937); 83 Cong. Rec. 7441 (1938).

<sup>66</sup> Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 57-58 (2010).

<sup>67</sup> *Id.* at 58.

working, with states like California and New York providing rigorous protections, and states like Mississippi providing no specific protections at all.<sup>68</sup> Indeed, seventeen states do not regulate child entertainment employment, and twenty-four states do not require children to have work permits for entertainment work.<sup>69</sup> Thus, child actors in America have been subject to unequal and often insufficient protection depending on where their work is performed.

Kidfluencers would likely fall under the same FLSA exemption because they share the relevant characteristics of child acting—namely that entertainment work is often viewed as non-oppressive labor that actually benefits children more than it harms them.<sup>70</sup> Alternatively, kidfluencers may not receive protection because the FLSA also exempts children employed by their parents from child labor regulation.<sup>71</sup> Though it is debatable whether kidfluencers are in fact employed by their parents, both of these exemptions are conceivable grounds to exclude kidfluencers from FLSA coverage.

Even so, social media production is particularly suited for federal regulation and may merit its own legislation to circumscribe the FLSA exemptions. Internet entertainment and advertising are necessarily interstate.<sup>72</sup> And because of the mobility of social media content production, a state-based regime presents a real risk of forum-shopping that could be prevented with a federal scheme. Nevertheless, this Comment focuses on possible state regulation of the social media industry because of its similarities to child acting, which has never been federally regulated.

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<sup>68</sup> *Child Entertainment Laws as of January 1, 2020*, U.S. DEP'T OF LAB. (Jan. 2020), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/H4FB-L47M>].

<sup>69</sup> *Id.*

<sup>70</sup> See 82 CONG. REC. 1780 (1937) (“Employment of these few children gives us pleasant and wholesome entertainment and the child is given the opportunity of displaying his or her talent which they love.”).

<sup>71</sup> See 29 U.S.C. § 203(l) (excluding children employed by parents from the definition of “oppressive child labor”); 29 CFR § 570.126 (2020) (explaining that the exclusion applies to children in most industries as long as they are employed exclusively by the parent and not any secondary employer). Though neither New York nor California exempt parents employing their own children from child labor regulations (except for certain industries, like farming), a state could choose to do so, which creates even greater need for new legislation for kidfluencers. See, e.g., 5 VA. CODE ANN. § 40.1-79.01 (2020) (exempting children employed by their parents in occupations other than manufacturing from child labor provisions).

<sup>72</sup> Congress said as much in its findings that “[t]he Internet is well recognized as a method of distributing goods and services across State lines” and “using the Internet constitutes transportation in interstate commerce.” Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(6)–(7), 122 Stat. 4001, 4002 (codified at 18 U.S.C. § 2251).

### C. Development of Coogan Laws

California is credited with spearheading child-actor protections through the enactment of its Coogan Law.<sup>73</sup> Jackie Coogan was a famous child comedian who starred in Charlie Chaplin's film *The Kid* in 1919.<sup>74</sup> Upon his twenty-first birthday, after his film career had ended, he discovered his parents had drained his earnings.<sup>75</sup> In California at the time, parents owned the earnings of their minor children, so Coogan had to sue his mother and former manager to recover some of his earnings.<sup>76</sup> In response, California enacted its so-called Coogan Law in 1939.<sup>77</sup>

Coogan Law refers to the state requirement that the parent or guardian of the child actor set up a blocked trust account for the child, into which 15% of the minor's acting wages are deposited until the child turns 18 years old.<sup>78</sup> For most of the twentieth century, California's Coogan Law had a serious flaw—Coogan trusts could only be created upon court approval of the contract.<sup>79</sup> This meant that, in 1999, about 95% of contracts with child entertainers did not have Coogan protection because many families never sought court approval.<sup>80</sup> In the 5% where court approval was sought, it was typically by the employer out of concern that the child would attempt to avoid the contract and not out of interest in protecting the child.<sup>81</sup>

In 1999, California amended its law to no longer require court approval and, quite significantly, to give sole property rights to the child for all earnings generated under the employment contract.<sup>82</sup> Today, California's Coogan Law is expansive—it requires entertainment employers to receive the written consent of the state Labor Commissioner to employ a minor under sixteen and to deposit 15% of the child's gross earnings into a blocked trust.<sup>83</sup>

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<sup>73</sup> CAL. FAM. CODE § 6752 (West 2020).

<sup>74</sup> *Coogan Law*, SAG\_AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [<https://perma.cc/E7WB-JEJ2>].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See 1939 Cal. Stat. ch. 637, § 1, at 2064-65 (1939) (California's first Coogan Law).

<sup>78</sup> As originally enacted in 1939, courts had discretion to choose what percentage of earnings should be directed to the trust account. *Id.* Today, California specifies that 15% must be set aside for the child's trust. CAL. FAM. CODE § 6752 (West 2020).

<sup>79</sup> Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 MCGEORGE L. REV. 201, 204 n.28 (2000).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; see also, Podlas, *supra* note 66 at 70 n.253 ("The limited body of case law on the subject suggests that the Coogan law provided far more protection to film makers than to child actors.") (quoting Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, BEVERLY HILLS BUS. ASS'N J., Summer/Fall 1997).

<sup>82</sup> S.B. 1162, 1999 Leg. (Cal. 1999) (enacted); see also Christiano, *supra* note 79, at 206 ("The child's family no longer has the right to claim a portion of the child's earnings for family use.").

<sup>83</sup> CAL. FAM. CODE § 6752 (West 2020).

If the child actor's parents do not set up a Coogan trust, the employer will send the money to the state's Coogan Fund, and the actor can retrieve the earnings upon turning eighteen-years-old.<sup>84</sup>

But, like for kidfluencers, harms to child actors are not just financial. Historically, child actors often faced long hours and dangerous working conditions that harmed both physical and mental well-being.<sup>85</sup> To address this, states like California impose hour restrictions on how long each age group can be on set in a given day<sup>86</sup> and educational requirements, like requiring a teacher to be on set.<sup>87</sup> In California, the studio teacher is responsible for representing the child's interest in "working conditions, physical surroundings, signs of the minor's mental and physical fatigue, and the demands placed upon the minor."<sup>88</sup>

Notably for the purposes of this Comment, California defines the "entertainment industry" to include any organization employing a minor in "[m]otion pictures of any type . . . using any format . . . by any medium . . . ; photography, recording, modeling, theatrical, productions; publicity; rodeos; circuses; musical performances; and any other performances."<sup>89</sup> This definition is arguably broad enough to capture social media production, but given the novel and powerful social media marketing industry, it was surely not contemplated by the statutes of any state, and states are not currently applying actor laws to social media production.

In 2018, California Assemblymember Kansen Chu proposed a bill that would have specifically expanded child actor protections to cover social media production.<sup>90</sup> By the time it passed the Assembly and was signed by the

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<sup>84</sup> *Id.* (stating that if the parent or guardian does not supply employer with Coogan account information within 180 days of the employment, "the employer shall forward to The Actors' Fund of America 15 percent of the minor's gross earnings" and the Fund must make one attempt to contact the child once they turn eighteen by sending a notice to the child's last known address).

<sup>85</sup> In perhaps the most extreme case, two child actors in "The Twilight Zone" series were killed on set while filming a scene involving a helicopter and an exploding building. *See* Charles S. Tashiro, *The "Twilight" Zone of Contemporary Hollywood Production*, CINEMA J., Spring 2002, at 27. It was later discovered that these children were working illegally outside of the permitted working hours for child actors. *Id.* In response to this tragedy, California revised its child acting rules to clarify what activities are not permissible or too dangerous, though it also extended the number of hours a child actor may work. *Id.* at 35.

<sup>86</sup> CAL. CODE REGS. tit. 8, § 11760 (2020) (ranging from children under six months of age, who are only allowed to work for twenty minutes per day, to sixteen- and seventeen-year-olds, who can work up to six hours per day).

<sup>87</sup> *Id.* (mandating how many hours of schooling child actors need per day); CAL. CODE REGS. tit. 8, § 11755.2 (2020) (requiring studios to provide a teacher for minors while on set).

<sup>88</sup> CAL. CODE REGS. tit. 8, § 11755.3 (2020).

<sup>89</sup> CAL. CODE REGS. tit. 8, § 11751(a) (2020).

<sup>90</sup> *Chu's News—September 2018*, ASSEMBLYMEMBER KANSEN CHU DIST. 25 (Sept. 19, 2018, 10:30 AM), <https://a25.asmdc.org/district-report/chus-news-september-2018> [<https://perma.cc/89C9-6BUF>]; A.B. 2388, 2018 Leg., Reg. Sess. (Cal. 2018).

Governor to become law, any mention of social media was removed. As California learned through the bill's failure, states should create regulation more specific to the social media industry, rather than extending current child acting laws to identically cover social media production.

### III. WEIGHING HARM TO KIDFLUENCERS AGAINST THE RIGHT TO PARENTAL AUTHORITY

Having surveyed the historic goals and development of child labor law, it is clear that the regime did not contemplate the meteoric rise of the social media marketing industry. There have been some calls for kidfluencer protection, but the proposals generally suggest simply extending existing state child actor and Coogan laws to cover social media production.<sup>91</sup> While kidfluencers are probably not included under the FLSA protection for the same reasons that child actors are exempted,<sup>92</sup> this Comment will show that it may also be impracticable to apply state child actor laws to kidfluencers because this industry has unique harms and family law implications.

This Part discusses how producing sponsored social media content is work, even though it is conducted at home. It goes on to highlight the many harms the industry inflicts on kidfluencers to show that some regulation is needed. However, it also recognizes the constitutional right that parents have to direct the activities and upbringing of their children, ultimately concluding that the social media context requires legislators to weigh the interest in protecting children from harm with a parent's right to choose the activities of their child in a way that is distinct from traditional child acting.

#### A. *A New Kind of Home-Work*

Unlike traditional child acting, which typically occurs at a studio or theater with a production team, social media production often takes place at home with the family. One reason for this may be that platforms like YouTube, TikTok, and Instagram do not allow children under the age of 13 to make their own accounts, so the parents must be involved.<sup>93</sup> More practically, many kidfluencers are too young to be able to write or produce their own content,

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<sup>91</sup> See, e.g., Cal. A.B. 2388 (proposing to "include digital exhibitions under those conditions" of existing child acting laws).

<sup>92</sup> See *supra* notes 64–72 and accompanying text; see also Podlas, *supra* note 66 (arguing that children on reality television programs do not fall under the FLSA for many of the reasons kidfluencers do not either).

<sup>93</sup> *Terms of Service*, YOUTUBE (Dec. 10, 2019), <https://www.youtube.com/static?gl=CA&template=terms> [<https://perma.cc/PSB9-VK58>]; *Legal*, TIKTOK (Feb. 2019), <https://www.tiktok.com/legal/terms-of-use?lang=en> [<https://perma.cc/QMP7-CANV>]; *Terms of Use*, INSTAGRAM (April 19, 2018), <https://help.instagram.com/581066165581870> [<https://perma.cc/8UW5-KG5A>].

so it has to be a family affair. As an illustration, a CBS Originals documentary shows parents feeding lines to their children who cannot even pronounce the word “influencer,” let alone know that they *are* influencers.<sup>94</sup>

Because the content creation is often managed by the parents, the company that contracted the work has almost no control when compared to a traditional film set. The parents often organize the photoshoots, film the videos, direct their children, post the content, and ultimately control the timeline.<sup>95</sup> The parents, then, have almost complete control over the conditions of the child’s work.

Parents of kidfluencers have insisted that their children are not working—they are playing. In news interviews, parents often claim *they* are the ones completing the work by negotiating contracts and creating the content,<sup>96</sup> and the kids are just “having fun.”<sup>97</sup> There is some appeal to this view—social media content often purports to be capturing the child’s normal activities, rather than a rehearsed performance. If we view the content production as a child simply being handed a toy to play with while the parents passively film it, the circumstances feel much less demanding of the child’s time and skill than traditional child acting. And even if rehearsal or memorization is required for the content, it may be tempting to liken parents filming their children for social media to parents enrolling their children in ballet to perform for an audience or in football to play for a crowd.

But the industry has now progressed to a point where the production of this content cannot just be considered play—it is work. These children are appearing in hundreds of posts per year,<sup>98</sup> and the child provides the value to company sponsors.<sup>99</sup> The content may be designed to appear like the child is playing, but the production still requires the child to use a specific product, perhaps even by a specific deadline, and be filmed doing it for monetary gain. As an illustration, one parent reported, “If there’re days [the kids are] totally

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<sup>94</sup> Taylor Mooney, *Companies Make Millions Off Kid Influencers, and the Law Hasn’t Kept Up*, CBSN ORIGINALS (Aug. 26, 2019, 6:19 AM), <https://www.cbsnews.com/news/kid-influencers-companies-make-millions-law-hasnt-kept-up-cbsn-originals> [<https://perma.cc/XW87-WJVM>].

<sup>95</sup> See, e.g., Allie Volpe, *How Parents of Child Influencers Package Their Kids’ Lives for Instagram*, THE ATL. (Feb. 28, 2019), <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675> [<https://perma.cc/9UYB-NFN6>] (“[The mother] manages [her daughter’s] career without an agent, fields all collaborative deals herself—[the child] earns anywhere from \$100 to \$5,000 a post—and styles and photographs her toddler.”).

<sup>96</sup> See, e.g., Mooney, *supra* note 94 (“They say it’s a family endeavor, their kids are having fun, and it should not necessarily be considered ‘labor.’”); Wong, *supra* note 2 (“The thing I always stress is that we [the parents] work, the girls do not.”).

<sup>97</sup> Volpe, *supra* note 95.

<sup>98</sup> See, e.g., *Ryan’s World*, *supra* note 42 (accumulating 1,830 videos since its creation in 2015); Stauffer Family, *supra* note 44 (posting more than 142 Instagram pictures in 2019).

<sup>99</sup> See Van Kessel et al., *supra* note 33 (showing that videos featuring a child under the age of thirteen receive three times as many views as those without children).

not into it, they don't have to be . . . [u]nless it's paid work. Then they have to be there."<sup>100</sup> Ultimately, these children are being contracted to provide a service on a schedule for compensation. Under these circumstances, play has become work.

### B. *A Snapshot of Harms Facing Kidfluencers*

Given that the nature of the work itself varies between traditional child actors and social media influencers, the harms these workers face also differ in certain respects. All child performers face some common harms—missing school, losing privacy, and exerting labor at an age where they have less personal agency. But the social media context introduces an additional host of harms, most notably the total lack of financial protection and the health risks associated with interactive media and extreme loss of privacy.<sup>101</sup> This section explores these harms to demonstrate the need for some level of regulation in the social media marketing industry.

#### 1. Financial Exploitation

The risk of exploitation in the social media context is double-barreled—children face exploitation by both their parents and by the companies that sponsor them. Social media provides every parent who has access to the internet with the potential, and perhaps delusion, of making millions of dollars by commercializing their children. Companies capitalize on this: toy-company Melissa & Doug offered payments and free toys to any family willing to post content of their children playing with the company's products, and the family would be compensated based on how many followers they had.<sup>102</sup>

The relative accessibility of social media fame is exasperated by the trend in parents exploiting their children, not only for money, but also for fame and celebrity.<sup>103</sup> There is a demonstrated willingness by some parents to push their children in the pursuit of social media fame: "Once we got to that age that [my son] resisted a lot, I shifted more to my daughter . . . . She is a little

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<sup>100</sup> Wong, *supra* note 2.

<sup>101</sup> See *infra* notes 102–117 and accompanying text.

<sup>102</sup> Maheshwari, *supra* note 11 ("The company said it would pay \$10 per 1,000 followers for individual Instagram posts and \$5 per 1,000 followers for Instagram Story posts.")

<sup>103</sup> See Ramon Ramirez, *What will it Take?: In the Wake of the Outrageous "Balloon Boy" Hoax, A Call to Regulate the Long-Ignored Issue of Parental Exploitation of Children*, 20 S. CAL. INTERDISC. L.J., 617, 620 (2011) ("[N]ot only [are] children viewed as sources of money, but also as a means of achieving fame and celebrity.").

workhorse.”<sup>104</sup> As we saw, the Hobson family is a tragic example of the dangers of exploitation by parents.<sup>105</sup>

Kidfluencers are at particular risk of financial exploitation because there are no regulations protecting their earnings. Unless their parents voluntarily allow it, there is currently no mechanism to provide kidfluencers with legal ownership of their earnings from social media content. These children, who are essential to their channels’ successes, are sacrificing privacy and exerting hours of labor each week while maintaining no legal right to their compensation. Especially if their social media work prevents the child from excelling in school or developing other skills, or even causes widely known reputational harm, their parents’ decision to make them a kidfluencer can have serious long-term financial effects.

Moreover, kidfluencers are likely not considered “employees” of the companies that sponsor them because the companies have no real control over the child’s work.<sup>106</sup> This means they may not be covered under most employment statutes, thus lacking protections like wage standards, workers compensation, and the right to unionize under the National Labor Relations Act.<sup>107</sup> Presumably, many of these parents are unsophisticated contract negotiators, yet they may have to handle contracting on their child’s behalf without the support of strong collectives or lobbying groups.<sup>108</sup>

Some states attempt to protect child actors from financial harm through Coogan Laws,<sup>109</sup> but again, no states currently require Coogan trusts for social

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<sup>104</sup> Rosman, *supra* note 32.

<sup>105</sup> *Supra* notes 2–5; *see also*, Mooney, *supra* note 94 (capturing the phenomenon of parents using their children for fame when the father of a well-known kidfluencer said, “[m]y goal in life is to become as famous as possible.”).

<sup>106</sup> *See* Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322 (1992) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)) (explaining that status as an “employee” depends on many factors centered on employer control over the work).

<sup>107</sup> Section 2(3) of the National Labor Relations Act excludes nonemployees, specifically independent contractors, from the Act’s coverage. 29 U.S.C. § 152(3). Accordingly, nonemployees do not enjoy the same rights to collectively bargain that employees do under Section 7. *Id.* § 157.

<sup>108</sup> *See, e.g.*, Volpe, *supra* note 95 (reporting that the mother of a kidfluencer who makes up to \$500 per post manages all sponsorship deals for her daughter without the assistance of an agent).

<sup>109</sup> *See* CAL. FAM. CODE § 6752 (2020) (“[T]he court shall require that 15 percent of the minor’s gross earnings pursuant to the contract be set aside by the minor’s employer, except an employer of a minor for services as an extra, background performer, or in a similar capacity, as described in [an earlier section.]”); KAN. STAT. ANN. § 38-620(b)(1) (2019) (establishing the amount of the minor’s gross income that is required to be set aside); LA. STAT. ANN. (2020) (“Monies placed in a trust fund . . . shall be placed in a blocked account and no funds shall be withdrawn prior to the date the minor attains the age of eighteen unless the minor is determined to be in necessitous circumstances by a court of competent jurisdiction.”); N.M. STAT. ANN. § 50-6-19 (2020) (“Whenever a child is employed in the performing arts, the child’s parent, guardian or trustee shall establish a trust account in the child’s state of residence for the benefit of the child within seven business days after the child’s employment contract is signed, and the employer shall deposit fifteen percent of the child’s gross

media influencers. Even though Coogan trusts do nothing to prevent bargaining disparities or underpayment, they at least ensure that the child receives some compensation for their talent and efforts.

## 2. Health Risks

The public nature of social media, as well as the industry's reliance on peer approval, presents health risks to kidfluencers. Unsurprisingly given the industry's novelty, there is not much information on the psychological effects of kidfluencing, or even adult influencing, outside of anecdotal accounts. While studies have indicated that social media use in general is linked with poor body image, negative self-concept, and depression among young people,<sup>110</sup> there are no conclusive studies showing the effects social media fame can have on a child star.

Perhaps the most parallel context is that of reality television stars,<sup>111</sup> though the fact that reality television is directed and filmed by a production studio rather than parents seems relevant to analyzing psychological harms. Nevertheless, both engagements expose children to the "loss of privacy and potential for humiliation."<sup>112</sup> Moreover, both purport to represent the child in their authentic nature, which can cause harm to children still forming their self-identity while subjected to criticism about their persona from a large audience.<sup>113</sup>

The extreme loss of privacy that social media influencers experience is a unique threat to these children's mental health and physical safety. Unlike traditional child actors, social media influencers often film in their own homes, use their real names, and share their daily routines.<sup>114</sup> Plus, the sheer

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earnings directly into the child's trust account."); N.Y. COMP. CODES R. & REGS. tit. 12, § 186 (2020) (outlining various protections for finances and wellbeing of children).

<sup>110</sup> Joseph Firth, John Torous, Brendon Stubbs, Josh A. Firth, Genevieve Z. Steiner, Lee Smith, Mario Alvarez-Jimenez, John Gleeson, Davy Vancampfort, Christopher J. Armitage & Jerome Sarris, *The "Online Brain,": How the Internet May Be Changing Our Cognition*, 18 WORLD PSYCHIATRY 119, 125 (2019); see Maeve Duggan, *Experiencing Online Harassment*, PEW RSCH. CTR. (July 11, 2017), <https://www.pewresearch.org/internet/2017/07/11/experiencing-online-harassment> [<https://perma.cc/U8UP-Y6GL>] (finding that 37% of Americans between the ages of eighteen and twenty-nine report "someone has tried to purposefully embarrass them" on social media, and 67% of young adults say they were subjected to some form online harassment).

<sup>111</sup> See DANA MITCHELL, ASSEMBLY COMM. ON ARTS, ENT., SPORTS, TOURISM, & INTERNET MEDIA, AB 2388, at 3 (Cal. 2018) (analyzing California's proposed kidfluencer bill and highlighting a parallel between social media influencers and reality TV stars).

<sup>112</sup> Podlas, *supra* note 66 at 44-45 (discussing the harms to wellbeing that young reality television participants face); see Duggan, *supra* note 110 (discussing online harassment).

<sup>113</sup> Katherine Neifeld, *More than a Minor Inconvenience: The Case for Heightened Protection for Children Appearing on Reality Television*, 32 HASTINGS COMM. & ENT. L.J. 447, 451-52 (2010).

<sup>114</sup> For example, many influencers will post YouTube videos claiming to take the viewers through their normal, daily routines. See, e.g., The Labrant Fam, *Our Morning Routine!!! (Get Ready with Us)*, YOUTUBE (Mar. 3, 2018), <https://www.youtube.com/watch?v=xKBfqcgJZ1c> [<https://perma.cc/YQY3-UP84>] (video of two adults and their young daughter waking up and

volume of content that influencers are expected to post means that they are on-camera and in front of audiences constantly.

Further, the ability for audiences to message kidfluencers directly on social media puts these children at heightened risk of online harassment and stalking. The wall between celebrities and the public is thin in the social media context, where audiences can communicate with them directly through the platform and track the stars' locations.<sup>115</sup> Stories of severe online harassment are countless, with influencers and celebrities recounting death threats, body shaming, disability and identity-based insults, and other personal forms of harassment.<sup>116</sup> This Comment cannot sufficiently explore the harms to child social media stars, but it is becoming clear that the short-lived fame of the platform can have serious health consequences.<sup>117</sup>

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getting ready for the day, with 8,856,584 views at the time of writing); The ACE Family, *THE REAL LIFE OF THE ACE FAMILY – "WELCOME TO OUR LIFE"*, YOUTUBE (Feb. 23, 2019), <https://www.youtube.com/watch?v=DMsD7AUNFs> [https://perma.cc/6ZVP-62C6] (documentary-style video where the couple takes viewers through their old dwellings, financial history, and home videos of their young daughter, with 12,655,555 views at the time of writing).

<sup>115</sup> Both Facebook and Instagram allow users to message one another, similar to texting, as well as pinpoint their location on their posts. But even if a celebrity declines to disclose their location, cyberstalkers and other followers can use the background of the pictures and, in one extreme case, even the reflection of the eyes to identify where the picture was taken. Marie C. Baca, *Your Smartphone Takes Amazing Selfies. Those Selfies Could Tell Stalkers Where You Live.*, WASH. POST (Oct. 16, 2019, 6:00 AM), <https://www.washingtonpost.com/technology/2019/10/16/your-smartphone-takes-amazing-selfies-those-selfies-could-tell-stalkers-where-you-live> [https://perma.cc/85QB-9UYW] (“[A] man allegedly stalked a Japanese pop star after determining her location based on reflections seen in her eyes in social media posts . . . . Those images helped the suspect find her train station. He then used Google Street View . . . to find her home.”).

<sup>116</sup> See Taylor Lorenz, *Instagram has a Massive Harassment Problem*, THE ATL. (Oct. 15, 2018), <https://www.theatlantic.com/technology/archive/2018/10/instagram-has-massive-harassment-problem/572890> [https://perma.cc/NR78-AZTR] (discussing how celebrity influencers are harassed while using social media platforms).

<sup>117</sup> See Jenni Gritters, *How Instagram Takes a Toll on Influencers' Brains*, THE GUARDIAN (Jan. 8, 2019, 7:00 AM), <https://www.theguardian.com/us-news/2019/jan/08/instagram-influencers-psychology-social-media-anxiety> [https://perma.cc/BUG4-F3MM] (“[M]aking Instagram a reliable part of your income is a taxing process, and it can take a serious psychological toll.”); Sam Blum, *The Fatigue Hitting Influencers as Instagram Evolves*, BBC WORKLIFE (Oct. 21, 2019), <https://www.bbc.com/worklife/article/20191022-the-fatigue-hitting-influencers-as-instagram-evolves> [https://perma.cc/LLK8-M5VU] (recounting the stressful lifestyles of online influencers and the disturbing toll it can take on wellbeing and mental health).

Recently, two former contestants and one former host on the reality TV show *Love Island* died by suicide, to the shock of their devoted fanbase. Derrick Bryson Taylor, *Caroline Flack, Who Hosted "Love Island," Dies by Suicide at 40*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/15/arts/caroline-flack-dead.html> [https://perma.cc/BPJ9-XYJ6]. Though the social media industry is relatively new, it has parallels to reality TV in the privacy and fame impact on the stars. The mental health harm inflicted by the short-lived fame of reality television stars and, we can expect, social media stars cannot be understated.

### C. Constitutional Right to Family Autonomy

Even with these identifiable harms, the fact that social media production occurs within the home and family unit raises constitutional questions about potential regulations. The Supreme Court first recognized a constitutional right to parental authority in 1923, when it determined that the right “to marry, establish a home and bring up children” is a protected liberty interest under the Fourteenth Amendment.<sup>118</sup> This view was affirmed two years later, when the Court recognized “the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>119</sup> Thus was born a tradition of family autonomy immune from invasive state interference in the upbringing of one’s child.

However, some twenty years after the inception of the right to parental authority, the Court clarified that this right is not without limits. The seminal case is *Prince v. Massachusetts*, where the child’s custodian permitted her to work in violation of the state’s child labor laws.<sup>120</sup> The Court recognized a “private realm of family life which the state cannot enter,” specifically concerning a parent’s decisions in raising their children.<sup>121</sup> However, it also recognized that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare,” and that child labor can be subject to more regulation than adult labor.<sup>122</sup>

Today, parental authority is exceedingly far-reaching.<sup>123</sup> Parents can choose what religious and moral ideas their child is exposed to,<sup>124</sup> who their child interacts with,<sup>125</sup> and what extracurricular activities they are involved in.<sup>126</sup> These decisions are generally not reviewed by courts or agencies except in circumstances like custody disputes or serious harm to the child.<sup>127</sup> Still,

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<sup>118</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>119</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

<sup>120</sup> 321 U.S. 158, 160 (1944).

<sup>121</sup> *Id.* at 166.

<sup>122</sup> *Id.* at 167–68.

<sup>123</sup> *But cf.* Patrick Henigan, *Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Rights of Parents*, 62 BROOK. L. REV. 1261, 1270 (1996) (positing that constitutional parental authority protects four categorical “areas of parenting” rather than a penumbra of parental functions).

<sup>124</sup> *See Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (clarifying that the constitutional right to parental authority includes “the inculcation of moral standards [and] religious beliefs”).

<sup>125</sup> *See Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“[T]he parents should be the ones to choose whether to expose their children to certain people or ideas.”).

<sup>126</sup> *See Pater v. Pater*, 588 N.E.2d 794, 796 (Ohio 1992) (refusing to limit a parent’s constitutional right to raise a child under their sincere religious beliefs, even if the parent does not allow the child to “participate in extracurricular activities, socialize with [people outside of their religious group], or attend college”).

<sup>127</sup> *See, e.g., Parham v. J.R.*, 442 U.S. 584, 603–04 (1979) (“Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the

like in *Prince*, states can and have limited parental authority where there is a significant interest in the health and welfare of children, including regulations like truancy laws and vaccination mandates.<sup>128</sup>

Thus, the constitutional right to parental authority limits, but not necessarily prohibits, potential state regulation of kidfluencers. Opponents of kidfluencer regulations may emphasize that social media production largely takes place at home, directed by the parents. Filming one's child and creating an online presence for them is arguably within a parent's liberty to control the upbringing of their child. Moreover, social media has dual functions for influencers as both a source of income and a platform for self-expression. Both *Meyer* and *Society of Sisters* upheld parental rights in part because of the interest in self-expression and the heterogeneity of society.<sup>129</sup> These important considerations of family autonomy and self-expression may cast doubt on some production regulations, like limiting the hours that a family can create self-expressive content together, but they do not implicate financial regulation.

On the other hand, proponents of regulation can rely on the limiting factors of parental authority. The Court in *Prince* established that states have the power to protect children from harm, even above the wishes of their parents, and specified child labor as an appropriate area of regulation.<sup>130</sup> States have a substantial interest in cabining the harms these child social media stars face, and a court could find that this outweighs any infringement on parental authority.<sup>131</sup> It may follow, then, that imposing some level of regulation on the work conditions and compensation of kidfluencers is well within the state's authority.

There is no easy answer to the question of how far state regulation of kidfluencer production can go—states will have to grapple with the constitutional issues in ways that they do not for traditional child actors.

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power to make that decision from the parents to some agency or officer of the state . . . . Neither state officials nor federal courts are equipped to review such parental decisions.”).

<sup>128</sup> See, e.g., CAL. EDUC. CODE §§ 48260-48260.5 (2020) (providing that, if a student misses three days of school with no excuse, the pupil is truant and the parents are reminded that they are “obligated to compel the attendance of the pupil at school,” and failure to meet this obligation may subject them to prosecution); CAL. HEALTH & SAFETY CODE § 120335 (2020) (mandating certain immunizations for admission to public and private schools, though not for home schooling).

<sup>129</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (acknowledging that the state may desire a homogeneous population, but people retain the liberty to learn and practice what they desire); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (precluding from states the general power “to standardize its children”).

<sup>130</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166, 168 (1944).

<sup>131</sup> See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 541, 546 (D.C. Cir. 1999) (limiting parental authority to “intimate family decisions” and holding, in any event, that parents “retain ample authority” over their children even if there is a mandatory curfew) (quoting *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998)).

Legislators should be conscious of this when crafting social media protections because, in some ways, regulating kidfluencers is exerting state power over the activities of a parent and their child in their own home. Still, because content production often qualifies as labor and subjects these children to serious harms, some level of regulation surely passes muster. The task, then, is to establish the boundaries of what social media production should be considered labor and determine what kinds of regulations are practicable in this novel landscape.

#### IV. PARTIAL-PROTECTION PROPOSAL

Because the substantial differences between social media influencing and child acting imbue the former with a distinct host of dangers and family-law considerations, states should not simply include kidfluencers under existing child acting laws (assuming the state even has any regulations in place). Though child acting laws vary among states, there are three common categories of regulation: Coogan trusts, work permits, and workplace conditions. At this point in the public debate and development of social media marketing, it is practicable and desirable to provide financial protection to kidfluencers in the form of Coogan trusts. But regulation beyond that will require more research and analysis given the concerns of over-regulating the family unit and interfering with the uniquely fast-paced social media market.

States should not regulate social media production through labor law when the content is unpaid because, on balance, the interest in parental authority over the activities of their family outweighs the risk of exploitation.<sup>132</sup> Even for kidfluencers and their parents, social media is an outlet for self-expression, art, and socialization. They should have the same rights to that noncommercial expression as the general public. Of course, every post is valuable in creating a brand, so one could imagine a system where every social media user who earns any money on their account must adhere to permit and workplace requirements for all content. But that overextends the regulation and does not give proper weight to family autonomy.

Even so, these children need *some* level of protection, and this Comment argues the appropriate line to separate personal expression and actual work is when content is created for money. When the child is being paid to produce content, they are at real and immediate risk of exploitation, and financial regulations, like Coogan laws, are appropriate. However, other requirements that states typically impose on child actors and their studios, like work

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<sup>132</sup> States like New York require work permits for child actors even when the work is unpaid. N.Y. ARTS & CULT. AFFS. LAW § 35.01 (McKinney 2020) (applying the child-actor permit requirements to performances “whether or not such child or any other person is to be compensated”).

permits and on-set education, are difficult, if not impossible, to apply to the social media context as they currently exist.

#### A. Coogan Trusts

Though it may not be clear how much states should oversee the production of social media content, states can readily provide financial protection to kidfluencers through Coogan trusts. Parents are typically charged with protecting their children financially, but parental motives become perverse when they stand to gain millions on their child's social media content. Requiring Coogan trusts for kidfluencers protects them from the same financial plight that countless child stars before them endured at the hands of their parents.<sup>133</sup> In the interest of intrinsic fairness, these children should be guaranteed compensation for their labor and loss of privacy, and Coogan trusts ensure that.

California, New York, Louisiana, and New Mexico all have Coogan Laws that require 15% of gross earnings to be deposited in a trust account for the child actor.<sup>134</sup> One could argue that the percentage should be lower in the social media context because parents perform a higher percentage of the total work than stage parents—negotiating contracts, setting up shoots, posting the content, and more—and are therefore entitled to a higher percentage of their child's earnings. But we should look at the percentage from the perspective of how much compensation the *child* deserves. These children are arguably more vital to the content earnings than traditional child actors, and they are subject to more pervasive privacy harms.<sup>135</sup> Accordingly, the percentage should at least match that of child actors.

Even with a strong policy interest in requiring Coogan trusts for kidfluencers, the industry is complicated because of the massive volume of influencers and because social media accounts can be used both for profit and as a personal hobby. For example, there were about 3.7 million brand-sponsored posts on Instagram in 2018, and that figure has been exponentially

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<sup>133</sup> Shirley Temple, Jackie Coogan, Dana Plato, Gary Coleman, Macaulay Culkin, Drew Barrymore, and Mary-Kate and Ashley Olsen all found themselves in a “financial battle with their parents after a star-studded career due to exploitation or poor money management by their parents, agents or managers.” Shayne J. Heller, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL J. ART & ENT. L. 161, 164 n.23 (1999).

<sup>134</sup> For examples of laws requiring trusts for child actors, see CAL. FAM CODE § 6752(b)(West 2020); KAN. STAT. ANN. § 38-620(b)(1) (2020); LA. STAT. ANN. § 51:2133 (2020); N.M. STAT. ANN. § 50-6-19 (2020); N.Y. COMP. CODES R. & REGS. tit. 12 §§ 186-1.1, 186-3.5.

<sup>135</sup> See *supra* notes 113–16 and accompanying text (pointing out the additional privacy concerns that come with social media fame).

rising.<sup>136</sup> Enforcing Coogan requirements on each of those posts that includes a child would be a colossal undertaking. Plus, it may be less urgent to regulate social media users who only post sponsored content for low dollar amounts on the assumption that these children are not subject to the same long hours, constant loss of privacy, or high-stress productions that a more commercialized account may demand.

Accordingly, states should adopt the model of Louisiana and New Mexico, which only require employers to deposit money into a Coogan trust for contracts over a threshold amount.<sup>137</sup> New Mexico only requires funds to be deposited into a Coogan trust for contracts earning \$1,000 or more, but states should adopt a threshold amount closer to Louisiana's \$500 because individual social media posts are often worth lower dollar figures than roles in entire stage or movie productions.<sup>138</sup>

Setting a threshold amount where Coogan trusts become required is appropriate in this context because it only regulates those children at risk of financial exploitation, thus minimizing state intrusion on the family unit. That is, if a kidfluencer can collect \$500 or more for a single post, it is likely they have amassed a following and significant online presence,<sup>139</sup> thereby triggering the concerns of financial exploitation and other harms mentioned earlier.<sup>140</sup> But the threshold excludes families who may use social media primarily as a hobby and have not developed the level of commercial operation that puts these children at significant risk. Moreover, the parents of kidfluencers may be less sophisticated in entertainment regulation than a child-actor agent, for example, and until their child is making significant

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<sup>136</sup> *Instagram Influencer Marketing is a \$1.7 Billion Dollar Industry*, MEDIKIX (Mar. 7, 2019), <https://mediakix.com/blog/instagram-influencer-marketing-industry-size-how-big/> [<https://perma.cc/DB99-2MAZ>].

<sup>137</sup> LA. STAT. ANN. § 51:2132 (2020) (“The provisions of this Chapter shall apply to any contract in which a minor is employed or agrees to render artistic or creative services for compensation of five hundred dollars or more . . . .”); N.M. STAT. ANN. § 50-6-19(I) (2020) (“[Coogan Laws] appl[y] only to contracts in an amount equal to or greater than one thousand dollars (\$1,000) in gross earnings.”).

<sup>138</sup> “Nano-influencers,” defined as having between 500 and 5,000 followers, may accept products in lieu of payment for sponsored posts and, when accepting cash, make an average of \$315 per YouTube video and \$100 per picture posted to Instagram. Blake Droesch, *How Much Are Brands Paying Influencers?*, EMARKETER (July 16, 2019), <https://www.emarketer.com/content/how-much-are-brands-paying-influencers> [<https://perma.cc/RU64-8ZML>]. “Power influencers,” with 30,000 to 500,000 followers, make on average \$782 per YouTube video and \$507 per Instagram picture. *Id.* In contrast, the primary actors union standardizes pay for a single day of theatrical performing at \$1,030. *SAG-AFTRA Theatrical Wage Table*, SAG-AFTRA, <https://www.sagaftra.org/files/20202023CBAWages.pdf> [<https://perma.cc/ZJV2-8TCQ>].

<sup>139</sup> \$507 per post puts an influencer in the category of “power influencer” with up to 500,000 followers. Droesch, *supra* note 135.

<sup>140</sup> *Supra* notes 101–17 and accompanying text.

money, the state should not expect them to know regulations as niche as Coogan Laws.

Still, there are many questions left open. Influencers often have several social media accounts, and kidfluencers frequently have their own channels but appear regularly on their parents' channels as well.<sup>141</sup> Unless a sponsorship contract expresses how much of the payment goes to each family member, it could be difficult to discern how much of the earnings should be attributed to the child and whether the threshold amount was met to invoke a Coogan trust requirement. We can look to California, which exempts background performers from Coogan coverage,<sup>142</sup> and states like Pennsylvania, which apply labor regulation to child reality show stars only when the program “expressly depends upon the minor’s participation” and the “participation is substantial.”<sup>143</sup> Similarly here, if the contract does not specify how much money is directed to the child, the threshold calculation could be apportioned based on how much of the content “depends upon the minor’s participation” and in which the child’s participation is “substantial.”<sup>144</sup>

Importantly, Coogan trusts have three major shortcomings, in both this context and for child actors more broadly. First, under the California model, when parents do not set up Coogan trusts, 15% of the gross earnings are deposited into a state fund instead of given to the family.<sup>145</sup> Though the state is obligated to send notice of the retained funds once the child turns eighteen,<sup>146</sup> there is a real possibility that the former-child-actor cannot be reached or redeem the funds, so the state could effectively *profit* off its child labor law.

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<sup>141</sup> Every member of the Labrant family has their own Instagram page, including 7-year-old Everleigh Rose (5.1 million followers), 1-year-old Posie (1.7 million followers), and new-born Zealand (562,000 followers). Everleigh Rose Bryant (@everleighrose), INSTAGRAM, <https://www.instagram.com/everleighrose/?hl=en> [<https://perma.cc/QS69-CVZU>]; Posie Rayne LaBrant (@posierayne), INSTAGRAM, <https://www.instagram.com/posierayne/?hl=en> [<https://perma.cc/28WD-UGL6>]; Zealand LaBrant (@zealand.labrant), INSTAGRAM, <https://www.instagram.com/zealand.labrant/?hl=en> [<https://perma.cc/8P32-9UFU>].

They also all appear on each family member’s page. The family has a joint YouTube channel (12.8 million followers), and Everleigh Rose also has her own (3.51 million subscribers). The LaBrant Fam, YOUTUBE, [https://www.youtube.com/channel/UC4-CHoepzZpD\\_ARhx6LaQ/featured](https://www.youtube.com/channel/UC4-CHoepzZpD_ARhx6LaQ/featured) [<https://perma.cc/ZN6G-92CX>]; Everleigh Rose, YOUTUBE, [https://www.youtube.com/channel/UCHo2Gib\\_Jx09ym3xDKjyGhg](https://www.youtube.com/channel/UCHo2Gib_Jx09ym3xDKjyGhg) [<https://perma.cc/CA38-FAAX>].

<sup>142</sup> CAL. FAM. CODE § 6752 (West 2020) (exempting a child who works as “an extra, background performer, or in a similar capacity” from Coogan Laws).

<sup>143</sup> 43 PA. STAT. AND CONS. STAT. ANN. § 40.5 (West 2020).

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

<sup>145</sup> FAM. § 6752 (stating that if the parent or guardian does not supply the employer with Coogan account information within 180 days of the employment, “the employer shall forward to The Actors’ Fund of America 15 percent of the minor’s gross earnings”)

<sup>146</sup> *Id.* (requiring that the Fund make one attempt to contact the child once they turn eighteen by sending a notice to the child’s last known address).

Second, approximately 8.4 million households were unbanked in America in 2017.<sup>147</sup> The Coogan law structure requires these families to set up bank accounts, regardless of their preferences. This is especially harmful to undocumented immigrants and citizens without the forms of identification required to set up a bank account.

Third, and most niche to the social media context, influencers are often paid with products rather than money, especially when they are starting out.<sup>148</sup> Coogan trusts cannot protect children who are paid in products or services. Nevertheless, kidfluencers with some of the largest followings who arguably suffer the most loss-of-privacy harm are paid huge amounts of cash,<sup>149</sup> so the law would at least be protecting those children at the height of exploitation.

Though the Coogan trust structure is not perfect, it can be readily applied to the social media context and serve as a first step in protecting this new generation of exploited talent.

### B. *Work Permits*

Coogan trusts provide financial protection to child performers, but, as discussed above, many of the harms facing kidfluencers are not financial in nature.<sup>150</sup> There have been calls for work-permit requirements for social media influencers to preempt some of those harms.<sup>151</sup> But the issue is not as cut and dry as it might seem, and states should conduct research and debate before imposing a permit requirement.

Currently, twenty-six states require child actors to obtain work permits for entertainment work.<sup>152</sup> California, for example, requires children to renew the permit each year and verify school record, attendance, and health.<sup>153</sup> New York's child actor laws require a permit for New York residents, even if the work is conducted outside of the state, and for non-residents who conduct creative services within the state.<sup>154</sup> This would of course be difficult to extend to social media kidfluencers because the content creation is mobile, meaning

<sup>147</sup> FED. DEPOSIT INS. CORP., 2017 FDIC NAT'L SURV. OF UNBANKED AND UNDERBANKED HOUSEHOLDS, EXECUTIVE SUMMARY 1 (2017).

<sup>148</sup> Maheshwari, *supra* note 12 ("For most nanoinfluencers, money isn't part of the deal. Free products are viewed as fair compensation . . .").

<sup>149</sup> Maheshwari, *supra* note 11.

<sup>150</sup> *Supra* notes 110–17 and accompanying text.

<sup>151</sup> See, e.g., O'Neill, *supra* note 23 (arguing in favor of extending child labor laws to social media stars); Lambert, *supra* note 23 (citing a lobbyist in California who is a proponent of requiring permits because parents "may be unprepared for a kidfluencer's fame and unequipped to handle it").

<sup>152</sup> *Child Entertainment Laws as of January 1, 2020*, U.S. DEP. OF LAB. (Jan. 2020), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/H4FB-L47M>].

<sup>153</sup> CAL. CODE REGS. tit. 8, § 11753(a) (2020).

<sup>154</sup> N.Y. COMP. CODES R. & REGS. tit. 12 § 186-2.1(b) (2020).

any influencer who posts about a trip to New York for profit or complementary services may be expected to file for a work permit.

To be sure, there would be impactful benefits if work permits were required for kidfluencers. First, a permitting scheme like in California or New York would ensure that the social media work is not excessively interfering with the child's education because it would require a school official to verify the child's academic and attendance records.<sup>155</sup> Second, because the permits would have to be renewed periodically, it would require active acknowledgement by the parents that their child is a worker. That is, parents would be reminded of the sacrifices their kids are making and that this activity is legally recognized as work, not just play. Third, parents who are registered with the state may be less likely to include their children in explicit or dangerous content out of fear of state monitoring. And fourth, states could collect data to inform future policy decisions in this growing industry.

Nevertheless, requiring work permits akin to the child actor context may be impracticable in the kidfluencer industry. First, social media posting is mobile and global, and it is infeasible to require families to apply for permits in every state where the child films sponsored content. Second, and perhaps most problematic, the industry is much faster-paced than traditional entertainment. For a studio actor, the child's guardian can apply for a permit with a fairly accurate idea of what the work will entail, the time frame, and the location. Social media deals can be made and completed within hours, so permitting would not be as accurate. Further, permits take time to get approved. When a video goes "viral," the kidfluencer may need to capitalize on that opportunity immediately because the attention span of social media users is progressively shrinking.<sup>156</sup>

Moreover, as with permits for child actors, states can charge fees and thus create a barrier to entry. These fees are not negligible—in California, for example, the initial application fee for a child-performer permit is \$198 and the yearly renewal fee is currently \$166.<sup>157</sup> This means any child who gains a

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<sup>155</sup> See CAL. LAB. CODE § 1308.6 (West 2020) (empowering the Labor Commission to conduct necessary investigations to ensure permits are only granted to child performers if the work environment is proper, "not detrimental to the health of the minor," and the minor's education will not be "neglected or hampered" by the work); N.Y. LAB. LAW § 151 (McKinney 2020) (requiring the child performer to provide evidence of "satisfactory academic performance" for each semester of the employment as a condition of the work permit).

<sup>156</sup> See Philipp Lorenz-Spreen, Bjarke Mørch Mønsted, Philipp Hövel & Sune Lehmann, *Accelerating Dynamics of Collective Attention*, NATURE COMM'NS, Apr. 15, 2019, at 2, <https://www.nature.com/articles/s41467-019-09311-w> [<https://perma.cc/GWL7-D8XM>] (reporting that empirical evidence shows a global trend toward "shorter intervals of collective attention given to each cultural item" on social media).

<sup>157</sup> *Child Performer Services Permit—Frequently Asked Questions*, STATE OF CAL. DEPT. OF INDUS. RELS. (May 2019), [https://www.dir.ca.gov/dlse/Child\\_performer\\_services\\_permit\\_FAQs.htm#fe16](https://www.dir.ca.gov/dlse/Child_performer_services_permit_FAQs.htm#fe16) [<https://perma.cc/3X7N-8W65>].

large following but cannot afford the permit fee would not be allowed to accept sponsorships even though they are doing the same work as other children. Beyond a financial burden, some families may be deterred from entering the market because of their apprehension about registering with the state.

Again, this work takes place in the home and is largely directed by the parents<sup>158</sup>—on balance, a state could reasonably decide that the doubtless benefits of a permit system do not outweigh the intrusion on the family unit or the unworkability of permitting in this fast-paced industry.

### C. *Production Regulations*

Though there have been calls for states to impose Coogan trust and permit requirements for child social media influencers, there has not been mainstream attention to the other common child actor regulations, specifically concerning work hours, conditions, and on-set teachers. Like permits, these regulations would help protect the welfare of child workers, but they are both difficult to implement and arguably an excessive intrusion on the family unit.

Surely regulating the hours, conditions, and education of child performers benefits them and helps protect them from the harms of exploitation. As described above, financial exploitation is not the only threat facing kidfluencers—there are also risks of pervasive privacy loss, psychological harm, and excessive hours because the work is constant and mobile.<sup>159</sup> Limiting the hours that parents and companies can work with kidfluencers would ensure that they have some private life outside of social media, and requiring certain workplace conditions that must be approved by an employer-hired teacher might protect kids in dangerous environments, like the Hobson children.<sup>160</sup>

But these regulations could be difficult and even impossible to impose. Even if the state set an hour limit that these children can work, the only way to enforce that rule would be to monitor the families within their own homes, which would be an overstep by the state.<sup>161</sup> A state might consider a self-reporting enforcement process where, if there is a report of excessive working hours, the parents must log the hours the child works each week, including preparation and filming. Though this approach could alleviate some of the concerns regarding home intrusion by the state, self-reporting may not be

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<sup>158</sup> See *supra* notes 93–97 and accompanying text.

<sup>159</sup> See *supra* notes 110–17 and accompanying text.

<sup>160</sup> See *supra* notes 1–6 and accompanying text.

<sup>161</sup> “Liberty protects the person from unwarranted government intrusions into a dwelling.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). Cf. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (making clear that states have restricted authority to search people’s homes for criminal enforcement).

effective and would still enable the state to granularly monitor the activities between parent and child at home.

Similar issues would arise if a state were to impose child-actor education requirements on kidfluencers. California, for example, requires studios to provide on-set teachers to educate the child performers and also to represent the child's interest in health and welfare.<sup>162</sup> States cannot simply apply studio-teacher requirements of this nature to the social media influencer context because that would require parents or corporate sponsors to hire teachers to be "on set" in the family's home. The imposition is suitable for a studio-setting, outside of a family's home and with a significant budget for a longer-term project. But states cannot expect parents to meet these standards inside their home, with a single-family budget, and with a less sophisticated knowledge of the law. Whether states can constitutionally impose home-teaching requirements like this on parents is a live question,<sup>163</sup> but parents do have the right generally to direct the education of their children.<sup>164</sup> And in any event, the point stands that an on-set teacher requirement is unworkable in this industry.

Until policymakers can construct more appropriate workplace regulations for social media production, child welfare laws could theoretically suffice as a backstop to child abuse and neglect. Regulations about content production, including education requirements and workplace safety mandates, duplicate many states' current laws regarding truancy and child abuse.<sup>165</sup> Of course protecting children from excessive hours and providing an additional agency overseeing these children's safety is desirable, but until states decide the appropriate level of regulation, there are at least existing safety regulations.

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<sup>162</sup> See *supra* notes 86–88 and accompanying text.

<sup>163</sup> Indeed, the limits of the parental right to direct a child's education have not been settled, especially in the homeschooling context. Because states, federal courts, and scholars disagree on how much the state may regulate parental education within the home, the question of on-set teachers for at-home influencers is also unclear. See, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("[T]he right to be free from all reporting requirements and 'discretionary' state oversight of a child's home-school education has never been recognized."). See generally, Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 BYU EDUC. & L.J. 59-60 (2017) (collecting cases and articles to show that the question of whether homeschooling is constitutionally protected is not yet resolved).

<sup>164</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–5 (1925) (continuing the reasoning of *Meyer v. Nebraska*, 262 U.S. 390 (1923), in recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"). This right is not without limits, as indicated by debate over whether there is or should be a constitutional right to homeschool one's children.

<sup>165</sup> See, e.g., CAL. EDUC. CODE § 48264 (West 2020) (allowing school and state officers to arrest students found skipping school without an excuse, and imposing procedures for repeat truants, including community service and state programs); CAL. PENAL CODE § 273d (West 2020) (providing an example of state child abuse laws).

Fundamentally, even though this Comment argues that kidfluencers are workers who need protection and compensation, it is also true that social media is simultaneously a personal and private expression of self as well as a job. Financial protection is possible through Coogan trusts because they simply guarantee the child receives some compensation for their labor. But other regulations regarding workplace conditions intrude on the actual activities of the family unit. The balance between family autonomy and child-actor protection is difficult in this context, so states and the federal government should continue to study this nuanced area before imposing regulations or simply adding kidfluencers to existing child actor laws.

#### CONCLUSION

The rise of the “kidfluencer” has introduced a new form of labor that is unregulated in our state-based child acting law regime. Children spend hours per day producing high-valued content at the direction of their parents with no financial or personal protection besides the good will of their parents. Although states do not have the right to unduly intervene in a parent’s raising of their child, states should at least provide financial protection through the Coogan trust model outlined above.<sup>166</sup> Other typical child acting regulations, like work permits and workplace condition requirements, would indeed protect the child but may be unworkable or overly invasive in the social media context where the work occurs at home with the parents.

Underlying this entire discussion is the question of whether social media labor regulations could be more effective as federal law rather than state based. Indeed, in 2015, Congresswoman Grace Meng introduced a bill that would federally regulate the number of hours that child actors can work and impose a federal Coogan trust requirement.<sup>167</sup> Federal regulation may be even more fitting for social media production, which is mobile and greatly affects interstate economy. Even if kidfluencing is not added under the standard FLSA regulations, these children may have an interest in federal protection that merits their own tailored regulations.

But until federal law begins to accommodate social media production, any protection must be created at the state level. Social media marketing is new, growing, and distinct from any other industry, including child acting. Thus, states should not merely add the words “and social media influencers” to existing child acting laws. Instead, states should consider imposing Coogan trust requirements for immediate financial protection and continue to research and refine the appropriateness of other regulations.

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<sup>166</sup> *Supra* notes 133–50 and accompanying text.

<sup>167</sup> Child Performers Protection Act of 2015, H.R. 3383, 114th Cong. (2015).