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ARTICLE

OVERSHARENTING: IS IT REALLY YOUR STORY TO TELL?

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ABSTRACT

Social media is about sharing information. If you are a parent, often the tendency is to relate every aspect of your children's lives. Most of the time, children do not consent to postings about them and will have a permanent digital shadow created by their parents that follows them the rest of their lives. The purpose of this article is to analyze the current status and potential future of children's online privacy from a comparative legal approach, highlighting recent case law in the United Kingdom, which is trending toward carving out special privacy rights for children. This contrasts with the United States approach, where once a photo or similar content is posted online, a right to privacy is essentially lost. Based on recent United States Supreme Court case opinions, and the state law movement to regulate in this area, as exemplified by the so-called "Eraser Law" in California, the time may be ripe to reexamine the "reasonable expectation of privacy" for children online and develop methods and a cause of action that allow children to take control of their own online story.

INTRODUCTION

Seeing photos and videos of your friends' and family's children on Facebook, Instagram or other social media sites is inescapable. Families no longer inflict visitors to the scrapbooks and boring family slideshows because now digital form of photos are paraded online for the world to see. The children of today will have a digital footprint unlike any we have seen thus far. A 2015 survey by Internet company Nominet found that by the time a child is five, there will be almost 1,000 online photos of them.¹ Children have little to no control or ability to consent to the posting of every intimate detail of their lives.

Do some parents go too far? David DeVore posted a video of his son

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1. *Today's Children Will Feature in Almost 1,000 Online Photos by the Time They Reach Age Five* (2015), KNOWTHENET, <http://www.knowthenet.org.uk/articles/today%E2%80%99s-children-will-feature-almost-1000-online-photos-time-they-reach-age-five#sthash.z5QBGwZa.dpuf>. (last visited Oct. 19, 2017).

in 2009, lightheaded and incoherent after a dental visit, which has 132 million views.² As one mother put it:

There is no doubt that parenting has changed dramatically, and it is going to be interesting to see how this affects our children as they grow up. Are we all horrible narcissists who are damaging our children by forcing them to grow up in a world where they feel a constant need for validation? Or are we oversharing simply as a way to feel connected to one another in a world that is increasingly functioning online?³

Regardless of the motivation for oversharing, the privacy battles of tomorrow could very well be parents vs. their children, as the children of today will battle to have disagreeable, embarrassing or damaging content removed. An 18-year-old woman in Austria has apparently sued her parents for posting embarrassing photos of her as a child on Facebook,⁴ though there are questions as to the legitimacy of the story.⁵ France's rigorous privacy laws already allow these kinds of suits to happen with potential consequences ranging from a year in prison to a fine of up to \$49,000.⁶ A report by the Family Online Safety Institute found 76% of teens are very or somewhat concerned about their online privacy.⁷ A study by researchers at the University of Michigan and the University of Washington found "a really interesting disconnect" between parents and children regarding sharing information.⁸ Among the 249 parent-child pairs across 40 states studied, one theme emerged from the children: "don't post anything about me on social media with-

2. Booba1234, *David After Dentist*, YOUTUBE, (Jan. 30, 2009, 7:00 PM), <https://www.youtube.com/watch?v=txqiwrbyGrs>.

3. Rosie Mortimer, *The Rise of Instamum Paranoia Among 'Millennial Parents'*, THE EVENING STANDARD, (Dec. 14, 2015, 2:09PM) <http://www.standard.co.uk/lifestyle/london-life/the-rise-of-instamum-paranoia-among-millennial-parents-a3136746.html>.

4. Julian Robinson, *Daughter, 18, Sues Her Parents for Posting Embarrassing Photographs of her as a Child on Facebook*, MAILONLINE, (Sept. 14, 2016, 11:48A.M) <http://www.dailymail.co.uk/news/article-3788817/Daughter-18-sues-parents-posting-embarrassing-photographs-child-Facebook.html>.

5. *Doubts Cast Over Alleged Facebook Court Case*, THE LOCAL, (Sept. 18, 2016, 2:00pm) <http://www.thelocal.at/20160916/doubts-cast-over-alleged-facebook-court-case>.

6. Glyn Moody, *French Parents Face Fines, Lawsuits and Prison for Posting Pictures of Their Own Children Online*, TECHDIRT, (Mar. 7, 2016, 12:46PM) <https://www.techdirt.com/articles/20160302/07480733781/french-parents-face-fines-lawsuits-prison-posting-pictures-their-own-children-online.shtml>.

7. *Teen Identity Theft: Fraud, Security, and Steps Teens Are Taking to Protect Themselves Online*, FAMILY ONLINE SAFETY INSTITUTE, (Nov. 6, 2013), <https://www.fosi.org/about/press/new-fosi-research-finds-teens-increasingly/>.

8. K.J. Dell'Antonia, *Don't Post About Me on Social Media, Children Say*, NY TIMES, (Mar. 8, 2016, 6:45AM), http://well.blogs.nytimes.com/2016/03/08/dont-post-about-me-on-social-media-children-say/?_r=0.

out asking me.”⁹ There is some evidence to support the claim that young people are becoming savvier about the potential permanence of social media postings.¹⁰ Some are demonstrating a preference for more ephemeral sites such as Snapchat and Periscope, where one can post content for a limited time.¹¹

What is the “reasonable expectation of privacy” for children online? Parents need clear guidelines regarding posting and using social media content relating to their children and children need a certain amount of control over their own online story. This paper will examine the issue from a comparative legal approach, highlighting recent case law in the United Kingdom in particular, which is trending toward carving out privacy rights for children. This contrasts with a United States approach, where once a photo or similar content is posted, the expectation of privacy appears to be lost.

PRIVACY PERSPECTIVES IN THE UNITED KINGDOM

In the United Kingdom 160 years ago, Queen Victoria requested some of her personal family pictures not be published.¹² The pictures were etchings she and her husband, Prince Albert, had requested be made from drawings of family members.¹³ They were meant to be shared only among close friends and family.¹⁴ William Strange published a catalog of the etchings he had questionably acquired from a royal printer and had the intent of displaying the etchings in an exhibition.¹⁵ Both Lord Chancellor and the Vice Chancellor granted injunctions preventing the display due to confidentiality law.¹⁶ Strangers must have come into possession of the etchings in “a breach of trust, confidence or contract.”¹⁷

It is doubtful Queen Victoria could have foreseen the technological advances that would allow for the widespread sharing of pictures with relative ease. Privacy law in the United Kingdom is intensely fact-based and has developed on a case-by-case basis.¹⁸ In recent years,

9. *Id.*

10. *Id.*

11. Sarah Banks, *Can Today's Networked Kids Protect Their Right to Privacy?*, CONTRIBUTORIA, (May 2015), <http://www.contributoria.com/issue/2015-05/54f59102d077e7c21b000096/>.

12. *Prince Albert v. Strange*, [1849] EWHC Ch J20, (1849) 1 Mac & G 25, (1849) 18 LJ Ch 120, 41 ER 1171.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. PARLIAMENT, JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS – CHAPTER 3, <https://publications.parliament.uk/pa/jt201012/jtselect/jtprininj/273/27306.htm>.

there has been a re-examination of press practices and privacy due to issues such as the phone-hacking scandal.¹⁹ Tabloids in England have opposed increased privacy protection and are incredulous toward the judges who decide privacy cases.²⁰

The Leveson Inquiry, a series of public hearings led by Lord Justice Leveson, examined the culture and practices of the press and suggested changes to privacy regulations.²¹ Champions of the changes are critical of the fact that the Leveson did not follow the recommendations.²² A new regulator found the Independent Press Standards Organization (IPSO), but the public has very little faith in its abilities to curb the press' appetite for sensationalism and use of corrupt practices.²³

Privacy cases are decided in the United Kingdom by applying the Human Rights Act (HRA).²⁴ The European Convention on Human Rights and Fundamental Freedoms Treaty of 1950 outlined certain civil liberties including a "Right to Respect for Private and Family Life" and "Freedom of Expression":

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of

19. Jane Martinson, *The phone-hacking scandal is over. So what's changed?*, THE GUARDIAN, (Dec. 11, 2015), <https://www.theguardian.com/media/2015/dec/11/the-phone-hacking-scandal-is-over-so-whats-changed>.

20. Gavin Phillipson, *Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions*, 1(1) J. OF MEDIA L. 73 (2009).

21. Leveson Inquiry: *Culture, Practice and Ethics of the Press* (2012), <http://www.levesoninquiry.org.uk/evidence/?day=2012-01-18>.

22. Peter Preston, *Leveson Inquiry Gets Nowhere Slowly*, THE GUARDIAN, (Sept. 13, 2015, 4:00PM), <http://www.theguardian.com/media/2015/sep/13/leveson-gets-nowhere-slowly>.

23. *Id.*

24. Great Britain. Human Rights Act 1998: ELIZABETH LL. CHAPTER 42 (1998). London: The Stationery Office.

frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁵

United Kingdom citizens with complaints under these articles took them to the European Court of Human Rights based in Strasbourg, France.²⁶ Formally approved in the United Kingdom in 1998 and effective in 2000, the HRA made remedies available in United Kingdom courts, although the Strasbourg court is still a last resort court.²⁷ Each privacy case requires a careful balancing of rights.

The first time a British court enforced the right of privacy under the HRA was in *Douglas v. Hello! Ltd.*, a series of cases involving actors Michael Douglas and Catherine Zeta Jones.²⁸ Douglas and Zeta Jones agreed to let *OK!* magazine provide exclusive coverage of their wedding in exchange for £1,000,000.²⁹ Unbeknownst to the bride and groom, a freelance photographer also came to the wedding and sold his photographs to *Hello!* magazine.³⁰ Although the case against *Hello!* was for invasion of privacy, the court focused its analysis on breach of confidentiality and the Data Protection Act of 1998, a regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information.³¹ Breach of confidence protects against the disclosure of confidential information and the obligation of confidence arises when someone obtains information they know is confidential.³² The judgment illustrated the right to control particular information about oneself in maintaining a certain image.

25. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, GR.BRIT., T.S.NO.005, (1953).

26. Jessica Elgot, *British Judges not Bound by European Court of Human Rights, Says Leveson*, THE GUARDIAN, (May 24, 2015, 5:46PM), <https://www.theguardian.com/law/2015/may/24/british-courts-echr-leveson>.

27. Justice, *A Guide to the Human Rights Act 1998: Questions and Answers*, Dec. 2000, <https://web.archive.org/web/20020312081934/http://www.justice.org.uk/images/pdfs/HRAINT.PDF>.

28. *Douglas v. Hello! Ltd.*, [2005] EWCA (Civ) 595, [2006] QB 125 (Eng).

29. *Id.* at 5.

30. *Id.* at 11, 13.

31. Great Britain. Data Protection Act 1998. Chapter 29. London: HMSO.

32. *Attorney General v. Guardian Newspapers Ltd.* (No 2), (1990) 1 AC 109.

In the case of supermodel Naomi Campbell, the newspaper the *Daily Mirror* published a photo of Campbell taken on a public street as she left a Narcotics Anonymous meeting.³³ The court held there was public interest in the photograph, however, it found the *Mirror* had breached Campbell's confidentiality under the Data Protection Act by publishing details about her medical treatment for drug dependency.³⁴ The newspaper group was ordered to pay Campbell £3,500.³⁵

The *Von Hannover* case was a landmark for European Union privacy law. The European Court of Human Rights ruled that photographs of Princess Caroline of Monaco and her children should not have been published even though they were taken in public places such as a café.³⁶ The court noted "anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation' of protection of...their private life."³⁷

A few years later, Harry Potter author, J. K. Rowling sued a photographic agency for taking and selling photographs to newspapers of Rowling's infant son being strolled down a street near their home.³⁸ Rowling won.³⁹ Privacy law expert Hugh Tomlinson stated, "[i]n this case an English court has held, for the first time, that the publication of an inoffensive photograph of an everyday activity in the street could amount to an invasion of privacy... This case puts in place another building block in the gradual construction by the courts of a fully developed law of privacy."⁴⁰ A significant element of the case hinged on Rowling's son's age, which the lower court did not find very meaningful.⁴¹ The appeals court put forth, "[t]he fact that he is a child is in our view of greater significance than the judge thought. The courts have recognized the importance of the rights of children in many different contexts and so too has the international community."⁴² The court also quoted *Tugendhat and Christie on The Law of Privacy and the Media*, "The acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person."⁴³

33. *Campbell v. Mirror Group Newspapers Ltd.* [2002] EWCA Civ 1373, ¶12 (Eng).

34. *Id.* at ¶170-171.

35. *Campbell v. MGN Limited*, [2004] UKHL 22, ¶125 (Eng).

36. *Von Hannover v. Germany* (2005) EHRR 1, ¶77 (Eng).

37. *Id.* at ¶69.

38. *Murray v. Big Pictures (UK) Limited* [2008] EWCA Cir. 446, ¶1 (Eng).

39. *Id.*

40. Clare Dyer, *J.K. Rowling Wins Ban on Photos of Her Son*, THE GUARDIAN, (May 8, 2008, 2:29 PM) <http://www.theguardian.com/media/2008/may/08/privacy.medialaw>.

41. *Murray v. Big Pictures (UK) Limited* [2008] EWCA Cir. 446 ¶15 (Eng).

42. *Id.* at ¶45.

43. *Id.* at ¶46.

In July 2010, a guest at a private party took photographs of actor Kate Winslet's soon-to-be husband, Edward RocknRoll showing RocknRoll partially naked.⁴⁴ The guest then posted the photos on his own Facebook account, where they were initially available to his 1,500 Facebook friends and then the account owner made those photos available to the public by changing the privacy settings.⁴⁵ After removing the photos, RocknRoll went to court to get an injunction to prevent *The Sun* from publishing the photos.⁴⁶ The Court held RocknRoll did have a reasonable expectation of privacy.⁴⁷ Defendant took the photographs at a private party on a private premise.⁴⁸ The defendant tried to argue that since the photos were on Facebook, RocknRoll did not have a reasonable expectation of privacy in the photos.⁴⁹ The court disagreed, citing the *McKennitt v. Ash* case:

Even where material has been revealed to the public, or to a section of the public, in connection with a sensitive topic (such as bereavement), it is important to recognize that the approach of the courts towards personal information differs somewhat from that adopted in connection with commercial secrets... there are grounds for supposing that the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected... Fresh revelations to different groups of people can still cause distress and damage to an individual's emotional or mental well-being.⁵⁰

Regardless of the limited publication on Facebook, the court found there still is an expectation of privacy that must be protected,⁵¹ The court also declared no public interest in the photographs other than of the salacious variety.⁵² As a result, the Court granted the injunction.⁵³

The most recent case concerning children and a reasonable expectation of privacy is *Weller v. Associated Newspapers Limited*.⁵⁴ Paul Weller is a famous musician in Great Britain. In 2012, the *MailOnline* website published photographs of Weller and his three children shopping and relaxing at a café in Los Angeles, California.⁵⁵ One child was

44. *RocknRoll v. News Group Newspapers Ltd.* [2013] EWCH 24 (Ch) ¶46 (Eng).

45. *Id.* at ¶1.

46. *Id.* at ¶23.

47. *Id.* at ¶27.

48. *Id.* at ¶1.

49. *Id.* at ¶9.

50. *Id.* at ¶23.

51. *Id.* at ¶27.

52. *Id.* at ¶33.

53. *Id.* at ¶45.

54. *Weller v. Associated Newspapers Limited* [2014] EWHC 1163 (QB) (Eng).

55. *Id.* at ¶1-2.

16 years of age, while the other two were ten months old.⁵⁶ Weller and his wife argued at trial that they had both tried very intentionally to keep their children out of the public eye and would not allow individuals to take their photograph.⁵⁷ At the very least, they wanted their children's faces to be pixelated so that they were not recognizable.⁵⁸ The defendant argued the photos were taken in a public place and that the 16-year-old had actually been a model in a well-known magazine.⁵⁹ In addition, Mrs. Weller published information about her children on her Twitter page, though never showing photographs of their faces.⁶⁰ The defendant also pointed to the fact that the photos were taken in the United States, questioning whether the claimants actually had a reasonable expectation of privacy.⁶¹

The court used the analysis employed in the *Campbell* case: (1) Ask whether "in respect of the disclosed facts the person in question had a reasonable expectation of privacy."⁶² If not, the claim under Article 8 of the HRA fails.⁶³ If that expectation did exist, then (2) the court has to balance a person's privacy rights against the publisher's right of freedom of expression under Article 10.⁶⁴ The court found there was a reasonable expectation of privacy here and, citing *Murray*, noted the privacy rights of children should be given considerable weight.⁶⁵ They also pointed to the then-press standards body, (the Press Complaints Commission [PCC]) Editor's Code of Practice regarding content containing children: "Editors must not use the fame, notoriety or position of the parent or guardian as sole justification for publishing details of a child's private life."⁶⁶ Though they clarified

[A] child does not have a separate right to privacy merely by virtue of being a child...however...a person's age is an important attribute... An older child is likely to have a greater perception of his own privacy and his experience of interference with it might well be more significant than for a younger child.⁶⁷

The court also spoke to the public place argument raised by the defendant, declaring that children, even when in public, do not "lay them-

56. *Id.* at ¶3.

57. *Id.* at ¶96.

58. *Id.* at ¶98.

59. *Id.* at ¶111-112.

60. *Id.* at ¶98.

61. *Id.* at ¶18.

62. *Campbell v. MGN Limited*, [2004] UKHL 22.21 (Eng).

63. *Weller v. Associated Newspapers Limited* [2014] EWHC 1163 (QB) ¶16-17 (Eng).

64. *Id.* at ¶15.

65. *Id.* at ¶77-78.

66. *Id.* at ¶23.

67. *Id.* at ¶29, 31.

selves open to the possibility of their privacy being invaded⁶⁸ and that the parents' lack of consent to the photographs being taken will also carry significant weight.⁶⁹

While some critics worry this case heralds the creation of special image rights for children, others do not extend the decision that far.⁷⁰ At a minimum, the case signaled that the media need to pay particular attention to the reasons for publishing photographs of the children of well-known parents.⁷¹ In addition, pixelating children's faces might save a media outlet from a privacy suit. The case also raises the question about the parents' role in preserving or negating a child's privacy rights. There is a distinction between someone like Rowling, who went to great lengths to protect her children's privacy, and a public figure who regularly flaunts their children in front of the media at red carpet events.⁷² Media law scholar Kirsty Hughes considered the question of how much exposure is too much: "If parents are naïve when they first appear in the public spotlight, does that mean that they cannot subsequently shield their children from publicity?"⁷³

Hannah Weller, Paul Weller's wife, campaigned for children's privacy, telling members of the British government that the post-PCC regulator, IPSO, is useless in protecting the privacy of children and that "nothing a parent does negates a child's right to privacy."⁷⁴ The media regularly takes material from social media sites like Facebook, assuming that such content is fair game.⁷⁵ Visiting media law professor Robin Callendar Smith at Queen Mary University of London, argued that the *Weller* case could put a stop to the media "scraping" the photographs of children from social media sites.⁷⁶

68. *Weller and Ors v. Associated Newspapers Limited*, [2015] EWCA Civ ¶1176 27 (Eng).

69. *Weller v. Associated Newspapers Limited* [2014] EWHC 1163 (QB) ¶37 (Eng).

70. Jennifer Agate, *Celebrity Gossip in a Jam? Privacy Damages of £10,000 Awarded in Weller v. Associated Newspapers Ltd.*, FARRER & CO., (July 2014), <http://www.farrer.co.uk/News/Briefings/Celebrity-gossip-in-a-jam--Privacy-damages-of-10000-awarded-in-Weller-v-Associated-Newspapers-Ltd/>.

71. *Id.*

72. Clare Dyer, *J.K. Rowling Wins Ban on Photos of Her Son*, THE GUARDIAN, (May 8, 2008, 2:29PM), <http://www.theguardian.com/media/2008/may/08/privacy.medialaw>.

73. Kirsty Hughes, *Publishing Photographs Without Consent*, 6(2) J. OF MEDIA L. 180, 191 (2014).

74. John Plunkett, *Public Has No Faith In Press Regulator, Says Children's Privacy Campaigner*, THE GUARDIAN, (Feb. 24, 2015, 6:46PM), <http://www.theguardian.com/media/2015/feb/24/public-has-no-faith-in-press-regulator-says-childrens-privacy-campaigner>.

75. Isabella Piasecka, *Pictures, Privacy and Facebook: Journalists Should Not Assume Children's Rights Can Be Ignored*, PRESS GAZETTE, (Feb, 18, 2016), <http://www.pressgazette.co.uk/content/pictures-privacy-and-facebook-journalists-should-not-assume-childrens-rights-can-be-ignored>.

76. Robin Callender Smith, *Freedom of UK Media to Publish Pictures of Children*

The decisions in *Weller* and *Murray* give great deference to children's privacy rights. In addition, *Von Hannover*, *Murray*, *Campbell* and *Weller* affirm that simply because someone is in public does not mean they negate their right to privacy. Even though these cases dealt with celebrity parents, media use of pictures and not parental postings, the same core question remains as to why children's privacy rights are often unacknowledged when, in most instances, they are not capable of consenting to such publicity.

PRIVACY PERSPECTIVES IN THE UNITED STATES

Although the United States received many legal traditions from England, there are distinctions in several areas of the law, notably between the HRA and the First Amendment to the United States Constitution. In the United States, the rights enumerated in the First Amendment have more weight than other amendments because they have a "preferred position."⁷⁷ Freedom of expression and freedom of the press will many times take precedent over other rights. In the HRA, Article 10 is diminished by the 10(2) qualifications such as national security and public safety.⁷⁸

Harvard law professors Samuel Warren and Louis Brandeis are widely recognized as the first in the United States to propose the concept of a legal right to privacy.⁷⁹ They viewed privacy as a personal right, to protect someone's dignity.⁸⁰ This led to remedies to redress wrongs such as mental suffering and embarrassment.⁸¹ Warren and Brandeis were both concerned with the media revealing aspects of private life that should remain private, to the public.⁸² While they could not have foreseen the technological advances fostering such a free flow of personal information, they predicted the dangers of right of privacy – not explicitly mentioned in the United States Constitution.

Richards and Solove argue that the Warren and Brandeis path of privacy law focused more on protection of "inviolate personality" from intrusion by strangers.⁸³ This is compared to privacy law in the United

Curtailed After Landmark Ruling, THE CONVERSATION, Nov. 20, 2015, <https://theconversation.com/freedom-of-uk-media-to-publish-pictures-of-children-curtailed-after-landmark-ruling-51062>.

77. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943).

78. Tim Crook, *COMPARATIVE MEDIA LAW AND ETHICS* 117 (1st ed. 2010).

79. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

80. *Id.* at 205.

81. Norman Witzleb, *Justifying Gain-Based Remedies for Invasions of Privacy*, 29 OXFORD J. LEGAL STUD. 325 (2009).

82. Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS., 326 (1966).

83. Neil M. Richard & Daniel Solove, *Privacy's Other Path: Recovering the Law of*

Kingdom, which is more prone to recognizing breaches of confidentiality arising from relationships built on trust.⁸⁴

William Prosser, a notable torts scholar, divided privacy law into four areas: appropriation, intrusion, false light and private facts.⁸⁵ Appropriation occurs when someone uses another person's name or likeness without their consent for commercial gain.⁸⁶ False light privacy is similar to defamation and includes false information or information that creates a false impression being published without someone's consent, the information is highly offensive to a reasonable person and the claim contains an actual malice element similar to some defamation claims: the person publishing the information must do so with a reckless disregard for the truth or know the information is false.⁸⁷ Intrusion concerns "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."⁸⁸ The private facts area affects "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."⁸⁹

Richards and Solove highlight the tort of breach of confidentiality as one that has been underdeveloped and underutilized in United States' courts.⁹⁰ At present the tort appears to apply to a "limited set of relationships with most cases involving the patient-physician relationship."⁹¹ This again, is in contrast to the version of confidentiality that has developed in the United Kingdom, with the focus on "the norms of trust within relationships... we confide in others, we trust them with information that can make us vulnerable, and we expect them not to betray us. These norms are missing from the Warren and Brandeis conception of privacy."⁹² It may be that this version of confidentiality is needed in order to address the issue of parents posting information which their children may later wish to have removed.

One of the earliest cases establishing a right to privacy in the Unit-

Confidentiality, 96 GEO. L. J. 123, 125 (2007).

84. *Id.*

85. William L. Prosser, *Privacy*, 48(3) CAL. L. REV. 383 (1960).

86. *Id.*

87. Restatement (Second) of Torts § 652 E (1977).

88. Restatement (Second) of Torts § 652 B (1977).

89. Restatement (Second) of Torts § 652 D (1977).

90. Neil M. Richard & Daniel Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. 123, 156 (2007).

91. *Id.*

92. *Id.*

ed States was in 1902, *Roberson v. Rochester Folding Box Co.*⁹³ Miss Roberson was stunned to wake up one morning and find a drawing of her face adorning posters placed all over her town advertising Franklin Mills flour.⁹⁴ Humiliated, she sued for invasion of privacy, but lost as there was no such cause of action at the time.⁹⁵ Her case, however, led to the establishment of the United States' first state privacy statute in 1903 in New York.⁹⁶

Privacy law progressed in the United States in a fragmented fashion, creating a patchwork of sector-specific legislation and efforts to protect certain categories of information,⁹⁷ such as the *Family Educational Rights and Privacy Act* (FERPA),⁹⁸ protecting student academic records; the *Health Insurance Portability and Accountability Act* (HIPAA),⁹⁹ protecting against disclosure of private medical information; and the *Children's Online Privacy Protection Act* (COPPA),¹⁰⁰ placing obligations on operators of websites directed to children under 13 years of age. These fragmented laws and many others are supplemented by sporadic state-specific privacy laws, creating a random assortment of regulations. Professor Daniel Solove asserts privacy law in the United States is in a state of confusion:

Privacy, however, is a concept in disarray. Nobody can articulate what it means. Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations.¹⁰¹

Privacy is often viewed in the United States as a commodity and, especially as it concerns privacy and data protection, conflicts arise over who "owns" the information.¹⁰² As social media evolves, people constantly share personal information on the various social media platforms and businesses have recognized the value that information can deliver from

93. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

94. *Id.* at 538, 542.

95. *Id.* at 538, 556.

96. Frederick R. Kessler, *A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute*, 15(4) *FORDHAM URB. L.J.* 951, 959 (1986).

97. Carter Manny, *Recent Controversy Surrounding the EU-US Safe Harbor Data Protection Regime*, 47 *BUS. L. REV.* 33 (2014).

98. *Family Educational Rights and Privacy Act* § 1232(g), 20 U.S.C. § 1232(g)(2012).

99. *The Health Insurance Portability and Accountability Act of 1996* P.L. No. 104-191, 110 Stat. 1938 (1996).

100. *Children's Online Privacy Protection Act of 1998*, 15 U.S.C. 6501-6505 (2012).

101. Daniel J. Solove, *UNDERSTANDING PRIVACY* 1 (2008).

102. Stephen J. Kobrin, *Safe Harbours Are Hard To Find: The Trans-Atlantic Data Privacy Dispute, Territorial Jurisdiction and Global Governance*, 30 *REV. OF INT. STUD.* 111 (2004).

a commercial perspective.¹⁰³ The relationship between data collectors and consumers is described as a, “Faustian bargain. They give us free computer power... and we reveal ever more about ourselves.”¹⁰⁴

Many social media sites have struggled with privacy protections and have been criticized for not doing enough to protect user privacy.¹⁰⁵ Facebook, in particular, has faced disapproval for its privacy practices.¹⁰⁶ But one need only look at some of the statements about privacy from Facebook’s founder and CEO, Mark Zuckerberg, who famously remarked in 2010 that privacy is no longer a social norm.¹⁰⁷ This echoed a statement made years earlier by SUN Microsystems Chairman Scott McNealy who pronounced in 1999 “You have zero privacy anyway. Get over it!”¹⁰⁸

A weak reliance on industry self-regulation has not inspired consumer trust.¹⁰⁹ The Federal Trade Commission has recognized in recent years the need for additional enforcement to protect consumers.¹¹⁰ In addition, the most recent Pew Research Center Survey of Americans’ attitudes about privacy reflect a growing concern about the use and misuse of personal information.¹¹¹ Yet, while there may be concern, the public’s behavior sends a different message.¹¹² Citizens will admit to not reading social media privacy policies or completely misunderstand-

103. Shane Darcy, *Battling for the Rights to Privacy and Data Protection in the Irish Courts*, 31(80) UTRECHT J. OF INT’L. & EUR. L. 131 (2015).

104. Edward Luce, *Big Data’s Infinite Harvest*, FINANCIAL TIMES, (May 24, 2015), <http://www.ft.com/intl/cms/s/0/d1177040-0075-11e5-a908-00144feabdc0.html#axzz3bXi19gK4>.

105. Anne Cassidy, *Are Facebook and Twitter Doing Enough to Protect Users?*, THE GUARDIAN, (Aug. 26, 2016, 3:00PM) <https://www.theguardian.com/media-network/2016/aug/26/social-media-sites-protect-users-twitter-facebook>.

106. Henry Farrell, *Facebook wasn’t great at respecting privacy in the first place. It’s gotten much worse*, WASHINGTON POST, (Aug. 18, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/08/18/facebook-wasnt-great-at-respecting-privacy-in-the-first-place-its-gotten-much-worse/?utm_term=.effc58c0c71c.

107. Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, THE GUARDIAN, (Jan. 11, 2010), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>.

108. Polly Sprenger, *Sun on Privacy: ‘Get over it’*, WIRED, (Jan. 26, 1999), <http://archive.wired.com/politics/law/news/1999/01/17538>.

109. Michelle De Mooy, *Rethinking Privacy Self-Management and Data Sovereignty in the Age of Big Data*, CENTER FOR DEMOCRACY AND TECHNOLOGY, (Apr.2017), https://cdt.org/files/2017/04/Rethinking-Privacy_2017_final.pdf.

110. Gerhard Stienke, *Data Privacy Approaches from US and EU Perspectives*, 19 TELEMAT INFORM 193 (2002).

111. Mary Madden & Lee Raine, *Americans’ Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CENTER, <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>.

112. Aaron Smith, *Half of Online Americans Don’t Know What a Privacy Policy Is*, Pew Research Center, <http://www.pewresearch.org/fact-tank/2014/12/04/half-of-americans-dont-know-what-a-privacy-policy-is/>.

ing what the policies actually mean and are nevertheless willing to divulge private information.¹¹³

California is one state attempting to protect the potentially poor judgment of minors who use social media sites.¹¹⁴ In 2013, they enacted the California Rights for Minors in the Digital World Act, which went into effect in 2015.¹¹⁵ The act, also known as the “eraser law” has, as one part, the option of allowing children under 18 request removal of their own social media or other online content.¹¹⁶ There are a few exceptions.¹¹⁷ If another law, federal or state, requires the information to be maintained online, it cannot be removed.¹¹⁸ It also does not apply to content posted by someone else.¹¹⁹ The philosophy of restricting the applicability of the law to children is that they may not have the judgment capabilities of a mature adult and may be more likely to post content they later regret.¹²⁰

As the law does not apply to content posted by third parties, it would not apply to parental postings about children.¹²¹ Law Professor Eric Goldman highlighted several other issues with the law including a potential conflict with the Dormant Commerce Clause (that states, in general, do not have the authority to regulate the Internet), and ambiguities in some of the law’s language as well as the length of time minors have to exercise the right to remove information.¹²²

The demand and necessity for the law is also unclear. Many websites, especially social media sites already have the functionality to allow users to delete their own posts.¹²³ A national online eraser law could be passed to get around the Dormant Commerce Clause issue, but there would still be the problem with lack of control around third party postings, such as what happened to Chelsea Chaney.¹²⁴

113. *Id.*

114. S.B. 568, 2013 LEG. 2013-14 SESS. (Cal. 2013), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Lydia A. Jones, *Will California's confusing new 'online eraser' law for minors work?*, THE WEEK, (Jan. 2, 2015), <http://theweek.com/articles/441431/californias-confusing-new-online-eraser-law-minors-work>.

122. Eric Goldman, *California's New 'Online Eraser' Law Should Be Erased*, FORBES, (Sept. 24, 2013, 1:35PM), <http://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased/#1d9fa182399d>. See also James Lee, *SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?*, 48 U. CAL. DAVIS. L. REV. 1173 (2015).

123. Deleting a Tweet, TWITTER, <https://support.twitter.com/articles/18906> (last visited Sept. 22, 2016).

124. *Cheney v. Fayette County Public School District*, 977 F. Supp. 2d 1308, 1316

As a high school senior, her Georgia high school technology director grabbed a photo of her in a bikini from her Facebook page and used it in an Internet safety presentation to a school district assembly.¹²⁵ Chaney filed a lawsuit claiming the technology director used the photo in a way that implied she was an alcoholic.¹²⁶ The case hinged on her privacy settings, which were very open, allowing “friends of friends” to see her content.¹²⁷ A federal judge threw out the case.¹²⁸ The outcome might have been different had Chaney opted for additional privacy in her settings. If she had privacy settings for her friends/followers only, she then might be able to claim some reasonable expectation of privacy.

Fraleley v. Facebook was a consumer class action lawsuit filed in 2011 charging Facebook with improperly taking users’ faces for the “sponsored stories” section of the site.¹²⁹ (This section of Facebook created ads showing the names or pictures of users who “liked” certain content.)¹³⁰ The lawsuit was settled and Facebook agreed to create clearer disclosure policies.¹³¹ However, pro-privacy advocates were still concerned about children’s photos in particular being used in advertising on Facebook without parental consent and they filed an objection to the settlement.¹³² A federal appeals court upheld the settlement in January 2016, noting it was unclear that the use of minors’ names and likenesses in the “sponsored stories” actually violated California law.¹³³

In 2014, a reporter for *BuzzFeed*, Jessica Testa, wrote a piece containing an amalgamation of tweets from a chat about sexual assault.¹³⁴ Twitter user @Steenfox was one of the chatters whose tweet, name and image appeared without her permission in Testa’s article.¹³⁵ The story went viral and @Steenfox was harassed.¹³⁶ While @Steenfox’s tweets were public, she had identified herself as a survivor of sexual assault.¹³⁷ Many newsrooms are cautious about identifying victims of sexual as-

(N.D. Ga. 2013).

125. *Id.* at 1308, 1313.

126. *Id.* at 1308, 1314.

127. *Id.*

128. *Id.* at 1308, 1317.

129. *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal., 2011).

130. *Id.*

131. *Id.*

132. *Fraleley v. Batman*, 638 F. App’x 594 (9th Cir. 2016).

133. *Id.*

134. Jamie Nesbitt Golden & Monique Judge, *What Happens When a Journalist Uses Your Tweets for a Story? Part One*, MEDIUM, (Nov. 16, 2015), <https://medium.com/thoughts-on-media/what-happens-when-a-journalist-uses-your-tweets-for-a-story-part-one-a8f3db9340ad#.umo7hiv84>.

135. *Id.*

136. *Id.*

137. *Id.*

sault in their stories without getting consent of the victim first.¹³⁸ @Steenfox was surprised to see her face headlining a story presented as click bait.¹³⁹ An argument could be made that being in a public feed on Twitter is far different in terms of the level of exposure from being a front-page story on a website.¹⁴⁰ The level of exposure from the website story would tend to be much higher.

DISCUSSION AND RECOMMENDATIONS

The last few cases highlight the tension between public and private on social media and what happens regarding third party postings. Courts in the United States seem to favor social media sites, especially if the user has employed “open” privacy settings. Yet, it may be time to reconsider our “expectations of privacy” when it concerns social media, especially when children are involved. Based on cases such as *Weller* and *Murray* in the United Kingdom and *Jones* and *Katz* in the United States, it is evident that refined policies and a different perspective on privacy could soon be cultivated.

Legally, privacy boundaries are in a state of flux. The Internet has created cross-border conflicts in terms of privacy standards. Any new standard will need to balance the concern that always exists when personal privacy is at stake: how do you protect it and not compromise freedom of expression? And our children are a substantial interest worthy of protection.

Contract law in both the United States and United Kingdom recognizes the implications of making agreements with vulnerable parties like children.¹⁴¹ In the United States,

Capacity to contract is questionable when dealing with minors because the rationale is that a minor is regarded as not having sufficient

138. Casey Bukro, *Shifting Views on Naming Sexual Assault Victims*, ETHICS ADVICELINE FOR JOURNALISTS, (Feb. 26, 2016), <https://ethicsadvicelineforjournalists.org/2016/02/26/naming-sexual-assault-victims/>.

139. (Click bait is “a term used to describe a type of hyperlink on a web page that entices a visitor to click to continue reading an article. Typically click bait links will forward the user to a page that requires payment, registration, or is one in a series of pages to help drive page views for the site.”) See Computer Hope, *Click Bait*, 2016, <http://www.computerhope.com/jargon/c/click-bait.htm>.

140. Robyn Pennacchia, *What To Wear To Your Sexual Assault: Talking To @Steenfox about BuzzFeed and Twitter Catharsis*, DEATH AND TAXES, (Mar. 13, 2014), <http://www.deathandtaxesmag.com/216788/what-to-wear-to-your-sexual-assault-talking-to-steenfox-about-buzzfeed-and-twitter-catharsis/>.

141. National Paralegal College, *Contracts of Minors*, http://nationalparalegal.edu/public_documents/courseware_asp_files/domesticRelations/FamilyRelationships/Contracts.asp (last visited Sept. 26, 2016) and Net Lawman, *Can a child or a minor enter into a contract?*, <https://www.netlawman.co.uk/ia/entering-contract-minor> (last visited Sept. 20, 2017).

capacity to understand and pass upon questions involving contractual rights. Accordingly, a person dealing with a minor does so at his or her peril and subject to the right of the minor to avoid the contract.¹⁴²

In the United Kingdom, if a person enters into a contract with a minor, it is considered voidable at any time before they come of age and for a short time after that point.¹⁴³ The law in the United Kingdom is “designed specifically to protect those under the age of majority when entering into a legally binding contract.”¹⁴⁴ Therefore, it could be argued that children should also be allowed to void information they posted due to a lapse in judgment, or to take control of their own story when potentially damaging information was posted by their parents or media when children were minors, provided it is not part of a legitimate news story in the public interest.

On the United States Supreme Court, definitions of privacy appear to be shifting. Justice Sonia Sotomayor drafted a concurring opinion in *U.S. v. Jones* in which she noted the “third party doctrine” (a legal principle that whatever you share with a third party is no longer private, and loses its Fourth Amendment protections against unreasonable searches and seizures) may need to be revisited, signaling a potentially new definition of privacy:

It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice [Samuel] Alito notes, some people may find the “tradeoff” of privacy for convenience “worthwhile,” or come to accept this “diminution of privacy” as “inevitable,” and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily

142. National Paralegal College, *Contracts of Minors*, http://nationalparalegal.edu/public_documents/courseware_asp_files/domesticRelationships/FamilyRelationships/Contracts.asp (last visited Sept. 26, 2016).

143. In Brief, *Minors and the Age of Majority: Entering Into Contracts with Minors*, <http://www.inbrief.co.uk/contract-law/contract-with-minors.htm> (last visited Sept. 26, 2016) ¶10.

144. *Id.* at ¶13.

disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.¹⁴⁵

In addition, Justice Alito's concurrence in *Jones* suggested the privacy test as put forth in *Katz v. U.S.* may need to be reviewed in terms of what, in our technology-focused world, is a "reasonable" expectation of privacy.¹⁴⁶

Legislation such as California's eraser law and the right to be forgotten naturally impact speech and press freedoms. Google and similar firms are grappling with the right to be forgotten mechanism, allowing people to request from sites like Google that certain information about them be removed.¹⁴⁷ And, as Professor Jeffrey Rosen argues, laws aren't always an appropriate remedy.¹⁴⁸ Relying on a legislative option such as the right to be forgotten may not be effective. Perhaps the focus should be on technological solutions instead of creating laws that impact free speech. Rosen suggests allowing data to expire after a certain amount of time as well as giving users the option to create temporary postings, with incentives for developers of apps to perform those functions.¹⁴⁹ Facebook is working on a system to alert and prompt parents of their privacy settings when they get ready to post pictures of their children.¹⁵⁰ This is a reasonable reminder that might cause parents to think twice before they post. Right to be forgotten legislation is imperfect and questions remain as to jurisdiction, enforcement, free speech impact, cost and implications on business interests. The rules have the potential to be ineffectively applied.¹⁵¹

A growing desire to control personal privacy means we need to rethink our "reasonable expectations." However, First Amendment concerns will most likely keep the United States from venturing as far as the United Kingdom in carving out special privacy rights for children.

As Eugene Volokh noted:

The difficulty is that the right to information privacy — the right to control other people's communication of personally identifiable infor-

145. *United States v. Jones*, 132 S. Ct. 945, 957 (2012).

146. *Id.* at 957-958.

147. Jonathan Zhou, *France Orders Google to Apply Europe's 'Right To Be Forgotten' Rule Globally*, EPOCH TIMES, (Sept. 21, 2015), <http://www.theepochtimes.com/n3/1756452-france-orders-google-to-apply-europes-right-to-be-forgotten-rule-globally/>.

148. Jeffrey Rosen, *Information Privacy: Free Speech, Privacy, and the Web That Never Forgets*, 9 J. TELECOMMS. & HIGH TECH. L. 345 (2011).

149. *Id.*

150. Glyn Moody, *French Parents Face Fines, Lawsuits and Prison for Posting Pictures of Their Own Children Online*, TECHDIRT, (Mar. 7, 2016), <https://www.techdirt.com/articles/20160302/07480733781/french-parents-face-fines-lawsuits-prison-posting-pictures-their-own-children-online.shtml>.

151. Steven C. Bennett, *The Right To Be Forgotten: Reconciling EU and US Perspectives*, 30 BERK. J. INT. LAW. 161 (2012).

mation about you — is a right to have the government stop people from speaking about you... and it is the First Amendment which generally bars the government from “controlling the communication of information,” whether the communication is “fair” or not.¹⁵²

Youth organizations such as UNICEF have called for children to be considered with a different standard in the media.¹⁵³ Children’s rights should be acknowledged.¹⁵⁴ The appetite for digital rights for children is strong across the Atlantic.¹⁵⁵ iRights is an initiative in the United Kingdom taking “the existing rights of children and young people (under 18) and articulates them for the digital world,” including the right to remove, the right to know, the right to safety and support, the right to make informed and conscious choices, and the right to digital literacy.¹⁵⁶ The group advocates a “delete button” for children to request removal of data children have posted themselves and they call for websites to refrain from sharing the data of minors to third parties.¹⁵⁷ There are 180 signatories including SkyTV and the YMCA, with the hope that their policies and tools will be adopted extensively.¹⁵⁸ In 2015, the Liberal Democrat political party in the United Kingdom circulated a draft policy of a Digital Bill of Rights, which made “it clear that online services have a duty to provide age-appropriate policies, guidance and support to the children and young people who use their services.”¹⁵⁹ It is clear that the United Kingdom recognizes the need to act and protect this vulnerable population.

If children were to bring a cause of action here in the United States against their parents who were refusing to remove pictures and videos from websites that were humiliating and potentially keeping them from employment or admission to a college or university, do we revive the

152. Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1050-1051 (2000).

153. Faith Gordon, *How Children Feel When Journalists Exploit Their Social Media Profiles*, THE CONVERSATION, Jan. 4, 2016, <http://theconversation.com/how-children-feel-when-journalists-exploit-their-social-media-profiles-49064>.

154. *Id.*

155. 5Rights, *The Five Rights*, <http://5rightsframework.com/> (last visited Sept. 26, 2016).

156. *Id.*

157. *The Right to Remove*, 5RIGHTS, <http://5rightsframework.com/the-5-rights/the-right-to-remove.html> (last visited on Sept. 20, 2017) and *The Right to Know*, 5 RIGHTS, <http://5rightsframework.com/the-5-rights/the-right-to-know.html> (last visited on Sept. 20, 2017).

158. *Signatories*, 5RIGHTS, <http://5rightsframework.com/signatories.html> (last visited Sept. 20, 2017).

159. *Manifesto 2015*, LIBERAL DEMOCRATS, https://d3n8a8pro7vhm.cloudfront.net/libdems/pages/8907/attachments/original/1429028133/Liberal_Democrat_General_Election_Manifesto_2015.pdf?1429028133 (last visited Sept. 26, 2016).

breach of confidentiality tort? The concept of confidentiality based on relationship of trust would need to be injected into this tort, as in its current application, it appears to be confined to relationships such as patient-physician.

Could an action similar to the United Kingdom’s “misuse of information” tort be created here? The test, concerning “the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people”¹⁶⁰ is as follows: (1) Whether the Claimants had a reasonable expectation of privacy and (2) whether balancing the individual’s right to privacy should yield to the publisher’s right to freedom of expression. The privacy test is set out by *Campbell* and looks at (1) whether the information contributes to a debate of general interest; (2) the notoriety of the person or people concerned; (3) the prior conduct of the person concerned; (4) the content, form, and consequences of the publication; (5) the circumstances in which the photos were taken.¹⁶¹ When it comes to the balancing test, the interests of a child are generally going to be higher than adults. If we were to use the case currently pending in Austria and run it through this test, here is how the analysis might work. The reported facts are these: an 18-year-old woman is suing her parents for posting to about 700 friends on Facebook 500 images without her consent that include photos of her as a child sitting on a toilet and lying naked in her bed.¹⁶² She requested that her parents remove the pictures.¹⁶³ Her father refused claiming he has the rights to the photographs because he took them.¹⁶⁴

Did the plaintiff have a reasonable expectation of privacy? She is a private citizen who has, as far as we know, not sought any fame or notoriety, is underage and unable to consent to at least some of the pictures that were taken in what appear to be extremely private circumstances. One might question the purpose of posting pictures that appear to be those of her on a toilet or unclothed and the effect those could have on the plaintiff as she grew old enough to realize what had been posted and who had viewed said photographs. Whose interests are greater here: The father who took the pictures or the child who was unable to consent and now has to live with the embarrassment and humiliation? “The misuse of a child’s information h will be determined on a case-by-case basis” but this test could help courts in the future. As the descrip-

160. *Campbell v. Mirror Group Newspapers Ltd.* [2004] UKHL 22, ¶ 51.

161. *Campbell v. Mirror Group Newspapers Ltd.* [2002] EWCA Civ 1373.

162. Ashley May, *18-year-old sues parents for posting baby pictures on Facebook*, USA TODAY, (Sept. 16, 2016, 11:14AM), <http://www.usatoday.com/story/news/nation-now/2016/09/16/18-year-old-sues-parents-posting-baby-pictures-facebook/90479402/>.

163. *Id.*

164. *Id.*

tion of the picture suggested, if she was in a state of undress, the picture could implicate child pornography laws.¹⁶⁵

As in the *RocknRoll* case, even though the pictures had been on Facebook, “fresh revelations to different groups of people can still cause distress and damage to an individual’s emotional or mental well-being.”¹⁶⁶ There is still an expectation of privacy to be protected.

In addition to legal reforms, technology holds promise to provide additional protections and support for children. Social media platforms should offer more options for temporary postings and ease of control over the data posted by users.

One should pay special attention to Internet literacy, but not just for children. Parents also need to share the responsibility. Parents need to balance the children’s right to privacy with their own need to tell their children’s story. Parents need to check privacy settings and ask as often as is feasible for permission from their children to post. Parents should remember every post is a thread in a tapestry, the weaving together of a permanent and public online story of their child(ren). In addition, Parents should consider, regardless of the laws, guidelines or remedies available: was it really their story to tell?

165. See The United States Department of Justice, *Citizen’s Guide to U.S. Federal Law on Child Pornography*: “Images of child pornography are not protected under First Amendment rights, and are illegal contraband under federal law. Section 2256 of Title 18, United States Code, defines child pornography as any visual depiction of sexually explicit conduct involving a minor (someone under 18 years of age). Visual depictions include photographs, videos, digital or computer generated images indistinguishable from an actual minor, and images created, adapted, or modified, but appear to depict an identifiable, actual minor. Undeveloped film, undeveloped videotape, and electronically stored data that can be converted into a visual image of child pornography are also deemed illegal visual depictions under federal law.

Notably, the legal definition of sexually explicit conduct does not require that an image depict a child engaging in sexual activity. A picture of a naked child may constitute illegal child pornography if it is sufficiently sexually suggestive. Additionally, the age of consent for sexual activity in a given state is irrelevant; any depiction of a minor under 18 years of age engaging in sexually explicit conduct is illegal,” <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography>.

166. *RocknRoll v. News Group Newspapers Ltd.* [2013] EWCH 24 (Ch).

