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Core Concepts and Contemporary Issues in Privacy

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Parents, Privacy, and Facebook: Legal and Social Responses to the Problem of "Over-Sharing"

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Abstract This paper examines whether American parents legally violate their children's privacy rights when they share embarrassing images of their children on social media without their children's consent. My inquiry is motivated by recent reports that French authorities have warned French parents that they could face fines and imprisonment for such conduct, if their children sue them once their children turn 18. Where French privacy law is grounded in respect for dignity, thereby explaining the French concerns for parental "over-sharing," I show that there are three major legal roadblocks for such a case to succeed in U.S. law. First, U.S. privacy tort law largely only protects a person's image where the person has a commercial interest in his or her image. Secondly, privacy tort laws are subject to constitutional constraints respecting the freedom of speech and press. Third, American courts are reluctant to erode parental authority, except in cases where extraordinary threats to children's welfare exist. I argue that while existing privacy law in the U.S. is inadequate to offer children legal remedy if their parents share their embarrassing images of them without their consent, the dignity-based concerns of the French should not be neglected. I consider a recent proposal to protect children's privacy by extending to them the "right to be forgotten" online, but I identify problems in this proposal and argue it is not a panacea to the over-sharing problem. I conclude by emphasizing our shared social responsibilities to protect children by teaching them about the importance of respecting one another's privacy and dignity in the online context, and by setting examples as responsible users of internet technologies.

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1 Introduction

With new technologies such as smart phones that allow individuals to connect to the internet nearly anywhere now widely available in Western societies, ordinary people are now able to document, report, and share information faster than ever to global audiences. This has contributed to what some call a culture of "over-sharing." Not only can individuals share more about themselves to wider audiences than before, but also, individuals can now similarly share about others, often without another's consent, and even without his or her knowledge. In response, the United States (U.S.) and the European Union (EU) have adopted privacy protections to address contemporary online privacy threats in our technologically saturated societies. But whereas new legislation in the U.S. primarily protects individual consumer, credit, and commercial information online, European privacy protections seek more to protect the intimate aspects of personal life.

One area that has received considerable attention concerns the online privacy rights of children. This has developed, in part, in light of increasing social awareness of the problem of bullying and cyber-bullying. The 2002 case involving the "Star Wars Kid," the 15 year-old boy, whose personal video of himself waving around a golf club while pretending it was a light saber was uploaded to the internet by classmates without his consent, catapulted these concerns to the forefront of the emerging conversation on children's privacy rights online (Solove 2010). After the video was shared on YouTube, it received numerous comments that taunted and mocked the boy for his weight and awkwardness.[1] Some people even edited the video and shared their own versions that exploited the images in embarrassing ways. He was humiliated so much in school that he entered counseling and completed his senior year of high school at home. In 2006, the video remained the most downloaded video of the year. This case is just one of many contemporary examples of how a child's identity and reputation can be constructed online when something unintended for public eyes finds itself in the hands of global audiences.

In light of how much parents now share about their children online, the question has been raised in the U.S. and the EU as to whether parents violate the privacy of their children when they share images of their children online, without their children's consent. Article 9 of the French Civil Code, for example, makes it unlawful to share the image of another person without the person's consent. Moreover, in France's civil law system, a civil action can be brought both in the civil and criminal courts, unlike under common law systems, like that of the U.S. (French Legislation on Privacy 2007). In light of the dual modes of liability in France, French authorities have even warned parents that "they could face fines of up to €45,000 (£35,000) and a year in prison for publishing intimate photos of their children on social media without permission, as part of the country's strict privacy laws" (Chazan 2016).

[1]The original video of the "Star Wars Kid" remains on YouTube, as well as the comments posted in response to it.

In the U.S., legal officials have not issued a public statement on the matter, but a recent study conducted by the University of Washington and the University of Michigan found that children aged 10–17 reported to being "really concerned" about the ways that their parents share about their children's lives online (Hiniker et al. 2016). Many children found it frustrating when their parents did not ask permission before sharing embarrassing content about them online, such as images or stories that show or describe them struggling with homework, experiencing the developments of puberty, throwing a tantrum, using the bathroom, or in some cases, sleeping or eating (Lee 2015).

In this essay, I examine relevant U.S. privacy law to see whether there are legal grounds for children to bring civil cases against parents for sharing images of them online without their consent, once the children turn 18.[2] I show that there are three major legal roadblocks for such a case in U.S. law. First, U.S. privacy tort law largely only protects a person's image where the person has a commercial interest in his or her image. Secondly, privacy tort laws are subject to constitutional constraints respecting the freedom of speech and press. Third, American courts are reluctant to erode parental authority, except in cases where extraordinary threats to children's welfare exist.

While I find that existing privacy legislation in the U.S. is inadequate to provide children with legal grounds to sue parents for sharing intimate or embarrassing images of them without their consent, I argue that the dignity-based concerns (typical of the Continental-style privacy of the French) are legitimate and should not be neglected. I then consider a recent proposal on how to respond to parental over-sharing in the U.S. by extending to children the "right to be forgotten" online, which has recently been adopted in the EU. I argue that though this might provide some added protection for the time being, it is ultimately insufficient to address the larger concerns at stake, and could even inadvertently introduce a few new risks to children online. I conclude by arguing that until (and beyond) the adoption of heightened online privacy legislation in the U.S., we need to emphasize our shared social responsibility to protect the online privacy of children, in part by educating them, through example, to appreciate the importance of protecting the intimate aspects of the personal life of another person.

2 Continental vs. Anglo-American Privacy Law and the Right to One's Image

In "Two Western Cultures of Privacy: Dignity versus Liberty," Whitman (2004) offers a comparative historical analysis of Continental and Anglo-American legal cultures of privacy, using Germany and France, on the one hand, and the U.S., on the other, as representative of each tradition, respectively. There exists a transcendental

[2]For the purposes of this paper, I use "child" to denote a relationship (i.e., with a parent), and "minor" to denote a person under 18.

clash, he argues, between the two traditions when it comes to privacy. What is more, Whitman argues this clash is the outcome of much older and deeper disagreements, on his view:

> Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity. The core continental privacy rights are rights to one's image, name, and reputation, and what Germans call the right to informational self-determination-the right to control the sorts of information disclosed about oneself. These are closely linked forms of the same basic right: They are all rights to control your public image-rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure-to be spared embarrassment or humiliation. The prime enemy of our privacy, according to this continental conception, is the media, which always threatens to broadcast unsavory information about us in ways that endanger our public dignity. . . . By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. At its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: It is the right to freedom from intrusions by the state, especially in one's own home (Whitman 2004, p. 1161).

As the quotation suggests, Whitman construes dignity as matter of one's self-respect, such that privacy protections grounded in concerns for dignity seek to protect persons from embarrassing or humiliating public exposure, which can undermine the pride one has in one's self. Liberty, as I interpret Whitman to mean, is anchored more in autonomy, such that privacy protections based on liberty seek to protect an individual's sphere of choice to do as she or he pleases, especially without the spying eyes of the state.

In what follows, I draw on Whitman's view that Continental privacy is based in dignity, while Anglo-American privacy is based in liberty, as a reference point both to lay out the privacy claims that French children might bring against parents who share their images online without their consent, and to explain why such claims are unlikely to succeed in American courts. Before doing so, I briefly lay out the relevant law in France that children might sue under, pursuant to the recent warning issued by French authorities.

French legal experts claim that children could sue their parents once they turn 18 for violating their privacy if they share "intimate" images of their children on social media without their children's consent, which is based in existing French law that makes it illegal to publish private details about another individual without the individual's prior consent (Flint 2014). This is based in Article 9 of the French Civil Code, which states that, "everyone has the right to respect for his or her private life" (French Legislation on Privacy 2007). The Code does not define "private life," but relates the concept of *intimité* (intimacy) to the concept of *vie privée* (private life), which is construed to include one's health, marital situation, family life, domicile, estate and financial situation, religion, and political orientations. A person's image, physical intimacy, family life, and marital situation are considered core elements of a person's intimacy and identity that receive greatest protection (Saarinen and Ladousse 2017). Article 9 also "entitles anyone, irrespective of rank, *birth*, fortune or present or future office, to oppose the dissemination of his or her picture – an attribute of personality – without the express permission of the person concerned" (French Legislation on Privacy 2007, emphasis added).

What is more, France has signed onto the United Nations Convention of the Rights of the Child (UNCRC), which states in Article 16 that, "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation" and that, "The child has the right to the protection of the law against such interference or attacks." This adds to France's commitment to protect dignity through privacy, here extended to the reputation and honour of children within and outside the home. Where French privacy law is grounded in dignity, I shall argue that American privacy law is largely anchored in a respect for property, liberty, and the family. The remainder of this section will address the property and liberty interests related to the right to one's image, and the next section will focus on the family.

U.S. privacy tort law on the right to one's image is largely anchored in a commercial, proprietary interest, but privacy's beginnings in American jurisprudence were quite Continental. In a famous 1890 article, Samuel Warren and Louis Brandeis argued that a paradigm of privacy protection is protecting a person's "inviolate personality." Warren and Brandeis observed that the (then) new technologies of print media and the Kodak camera allowed the press to record and share images of others without their consent. They argued, moreover, that the common law evolved to address technological changes such as these, and to provide relief for persons whose private lives were invaded. Moreover, because the harm caused by violations of this sort was not tangible in nature but an intangible harm that attacked person's "inviolate personality," they insisted that privacy rights understood as rights to one's personality—captured by one's image, for example—were distinct from property rights.

Early courts were reluctant to embrace in practice, however, Warren and Brandeis' idea that privacy protects personality apart from our interest in the commercial aspect of our image. In *Roberson v. Rochester Folding Box Co.* (64 N.E. 442, N.Y. 1902), a woman sued a flour company for using her picture to advertise their product, but the N.Y. Court of Appeals refused to even recognize the tort. After the decision was denounced by the *New York Times*, New York passed legislation recognizing a privacy tort that would allow a person to sue for invasion of privacy where his or her "name, portrait, or picture" was used without consent "for the purposes of trade." This created legal ground for using another's image without consent, but it confined the tort to commercial usages. Similarly, in 1905, the Georgia Supreme Court found, in *Pavesich v. New England Life Insurance Co.* (122 Ga. 190; 50 S.E. 68), a violation of the plaintiff's right to "seclusion from intrusion" after an insurance company used his image for business purposes without his consent.[3] In 1930, when a hospital leaked an image of a deformed child, the Georgia Supreme Court found this actionable grounds on a breach of confidentiality, rather than privacy per se, despite the lack of commercial or proprietary interest

[3]Richards and Solove (2010), p. 1916 think that this case embraced Warren and Brandeis' view, even if it was not exactly the tort they had in mind, whereas Prosser's appraisal of it divorces it from Warren and Brandeis, and from the other privacy torts altogether.

(*Bazemore v. Savannah Hosp.* (171 Ga. 257, GA 1930). The *First Restatement of Torts* (1934) recognized cause of action for serious "invasion of privacy," but by 1940, privacy was still only recognized in a distinct minority of U.S. jurisdictions.

In 1953, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* (131 F. Supp. 262, Dist. Court, ED N. Y. 1955), Judge Jerome Frank articulated a "right of publicity," through which the right to privacy in one's image found a firm place in U.S. law. This right, however, was quite different from the right to one's personality that Warren and Brandeis sought to protect.[4] According to McCarthy (2000), the right of publicity in U.S. tort law is a commercial right that is infringed not by an "injury to the psyche," but by "an injury to the pocket book."

It has been argued that Prosser's 1955 treatise on torts, which became the basis for a revision of U.S. tort law in the *Second Restatement of Torts* also embraced this commercial, proprietary view of the right to property in one's image,[5] and, at the same time, anchored privacy in a respect for liberty, and in particular, for liberty or freedom of the press. Based on his survey of nearly 300 privacy cases, Prosser articulated four privacy torts, which included: "intrusions upon the plaintiff's solitude; publicity given to his name or likeness, or to private information about him; placing him in a false light in the public eye; and the commercial appropriation of elements of his personality" (Prosser 1955).[6] What is more, Prosser was reluctant to expand tort law beyond these four categories, out of a concern for making the law overbroad and impractical. For example, although the intrusion tort relied heavily on showing the intentional infliction of emotional distress, Prosser rejected the idea of introducing a distinct intentional infliction tort to prevent the law from dealing with what he considered trivial claims (Richards and Solove 2010).

Prosser's four privacy torts are relevant for thinking about the legal claims available to children whose parents share images of them on social media without their consent, but unless a child has a commercial interest in his or her image, or the image is found to be highly offensive to a reasonable person, it is unlikely the tort would succeed in court.[7] Moreover, Prosser held that the four privacy torts were distinct from one another, except that each was protected the "right to be let alone," and each was in tension with the free press (1960, p. 389). Thus, another major roadblock to the legal claims children could bring against parents who share their images without their consent is the First Amendment freedoms of speech of their

[4]Unlike Warren and Brandeis, who were highly educated in the European tradition, it is not surprising that Jerome Frank, a notable legal realist, would articulate a tangible basis for privacy, rather than privacy as protecting the intangible attributes of the self that make up one's personality.

[5]For a particularly powerful statement of this view, see Bloustein (1964).

[6]For the doctrinal adoption in the law, see American Law Institute (1979, §§ 652B, C, D, E).

[7]Aside from celebrity children, children typically lack a commercial interest in their image, and while the privacy rights of celebrities is related, it is outside the narrow scope of this essay. Moreover, even intimate or embarrassing images of children are unlikely to be considered highly offensive to a reasonable person, unless they are of a clearly sexual nature or depict abuse. Again, although related, this paper is not concerned with such cases, as they would constitute independent criminal activity.

parents.[8] Indeed, Whitman calls freedom of the press and speech "the most poisonous for continental-style privacy rights" (2004, p. 1209).

The following cases are often cited as evidence of the U.S. priority of the press over privacy: *Sidis v. F-R Publishing Corp* (113 F.2d 806 2d Cir.,1940), (upholding the publication of a magazine detailing the reclusive adult life of a former child prodigy on the basis that it was of public interest), *Cox Broadcasting Corp v. Cohn* (420 U.S. 469, 1975) and *Florida Star v. B.J.F* (491 U.S. 524, 1989), (upholding the publication of the names of rape victims against state law), and *Hustler Magazine, Inc. v. Falwell* (485 U.S. 46, 1988), (rejecting the claim for damages for emotional distress in response to a satirical presentation of a public figure that a reasonable person should have known not to be factual).

In these cases, the plaintiffs arguably have dignity-based concerns for suppressing the publicized materials, but freedom of the press prevailed. Because individuals today are now able to share information about others rapidly to a global audience, it affords the vanguards of social media some role in technology-based press. While some want to argue that the First Amendment does not protect the low-value speech on blogs, websites, and the like, it is possible that social media vanguards would claim freedom of the press protections for sharing stories that have gone "viral," like the video of the "Star Wars Kid," on the grounds that they are newsworthy and thus in the public interest.

Existing privacy tort law is anchored in respect for two things that serve as two major roadblocks undermining the legal force of the claim that children's privacy is violated when their parents share their images on social media without their consent. The first is the respect for the right to property, out of which existing privacy tort law develops into an instrument to protect one's commercial, proprietary interest in his or her image. The second is respect for freedom of speech and the press, against which existing privacy tort law has to compete. In the next section, I address the third and final roadblock: the reluctance of U.S. courts to intervene in the family.

3 The Right to Privacy Within the Family

In addition to being anchored in a respect for property and liberty, privacy protections in the U.S. on a constitutional level developed in light of a third concern: respect for the family and the home. The Constitution protects affairs conducted in the home from unwanted state intrusion both through the Fourth Amendment's prohibition on unreasonable searches and seizures and through the right to privacy first recognized in *Griswold v. Connecticut* (381 U.S. 479,1965), (upholding the right of married couples to use contraception). In this section, I show that respect for

[8]In light of how quickly online information can spread, if parents share images of their children with others who then download and share it themselves, the question of suppression then involves the freedom of speech of these other individuals as well. Some acts of appropriating and sharing images of children is illegal, however, as when pedophiles download children's images and upload them onto to pedophilia sites. Because this is the domain of the criminal law, I am not focusing on it here.

the family and the home in U.S. privacy law reflects a concern with dignity, but it remains distinctly Anglo-American in that it applies primarily to adults, and, within the family, is a privilege of parents.

To recall, Whitman (2004) argues that privacy law in the U.S. is more deeply grounded in liberty than dignity, but Laurence Tribe has recently offered another view. Tribe (2015) argues that constitutional privacy law from *Griswold* to *Obergefell*, (respecting the right of individuals of the same gender to marry) is deeply grounded in dignity. Similarly, Anita Allen has explained in a recent interview that, "Privacy is about dignity, it is about modesty and reserve, and it is very much a matter of protecting ourselves from harm – in a utilitarian sense –of lost reputation and harm of lost opportunities for our future. For me, they are all important issues that help to explain why privacy is important" (2015). Allen insists that privacy indeed needs protection, "Whether it is the privacy we ought to have as we walk along the streets, or the privacy we ought to have when we engage in rest and intimacies in our own home," thus reinforcing the notion that privacy is about living a dignified life.

It is primarily adults who have been given wide constitutional privacy protections with respect to the affairs of the home and family life. The issues this section addresses are whether, and to what extent, children have privacy rights within home the independent of their parents—and whether such rights have legal force such that children could bring civil suit against parents who violate them. With respect to the first issue, children have increasingly been given rights independent of their parents to consent to reproductive and health services. One notable case here is *Bellotti v. Baird* (443 U.S. 622, 1979), (upholding the right of a minor to get an abortion).[9] What is interesting about the areas in which children have been given rights independent of their parents is that these are precisely some of the same areas of privacy that feminists have long strived for, namely privacy within the family from the husband or the head of the family.[10]

The precedent offered by these cases is likely to have limited legal force, however, in light of other legal barriers, such as the parent-immunity doctrine, which is an American legal doctrine holding that a child cannot bring legal action against his or her parents for civil wrongs that the parents inflict while the child is a minor. While some states have abolished it, it remains law in several states. What is more, the Supreme Court has historically been reluctant to erode parental authority, except where the child's physical wellbeing is at stake.[11]

One could try to argue, using the concept of parens patriae, which empowers the state to interfere in the family when necessary to protect children's welfare, that instances of parental over-sharing create a substantial risk of harm to a child's welfare,

[9]In every U.S. state, children of all ages have the right to consent on their own to testing and treatment of sexually transmitted infection (STIs). See Hasson (2013).

[10]I thank Ann Cudd for bringing this similarity to my attention.

[11]The following cases upheld broad parental authority: *Troxel v. Granville* (530 U.S. 57, 2000); *Parham v. J. R* (442 U.S. 584, 1979); *Quilloin v. Walcott* (434 U.S. 246, 1978); *Wisconsin v. Yoder* (406 U.S. 205, 1972); *Pierce v. Society of Sisters* (268 U.S. 510, 1925); *Meyer v. Nebraska* (262 U.S. 390, 1923). For a general discussion, see Hamilton (2006).

but an appeal to parens patriae is not firm enough a concept in U.S. law to ground a blanket prohibition on parental over-sharing. Of course, children can be victimized in numerous ways online, the most relevant of which for my purposes is by bullying and cyber-bullying. While bullying and cyber-bullying present real and serious risks to children's dignity and security, they are unlikely to warrant state intrusion.

Consent is another issue that would be difficult to work out in a case like this because the parent-child relationship is a unique one, where children necessarily share highly personal and intimate details and moments with their parents. The issue of consent is further complicated by questions concerning rights of minors to consent. The Children's Online Privacy Protection Act (COPPA) prohibits companies and other third parties from soliciting children under 13 for personal information (e.g., address or social security number) without parental consent. Insofar as parents are considered the gatekeepers of children's online privacy according to existing law, it is unclear that children would have much relief in claiming parents violate their privacy online.

4 Should Children Have a "Right to be Forgotten"?

In a recent article in the *Emory Law Review,* Steinberg (2017) describes her work as providing the first in-depth analysis of the parental over-sharing problem. She frames her analysis as exploring the tension between parents' rights to share online about their children and children's interest in privacy. Similar to the present analysis, Steinberg finds that U.S. law offers little real guidance on how to resolve the interfamilial tension involved in this case, despite the fact that children have genuine interests in online privacy because of the risks of digital kidnapping and bullying. She thus proposes a "child-centered, public-health based model of reform" that extends EU's right to be forgotten to U.S. children. In this section, I briefly discuss what the right to be forgotten is and how it would work in Steinberg's theory. Based on my own consideration of it, I conclude that while it might provide some added protection for the time being, it is ultimately insufficient to address the larger concerns at stake and could even inadvertently introduce a few new risks to children's privacy and dignity online.

In 2014, the European Court of Justice, the EU's top court, issued a landmark ruling that EU citizens have the right to be forgotten, or the right to erase content in their digital footprint if the content no longer served a public interest (*Google Spain v. AEPD and Mario Costeja González* Case C-131/12, 2014). Steinberg argues that, if we extend the right to be forgotten to children in the U.S., it would strengthen the force of the privacy claims that children could make over time, relative to the enervating strength of their parent's free speech claims. She explains as follows:

> [The] court could recognize that children have an evolving ability to provide consent. Under this theory, courts could hold that young children vicariously consent to parental disclosures, but as children age, they should gain more control over their personal information. Indeed, the expressive nature of the parental disclosures becomes "data" (instead of "speech") as the child reaches the age of majority. The proposed definition is consistent with the European Union's

definition of online content, and it recognizes the importance of individual autonomy. It also allows individuals to control 'which information about themselves . . . [remains] disclosed, to whom and for what purpose. This balanced-rights approach offers solutions to the conflicts that arise between children and their parents in the online world (2017, pp. 39–40).

If the right to be forgotten were extended to children, it would allow children to request to delete their online images. The closest analogue to existing U.S. law is a California law that requires all websites and "apps" that children use to have an "eraser button," so that children can delete things they have posted (SB 568 California Business & Professions Code Sec. 22581). If the right to be forgotten were adopted in the US, it would allow for even more control, as children could request to have images posted of them by others deleted as well.

Steinberg's view is attractive; it aims to resolve the interfamilial tension left by U.S. law by balancing competing concerns between parent and child, and it proposes to transplant part of EU law into the U.S. in the hope of giving children greater control over their online identities. In what follows, I lay out four concerns with this proposal, not to reject it, but to get a better view of some of the possible consequences of adopting it on the goal of protecting children online.

The first concern is that extending the right to be forgotten to children might hamper children's development of dignity and respect for themselves and others. If children can delete what they post online, there is less accountability, and children will have a harder time coming to appreciate the consequences of their online actions than they might if they have to live with the record afterwards. This can inadvertently lead to an environment where violations to dignity and security brought about through bullying escalate rather than diminish. Evidence for this concern is found in the fact that new "apps" that allow people to send images that automatically expire after a few seconds, like Snapchat, and that allow people to send anonymous or secret messages, like Whisper, are often cited by adolescents as the new sites of cyber-bullying, far more than older social media like Facebook or Instagram, which keep a record of individuals' online presences.[12] This is especially concerning for children, given that adolescence is a time when children begin to develop a conception of their own identity, making it a vulnerable time for the development of dignity and self-respect.[13] Relying on greater control of technology, without accountability, may introduce new risks that threaten children's development through experiences on social media.

The second concern is that the right to be forgotten would require children to petition in order to have something removed from their digital footprint, which would mean that they have to pursue legal proceedings. This could create a further risk of harm to children's privacy and dignity, because they would have to further share the embarrassing content with strangers who oversee the petitions for removal, in order to substantiate a claim for removal. Such circumstances could bring about

[12]For a discussion of these concerns, see PH (2014), Balingit (2015), and *Scholastic Choices*.

[13]Erikson (1950) identified adolescence (or the period between ages 13 or 14 to about 20) as the period of the fifth psycho-social crisis, "Learning Identity versus Identity Diffusion," where the child, now an adolescent, learns how to answer questions about his or her own identity, thus making it an impressionable stage of ego-development.

additional exposure and produce the opposite effect of widening rather than limiting the audience of the information, especially if the petition were denied.

The third concern is more practical and addresses the difficulty in deleting information that has gone "viral" online. As seen with the video of the "Star Wars Kid," shared information about a child can move quickly across the internet and find its way to a global audience. Once information is spread too widely, it is unlikely that the right to be forgotten can offer a remedy.

The fourth and final concern with Steinberg's proposal is how she frames the tension that her proposal seeks to balance, namely a tension between a parent's *right* to share and a children's *interest* in privacy. By framing the tension like this, her analysis privileges either the free speech claim over the privacy claim, or a parental claim over the claim of a child, or perhaps both. And, to do so, is ultimately to anchor the right to be forgotten at the bottom of the same sea that makes existing U.S. privacy law so weak when speech or families are involved.

Ultimately, these concerns suggest that simply extending the right to be forgotten to U.S. children is not a panacea to the problems of parental over-sharing in the U.S. or to over-sharing generally. We will not return to Warren and Brandeis by bringing the right to be forgotten to the U.S., but there remain good reasons to revisit Warren and Brandeis' understanding of privacy and to focus on our shared social responsibilities to respect the dignity interest each person has in his or her image. This is especially important for children, as they are developing who they are through their experiences online and through social media.

Sherry Turkle, a pioneer in the psychology of social media, has powerfully captured deep concerns that come with our increasingly digitally connected world. In *Alone Together: Why We Expect More Out of Technology and Less Out of Each Other,* Turkle (2011) explains how the more we become digitally connected with one another, the less we become ethically concerned with one another. In her subsequent book, *Reclaiming Conversation: The Power of Talk in a Digital Age*, Turkle (2015) shows that increasing use of technology can greatly erode empathy, especially among children. Building on Turkle's work, I argue that we should encourage more deliberation and respectful dialogue on privacy and social media within families, schools, and leaders of social media. By welcoming technology into nearly all areas of public and private life, we assume a shared responsibility to use social media in a responsible way, and teach children how to do so as well.

If reclaiming conversation within the home and in the school about the responsibilities and privileges associated with social media can even help foster the development of empathy, as Turkle's findings suggest, then it further works to combat the risk of bullying as well, insofar as the cultivation of empathy in children has been shown to powerfully reduce the risk of bullying among them.[14] What is more, if parents respect the dignity of their children when embarrassing or intimate images are at issue, then children are more likely to develop into people who respect the dignity of others.

[14]For a discussion on this topic, see Szalavitz (2010) and Weissbourd (2014).

To further this end, schools can take a more active role in informing parents of the concerns raised by over-sharing about their children and encourage parents to discuss online privacy with their children. As more schools are integrating social media into school life, the stronger the case is for incorporating social media privacy training into school curricula for children. Schools can empower children to become responsible users of social media and help children work out for themselves what they want and do not want shared about themselves online. This could become a part of existing education offered to students on bullying, which is increasingly being offered at schools.

What is more, we should emphasize the responsibilities of social media vanguards and companies to educate users on how to use the technology responsibly. Facebook, for example, offers mechanisms by which a child can message a user who shared content they wish to have removed. Facebook is now also working with the Yale Center for Emotional Intelligence to find ways to make children more comfortable sharing messages to users who shared something about them they do not like.[15] The team has found that posts are often removed at the request of the person who claimed that it hurt their feelings or embarrassed them. If it is not, users can petition Facebook staff directly to remove the shared information.

Regarding parental over-sharing, using the law to resolve family disagreements about privacy and social media can hamper the development of empathy within the family. While the courts may be deliberative bodies, the law is a highly technical enterprise that limits the role of emotion in its proceedings. Neither does the law encourage us to take one another's perspectives, as is necessary for empathy development. An approach that emphasizes our social responsibilities in protecting privacy, security, and dignity on social media may prove superior for addressing the larger concerns at stake in a technologically saturated society such as our own.

Lastly, a solution that focuses on shared social responsibilities rather than legal solutions may better guard against a possible chilling effect when it comes to online sharing. While there are real concerns related to dignity and security when parents share about their children online, many parents also use social media and other online forums as a way to celebrate their families, and especially the achievements of their children. Before cameras were so widely available as they are in today's society, many families would only buy cameras upon the birth of a child, to document and share milestones in the child's life. While these images would typically be placed in a physical family photo album, rather than an open digital archive, it is important to balance the benefits of allowing families to come together through photography while protecting against the threats to privacy of family members of unwanted and unwelcome online exposure.

[15]See Bilton (2014) for a deeper discussion of Facebook's recent efforts in this area.

5 Conclusion

This paper addressed the question of whether parents violate their children's privacy by sharing intimate or embarrassing images of their children online without their children's consent. I found three major roadblocks in U.S. law that would prevent such a case succeeding in court. I argued, nonetheless, that the dignity-based concerns with parental over-sharing of the French are warranted and should not be neglected. I evaluated a proposal to extend to U.S. children the EU's right to be forgotten, as a response to the parental over-sharing problem in the U.S. I argued that such reform might be a good starting point, but could introduce new risks to children's privacy and be inadequate to address some of the larger concerns at stake in this issue. I concluded by arguing that until (and even after) our adoption of online privacy legislation to address privacy in one's image online, local institutions and leaders of social media need to exercise shared social responsibilities to protect the online privacy of U.S. children, in part by educating them, through example, to appreciate and protect certain intimate aspects of their lives and the lives of others.

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Digitizing Privacy

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Abstract Digitization has not changed the ways in which we can invade another's privacy: intrusion, disclosure, false light, and appropriation still cover the range of possible invasions. But because of digitization, invasions of privacy have become more penetrating, pervasive, and prevalent. What we have lost is nothing different in kind than what was lost before when we only had to worry about eavesdropping and peeping Toms, but by explaining how digitization has affected the privacy torts, we gain a better understanding of a moral harm that underlies all invasions of privacy—being treated as an object to be viewed, used, and manipulated.

1 Introduction

The occasion that prompted Warren and Brandeis to introduce privacy into the legal world was the wedding of Warren's daughter. Yellow journalists crashed it and then wrote about what was to have been a private affair. Anyone who read the newspapers became privy to the wedding. Were his daughter to marry now, at least one guest's video, and probably many more, would be uploading to the web as the wedding proceeded—available to the world in general, to anyone with access to the web.

Digitization, and the technology that made it possible, has made invasions of privacy more penetrating, pervasive, and prevalent—more prevalent because we can obtain far more information about anyone than before, more pervasive because the technology for invasions is available to just about anyone,[1] more prevalent because everyone is a person of interest to someone who can now easily come to know something that was inaccessible before the digital age.

[1]Digitization has also made other kinds of harm more prevalent and pervasive—and inexpensive. The radio device used to hack into VW's locks—for at least 100 million vehicles—costs $40, money well-spent for thieves still interested in stealing a VW (Greenberg 2016b).

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